[ORAL ARGUMENT HAS NOT BEEN SCHEDULED]
No. 20-5195

In the United States Court of Appeals for the District of Columbia Circuit

OPEN TECHNOLOGY FUND, AMBASSADOR RYAN CROCKER, AMBASSADOR KAREN KORNBLUH, BEN SCOTT, MICHAEL W. KEMPNER,
Plaintiffs-Appellants,

v.

MICHAEL PACK, in his official capacity as Chief Executive Officer and Director of the U.S. Agency for Global Media,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia
Case No. 1:20-cv-1710-BAH (The Hon. Beryl A Howell)

PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

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July 9, 2020

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COMBINED CERTIFICATES

Certificate as to Parties, Rulings, and Related Cases

As required by Circuit Rules 27(a)(4) and 28(a)(1), counsel for Appellants Open Technology Fund, Ambassador Ryan Crocker, Ambassador Karen Kornbluh, Ben Scott, and Michael Kempner provide the following information:

I. Parties and Amici Appearing Below

The parties who appeared before the U.S. District Court were Open Technology Fund, Ambassador Ryan Crocker, Ambassador Karen Kornbluh, Ben Scott, and Michael Kempner, *Plaintiffs-Appellants*, and Michael Pack, *Defendant-Appellee*.

II. Parties and Amici Appearing in this Court

The parties appearing in this Court are Open Technology Fund, Ambassador Ryan Crocker, Ambassador Karen Kornbluh, Ben Scott, and Michael Kempner, *Plaintiffs-Appellants*, and Michael Pack, *Defendant-Appellee*.

III. Rulings under Review

The rulings under review in this case are the July 2, 2020 Memorandum Opinion and Order of the U.S. District Court for the District of Columbia (Howell, C.J.) denying the Plaintiffs-Appellants' motion for a preliminary injunction and temporary restraining order, and the July 6, 2020 Minute Order of U.S. District Court for the District of Columbia (Howell, C.J.) denying the Plaintiff-Appellants' motion for reconsideration and, in the alternative, for an injunction pending appeal.

IV. Related Cases

Counsel are unaware of any related cases in any court.

Respectfully submitted,

/s/ Deepak Gupta
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July 9, 2020

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INTRODUCTION

Open Technology Fund (OTF) and four members of its board sought a temporary restraining order and preliminary injunction to prevent an unprecedented federal-government takeover of OTF—a private, nonprofit organization dedicated to advancing freedom of expression and association on the internet. The district court denied the motion on July 2 and the plaintiffs noticed their appeal that day.

In the few days since this appeal was filed, the government has dramatically escalated its attempts to wrest control of OTF. Having purportedly replaced OTF's board with sitting federal officials, the government's latest actions include attempts to install a new "Acting CEO"; repeated efforts by government officials to obtain physical entry into OTF's offices, including insisting that the security guards allow them entry; demands for the key to OTF's offices; unexplained demands for an immediate on-site inspection (at a time when OTF's staff is working remotely due to the pandemic); and even efforts to directly pressure the nonprofit's landlord to turn over control of OTF's office space. *See* Cunningham Decl. ¶ 2. All this in the past week. *Id.* In several instances, federal officials have wielded the district court's order denying preliminary relief as if it were an order mandating the immediate federal-government takeover of an independent nonprofit. *Id.* ¶ 3.

OTF now seeks an injunction pending appeal to preserve the status quo, prevent an unlawful power grab, and facilitate an orderly appellate process.

The plaintiffs are highly likely to succeed on the merits. As the district court correctly held, Congress gave the government no authority to remove OTF's officers or directors. Op. 12-19. The only source of independent authority on which the government relied below (ECF 7 at 3-8) was a provision covering "organization[s]" "authorized under" the International Broadcasting Act. 22 U.S.C. § 6209(d). But OTF wasn't "authorized under" the Act. It's a creature of neither Congress nor the Executive Branch. So that statute "does not extend to OTF." Op. 19.

This is therefore not a situation where the "Government creates a corporation by special law" and "retains for itself permanent authority to appoint a majority of the directors." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 374, 399 (1995). OTF is "at bottom a non-governmental entity, a private state-chartered corporation whose operational independence has been carefully protected by Congress." *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121, 1129 (D.C. Cir. 1985). That independence "expressly prevent[s] a governmental takeover." *Id.* at 1125; *see* 22 U.S.C. §§ 6204(b), 6209(c). Because OTF is a private organization dedicated to expressive activity, it is also protected by the First Amendment's guarantee of freedom of association. "There can be no clearer example of an intrusion into the internal structure or affairs of an association" than a governmental attempt to "force[] the group to accept members it does not desire." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

So, given all this, why did the district court deny relief? The court relied on a source of authority not advanced by the government—a single sentence in OTF's now-superseded 2019 grant agreement, which the court read in conjunction with the organization's bylaws to give the government plenary authority to replace its leadership. Op. 19-24. Although the Court found the sentence "ambiguous," *id.* at 20, it ultimately concluded that it was best read as "allowing [agency] officials to be placed on the OTF board, presumably by" the agency head, *id.* at 22. That is an evident misreading of that sentence. *See* ECF 26-1 ¶¶ 2-6.

Over the July 4th weekend, after this case was already on appeal, the New York Times reported the government's purported Friday-night appointment of an "Acting CEO" for OTF as if it were a fait accompli: the government had "appointed an interim chief executive" for the nonprofit. Pranshu Verma & Edward Wong, *New Trump Appointee Puts Global Internet Freedom at Risk, Critics Say*, New York Times, July 4, 2020. But OTF's board of directors, president, general counsel, and staff have all rejected this assertion of "the extraordinary power to intrude into [its] internal corporate affairs," Ex. B at 1, leading to the existence of two dueling boards and CEOs—each now claiming control over the organization.

This situation is untenable. It "imperil[s] virtually every aspect of Open Technology Fund's operations and existence," casting "essential day-to-day corporate functions" into doubt and threatening its ability "to function going forward." ECF

4-12 ¶ 15. Even more importantly, OTF's ability to fulfill its mission depends on maintaining the trust of journalists and activists in repressive regimes around the world, who view its independence from the government as essential to their personal safety. *See id.* ¶ 12. Each day that the government is allowed to continue its takeover effort undermines that hard-won trust further—trust that may never fully be regained. *See id.* Because these "obstacles unquestionably make it more difficult for [OTF] to accomplish [its] primary mission," the plaintiffs suffer "irreparable harm." *League of Women Voters v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016).

The unlawful campaign to federalize the Open Technology Fund has already provoked widespread, bipartisan condemnation. In a letter issued the day before the district court's decision, a bipartisan group of U.S. Senators expressed "deep concern" regarding the "termination of qualified, expert staff and network heads for no specific reason as well as the removal of their boards"—a move that "raises questions about the preservation of these entities." Mot. to Expedite, Ex. C at 1. The government's latest actions make clear that it views the district court's decision as a green light to aggressively ramp up its an attempted takeover of OTF, notwithstanding the pendency of an appeal in this Court. An injunction to preserve the status quo pending appeal is therefore urgently required.

Attached to this motion are the decision below, relevant portions of the record, and supporting declarations. As required by Federal Rule of Appellate Procedure

8(a)(1)(C), the plaintiffs first sought the same relief in the district court (ECF 26), which was denied hours later by minute order. *See* Minute Order (July 9, 2020). Given the government's ongoing actions on a daily basis since the appeal was filed, this relief is required at the earliest possible opportunity and cannot await the full decisional process. The government has indicated that it will oppose this motion.[1]

STATEMENT

OTF was created in 2019 as an independent nonprofit organization dedicated to advancing internet freedom in repressive regimes around the globe. The organization supports the research, development, and implementation of technologies that provide secure, uncensored internet access. These technologies are designed to stay one step ahead of government censors, countering attempts by authoritarian governments to control the internet and restrict freedom of information and association. It also supports projects to protect journalists, sources, and audiences from repressive surveillance and digital attacks, ensuring that they can safely create and consume objective, unbiased reporting.

Although OTF could operate through private funding if it wanted, it has until now received grants for its work from U.S. Agency for Global Media (USAGM)—

[1] Three of the plaintiffs-appellants are also directors of the boards of Radio Free Europe, Radio Free Asia, and the Middle East Broadcasting Networks, and they challenge their purported terminations as board members of those organizations. That challenge is part of this appeal but is not raised in this motion.

the agency charged with funding the government's international-broadcasting program. OTF is not, however, a government entity, but a private, nonprofit organization. This appeal is about whether, despite that fact, USAGM has the power to summarily replace OTF's leadership and take over the organization against its will.

A. Statutory background

"For nearly 80 years, international broadcasting sponsored by the United States" has been a "beacon of hope for those trapped within authoritarian regimes." Op. 1. Federally funded international broadcasting began with Voice of America during World War II, and since then gradually expanded to include Radio Free Europe, Radio Free Asia, Middle East Broadcasting Networks, and other organizations that broadcast around the world. Cong. Research Serv., RL 43521, *U.S. International Broadcasting* 1 (2016).

In the International Broadcasting Act of 1994, Congress "reorganized all existing U.S. international broadcasting services under a new Broadcasting Board of Governors." *Id.* at 3. The name "Broadcasting Board of Governors" originally referred to "both the independent federal agency that directs and oversees all U.S. government-funded non-military broadcasting, and the nine-member board" that, at the time, "provide[d] executive leadership for the agency." *Id.* at 5. The agency, on authority granted by Congress, later changed its name to the United States Agency for Global Media, or USAGM. Op. 7.

Congress amended the Act in 2016 to restructure the agency, relegating the nine-member board to an advisory role and transferring leadership to a new CEO appointed by the President. *See* 22 U.S.C. §§ 6203, 6204(a)(1)-(22), 6205; Op. 6-7. The CEO was given an enumerated set of powers to oversee the activities of agency-funded entities, including the authority to "make and supervise grants and cooperative agreements for broadcasting and related activities," 22 U.S.C. § 6204(a)(5), and to "allocate funds … among … grantees," *id.* § 6204(a)(6). Congress also gave the CEO authority "to incorporate a grantee"—to establish a new, government-created corporation authorized to receive grants. *Id.* § 6209(a)(1).

But Congress also established limits on the CEO's power over agency grantees, designed to ensure that those grantees would remain fundamentally private entities. Congress provided that nothing in the Act "may be construed to make … any … entity provided funding by the agency a Federal agency or instrumentality." *Id.* § 6209(c). It also required the CEO to "respect the professional independence and integrity" of grantees. *Id.* § 6204(b). And while it empowered the CEO to appoint or remove officers and directors of certain entities, it limited that authority to particular named organizations ("RFE/RL Inc., Radio Free Asia, and the Middle East Broadcasting Networks") and organizations "authorized under" the Act—that is, organizations that are either expressly authorized by statute, like Radio Free Asia, *id.* § 6208, or organizations directly incorporated by the CEO, *id.* § 6209(a)(1). *Id.* § 6209(d).

Likewise, Congress authorized the CEO to condition an organization's grant agreement on USAGM's "authority to name and replace the board," but only for grants to those same types of organizations. *Id.* § 6204(a)(20), (21).

B. Factual background

1. OTF establishes itself as a private nonprofit organization, outside of government control.

OTF's founder, Libby Liu, created the organization in 2019 as a 501(c)(3) nonprofit corporation under District of Columbia law, without any "permission or authorization from Congress or from any part of the Executive Branch." ECF 10-1 ¶¶ 2, 3. The organization is not authorized, or even mentioned, in the International Broadcasting Act. Op. 14-15. Nor was it created by USAGM under the CEO's authority "to incorporate a grantee." 22 U.S.C. § 6209(a)(1). OTF anticipated that it may "one day get express authorization from Congress that would put [it] on the same footing as congressionally-authorized grantees like Radio Free Europe and Radio Free Asia" (where its programs were originally developed) but it was "incorporated as," and still "remains, an independent organization"—not "a government-created or government-controlled entity." ECF 10-1 ¶¶ 3, 6.

Although OTF is funded by USAGM, its grant agreement affirms the organization's "independence and integrity," guaranteeing its status as a "private, nonprofit corporation" rather than a "Federal agency or instrumentality." ECF 4-4 at 10-11. Consistent with its status as a grantee that has not been "authorized" by

Congress or USAGM, *see* 22 U.S.C. § 6204(a)(21), USAGM's agreement with OTF requires only that the organization's "articles of incorporation, by-laws or other constitutional documents" provide that its board of directors "*may* consist of *some or all* of the current members of the USAGM … and other technical experts, *as appropriate*." ECF 4-4 at 4 (emphasis added). In contrast, USAGM's agreements with congressionally authorized grantees, like Radio Free Europe and Radio Free Asia, require that the boards of those organizations "*shall* consist of the current members of the USAGM … *and of no other members*." ECF 4-5 at 4 (emphasis added), 4-6 at 4, 4-7 at 4.[2]

OTF complied with that requirement of the grant agreement at the time of its incorporation—its "articles of incorporation … provide" that, on their adoption, OTF's board would consist of five named members of the USAGM Board of Governors and one "technical expert." ECF 26-1 ¶ 5; *see* ECF 10-2 at 7. And its bylaws provide that the "initial Board of Directors," which consists of those "named in the

[2] The provision in OTF's 2019 grant agreement—that the board of directors may include "current members of the USAGM"—contains a typographical error. ECF 26-1 ¶¶ 3-4. USAGM itself does not have "members"; only its board does. *Id.* ¶ 3. Prior versions of the agreement referred to "current members of the BBG"—meaning the nine-member Broadcasting Board of Governors. *Id.* When the agency changed its name, "BBG" was replaced throughout the agreement with "USAGM"—resulting in "members of the USAGM." *Id.* But the agreement's intended meaning, and the only sensible way to interpret it, is that OTF's board may include "current members of the USAGM *Board of Governors*." *Id.* That, in fact, is the language that appears in OTF's now-operative 2020 grant agreement. *Id.* ¶ 4.

Articles of Incorporation," "shall hold office until the installation of the Directors elected in accordance with" its provisions. ECF 4-8 § 5.1.

Following those initial appointments, OTF's bylaws entitle it—as an independent, self-governing organization—to elect directors of its choosing; the bylaws do not prohibit the election of future directors from USAGM's board, but they do not require it either. Directors are "elected by [OTF's] Board of Directors for three-year terms upon majority vote of the Board." ECF 4-8 § 5.2. Elections must be conducted with "notice to and in consultation with the USAGM Advisory Board," but neither USAGM's board nor its CEO have authority to veto OTF's selection. *Id.* Likewise, directors may be removed "for cause" by the vote of two-thirds of a quorum of directors, and "[a]ny vacancy occurring on the Board of Directors due to removal … may be filled by a majority vote of the remaining Directors." *Id.* §§ 5.2, 6.12. Officers, too, are elected "by majority vote of the Board of Directors," and "hold office until [a] successor is elected and qualified" or the officer's "earlier resignation or removal." *Id.* § 7.1.

The bylaws also recognize the possibility that OTF may, at some time in the future, be authorized by Congress and thereby brought under some measure of USAGM oversight. Thus, they permit "the appointment of a Federal official as Director or Officer by the USAGM [CEO]," but only "*provided that* such appointment … [is] *authorized* under the Act." *Id.* § 9.0 (emphasis added). And they include additional

provisions permitting the CEO to appoint and remove directors and officers, but only "as *may be* authorized by 22 U.S.C. 6203 et seq." *Id.* §§ 5.2, 7.1 (emphasis added). A bill that would create such authorization was recently introduced in the House. *See* H.R. 6621, 116th Cong. (2020) ("Open Technology Fund Authorization Act"). It was the possibility that Congress might "one day" pass such an authorization that "guided [the founders'] intent" in adding that language to the bylaws. ECF 26-1 ¶ 6. But the authorization has not yet passed, and OTF's founders "never understood either the grant agreement or the bylaws to give the CEO of USAGM the power to remove or replace [its] officers or directors absent congressional authorization." *Id.* ¶ 7.

2. Immediately upon his confirmation as CEO, Pack attempts to terminate and replace OTF's officers and directors.

On June 4, 2020, the Senate confirmed Michael Pack as CEO of USAGM. Within days, Pack "upended U.S.-sponsored international broadcasting" by unilaterally removing and replacing the operational heads and directors of OTF and other USAGM-funded organizations. Op. 1-2.

Pack's "Wednesday night massacre" immediately provoked widespread, bipartisan outcry. *Id.* at 2-3. In a letter issued the day before the district court's decision in this case, a bipartisan group of senators wrote to Pack to express their "deep concern" regarding his termination of the organizations' "qualified, expert staff" and "removal of their boards" "for no specific reason"—a move that "came without any

consultation with Congress." Mot. to Expedite, Ex. C. The "credibility and independence" of the organizations, the senators wrote, is "critical" to those "living under repressive regimes." *Id.* As the district court acknowledged, the "[w]idespread misgivings about Pack's actions raise troubling concerns about the future of these great institutions … supporting freedom of opinion and expression in parts of the world without a free press." Op. 3.

For OTF, Pack's attempted takeover "imperil[s] virtually every aspect of [the organization's] operations and existence," casting "essential day-to-day corporate functions" into doubt and threatening its ability "to function going forward." ECF 4-12 ¶ 17. Even more importantly, it threatens OTF's "ability to protect … vulnerable communities facing repressive regimes." *Id.* Around the world, journalists and activists trust OTF "to safeguard their identities and enable their important work." *Id.* But that trust depends on the organization's independence and is undermined by even the perception that it has come under government control. ECF 26-7 ¶ 8. Since the news of Pack's actions became public, OTF has been "inundated" with emails from past, current, and prospective funding recipients—"all expressing grave concern over the safety of their identities and their work in the hands of [OTF's] purported new leadership." ECF 4-12 ¶ 12. "Each hour and day that this state of affairs persists causes lasting, irreversible damage to [the] organization, its reputation, and

its effectiveness in performing its vital mission in service of global internet freedom." *Id.*

3. The district court rejects OTF's request for temporary and preliminary injunctive relief.

OTF and four of its directors sued Pack and moved for a temporary restraining order and preliminary injunction preventing further interference in the organization's independence. ECF 1, 4. Pack, they argued, lacks any legal authority to remove or replace officers or directors of this private nonprofit organization.

The district court denied the plaintiffs' motion, holding that they were unlikely to prevail on their claims. In reaching that conclusion, however, the court rejected the government's lead argument that Pack's statutory authority as CEO under 22 U.S.C. § 6209(d) gave him the power to replace OTF's officers and board. "Adoption of Pack's interpretation," the court wrote, "would mean that any grantee of the [Agency]—no matter the size of the grant or independence of the grantee from the government—would, as a statutory matter, forfeit control over its board and officers to the whim of the CEO." Op. 13. Such a reading of the statute, the court concluded, would be untenable. *Id.* at 19.

Instead, the court relied on a source of authority not advanced by the government—a single sentence from OTF's grant agreement, which the court read in conjunction with the organization's bylaws to give Pack plenary authority to replace its leadership. *Id.* at 19-24. Although the Court found the sentence "ambiguous," it

ultimately concluded that it was best read as "allowing USAGM officials to be placed on the OTF board, presumably by the USAGM CEO." *Id.* at 20, 22. The court also concluded, "for substantially the same reasons," that OTF had failed to show irreparable injury. *Id.* at 29.

Because the district court's decision rested on a ground for which it "lacked the benefit of any briefing, evidence, or input from the parties," the plaintiffs moved for reconsideration—attaching documentary evidence on the grant agreement's meaning. ECF 26 at 10. In the alternative, the plaintiffs moved for an injunction pending appeal. *Id.* at 1. The court denied both requests later that day, writing in a minute order that the plaintiffs had already been allowed to file six declarations before the court's decision—although none had addressed the issue on which the court's decision was ultimately based because it was not argued by the government. *See* Minute Order (July 9, 2020).

STANDARDS

A motion for an injunction pending appeal under Federal Rule of Appellate Procedure 8(a)(2) is subject to the same four criteria as a motion for preliminary injunction. *See Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977). Thus, to obtain an injunction pending appeal, the moving party "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of

equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *accord Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam).

ARGUMENT

I. The plaintiffs are likely to succeed on the merits.

A. The district court correctly concluded that the government lacks statutory authority to remove or replace OTF's officers or directors.

1. In the district court, the government identified only one source of independent legal authority for Pack's attempted removal and replacement of OTF's officers and directors: 22 U.S.C. § 6209(d). The district court correctly held that "the USAGM CEO's § 6209(d) remove-and-replace authority does not extend to OTF." Op. 19. Under that provision, the CEO may appoint officers and directors of organizations in two categories: (1) "RFE/RL Inc., Radio Free Asia, and the Middle East Broadcasting Networks or any organization that is established through the consolidation of such entities" and (2) "any organization … authorized under this chapter." 22 U.S.C. § 6209(d).

OTF is not mentioned in the International Broadcasting Act. "A search of the statute reveals no authorization" of the kind "usually found in the statutory charters of governmental entities." *Denkler v. United States*, 782 F.2d 1003, 1005 (Fed. Cir. 1986). Nor was OTF incorporated by the government: It was incorporated solely by its

founder, Libby Liu, without any "permission or authorization from Congress or from any part of the Executive Branch." ECF 10-1 ¶¶ 2, 3. In a recent report to Congress, USAGM acknowledged OTF's status "as an independent non-profit organization." ECF 10-3 at 6. And, in this litigation, the government has conceded that OTF was not "established by or under the authority of Congress or the U.S. Agency for Global Media." ECF 12 at 1-2 (internal quotations omitted).

The government's principal argument below was that OTF should be deemed "authorized under this chapter" because it receives funding through *grants* "authorized under this chapter." The district court correctly held that this reading is unlikely to succeed. The statute covers an "*organization* that is … authorized under this chapter." The adjective, "authorized," modifies the noun, "organization": It is the organization itself (not some action, such as a grant) that must be authorized under the Act. And the preceding items listed in § 6209(d)—the names of specific organizations and "an organization that is *established* through the consolidation of such entities"—emphasizes that § 6209(d) is concerned with the establishment of organizations themselves—not actions related to funding. *Id.* § 6209(d) (emphasis added).

The government's reading also fails to explain the distinct statutory language in section 6209(c), which covers "Radio Free Europe, Radio Free Asia, or the Middle East Broadcasting Networks *or any other grantee or entity provided funding by the agency*." If Congress had wanted to give the government the power to fire and appoint officers

and directors of any organization that receives Agency funding, "it knew how to do so." *Custis v. United States*, 511 U.S. 485, 492 (1994). Congress's omission of similar language in § 6209(d) indicates that it did not intend this result. This distinct language, in the neighboring statutory provision, cannot be dismissed as "inartful drafting." ECF 7 at 6 n.5. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Finally, the government's reading ignores the use of the term "authorization" as a term of art in appropriations law. Authorization laws establish, continue, or modify an agency, program, or activity for a fixed or indefinite period of time. 1 U.S. Gov't Accountability Office, GAO-04-261SP, *Principles of Fed. Appropriations Law* 2-41 (2004); Cong. Research Serv., RS20371, *Overview of the Authorization-Appropriations Process* 1 (2012). There are many examples of Congress authorizing the establishment of corporations for public purposes. *See, e.g.*, 47 U.S.C. § 396(b) (authorizing the Corporation for Public Broadcasting); Rail Passenger Service Act of 1970, Pub. Law. No. 91-518, § 310, 84 Stat. 1327, 1330 (1970) (authorizing Amtrak). This was true of USAGM-funded entities authorized both before and after the enactment of 22 U.S.C. § 6209(d), such as Radio Free Asia (*id.* § 6208), and Radio Free Afghanistan (*id.* § 6215). Indeed, the proposed "Open Technology Fund Authorization Act" would do precisely

that—it would establish OTF as a congressionally authorized entity, giving it the benefit of continuing appropriations support in exchange for greater measures of accountability to the government. *See* H.R. 6621, 116th Cong. (2020) (legislation "[t]o amend the United States International Broadcasting Act of 1994 to authorize the Open Technology Fund").

Ultimately, as the district court concluded, the government's argument proves too much: If it were right, it "would mean that any grantee of the USAGM," even an independent entity that never consented to congressional authorization, would hand "control over its board and officers to the whim" of the government. Op. 13.

2. The government's reading of the statute, even if it were plausible, would pose serious constitutional problems that are best avoided. The plain language of the statute naturally limits the statute's reach to entities whose establishment has been authorized by Congress. But the government's reading would allow an unprecedented level of unwanted government intrusion into a private organization engaged in expressive activity. Under the First Amendment, it is well established that "the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed." *Knox v. Serv. Emps. Int'l. Union, Local 1000*, 567 U.S. 298, 309 (2012). But that "[f]reedom of association would prove an empty guarantee if associations could not limit *control over their decisions* to those who share the interests and persuasions that underlie the association's being." *Cal. Democratic*

Party v. Jones, 530 U.S. 567, 574-75 (2000) (emphasis added). Thus, "a corollary of the right to associate is the right not to associate." *Id.*

"Government actions that may unconstitutionally burden this freedom may take many forms, one of which is intrusion into the internal structure or affairs of an association, like a regulation that forces the group to accept members it does not desire." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). As the government interprets it, the statute at issue here is such a regulation. But this case is not just about who may *join* a group; here, the affront to associational freedom is much greater—an attempt by the federal government to "control" the organization's "decisions" by firing the organization's entire executive leadership and replacing its board of directors with a board consisting of a majority of federal-government officials. *Jones*, 530 U.S. at 574-75. It is hard to conceive of a government action more hostile to associational freedom than a "hostile takeover" of a nonprofit organization engaged in expressive activity, especially when the government seeks to obtain majority control "to distort or destroy their missions." *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 692-93 (2010).

OTF and its board of directors and officers thus have the constitutional right to associate with each other through their independent nonprofit organization for the common purpose of expressing and promoting their common views and mission—including their commitments to "advance Internet freedom in repressive

environments" worldwide; "counter attempts by authoritarian governments" to "control the Internet and restrict freedom of information and association online"; and "protect journalists, sources, and audiences from repressive surveillance and digital attacks." ECF 4-12 ¶¶ 2-3. They also have the right *not* to associate with others, including those they justifiably perceive as philosophically opposed to their mission and views.

Because the government's reading thus presents a "substantial constitutional question," there must be "clear evidence that Congress actually intended" this result. *Peretz v. U.S.*, 501 U.S. 923, 930 (1991). Where "an alternative interpretation of the statute"—one that limits the statute's reach to organizations authorized by Congress—"is 'fairly possible,'" the courts are "obligated" to adopt that construction. *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001). But here there is only one plausible reading of the statute: The CEO's § 6209(d) authority does not extend to OTF.

B. The bylaws do not confer on the government remove-and-replace authority over OTF that it lacks under the statute.

The district court held that, despite lacking any statutory authority to remove or replace OTF's board and officers, the government could do so based on OTF's bylaws. But the bylaws do not confer any authority on the CEO beyond what is provided in the International Broadcasting Act. And because the bylaws are unambiguous, the district court erred in relying on last year's grant agreement between OTF and USAGM to aid its interpretation.

1. "The principles governing the construction of contracts also govern the construction of by-laws." *C & E Servs., Inc. v. Ashland, Inc.*, 498 F. Supp. 2d 242, 265 (D.D.C. 2007); *see Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 361 (D.C. 2005). Thus, when interpreting corporate bylaws, the court must "look first to the actual language of the [bylaws] and give that language its plain meaning." *Id.* (quoting *Capital City Mortg. Corp. v. Habana Village Art & Folklore, Inc.*, 747 A.2d 564, 567 (D.C. 2000)). And where this plain meaning is unambiguous, courts should stick to the text. *See 1230-1250 Twenty-Third St. Condo. Unit Owners Ass'n, Inc. v. Bolandz*, 978 A.2d 1188, 1191 (D.C. 2009).

OTF's bylaws unambiguously fail to provide Pack with any independent authority to remove or appoint OTF officers or directors. Instead, the bylaws merely incorporate the Act, limiting the government's role in appointment or removal of officers and directors to that provided by the Act itself, which, as the district court correctly held, does not confer any such authority unless and until Congress authorizes OTF by statute.

Under OTF's bylaws, directors "shall be elected by the Board of Directors … upon majority vote" or "as *may be* authorized by 22 U.S.C § 6203 et seq." ECF 4-8 § 5.2 (emphasis added). Similarly, directors may be removed "for cause" by a vote of two-thirds of directors, *id.* § 6.12, or "as *may be* authorized by 22 U.S.C. § 6203 et seq," *id.* § 5.2 (emphasis added). Officers can be appointed and removed in a similar

manner, either by a vote of directors or "as *may be* authorized by 22 U.S.C. § 6203 et seq." *Id.* § 7.1 (emphasis added). Finally, the bylaws state that "the appointment of a Federal official as Director or Officer by the USAGM [CEO] shall not be deemed a conflict of interest, *provided that* such appointment … [is] authorized under the Act." *Id.* § 9.0 (emphasis added).

The plain meaning of these provisions is unambiguous: The bylaws do not confer any authority upon the CEO that he does not possess by virtue of the Act alone. But this does not mean these references have "essentially no meaning," as the district court believed. Op. 21. The key phrases in each of these provisions—"may be" and "provided that"—indicate the *future possibility* that OTF will receive congressional authorization. *See Augustine Med., Inc. v. Progressive Dynamics, Inc.*, 194 F.3d 1367, 1371 (Fed. Cir. 1999) ("The phrase 'may have' is necessarily future-oriented. … [I]t implies a *future possibility* … ."); *Wash. Props., Inc. v. Chin, Inc.*, 760 A.2d 546, 549 (D.C. 2000) ("[W]ords and phrases such as … 'provided that' … are commonly used to indicate that [the provision] has expressly been made conditional."). This plain-language reading is particularly appropriate for bylaws, which "[p]rimarily … look to the future." 8 Fletcher Cyc. Corp. § 4166; *see Walker v. Johnson*, 17 App. D.C. 144, 156 (D.C. 1900) ("A by-law is a rule for future action.").

The future-oriented references to the Act make perfect sense here. At the time its bylaws were enacted, OTF was "hopeful that [it] would one day get express

authorization from Congress that would put [it] on the same footing as congressionally-authorized grantees like Radio Free Europe and Radio Free Asia." ECF 26-1 ¶ 6. Obtaining such authorization, which would statutorily assure OTF of its longevity, congressional support, and continued funding, would be a reasonable trade for giving up some measure of its independence. As OTF's founder and incorporator, Libby Liu, explained, this specific future possibility that OTF would "one day get express authorization from Congress" "guided our intent in both the bylaws and the articles." *Id.* Thus, OTF crafted its bylaws to ensure that, *if* it received the congressional authorization it was hoping for ("*provided that* such appointment … [is] *authorized* under the Act"), ECF 26-5 at 13, *then* its bylaws would already be in compliance with the Act—including § 6209(d). But Liu "never understood … the bylaws to give the CEO of USAGM the power to remove or replace [OTF's] officers or directors absent congressional authorization of OTF." ECF 26-1 ¶ 7. Rather than require its bylaws to be amended upon its authorization, OTF chose to enact bylaws flexible enough to withstand such a statutory change. This kind of future-oriented drafting is a reasonable solution where drafters anticipate a future statutory change.

2. Because OTF's bylaws are unambiguous, they "speak[] for [themselves] … and [can be interpreted] without … extrinsic evidence." *Bolandz*, 978 A.2d 1188 at 1191. But even assuming that the bylaws are ambiguous, extrinsic evidence—namely, the now-superseded 2019 grant agreement between OTF and USAGM—is more

consistent with OTF's reading. And this interpretation is further reinforced by the District of Columbia's default corporate-law rules and constitutional background principles.

a. The district court found that the bylaws must confer authority on the CEO to appoint and remove OTF's officers and directors—over the plain text of the by-laws—based on a misreading of OTF's 2019 grant agreement. The 2019 version of the grant agreement required that OTF's "articles of incorporation, by-laws or other constitutional documents shall provide that the Board of Directors of [OTF] *may consist of some or all of the current members of the USAGM* … and other technical experts, as appropriate." ECF 4-4 at Art. IV(b) (emphasis added).[3] Although the Court found this sentence "ambiguous," Op. 20, it ultimately concluded that the sentence is best read as "allowing USAGM officials to be placed on the OTF board, *presumably by the USAGM CEO*," *id.* at 22 (emphasis added).

That reading, on which the district court placed heavy reliance, is manifestly wrong. Because the Court lacked the benefit of any briefing, evidence, or input from the parties concerning the meaning of this sentence, the Court's reasoning relies on several false steps. The grant agreement does not require OTF to give the

[3] As discussed above at *infra* note 2, the "members of the USAGM" referenced in the 2019 grant agreement refers to members of the USAGM Board of Governors. This reading is made explicit in the now-operative 2020 grant agreement. *See* ECF 16-1 at 19.

government authority to appoint or remove its officers and directors. The grant agreement provision—merely requiring that "some or all" members of the USAGM Board of Governors "may" sit on Open Technology Fund's board—is satisfied by (1) OTF's articles of incorporation, which populated OTF's initial board with six people, five of whom were members of the Board of Governors at the time (ECF 10-2 at 7); and (2) OTF's bylaws, which nowhere prohibit members of the USAGM Board of Governors from sitting on its board.

b. Background principles of District of Columbia law governing nonprofit corporations also support OTF's interpretation of its bylaws. Even if the bylaws did not manifestly foreclose Pack's actions, the District of Columbia Nonprofit Corporation Act of 2010, D.C. Code Ann. § 29-401.01 *et seq.*, provides a series of default rules that govern nonprofits and that all cut against the government's position. District law establishes a presumption that the appointment and removal of nonprofit officers and directors will be determined by the board, if no alternate procedure is clearly provided for in the articles of incorporation or bylaws. D.C. Code Ann. § 29-406.08(b). Additionally, "[a] director who is designated in the articles of incorporation," like the initial board here, "may be removed by an amendment to the articles." *Id.* § 29-406.08(d). The default rule with respect to appointments is the same: A vacancy on the board "may be filled by a majority of the directors remaining in office." *Id.* § 29-406.10(a). Similar default rules govern the appointment and removal of

nonprofit officers. *See id.* § 29-406.40(a); *id.* § 29-406.43(b). Each of these rules cuts against the government's position. An entity incorporated under the D.C. Nonprofit Corporation Act, like OTF, can of course override these statutory defaults through clear and unambiguous language to that effect in its articles of incorporation or by-laws. But, in the absence of such language, the statutory defaults prevail.

c. Finally, courts considering a nonprofit takeover attempt must also take heed of fundamental First Amendment principles of associational freedom—particularly where, as here, the nonprofit in question is engaged in expressive activity. As explained above, under the First Amendment, the government's attempt to exercise "control over" all of OTF's decisions is the greatest possible "intrusion in the internal structure or affairs" of the organization—an "unconstitutional[] burden" on OTF's associational freedom. *Dale*, 530 U.S. at 647-48, 693. When an incumbent board defends against an attempted takeover of a nonprofit organization, "[d]eferential review of defenses is appropriate to permit associations to define and limit their membership in order to control the organization's expression." Reiser, *Nonprofit Takeovers: Regulating the Market for Mission Control*, 2006 B.Y.U. L. Rev. 1181, 1251 n.244 (2006) (citing *Dale*, 530 U.S. at 648). "Directors, officers, and managers of a targeted nonprofit will be genuinely afraid that their organization's mission will be impaired, if not betrayed, by a takeover." *Id.* at 1184-85. "[T]he fact that a takeover may be a means by which to transform a nonprofit's mission illegitimately poses a significant risk beyond the

bounds of the affected organization. It also raises concerns for the nonprofit sector's role in society." *Id.* at 1185.

The district court dismissed OTF's freedom-of-association arguments in a footnote, stating that Pack's attempted takeover of OTF "raise[s] no constitutional issue" because "OTF's bylaws and grant agreement evince OTF's consent to the USAGM CEO's assumption of remove-and-replace authority over the OTF officers and directors." Op. 24 n.18. That was error. These constitutional issues are not just relevant to the interpretation of the statute; they are relevant to the interpretation of the bylaws as well. The question here is whether the federal government may take an action that would otherwise constitute a serious intrusion into OTF's associational freedom protected by the First Amendment. This constitutional protection may be waived via contract (or bylaws) only upon clear and convincing evidence that the waiver is "voluntary, knowing, and intelligently made." *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185, 187 (1972); *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993); *DNC v. RNC*, 673 F.3d 192, 205 (3d Cir. 2012).

Here, OTF did not agree to give up its independent status without obtaining the corresponding benefits of congressional authorization. Specifically, OTF never understood the language in the grant agreement or bylaws "to give the CEO of USAGM the power to remove or replace [its] officers or directors absent congressional authorization of OTF." ECF 26-1 ¶ 7; *see also id.* ("If we had been asked by USAGM

to waive our right to govern ourselves as an independent organization in this manner, we would have declined."). And it appears from its filing that the government did not either. *See* ECF 7 at 7-8 (government brief failing to even once mention the grant agreement as authority supporting Mr. Pack's actions); *id.* (arguing that the OTF bylaws merely "reinforced" the CEO's statutory authority, rather than serving as an external source of authority). Any waiver, then, could not have been "voluntary, knowing, [or] intelligently made."

Against the backdrop of these constitutional principles, OTF's bylaws should not be read to override the statutory defaults of the D.C. Nonprofit Corporation Act absent clear and unambiguous language to the contrary. There is no such language here. Thus, any ambiguity in Open Technology Fund's bylaws, to the extent it exists, should be resolved by reserving control over OTF squarely in the hands of OTF's board and officers rather than in the federal government.

II. The government's escalating efforts to take over OTF—including actions taken since this appeal was filed—are causing severe irreparable harm, while an injunction to preserve the status quo pending appeal will cause Pack no harm whatsoever.

In the few days since the plaintiffs filed their notice of appeal on July 2, the defendant, Michael Pack, has taken a series of escalating and consequential actions, including "attempts to install a new 'Acting CEO'"; "efforts to obtain physical entry into OTF's offices in Washington, DC, including repeatedly insisting that the security guards allow them entry; demands for the key to OTF's offices; multiple

unexplained demands for an immediate on-site inspection of OTF's offices at a time when OTF's staff is working remotely due to COVID-19; and efforts to directly pressure [OTF's] landlord to turn over control of [its] office space to them." Cunningham Decl. ¶ 2.

Through these actions, Pack is attempting to render the takeover of OTF a fait accompli before this Court can decide this appeal. These actions threaten the orderly appellate process in this Court: They not only compound the irreparable harm that OTF has already suffered as a result of Pack's attempted takeover, but make clear that the organization will continue to face imminent harm while this case is on appeal absent this Court's intervention. On the other side of the scale, the government cannot explain how it could possibly be harmed by having to wait until the appeal is decided before seizing control of an independent nonprofit organization.

1. Pack's hostile actions—both before and after the plaintiffs filed their appeal—"imperil virtually every aspect of [OTF]'s operations and existence," including its ability "to chart [its] own course as an organization"; its ability "to stay true to [its] mission and principles" and its "ability to protect the vulnerable communities facing repressive regimes" that trust it "to safeguard their entities and enable their important work around the world." ECF 4-12 ¶ 17. And Pack's recent flurry unexplainable demands has also imposed substantial resource burdens on the organization's leadership and staff, preventing them from carrying out OTF's core activities

in support of global internet freedom. *See* Cunningham Decl. ¶ 17. For example, Pack's recent actions have led to reduced partnership applications, uncertainty as to whether OTF will be able to open new funding rounds, and delays in hiring critical program staff. *See id.* Because these "obstacles unquestionably make it more difficult for [OTF] to accomplish [its] primary mission," the plaintiffs suffer "irreparable harm." *League of Women Voters*, 838 F.3d at 9.

More broadly, Pack's takeover efforts are critically wounding OTF's public perception as an independent and honest partner to journalists and activists in repressive regimes around the world. *See* ECF 4-12 ¶ 17; ECF 26-7 ¶ 8. Already, OTF has been denied the opportunity to sponsor an important project on timely human-rights issues in Hong Kong and China because the applicant believed that "OTF has lost credibility as a result of Pack's recent actions." *Id.* ¶ 9. And these problems will only get worse absent an injunction pending appeal. *See* Cunningham Decl. ¶ 7. Pack has demonstrated that he will continue to undermine OTF's hard-won trust and goodwill around the globe while this appeal is pending—for example, by purporting to appoint an "Acting CEO" who is "little known in the internet freedom community." Pranshu Verma & Edward Wong, *New Trump Appointee Puts Global Internet Freedom at Risk, Critics Say*, New York Times, July 4, 2020. Even if OTF can manage to forestall efforts by that "Acting CEO" to seize the reins while this appeal is pending, the paper of record has reported the appointment as a fact. What's more, OTF's

partners are now hesitant to work with the organization because they "fear that their personal information will be jeopardized by outsiders to the internet-freedom community having access to their information." Cunningham Decl. ¶ 17. Additional lost research and partnership opportunities are thus sure to follow—harms that are "beyond remediation." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

The district court's analysis of irreparable harm did not address any of this. Instead, it found that OTF failed to show irreparable harm "for substantially the same reasons that its case fails on the merits." Op. 29. That was error. Under this Court's precedent, "irreparable harm analysis" must "assume[], without deciding, that the movant has demonstrated a likelihood that the non-movant's conduct violates the law." *England*, 454 F.3d at 303. The district court did the opposite. The district court itself concluded that, "[i]f [the plaintiffs] are correct, the result will be to diminish America's presence on the international stage, impede the distribution around the world of accurate information on important affairs, and strengthen totalitarian governments everywhere." Op. 33. It's difficult to imagine harms more irreparable than that.

Finally, both OTF and the individual board-member plaintiffs have suffered irreparable harm because Pack's actions have severely interfered with their constitutional right to freely associate with like-minded persons to further a common mission.

"There can be no clearer example of an intrusion into the internal structure or affairs of an association" than the federal government's attempt to "force[] the group to accept members it does not desire." *U.S. Jaycees*, 468 U.S. at 623; *see also Dale*, 530 U.S. at 647-48. This is particularly the case here, where "Congress's intent has been manifest that" grant-funded organizations like OTF "are to enjoy independence." *Ralis*, 770 F.2d at 1125. Transforming OTF from an independent organization "into [a] house organ[] for the United States Government," as Pack seeks to do here, would be "inimical to [its] fundamental mission." *Id.*[4]

2. The balance of the equities and public interest—which "merge when the Government is the opposing party"—also weigh strongly in favor of injunctive relief. *Nken v. Holder*, 556 U.S. 418, 435 (2009). In contrast to the severe irreparable harm to OTF, the government will suffer *no* discernable harm from an injunction pending appeal. There is no conceivable pressing reason—and the government has offered none—why Pack and his designates cannot wait until after this Court has decided

[4] The Court was also wrong to dismiss the serious irreparable harm to the ousted directors of a corporation based on garden-variety federal-government employment cases, which rest on the principle that "the [g]overnment has traditionally been granted the widest latitude in the dispatch of its own internal affairs." *Sampson v. Murray*, 415 U.S. 61, 83 (1974). This isn't an employment case. It's a case about the government's intrusion into the internal affairs of a private nonprofit organization. And the board members are challenging Pack's authority to hijack an organization over which they currently exercise control. The consequences of their lost control—namely, any governance actions taken by the purported board in the interim—can't be unwound. That is irreparable harm.

this appeal before, for example, inspecting and obtaining physical control of OTF's vacant offices or appointing a new CEO.

Yet the government has aggressively moved forward with its takeover efforts (and will presumably continue to do so) notwithstanding this pending appeal, wielding the district court's denial of preliminary relief as if it somehow were a final court order "mandating the immediate federal-government takeover of OTF." Cunningham Decl. ¶ 3. Pack's "self-help" remedies here disrupt the ordinary litigation process and disrespect the proper role of the federal courts to "provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help." *Talamini v. Allstate Ins. Co.*, 470 U.S. 1067, 1070-71 (1985) (Stevens, J., concurring); *see also, e.g.*, *Simon Prop. Grp., Inc. v. Taubman Ctrs., Inc.*, 262 F. Supp. 2d. 794, 798-99 (E.D. Mich. 2003) (finding stay warranted as to shareholders contesting an attempted corporate takeover because, "[w]ithout a stay," the party "would be free to move forward with its takeover bid" which would "irreversibly alter[]" the "status quo"); *Bernstein v. Goldsmith*, 2006 WL 1644849, at *7 (D.N.J. June 5, 2006) ("Courts generally disfavor the remedy of self-help when appropriate judicial or administrative avenues are available."). Allowing a party to unilaterally assert authority to take over an organization without judicial imprimatur when the dispute turns entirely on whether that party *has* such authority in the first place cannot further the public interest.

Nor is the public interest served by permitting a rogue government official to wield sweeping, unchecked, and unlawful power over a private nonprofit organization that Congress sought to keep independent from precisely such overreaching control. That is even more true when that overreach causes lasting, irreparable harm to not only the plaintiffs but also to the global public—especially vulnerable groups in repressive and authoritarian societies—who all suffer from the loss in integrity and public confidence that comes from OTF's diminished independence. This Court should issue an injunction maintaining the pre-takeover status quo until it adjudicates the merits of this case.

CONCLUSION

This Court should grant an injunction pending appeal. While this appeal is pending, the Chief Executive Officer of the U.S. Agency for Global Media—and his agents, officers, subordinates, successors, or any persons acting in concert with them—should be enjoined from taking any action or giving effect to any action purporting to exercise authority on behalf of the U.S. Agency for Global Media to remove or replace any officers or directors of OTF.

Respectfully submitted,

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July 9, 2020

CERTIFICATE OF COMPLIANCE WITH RULE 32(g)(1)

I hereby certify that my word processing program, Microsoft Word, counted 8,351 words in the foregoing motion, exclusive of the portions excluded by Rule 32(g)(1). The document also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in proportionally spaced typeface in 14 point Baskerville font.

/s/ Deepak Gupta
Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2020, I electronically filed the foregoing motion with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ Deepak Gupta
Deepak Gupta

Addendum

ADDENDUM TO PLAINTIFFS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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Exhibit A

GRANT AGREEMENT
BETWEEN THE
U.S. AGENCY FOR GLOBAL MEDIA AND
OPEN TECHNOLOGY FUND

FAIN: OT01-19-GO-00001

GRANT FUNDS TABLE

	Initial Award	New Award Total	Currency gain/(loss) (Informational)
Operations	$4,000	$4,000	None Reported
Internet Freedom	-0-	-0-	None Reported
FUNDING	$4,000	$4,000	None Reported

Preamble

This Grant Agreement ("Agreement") is between the **U.S. AGENCY FOR GLOBAL MEDIA**[1] (hereinafter "USAGM") and **OPEN TECHNOLOGY FUND** (hereinafter "Non-Federal Entity"), a nonprofit organization incorporated in the District of Columbia. USAGM enters into this Agreement under the authority provided by the U.S. International Broadcasting Act of 1994, as amended, 22 U.S.C. §§ 6201 et seq. (the "International Broadcasting Act") and other authorization or appropriation acts that provide authority for such activities. **The Catalog of Federal Domestic Assistance (CFDA) Number for USAGM is 90.500. The DUNS Number for the Non-Federal Entity is 117206256. The Federal Award Identification Number (FAIN) for this Award for Financial Assistance is OT01-19-GO-00001.**

WHEREAS, USAGM is the United States Government agency responsible for non-military U.S. Government-funded international broadcasting pursuant to the authorities set forth in the International Broadcasting Act;

WHEREAS, the purpose of the activities supported by the International Broadcasting Act is to "promote the right of opinion and expression, including the freedom 'to seek, receive, and impart information and ideas through any media and regardless of frontiers,' in accordance with Article 19 of the Universal Declaration of Human Rights;" Id. § 6201 (1)

WHEREAS, USAGM's mission is "to inform, engage, and connect people around the world in support of freedom and democracy;"

BBG SEP 09 2019 OGC

[1] On August 22, 2018, The Broadcasting Board of Governors (BBG) officially changed its name to the U.S. Agency for Global Media (USAGM).

WHEREAS, USAGM seeks to find tools to facilitate the provision and receipt of news and information to countries that have limited or no access to free press and media, and, in furtherance thereof;

WHEREAS, in furtherance of this mission and as authorized by the International Broadcasting Act, USAGM makes and supervises a grant to the Non-Federal Entity to advance Internet freedom overseas through the research, development, and implementation of technologies that enable secure and unrestricted access to news and information on the Internet, consistent with the scope and limitations of the authorization for such activities in our annual appropriation act and other provisions of law;

NOW, THEREFORE, USAGM agrees to make, and the Non-Federal Entity agrees to accept, the grant of funds in accordance with the following provisions:

Article I - THE GRANT

a. Amount of the Grant. USAGM hereby grants the amount of **$4,000.00** (the "Grant Funds"), provided by the Continuing Appropriations Act, 2019, Division C of P.L. 115- 245 (September 28, 2018), to Non-Federal Entity for the purposes and subject to the terms and conditions stated herein. -

b. Use of the Grant Funds. The Non-Federal Entity may use the Grant Funds solely for planning and operating expenses related to advancing Internet freedom overseas, within the meaning of paragraph c of Article I, and administration thereof. The Grant Funds are provided solely for the purposes and in the amounts approved by USAGM and as set forth in the Approved Financial Plan (as such term is defined in Article V1 hereof and subject to the review procedures and adjustments described therein).

c. The funds made available under this grant are subject to the purposes set forth in law for the Agency's internet freedom funding, including the annual appropriation Act. For funds appropriated under the Consolidated Appropriations Act, 2019, section 7065 of that act defines the scope of USAGM Internet Freedom funding.

d. Funds provided under a partial year, Continuing Resolution (CR) are subject to the terms and conditions set forth in Article VI(a)(5) and those otherwise required under a partial year, CR.

Article II - WORK/ PROJECTS SUPPORTED WITH GRANT FUNDS

a. Non-Federal Entity shall use the Grant Funds to support authorized Internet Freedom activities consistent with the relevant principles and standards set forth in the International Broadcasting Act and the strategy for USIB as determined and implemented by the USAGM.[2]

[2] Under authority delegated by the Board of the USAGM, the Chief Executive Officer (CEO) exercises all of the Board's delegable authorities for day-to-day operation of the Agency, including with respect to the Non-Federal Entities,

b. The Non-Federal Entity shall carry out projects described in the Approved Financial Plan, as defined in Article VI of this Agreement. Upon USAGM's request, the Non-Federal Entity shall provide to USAGM with a detailed written schedule of all of the efforts and the projects funded with the Grant Funds.

c. All efforts shall be carried out in a manner consistent with the Agency Internet Freedom Framework and Governance Documents.

Article III - RIGHTS

a. Subject to the limitations of Article III(c), the Non-Federal Entity acknowledges and agrees that USAGM is authorized to provide for distribution of the programming that is paid for with the Grant Funds over the global network of broadcasting and transmission facilities owned and/or operated by USAGM or, as the case may be, through affiliated networks arranged by USAGM ("USAGM's Global Distribution Network"). Subject to the limitations of Article ITI(c), the Non-Federal Entity shall provide the programming that it produces with the Grant Funds to USAGM for distribution over USAGM Global Distribution Network.

b. The Non-Federal Entity may not use Grant Funds for the purpose of concluding agreements with affiliates, except as approved in writing by USAGM. Unpaid affiliate agreements must be consistent with the USAGM's strategy for USIB, as described in Article II (a).

c. The Non-Federal Entity grants to USAGM a worldwide, non-exclusive, royalty-free and perpetual license to broadcast, use, distribute and create derivative works from those of the Non-Federal Entity's original programs that contain no materials provided by or licensed from any third parties. The Non-Federal Entity grants to USAGM a worldwide, non- exclusive, royalty-free license to broadcast and otherwise use those of the Non-Federal Entity's programs that are legally available for such licensing and use. When obtaining materials from third parties for inclusion in its original programming, the Non-Federal Entity agrees to use reasonable best efforts to secure sufficient rights to permit the Non- Federal Entity to license to USAGM (on a non-exclusive, worldwide and royalty-free basis) the right to broadcast the resulting original programming; provided, however, that the Non-Federal Entity shall not be required to do so where the acquisition of such rights would materially and detrimentally affect the Non-Federal Entity's ability to secure its own license from said third parties. The Non-Federal Entity shall provide, without charge, information concerning, and DVD or other electronic copies of any of its programs to USAGM upon USAGM's request.

d. The Non-Federal Entity hereby grants to USAGM, and USAGM hereby accepts, an irrevocable, royalty-free, fully paid-up, non-exclusive, perpetual license during the Grant Term to use registered and unregistered trademarks owned by the Non-Federal Entity. USAGM's use of the Non-Federal Entity's trademarks shall be limited to use in

conjunction with disseminating the Non-Federal Entity's materials to USAGM's audiences for the purpose of furthering the USAGM mission.

e. As used here and elsewhere in this grant agreement, "programming" may refer to any hardware, software, or other end-products of the grant.

Article IV - COOPERATION WITH USAGM GOVERNANCE OF UNITED STATES INTERNATIONAL BROADCASTING

As a condition of its receipt and use of the Grant Funds provided hereunder, the Non-Federal Entity shall cooperate with USAGM's governance of USIB under the International Broadcasting Act as follows:

a. The Non-Federal Entity acknowledges that certain authorities of USAGM under the International Broadcasting Act are non-delegable, including those listed in Attachment A, meaning that USAGM has sole and exclusive authority to determine USIB strategy and policy and that the Grant Funds are intended to promote and implement such USAGM-sponsored strategy and policy.

b. The Non-Federal Entity's articles of incorporation, by-laws or other constitutional documents shall provide that the Board of Directors of the Non-Federal Entity may consist of some or all of the current members of the USAGM established under the International Broadcasting Act and other technical experts, as appropriate. The Board of Directors shall make all major policy determinations governing the operations of the Non-Federal Entity and shall appoint and fix the compensation of such managerial officers and employees of the Non-Federal Entity as it considers necessary to carry out the purposes of the Grant.

c. The Non-Federal Entity shall cooperate in the processes and protocols of USAGM as follows:

1. The Non-Federal Entity acknowledges that USAGM has adopted certain rules of conduct to govern the participation and cooperation of the elements of USAGM-sponsored USIB. Such rules of conduct are set forth in Attachment B hereto.

2. The Non-Federal Entity shall report such information to USAGM as may be reasonably requested by USAGM in the format and within the timeframe so requested. Consistent with the USAGM's desire to foster transparency as described in the "rules of the road"' in Attachment B, and in order to better enable the Non-Federal Entity to provide accurate and relevant information, where possible, USAGM's request will include information regarding the purpose of the request.

3. The Non-Federal Entity acknowledges that USAGM has delegated to the Chief Executive Officer (CEO) the authority to oversee the day-to-day management of the Federal agency and to identify, evaluate, and resolve strategic trade-offs and conflicts among the entities, including the Non-Federal Entity, consistent with the Board's strategic guidelines and subject to the Board's continued oversight. The Non- Federal Entity shall use Grant Funds in a manner consistent with any such delegation.

4. In order to facilitate coordinated communications among the elements of USIB, the Non-Federal Entity will seek advance approval of USAGM of any Congressional and Executive Branch communications and outreach activities undertaken with the use of the Grant Funds, provided that nothing in this paragraph, shall prevent the Non-Federal Entity (i) from responding to specific requests for information, documents or materials from Congress or the Executive Branch, or (ii) from engaging in routine correspondence or communications with Congress and/or the Executive Branch (including United States embassies). Upon USAGM's request, the Non-Federal Entity shall inform USAGM about such responses to requests and/or correspondence in a timely manner. The Non-Federal Entity acknowledges that 31 U.S.C. §1352 prohibits Non-Federal Entities from using appropriated funds to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the making, extension, continuation, renewal, amendment, or modification of any Federal grant. This provision shall not apply to any communications or outreach activities of any Director of the Board of Directors of the Non-Federal Entity who is a Governor of the USAGM at the time such communication or outreach activity is undertaken.

5. The Non-Federal Entity shall not disclose any information expressly designated in writing as confidential by USAGM to any third party not authorized by USAGM to receive it. USAGM shall provide to the Non-Federal Entity a copy of the written standards and procedures used by USAGM in designating information as confidential. The Non-Federal Entity shall require each Non-Federal Entity employee and contractor with access to USAGM-designated confidential information to enter into a written undertaking of confidentiality consistent with this paragraph. The Non-Federal Entity further agrees to take all steps reasonably necessary to protect the confidentiality of the confidential information and to prevent the confidential information from falling into the public domain or into the possession of unauthorized persons. The Non-Federal Entity shall have no obligation of confidentiality with respect to information that (A) was known to the Non-Federal Entity prior to receiving any of the confidential information from USAGM, (B) has become publicly known through no wrongful act of the Non-Federal Entity, or (C) was received by the Non-Federal Entity from a third party without restriction as to the use and disclosure of the information.

6. The Non-Federal Entity shall participate in activities of the International Broadcasting Bureau (IBB) Coordinating Committee in accordance with the International Broadcasting Act.

7. As indicated in Article II(c), all efforts shall be carried out in a manner consistent with the Agency Internet Freedom Framework and Governance Documents.

Article V- MUTUAL ASSISTANCE TO PROMOTE UNITED STATES INTERNATIONAL BROADCASTING

a. In the spirit of cooperation among USAGM-sponsored entities and in order to promote the efficient use of Grant Funds and Agency resources, USAGM and the Non-Federal Entity will use their reasonable best efforts to render assistance to each other to promote the interests of USIB and the implementation of USAGM's strategy.

b. Upon USAGM's request, the Non-Federal Entity shall make reasonable efforts to provide or facilitate provision of administrative or other services or resources to USAGM or other USAGM-sponsored broadcasting entities in order to promote implementation of USAGM's strategy. Grant Funds shall be available for in-kind services to the USAGM or other USAGM-sponsored entities where cost effective and consistent with the USAGM strategic plan as determined by USAGM. USAGM shall not be required to reimburse the Non-Federal Entity for Grant Funds used to provide such in-kind services nor otherwise to supplement the Grant Funds provided hereunder. USAGM will endeavor to make such requests in a manner that does not interfere with the Non-Federal Entity's ability to discharge its responsibilities under this Agreement and, where necessary to achieve the request, to provide resources to assist the Non-Federal Entity in fulfilling such requests. The Non-Federal Entity shall notify USAGM of any expenditures it makes on provision of in-kind services to USAGM and other USAGM-sponsored entities.

c. All assistance contemplated under this Article V shall be rendered in a manner consistent with applicable law and regulations.

Article VI— ADMINISTRATION OF THE GRANT

a. Development and Review of the Approved Financial Plan

1. Definition. As used in this Agreement, the term "**Approved Financial Plan**" shall mean (i) the financial plan for use of the Grant Funds that is approved by USAGM in accordance with the procedures set forth in this Article VI; (ii) any modification to such plan that is approved by USAGM during the term of this Agreement; and (iii) any proposal or modification of such proposal during a Continuing Resolution as referenced in Article VI (a) (5) below.

2. Financial Plan Required. Unless otherwise determined by USAGM, within 30 calendar days (or, if the same is on a U.S. federal holiday, the first business day occurring thereafter) of entering into this Agreement (or, as the case may be, any amendment to this Agreement which alters the amount or purpose of Grant Funds available), the Non- Federal Entity shall submit to USAGM a proposed detailed financial plan consistent with the strategy, purposes, and language services approved by USAGM and covering the full amount of the Grant.

3. Financial Plan Detail. The Non-Federal Entity's proposed financial plan shall delineate the Non-Federal Entity's anticipated monthly expenditures for each budget line item, anticipated monthly expenditures for each office and language service, and any additional detail required by USAGM. Budget line items will be

defined by the USAGM in order to ensure uniformity.

4. Approval of the Proposed Financial Plan. USAGM shall transmit any disapproval of the proposed financial plan within 30 days of its receipt from the Non-Federal Entity. If USAGM has not notified the Non-Federal Entity of its disapproval within 30 days of receiving the plan, the plan shall be deemed approved.

5. Financial Plan during a Partial Year Continuing Resolution (CR). If appropriations for the full year amount of the Grant Funds are not available to USAGM at the time that the Non-Federal Entity enters into this Agreement, the Non-Federal Entity shall provide, with each request for funding, an explanation of funding requirements for the period covered by the funding request and two subsequent months. Unless otherwise determined by law or approved by USAGM, such requirements shall include only the minimum amounts of Grant Funds reasonably necessary to sustain current operations under the partial-year Continuing Resolution. No later than 30 days after enactment of an appropriation covering the fiscal year, the Non-Federal Entity shall submit a proposed detailed financial plan for approval in accordance with paragraphs one (1) through four (4) of this subsection. The Non-Federal Entity shall operate at a rate of obligation under its CR financial plan until] USAGM approval in accordance with this paragraph.

b. USAGM will provide the Grant Funds to Non-Federal Entity by the U.S. Treasury electronic funds transfers through the Automated Clearing House System. USAGM will make disbursements in monthly increments or on such other basis as may be consistent with the Approved Financial Plan.

c. Reporting and Review of Use of Grant Funds

1. Monthly Reports. Unless otherwise approved by USAGM, twenty (20) days after the end of each month, except following the final month of the fiscal year, when this period shall be 30 days, the Non-Federal Entity shall provide to USAGM a report (Monthly Reports shall include a Federal Financial Report (SF-425) and Statement of Obligations and Disbursements (SOD)), for such month, of obligations and cash disbursements in U.S. dollars with the level of detail described in Article VI(a)(3), together with such additional information as USAGM may request from time to time. As requested by USAGM, the Non-Federal Entity shall justify in detail its use of Grant Funds against items defined in the Approved Financial Plan.

2. Reporting on Mitigation of Illicit Use. In accordance with Continuing Appropriations Act, 2019, Division C of P.L. 115- 245 (September 28, 2018), the Non-Federal Entity shall establish safeguards to minimize the use of Work supported with these grant funds for illicit purposes to the greatest extent possible ("the Safeguards"). The Non-Federal Entity shall provide USAGM an annual update of the Safeguards and shall review the risks and benefits of all supported

Work in relationship to the Safeguards and report findings to USAGM upon request.

3. Other Reviews. The Non-Federal Entity shall prepare and submit to USAGM such other reviews and reports on expenditures and obligations as USAGM may request on a schedule to be provided periodically by USAGM.

4. Report on Vacancies. Not later than the 21 days after the end of each fiscal quarter, the Non-Federal Entity shall submit a report to USAGM listing personnel vacancies as of the end of the quarter. This report should be organized by division and include the Position Title, Grade Level, Annual Salary, Date Vacant and Expected Hire Date. The provision of such report to USAGM is solely to facilitate USAGM's budget planning and reporting to Congress and does not imply that the Non-Federal Entity is required to seek USAGM approval to fill personnel vacancies.

5. Report on Equipment and Equipment Disposition. In accordance with the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for federal Award, 2 CFR §200, the Non-Federal Entity shall submit annually to USAGM an inventory of all equipment. Requests for disposition instructions concerning property purchased with Grant Funds with an estimated fair market value (at the time of such disposition) of U.S. $5,000 or more must be submitted to USAGM 120 days in advance of the proposed disposition. If USAGM has not notified the Non-Federal Entity that the disposition is disapproved, the disposition will be deemed approved.

d. The Non-Federal Entity shall maintain at its principal offices full and complete records and books of account, in accordance with generally accepted accounting principles, covering the financial details applicable to the Grant. The Non-Federal Entity shall maintain separate accountability for funds provided under this Agreement. The Non-Federal Entity shall expend these funds only on the operating costs authorized by this Agreement unless it receives prior written approval of USAGM to do otherwise.

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e. In accordance with 2 CFR §200.308, the Non-Federal Entity is required to report deviations from the Approved Financial Plan to USAGM. The Non-Federal Entity shall make reasonable efforts to provide prior notice of anticipated deviations. The Non-Federal Entity may not transfer Grant Funds among direct costs if the cumulative amount of such transfers exceeds, or is expected to exceed 10 percent of the total budget in the Approved Financial Plan unless otherwise approved by USAGM .

f. Unless otherwise approved by USAGM, the Non-Federal Entity shall provide five (5) days advance notification of any new grants or contracts exceeding U.S. $350,000 and any new leases exceeding U.S. $200,000.

g. Return of Funds

1. The Non-Federal Entity shall return to USAGM at the conclusion of the fiscal year or other period agreed upon by the parties any portion of the Grant Funds that are not required for a legally binding transaction or designated by the Non-Federal Entity for a purpose and in an amount consistent with the Approved Financial Plan.

2. Any and all interest earned on Grant Funds provided to the Non-Federal Entity pursuant to this Agreement shall be returned to USAGM on an annual basis in accordance with the requirements of 2 CFR §200.305.

3. Expenditures by the Non-Federal Entity that are not consistent with the Approved Financial Plan or otherwise permitted by this Agreement shall be recovered by the Non- Federal Entity and promptly refunded to USAGM.

Article VII—REGULATORY COMPLIANCE

a. The Parties acknowledge and agree that the Parties are subject to all Federal rules and regulations pertaining to federal grants, including the following: 22 U.S.C. §§ 6201 et seq., 31 U.S.C. §§ 7502 and 1352, 41 U.S.C. § 702, the Federal Grant and Cooperative Agreement Act and implementing regulations, and 2 CFR §200.

b. Allowability of costs incurred under this Agreement will be determined in accordance with 2 CFR §200, pursuant to certain clarifications specified in Attachment C and subject to any exceptions granted by authorization or appropriation laws.

c. The Non-Federal Entity shall comply with the covenants and other contracting provisions set forth in Attachment D.

d. The Non-Federal Entity shall comply with grant limitations in the International Broadcasting Act and/or any applicable appropriations statute that are expressly applicable to the Non-Federal Entity, including without limitation, those set forth in Attachment E.

e. The Non-Federal Entity shall deliver all required certifications identified in Attachment F upon execution of this Grant Agreement.

f. No Grant Funds may be used for the following purposes:

1. to pay any salary or other compensation, or enter into any contract providing for the payment of salary or compensation in excess of the rates established for comparable positions under Title 5 of the United States Code, or the foreign relations laws of the United States.

2. to pay first-class travel for any employee of the Non-Federal Entity, or the relative of any employee.

g. The Non-Federal Entity shall comply with all applicable U.S. laws and regulations, including, without limitation, the copyright laws of the United States.

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h. In accordance with Continuing Appropriations Act, 2019, Division C of P.L. 115-245 (September 28, 2018), the Non-Federal Entity shall only support technologies that undergo comprehensive security audits to ensure that such technology is as secure as possible and has not been compromised in a manner detrimental to the interest of the United States or to individuals and organizations benefiting from program supported by such funds.

i. When engaging outside the United States in activities that require the use of Grant Funds, the Non-Federal Entity shall exercise due diligence to ascertain the local laws and regulations, and other relevant local circumstances, applicable to the Non-Federal Entity's activities in the relevant country(ies) where such activities shall be undertaken. In the event that the Non-Federal Entity or any of its employees or contractors becomes subject to any fine, imprisonment, judgment, tax, or other penalty (whether civil, administrative, criminal, or otherwise) in any country as a result of the activities undertaken with the use of the Grant Funds, the Non-Federal Entity shall notify USAGM in writing of the same as soon as practicable (but, in no case later than 30 days following any such event) and shall provide such information as USAGM may request regarding the circumstances of any such penalty.

j. Consistent with 2 CFR §200.113, applicants and recipients must disclose, in a timely manner, in writing to the Office of Inspector General (OIG) for the Department of State and the U.S. Agency for Global Media, with a copy to the cognizant Grants Officer, all violations of Federal criminal law involving fraud, bribery, or illegal gratuities potentially affecting the Federal award. Sub-recipients must disclose, in a timely manner, in writing to the OIG and to the prime recipient (pass-through entity) all violations of Federal criminal law involving fraud, bribery, or illegal gratuities potentially affecting the Federal award. Failure to make required disclosures can result in any of the remedies described in §200.338. Remedies for noncompliance, including suspension or debarment. Disclosures must be sent to: U.S. Department of State Office of Inspector General, P.O. Box 9778, Arlington, VA 22219, Website: https://oig.state.gov/hotline Phone: 1-800-409-9926 or 202-647-3320

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Article VIII — LIMITATIONS OF USAGM OVERSIGHT

a. The Non-Federal Entity is a private, nonprofit corporation, and nothing in this Agreement may be construed to make the Non-Federal Entity a Federal agency or instrumentality,

b. USAGM's oversight and supervision of the Grant Funds are subject to limitations in applicable law.

c. USAGM acknowledges and affirms the safeguards contained in the United States International Broadcasting Act of 1994 (as amended) meant to preserve the journalistic independence and integrity of USAGM programming. USAGM acknowledges and affirms that those safeguards extend to the Non-Federal Entity. To that end, no U.S. Government official—including individual Governors, the CEO, the Secretary of State, and the Inspector General—may attempt to influence the content or editorial choices of one of the broadcasting entities in a manner that is not consistent with the highest

standards of professional broadcast journalism. Nor may any U.S. Government official take any other action that may tend to undermine the journalistic integrity, credibility, or independence of USAGM, the Non-Federal Entity, or Work funded by the Non-Federal Entity or its broadcasters. In the event that the Non-Federal Entity reasonably believes that a breach of this Article VIII (c) has occurred, then the Non-Federal Entity shall report the breach to the Chairperson of the USAGM.

d. USAGM acknowledges and affirms the safeguards contained in the United States International Broadcasting Act of 1994 (as amended) meant to preserve the journalistic independence and integrity of USAGM programming. To that end, no U.S. Government official—including individual Governors, the CEO, the Secretary of State, and the Inspector General—may attempt to influence the content or editorial choices of one of the broadcasting entities in a manner that is not consistent with the highest standards of professional broadcast journalism or take any other action that may tend to undermine the journalistic credibility or independence of USAGM or its broadcasters. In the event that the Non-Federal Entity reasonably believes that a breach of this Article VIII (b) has occurred, then the Non-Federal Entity shall report the breach to the Chairperson of the USAGM.

Article IX - FUNDRAISING

The Non-Federal Entity may not engage in fundraising from other sources except in accordance with the principles of fundraising to be agreed by USAGM and the Non-Federal Entity. The Non-Federal Entity is prohibited from using any Federal funds to finance its fundraising efforts, except as may be agreed upon.

Article X - PERSONNEL SECURITY POLICY

a. To the extent authorized and that USAGM determines that they are able, USAGM will perform security background investigations and provide appropriate clearance for the persons holding the positions listed in the letter to be provided by USAGM to the Non-Federal Entity following the signing of this Agreement. These security background investigations and clearances shall be performed at no cost to the Non-Federal Entity.

With regard to those of the Non-Federal Entity's employees and contractors who are not identified in the letter to be provided pursuant to Article X (a), but who are determined by the Non-Federal Entity and USAGM to require background investigations and/or clearances, the Non-Federal Entity and USAGM shall establish an agreed upon protocol ("Protocol"), which shall be reduced to writing and confirmed in a letter agreement following the signing of this Agreement. The Protocol shall cover (i) the categories of persons for whom such investigations and/or clearances are required, (ii) the identity of the entity or entities that will perform the investigations and/or clearances and, where necessary, (iii) who shall cover the costs associated with such investigations and/or clearances,

Article XI — IT NETWORK SECURITY POLICY

Any material breach of the Non-Federal Entity's IT network security policies, or any incident that materially affects the integrity or operations of the Non-Federal Entity's IT network system, shall be reported to USAGM within twenty-four (24) hours of detection. These violations shall include, but are not limited to, the following:

1. Unauthorized access to any of the social media or web site content management systems used by the Non-Federal Entity.

2. Disruption or denial of service for production or distribution systems.

3. Unauthorized modification or removal of the Non-Federal Entity data.

Article XII - AUDITS AND INSPECTIONS

a. Records required to be kept in order to comply with the terms and conditions of this Agreement, including bid solicitations, evidence of shipment for commodities and procurement and service contracts, shall be maintained by the Non-Federal Entity for a period of three (3) years from the date of the submission of the final expenditure report, in a manner that will permit verification of the Non-Federal Entity's compliance with its representations, warranties, and obligations contained in this Agreement. If any litigation, claim or audit is started before the expiration of the 3-year period, the records shall be retained until such litigation, claim or audit has been resolved.

b. The Non-Federal Entity acknowledges the audit requirements set forth in accordance with 2 CFR §200 Subpart F.

c. Operations of the Non-Federal Entity, as related to use of the Grant Funds, may be audited by the Government Accountability Office in accordance with such principles and procedures and under such rules and regulations as may be prescribed by the Comptroller General of the United States. Any such audit shall be conducted at the place or business where accounts of the Non-Federal Entity are normally kept.

d. Representatives of the Government Accountability Office shall have access to all books, accounts, records, reports, files, papers, and property belonging to or in use by the Non-Federal Entity, pertaining to such financial transactions and necessary to facilitate an audit. Such representatives shall be afforded full facilities for verifying transactions with any assets held by depositories, fiscal agents, and custodians, All such books, accounts, records, reports files, papers, and property of the Non-Federal Entity, shall remain in the possession and custody of the Non-Federal Entity.

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e. The Inspector General of the United States Department of State is authorized to exercise the authorities of the Inspector General Act of 1978 with respect to the Non-Federal Entity.

f. USAGM shall conduct an annual review to measure the Non-Federal Entity's performance in achieving the purposes of this Agreement and compliance with its terms. Such reviews shall be conducted at reasonable times and upon reasonable notice to the Non-Federal Entity.

g. To ensure continuous and cooperative planning and operations hereunder, the Non-Federal Entity shall permit USAGM or its authorized representatives, including the Inspector General, to visit the Non-Federal Entity's facilities and to inspect the facilities, activities, and work pertinent to the grant, both in the United States and abroad, and to interview personnel engaged in the performance of the grant to the extent deemed necessary by USAGM. USAGM, however, shall not exercise any prepublication review of the substance of any broadcast or print publication of the Non-Federal Entity.

Article XIII - FAILURE TO COMPLY WITH THE TERMS OF THE GRANT

In the event that the Non-Federal Entity fails to comply with any material term of this Grant, then, upon the decision of the USAGM Board of Governors, USAGM shall have the right to suspend or terminate the Non-Federal Entity's use of the Grant Funds by providing written notice to the Non- Federal Entity. USAGM shall provide advance notice of suspension or termination, except in urgent or compelling circumstances, as determined by USAGM in its sole discretion, after which the Non-Federal Entity will have ten (10) business days to bring itself in compliance with this Agreement.

In the event USAGM suspends or terminates the Non-Federal Entity's use of Grant Funds, the Non-Federal Entity shall forthwith return any portion of the Grant Funds in its possession or control to USAGM. Any such termination or suspension shall be without further obligation by USAGM or the United States.

Article XIV - POINTS OF CONTACT

For USAGM, the following person, or anyone otherwise designated by the Chief Executive Officer, shall be deemed to be the points of contact for the Non-Federal Entity with respect to the provisions of this Agreement:

Grant Turner
Chief Financial Officer
Tel: (202) 203-4845
Email: gturner@USAGM.gov

For the Non-Federal Entity, the following persons, or anyone otherwise designated by either of them, shall be deemed to be the points of contact for the Non-Federal Entity with respect to the provisions of this Agreement:

Nathaniel Kretchun
Secretary/Treasurer
Tel: (214) 394-5920
Email: nat@opentech.fund

Article XV - AMENDMENTS

The terms of this Agreement may be amended by mutual written consent between USAGM and the Non-Federal Entity.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year specified below:

OPEN TECHNOLOGY FUND

BY _____

Libby Liu
CEO

DATE 9/26/19

U.S. AGENCY FOR GLOBAL MEDIA
International Broadcasting Bureau

BY _____

for John F. Lansing
CEO & Director

DATE 9/26/19

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ATTACHMENT A

NON-DELEGABLE USAGM AUTHORITIES

1. To supervise all broadcasting activities conducted pursuant to International Broadcasting Act, the Radio Broadcasting to Cuba Act and the Television Broadcasting to Cuba Act.

2. To review and evaluate the mission and operation of, and to assess the quality, effectiveness, and professional integrity of, all such activities within the context of the broad foreign policy objectives of the United States.

3. To ensure that United States International Broadcasting (USIB) is conducted in accordance with the broadcasting standards and principles set forth in the Act:

Broadcasting Standards USIB shall –	Broadcasting Principles USIB shall include –
be consistent with the broad foreign policy objectives and the international telecommunications policies and treaties of the United States;	news which is consistently reliable and authoritative, accurate;
not duplicate the activities of private US broadcasters or government supported broadcasting entities of other democratic nations;	a balanced and comprehensive projection of United States thought and institutions, reflecting the diversity of United States culture and society;
be conducted in accordance with the highest standards of broadcast journalism;	clear and effective presentation of the policies of the United States Government and responsible discussion and opinion on those policies, including editorials, broadcast by the Voice of America, which present the views of the United States Government;
be based on reliable information about its potential audience;	the capability to provide a surge capacity to support United States foreign policy objectives during crises abroad;
be designed to effectively reach a significant audience;	programming to meet needs which remain unserved by the totality of media voices available to the people of certain nations;
promote respect for human rights, including freedom of religion.	information about developments in each significant region of the world;
	a variety of opinions and voices from within particular nations and regions prevented by censorship or repression from speaking to their fellow countrymen;
	reliable research capacity to meet the criteria under this section;
	adequate transmitter and relay capacity to support USIB activities; and training and

		technical support for independent indigenous media through government agencies or private United States entities.
4. To review, evaluate, and determine, at least annually, after consultation with the Secretary of State, the addition or deletion of language services.		
5. To make and supervise grants for broadcasting and related activities.		
6. To allocate funds appropriated for international broadcasting activities among the various elements of the International Broadcasting Bureau and Non-Federal Entities.		
7. To submit an annual report to the President and the Congress.		
8. To appoint such staff personnel for the Board as the Board may determine necessary to carry out its functions.		

ATTACHMENT B

The USAGM Board of Governors (Board) on June 3, 2011, adopted the following "rules of the road" governing Board operations and procedures and the interactions among the elements of United States International Broadcasting (USIB), namely (i) the Board; (ii) the International Broadcasting Bureau (IBB), Voice of America (VOA), and Office of Cuba Broadcasting (OCB); and (iii) USAGM's private Non-Federal Entities Radio Free Europe/Radio Liberty (RFE/RL), Radio Free Asia (RFA), Open Technology Fund (OTF), and Middle East Broadcasting Networks (MBN) (collectively, "Non-Federal Entities").

The Board affirmed the following general principles of USAGM governance:

- To fulfill its statutory mission, the Board requires the elements of USIB to cooperate in working toward goals established by the Board, and implemented by the IBB, in a spirit of collegiality, transparency, mutual respect, and good communication with peers and colleagues.

- The Board will endeavor to focus its attention on issues of strategic importance as required for the Board to exercise the non-delegable authorities of the Board in the United States International Broadcasting Act of 1994 (as amended).

- The Board will rely on the IBB to assist the Board in carrying out the Board's responsibilities for decisions and oversight of U.S. international broadcasting. The Board will delegate authority to the CEO to oversee the day-to-day management of the federal agency and to identify, evaluate, and resolve strategic trade-offs and conflicts among the broadcasting entities, consistent with the Board's strategic guidelines and subject to the Board's continued oversight. The Board will require the federal and non-federal elements of USIB to cooperate with and assist the CEO in fulfilling these duties.

- In recognition of the collective decision-making authority of the Governors and their desire to leverage their collective talents to promote and enhance USIB, the Governors will work to avoid the creation of "fiefdoms" in respect of the individual elements of USIB or particular functions or authorities of the Board.

- The Board will require the management of the respective, federal and non-federal elements of USIB to faithfully implement and operationalize the Board's decisions, including revised management structures intended to improve the overall efficiency of USIB, and to cooperate fully with the Committees, the CEO, and other senior USAGM officials or reporting mechanisms on which the Board relies to inform its deliberations and decision-making.

ATTACHMENT C

Allowability of costs incurred under this Agreement will be determined in accordance with 2 CFR §200 Subpart E with the following clarifications:

a. All operating costs are determined to be direct costs. (See 2 CFR §200.413)

b. The following expenses, insofar as they are reasonable and necessary to further the purpose of the grant, are authorized. (Relevant paragraphs of 2 CFR §200, are noted in parentheses.)

1. Official representation expenses necessary to further the mission of Non-Federal Entity, are not to exceed the amount in the Approved Financial Plan unless otherwise authorized by USAGM. (See Department of State Standardized Regulations (DSSR), Section 300 Representation Allowances - - 330 Prohibitions)

2. Capital expenditures for general purpose equipment. (See 2 CFR §200.439)

3. Overtime, extra-pay shift, and multi-shift premiums. (See 2 CFR §200.430)

4. Participant support costs (See 2 CFR §200.456)

5. Costs of legal, accounting, and consulting services, and related costs, incurred in connection with organization and reorganization. (See 2 CFR §200.435; §200.455 & §200.462)

6. Public information service costs. (See 2 CFR §200.421)

7. Publication and printing costs. (See 2 CFR §200.461)

8. Foreign travel costs as specified in the Approved Financial Plan. (See 2 CFR §200.474)

9. The cost of advertising the availability of publications, recordings, or services of the Non-Federal Entity, subject to limitations in applicable law or regulation.

ATTACHMENT D

1. COVENANT AGAINST CONTINGENT FEES

The Non-Federal Entity warrants that no person or selling agency has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees, bona fide established commercial or selling agencies maintained by Non-Federal Entity for the purpose of securing business. For breach or violation of this warranty, USAGM shall have the right to annul this Agreement without liability or in its discretion to deduct from the Agreement price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage or contingent fee.

2. EQUAL OPPORTUNITY

During the performance of this Agreement, the Non-Federal Entity agrees that it will not discriminate against an employee or applicant for employment because of race, creed, color, sex, national origin, age, or handicap in accordance with all pertinent Federal laws and regulations prohibiting discrimination in employment including, but not limited to, Title VII of the Civil Rights Act of 1964, as amended; 42 U.S.C. 2000e, et seq.; section 504 of the Rehabilitation Act of 1973, as amended; 29 U.S.C. 794; the Age Discrimination Employment Act of 1975, as amended; and 42 U.S.C. 6101, et seq. The provisions of this paragraph shall apply to employment actions including, but not limited to, employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. The Non-Federal Entity shall continue to include in all solicitations or advertisements for employees placed by or on behalf of the Non-Federal Entity language stating that "Non-Federal Entity is an equal opportunity employer committed to work force diversity."

3. AIR TRAVEL

The Non-Federal Entity agrees that all travel paid for with the Grant Funds will comply with the "Fly America Act" (49 U.S.C. § 40118).

4. CONVICT LABOR

In connection with the performance of work under this grant, the Non-Federal Entity agrees not to employ any person undergoing sentence of imprisonment except as provided by 18 U.S.C. 3622 and Executive Order No. 11755, December 29, 1973, as amended.

5. THE NON-FEDERAL ENTITY SHALL COMPLY WITH:

a. Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d et seq.,

which prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving Federal financial assistance.

b. Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, which prohibits discrimination on the basis of handicap in programs and activities receiving Federal financial assistance.

c. The Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 et seq., which prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance.

ATTACHMENT E

GRANT LIMITATIONS – OPEN TECHNOLOGY FUND

A. The headquarters of OPEN TECHNOLOGY FUND (OTF) and its senior administrative and managerial staff must be in a location which ensures economy, operational effectiveness, and accountability to the Board.

B. Any contract entered into by OTF shall specify that all obligations are assumed by OTF and not by the United States government.

C. Any lease agreement entered into by OTF shall be, to the maximum extent possible, assignable to the United States Government.

D. OTF shall make every reasonable effort to ensure that administrative and managerial costs for operation of OTF should be kept to a minimum and, to the maximum extent feasible, should not exceed the costs that would have been incurred if OTF had been operated as a Federal entity rather than as a Non-Federal Entity.

ATTACHMENT F

1. CERTIFICATION REGARDING LOBBYING

The Non-Federal Entity shall sign the Certification (Attachment G) Concerning Lobbying Activities that it will comply with 31 U.S.C. § 1352 concerning the use of appropriated funds for lobbying activities. If no appropriated funds have been paid or will be paid for lobby activities, the Non-Federal Entity shall submit Standard Form LLL, "Disclosure of Lobbying Activities."

2. CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

The Non-Federal Entity shall sign the Certification (Attachment H) Regarding Drug Free Workplace Requirements: Drug-Free Workplace Act of 1988 that it will provide a drug-free workplace in accordance with the Drug-Free Workplace Act of 1988, 22 CFR 513, Subpart F.

3. FEDERAL DEBT STATUS

Under OMB Circular No. A-129, the Non-Federal Entity must certify that it is not delinquent on payment of any Federal debt. The Non-Federal Entity shall sign the Certification (Attachment I) Regarding Federal Debt Status.

4. DEBARMENT AND SUSPENSION

Executive Order 12549 of February 18, 1986, as clarified by Executive Order 12689 of August 15, 1989, requires uniform Federal rules on non-procurement debarment and suspension from certain transactions with the Government. The May 26, 1988 Federal Register (53 Fed. Reg. 19161) contains these rules, which, among other things, require signature by Non-Federal Entities of the Certification (Attachment J) Regarding Debarment and Suspension.

5. STANDARDS OF ETHICAL CONDUCT

The Non-Federal Entity will publish written policy guidelines, as approved by USAGM, on conflict of interest and avoidance thereof. These guidelines will reflect federal laws and must cover financial interest, gifts, gratuities and favors, nepotism, political activity and foreign affiliations, outside employment, and use of company assets. These rules must also indicate how outside activities, relationships, and financial interests are reviewed by the responsible Non-Federal Entity official(s). The Non-Federal Entity will ensure that each employee is given a copy of the policy and notified that, as a condition of employment under the grant, the employee must abide by the terms of the policy.

ATTACHMENT G

Certification Concerning Lobbying Activities

The undersigned certifies, to the best of his or her knowledge and belief that:

(1) No federal funds have been paid or will be paid, by or on behalf of the undersigned, to any person influencing or attempting to influence an officer or employee of any agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment or modification of any Federal contract, grant, loan or cooperative agreement.

(2) No registrant under the Lobbying Disclosure Act of 1995 has made lobbying contacts on behalf of the undersigned with respect to this grant.

(3) The undersigned shall require that the language of this certification be included in the award documents for all sub-awards at all tiers (including subcontracts, sub-grants and contracts under grants, loans and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was made when this contract was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each failure.

OPEN TECHNOLOGY FUND

Libby Liu

9/26/19
Date

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ATTACHMENT H

Certification Regarding Drug Free Workplace Requirements
Drug-Free Workplace Act of 1988

The Non-Federal Entity certifies that it will provide a drug-free workplace by (a) publishing a statement notifying employees that the unlawful manufacture, distribution dispensation, possession or use of a controlled substance is prohibited in the Non-Federal Entity's workplace and specifying that action that will be taken against employees for violation of such prohibitions; (b) establishing a drug-free awareness program to inform employees about (1) the dangers of drug abuse in the workplace, (2) the Non-Federal Entity's policy of maintaining a drug-free workplace, (3) any available drug counseling, rehabilitation, and employee assistance programs, and (4) the penalties that may be imposed on employees for drug abuse violations (c) making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (c), (d) notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will (1) abide by the terms of the statement and (2) notify the employer of any criminal drug statute conviction for a violation occurring in the workplace not later than five days after such conviction ; (e) notifying the agency within ten days after receiving notice under subparagraph (d) (2) from an employee or otherwise receiving actual notice of such conviction; (f) taking one of the following actions with respect to any employee who is so convicted: (1) taking appropriate personnel action against such an employee, up to and including termination, or (2) requiring such an employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency; and (g) making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e), and (f).

OPEN TECHNOLOGY FUND

Libby Liu

Date 9/26/19

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ATTACHMENT I

Certification Regarding Federal Debt Status
(OMB Circular A-129)

The Non-Federal Entity certifies to the best of its knowledge and belief that it is not delinquent in the repayment of any federal debt.

OPEN TECHNOLOGY FUND

Libby Liu

Date 9/26/19

ATTACHMENT J

Certification Regarding Debarment and Suspension

The Non-Federal Entity certifies to the best of its knowledge and belief that its principals : (a) are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excided form covered transactions by any Federal department or agency; (b) have not, within a three year period preceding this grant, been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, state or local) transaction or contract under a public transaction; violation of Federal or state anti-trust statutes; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements or receiving stolen property; (c) are not presently indicted or otherwise criminally or civilly charged by a governmental entity (Federal, state or local) with any of the offenses enumerated in paragraph (b) of this certification; and (d) have not within a three-year period preceding this grant had one or more public transactions (Federal, state or local) terminated for cause of default.

OPEN TECHNOLOGY FUND

Libby Liu

Date 9/26/19

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Radio Free Asia

FY 2019 FINANCIAL PLAN - Open Technology Fund (OTF)

October 1, 2018 Through September 30, 2019

9/24/2019

OTF - NEW DIGITAL MANDARIN	October	November	December	January	February	March	April	May	June	July	August	September	FY2019
Salaries													-
Benefits													-
Sal/Ben -Operations	-	-	-	-	-	-	-	-	-	-	-	-	-
Contract Services												-	-
Travel & Allowances													-
Office Space													-
General & Administrative Expenses													-
Technical & Capital Expenses												4,000	4,000
SUBTOTAL	-	-	-	-	-	-	-	-	-	-	-	4,000	4,000
													-
TOTAL OTF - NEW DIGITAL MANDARIN	-	-	-	-	-	-	-	-	-	-	-	4,000	4,000

USAGM APPROVAL STATEMENT: USAGM Financial Plan Approval applies to Open Technology Fund (OTF) which was for established as an independent non-profit grantee to implement the agency's Internet freedom programs. The agency believes that this additional independence will be beneficial to the overall mission. As envisioned, this grantee would combine the expertise and funding of the USAGM Office of Internet Freedom (OIF) and OTF to implement the agency's Internet freedom program. The establishment of OTF is authorized by Congressional Notification (CN) received on September 19, 2019. The agency estimates that the maximum costs for incorporating the proposed Internet freedom grantee in FY 2019 would not exceed $4,000, with residual start-up costs, recurring staffing expenses, and programmatic costs funded out of Internet freedom resources appropriated in FY 2020 and subsequent years.

U.S. AGENCY FOR GLOBAL MEDIA

FINANCIAL PLAN APPROVAL

John F. Lansing | CEO — Date 9/26/19

For

OCFO

2019 SEP 26 PM 5:46

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Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OPEN TECHNOLOGY FUND, et al. Plaintiffs, v. MICHAEL PACK, in his official capacity as Chief Executive Officer and Director of the U.S. Agency for Global Media, Defendants.	Case No. 1:20-cv-1710

DECLARATION OF J. LAUREN TURNER

I, J. Lauren Turner, declare as follows:

1. I am the General Counsel of the Open Technology Fund (OTF), a non-profit organization incorporated in the District of Columbia and a plaintiff in this action. I am offering this declaration in support of the plaintiffs' motion for a temporary restraining order and preliminary injunction.

2. Open Technology Fund's mission is to advance Internet freedom in repressive environments by supporting the applied research, development, implementation, and maintenance of technologies—including large-scale circumvention tools—that provide secure and uncensored access to the U.S. Agency for Global Media's journalism content and the broader Internet. Open Technology Fund works to counter attempts by authoritarian governments in U.S. Agency for Global Media-priority countries to control the Internet and restrict freedom of information and association online.

3. Consistent with section 7050(b) of the Further Consolidated Appropriations Act, 2020 (P.L. 116-94), to "carry out research and development of new tools or techniques" and

"utilize tools and techniques to securely develop and distribute USAGM digital content," Open Technology Fund supports projects to: provide uncensored access to the internet to individuals living in information-restrictive countries to ensure that they can safely access U.S. Agency for Global Media content; and protect journalists, sources, and audiences from repressive surveillance and digital attacks to ensure that they can safely create and consume U.S. Agency for Global Media content.

4. Open Technology Fund executes its mission by awarding contracts to individuals and organizations that develop and implement technology that supports the mission and congressional internet freedom efforts. Open Technology Fund awards these contracts through an open and competitive application process.

5. On June 9, 2020, U.S. Agency for Global Media CEO Michael Pack instituted a "freeze" on all of our contracts, contract extensions, and personnel actions, including hiring. Attached as **Exhibit A** is a true and correct copy of the email from acting U.S. Agency for Global Media CEO Grant Turner informing us of the "freeze."

6. On June 17, 2020, Mr. Pack sent us a communication claiming that Open Technology Fund's Board of Directors had been fired and replaced with a Board of Mr. Pack's choosing. This action purportedly also included Mr. Pack's self-appointment as the Chairman of Open Technology Fund's Board. That same day, Mr. Pack purported to fire Open Technology Fund's CEO. The following day, Mr. Pack purported to fire Open Technology Fund's President too. Thus, even though we are a private, independent non-profit organization, and even though Mr. Pack lacks any legal authority to fire our officers or directors, we have been placed in an untenable position: Our funding agency is claiming to be able to completely eliminate and replace our leadership with a government-controlled board and, hence, any semblance of organizational independence we possess. Attached as **Exhibit B** is a true and correct copy of the

letter from U.S. Agency for Global Media CEO Michael Pack purporting to fire and replace our board of directors. Attached as **Exhibit C** is a true and correct copy of the letter from U.S. Agency for Global Media CEO Michael Pack purporting to fire our CEO. Attached as **Exhibit D** is a true and correct copy of the letter from U.S. Agency for Global Media CEO Michael Pack purporting to fire our president.

7. Needless to say, these purported terminations pose an immediate, ongoing, and serious threat to Open Technology Fund's ability to properly operate and fulfill its mission. As a direct result of the Mr. Pack's purported actions last Wednesday, Open Technology Fund has been operating under a legal cloud—uncertainty and paralysis that mounts each day, and that impedes our ability to perform our important anti-censorship work across the globe. Moreover, if Mr. Pack's view of the law were to prevail, the organization would be under the direction of a Chairman who instituted the very freeze that further prevents us from fulfilling our organizational mission. Absent a court order providing a declaratory and injunctive relief, Open Technology Fund thus faces grave, existential risk as an organiation.

8. Mr. Pack's actions have also caused immediate and continuing harm to Open Technology Fund and the estimated two billion people across the globe who benefit from the tools and technologies that the Fund supports. In this way too, Mr. Pack's actions have prevented and will continue to prevent Open Technology Fund from fulfilling its mission in the immediate term absent declaratory and injunctive relief. These actions will have long term negative impacts on Office of Technology Fund's ability to fulfill its mission.

9. If Open Technology Fund acts in contravention of the freeze, it risks a violation of the grant agreement governing the funds it receives from the U.S. Agency for Global Media and, consequently, the termination of its funding. If the freeze persists for 30 days, approximately 30

contracts worth approximately $5 million that are currently in the application review, negotiation, and award process will not be executed as planned.

10. In particular, Open Technology Fund is now at imminent risk of being unable to provide funding to the internet-freedom community. Because Open Technology Fund distributes money to the internet-freedom community via contracts, this freeze immediately halted Open Technology Fund's ability to perform its mission by freezing $1.5 million in the Fund's bank account and intended for use in the field. The U.S. Agency for Global Media is currently holding approximately $11 million of fiscal year 2020 funds appropriated by Congress to support internet freedom. These funds were allocated to Open Technology Fund pursuant to the U.S. Agency for Global Media's congressionally approved Internet Freedom Spend Plan, and committed to Open Technology Fund through its grant agreement. During its last call for applications, Open Technology Fund received requests from the field for nearly $20 million in support. This money stands to benefit people in multiple repressive regimes, many of which are adversaries of the United States. Open Technology Fund is now unable to execute contracts related to these requests. The U.S. Agency for Global Media has been entirely unresponsive to our requests regarding the intended purpose and duration of the freeze.

11. In addition, Mr. Pack's funding freeze and purported terminations have also immediately impacted Open Technology Fund's ability to perform its essential corporate functions. As a newly independent non-profit, Open Technology Fund is in the process of building out staff to support the distribution of the approximately $20 million designated to it for internet-freedom efforts. At the time the freeze was instituted, we were in the process of interviewing for six key positions, from new program managers and accounting support to additional technology positions. We have been unable to continue the interview process and are not able to extend job offers to these candidates. In addition, we are facing an expiring lease for

our current office space, which we cannot renew or extend in light of this freeze and without the clear of direction of stable, uncontested corporate leadership.

12. Moreover, Mr. Pack's actions create a grave risk of harm to the communities that the Open Technology Fund serves around the world. The individuals and organizations that apply to Open Technology Fund for money work on behalf of, and often themselves are, citizens of repressive regimes. Applying to Open Technology Fund, a U.S. government grantee, is in itself a great risk to these individuals. Those who take that risk do so because Open Technology Fund has earned their trust as the leading funder of open source internet freedom efforts globally. Moreover, because Open Technology Fund prioritizes funding projects created by members of the communities they are meant to serve, who understand first-hand the challenges present, our work is appreciated as being particularly effective. Following news of Mr. Pack's purported firing and replacement of our Board of Directors, and the purported firing of our CEO and President, Open Technology Fund has been inundated with emails from past, current, and prospective funding recipients—all expressing grave concern over the safety of their identities and their work in the hands of Open Technology Fund's purported new leadership. Each hour and day that this state of affairs persists causes lasting, irreversible damage to our organization, its reputation, and its effectivenss in performing its vital mission in service of global internet freedom.

13. The members of Open Technology Fund's purported new Board not only lack expertise in the area of technology and internet freedom, but have publicly aligned themselves with causes in direct conflict with many of the ideals that Open Technology Fund espouses and the communities that Open Technology Fund supports. As a result, we are now in the uniquely challenging position of trying to safeguard sensitive information about our applicants and the work they perform out of the well-founded fear that this information could be used adversely

against the internet freedom community by the Agency's preferred leadership for our organization.

14. As a result of Mr. Pack's actions, Open Technology Fund is at imminent risk of losing expert staff who have expressed fear and concern about the organization's future and about our ability to maintain a safe and sustainable work environment. The Open Technology Fund's team currently consists of a diverse set of researchers, technologists, and regional experts—a number of whom self-identify in social or political groups that members of the Board of Directors purportedly installed by Mr. Pack work against. Open Technology Fund's reputation in the community rests largely on the unique expertise and community alignment of its team; losing team members will be a significant blow to our reputation and our ability to effectuate our mission.

15. We are especially concerned that, with the exception of one individual, Pack's purported new board is entirely made up of government officials. Mr. Pack's decision to attempt to replace a largely independent board with a board dominated by and controlled by government officials appears calculated to undermine our independence in our operations and further erode the trust we have built with the global community we serve.

16. Open Technology Fund is now being squeezed by Pack and the U.S. Agency for Global Media. Through their purported terminations and installation of a government-controlled board and their ominous directives to freeze activities—without further context or reasoning—they are effectively using the power of the purse to control our funding and hiring decisions, which is beyond the scope and conditions of our grant agreement and is indeed even contrary to it. They have imposed conditions on our spending, issued data calls seeking information about the projects we currently support through contracts, and have inhibited our operations in ways that seem designed to shut our organization down entirely or have us espouse

principles that are antithetical to our organizational mission. We are also under threat of having a new Open Technology Fund CEO installed to serve at CEO Pack's pleasure.

17. In summary, the actions taken by Mr. Pack in past few days imperil virtually every aspect of Open Technology Fund's operations and existence—our ability to chart our own course as an organization; our ability to stay true to our mission and princples; our essential day-to-day corporate functions, such as hiring and maintenance of our office space; our continued funding; our ability to protect the vulnerable communities facing represssive regimes that trust us to safeguard their identities and enable their important work around the world; our reputation and goodwill; our ability to retain our valued staff; and hence, ultimately, our continued existence as an independent organization. Unless we are granted some measure of relief from the court, it is unclear how we will be able to function going forward.

18. These facts are a matter of my personal knowledge.

I declare under penalty of perjury under the laws of the District of Columbia that the foregoing declaration is true and correct. Dated this 24th day of June, 2020, and executed in Washington, DC.

/s/ J. Lauren Turner
J. Lauren Turner

Exhibit C

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
CORPORATIONS DIVISION

CERTIFICATE

THIS IS TO CERTIFY that the attached is a true and correct copy of the documents for this entity as shown by the records of this office.

Open Technology Fund

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of this office to be affixed as of 9/20/2019 12:07 PM

Business and Professional Licensing Administration

PATRICIA E. GRAYS
Superintendent of Corporations
Corporations Division

Muriel Bowser
Mayor

Tracking #: lTIUn28e

Initial File #: N00006393100

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS
CORPORATIONS DIVISION

CERTIFICATE

THIS IS TO CERTIFY that all applicable provisions of the District of Columbia Business Organizations Code have been complied with and accordingly, this ***CERTIFICATE OF INCORPORATION*** is hereby issued to:

Open Technology Fund

Effective Date: 9/20/2019

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of this office to be affixed as of 9/20/2019 12:06 PM

Business and Professional Licensing Administration

PATRICIA E. GRAYS
Superintendent of Corporations
Corporations Division

Muriel Bowser
Mayor

Tracking #: bOXhACqK

ARTICLES OF INCORPORATION
OF
OPEN TECHNOLOGY FUND

To: D.C. Department of Consumer and Regulatory Affairs
Corporations Division
Washington, D.C.

We, the undersigned natural persons of the age of eighteen years or more, acting as incorporators of a non-profit corporation, adopt the following Articles of Incorporation for such corporation pursuant to the District of Columbia Non-Profit Act of 2010, as amended.

ARTICLE I

The name of the Corporation is Open Technology Fund (hereinafter called the "Corporation").

ARTICLE II

The period of duration of the Corporation is perpetual.

ARTICLE III

The purpose for which the Corporation is organized is to operate exclusively for charitable, educational, scientific and literary purposes, within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (or corresponding provisions of any subsequent federal tax laws); and within such limits to have as it purposes, to (1) further the internet freedom objectives of the United States Agency for Global Media ("USAGM") so as to expand unrestricted access to information available to the public on the internet, and (2) support the development and use of circumvention and secure communications technologies on a worldwide basis where the same is restricted in order to advance the internet freedom objectives of USGAM, and (3) lessen the burdens of government by furthering the internet freedom objectives of USGAM; and consistent with the above, to exercise all powers available to corporations organized pursuant to the District of Columbia Non-Profit Act of 2010, as amended.

ARTICLE IV

The Corporation shall have no members.

ARTICLE V

The affairs of the Corporation shall be managed by its Board of Directors. The number of directors (not less than three) and the manner of electing directors shall be fixed in the Bylaws of the Corporation.

ARTICLE VI

Except as provided in these Articles, the internal affairs of the Corporation shall be regulated and determined as provided in the Bylaws.

ARTICLE VII

In all events and under all circumstances, and notwithstanding merger, consolidation, reorganization, termination, dissolution, or winding up of this Corporation, voluntary or involuntary, or by the operation of law, or upon amendment of the Articles of Incorporation of the Corporation:

(a) The Corporation shall not have or exercise any power or authority either expressly, by interpretation, or by operation of law, nor shall it directly or indirectly engage in any activity that would prevent it from qualifying (and continuing to qualify) as a corporation described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (or corresponding provisions of any subsequent federal tax laws).

(b) No part of the assets or net earnings of the Corporation shall inure to the benefit of or be distributable to its incorporators, directors, officers or other private persons having a personal or private interest in the Corporation, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services actually rendered and to make reimbursement in reasonable amounts for expenses actually incurred in carrying out the purposes set forth in ARTICLE III hereof.

(c) No substantial part of the activities of the Corporation shall consist of the carrying out of propaganda, or of otherwise attempting to influence legislation unless Section 510(h) of the internal Revenue Code of 1986, as amended (or corresponding provisions of any subsequent federal tax laws), shall apply to the Corporation, in which case the Corporation shall not normally make lobbying or grass roots expenditures in excess of the amounts therein specified. The Corporation shall not in any manner or to any extent participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office; nor shall it engage in any "prohibited transaction" as defined in Section 503(b) of the Internal Revenue Code of 1986 (or corresponding provisions of any subsequent federal tax laws).

(d) Neither the whole, or any part of or portion, of the assets or net earnings of the Corporation shall be used, nor shall the Corporation ever be operated, for objects or purposes other than those set forth in ARTICLE III hereof.

(e) In the event that the Corporation is a private foundation within the meaning of Section 509 of the Internal Revenue Code of 1986, as amended (or corresponding provisions of any subsequent federal tax laws):

(1) The Corporation shall distribute its income for each taxable year at such time and in such manner as not to subject it to the tax on undistributed income imposed by Section 4942 of the Internal Revenue Code of 1986, as amended (or any corresponding provisions of any subsequent federal tax laws).

(2) The Corporation shall not engage in any act of self-dealing as defined in Section 4941(d) of the Internal Revenue Code of 1986, as amended (or any corresponding provisions of any subsequent federal tax laws).

(3) The Corporation shall not retain any excess business holdings as defined in Section 4943(c) of the Internal Revenue Code of 1986, as amended (or any corresponding provisions of any subsequent federal tax laws).

(4)The Corporation shall not make any investments in such a manner as to subject it to tax under Section 4944 of the Internal Revenue Code of 1986, as amended (or any corresponding provisions of any subsequent federal tax laws).

(5) The Corporation shall not make any taxable expenditure that would subject it to tax under Section 4945(d) of the Internal Revenue Code of 1986, as amended (or any corresponding provisions of any subsequent federal tax laws).

(f) Upon dissolution of the Corporation, all of its assets and property of every nature and description remaining after payment of all liabilities and obligations of the Corporation (but not including assets held by the Corporation upon condition requiring return, transfer, or conveyance, which condition occurs by reason of the dissolution) shall be paid over and transferred to one or more organizations which engages in activities substantially similar to those of the Corporation and which are then qualified for exemption from federal income taxes as organizations described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (or any corresponding provisions of any subsequent federal tax laws).

ARTICLE VIII

To the fullest extent permitted by law, no director shall be liable to the Corporation for monetary damages for any action taken, or any failure to take any action, as a director, provided that this provision shall not eliminate or limit the liability of a director (a) to the extent of a financial benefit received by the director to which the director was not entitled, (b) for an intentional infliction of harm, (c) for an intentional violation of criminal law, or (d) for voting for or assenting to an unlawful distribution made by the Corporation. To the fullest extent permitted by law, any repeal or modification of this ARTICLE VIII shall be prospective only and shall not adversely affect any right or protection of, or any limitation of the liability of, a director of the Corporation existing at, or arising out of facts or incidents occurring prior to, the effective date of such repeal or modification.

ARTICLE IX

The address, including street and number of the Corporation's initial registered office in the District of Columbia is 2025 M Street N.W., Washington, D.C. 20036. The name of the Corporation's initial registered agent at such address is Libby Liu.

ARTICLE X

The number of Directors constituting the initial Board of Directors is [three (3)] and the names and addresses, including street and number, of the persons who are to serve as the initial directors until the first annual meeting or until their successors be elected and qualified are:

NAME	ADDRESS
Dr. Leon Aron.	2025 M Street N.W., Washington, D.C. 20036
Ambassador Ryan Crocker	2025 M Street N.W., Washington, D.C. 20036
Mr. Michael Kempner	2025 M Street N.W., Washington, D.C. 20036
Ambassador Karen Kornbluh	2025 M Street N.W., Washington, D.C. 20036
Mr. Ben Scott	2025 M Street N.W., Washington, D.C. 20036
Mr. Kenneth Weinstein	2025 M Street N.W., Washington, D.C. 20036

ARTICLE XI

The names and addresses, including street number, of the incorporators of the Corporation are:

NAME	ADDRESS
Libby Liu	2025 M Street, N.W. Washington, D.C. 20036

IN WITNESS WHEREOF, the undersigned has set her hand and seal this 20th day of September 2019.

Libby Liu, Incorporator

Exhibit D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OPEN TECHNOLOGY FUND, *et al.*, Plaintiffs, v. MICHAEL PACK, in his official capacity as Chief Executive Officer and Director of the U.S. Agency for Global Media, Defendant.	Civil Action No. 20-1710 (BAH) Chief Judge Beryl A. Howell

ORDER

Upon consideration of plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, ECF No. 4; plaintiffs' Motion for Hearing Status Conference, ECF No. 18; the memoranda in support and opposition; the parties' declarations, exhibits, and supplemental filings; the arguments presented at the hearing held on June 26, 2020; and the full record herein, for the reasons stated in the Memorandum Opinion issued with this Order, it is hereby

ORDERED that plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, ECF No. 4, is **DENIED**; and it is further

ORDERED that plaintiffs' Motion for Hearing Status Conference, ECF No. 18, is **DENIED**.

SO ORDERED.

Date: July 2, 2020

Beryl A. Howell

BERYL A. HOWELL
Chief Judge

Exhibit E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OPEN TECHNOLOGY FUND, *et al.*, Plaintiffs, v. MICHAEL PACK, in his official capacity as Chief Executive Officer and Director of the U.S. Agency for Global Media, Defendant.	Civil Action No. 20-1710 (BAH) Chief Judge Beryl A. Howell

MEMORANDUM OPINION

For nearly 80 years, international broadcasting sponsored by the United States has served as a trusted and authoritative global news source, a forum for the expression of diverse viewpoints on the most pressing topics of the day, a model of journalistic excellence and independence, and a beacon of hope for those trapped within authoritarian regimes. Despite being funded by American taxpayers, U.S. international broadcasting has typically remained free of governmental interference. Indeed, its autonomy and its commitment to providing objective news coverage has often been viewed as key to its ability to advance the interests of the United States abroad. Our country's commitment to this model of cultural export has largely been viewed as a rousing success, helping to undermine and topple some of history's most oppressive regimes—including Nazi Germany and the Soviet Union—by spreading freedom and democracy around the globe.

The current Chief Executive Officer ("CEO") of the United States Agency for Global Media ("USAGM")—the defendant, Michael Pack—is accused of putting this legacy at serious risk. Since taking office less than a month ago, Pack has upended U.S.-sponsored international broadcasting. Most relevant to the current dispute, on June 17, 2020, Pack unilaterally removed

the operational heads and directors of four USAGM-funded organizations—Open Technology Fund ("OTF"), Radio Free Europe ("RFE"), Radio Free Asia, and the Middle East Broadcasting Networks (collectively, "Networks")[1]—and replaced the directors with five members of the current Trump Administration as well as an employee of Liberty Counsel Action, a conservative advocacy organization.

The backlash was instantaneous. Certain members of the press dubbed the event a "Wednesday night massacre." *E.g.*, Julian Borger, *Voice of America: independence fears after Trump ally purges senior officials*, THE GUARDIAN (June 18, 2020, 1:37 pm EDT), https://www.theguardian.com/media/2020/jun/18/voice-of-america-independence-fears-after-trump-ally-purges-senior-officials; Jennifer Hansler and Brian Stelter, *'Wednesday night massacre' as Trump appointee takes over at global media agency*, CNN BUSINESS (June 18, 2020, 12:20 PM ET), https://www.cnn.com/2020/06/17/media/us-agency-for-global-media-michael-pack/index.html. Members of Congress from both sides of the political aisle expressed serious concern about the terminations. *See* Press Release, Congressman Michael McCaul and Senator Blackburn, McCaul, Blackburn Statement on OTF Firings, Organization's Future (June 19, 2020), *available at* https://perma.cc/TLR8-A36P; Sarah Ellison, *How Trump's obsessions with media and loyalty coalesced in a battle for Voice of America*, WASH. POST (June 19, 2020, 4:52 PM EDT), https://www.washingtonpost.com/lifestyle/media/how-trumps-obsessions-with-media-and-loyalty-coalesced-in-a-battle-for-voice-of-america/2020/06/19/f57dcfe0-b1b1-11ea-8758-bfd1d045525a_story.html [hereinafter Ellison, *A battle for Voice of America*] (quoting statement from Representative Eliot Engel, Chair of the Foreign Affairs Committee of the House of Representatives). Senator Robert Menendez, Ranking Member of the Senate Committee on

[1] OTF is not a broadcaster. Rather, OTF "advance[s] Internet freedom in repressive environments by supporting the applied research, development, implementation, and maintenance of technologies that provide secure and uncensored access to the Agency's content and the broader Internet." Compl. ¶ 17, ECF No. 1. The Court, however, refers to these USAGM grantees as the "Networks" for the sake of convenience.

Foreign Relations, sent a letter to the Department of State's acting inspector general asking for a "review" of "whether Mr. Pack's wholesale firing of the leadership of [USAGM] networks violated" USAGM's regulations. Letter from Senator Robert Menendez to Acting Inspector General Stephen Akard (June 23, 2020), *available at* https://perma.cc/ZE9N-6XBD.

Widespread misgivings about Pack's actions raise troubling concerns about the future of these great institutions designed to advance the values and interests of the United States by providing access to accurate news and information and supporting freedom of opinion and expression in parts of the world without a free press. Plaintiffs—OTF and four of the individuals whom Pack removed from the Networks' boards—claim that Pack's actions violate the International Broadcasting Act ("IBA"), 22 U.S.C. §§ 6201–16, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.* Compl. ¶¶ 47–60.[2] They seek an order enjoining Pack "from taking any action or giving effect to any action purporting . . . [(1)] to remove any officers or directors of [OTF]," (2) to "replace the boards of directors of [the Networks] with a board effectively controlled by the federal government, or [(3)] to give effect to any personnel decisions (such as removal of corporate officers) that must be taken by the organization's board of directors." Pls.' Motion for a Temporary Restraining Order and Preliminary Injunction ("Pls.' Mot."), at 33–34, ECF No. 4. For his part, Pack defends his action as authorized by 2016 amendments to the IBA, which amendments, despite being buried without fanfare in a brief 6-page section of a 970-page enacted bill, made profound structural changes in the management of the agency tasked with overseeing the funding and operations of the affected Networks.

[2] Individual plaintiffs Ambassador Ryan Crocker, Ambassador Karen Kornbluh, and Michael Kempner were members of the boards of directors of plaintiff OTF, RFE, Radio Free Asia, and the Middle East Broadcasting Networks, Compl. ¶¶ 4, 5, 7, and individual plaintiff Ben Scott was a member of the board of directors of plaintiff OTF, *id*. ¶ 6.

Plaintiffs seek extraordinary relief but have fallen short of making the requisite showings. Consequently, as explained in more detail below, plaintiffs' motion is denied.

I. BACKGROUND

A. History of the USAGM

"Modern U.S. government-funded international broadcasting began during World War II with the creation of the Voice of America," CONG. RESEARCH SERV., RL 43521, U.S. INTERNATIONAL BROADCASTING: BACKGROUND AND ISSUES FOR REFORM 1 (2016) [hereinafter CRS INT'L BROADCASTING REP.], which, "[s]ince its first transmission in Germany in 1942, . . . has served as the official news outlet of the United States government in foreign lands during wars both hot and cold," *Namer v. Broad. Bd. of Governors*, 628 Fed. App'x 910, 911 (5th Cir. 2015). Voice of America was such a success that U.S. international broadcasting "continued throughout the Cold War period with Radio Free Europe broadcasting behind the Iron Curtain, and Radio Liberty [('RL')] targeting populations in the former Soviet Union." CRS INT'L BROADCASTING REP. at 1. Yet, unlike Voice of America, RFE and RL "were technically independent services, each overseen by a private U.S. corporation." *Id.* at 2. "In 1973, Congress formally created the Board of International Broadcasting (BIB)," a nine-member "independent bipartisan board," "to oversee and fund both RFE and RL under the International Broadcasting Act of 1973 (P.L. 93-129)." *Id.* at 3. Notwithstanding oversight from and American taxpayer funding through BIB, RFE and RL—now combined to form a single corporation—remained separate from the government, and "provid[ed] an example of an independent broadcaster promoting journalistic integrity and democratic principles of a free media." *Id.* Over the decades, this model was expanded around the globe, including through the creation of Radio Free Asia and the Middle East Broadcasting Networks, *see id.* at 4, and Radio Free Afghanistan, *see* 22 U.S.C. § 6215.

"For almost as long as these services have been in existence, debates over the effectiveness, strategic direction, and necessity of U.S. international broadcasting have persisted." CRS INT'L BROADCASTING REP. at 1. "It was deemed important by Congress that institutional arrangements be such that the stations not lose their 'non-official status'; to transform [them] from independent broadcasters into house organs for the United States Government was seen as inimical to [their] fundamental mission." *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121, 1125 (D.C. Cir. 1985). The method for achieving this independence, however, evolved over time. BIB itself adopted regulations that, *inter alia*, ensured broadcasters would operate "as independent broadcast media with professional independence." *Id.* (internal quotation marks omitted) (quoting 22 C.F.R. § 1300.1(b) (1985)). 1994 amendments to the IBA placed similar language into the IBA itself, creating the so-called "statutory firewall." *See* CRS INT'L BROADCASTING REP. at 3–4. Simultaneously, "Congress abolished the BIB and reorganized all existing U.S. international broadcasting services under a new Broadcasting Board of Governors [('BBG')]." *Id.* at 3. The BBG was largely structured along the same lines as the BIB, made up of (1) eight presidentially appointed, senate-confirmed governors, "no more than four of whom [could] be from the same political party," and (2) the Secretary of State, who "serve[d] as the ninth voting member ex officio." *Id.* at 5. "By ensuring broadcasting independence while at the same time institutionalizing guidance from the Secretary of State," the 1994 law "aimed to produce U.S. international broadcasting that is both credible and supportive of U.S. foreign policy objectives." *Id.* at 3–4. Continuing this trend, in 1999, Congress made BBG an independent agency. *See id* at 4.

By 2016, "[m]any observers perceive[d] flaws in the BBG's structure" that were believed to produce, *inter alia*, "weak leadership from the Board" and "inefficient administrative and personnel management of the agency." *Id.* at 1. The criticisms were bipartisan. *See id.* at 12

(citing testimony of former Secretary of State Hillary Clinton); *id.* at 17 (noting that reform legislation had co-sponsors from both major political parties). To address these issues, Congress considered various legislative changes "intended, in large part, to address these perceived shortcomings." *Id.* at 1. The 113th Congress, for instance, considered the creation of a new "Freedom News Network," formed from a combination of RFE, Radio Free Asia, and the Middle East Broadcasting Networks, which would have had a "completely private" board. Report 113-541, House Comm. on Foreign Affairs, at 25 (July 18, 2014). Similar legislation was introduced in 2015. *See* CRS INT'L BROADCASTING REP. at 1, 19–25. In December 2016, Congress finally acted by including, within the almost thousand-page National Defense Authorization Act for Fiscal Year 2017, amendments to the IBA that imposed a fundamentally new structure on the agency. Most notably, Congress created a presidentially appointed CEO of the BBG and granted the new CEO expansive, unilateral powers. *See* 22 U.S.C. §§ 6203, 6204(a)(1)–(22). Congress retained, however, the statutory firewall, demanding "respect [for] the professional independence and integrity of the Board, its broadcasting services, and the grantees of the Board." *See id.* § 6204(b).

On December 23, 2016, President Obama signed into law the National Defense Authorization Act, which included the provisions amending the IBA. He contemporaneously issued a statement explaining that his Administration "strongly support[ed] the bill's structural reform of the [BBG], which streamlines BBG operations and reduces inefficiencies, while retaining the longstanding statutory firewall, protecting against interference with and maintaining the professional independence of the agency's journalists and broadcasters and thus their credibility as sources of independent news and information." President Obama's Statement on Signing the National Defense Authorization Act for Fiscal Year 2017, 2016 DAILY COMP. PRES. DOC. 863, at 3 (Dec. 23, 2016). Noting that these amendments "elevate the current Chief

Executive Officer of the Broadcasting Board of Governors to the head of the agency and reduce the current members of the Board, unless on expired terms, from serving as the collective head of the agency to serving as advisors to the Chief Executive Officer," he stressed that "my Administration supports the empowerment of a Chief Executive Officer with the authority to carry out the BBG's important functions." *Id*.

In 2018, the agency itself changed its name to the United States Agency for Global Media. *Firewall and Highest Standards of Professional Journalism*, 85 Fed. Reg. 36,150, 36,150 n.1 (June 15, 2020) [hereinafter *Firewall* Rule]. No substantive changes occurred alongside the name swap. *See id.* On June 12, 2020, the agency put into effect a new rule interpreting the "statutory firewall." *See generally id.* at 36,150–53.

B. The Present Dispute

In 2018, President Trump—the first president with the authority granted by the 2016 IBA amendments to select the single individual vested with authority to run USAGM—nominated Michael Pack to serve as the USAGM CEO. Pack's nomination was strongly supported by conservative commentator Steve Bannon, *see, e.g.*, Ellison, *A battle for Voice of America* (quoting Bannon as saying: "He's my guy, and I pushed him hard."), who previously served as a presidential advisor and was perceived to have influence with the White House. Nevertheless—or perhaps due to public support from a controversial figure—for approximately two years, Pack's nomination languished in the Senate. In April 2020, President Trump placed renewed effort behind achieving Pack's confirmation, holding a news conference to draw attention to the issue. At the conference, President Trump stated: "If you hear what's coming out of the Voice of America, it's disgusting. The things they say are disgusting toward our country. And Michael Pack would get in and do a great job." Catie Edmondson and Edward Wong, *With Push From Trump, Senate Moves to Install Contentious Filmmaker at U.S. Media Agency*, N.Y. TIMES (May

8, 2020), https://www.nytimes.com/2020/05/08/us/politics/michael-pack-voa.html; *see also* CONG. RESEARCH SERV., IN11365, PRESIDENT TRUMP CRITICIZES VOA COVERAGE OF CHINA'S COVID-19 RESPONSE 1 (2020) [hereinafter 2020 CRS REPORT] (noting that the White House issued a statement on April 10, 2020 critical of VOA for running an Associated Press article on its website on April 7, 2020 that the White House asserted "amplified Beijing's propaganda").[3]

The President's push worked. On June 4, 2020, Pack's appointment was confirmed by the Senate and, on June 8, 2020, he was sworn in as the CEO of USAGM. After a week on the job, on June 17, 2020, Pack removed the Networks' heads and the members of their boards of directors, including the individual plaintiffs in this lawsuit, explaining that he acted "pursuant to [his] authorities as [CEO] of [USAGM], including under 22 USC 6209(d) and [the Networks'] bylaws." *E.g.*, Turner Decl., Ex. B, at 1, ECF No. 4-14. As noted, Pack replaced the former board members with five members of the current Administration as well as an employee of Liberty Counsel Action, a conservative advocacy organization. *Id.*[4]

On June 23, 2020, OTF and the individual plaintiffs brought the instant suit, claiming that Pack's actions violate the IBA and the APA. Compl. ¶¶ 47–60. On June 25, 2020 they filed the pending motion for a temporary restraining order and preliminary Injunction. *See generally* Pls.' Mot. The morning of June 26, 2020, Pack filed, in accordance with a scheduling order entered by the Court, *see* Min. Order (June 25, 2020), his opposition, *see* Def.'s Opp'n to Pls.' Mot.

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[3] Notably, VOA Mandarin's service has extensive reach. Its "audience has continued to grow, particularly for its YouTube programs, which have reached roughly 100 million viewers. During the past year, VOA Mandarin reported on numerous topics that are sensitive to the [People's Republic of China ('PRC')] government and generally banned, including Chinese dissident views, the mass detention of Uyghurs, political protests in Hong Kong, politics in Taiwan, and PRC 'misinformation' efforts. VOA also published articles in English and Chinese questioning China's COVID-19 numbers and timeline of events. VOA Mandarin's website received over 68 million visits from April 2019 to April 2020, including 4.5 million article views related to COVID-19 coverage." 2020 CRS REPORT at 2.

[4] Specifically, Pack appointed, in addition to himself: Jonathan Alexandre, Senior Counsel to Liberty Counsel Action; Robert Bowes, Senior Advisor to the Secretary of Housing and Urban Development; Bethany Kozma, Deputy Chief of Staff at the United States Agency for International Development; Rachel Semmel, Communications Director at the Office of Management and Budget; and Emily Newman, Chief of Staff at USAGM. Turner Decl., Ex. B, at 1.

("Def.'s Opp'n"), ECF No. 7, and, later that afternoon, also submitted a Notice of Supplemental Authority, ECF No. 8, while plaintiffs filed a Motion to File Supplemental Declarations, ECF No. 9, which was granted, *see* Min. Order (June 26, 2020). A hearing was held the same day. *See* Min. Entry (June 26, 2020). On June 29, 2020, plaintiffs filed an additional supplemental declaration, concerning the incorporation of OTF, *see* Pls.' Notice of Suppl. Auth. Supp. Pls.' Mot., ECF No. 10, to which Pack filed a response the same day, *see* Def.'s Resp. to Pls.' June 29, 2020 Notice of Suppl. Auth., ECF No. 12. Also, on June 29, 2020, plaintiffs filed a notice with the Court regarding the status of its 2020 operational grant. *See* Pls.' Notice to the Court and Request for a Status Conf. ("Pls.' June 29 Notice"), ECF No. 13. Pursuant to the Court's order, *see* Min. Order (June 30, 2020), Pack addressed plaintiffs' notice the following day, *see* Def.'s Resp. to Pls.' June 29 Notice ("Def.'s June 29 Resp."), ECF No. 16. The morning of July 1, 2020, plaintiffs filed yet another supplemental declaration, *see* Pls.' Notice of Suppl. Auth. in Supp. Pls.' Mot. ("Pls.' July 1 Notice"), ECF No. 17, to which the government responded that afternoon, *see* Def.'s Resp. to Pls.' July 1 Notice ("Def.'s July 1 Resp."), ECF No. 19. Also, on the afternoon of July 1, 2020, plaintiffs submitted a reply brief. *See* Pls.' Reply in Supp. of Pls.' Mot., ECF No. 19. Plaintiffs' motion for a temporary restraining order and preliminary injunction is now ripe for resolution.[5]

II. LEGAL STANDARD

In evaluating a motion for both a temporary restraining order and preliminary injunctive relief, generally the same standard is applied. *See Sampson v. Murray*, 415 U.S. 61, 86 (1974) (confirming that "a temporary restraining order continued beyond the time permissible under Rule 65 must be treated as a preliminary injunction, and must conform to the standards

[5] At the hearing on June 26, 2020, plaintiffs reported that "[RFE] would be joining in the motion." Hr'g Tr. at 45:20–21. The Court informed plaintiffs' counsel that, if that were the case, plaintiffs should amend their complaint "no later than Monday," June 29, 2020. *Id.* at 46:2–3. In their July 1, 2020 reply brief, plaintiffs stated that they "do not seek to amend their complaint to add any new party." Pls.' Reply at 2 n.1.

applicable to preliminary injunctions"); *Nat'l Mediation Bd. v. Air Line Pilots Ass'n, Int'l*, 323 F.2d 305, 305 (D.C. Cir. 1963) (per curiam) (noting that "[a]n order extending a temporary restraining order beyond the 20 days allowed by Civil Rule 65(b) is tantamount to the grant of a preliminary injunction"). To obtain either form of relief, plaintiffs must establish that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. *See Winter v. Natural Res. Def. Counsel*, 555 U.S. 7, 20 (2008). The first factor is the "most important factor." *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014); *see also Munaf v. Geren*, 553 U.S. 674, 690 (2008) ("[A] party seeking a preliminary injunction must demonstrate, among other things, 'a likelihood of success on the merits.'" (quoting *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418, 428 (2006)).[6]

A temporary restraining order or a preliminary injunction "is an extraordinary . . . remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion" on each of the factors. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (emphasis omitted) (quoting 11A C. Wright, A. Miller, & M. Kane, FEDERAL PRACTICE AND PROCEDURE § 2948, pp. 129–30 (2d ed. 1995)). When the requested preliminary relief would alter the status quo, the standard the movant must satisfy is especially "demanding." *Archdiocese of Wash.*, 897 F.3d at 319; *see also Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969) ("The power to issue a preliminary injunction, especially a mandatory one, should be 'sparingly exercised.'" (quoting 7 J.W. Moore, Federal Practice P65.04(1), p. 1627 (2d ed. 1968))).

[6] The D.C. Circuit has previously followed a "sliding scale" approach to evaluating preliminary injunctions, but that approach is likely inconsistent with *Winter*, *see Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 334 (D.C. Cir. 2018) (observing that *Winter* may be "properly read to suggest a 'sliding scale' approach to weighing the four factors be abandoned"); *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1295 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (noting "this Circuit's traditional sliding-scale approach to preliminary injunctions may be difficult to square with the Supreme Court's recent decisions in" *Winter* and *Munaf*), and therefore will not be employed here, *see Singh v. Carter*, 185 F. Supp. 3d 11, 16–17 (D.D.C. 2016).

III. ANALYSIS

The four-factor test plaintiffs must satisfy to obtain the preliminary injunctive relief they seek is addressed below, with the final two factors considered together.

A. Plaintiffs Fail To Establish A Likelihood Of Success On The Merits

As to the first factor, plaintiffs contend that Pack's removal and replacement of the officers and directors of the Networks violate the IBA for two reasons.[7] First, they argue that the USAGM CEO lacks authority to remove and replace OTF's officers and directors. Pls.' Mot. at 16–21. Second, they contend, with respect to both OTF and the remaining Networks, that Pack's actions violated the IBA's "statutory firewall." *Id.* at 21–24. These arguments are addressed *seriatim*.[8]

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[7] Initially, plaintiffs also argued that Pack "ordered an immediate 'freeze' on the use of the federal grant funds on which these private organizations depend," Pls.' Mot. 1, and that this "freeze" was "'arbitrary, capricious,' and 'otherwise not in accordance with law,' in violation of the APA." Pls.' Mot. at 3 (quoting 5 U.S.C. § 706(2)(A)). On June 26, 2020, however, USAGM advised its grantees, via an email, that "[t]here is no freeze in funding," and grantees "may continue taking" actions that had previously been put on hold. Def.'s Notice of Suppl. Auth., Ex. A at 1, ECF No. 8. At the hearing held the same day, government counsel representing Pack confirmed that no "freeze" remains in effect, and that the grant providing OTF's operational funding—of particular importance to OTF—is active. *See* Hr'g Tr. at 3:13–5:7. Plaintiffs thus maintained that they "are not pressing the claim regarding the freeze for purposes of this motion." *Id.* at 4:17–18; *see also id.* at 5:4–7 (confirming the same). On June 29, 2020, however, plaintiffs notified the Court that "[e]ven though the 2020 grant agreement had already been offered by USAGM and accepted by OTF, USAGM is now attempting to withhold funds through an 'amendment' to the grant" under which USAGM "intends to approve funding only in the amount of $1,619,926." Pls.' Notice at 2 (internal quotation marks omitted). Plaintiffs requested a status conference to address the issue. *Id.* In response, Pack maintained that "[c]ontrary to Plaintiffs' assertions, USAGM is not 'withhold[ing]' anything; it is simply disbursing fourth-quarter funds on a monthly basis, subject to negotiations between USAGM and OTF." Def.'s Resp. to Pls.' Notice. The morning of July 1, 2020, plaintiffs moved for a status conference, *see* Mot. for Hearing Status Conference, ECF No. 18, and, as noted, submitted yet another supplemental declaration, further detailing why OTF believes USAGM's new funding-disbursement plan will disrupt its actions, *see* Pls.' July 1 Notice, and to which Pack responded that afternoon, *see* Def.'s July 1 Resp. Finally, plaintiffs' reply brief submitted on July 1, 2020 also addressed this issue. *See* Pls.' Reply at 15–19. Plaintiffs have unnecessarily spilled much ink. The legality of disbursing funds to plaintiffs on a monthly basis is not within the scope of plaintiffs' complaint—which the plaintiffs opted not to amend, despite an invitation from the Court to do so, *see supra* note 5—and is also outside the scope of their pending motion for injunctive relief. Plaintiffs attempt to change this state of affairs in their reply brief, but resolution of the question of the legality of Pack's removals and appointments will not be further delayed. Accordingly, a status conference is unnecessary and plaintiffs' motion for this Court to hold one is denied. This issue is not further addressed in this Memorandum Opinion.

[8] Pack raises two threshold issues. First, he argues that plaintiffs "lack a private right of action under the [IBA]." Def.'s Opp'n at 10. This argument is beside the point, as plaintiffs have also alleged an APA claim, asserting that Pack's "attempted appointment and removal of officers and directors of the [Networks] [and] his violation of the statutory firewall . . . are all agency actions that are arbitrary and capricious, abuses of discretion, and violations of law." Compl. ¶ 59. Plaintiffs have been adversely affected by final agency action, and thus they may proceed under the APA. 5 U.S.C. §§ 702, 704. Implicitly recognizing this, Pack further maintains, second, that his removal determinations "are unreviewable [under the APA] because they are committed to agency discretion by

1. The USAGM CEO Has Authority To Remove And Replace OTF Directors And Officers

a. Section 6209(d) Grants The CEO Broad Remove-And-Replace Authority Only As To Organizations Expressly Authorized In Chapter 71 Of The U.S. Code

As noted, in removing and replacing the directors and officers of all four Networks—OTF, RFE, Radio Free Asia, and the Middle East Broadcasting Networks—Pack purported to act, in part, pursuant to his authority under § 6209(d) of the IBA. Yet, in the case of OTF, plaintiffs maintain that Pack has no § 6209(d) authority. Analyzing the text of § 6209(d), plaintiffs observe, correctly, that the USAGM CEO's authority to appoint or remove officers and directors extends to only two types of organizations: (1) "RFE/RL Inc., Radio Free Asia, and the Middle East Broadcasting Networks or any organization that is established through the consolidation of such entities," and (2) "any organization . . . authorized under [the IBA]." 22 U.S.C. § 6209(d); *see* Pls.' Mot. at 16–17. In plaintiffs' view, OTF fits into neither category. *See* Pls.' Mot. at 17. Pack, on the other hand, insists that OTF fits neatly into the second. *See* Def.'s Opp'n at 4. Resolution of this dispute regarding Pack's treatment of OTF thus turns on the scope and proper construction of the clause "any organization . . . authorized under this chapter," in § 6209(d).

To fit within the second category, plaintiffs posit that OTF "would need to have been specifically 'authorized' under the Act." Pls.' Mot. at 17. Plaintiffs contend that no such

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law." Def.'s Opp'n at 11. He focuses on the language found in IBA's § 6209(d), which provides that "[o]fficers and directors of . . . any organization . . . authorized under this chapter, shall serve *at the pleasure of*" the USAGM CEO. 22 U.S.C. § 6209(d) (emphasis added). Plaintiffs' argument, however, also turns on application of § 6204(b)—the so-called "statutory firewall,"— directing that the CEO "shall respect the professional independence and integrity of . . . the grantees of the board." *Id.* § 6204(b). Further, plaintiffs maintain that Pack did not have "authority to make [his] decision at all," which plaintiffs appropriately point out "is a pure question of law." Pls.' Reply at 19–20. The APA's exception to judicial review for actions "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), is "'vary narrow,' barring judicial review only in those 'rare instances' where 'there is no law to apply.'" *Gresham v. Azar*, 950 F.3d 93, 98 (D.C. Cir. 2020) (citations omitted) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)). Here, § 6204(b) contains a command regarding what the CEO *shall* do, and alleged violation of that command is at issue, and, further, § 6209(d) presents legal questions about its scope, thereby avoiding application of the very narrow exception urged by Pack.

authorization has occurred. In fact, legislation that would "authorize" OTF is pending before Congress, *see id.* at 17 (citing H.R. 6621, 116th Cong. (2020)), but unless and until that legislation is passed, OTF "is just like any a [sic] private, nonprofit corporation that receives funds from the U.S. government," *id.* at 18.

Pack counters that plaintiffs read § 6209(d) too parsimoniously. In his view, § 6209(d) does not limit the USAGM CEO's authority only to organizations "expressly and specifically identified in [the IBA]," Def.'s Opp'n at 5, as that reading would essentially transmute the key clause "authorized *under*" to "authorized *in*" the IBA, *see id.* at 6. Instead, "*under* this chapter" must be read more broadly "to capture organizations funded pursuant to (*i.e.,* 'under') the CEO's § 6204 grant-making 'authorit[y].'" *Id*. (alteration in original) (quoting 22 U.S.C. § 6204). Thus, the fact that OTF is not expressly mentioned in chapter 71 of the U.S. Code, which is where the IBA is codified, is of no matter, according to Pack, because Congress could not have intended, as plaintiffs argue, to extend the USAGM CEO's remove-and-replace power only to those organizations expressly authorized *in* chapter 71, either by virtue of an explicit reference in the IBA, as in a standalone provision establishing the organization, or because the organization was incorporated by the CEO, pursuant to powers granted by the IBA. *Id*.

Adoption of Pack's interpretation would mean that any grantee of the USAGM—no matter the size of the grant or independence of the grantee from the government—would, as a statutory matter, forfeit control over its board and officers to the whim of the CEO, even if such a condition for receipt of the grant funds is nowhere made apparent in the grant funding agreement or sanctioned by the grantee's foundational or governing documents. Pack assumes that his remove-and-replace power extends over all grantees, despite their otherwise independent status

from USAGM. The question before this Court is whether the statutory language supports this assumption.[9]

Pack backs up his construction with "at least three reasons," *id*. at 4, but none is ultimately persuasive to overcome the plain text of the statute. First, he relies on the definition of "authorize" as meaning to "'give legal authority; to empower,'" *id*. at 4 (quoting *Authorize*, BLACK'S LAW DICTIONARY (11th ed. 2019)), and asserts that since the CEO, *not* any specific organization, is provided with legal authority under chapter 71, this phrase must refer to any organization, such as OTF, that has been funded "under" the CEO's "authority," *see id.* The logic of this argument is flawed, however, because it ignores the full text of the key clause, which plainly refers to "any *organization*," not any *action* by the CEO, "authorized under this chapter." 22 U.S.C. § 6209(d) (emphasis added). Thus, plaintiffs are correct that organizations "authorized under" the IBA "include entities authorized both before and after the enactment of 22 U.S.C. § 6209(d), such as Radio Free Asia (*id.* § 6208), and Radio Free Afghanistan (*id.* § 6215)," as well as organizations incorporated by the CEO, pursuant to his authority in § 6209 (a)(1). Pls.' Reply at 3. "Either source of authorization—whether by Congress or the CEO—could be sufficient to 'authorize' the establishment of an organization 'under' the Act." *Id*. Yet,

[9] Congress considered enacting legislation that would have defined "grantee" to mean "the non-Federal organization described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such code as of day before the date of the enactment of this Act that receives Federal funding from the Broadcasting Board of Governors, and includes Radio Free Asia, RFE/RL, Incorporated, and the Middle East Broadcasting Networks, Incorporated." H.R. REP. NO. 113-541, at 4. That broad definition would have simplified matters greatly, in Pack's favor, but that language is *not* what Congress enacted. The few definitions contained in the current IBA's § 6213 provide no help. Indeed, only four terms are defined in § 6213, and one of them, "RFE/RL, Incorporated," is defined by reference to a section of the IBA, § 6206, that has been *repealed*. This is emblematic of an undeniable fact: the IBA, as currently written, is a mess. Many provisions overlap substantively with others, key definitions are nowhere to be found, and choices as to how the statute is organized are puzzling, to say the least. Perhaps this is a product of the fact that the most recent IBA amendments were determined by a conference committee tasked with finalizing a nearly thousand-page bill of which the IBA amendments were only a minuscule part, *see generally* H.R. REP. NO. 114-840, at 1209–10 (2016) (Conf. Rep.), or that the statute has been modified by accretion over time. Regardless, U.S.-sponsored international broadcasting would likely benefit from additional attention by Congress to the IBA.

as, plaintiffs emphasize, OTF "is not even mentioned, let alone authorized, anywhere within the Act," nor was it "incorporated by the CEO." *Id*. at 4.[10]

Second, Pack contends that "§ 6209(d)'s 'authorized under this chapter' clause is mostly superfluous unless it captures organizations that Congress does not specifically contemplate, such as those funded as 'authorized under' the CEO's § 6204 grant-making power." Def.'s Opp'n at 6. Not so. As plaintiffs observe, rather than requiring that the language of § 6209(d) be updated upon the establishment of a new organization in a standalone IBA provision or when incorporated by the CEO, this catchall clause accommodates such additions within the purview of the subsection. *See* Pls.' Reply at 6 ("That Congress wanted a mechanism to incorporate organizations within the ambit of § 6209(d) without being required to continually update the provision's text is well within its authority."). The "[e]stablishment of Radio Free Afghanistan," in § 6215, provides a clear example of this use of the clause, since this organization is not expressly named in § 6209(d) but is nonetheless an organization authorized under chapter 71 to receive grants. *See* 22 U.S.C. § 6215(b) (authorizing, in subsection titled "Grant authority," BBG "to make grants to support Radio Free Afghanistan"); *see also* Radio Free Afghanistan Act, Pub. L. No. 107-148, 116 Stat. 64 (2002) (legislation amending IBA with § 6215, entitled "An act to *authorize* the establishment of Radio Free Afghanistan" (emphasis added)).

[10] At the hearing, the Court queried plaintiffs' counsel about the origin of OTF since entities incorporated by USAGM also fall "under" the IBA for purposes of § 6209(d), *see, e.g.*, 22 U.S.C. § 6209(a)(1) (noting that the USAGM CEO "is authorized to incorporate a grantee"). At the time of the hearing, OTF's website indicated that OTF "was created in 2012 as a program of Radio Free Asia," and that "[i]n 2019, the USAGM, with the help of Congress, *created* a new, restructured OTF—making OTF an independent Internet freedom non-profit organization." *OTF's History*, OPEN TECH. FUND, https://www.opentech.fund/about/our-history/ (visited June 28, 2020) (emphasis added). Plaintiffs' counsel acknowledged that: "Yes, [USAGM] supported—it's a time when nobody was disagreeing. So [USAGM] supported the decision it was funding all of these entities. But, as a legal matter, this is a private, independent nonprofit organization . . . ." Hr'g Tr. at 13:4–7. Plaintiffs subsequently alerted the Court, on June 29, 2020, that the website description regarding the incorporation of OTF had been modified and OTF was, in fact, independently incorporated as a non-profit. *See* Decl. of Libby Liu ¶ 3, ECF No. 10-1.

Finally, Pack attempts to bolster his broad reading of § 6209(d) as capturing all agency-funded organizations by comparing § 6209(d)'s "authorization" language to the text in § 6204(a)(5), "which gives the CEO the 'authorit[y]' to 'make and supervise grants and cooperative agreements.'" Def.'s Opp'n at 4 (alteration in original) (quoting 22 U.S.C. § 6204(a)(5)). "The parallel language employed in both provisions," he argues, "confirms that an organization falls within § 6209(d)'s appointment-and-removal provision when it is authorized to receive funding under the CEO's grant-making authority." *Id.* Pack's reading requires a logical leap too far. These are two wholly separate CEO powers and the use of a variation of the same word "authority" simply does not operate to conflate them, particularly when two other CEO "authorities" enumerated in § 6204(a) actually address the CEO's removal-and-replacement power while the grant-making subsection on which Pack relies, § 6204(a)(5), does not. *See* 22 U.S.C. §§ 6204(a)(20), (21).[11]

Moreover, Pack's insistence on reading §§ 6209(d) and 6204(a)(5) together is inconsistent with other subsections in § 6209. *See Ardestani v. INS*, 502 U.S. 129, 135 (1991) (explaining that "[t]he word 'under'" must "draw its meaning from its context"). Section 6209—

[11] Specifically, § 6204(a)(20) authorizes the CEO "to condition" any grant "to RFE/RL, Inc., Radio Free Asia, or the Middle East Broadcasting Networks, or any organization that is established through the consolidation of such grantee entities, on [(1)] authority to determine membership of their respective boards, and [(2)] the consolidation of such grantee entities into a single grantee organization under terms and conditions established by the Board," 22 U.S.C. § 6204(a)(20), while § 6204(a)(21) authorizes the CEO "[t]o redirect or reprogram funds within the scope of any grant . . . or between grantees . . . and to condition grants . . . on such grants . . . including authority to name and replace the board of any grantee authorized under this chapter, including with Federal officials, to meet the purposes of this chapter," *id*. § 6204(a)(21).

The two enumerated CEO powers in §§ 6204(a)(20) and (21) have significant overlap but also some significant differences. Both authorize the conditioning of grants to three named organizations (and their consolidated organization) on the CEO's authority to determine the membership of their boards, but subsection (a)(21) adds the CEO's authority to re-direct and reprogram funds between all grantees and to condition grants to "any grantee authorized under this chapter" on providing the CEO authority "to name and replace the board" with federal officials. While subsection (a)(20) is limited to the three explicitly named organizations (and any consolidated entity from those three), paragraph (21) applies to "any grantee authorized under this chapter," using closely analogous language to § 6209(d).

Construing subsection (a)(21) in the same way as § 6209(d) to apply only to grantees "authorized under" chapter 71, either by explicit reference, including in a standalone provision, or by CEO incorporation, means that other grantees—omitted from such reference and independently incorporated, such as OTF—are not covered by the grant-condition language in either subsections (a)(20) or (21). This leaves the CEO's power to set conditions on funding to such grantees to his general grant-making power, under § 6204(a)(5).

which is entitled "Broadcast entities reporting to Chief Executive Officer"—contains five subsections principally focused on three named broadcast networks—RFE/RL, Radio Free Asia, and the Middle East Broadcasting Networks—and any consolidated grantee formed from them. The first subsection sets out the CEO's authority "to incorporate a grantee" and to condition annual grants to these three named grantees on their consolidation "into a single, consolidated private, non-profit organization." 22 U.S.C. § 6209(a)(1).[12] The remaining four subsections go on to provide that (1) the consolidated grantee would have a specified mission, *id*. § 6209(b); (2) like the named grantees "or any other grantee or entity provided funding by the agency," the consolidated grantee would not be considered "a Federal agency," *id*. § 6209(c); (3) also like the named grantees or other organization "authorized under this chapter," the consolidated grantee would be subject to the CEO's remove-and-replace authority, *id*. § 6209(d); and (4) the consolidated grantee, despite now being a single entity, would continue to disseminate content under the "brand names" of the three named grantees, *id*. § 6209(e). Thus, taken as a whole, § 6209 reveals its over-arching purpose is to empower the CEO to combine RFE, Radio Free Asia, and the Middle East Broadcasting Networks into a single entity, and then to provide how that consolidated entity would function, with the three named organizations reduced to "brand names," and to clarify that the CEO's authority over the consolidated grantee is essentially the same as over the named grantees.[13] In this context, the critical clause "organization . . . authorized under this chapter," *id*. § 6209(d), is best understood to cover grantees similarly

[12] This subsection is broadly titled "Consolidation of grantee organizations," which seemingly encompasses all organizations receiving USAGM grants. Similarly, the title of § 6209(d) is "Leadership of grantee organizations." 22 U.S.C. § 6209(d). These titles, however, are of minimal interpretive value, and the statutory text contradicts the broad application that these titles imply. *See Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528–29 (1947) (noting "the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text").

[13] In fact, certain parts of § 6209 are repetitive of provisions already set out in standalone sections for the two named organizations, RFE and Radio Free Asia. *See, e.g.*, 22 U.S.C. §§ 6207(e), (f), 6211 (providing that RFE is not a federal agency and setting out its functions and mission); *id.* § 6208(a)(1), (b), (h) (same as to Radio Free Asia).

named in chapter 71, or consolidated from such entities and/or incorporated by the CEO, per § 6209(a)(1).

Without concrete textual support, Pack would read the critical clause § 6209(d) as if it were written "to cover 'any organization provided authorized funding by the agency.'" Pls.' Reply at 2. Such a reading is especially unwarranted given that the immediately preceding subsection, § 6209(c), *does* refer to funding, providing that "[n]othing in this chapter or any other Act . . . shall be construed to make . . . Radio Free Europe, Radio Free Asia, or the Middle East Broadcasting Networks or any other grantee or entity provided *funding* by the agency a Federal agency or instrumentality." 22 U.S.C. § 6209(c) (emphasis added). Subsection 6209(c) thus shows that Congress had text available to cover all USAGM grantees, but declined to use that text in the very next subsection, § 6209(d).

Pack asserts that "'merely because a statute contains "examples of inartful drafting" does not mean courts are incapable of discerning its meaning, particularly with the aid of broader statutory context.'" Def.'s Opp'n at 6 n.5 (quoting *United States v. Epskamp*, 832 F.3d 154, 162 (2d Cir. 2016)). Here, though, *plaintiffs'* reading comports with the broader statutory context. "Congress's intent has been manifest" that U.S.-funded international broadcasters—when not government operated, such as in the case of VOA—"are to enjoy independence in programming and broadcasting decisions, subject to the sensible limitation that their programming and broadcasting be consistent with the foreign policy of the United States." *Ralis*, 770 F.2d at 1125; *see also* H.R. REP. NO. 113-541, at 21 (explaining that "credible and accurate news funded by the United States government is not an oxymoron"). Adopting a limited ruling of § 6209(d), and requiring that the CEO acquire remove-and-replace authority via the grant-making process, *see* 22 U.S.C. § 6204(a)(5), (21), through which grantees can manifest their assent to the CEO's

acquisition of that authority, helps ensure that USAGM "respect[s] the professional independence and integrity of . . . the grantees of [USAGM]," *id.* § 6204(b).

In short, the clause in § 6209(d) "authorized *under* this chapter" may be interpreted as "*in* this chapter."[14] Consequently, given the absence of any mention of OTF in chapter 71 and the fact that this organization was not incorporated by the CEO under authority provided in the IBA, plaintiffs are correct: the USAGM CEO's § 6209(d) remove-and-replace authority does not extend to OTF by virtue of the operation of the IBA alone. This does not end the analysis, however, since the CEO may nonetheless have remove-and-replace authority over OTF's officers and directors pursuant to his grant-making authority under § 6204(a)(5), in combination with OTF's consent under the organization's grant agreement and/or bylaws. *See* Pls.' Reply at 12 (acknowledging that OTF's bylaws can "provide independent authority for appointment and removal").

b. OTF's Grant Agreement And Bylaws Authorize USAGM's CEO To Remove And Replace OTF Officers And Directors

As the CEO's authority to remove and replace OTF's officers and directors turns on whether OTF's grant agreement with USAGM or its bylaws provide such authority, these documents are examined in turn. One sentence from OTF grant's agreement is most relevant: "[OTF's] articles of incorporation, by-laws or other constitutional documents shall provide that the Board of the Directors of [OTF] may consist of some or all of the current members of the USAGM established under the International Broadcasting Act and other technical experts, as

[14] Interestingly, both sides appear to agree that the clause in § 6209(d) "authorized under this chapter" should not be interpreted as "*in* this chapter." *See* Def.'s Opp'n at 6; Pls.' Reply at 6–7. Plaintiffs contend that "had Congress used the word 'in' rather than 'under' in § 6209(d)," this subsection would not have covered "[o]rganizations incorporated by the CEO (as permitted by § 6209(a)(1))." Pls.' Reply at 6–7. This conclusion is incorrect since CEO-incorporated organizations authorized in § 6209(a)(1) are thereby also authorized under the IBA, which comprises "this chapter," 71, referenced in § 6209(d).

appropriate." Gupta Decl., Ex. A, OTF Grant Agreement art. IV(b), at 4, ECF No. 4-4 [hereinafter OTF Grant Agreement].[15]

This sentence is ambiguous. This language could be read to mean, simply, that OTF must not enact a *prohibition* on USAGM officials serving as OTF officers or directors, without mandating their inclusion on OTF's board. For example, by contrast to the OTF agreement language, the grant agreement language for Radio Free Asia—which incubated OTF before the latter organization was spun off into an independent non-profit fully funded by USAGM—more firmly requires its "articles of incorporation, by-laws or other constitutional documents [to] provide that the Board of Directors of the Non-Federal Entity *shall* consist of the current members of the USAGM established under the International Broadcasting Act and of no other members." Gupta Decl., Ex. B, Radio Free Asia Grant Agreement art. IV(b), at 4, ECF No. 4-5 [hereinafter Radio Free Asia Grant Agreement] (emphasis added). Yet, while certainly not as express as Radio Free Asia's grant agreement, the relevant sentence in OTF's grant agreement could also be read as requiring that, whatever OTF's governing documents might otherwise say about selection of OTF's board, USAGM members must be put on OTF's board. The grant agreement provides no additional detail about how USAGM members would join OTF's board. In any event, the parties devote little attention to the OTF grant agreement. *See* Pls.' Mot. at 20; Def.'s Opp'n at 3–8 (addressing the CEO's authority over OTF without addressing OTF's grant agreement). Instead, they focus on the terms of OTF's bylaws, *see* Pls.' Mot. at 19–20; Def.'s Opp'n at 7–8, which the Court turns to next.

[15] At least one other provision in the OTF grant agreement confirms contemplation that USAGM members would serve on OTF's board. *See* OTF Grant Agreement art. IV(c)(4), at 5 (making certain OTF reporting requirements to USAGM inapplicable "to any communications or outreach activities of any Director of the Board of Directors of [OTF] who is a Governor of the USAGM at the time such communication or outreach activity is undertaken").

The parties' dispute over OTF's bylaws turns on four key provisions. First, § 2.3 of OTF's bylaws provides that OTF "shall at all times select and provide for the election, resignation or removal of the members of its Board of Directors, and appoint and provide for the resignation or removal of its Officers, *pursuant to and in compliance with the provisions of the Act*, as it may be amended from time to time." Gupta Decl., Ex. E, Bylaws of OTF § 2.3, at 2, ECF No. 4-8 [hereinafter OTF Bylaws] (emphasis added). Second, pursuant to § 5.2, "[i]ndividuals shall be elected by the Board of Directors for three-year terms upon majority vote of the Board of Directors, *or as may be authorized by 22 U.S.C. 6203 et seq*., with notice to and in consultation with the USAGM Advisory Board." *Id.* § 5.2, at 3 (emphasis added). Third, in accordance with § 7.0, "[t]he Officers of [OTF] shall be the Chair of the Board of Directors, Chief Executive Officer . . . , President, Vice President/Treasurer, and General Counsel/Secretary . . . , and such other officers as the Board of Directors, *or the USAGM Chief Executive Officer in accordance with the Act*, may appoint." *Id.* § 7.0, at 7 (emphasis added). Fourth, under § 7.1, "[a]ll other Officers shall be elected by majority vote of the Board of Directors at a duly called meeting at which a quorum is present *or as may be authorized by 22 U.S.C. 6203 et seq.*" and "shall hold office until his or her successor is elected and qualified or his or her earlier resignation or removal *or as may be authorized by 22 U.S.C. 6203 et seq*." *Id.* § 7.1, at 8 (emphases added).

In plaintiffs' view these bylaw provisions referencing the IBA, its statutory sections, and the USAGM CEO have essentially no meaning. They contend that the bylaws "do not confer any additional authority upon" the USAGM CEO not already found in the IBA, and "since the [IBA] does not grant Mr. Pack the authority to appoint or remove [OTF]'s officers or directors, these bylaw provisions do not enable him to do so, either." Pls.' Mot. at 20. Put another way, by plaintiffs' circular reading, if OTF is not authorized "under" the IBA, then OTF is not subject to

whatever the CEO "may be authorized" by the IBA to do. Pack, by contrast, maintains that these bylaws "reinforce[]" the conclusion that the IBA grants the USAGM CEO remove-and-replace authority. Def.'s Opp'n at 7.

Although plaintiffs' reading is plausible, Pack has the better argument, for his interpretation both gives the bylaws some meaning and ensures that the bylaws are interpreted in the context in which they were adopted, namely, consistent with the grant agreement requirement that OTF's bylaws allow OTF's board to be taken over by USAGM officials. Plaintiffs' circular reading would, as do its papers, brush off the grant agreement language. Recall that, to comply with its grant agreement, OTF was required to adopt bylaws that "provide that the Board of the Directors of [OTF] may consist of some or all of the current members of the USAGM established under the International Broadcasting Act and other technical experts, as appropriate." OTF Grant Agreement art. IV(b), at 4. This sentence means that OTF was required to adopt bylaws either (1) permitting USAGM officials and employees to serve on the OTF board, or (2) allowing USAGM officials to be placed on the OTF board, presumably by the USAGM CEO, who is acknowledged to be vested with authority "[t]o make and supervise grants for broadcasting and related activities." *Id.* Attachment A ¶ 5. As noted, this second meaning amounts to granting the CEO remove-and-replace authority. The test of whether OTF understood the grant agreement to have the second meaning is answered by looking at how OTF satisfied the grant agreement's Article IV(b) requirement. It did *not* enact a bylaw provision concerning *who* may serve as its officers and directors. Rather, the bylaws include terms that explain *how* officers and directors are selected and removed.[16] Indeed, OTF even went so far as

[16] Plaintiffs claim that § 5.1 of OTF's bylaws "does not provide for removal of the initial board members [of OTF]—under the Act or otherwise." Pls.' Reply at 13. That may be true, but plaintiffs overlook § 2.3, which states that OTF "shall *at all times* select and provide for the election, resignation, or *removal* of the members of its Board of Directors . . . pursuant to and in compliance with the provisions of the [IBA]." OTF Bylaws § 2.3, at 2 (emphases added).

to write into its bylaws that the USAGM CEO "may appoint" OTF officers, so long as he does so "in accordance with the [IBA]." OTF Bylaws § 7.0, at 7. That decision makes sense only if OTF understood Article IV(b) of its grant agreement to be a condition requiring OTF to give the USAGM CEO remove-and-replace authority. In turn, to ensure that OTF's bylaws comply with the grant agreement, §§ 2.3, 5.2, and 7.1 of the bylaws must be interpreted as affirmative grants of authority to the CEO.[17]

This reading is confirmed by comparing OTF's bylaws to those that plaintiffs concede grant the CEO remove-and-replace authority. RFE's bylaws, for instance, provide, *inter alia*, that "[t]he members of the Board of Directors shall be elected by the affirmative vote of a majority of the then members of the Board of Directors, even if less than a quorum, *or as may be authorized in 22 U.S.C. §§ 6204 and 6209*." Gupta Decl., Ex. F, RFE Bylaws § 2.3, at 2, ECF No. 4-9 (emphasis added). This language tracks OTF's bylaws almost exactly. OTF's bylaws provide, in relevant part, that "[i]ndividuals shall be elected by the Board of Directors for three-year terms upon majority vote of the Board of Directors, *or as may be authorized by 22 U.S.C. 6203 et seq.*" OTF Bylaws § 5.2, at 3 (emphasis added). Given that "as may be authorized" confers remove-and-replace authority on the USAGM CEO in the RFE bylaws, it does so in the OTF bylaws as well. Plaintiffs' claim that this comparison favors their position—because the RFE bylaws single out § 6209, while OTF's refer only generally to the IBA, *see* Hr'g Tr. at 17:20–24, ECF No. 14 (arguing that bylaws such as RFE's "incorporate 6209(d)")—fails to grapple with the OTF grant language. When the OTF bylaws state that directors shall be elected "as may be authorized by 22 U.S.C. 6203 et seq.," OTF Bylaws § 5.2, at 3, that language

[17] In the alternative, plaintiffs assert that under § 5.2 of OTF's bylaws, new directors "can only be appointed 'with notice and in consultation with the USAGM Advisory Board,'" Pls.' Reply at 13 (quoting OTF Bylaws § 5.2, at 3), and "Pack failed to comply" with this command, *id*. This argument fails for two reasons. First, it does nothing to establish that Pack's *removal* of OTF directors violated the bylaws. Second, § 5.2 says nothing about *when* notice and consultation must occur, *i.e.*, before or *after* appointment occurs.

includes § 6209(d), as well as § 6204(a)(5) and other relevant sections of the IBA. These are not, as OTF would have it, merely empty references, given OTF's grant language requiring placement of USAGM officials on the board, at the agency's discretion.

* * *

The OTF bylaws, in conformance with Article IV(b) of the OTF grant agreement, confer remove-and-replace power on the USAGM CEO over OTF's officers and directors. Thus, although plaintiffs advance the proper interpretation of § 6209(d) of the IBA, their claim that Pack exceeded his authority when he removed OTF's directors and chief executive officer ultimately fails.[18]

2. The USAGM CEO Did Not Violate The Statutory Firewall By Exercising His § 6209(d) Authority

Plaintiffs' second merits argument fares no better than their first. They argue that the CEO's removal and replacement of the Networks' boards of directors violated the IBA's "statutory firewall" found in § 6204(b), *see* Pls.' Mot. at 21–24, which provides that the USAGM CEO "shall respect the professional independence and integrity of the Board, its broadcasting services, and the grantees of the Board," 22 U.S.C. § 6204(b). They acknowledge—at least in the case of the Networks other than OTF—that their officers and directors "serve at the pleasure of and may be named by" the CEO. *Id.* § 6209(d); *see* Pls.' Mot. at 21. They contend, however, that the CEO may not exercise his § 6209(d) authority in a way that "is in irreconcilable conflict with the firewall." Hr'g Tr. 23:17–18.

[18] Plaintiffs, in their reply brief, raise a host of constitutional arguments. *See* Pls.' Reply at 1–2, 7–11, 13. Those arguments, however, presume that this case concerns "the *involuntary* federal takeover of a private organization." *Id.* at 2 (emphasis added). In fact, OTF's bylaws and grant agreement evince OTF's consent to the USAGM CEO's assumption of remove-and-replace authority over the OTF officers and directors. *See id.* at 12 (acknowledging that OTF's bylaws can "provide independent authority for appointment and removal") Accordingly, Pack's actions raise no constitutional issue.

Undoubtedly, a tension exists within the statute between the control that the government must necessarily exert over its own messaging, and the independence that U.S. international broadcasters must maintain to accomplish their mission. Yet, as the D.C. Circuit explained when analyzing the structure of U.S.-funded international broadcasting that Congress has erected and interpreting BIB regulations that preceded but were similar to the statutory firewall, Congress has ultimately struck a balance. USAGM is "given evaluative and review responsibilities"; "day-to-day control" is "left to the stations themselves." *Ralis*, 770 F.2d at 1125. Accordingly, only when the USAGM CEO engages in day-to-day control is the statutory firewall violated. The CEO may not, for example, tell broadcasters what stories to cover or how to cover them. Nor may the CEO fire a particular staff member or command that a piece be assigned to a specific reporter. He may and must, however, oversee the operations of the Networks by exercising the statutory powers Congress gave him, including his § 6209(d) authority. *See id.* at 1126 (explaining that while USAGM does not have "control of [the Networks'] operations," it is "obviously an important and powerful actor on this stage," and its "powers and duties" are "substantial").

Notably, plaintiffs themselves advance only a very narrow argument. They do not claim that the CEO is prohibited from removing and replacing a named grantee's board in its entirety. Nor do they claim that the makeup of the Networks' boards must be bipartisan. *See* Pls.' Reply at 14. They do not even contend that the CEO is prohibited from putting *some* government officials on a grantee's board, *see id.*—a wise concession, given that § 6204(a)(21) provides that the CEO may "condition grants or cooperative agreements" on their "including authority to name and replace the board of any grantee authorized under this chapter, *including with Federal officials*," 22 U.S.C. § 6204(a)(21) (emphasis added). Rather, plaintiffs assert that "the one thing [the CEO] cannot do is install a board that is majority controlled by the Federal Government

because when [the CEO] do[es] that [a grantee] is no longer an independent organization." Hr'g Tr. at 27:23–28:1.

Plaintiffs' argument does not hold water. In reality, the CEO has "substantial" control over the Networks, *Ralis,* 770 F.2d at 1126, and part of that control stems from the CEO's power *to appoint*, not his power to appoint *government officials*. As much as plaintiffs protest otherwise, an appointee's federal employment status has no apparent bearing on whether she will oversee the Networks in the way that the CEO expects her to. Thus, a rule preventing the CEO from creating a board whose members are primarily federal officials would do nothing to help preserve the Networks' independence. Furthermore, and more importantly, such a rule would be unmoored from the statutory text, which expressly contemplates the appointment of federal officials to the Networks' boards, 22 U.S.C. § 6204(a)(21), requires that the Networks include "clear and effective presentation of the policies of the United States Government" in their broadcasting, *id.* § 6202(b)(3), and provides that the officers and directors of the Networks (other than OTF) serve "at the pleasure of" the CEO, *id.* § 6209(d).

Plaintiffs nevertheless insist upon their bright-line rule. They point to the D.C. Circuit's observation in *Ralis* that "[relevant] regulations expressly prevent a governmental *takeover* of the stations' operational control," 770 F.2d at 1125 (emphasis added), and they analogize to corporate law, in which context, plaintiffs claim, a "takeover" occurs when one corporation installs a majority of its chosen directors on another corporation's board, *see* Hr'g Tr. at 32:25–33:2 ("There is a critical distinction between installing a board that is majority controlled by one entity; we call that a takeover."). Plaintiffs, however, focus on the wrong words from their cherrypicked sentence from *Ralis*. What the CEO may not do is "take[ ]over . . . *operational* control," *i.e.*, management of the Networks' "day-to-day" operations. *Ralis*, 770 F.2d at 1125

(emphasis added).[19] Exercise of the CEO's statutory appointment power is no such takeover, even where, as here, the CEO has largely selected board members from the current Administration and uniformly from one political party. The 2016 amendments to the IBA authorized precisely this outcome.

* * *

Assessing, as a policy matter, whether Congress erred in 2016 by transferring the bipartisan BBG's powers to a single presidentially appointed CEO is not properly an issue before this Court. Common sense could lead to the conclusion that a bipartisan board, by its nature, may be less efficient than a single executive, while inherently more balanced. Given that U.S. international broadcasting must simultaneously advance the foreign policy objectives of the United States, present a diversity of viewpoints, and model independent journalism for the world, these IBA goals may be better served by a more balanced approach. *See* 2020 CRS REPORT at 2 ("While Congress did not alter the principles that apply to U.S. international broadcasting, the changes left the authority to direct U.S. international broadcasting in the hands of a singular agency head appointed by and answerable to the President, and required to 'consult regularly' with the Secretary of State for 'foreign policy guidance,' possibly weakening the structural

[19] The plaintiffs also point to a regulation of the BBG that went into effect "as of June 11, 2020" that interprets § 6204(b), *see Firewall* Rule, 85 Fed. Reg. 36,150, and to a companion provision in the grant agreements that the CEO may not "attempt to influence the content or editorial choices of one of the broadcasting entities in a manner that is not consistent with the highest standards of professional broadcast journalism or take any other action that may tend to undermine the journalistic credibility or independence of USAGM or its broadcasters," *e.g.* Radio Free Asia Grant Agreement art. VIII(c), at 10; *see, e.g.*, Pls.' Mot. at 2, 9–10. The *Firewall* rule does not expressly embrace a bar on placement of a majority of government officials on the Networks' boards but does cabin the CEO's exercise of "direction and oversight" to that which "those in equivalent leadership positions in an organization overseeing other reputable news organizations may provide, in a manner consistent with the highest standards of professional journalism." *Firewall* Rule, 85 Fed. Reg. at 36,152. Nothing in the record here would enable evaluation of Pack's actions in this case against that "equivalen[cy]" standard. In any event, for purposes of this motion, plaintiffs rely solely on the statute, making minimal effort to tie the *Firewall* rule and the grant provisions to their "majority-control" interpretation of the text. *See* Hr'g Tr. at 36:19–25, 37:1–2 ("[T]he [firewall regulation] . . . is not a provision that we are relying on; it's not inconsistent with what we're saying. It's just—I want to be really clear that we're not saying that it's just journalistic standard in some sense that has been violated. What has been violated is the requirement for structural independence. We're relying principally on the statute, not on the regulations."); *see also id.* at 38:22–25 (explaining plaintiffs' position that the grant provision "[is] just reaffirming . . . this constellation of statute regulation and contract that has always stood for the principle that you can't have a government takeover").

independence of the broadcasters."). As the D.C. Circuit has cautioned, however, "[i]n a sensitive area directly affecting the foreign relations of the United States, we in the 'least dangerous branch' should not and will not compromise a structure carefully erected by the political branches." *Ralis*, 770 F.2d at 1126. Plaintiffs have not established a likelihood of success on the merits, and thus this most important factor weighs against them.

B. Plaintiffs Have Not Demonstrated Irreparable Harm

Turning next to the second factor, plaintiffs have failed to establish they are likely to suffer irreparable harm absent preliminary injunctive relief. To demonstrate irreparable harm, the moving party must satisfy two requirements. "First, the harm must be 'certain and great,' 'actual and not theoretical,' and so 'imminen[t] that there is a clear and present need for equitable relief to prevent irreparable harm.'" *League of Women Voters of United States v. Newby*, 838 F.3d 1, 7–8 (D.C. Cir. 2016) (alteration in original) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)). "Second, the harm 'must be beyond remediation.'" *Id.* at 8 (quoting *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297).

Here, the organizational plaintiff, OTF, and the individual plaintiffs have different theories of harm. OTF argues that it will suffer irreparable harm because Pack "has imperiled [OTF's] ability to achieve its mission by . . . attempting to fill its board with political allies who have publicly aligned themselves with causes in direct conflict to the Fund's mission." Pls.' Mot. at 27. The individual plaintiffs, for their part, assert that their "'right to participate in the management of' the [Networks] 'has intrinsic value,'" and thus "Pack's attempt to 'destroy [the plaintiffs'] voice in management' . . . constitutes irreparable harm." *Id.* at 31 (second alteration in original) (first quoting *Wisdom Import Sales Co. v. Labatt Brewing Col.*, 339 F.3d 101, 114 (2d Cir. 2003); and then quoting *Street v. Vitti*, 685 F. Supp. 379, 384 (S.D.N.Y. 1998)). Each contention is taken in turn.

1. Pack's Actions Neither Impair OTF's Programs Nor Conflict With Its Mission

An organization seeking to establish a likelihood of irreparable harm must demonstrate that the "actions taken by [the defendant] have 'perceptibly impaired' the [organization's] programs." *League of Women Voters*, 838 F.3d at 8 (alterations in original) (internal quotation marks omitted) (quoting *Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994)). "If so, the organization must then also show that the defendant's actions 'directly conflict with the organization's mission.'" *Id.* (quoting *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996)). OTF satisfies neither step, for substantially the same reasons that its case fails on the merits. *See, e.g.*, *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 281 F. Supp. 3d 88, 116 (D.D.C. 2017) ("Since the Court has concluded that plaintiff's constitutional and statutory rights have not been violated, plaintiff has failed to demonstrate that it would suffer irreparable harm in the absence of relief."). The CEO's exercise of his "evaluative and review responsibilities," *Ralis*, 770 F.2d at 1125, *enhances* OTF's programs and *comports* with OTF's mission, for it is the CEO who is ultimately accountable for ensuring that U.S.-funded international broadcasting functions in accordance with its standards and principles, *see* 22 U.S.C. § 6204(a)(3), as acknowledged in OTF's bylaws, *see* OTF Bylaws Attachment A ¶ 3. OTF thus has failed to demonstrate a likelihood of irreparable harm.

2. Individual Plaintiffs' Loss Of Board Positions Does Not Constitute Irreparable Harm

As for the individual plaintiffs, their claim of harm runs headlong into the well-worn rule from *Sampson v. Murray* that loss of employment is not irreparable harm except in a "genuinely extraordinary situation." 415 U.S. at 92 n.68; *see Farris v. Rice*, 453 F. Supp. 2d 76, 79 (D.D.C. 2006) ("[C]ases are legion holding that loss of employment does not constitute irreparable

injury."). Nothing about the individual plaintiffs' alleged harms are "genuinely extraordinary." True, unlike in the typical case involving loss of employment, here no loss of income is on the line, *see* Hr'g Tr. at 43:7–11, but in *Sampson* itself, the Supreme Court established that the possibility of non-monetary harm is not, alone, sufficient to justify deviation from the *Sampson* rule, as the Court rejected a claim that humiliation and damages to reputation associated with loss of employment justified preliminary relief. *See* 415 U.S. at 91. Nor does it matter that the individual plaintiffs held high-level positions, sitting on the boards of directors at the Networks. Courts have consistently applied the *Sampson* rule regardless of the type of employment at issue. *See, e.g.*, *English v. Trump*, 279 F. Supp. 3d 307, 334 (D.D.C. 2018) (Acting Director of Consumer Financial Protection Bureau); *Burns v. GAO Empl. Fed. Credit Union*, No. 88-3424, 1988 WL 134925, at *1–2 (D.D.C. Dec. 2, 1988) (President of Board of Directors of U.S. General Accounting Office Employees Federal Credit Union); *EEOC v. City of Janesville*, 630 F.2d 1254, 1256 (7th Cir. 1980) (Chief of Police); *Levesque v. State of Maine*, 587 F.2d 78, 79 (1st Cir. 1978) (Maine Commissioner of Manpower).

To avoid the *Sampson* rule, plaintiffs continue to cite to the corporate law context, *see* Hr'g Tr. at 42:2 ("This is more like a corporate takeover case . . . ."), pointing to out-of-jurisdiction cases in which courts have held that "'a party's loss of control' of a corporation 'constitutes irreparable harm,'" Pls.' Mot. at 31 (alteration omitted) (quoting *Suchodolski Assocs., Inc. v. Cardell Fin. Corp.*, 2003 WL 22909149, at *4 (S.D.N.Y. Dec. 10, 2003)) (also citing *Wisdom Import Sales Co.*, 339 F.3d at 114–15; *Street*, 685 F. Supp. at 384). These non-binding decisions are inapposite, as they turned on the need to preserve bargained-for rights that, once lost, could never be restored. *See, e.g.*, *Wisdom Import Sales Co.*, 339 F.3d at 114 ("We hold only that the denial of bargained-for minority rights, standing alone, may constitute irreparable harm for purposes of obtaining preliminary injunctive relief where such rights are

central to preserving an agreed-upon balance of power (*e.g.*, preserving the management role of the minority directors) in corporate management."). Here, by contrast, the individual plaintiffs never secured a right to manage the affairs of the Networks on which they served "at the pleasure of" the USAGM CEO, 22 U.S.C. § 6209(d) (authority over Networks other than OTF); *see also* OTF Bylaws at 2–3 (granting the USAGM CEO power to determine OTF board members), and even if they had any right to be reinstated to their positions by virtue of *the Networks*' right to have their "professional independence and integrity" "respect[ed]," *id.* § 6204(b), that right could be vindicated at a later date.[20]

The more apt comparison is to *English v. Trump*, which addressed whether the President could appoint an Acting Director to head the Consumer Financial Protection Bureau ("CFPB"), or instead whether only CFPB's Deputy Director could fill that role. *See* 279 F. Supp. 3d at 311. As here, the Deputy Director advanced a theory of irreparable harm "bas[ing] her alleged injury . . . on 'the loss of a "statutory right to function" in a position directly related to a federal agency's "ability to fulfill its mandate."'" *Id.* at 334 (quoting the plaintiff's motion (quoting *Berry v. Reagan*, No. 83-3182, 1983 WL 538, at *5 (D.D.C. Nov. 14, 1983))). *English*, however, determined that the Deputy Director's claim fit neatly within the *Sampson* rule. *See id.*

This Court reaches the same conclusion with respect to the former members of the Networks' board of directors. Indeed, the case for irreparable harm was stronger in *English* than here, for in *English*, the position of acting director was set to "expire when the President nominate[d] and the Senate confirm[ed] a new Director for the CFPB," *id.* at 335 (internal

[20] The other cases upon which the individual plaintiffs rely, *see* Pls.' Mot. at 32, are similarly distinguishable because they arose in different legal contexts where the alleged harms extended beyond loss of employment, *see Pa. Prof'l Liab. Joint Underwriting Ass'n v. Wolf*, 328 F. Supp. 3d 400, 411 (M.D. Pa. 2019) (finding irreparable harm in takings case where state action would force the plaintiff "to transfer *all* of its assets to the Commonwealth" (emphasis in original)); *Atl. Coast Airlines Holdings v. Mesa Air Group*, 295 F. Supp. 2d 75, 95–96 (D.D.C. 2003) (finding irreparable harm in antitrust case where there was a "realistic chance of harm to *competition*," and explaining that "[t]he identity of the members of the [plaintiff's board of directors] is *not* the issue" (emphases added)).

quotation mark omitted) (quoting the plaintiff's motion), which could have occurred before the case was resolved. Here, by contrast, the individual plaintiffs point to no imminent risk that their former board positions will disappear—only that their replacements will assume their former positions. Should plaintiffs ultimately prevail, they can be restored to the Networks' board of directors, and thus they will not suffer irreparable harm in the absence of preliminary relief. *See Murray*, 415 U.S. at 90 ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.").

C. The Balance Of Equities And Public Interest Weigh Against Injunctive Relief

Finally, the third and fourth factors may be easily dispatched. The parties agree, *see* Pls.' Mot. at 32; Def.'s Opp'n at 32 n.11, that because the government is the non-movant, the balance of the equities and the public interest "merge into one factor," *Ramirez v. U.S. Immigration & Customs Enf't*, 310 F. Supp. 3d 7, 32 (D.D.C. 2018) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Further, plaintiffs acknowledge that "the balance of the equities and the public interest here are 'essentially derivative of the parties' arguments on the merits of the case.'" Pls.' Mot. at 33 (quoting *Am. Meat Inst. v. U.S. Dep't of Agric.*, 968 F. Supp. 2d 38, 83 (D.D.C. 2013), *judgment reinstated*, 760 F.3d 18 (D.C. Cir. 2014)). "[T]hus, 'it follows that the public interest factor of the preliminary injunction test should weigh in favor of whoever has the stronger arguments on the merits,'" *id.* (quoting *Am. Meat Inst.*, 968 F. Supp. 2d at 83), *i.e.*, Pack.

Indeed, thwarting the lawful exercise of authority of a duly appointed official would be inequitable and disserve the public interest. Setting USAGM's priorities and managing, at a broad level, U.S. international broadcasting is the prerogative of the USAGM CEO—not that of plaintiffs, and certainly not of this Court. Moreover, Congress's choice to grant the USAGM CEO broad, unilateral powers over grant-making and oversight of USAGM grantees is itself "a

declaration of public interest and policy which should be persuasive in inducing courts to give relief." *Va. Ry. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937). Meanwhile, plaintiffs, as discussed above, will suffer no irreparable harm from the denial of their motion.

Accordingly, the balance of the equities and the public interest, just like the first two factors, weigh against granting the requested relief.

IV. CONCLUSION

Pack's actions have global ramifications, and plaintiffs in this case have expressed deep concerns that his tenure as USAGM CEO will damage the independence and integrity of U.S.-sponsored international broadcasting efforts. If they are correct, the result will be to diminish America's presence on the international stage, impede the distribution around the world of accurate information on important affairs, and strengthen totalitarian governments everywhere. Yet, Congress has decided to concentrate unilateral power in the USAGM CEO, and the Court cannot override that determination. If Pack's actions turn out to be misguided, his appointment by the President and confirmation by the Senate points to where the accountability rests: at the ballot box. Based on an evaluation of plaintiffs' likelihood of success on the merits, the solution is likely not in this Court.

For the foregoing reasons, plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, ECF No. 4, is denied.

An Order consistent with this Memorandum Opinion will be filed contemporaneously.

DATE: July 2, 2020

BERYL A. HOWELL
Chief Judge

Exhibit F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OPEN TECHNOLOGY FUND, et al.

Plaintiffs,

v.

MICHAEL PACK, in his official capacity as Chief Executive Officer and Director of the U.S. Agency for Global Media,

Defendant.

Case No. 1:20-cv-1710

DECLARATION OF LIBBY LIU IN SUPPORT OF MOTION FOR RECONSIDERATION AND INJUNCTION PENDING APPEAL

I, Libby Liu, declare as follows:

1. I am the Founder of the Open Technology Fund (OTF). I offer this declaration in support of the plaintiffs' motion for reconsideration of the denial of a temporary restraining order and preliminary injunction and, in the alternative, for an injunction pending appeal.

2. I understand that the Court's opinion relies on the following sentence in the 2019 OTF grant agreement: "The Non-Federal Entity's articles of incorporation, by-laws or other constitutional documents shall provide that the Board of Directors of the Non-Federal Entity may consist of some or all of the current members of the USAGM established under the International Broadcasting Act and other technical experts, as appropriate." Because the government did not rely on this sentence (or on the grant agreement), the Court lacked the benefit of evidence or argument concerning its meaning.

3. I was partly responsible for preparing the 2019 agreement. I can attest that the phrase "current members of the USAGM" was intended to refer to the current members of the USAGM Board of Governors at the time. This intent is apparent from both prior and future

versions of the agency's standard grant agreements. Prior versions referred to "the current members of the BBG established under the International Broadcasting Act," meaning the "Broadcasting Board of Governors," which was the old name of the agency. When the term "BBG" was automatically replaced in these standard documents with the term "USAGM," the result generated potential confusion because USAGM did not literally have any "members"—only its board did. True and correct copies of three grant agreements (from 2015, 2018, 2019) are attached hereto as **Exhibit A**.

4. This typo was cleared up in the now-operative 2020 grant agreement between OTF and USAGM, which was submitted by the government but which the Court's opinion neither quotes nor discusses. In that agreement, the sentence reads as follows: "The Non-Federal Entity's articles of incorporation, by-laws or other constitutional documents shall provide that the Board of Directors of the Non-Federal Entity *may consist of some or all of the current members of the USAGM Board of Governors* established under the International Broadcasting Act and other technical experts, as appropriate." (emphasis added). ECF No. 16-1 at 19.

5. Consistent with this provision, Open Technology Fund's articles of incorporation provide that the Board of Directors of Open Technology Fund shall consist of Leon Aron, Ambassador Ryan Crocker, Michael Kempner, Ambassador Karen Kornbluh, Ben Scott, and Kenneth Weinstein. ECF No. 10-2 at 7. With the exception of Ben Scott, all six were "current members of the USAGM Board of Governors" at the time that OTF's articles of incorporation and OTF's corporate bylaws were adopted. Ben Scott is a "technical expert" and was not a member of the USAGM Board of Governors. Later, a representative from the U.S. Department of State joined OTF's Board. Finally, and also consistent with the relevant provision, an additional "technical expert" (William Schneider) was added to the OTF board. The

composition of OTF's corporate board remained unchanged at the time that Michael Pack attempted to oust all of its members.

6. A comparison between OTF's grant agreements and grant agreements with congressionally-authorized grantees reveals another very important difference. The grant agreements with congressionally-authorized grantees, like those with Radio Free Asia provided in Exhibit A, *mandated* that their boards exactly mirror the BBG or USAGM boards, without any additional members. Those agreements state that the grantees board "*shall consist* of the current members of the Broadcasting Board of Governors under the International Broadcasting Act *and no other members*." The OTF grant agreement, in obvious contrast, states only that OTF's board "*may consist*" of "*some or all*" of the agency's board members, and leaves it up OTF to decide for itself. This is a critical and intentional difference, reflective of OTF's independent status.

6. No outside person or organization—not Congress, not anyone in the Executive Branch—required that we include any particular people on the board of directors of our independent organization. Each member of OTF's corporate board agreed to serve in his or her personal capacity, pursuant to his or her fiduciary duty of care, and to act in the best interests of the corporation. We decided to add these people to our board because we believed they were supportive of the mission, we were hopeful that we would continue to receive support for our efforts from Congress and USAGM, and, most importantly, because we were hopeful that we would one day get express authorization from Congress that would put Open Technology Fund on the same footing as congressionally-authorized grantees like Radio Free Europe and Radio Free Asia. That reasoning guided our intent in both the bylaws and the articles. It should be apparent from the language of the relevant grant-agreement provision—which refers to "some or all" of the members, and uses the words "may consist" rather than "shall consist"—that USAGM

was not requiring us to name these people to our independent board, let alone somehow giving the CEO sweeping remove-and-replace authority via a grant agreement.

7. I never understood either the grant agreement or the bylaws to give the CEO of USAGM the power to remove or replace our officers or directors absent congressional authorization of OTF. If we had been asked by USAGM to waive our right to govern ourselves as an independent organization in this manner, we would have declined.

8. OTF's bylaws were adopted by unanimous consent of OTF's board of directors on or about September 23, 2019. Attached here as **Exhibit B** is a true and correct copy of the adopted OTF bylaws and unanimous consent signed by the chairman of OTF's board, Kenneth Weinstein. Attached here as **Exhibit C** is a true and correct copy of the consents to adopt the bylaws signed by the remaining OTF board members at that time and received on September 23, 2019: Mr. Aron, Mr. Crocker, Ms. Kornbluh, Mr. Kempner, and Mr. Scott.

I declare under penalty of perjury under federal law that the foregoing declaration is true and correct. Dated this 7th day of July, 2020, and executed in Washington, DC.

/s/Libby Liu
Libby Liu

Exhibit G

BYLAWS OF
OPEN TECHNOLOGY FUND
(A District of Columbia Nonprofit Corporation)

1.0 NAME

The name of this corporation shall be the OPEN TECHNOLOGY FUND, hereinafter referred to as the "Corporation."

2.0 CORPORATE PURPOSE

2.1 Nonprofit Purpose

The Corporation is organized and shall operate exclusively for charitable, scientific, literary, or educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (or corresponding provision of any future United States Internal Revenue law).

2.2 Character of Affairs

The character of affairs that the Corporation intends to conduct is consistent with the internet freedom objectives of the United States Agency for Global Media (USAGM), to support the worldwide expansion of unrestricted access by the public to information on the internet through the development and use of circumvention and secure communications technologies where such access is otherwise restricted, and to carry out such other activities as deemed necessary to effectuate such affairs.

2.2.1 Mission and Objectives

The Corporation shall promote the rights of freedom of opinion and expression, including the freedom to "seek, receive, and impart information and ideas through any media and regardless of frontiers" online in accordance with Article 19 of the Universal Declaration of Human Rights, according to the conviction that open communication of information and ideas among peoples of the world contributes to international peace and stability. The Corporation shall accordingly support the efforts of USAGM journalists to disseminate, and its audiences to receive, international broadcasting consistent with the standards, principles, and goals of the International Broadcasting Act of 1994, as amended, 22 U.S.C. 6201 et seq. ("Act").

To achieve these objectives, the Corporation shall provide funding, services, and support in furtherance of efforts by and through USAGM to advance internet freedom globally through the research, development and implementation of technologies that expand unrestricted access to information on the internet; to timely respond to requests from USAGM and its networks and grantees concerning same; and to carry out such other activities as deemed necessary to raise funds for the purposes described above, including solicitation and acceptance of gifts, grants, devises, bequests, and funds as may be donated or otherwise provided to the Corporation by any person, commensurate with the limitations set forth herein.

2.3 Compliance

The Corporation, in selecting Directors and Officers under these Bylaws, shall at all times select and provide for the election, resignation or removal of the members of its Board of Directors, and appoint and provide for the resignation or removal of its Officers, pursuant to and in compliance with the provisions of the Act, as it may be amended from time to time. The Corporation shall timely revise these Bylaws to reflect amendments to those provisions of the Act applicable to the Corporation's affairs.

3.0 CORPORATE OFFICES

The principal office of the corporation shall be located in Washington, D.C. The Corporation may have offices at such other places, both within and outside the District of Columbia, as the Board of Directors may from time to time determine or the business of the Corporation may require.

4.0 MEMBERSHIP

As a non-membership corporation, the Corporation shall have no members; and, to the extent necessary or desirable, the Board of Directors shall exercise the rights and powers of members as provided in applicable law.

5.0 GOVERNANCE STRUCTURE

The business and affairs of the Corporation shall be managed under the general direction of the Board of Directors, which may exercise all such powers of the Corporation and do all such lawful acts and things as are not prohibited by statute or by the Articles of Incorporation or these Bylaws. The Directors shall act only as a Board of Directors, or as a committee thereof.

5.1 Number of Directors

The number of Directors shall be no fewer than three (3), but may be increased or decreased within the aforesaid limit from time to time, provided that no decrease shall have the effect of shortening the term of any incumbent Director.

The initial Board of Directors shall consist of the persons who are named in the Articles of Incorporation of the Corporation, and said Directors, or their replacements in the event of a vacancy on the Board of Directors, shall hold office until the installation of the Directors elected in accordance with the provisions herein.

5.2 Election of Directors

Individuals shall be elected by the Board of Directors for three-year terms upon majority vote of the Board of Directors, or as may be authorized by 22 U.S.C. 6203 et seq. , with notice to and in consultation with the USAGM Advisory Board, the latter of which shall assess the individual's potential promotion of and impact upon the mission and objectives set forth in Section 2.2.1, as they relate to USAGM and its networks and grantees. He or she shall hold office until the expiration of his or her term and until his or her successor is elected and qualified, or his or her earlier resignation or removal or or as may be authorized by 22 U.S.C. 6203 et seq.

Any vacancy occurring on the Board of Directors due to removal or resignation may be filled by a majority vote of the remaining Directors. The Director so elected shall hold office for the remainder of his or her predecessor's term or until his or her successor is elected and qualified or until his or her earlier resignation or removal.

5.3 Resignation of Directors

Any Director may resign at any time by delivering written notice to the Board of Directors, the Chair of the Board of Directors, or the Chief Executive Officer. A resignation is effective when the notice is delivered unless the notice specifies a later date.

5.4 Committees of the Board of Directors

The Board of Directors may from time to time designate two (2) or more Directors to serve on such committee or committees, both standing and ad hoc, as deemed necessary and proper. Such committees shall have the authorities provided in such

resolution but shall not exercise the authority of the Board of Directors in the management of the corporation. No committee shall have the power to amend the Articles of Incorporation or the Bylaws of the Corporation.

The Board of Directors shall have the power at any time to (a) designate a member of any committee as the committee's chairperson; (b) fill vacancies on any committee; (c) change the membership of any committee; or (d) discharge a committee. The resolution creating a committee shall specify whether it is a standing committee, and if not a standing committee, shall specify the time period during which the committee shall exist. The resolution creating a committee shall also establish the term of office of members of the committee, requirements for meetings of the committee, and shall establish the quorum necessary for it to take action.

5.4.1 Audit Committee

The Audit Committee shall be a standing committee of the Board of Directors. It shall be responsible for making recommendations to the Board of Directors regarding the Corporation's integrity, financial credibility, and long-term viability, including the results of audits of the accounts of the Corporation performed in accordance with generally accepted auditing standards by independent certified or licensed public accountants. In consultation with the Vice President/Treasurer, the chair of the Audit Committee shall convene appropriate meetings. The Audit Committee shall have the power to adopt rules for the conduct of its business with respect to all matters not provided for in the Bylaws.

6.0 MEETINGS OF THE BOARD OF DIRECTORS

6.1 Annual Meeting

An annual meeting of the Board of Directors shall be held at the principal office of the Corporation, and at such time or other place as shall be determined by the Board of Directors and designated in the notice of the meeting. Meetings may be held within or without the District of Columbia.

6.2 Regular Meetings

Regular meetings of the Board of Directors shall be conducted on a quarterly basis or on such other basis as determined by the Directors. Meetings may be held within or

without the District of Columbia.

6.3 Agendas

Wherever practicable, agendas for regular meetings shall be prepared and distributed electronically to each Director at least seven (7) days prior to each meeting. The Chief Executive Officer and President shall propose agenda items to the Chair. Individual Directors may designate agenda items and resolutions.

6.4 Notice of Annual and Regular Meetings

Notice of each annual and regular meeting of the Board of Directors stating its date, time, and place shall be provided to each Director personally, or by post, by overnight courier, by telephone, or by electronic mail at the street address, telephone number, or electronic mail address of corporate record. Such notice shall be provided not less than ten (10) days prior to the date of the meeting and need not specify the business to be transacted at or the purpose of the periodic meeting. Before or at any meeting of the Directors, any Director may, in writing, waive notice of such meeting and such waiver shall be deemed equivalent to a giving of notice. Attendance by a Director at an annual or regular meeting of the Board of Directors without objection shall be deemed as a waiver of notice by such Director.

6.5 Special Meetings

Special meetings of the Board of Directors may be called by the Chair or by one less than a majority of Directors then serving on the Board of Directors. With the exception of a special meeting conducted telephonically, as specified herein, such special meetings shall only be called upon no less than forty-eight (48) hours' notice to each Director, which shall specify the date, time, and place of the meeting. Meetings may be held within or without the District of Columbia.

6.6 Emergency Meetings

Upon the occurrence of urgent circumstances and request of the Chair or one less than a majority of Directors, an emergency meeting may be convened upon twenty-four (24) hours' notice by telephonic or electronic means to each Director, which shall specify the date, time, and place of the meeting. The emergency meeting may be conducted in person, by telephone, or other appropriate means, and may be held within or without the District of Columbia.

6.7 Telephonic Meetings

The Board of Directors, or any committee thereof, may conduct meetings telephonically, by means of conferencing equipment or similar systems by which all participants may be heard. Participation in such a meeting is equivalent to personal presence at such meeting.

6.8 Action Without Meeting

Directors may take action without a meeting if all Directors consent thereto in writing, and such consent shall constitute a unanimous vote. Record of such consent shall be filed by the Secretary with the minutes of proceedings of the Board of Directors in the books and records of the Corporation.

6.9 Quorum

At all meetings of the Directors, a majority of the Directors shall constitute a quorum for the transaction of any business, and the acts of a majority of the Directors present at a meeting at which a quorum is present shall be the acts of the Directors except as otherwise specified herein. If at any meeting of the Directors there be less than a quorum present, the majority of those Directors present may adjourn the meeting until a quorum can be present.

6.10 Minutes

The minutes and a record of any decisions made at a meeting of the Board of Directors shall be maintained by the Secretary and made available by same to all Directors before the next scheduled meeting of the Board of Directors.

6.11 Compensation and Reimbursement of Directors

No compensation shall be provided to Directors for services rendered to or as members of the Board of Directors or its committees, save reimbursement for reasonable costs and expenses incurred on behalf of the Corporation, as authorized by the Board of Directors and pursuant to the limitations set forth herein, except as otherwise may be set forth in these Bylaws.

6.12 Removal of Directors

Any Director may be removed from office for cause by the vote of two-thirds (2/3) of those Directors present at a meeting of the Board of Directors at which a quorum is present, provided that all Directors, including the Director to be removed are provided

no less than ten (10) days' notice of such meeting.

6.13. **Standard of Conduct for Directors**

Directors when discharging the duties of a Director shall act in good faith, in a manner reasonably believed to be in the best interests of the Corporation. Directors, when becoming informed in connection with their decision-making function or devoting attention to their oversight function, shall discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances. In discharging Board or committee duties, Directors shall disclose information to the Board or a committee that is material to the discharge of the Directors' decision-making or oversight functions; provided, however, that disclosure is not required to the extent that the Director reasonably believes that disclosing would violate a duty imposed by law, a legally enforceable obligation of confidentiality, or a professional ethics rule. Unless a Director has knowledge that makes reliance unwarranted, a Director when discharging the duties of a Director may rely on information, opinions, reports, or statements prepared or presented by officers, employees or volunteers of the Corporation whom the Director reasonably believes to be reliable and competent in the functions performed or the information or opinions provided, legal counsel, public accountants or other persons retained by the Corporation as to matters that the Director reasonably believes to be within the person's professional or expert competence or as to which the person merits confidence, or a committee of the Board of Directors of which the Director is not a member if the Director reasonably believes the committee merits confidence.

7.0 OFFICERS

The Officers of the Corporation shall be the Chair of the Board of Directors, Chief Executive Officer ("CEO"), President, Vice President/Treasurer, and General Counsel/Secretary (collectively, the "Officers"), and such other officers as the Board of Directors, or the USAGM Chief Executive Officer in accordance with the Act, may appoint.

In no event shall the positions of President and Treasurer be occupied simultaneously by the same individual.

7.1 Election and Term of Office

The Chair shall be elected by majority vote of the Board of Directors at a duly called meeting at which a quorum is present. The Chair shall serve a term of two (2) years on a calendar year basis, and he or she shall hold office until his or her successor is elected

and qualified or his or her earlier resignation or removal. In no event shall the position of Chair be filled by the same individual for more than two (2) consecutive terms.

All other Officers shall be elected by majority vote of the Board of Directors at a duly called meeting at which a quorum is present or as may be authorized by 22 U.S. C. 6203 et seq. Each Officer shall serve a term of three (3) years on a calendar year basis, and he or she shall hold office until his or her successor is elected and qualified or his or her earlier resignation or removal or as may be authorized by 22 U.S.C. 6203 et seq. There shall be no limitations on consecutive or total terms of office for such Officers.

7.2 Powers and Duties

The respective Officers shall have the powers and duties usually vested in such officers, including without limitation the following, and those that may be vested in them by the Board of Directors from time to time.

7.2.1 Chair of the Board of Directors

The Chair shall preside over all meetings of the Board of Directors; shall serve as a members of all standing committees of the Board of Directors; shall annually evaluate, in consultation with the Board, the performance of the CEO and shall exercise any other powers and discharge any other duties as vested in the Chair by the Board of Directors.

7.2.2 Chief Executive Officer

The CEO shall be responsible for implementing and sustaining medium- and long-term initiatives related to fundraising, grantmaking, external relations, partnerships, Corporate development, recruitment for the Board of Directors, and retention of subject matter experts to augment the work of such standing and ad hoc committees of the Board of Directors as may be established; shall serve as the primary liaison between the Board of Directors and the President, pursuant to the translation of qualitative plans and projects into actionable and quantitative executables; shall serve as the Corporation's resource for maintaining cross-organizational cohesion and inclusiveness; shall provide suggestions for consideration of the Board of Directors nominees for the positions of Officers of the Corporation as well as succession planning; shall be responsible for Corporate strategy in conjunction with the President; and, subject to the limitations in this article, have exclusive authority over all hiring

and employment decisions by the Corporation after taking into consideration any recommendations by the President ; and shall serve as a member of the USAGM International Coordinating Committee (or such successor coordinating committee that consists of representatives of Radio Free Asia, RFE/ RL, Incorporated, the Office of Cuba Broadcasting, the Voice of America, and USAGM).

7.2.3 President

The President shall exercise active and general management of the day-to-day affairs of the Corporation and ensuring the implementation of all resolutions and orders of the Board of Directors; shall be responsible for the recruitment, training and retention of staff and make recommendations for employment actions to the CEO; shall be responsible for developing corporate strategy and executing action plans in collaboration with the CEO; shall timely inform, either directly or through the CEO, as appropriate, the Board of Directors of such matters of significance to the Corporation that occur during the general management of its day-to-day affairs; shall seasonably inform the Board of Directors of the state and operations of the Corporation.

7.2.4 Vice President/Treasurer

The Vice President/Treasurer shall, in the absence or disability or pursuant to the removal or resignation of the President, exercise the powers and discharge the duties of the President as set forth herein, subject to the same limitations incumbent thereupon; shall serve as the Treasurer of the Corporation, overseeing and administering all financial affairs of the Corporation, including the administration and maintenance of all financial records and books of account and the means by which such books and records are kept and reported; shall prepare and recommend an annual budget of the Corporation for the consideration of and adoption by the Board of Directors; shall seasonably submit to the Board of Directors, or upon request of same, reports on the financial affairs and state of the Corporation; shall provide for the timely completion of all such audits as may be required by law or generally accepted accounting practices; and shall timely inform, either directly or through the Chair, as appropriate, the Board of Directors of such matters of significance to the Corporation that arise with respect to the discharge of the foregoing duties.

7.2.5 General Counsel/Secretary

The General Counsel/Secretary shall serve as chief legal officer for the Corporation; shall provide advice and counsel on such matters concerning the Corporation as may be referred to the General Counsel/Secretary by Directors, Officers, or the collective Board of Directors or its committees; shall attend each meeting of the Board of Directors and take the minutes thereof, maintaining the official record of same; shall issue the official notice of meetings of the Board of Directors as set forth herein; and shall timely inform, either directly or through the Chair, as appropriate, the Board of Directors of such matters of significance to the Corporation that arise with respect to the discharge of the foregoing duties, including matters of legal risk and regulatory compliance.

7.3 Compensation of Officers

The Board of Directors shall establish the annual rate of compensation for the CEO, which shall be paid from the Corporation's operating funds. No other Officer shall be compensated for their service as an Officer of the Corporation, save reimbursement for reasonable costs and expenses incurred on behalf of the Corporation pursuant to the limitations set forth herein, provided, however, that such other Officers may be compensated for services rendered to the Corporation in their capacities as employees of the Corporation.

7.4 Resignation of Officers

Any Officer may resign at any time by delivering written notice to the Board of Directors, the Chair of the Board of Directors, or the Chief Executive Officer. A resignation is effective when the notice is delivered unless the notice specifies a later date. Acceptance by the Board of Directors of such resignation shall not be necessary to make it effective.

7.5. Standard of Conduct for Officers

Each officer of the Corporation shall discharge his or her duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the officer reasonably believes to be in the best interests of the Corporation. Each officer shall inform his or her superior officer to whom the officer reports or the Board of Directors or a committee thereof of any information about the affairs of the Corporation known to the officer and within the scope of the officer's functions, and known to the officer to be material to the superior

officer, Board or committee thereof. Each officer shall inform his or her superior officer, or another appropriate person within the Corporation, or the Board or a committee thereof, of any actual or probable material violation of law involving the Corporation, and any material breach of duty to the Corporation by an officer, employee, or agent of the Corporation that the officer believes has occurred or is likely to occur. When discharging his or her duties an officer who does not have knowledge that makes reliance unwarranted may rely on information, opinions, reports, or statements prepared or presented by officers or employees of the Corporation whom the officer reasonably believes to be reliable and competent in the functions performed or the information or opinions provided, or legal counsel, public accountants or other persons retained by the Corporation as to matters that the officer reasonably believes to be within the person's professional or expert competence or as to which the person merits confidence.

8.0 FINANCIAL ADMINISTRATION AND FUNDRAISING

8.1 Purpose of the Financial Assistance

The Corporation shall have the power to make grants, contracts, cooperative agreements, contributions and to render other financial assistance for the purposes expressed in Section 2.0 of the Bylaws and in accordance with available financial resources as determined by the Vice President/Treasurer.

8.2 Accounting Required

The Board of Directors shall require that all grantees furnish a periodic accounting of sufficient detail and particularity to show that such funds were expended for the purposes that were approved by the Corporation. Pursuant to the Corporation's receipt of grants or funds under the Act, the Corporation shall at all times comply with the following requirements set forth by USAGM:

1. The activities of the Corporation as set forth in Section 2.2.1, and any Grant Agreement with USAGM, will be in compliance with USAGM grant administration and under the oversight of the USAGM Director of Internet Freedom.
2. The Corporation shall furnish USAGM a quarterly accounting of all grant funds to ensure that such funds were expended appropriately and in support of the Agency's mission to "inform, engage, and connect people around the world in support of freedom and democracy."

3. The Corporation shall, upon request and at any time, furnish USAGM with an audit of any Corporate program expenditure.
4. The Corporation shall at all times administer its funds in full compliance with and adherence to the terms of any grant agreement between the Corporation and USAGM, pursuant to full cooperation between same.
5. The Corporation shall designate a liaison between the Corporation and USAGM, by and through the USAGM Director of Internet Freedom, who shall make regular recommendations to the Board of Directors regarding the ways in which the Corporation can support the efforts of USAGM journalists to disseminate, and its audiences to receive, international broadcasting consistent with the standards, principles, and goals of the Act.

8.3 Restrictions on Contributions

The Corporation retains complete control and discretion over the use of all contributions it receives. Contributions received by the Corporation from the solicitations for specific grants shall be regarded as for the use of Corporation and not for the organizations from which the funds were solicited. The Corporation refuses to accept contributions earmarked exclusively for allocation to one or more foreign organizations.

8.4 Restrictions on Fundraising

The Corporation shall not engage in any fundraising activities whatsoever unless such activities have been expressly approved in writing in advance by the Board of Directors.

8.5 Records of Fundraising

The Corporation shall, upon request, make available such records, documentation, and books of account concerning its fundraising activities to the USAGM Director of Internet Freedom for his or her inspection. The Corporation shall furnish an accounting of its fundraising activities to the USAGM Director of Internet Freedom on a quarterly basis.

9.0 CONFLICTS OF INTEREST TRANSACTIONS

In addition to any other policies as to conflict of interest transactions that the Corporation may, from time to time, adopt, the Corporation shall, at a minimum, adhere to the following procedures with respect to conflict of interest transactions: A contract or transaction between the Corporation and one or more of its Directors, or officers or between the

Corporation and any other entity in which one or more of its Directors, or officers are Directors or officers, hold a similar position, or have a financial interest, shall not be void or voidable solely for that reason, or solely because the Director, member of a designated body, or officer is present at or participates in the meeting of the Board of Directors that authorizes the contract or transaction, or solely because his or their votes are counted for that purpose, if (1) the material facts as to the relationship or interest and as to the contract or transaction are disclosed or are known to the Board of Directors and the Board in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors even though the disinterested directors are less than a quorum; or (2) the contract or transaction is fair as to the Corporation as of the time it is authorized, approved, or ratified by the Board of Directors. For purpose of this Article 9.0, common or interested directors may be counted in determining the presence of a quorum at a meeting of the Board that authorizes a contract or transaction specified in this Article.

Notwithstanding the foregoing, the appointment of a Federal official as Director or Officer by the USAGM Chief Executive Officer shall not be deemed a conflict of interest, provided that such appointment and service to the Corporation are authorized under the Act and related provisions of law.

10.0 MAINTENANCE OF TAX-EXEMPT STATUS

The Corporation has been formed as a nonprofit corporation under District of Columbia law for charitable, scientific, literary, or educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (or corresponding provision of any future United States Internal Revenue law).

It shall be the duty of each Director and Officer to maintain the tax-exempt status of the Corporation pursuant to the provisions of Section 501(c)(3) of the Internal Revenue Code of 1986 (or corresponding provision of any future United States Internal Revenue law) and its regulations (as they now exist or as they may hereafter be amended). A willful violation of this duty shall constitute a wrongful act or conduct subjecting the participating Director or Officer to removal procedures as set forth in these Bylaws.

11.0 AMENDMENTS

An amendment to the Articles of Incorporation or these Bylaws may be adopted only after Directors have been given ten (10) days' notice of the content of the proposed amendment by post, overnight courier, or electronic mail at the street address or electronic mail address of

corporate record. The proposed amendment shall be adopted and implemented upon a two-thirds (2/3) affirmative vote of the Board of Directors [then in office/ at duly called meeting at which a quorum is present] or by unanimous consent.

12.0 INDEMNIFICATION, LIABILITY LIMITATION AND INSURANCE

12.1 Indemnification

Unless expressly prohibited by law, to the fullest extent permitted by law the Corporation shall fully indemnify any person made, or threatened to be made, a party to an action, suit or proceeding (whether civil, criminal, administrative or investigative) by reason of the fact that such person, or such person's testator or intestate, is or was a director, officer, employee or agent of the Corporation or serves or served any other enterprise at the request of the Corporation, against all expenses (including attorneys' fees), judgments, fines and amounts paid or to be paid in settlement incurred in connection with such action, suit or proceeding.

12.2 Limitation of Liability for Volunteers and Employees

Provided the corporation maintains liability insurance with a limit of coverage of not less than $200,000 per individual claim and $500,000 per total claims that arise from the same occurrence, officers, directors and other persons who perform services for the Corporation and who do not receive compensation other than reimbursement of expenses for those services ("volunteers") shall be immune from civil liability; except that the foregoing insurance requirements shall not be required if the Corporation is exempt from federal income taxes under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, and the Corporation has annual total functional expenses (exclusive of grants and allocations) of less than $100,000. Additionally, persons regularly employed to perform a service for a salary or wage ("employees") shall not be held personally liable in damages for any action or omission in providing services or performing duties on behalf of the corporation in an amount greater than the amount of total compensation (other than reimbursement of expenses) received during the twelve (12) months immediately preceding the act or omission for which liability was imposed. Regardless of the amount of liability insurance maintained, this limitation of liability for officers, directors, volunteers and employees shall not apply when the injury or damage was a result of such person's willful misconduct, crime (unless the officer, director, volunteer or employee had reasonable cause to believe that the act was lawful), transaction that resulted in an improper personal benefit of money,

property or service to the officer, director, volunteer or employee, or act or omission that was not in good faith and was beyond the scope of authority of the Corporation pursuant to this applicable law or the corporate charter. This limitation of liability shall not apply to any licensed professional employee operating in his or her professional capacity. The Corporation is liable only to the extent of the applicable limits of insurance coverage it maintains.

12.3 Insurance

Notwithstanding any other provision in these Bylaws, including this Article 12.0, the Corporation shall purchase insurance on behalf of any individual who is or was a director or officer of the Corporation, or who, while a director or officer of the Corporation, serves or served at the Corporation's request as director, officer, partner, employee, or agent of another entity (including, but not limited to an employee benefit plan), against liability asserted against or incurred by the individual in that capacity or arising from the individual's status as a director or officer, whether or not the Corporation would otherwise have power to indemnify or advance expenses to the individual against the same liability under the District of Columbia Nonprofit Corporation Act of 2010 Act, as amended.

13.0 MISCELLANEOUS PROVISIONS

13.1 Fiscal Year

The fiscal year of the Corporation shall begin on the first day of October of every year, except that the first fiscal year of the Corporation shall begin as of the date of incorporation. The fiscal year provided for herein shall be subject to change by act of the Directors, should corporate practice subsequently dictate.

13.2 Execution of Instruments

All checks or demands for money and notes of the Corporation shall be signed by such Officer or Officers or such other person or persons as the Board of Directors may from time to time designate.

13.3 Corporate Seal

The Corporation may have a corporate seal of such design as the Board of Directors may prescribe. The General Counsel/Secretary shall have custody of the corporate seal and the authority to affix it to all instruments so requiring.

13.4. Director, Officer and Employee Representations.

No Director, officer or employee of the Corporation (or any entity in which such person is in a position of authority such as an owner, officer or chief executive) is authorized to speak or take action on behalf of the Corporation without the prior specific authorization of the Chair of the Board of Directors (or his/her designee) or the CEO or President (or his/her/their designee). In addition, no such person(s) or entities are authorized to use the name or logo of the Corporation in conducting any non-Corporation business in any manner that suggests or reasonably may be interpreted to imply the approval by the Corporation without the prior specific authorization of the Chair of the Board of Directors (or his/her designee).

13.5. Loans.

The Corporation shall not lend money to or guarantee the obligations of a Director or officer.

14.0 CONTEST OF VALIDITY OF CORPORATE ACTIONS [OPTIONAL]

In the event that any of the members of the Board of Directors, officers, or any other party or parties that are permitted by applicable law to be subject to this provision, seeks to contest or otherwise challenge the validity of any action taken by the Corporation or the Board of Directors, then to the fullest extent permitted by applicable law, such challenge shall be resolved as permitted by and in accordance with Section 20-401.22(c) of the District of Columbia Nonprofit Corporation Act of 2010, as amended, as follows: Such contest or other challenge of the validity of an action taken by the Corporation or the Board of Directors shall be submitted for final disposition to the Board of Directors who shall resolve such challenge by a majority vote of all of the then-existing members of the Board of Directors; and such disposition by the Board of Directors shall be final to the fullest extent permitted by applicable law.

CONFLICT OF INTEREST POLICY
OF THE
OPEN TECHNOLOGY FUND

Article I
Purpose

The purpose of this Conflict of Interest Policy (this "Policy") is to protect the interests of Open Technology Fund (the "Organization") when it is contemplating entering into a transaction or arrangement that might benefit the private interest of an officer or key employee* of the Organization or a member (whether a director or committee member) of the Organization's Board of Directors (the "Board") or might result in a possible excess benefit transaction. This policy is intended to supplement but not replace any applicable state and federal laws governing conflicts of interest applicable to nonprofit and charitable organizations.

Article II
Definitions

1. Interested Person

Any director, officer, member of a committee with Board-delegated powers, or key employee who has a direct or indirect financial interest, as defined below, is an interested person.

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* A "key employee" is an employee (other than an officer, director, or trustee) who meets all three of the following tests applied in the following order:

1. **$150,000 Test**. Receives reportable compensation from the organization and all related organizations in excess of $150,000 for the calendar year ending with or within the organization's tax year.
2. **Responsibility Test**. The employee: (a.) has responsibilities, powers or influence over the organization as a whole similar to those of officers, directors, or trustees; (b.) manages a discrete segment or activity of the organization that represents 10% or more of the activities, assets, income, or expenses of the organization, as compared to the organization as a whole; or (c.) has or shares authority to control or determine 10% or more of the organization's capital expenditures, operating budget, or compensation for employees.
3. **Top 20 Test**. Is one of the 20 employees (that satisfy the $150,000 Test and Responsibility Test) with the highest reportable compensation from the organization and related organizations for the calendar year ending with or within the organization's tax year.

2. Financial Interest

A person has a financial interest if the person has, directly or indirectly, through business, investment, or family:

a. An ownership or investment interest in any entity with which the Organization has a transaction or arrangement;

b. A compensation arrangement with the Organization or with any entity or individual with which the Organization has a transaction or arrangement; or

c. A potential ownership or investment interest in, or compensation arrangement with, any entity or individual with which the Organization is negotiating a transaction or arrangement.

Compensation includes direct and indirect remuneration as well as gifts or favors that are substantial in nature.

A financial interest is not necessarily a conflict of interest. Under Article III, Section 2 of this Policy, a person who has a financial interest may have a conflict of interest only if the Board, or committee of the Board to which the Board has delegated such powers, decides that a conflict of interest exists.

Article III

Procedures

1. Duty to Disclose

In connection with any actual or possible conflict of interest, an interested person must disclose the existence of the financial interest and all material facts to the Board and members of committees with Board-delegated powers considering the proposed transaction or arrangement.

2. Determining Whether a Conflict of Interest Exists

After disclosure of the financial interest and all material facts, and after any discussion with the interested person, he or she shall leave the Board or committee meeting while the determination of a conflict of interest is discussed and voted upon. The remaining Board or committee members shall decide if a conflict of interest exists.

3. Procedures for Addressing the Conflict of Interest

a. An interested person may make a presentation at the Board or committee meeting, but, after the presentation, he or she shall leave the meeting during the discussion of, and the vote on, the transaction or arrangement involving the possible conflict of interest.

b. The chairperson of the Board or committee shall, if appropriate, appoint a disinterested person or committee to investigate alternatives to the proposed transaction or arrangement.

c. After exercising due diligence, the Board or committee shall determine whether the Organization can obtain with reasonable efforts a more advantageous transaction or arrangement from a person or entity that would not give rise to a conflict of interest.

d. If a more advantageous transaction or arrangement is not reasonably possible under circumstances not producing a conflict of interest, the Board or committee shall determine by a majority vote of the disinterested directors whether the transaction or arrangement is in the Organization's best interest, for its own benefit, and whether the transaction or arrangement is fair and reasonable to the Organization. In conformity with the above determination, the Board or committee shall make its decision as to whether the Organization shall enter into the transaction or arrangement.

4. Violations of the Conflict of Interest Policy

a. If the Board or committee has reasonable cause to believe a Board or committee member has failed to disclose actual or possible conflicts of interest, it shall inform the member of the basis for such belief and afford the member an opportunity to explain the alleged failure to disclose.

b. If, after hearing the Board or committee member's response and after making further investigation as warranted by the circumstances, the Board or committee determines the member has failed to disclose an actual or possible conflict of interest, it shall take appropriate disciplinary and corrective action.

Article IV

Records of Proceedings

The minutes of the Board and all committees with Board-delegated powers shall contain:

a. The names of the persons who disclosed or otherwise were found to have a financial interest in connection with an actual or possible conflict of interest, the nature of the financial interest, any action taken to determine whether a conflict of interest was present, and the Board's or committee's decision as to whether a conflict of interest in fact existed; and

b. The names of the persons who were present for discussions and votes relating to the transaction or arrangement, the content of the discussion, including any alternatives to the proposed transaction or arrangement, and a record of any votes taken in connection with the proceedings.

Article V

Compensation

a. A voting member of the Board who receives compensation, directly or indirectly, from the Organization for services is precluded from voting on matters pertaining to that Board member's compensation.

b. A voting member of any committee whose jurisdiction includes compensation matters and who receives compensation, directly or indirectly, from the Organization for services is precluded from voting on matters pertaining to that member's compensation.

c. No voting member of the Board or any committee whose jurisdiction includes compensation matters and who receives compensation, directly or indirectly, from the Organization, either individually or collectively, is prohibited from providing information to any committee regarding compensation. Such Board or committee member may present information as background or answer questions at a Board or committee meeting prior to the commencement of deliberations or voting relating to his or her compensation.

Article VI

Annual Statements

Each director, officer, member of a committee with Board-delegated powers, and key employee shall sign a statement annually which affirms that such person:

a. Has received a copy of this Policy;
b. Has read and understands this Policy;
c. Has agreed to comply with this Policy; and

d. Understands the Organization is a charitable organization and in order to maintain its federal tax exemption it must engage primarily in activities which accomplish one or more of its tax-exempt purposes.

Article VII

Periodic Reviews

To ensure the Organization operates in a manner consistent with charitable purposes and does not engage in activities that could jeopardize its tax-exempt status, periodic reviews may be conducted. The periodic reviews may include the following subjects:

a. Whether compensation arrangements and benefits are reasonable, based on competent survey information, and the result of arm's length bargaining.

b. Whether partnerships, joint ventures, and arrangements with management organizations conform to the Organization's written policies, are properly recorded, reflect reasonable investment or payments for goods and services, further charitable purposes and do not result in inurement, impermissible private benefit or in an excess benefit transaction.

Article VIII

Use of Outside Experts

In complying with this Policy, the Organization may, but need not, use outside advisors. If outside experts are used, their use shall not relieve the Board of its responsibilities under this Policy.

ANNUAL CONFLICT OF INTEREST POLICY STATEMENT

OPEN TECHNOLOGY FUND

For Fiscal Year 20__

To: Open Technology Fund

From: KENNETH WEINSTEIN, CHAIR
Print Name and Title

As of the date set forth below, for the fiscal year referenced above, I hereby affirm the following to Open Technology Fund:

1. I have received a copy of the Open Technology Fund Conflict of Interest Policy (the "Policy").

2. I have read and understand the Policy.

3. I agree to comply with the Policy.

4. I understand that Open Technology Fund is a charitable, educational and scientific organization and that in order to maintain its federal tax exemption it must engage primarily in activities which accomplish one or more of its tax-exempt purposes.

Signature

5/23/19

Date

Unanimous Consent
of the Board of Directors of
Open Technology Fund
(in lieu of an organizational meeting)

The undersigned, being all of the initial members of the Board of Directors of the Open Technology Fund, a District of Columbia nonprofit corporation (the "Corporation") for the purpose of taking action without an organizational meeting of the Board of Directors (the "Board") pursuant to the District of Columbia Nonprofit Corporation Act of 2010, as amended, hereby adopt the following resolutions:

RESOLVED, that the proposed Bylaws attached hereto as Exhibit A are hereby adopted as the Bylaws of the Corporation, and the Secretary is hereby instructed to insert said Bylaws in the Minute Book of the Corporation.

RESOLVED, that the Conflicts of Interest Policy attached hereto as Exhibit B is hereby approved and adopted.

RESOLVED, that the following persons are named to succeed the initial Board of Directors named in the Articles of Incorporation, and are hereby elected to serve as the directors of the Corporation through September 24, 2022, and until their terms have expired and their respective successors are elected and qualified, or until their earlier death, resignation, or removal, or as otherwise may be authorized pursuant to the Bylaws of the Corporation:

Name
Leon Aron
Ryan Crocker
Michael Kempner
Karen Kornbluh
Ben Scott
Kenneth Weinstein

RESOLVED, that the following persons are hereby elected to serve as initial officers of the Corporation, holding the offices indicated opposite their names, until December 31, 2021, and until their respective successors are elected and qualified or until their earlier death, resignation or removal:

Name	Title
Kenneth Weinstein	Chair
Laura Cunningham	President
Libby Liu	Chief Executive Officer
Nathaniel Kretchun	Secretary/Treasurer

RESOLVED that the Chair, President, Chief Executive Officer, and/or Secretary / Treasurer are each hereby authorized to pay all fees and expenses necessary or appropriate in connection with the organization of the Corporation.

RESOLVED, that the proper officers of the Corporation are hereby authorized to make all such filings with the governmental entities of the United States or of any state, country or other jurisdiction as may be deemed necessary, appropriate or convenient in connection with the conduct of the affairs of the Corporation, including filings to establish federal and state tax exemptions.

RESOLVED, that the proper officers of the Corporation are hereby authorized to take all actions and to execute and file all instruments necessary or appropriate in order to qualify the Corporation under any law or laws in any state, country or other jurisdiction in which it is necessary or expedient for the Corporation to conduct activities, including without limitation the appointment and substitution of agents or attorneys for service of process, and the designation and change of statutory offices, and to effect withdrawal from any state, country or other jurisdiction whenever it is deemed expedient for the Corporation to cease conducting activities therein.

RESOLVED, that the Chair, President, Chief Executive Officer, and/or Secretary/Treasurer of the Corporation, are hereby authorized and directed to open an account or accounts for the Corporation with such bank or banks in the District of Columbia, and in any other state, country or other jurisdiction as any such officer may deem appropriate in conducting the affairs of the Corporation, and to deposit therein funds coming into the possession of the Corporation, such account or accounts to be in the name of the Corporation;

RESOLVED FURTHER, that all such banks are hereby authorized and directed to pay checks and other orders for the payment of money drawn in the name of the Corporation when signed by any one of the Chair, President, Chief Executive Officer, and/or Secretary/Treasurer, provided two signatures of the foregoing shall be authorized for amounts exceeding $25,000, and no such bank shall be required, in any case, to make inquiry respecting the application of any instrument executed by virtue of this resolution, or of the proceeds therefrom, nor be under any obligation to see to the application of such instrument or proceeds: and

RESOLVED FURTHER, that all resolutions required by such banks in connection with such accounts which are consistent with the foregoing are hereby adopted, and the Secretary is directed to attach copies of all such resolutions to these resolutions.

RESOLVED, that all contracts and financial commitments entered into by the Corporation shall be executed by any two of the Chair, President, Chief Executive Officer, and/or Secretary/Treasurer; provided that purchase orders for goods or services made in the normal course of operations and having an aggregate purchase price not exceeding $25,000 each may be signed by any one of the foregoing.

RESOLVED, that the principal office of the Corporation shall be located 2025 M Street, N.W., Washington, D.C. 20036.

RESOLVED, that the proper officer or officers of the Corporation are hereby authorized and directed to do all things, take all actions and execute, deliver and file

all documents as may be necessary or convenient in effecting the foregoing resolutions.

RESOLVED, that this Unanimous Consent of the Board of Directors shall be filed in the Minute Book of the Corporation.

IN WITNESS WHEREOF, the undersigned have executed this Unanimous Consent of the Board of Directors of the Corporation effective as of the 23rd day of September, 2019. This Unanimous Consent of the Board of Directors of the Corporation may be executed in counterparts.

_____
Leon Aron

_____
Ryan Crocker

_____
Michael Kempner

_____
Karen Kornbluh

_____
Ben Scott

_____
Kenneth Weinstein

Attachments –

Exhibit A (Bylaws)
Exhibit B (Conflict of Interest Policy)

Exhibit H

MINUTE ORDER (paperless) DENYING plaintiffs' 26 Motion for Reconsideration of Denial of Temporary Restraining Order and Preliminary Injunction and, in the Alternative, for an Injunction Pending Appeal ("Pls.' Mot."). Plaintiffs acknowledge that their pending motion raises no new grounds for preliminary relief. *See* Pls.' Mot. at 1 (conceding that plaintiffs' motion concerns "issues that [the Court] has just decided"); *id.* at 4 (recognizing that plaintiffs' alternative request for relief "is subject to the same four criteria" as the already-denied motion for preliminary injunction). Indeed, plaintiffs' new motion barely addresses any subject that pertains to any organization at issue other than the Open Technology Fund ("OTF"), *see, e.g.*, *id.* at 13-14 (devoting only about one page to the "statutory firewall"), and plaintiffs still do not meaningfully grapple with the rule of *Sampson v. Murray*, 415 U.S. 61 (1974), that loss of employment is not irreparable harm except in a genuinely extraordinary situation, *see* Pls.' Mot. at 15 (stating merely that "[t]his isn't an employment case" and continuing to rely on inapposite, non-binding, out-of-circuit caselaw). As for plaintiffs' contention that the Court's interpretation of OTF's 2019 grant agreement "lacked the benefit of any briefing, evidence, or input from the parties," *id.* at 10, plaintiffs ignore that the Court permitted the plaintiffs to file *six* declarations, *four* of which were supplemental, *see* ECF Nos. 4-3, 4-12, 9-2, 9-3, 10-1, 17-1. Nevertheless, plaintiffs attempt to further expand the record by submitting two *additional* declarations,

with *eight* new exhibits attached (one of which is split into three parts, and another into two parts). *See* ECF Nos. 26-1-26-13. Enough has been said in this Court. Plaintiffs' motion is DENIED for the reasons set forth in the Court's 22

Memorandum Opinion. Signed by Chief Judge Beryl A. Howell on July 7, 2020. (lcbah1) (Entered: 07/07/2020)