

2. USAGM is an independent arm of the United States government that operates various media networks, including the Voice of America. Michael Pack was confirmed as the new Chief Executive Officer (“CEO”) of USAGM on June 4, 2020.

3. Shortly after being sworn in as the CEO of USAGM, Pack removed OTF’s Board of Directors and putatively installed a new Board of Directors of his choosing. Pack also moved to replace officers of OTF and asked his replacement Board to ratify his acts. Pack lacks authority to take these actions, making his removal and replacement of the Board and steps to remove officers *ultra vires* and illegal.

4. As an independent District nonprofit organization, the composition and governance of OTF’s Board of Directors is governed by the District’s Nonprofit Corporation Act (“NCA”), OTF’s Articles of Incorporation, and its bylaws. None of those sources grants the USAGM CEO the authority to remove and replace OTF’s Board of Directors or its officers. OTF’s original Board has instituted a challenge to Pack’s actions, issued a resolution disavowing the removal and replacement of the Board and officers, and provided the Attorney General notice of the dispute.

5. To prevent continued disruption to OTF’s abilities to carry out its nonprofit purpose, the District seeks a declaration from the Court recognizing the original Board as valid and voiding Pack’s replacement of that original Board and any OTF officers. To the extent necessary, the District also requests that that Court hold a meeting with affected parties, including the Attorney General, to resolve any disputed provisions within OTF’s bylaws regarding the authority to remove and select directors and officers.

PARTIES

6. Plaintiff District of Columbia (“District”), a municipal corporation empowered to sue and be sued, is the local government for the territory constituting the permanent seat of the

government of the United States. The District is represented by and through its chief legal officer, the Attorney General for the District of Columbia. The Attorney General has general charge and conduct of all legal business of the District and all suits initiated by and against the District and is responsible for upholding the public interest. D.C. Code § 1-301.81(a)(1). The Attorney General is also responsible for ensuring District nonprofits operate for their specified public purposes and is specifically tasked with bringing suits in the Superior Court concerning contested corporate actions of District nonprofits. D.C. Code §§ 29-401.23 and 29-401.60.

7. Defendant Open Technology Fund (“OTF”) is an independent 501(c)(3) nonprofit organization incorporated under District of Columbia law. Its principal office is located in Washington, D.C., and it is registered to do business in Washington, D.C.

JURISDICTION

8. The Court has jurisdiction over the subject matter of this case pursuant to D.C. Code §§ 11-921(a)(6) and 29-412.22.

9. The Court has personal jurisdiction over Defendant pursuant to D.C. Code §§ 13-422 and 13-423.

THE LEGAL FRAMEWORK GOVERNING CONTESTED NONPROFIT CORPORATE ACTIONS

10. The District’s Nonprofit Corporation Act (“NCA”) regulates the governance of nonprofit organizations incorporated under District of Columbia law. Relevant provisions govern the establishment and composition of a board of directors, including procedures for the selection and removal of directors from the board. D.C. Code §§ 29-406.01 *et seq.* The general presumption under the NCA is that the board of directors is responsible for removing directors. *See* D.C. Code § 29-406.08(b), (c).

11. The NCA also broadly empowers the Attorney General to police nonprofits incorporated under District law, including the ability to intervene in or commence proceedings in matters of nonprofit governance for which notice must be given to the Attorney General under the NCA. D.C. Code § 29-401.60(b). One such matter is when there is a proceeding involving a contested corporate action by a charitable corporation. *Id.* § 29-401.23.

12. The NCA defines a “corporate action” that may be subject to Superior Court review to include “the suspension, removal, or expulsion of members, delegates, directors, members of a designated body, or officers of a nonprofit corporation.” *Id.* § 29-401.20(1).

13. If the nonprofit corporation’s bylaws include “a means of resolving a challenge to a corporate action...the Superior Court may enforce the articles or bylaws if appropriate.” D.C. Code § 20-401.22(c). When the bylaws contain no such provision, or if such a provision cannot effectively be enforced, then the “Superior Court may hear and determine the validity of the [contested] corporate action.” *Id.* § 20-401.22(a). “If it is determined that no valid corporate action has been taken, the Superior Court may order a meeting to be held in accordance with § 29-401.21.” *Id.* § 20-401.22(b).

14. When a corporate action has been taken without a valid meeting of the Board of Directors as required by the nonprofit corporation’s bylaws, “the Superior Court may summarily order a meeting to be held upon the application of...the Attorney General for the District of Columbia in the case of a charitable corporation.” *Id.* § 20-401.21(a). The Superior Court has the authority to “appoint an individual to hold the meeting under such orders and powers as the Superior Court may consider proper, and may take such action as may be required to give due notice of the meeting and convene and conduct the meeting in the interests of justice.” *Id.* § 20-401.21(b).

15. The Superior Court must provide “notice of the pendency of the proceedings” to resolve contested corporate actions “to all persons affected thereby.” *Id.* § 20-401.22(b).

**FACTS RELATED TO CONTESTED CORPORATION ACTION OF ATTEMPTED
REMOVAL OF OTF’S BOARD OF DIRECTORS AND OFFICERS**

16. Formerly a program within Radio Free Asia – one of the broadcast networks overseen by the USAGM – in 2019, OTF became an independent nonprofit corporation incorporated under District of Columbia law and is recognized as a 501(c)(3) organization.

17. Throughout its existence, OTF has focused on promoting “worldwide expansion of unrestricted access by the public to information on the internet” by providing “circumvention and secure communications technologies” to journalists and others living in countries where access to independent media is restricted. OTF Bylaws, § 2.2.

18. Although a standalone organization, OTF helps with coordination across the broadcast networks operating under USAGM and provides access to circumvention technologies to journalists who contribute to these networks. To help fulfill this mission, OTF receives annual grants from USAGM. It received its first USAGM grant on September 26, 2019.

19. When it restructured as an independent District nonprofit corporation, OTF’s bylaws called for the creation of a Board of Directors. This original Board consisted of technical experts and individuals who were serving on the USAGM Board of Governors at the time OTF’s articles of incorporation and bylaws were adopted. These members include Leon Aron, Ambassador Ryan Crocker, Michael Kempner, Ambassador Karen Kornbluh, Ben Scott, William Schneider, and Chairman of the Board Kenneth Weinstein.

20. Michael Pack was first nominated to be Chief Executive Officer (“CEO”) of USAGM by President Trump in 2018. Pack’s appointment was confirmed by the Senate on June 4, 2020, and he was sworn in as CEO of USAGM on June 8, 2020.

21. On June 17, 2020, Michael Pack asserted authority to remove OTF's operational head and the members of its Board of Directors. Pack also claimed authority to install a replacement Board of Directors. In doing so, Pack relied on his "authorities as Chief Executive Officer (CEO) of the United States Agency for Global Media (USAGM), including under 22 USC 6209(d) and [OTF's] bylaws," as stated in a letter to the purportedly ousted CEO of OTF.

22. Pack appointed the following individuals as the purported new Board of Directors:

- Jonathan Alexandre (Senior Counsel, Liberty Counsel Action),
- Robert Bowes (Senior Advisor to the Secretary, U.S. Department of Housing and Urban Development),
- Bethany Kozma (Deputy Chief of Staff, United States Agency for International Development),
- Rachel Semmel (Communications Director, Office of Management and Budget),
- Emily Newman (Chief of Staff, USAGM), and
- Michael Pack (CEO, USAGM) as Chairman.

23. The following day, Pack asserted purported authority to remove Laura Cunningham from her position as OTF President. Cunningham at the time had also assumed the role of acting CEO of OTF.

24. On June 23, 2020, the original OTF Board of Directors filed an action challenging Pack's authority to remove and replace the original Board of Directors. *Open Technology Fund v. Pack*, No. 1:20-cv-01710-BAH (D.D.C. June 23, 2020).

25. On July 2, 2020, the District Court issued an opinion denying OTF's motion for a temporary restraining order and preliminary injunction. The court found that the plain language

of Section 6209(d) of the International Broadcasting Act (“IBA”) did *not* grant Pack remove-and-replace authority for OTF’s Board of Directors. *Open Technology Fund v. Pack*, No. 1:20-cv-01710-BAH, at 19 (D.D.C. July 2, 2020). The court proceeded, however, to attempt to interpret OTF’s bylaws in conjunction with the grant agreement between OTF and USAGM, finding that this combination of documents may confer remove-and-replace authority on the USAGM CEO. *Id.* at 24. The OTF Board of Directors has noticed an appeal of this decision.

26. On July 3, 2020, Pack informed OTF that he was appointing an acting CEO.

27. The General Counsel of OTF responded to Pack on July 6, 2020, informing him that the original Board of Directors did not accept Pack’s appointment of the new acting CEO and that Pack’s remove-and-replace authority was still the subject of ongoing litigation.

28. On the evening of July 6, Pack informed OTF that the Board of Directors he purportedly appointed had ratified Pack’s appointment of an acting CEO.

29. In the following days, USAGM personnel repeatedly attempted to effectuate the purported acting CEO’s onboarding process and enter OTF’s office space, but OTF continued to advise Pack and representatives from USAGM that such efforts would be rejected in light of the ongoing litigation and the original Board’s position that it retained governance authority over OTF.

30. On July 10, 2020, the original OTF Board of Directors met to take emergency action disavowing Pack’s removal and replacement of the OTF Board and officers. At this meeting, the original Board of Directors passed resolutions rejecting Pack’s dismissal and replacement of the original Board of Directors and affirming the status quo of OTF leadership, including Cunningham’s position as President and acting CEO of OTF.

31. By no later than July 10, 2020, the original OTF Board of Directors provided the Attorney General notice of its lawsuit challenging Pack's actions and the original OTF Board of Director's resolutions to disavow Pack's attempts to assert control of OTF.

32. Pack's purported removal and replacement of the OTF's original Board of Directors has impacted OTF's ability to effectively carry out its nonprofit purposes. Without clarity as to which Board is properly in place, OTF is effectively left leaderless and incapable of authorizing decisions on behalf of the nonprofit corporation that allow it to carry out its functions, including an inability to authorize funding for partner organizations or provide support for potential partner organizations. This sudden upheaval in leadership also leaves employees of the organization at risk of losing their jobs.

33. Neither OTF's bylaws nor the IBA, as incorporated by reference in the bylaws, provides the USAGM CEO with the removal and replacement authority Pack claims.

34. Mirroring the NCA, OTF's bylaws presume that the Board of Directors is responsible for both election and removal of directors. Section 5.2 of the bylaws provides for the election of individual directors by majority vote of the Board of Directors, and the Board of Directors may also fill any vacancy "occurring on the Board due to resignation or removal" by a majority vote "of the remaining Directors."

35. Section 6.12 of OTF's bylaws contains the only clear mechanism for 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." OTF Bylaws, § 6.12.

36. The IBA contains no provision that grants the USAGM CEO authority to remove the directors of an independent grantee organization like OTF.

37. The dispute resolution mechanism in OTF's bylaws cannot effectively address the issue of competing Boards of Directors. Section 14.0 of OTF's bylaws allows members of the Board of Directors and other parties to challenge a corporate action, and "[s]uch 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." No such vote can meaningfully take place when the dispute at issue concerns the composition of the Board of Directors.

38. The only proper forum for contesting the removal and replacement of OTF's Board of Directors and CEO under the NCA is the Superior Court.

Count I

(Request for Declaration of Validity of Contested Corporation Action and Other Relief Pursuant to the District's Nonprofit Corporation Act)

39. The District repeats and realleges Paragraphs 1 through 38 as if set forth fully in this Paragraph.

40. There presently exists disputes as to the proper governance of OTF due to Pack's asserted removal and replacement of OTF's Board of Directors and OTF officers.

41. The District's Nonprofit Corporation Act establishes the Superior Court as the proper forum for resolving contested corporate actions of District nonprofit corporations. Those disputes are to be resolved by the Superior Court pursuant to the procedures and substantive provisions set out in D.C. Code § 29-401.20, *et seq.*

42. Pack's assertion of authority to remove and replace the OTF Board of Directors is inconsistent with the District's Nonprofit Corporation Act and OTF's relevant governance documents.

43. Pack's removal and replacement of the OTF Board of Directors and any OTF officers was *ultra vires* and should be declared invalid.

44. The Superior Court should use its authority under D.C. Code §§ 29-401.21-22 to resolve these disputes, including convening a meeting of the interested parties pursuant to D.C. § 29-401.21 as necessary, and provide notice of the proceedings to resolve these disputes to all members of the competing Boards of Directors pursuant to § 29-401.22.

Prayer for Relief

WHEREFORE, the District requests that this Court:

- a. Declare that the removal of OTF's Board of Directors by USAGM CEO Michael Pack was unauthorized under OTF's bylaws, such that the removed Board of Directors is the valid, operating Board;
- b. Declare that any other actions by USAGM CEO Michael Pack and/or the replacement Board of Directors are invalid;
- c. Alternatively, if the Court finds that OTF's bylaws are ambiguous as to removal of the Board of Directors, order a meeting to be held, and appoint an individual to hold the meeting, with the participation of the Attorney General, to determine which Board of Directors is the valid, acting Board; and
- d. Order such other relief as the Court determines to be just and proper.

Date: July 20, 2020

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

KATHLEEN KONOPKA
Deputy Attorney General
Public Advocacy Division

/s/ Jimmy R. Rock
JIMMY R. ROCK (#493521)
Assistant Deputy Attorney General
Public Advocacy Division

/s/ Catherine Jackson
CATHERINE JACKSON (#1005415)
Chief, Public Integrity Section

/s/ Nicole S. Hill
JENNIFER JONES (# 4673125)*
Senior Trial Counsel
NICOLE HILL (#888324938)
Assistant Attorney General
Office of the Attorney General
441 Fourth St., N.W., Suite 600-South
Washington, D.C. 20001
(202) 727-4171 (phone)
(202) 730-1868 (fax)
nicole.hill@dc.gov

Attorneys for the District of Columbia

* Admitted to practice only in New York. Practicing in the District of Columbia under the direct supervision of Kathleen Konopka, a member of the D.C. Bar, pursuant to D.C. Court of Appeals Rule 49(c).