UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Judge Casey

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THE ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC.; THE PROFESSIONAL/SCHOLARLY PUBLISHING DIVISION OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC.; PEN AMERICAN CENTER, INC.; and ARCADE PUBLISHING, INC.,

Plaintiffs,

- against -

THE OFFICE OF FOREIGN ASSETS CONTROL OF THE DEPARTMENT OF THE TREASURY; JOHN W. SNOW, SECRETARY OF THE TREASURY, in his official capacity; and R. RICHARD NEWCOMB, DIRECTOR, OFFICE OF FOREIGN ASSETS CONTROL, in his official capacity,

Defendants.

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04 CV 7604

Civ. No. _____

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PRELIMINARY AND PERMANENT INJUNCTIONS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

Page(s)

FEDERAL MATERIALS

MISCELLANEOUS

Preliminary Statement

The Office of Foreign Assets Control of the United States Department of the Treasury has promulgated regulations that classify ordinary publishing activities in the United States as illegal transactions if they involve authors in countries subject to certain U.S. trade restrictions. Congress, however, has twice declared that trade embargoes may *not* be allowed to restrict the international flow of information and ideas. Plaintiffs seek to enforce the commitment Congress has made and to defend their constitutional rights, as publishers, authors, editors and translators, to work with authors from any country in the world and publish their works for readers here.

Congress has authorized the use of embargoes as tools of foreign policy. It has insisted, however, that trade sanctions not be used to cut off communications between the people of the United States and people living under governments we oppose. In two successive amendments to the statutes that authorize embargoes – the Berman Amendment and the Free Trade in Ideas Amendment – Congress has declared that the Office of Foreign Assets Control ("OFAC") does not have the authority "to regulate or prohibit, directly or indirectly" the import or export "of information or informational materials, including . . . publications."

Defying Congress, OFAC has regulated and prohibited, directly and indirectly, exactly what Congress instructed it not to. *See* 31 C.F. R. §§ 500.206(c), 515.206(a)(2), 538.211(c)(2) and 560.210(c)(2). The regulations OFAC has promulgated, which apply to countries such as Cuba, Iran, and Sudan, forbid Americans to engage in "transactions related to information and informational materials" that are "not fully created and in existence at the time of the transaction," which means that Americans involved in the publishing process may not work with authors in those countries to develop any new works or revise existing works for American readers. The regulations further prohibit the "substantive or artistic alteration or enhancement"

of works by authors in the disfavored nations by anyone in the United States, which means that anyone subject to OFAC's jurisdiction may not freely edit, co-author, reinterpret or enhance them in the ways works from other countries are routinely enhanced for publication here – including by combining them with other works in collections or by adding introductions, illustrations, explanatory notes or prefaces. The regulations also prohibit "the provision of marketing and consulting services" either for existing works or for not-yet-fully-created works, which OFAC has acknowledged means that Americans simply cannot publish books by authors in those countries, because marketing, advertising, design and other services are inherent in the publication of a book. Publishers and authors cannot undertake any of these routine publishing activities except by special license from OFAC, which is bound by no articulated standards. Thus, OFAC's restrictions effectively prevent authors in embargoed countries from communicating their thoughts and ideas to American readers.

The works that Americans may not publish or promote as a result of OFAC's restrictions – and that most Americans, therefore, may not read – cannot be catalogued. They may arise in any field of knowledge, but many of them inevitably relate to the countries subject to embargo and to the difficulties faced by people there – subjects of great interest in the United States. Particular publications that have been cancelled, suspended or threatened by the regulations include articles in the *Journal of Democracy* and *Mathematical Geology*; books on Cuban archaeology, ornithology and the history of slavery; and *The PEN Anthology of Contemporary Iranian Literature*.

OFAC's restrictions create a literary and intellectual quarantine, interrupting the flow of information and ideas through the global community of scholars and curtailing the communications that ultimately bring people of different nations together. Congress expressly

designed the Berman and Free Trade in Ideas amendments to prevent trade embargoes from interfering with the marketplace of ideas and diminishing First Amendment freedoms. The OFAC regulations thus violate the very statutes that authorize bans on trade. (Point I A)

The OFAC regulations also block the exercise of fundamental First Amendment rights by punishing and inhibiting free speech in the most direct way possible – subjecting violators to civil and criminal penalties. They are constitutionally defective on several grounds. First, they impose an unconstitutional burden on core First Amendment rights. The regulations effectively amount to a total and therefore impermissible ban on books, a time-honored medium of expression. They are therefore presumptively unconstitutional. Even if some sort of balancing test applies, they cannot survive exacting or even intermediate scrutiny. (Point II A) Second, the ban on "substantive or artistic alteration or enhancement" is so vague and so inconsistently applied that the regulations are unconstitutional for the additional reason that they fail to give adequate notice of what is prohibited. (Point II B) Third, the regulations create a licensing scheme for publishing that acts as a classic prior restraint. (Point II C)

The very idea of applying for permission to publish threatens the principles of free expression that have made the United States a beacon of hope for people around the world. Writers in Cuba, Iran, Sudan and many other countries see their work directly suppressed by their own government authorities, and they may be jailed to prevent them from communicating ideas that are viewed as dangerous. The United States has historically served as a conduit for information and ideas suppressed by other governments, such as Alexander Solzhenitsyn's exposés of the Soviet prison camp system, democracy advocate Wei Jingsheng's letters during his first fifteen years as a political prisoner in China, and the writings of Aung San Suu Kyi, the Nobel Peace Prize winner who is still under house arrest in Burma. Books like theirs help

Americans understand what is happening in countries whose governments shield their people from our view. But the OFAC regulations prohibit Americans from publishing the works of dissidents and advocates for liberty in the very nations whose governments we seek to oppose.

Excluding works by authors who live in Iran, Cuba and Sudan from the United States deprives us of insight and information that is all too rare. Many American readers are learning about life in post-revolution Iran from *Reading Lolita in Tehran*, the memoir of a literature professor who invited seven of her best female students to meet weekly in secret in her home to study works of Western literature that were banned in Iran. The book has been on bestseller lists in the United States for more than 30 weeks. Its author fled Iran for this country in 1997. If she had remained in Iran, her book could not have been published there, but it also could not have been published here, because of the OFAC regulations. Her story about forbidden literature in the Islamic Republic of Iran would have been forbidden literature in the United States.

In the wake of recent interpretations OFAC has issued of its Information Regulations, publishers and authors are suspending publication of works of critical value to the progress of research and the conduct of foreign affairs. Plaintiffs seek a preliminary and permanent injunction to halt their enforcement. (Point III)

STATEMENT OF FACTS

A. U.S. Economic Sanctions

The regulations at issue have been imposed under the Trading With the Enemy Act ("TWEA"), 50 U.S.C. App. §§ 1-40, and the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-06. TWEA was enacted as a wartime measure in 1917. Congress granted the executive branch "definitely restricted powers" to seize the property of those designated as enemies and to regulate business between citizens of nations at war. *Behn, Meyer & Co. v. Miller*, 266 U.S. 457, 462 (1925). TWEA was later amended to extend to

peacetime national emergencies without a declaration of war, and Congress enacted IEEPA in 1977 to establish separate, limited authority for the imposition of sanctions in peacetime. U.S. sanctions against Cuba, originally imposed in 1963, continue under the authority of TWEA, while IEEPA authorizes sanctions imposed in subsequent years against Iran, Sudan and other countries. The embargoes are primarily intended to limit the flow of U.S. currency to these nations.

The Office of Foreign Assets Control promulgates and enforces U.S. economic sanctions pursuant to TWEA and IEEPA. Separate regulations set out the terms of the embargoes for each country. The regulations for Cuba, Iran, and Sudan prohibit most forms of trade. Goods or services that originate in those countries may not be imported into the United States, and goods or services from the United States may not be exported to those countries, with some exceptions. *See* Foreign Assets Control Regulations, 31 C.F.R. § 500 (2004); Cuban Assets Control Regulations, 31 C.F.R. § 515 (2004); Sudanese Sanctions Regulations, 31 C.F.R. § 538 (2004); Iranian Transactions Regulations, 31 C.F.R. § 560 (2004). The regulations challenged here, which apply the sanctions to activities protected by the First Amendment, are codified at 31 C.F.R. §§ 500.206(c), 515.206(a)(2), 538.211(c)(2), and 560.210(c)(2), and in the second sentences of §§ 500.550(b) and 515.545(b) (the "OFAC Information Regulations").

The sanctions carry the force of substantial penalties behind them. Violations of TWEA may be punished by up to ten years in prison and by criminal penalties of up to $1,000,000 for corporations and $250,000 for individuals. Violations of IEEPA may be punished by up to ten years in prison and by criminal penalties of up to $500,000 for corporations and $250,000 for individuals. OFAC may, in addition, impose civil penalties of up to $65,000 under TWEA and up to $11,000 under IEEPA through administrative proceedings. Multiple violations may be

found within a single transaction. Reporting, Procedures, and Penalties Regulations, 31 C.F.R. § 501.701; 50 U.S.C. App. § 16; 50 U.S.C. § 1705; 18 U.S.C. § 3571 (2004).

B. The Berman Amendment and the Free Trade in Ideas Amendment

1. The Berman Amendment

In 1988, in response to several seizures of shipments of magazines and books from embargoed countries at the U.S. border, Congress added an exemption to IEEPA and TWEA to ensure that "informational materials" would not be excluded from the United States. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988); *Kalantari v. NITV, Inc.*, 352 F.3d 1202 (9th Cir. 2003). In what became known as the "Berman Amendment," Congress restricted executive authority, making clear that the executive branch may not regulate or prohibit the import or export of informational materials directly or indirectly. In pertinent part, the Berman Amendment provided that

> [t]he authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly, the importation ... or the exportation ..., whether commercial or otherwise, of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other informational materials.

50 U.S.C. App. § 5(b)(4)(1988).[1]

The legislative history of the Berman Amendment reflects Congress's concern that trade sanctions not interfere with the exchange of ideas and information. The Conference Report declares that the Amendment "clarifies that the Trading with the Enemy Act and the

[1] To ensure that the exemption for informational materials could not interfere with controls on the export of sensitive technology or security information, Congress excluded materials "otherwise controlled for export under section 5 of the Export Administration Act of 1979," which permits the President to prohibit the export of goods or technology to protect national security, "or with respect to which acts are prohibited by chapter 37 of title 18, United States Code," which prohibits espionage and the disclosure of classified information. *Id.*; 50 U.S.C. App. § 2404; 18 U.S.C. §§ 79-799. Those provisions are not challenged here.

International Emergency Economic Powers Act do not authorize regulations on the export or import of informational material not otherwise controlled under the Export Administration Act." H.R. Conf. Rep. No. 100-576, *reprinted in* 1988 U.S.C.C.A.N. 1547, 1872.[2] The House Foreign Affairs Committee's report emphasizes the principle that ideas and information should flow freely both into the United States and from the United States to the rest of the world, in light of the First Amendment interests at stake, which a recent resolution of the American Bar Association had highlighted:

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

H.R. Rep. No. 100-4, pt. 3, at 113 (1987)[3] (Davis Decl. Ex. B).

Senator Mathias, who sponsored the predecessor bill identical in pertinent part to the Berman Amendment and incorporated as part of its legislative history, explained that "[t]oday's telecommunications media can bring into our living rooms the images and voices of exponents of every political and artistic tendency around the globe. To deny . . . information entry or exit not only injures our freedom but insults the intelligence of the American people" and deprives us of tools of self-government:

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[2] A copy of the relevant excerpt of the conference report is annexed as Exhibit A to the Declaration of Edward J. Davis, dated Sept. 24, 2004, submitted herewith ("Davis Decl.").

[3] The Berman Amendment was passed as part of the Omnibus Trade and Competitiveness Act of 1988, which was derived largely from a predecessor bill that was vetoed because it included a subtitle relating to plant closings. The 1988 act, however, specifically provides that the legislative history for the predecessor bill should be treated as its own legislative history. Omnibus Trade and Competitiveness Act of 1988, Pub.L. No. 100-418, 102 Stat. 1107, § 2.

> A free flow of information and ideas among American citizens is the foundation of our democratic society. Through open and robust debate in the marketplace of ideas, American citizens inform themselves of choices that affect their lives. However, this liberty, secured by the first amendment, is thwarted by a number of laws which permit the Government to restrict the flow of information and the travel of individuals into and out of the United States.... Expanding contacts across borders and permitting a free exchange or interchange of information and ideas increases confidence; sealing off one's people from the rest of the world reduces it.

132 Cong. Rec. S3707-04 (1986) (Davis Decl. Ex. C).

2. OFAC's Response to the Berman Amendment

OFAC amended its regulations in a purported attempt to comply with the Berman Amendment. The amended regulations expanded the general licensing provisions to authorize all transactions relating to "informational materials." 54 Fed. Reg. 5229, 5231-34 (1989); 31 C.F.R. §§ 500.206, 500.550, 515.206, 515.545 (1990, 2004). However, they narrowly defined "informational materials" to include only "information recorded in tangible form," excluding "intangible items, such as telecommunications transmissions." 54 Fed. Reg. 5229, 5231, 5233; 31 C.F.R. §§ 500.332, 515.332 (1990). The exemption for transactions relating to "informational materials" also contained the following unexplained carve-out:

> This section does not authorize transactions related to informational materials not fully created and in existence at the date of the transaction, or to the substantive or artistic alteration or enhancement of informational materials, or to the provision of marketing and business consulting services by a person subject to the jurisdiction of the United States. Such prohibited transactions include, without limitation, payment of advances for informational materials not yet created and completed, provision of services to market, produce or co-produce, create or assist in the creation of informational materials, and payment of royalties to a designated national with respect to income received for enhancements or alterations made by persons subject to the jurisdiction of the United States to informational materials imported from a designated national.

54 Fed. Reg. 5229, 5231, 5233; 31 C.F.R. §§ 500.206(c); 515.206(c) (1990). The new regulations went into effect on February 2, 1989.

Within a year, OFAC's restriction of the scope of "informational materials" exempted from regulation faced two legal challenges. In the first case, *Cernuda v. Heavey*, 720 F. Supp. 1544 (S.D. Fla. 1989), 200 Cuban paintings allegedly imported in violation of TWEA had been seized, but the court ruled that the artwork qualified as "informational materials" exempt from regulation. The second challenge, *Capital Cities/ABC v. Brady*, 740 F. Supp. 1007 (S.D.N.Y. 1990), arose from a proposed transaction for the live broadcast of the 1991 Pan American Games from Cuba. OFAC argued that Congress' choice of the term "informational *materials*" meant that the exemption was limited to works fully in being, "physical or corporal work[s] in existence," rather than "ideas and information protected by the First Amendment."[4] The court accepted OFAC's argument, leading Congress to visit the issue again.

3. Congress's Response to OFAC's Unauthorized Prohibitions: the Free Trade in Ideas Amendment

Dismayed by OFAC's unauthorized narrowing of the Berman Amendment and the outcome in the *Capital Cities* case, Congressman Berman proposed new legislation in 1992, known then as the Free Trade in Ideas Act, to clarify Congress's original intent to allow the free flow of all information protected by the First Amendment. Congressman Berman explained the concerns of Congress and the aim of the legislation:

> The purpose of this legislation is to protect the right of Americans ... to exchange information and ideas with foreigners. This bill would amend [TWEA and IEEPA] to ensure that the President's power to regulate economic relations with foreign countries is not used to inhibit communication with the people of those countries.

[4] A copy of the memorandum of law submitted on behalf of OFAC in the *Capital Cities/ABC* case ("OFAC *Capital Cities/ABC* Brief") is annexed as Exhibit G to the Davis Decl. *See* OFAC *Capital Cities/ABC* Brief at 13-14.

> The fact that we disapprove of the government of a particular country ought not to inhibit our dialog with the people who suffer under those governments....
>
> [C]onsistent adherence to our own democratic principles is the surest way to promote our political values abroad. We are strongest and most influential when we embody the freedoms to which others aspire. There is a growing consensus that foreign policy goals should and can be pursued without infringing on the First Amendment rights of Americans to impart and receive information and ideas.
>
> My amendment to the Omnibus Trade and Competitiveness Act of 1988 to allow the export and import of books and other informational materials, subject to protections for national security information, was enacted with bipartisan support in Congress, and with the imprimatur of the administration.
>
> Nevertheless, the Treasury Department, which is charged with enforcement of this law, has attempted to interpret it so as to limit the exchange of public information between Americans and foreigners.... [T]he insignificant sums of money that may be realized by foreign governments from trade in books, works of art, and other informational materials, cannot be a valid reason for curtailing the rights of Americans, or for cutting off the flow of ideas to captive peoples who are starved of contact with the larger world of ideas and information.

138 Cong. Rec. E1856-04, E1857 (Davis Decl. Ex. D). A summary of the bill in the legislative history reiterated that the legislation was "necessary to clarify the intent of Congress in adopting the Berman amendment":

> That provision provided protection from embargoes for materials protected by the First Amendment of the U.S. Constitution. The Executive Branch has interpreted the 1988 provision narrowly, to exclude many informational and artistic materials. That has resulted in litigation, with results adverse to the Administration position. Nevertheless, delays resulting from attempts to restrict information exchanges have effectively prevented the free flow of information which was contemplated by the 1988 provision. Section 2 makes clear that *all First Amendment protected materials and activities*, including paintings, telecommunications, and travel necessary for trade in information, are within the ambit of the statute's protection.

Id. (emphasis added).

Following Congressman Berman's introduction of the Free Trade in Ideas Act, Secretary of State Warren Christopher asked him to withdraw the provision in exchange for regulatory reform and "an interagency review of our existing sanctions programs ... to ensure they properly reflect our mutual commitment to the dissemination of information and ideas." The letter affirmed "the Administration's commitment to the dissemination of information and ideas as a significant element in the promotion of democracy" and "endorse[d] the underlying objectives of the Free Trade in Ideas Act." 140 Cong. Rec. S15462-02, S15466 (Davis Decl. Ex. E).

When Congress felt the interagency process was proceeding too slowly, it enacted what became known as the "Free Trade in Ideas Amendment" as part of the State Department Authorization Act of 1994. Congress added the words "information and" to the phrase "informational materials" to make it clear that the exemption applies to information even if it has not yet been given tangible form as a "fully created" completed work at the time of the transaction. Congress also added four new examples of informational materials that would be covered by the exemption and expressly stated that the exemption applies regardless of format or medium of expression. The statutory language now reads:

> The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly, the importation from any country, or the exportation to any country, whether commercial or otherwise, *regardless of format or medium of transmission,* of *any information or* informational materials, *including but not limited to*, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, *compact disks, CD ROMs, artworks, and news wire feeds.*

P.L. 103-236, Sec. 525(b), (c); *codified in* 50 U.S.C. § 1702(b)(3); 50 U.S.C. App. § 5(b)(4). (The words in italics were added by the Free Trade in Ideas Amendment to the original text of the Berman Amendment.)

Echoing Congressman Berman's remarks, the conference committee's report reiterates that the purpose of the Free Trade in Ideas Amendment was to counteract OFAC's misinterpretation of the scope of the exemption for "informational materials":

> [The Berman Amendment] established that no embargo may prohibit or restrict directly or indirectly the import or export of information that is protected under the First Amendment to the U.S. Constitution. The language was explicitly intended, by including the words 'directly or indirectly,' to have a broad scope. However, the Treasury Department has narrowly and restrictively interpreted the language in ways not originally intended. The present amendment is only intended to address some of those restrictive interpretations, for example limits on the type of information that is protected or on the medium or method of transmitting the information.

H.R. Conf. Rep. No. 103-482, 1994 U.S.C.C.A.N. 398, 483 (Davis Decl. Ex. F). It further specified that Congress intended "informational materials" to include both tangible and intangible information:

> The committee of conference intends these amendments to facilitate transactions and activities incident to the flow of information and informational materials without regard to the type of information, its format, or means of transmission, and *electronically transmitted information, transactions for which must normally be entered into in advance of the information's creation.*

Id. (emphasis added).

Congress's message in enacting the Free Trade in Ideas Amendment was clear. The exemption for "information and informational materials" was to apply to all materials and activities protected by the First Amendment, regardless of medium and regardless of whether the materials were fully created before they were imported or not.

C. The Present OFAC Information Regulations

1. Contradictions of the Statute

In spite of this clarification of the statutory language and Congress's explicit articulation

of the legislation's purpose, OFAC has continued to misinterpret and misapply the sanctions statutes, in defiance of Congress's manifest intent. OFAC revised its regulations to respond to the Free Trade in Ideas Amendment – the term "information" was added, and the definition of informational materials was revised to encompass "compact disks, CD ROMS, artworks and news wire feeds." 60 Fed. Reg. 8933, 8934 (1995). But OFAC made no changes to the provisions of the regulations that forbid Americans from entering into transactions related to information "not fully created and in existence at the date of the transactions" – such as publishing agreements for new or to-be-revised books or articles. 31 C.F.R. §§ 500.206(c), 515.206(a)(2) (2004). Nor did OFAC retract the prohibitions on "substantive or artistic alteration or enhancement of informational materials" and "the provision of marketing and consulting services" in connection with either existing or not-yet-fully-created works, despite Congress's second declaration that no direct or indirect regulation or prohibition of information is permitted. *Id.* *See also* 31 C.F.R. §§ 538.211(c)(2), 560.210(c)(2).

2. The Licensing Provisions

OFAC's regulations give the agency discretion to authorize otherwise prohibited transactions by way of licenses. Reporting, Procedures and Penalties Regulations, 31 C.F.R. § 501.801 (2004). They provide for both general licenses, which permit entire classes or categories of transactions, and specific licenses, which require case-by-case determinations and approval by OFAC. OFAC's determinations, however, are not subject to any announced criteria –OFAC has stated simply that they are guided by U.S. foreign policy and national security concerns. *See* OFAC website, Frequently Asked Questions, *available at*

www.ustreas.gov/offices/enforcement/ofac/faq/#license.[5] OFAC's regulations further permit it to amend or rescind existing licenses at any time or to exclude any particular person or transaction from operation of any general or specific license. 31 C.F.R. §§ 501.803, 500.503, 515.503, 538.502, 560.502 (2004). There is no limit to how long OFAC may take to respond to a license application – indeed, one letter ruling on the OFAC Information Regulations was issued almost a year and a half after the inquiry was made (*see* 9/26/03 OFAC Ruling described below).[6] Nor is there any formal process for appealing the denial of a license. Reporting, Procedures and Penalties Regulations, 31 C.F.R. § 501.801 (2004).

D. OFAC's Enforcement

1. Penalties Applied to First Amendment Activities

OFAC's enforcement division vigorously investigates violations of its regulations and the statutes it administers. Since 1993 it has imposed penalties in more than 8,000 matters, generating fines of nearly $30 million. Congressional Testimony of OFAC Director, R. Richard Newcomb, June 16, 2004, *reprinted at* 2004 WL 2012773.

Among the few publicized enforcement actions involving First Amendment activity was the action taken by OFAC against the musician Ry Cooder. In 1999, Mr. Cooder was fined $25,000 for collaborating with Cuban musicians to record the enormously popular, Grammy-winning album *The Buena Vista Social Club*. According to press reports, when Mr. Cooder sought to return to Cuba to record a second album, OFAC refused to grant him a license. Later

[5] The importation of works from, and exportation of services to, North Korea similarly requires prior approval from OFAC, and OFAC's regulations leave open the criteria applied to such applications. 31 C.F.R. § 500.586(b)(2) (2004).

[6] Copies of interpretive rulings issued by OFAC pertaining to the OFAC Information Regulations are annexed to the Declaration of Marc H. Brodsky, Chair of the Executive Council of plaintiff PSP, dated Sept. 22, 2004, submitted herewith ("Brodsky Decl."). *See* Brodsky Decl., Ex. B.

reversing its position, OFAC stated that Mr. Cooder could return to Cuba to record the album but only if he agreed to forgo any profits from the album. Mr. Cooder rejected that offer and instead lobbied senior members of the Clinton Administration for an unconditional license. Those efforts paid off when President Clinton, during his last days in office, prevailed on OFAC to grant the license, and the album was made and distributed. Declaration of Peter Givler, Executive Director of AAUP, dated Sept. 21, 2004, submitted herewith ("Givler Decl."), ¶ 57, Ex. F. This example suggests that OFAC's licensing determinations may be influenced by the resources and influence of the applicant.

Plaintiffs do not know how often OFAC has imposed sanctions for First Amendment protected activities because OFAC has only recently begun to make reports of its enforcement actions accessible to the public. Plaintiffs are not aware of efforts by OFAC to enforce its overly narrow interpretation of the exemption against books or journal articles after the Berman and the Free Trade in Ideas Amendments and prior to September, 2003. During that period, many in the publishing community were aware that Congress had protected information from trade embargoes and thought no further about the subject. Givler Decl. ¶ 42. Beginning late last year, however, OFAC issued a series of interpretive rulings that created increasing concern for publishers, authors and others; led them to suspend planned publications; and led the plaintiffs to institute this action.

2. OFAC Letters to Unnamed Entities

In September 2003, responding to inquiries from U.S. entities interested in publishing books by Iranian authors in the United States and working with Iranian publishers to publish U.S. works there, OFAC ruled that several routine publishing activities would *not* be covered by the exemption for information and would therefore be barred. In two letters, OFAC stated that:

- U.S. persons may not engage Iranian authors to create new works;

- U.S. persons are not authorized to assist Iranian authors by editing and otherwise preparing their manuscripts for publication, including the reordering of paragraphs or sentences, correction of syntax and grammar, and replacement of inappropriate words, since such activities "would result in a substantively altered or enhanced product"; and

- U.S. persons may not create illustrations for Iranian-authored works because that would constitute "a prohibited exportation of services."

9/15/03 OFAC Ruling, 9/26/03 OFAC Ruling (Brodsky Decl. Exs. A, B).

Even more broadly, OFAC ruled that the publication of books in the U.S. on behalf of persons in Iran or publication of books in Iran on behalf of U.S. persons is prohibited. As OFAC put it, "Inherent in the publication of a book are marketing, distribution, artistic, advertising and other services not exempt from [OFAC's regulations]. Thus, you may not publish books in the United States on behalf of a person in Iran, nor may a person in Iran publish books on your behalf." 9/26/03 OFAC Ruling; *see also* 9/15/03 OFAC Ruling (Brodsky Decl. Exs. A, B).

3. OFAC Correspondence with IEEE

That same month, OFAC issued an interpretive ruling to the Institute of Electrical and Electronics Engineers ("IEEE"), which publishes scientific and technical journals, that certain ordinary activities undertaken by IEEE in the publication of works by Iranian authors fell outside the "information and informational materials exemption" and therefore were barred:

> [The] collaboration on and editing of manuscripts submitted by persons in Iran, including activities such as the reordering of paragraphs or sentences, correction of syntax, grammar, and replacement of inappropriate words by U.S. persons ... may result in a substantively altered or enhanced product, and is therefore prohibited under [OFAC's regulations] unless specifically licensed.

9/30/03 OFAC Ruling (Brodsky Decl. Ex. C). Further, IEEE's facilitation of a peer review process, including the selection of reviewers to collaborate with Iranian authors and transmitting the reviewers' comments to the authors, would violate the regulations because it would

substantively enhance the articles. OFAC indicated that a U.S. publisher could accept "camera-ready copy" from Iran and distribute it here but that "the provision of marketing or business consulting services is generally not permitted as incidental to the importation or exportation of informational materials," although marketing a periodical as a whole (as opposed to an article by an author in one of the disfavored nations) would be permissible. *Id.*

In October 2003, IEEE submitted supplemental information to OFAC and called upon the agency to recognize that the Berman Amendment exempted all aspects of its publication process from trade sanctions, including editing and peer review. Congressman Berman sent a letter to OFAC's director stating that its recent interpretations were "patently absurd" and "clearly inconsistent with both the letter and spirit of the law." Letter from Rep. Berman to Richard Newcomb, Director of OFAC, dated Mar. 3, 2004 (Davis Decl. Ex. H).

On April 2, 2004, OFAC ruled that IEEE could, without a license, engage in the limited peer review process it had described, *but only* so long as the process begins with completed manuscripts – not new or commissioned material – and provides only "general guidance and suggestions" from reviewers and editors that does not result in the "substantive[] re-writ[ing] or revis[ing of] the manuscript" or "a collaborative interaction . . . resulting in co-authorship or the equivalent thereof." 4/2/04 OFAC Ruling (Brodsky Decl. Ex. D). This time, OFAC stated that routine copy editing, such as changing font sizes, correcting linguistic errors and repositioning illustrations, would be exempt because such acts would *not* amount to substantive alteration or enhancement of the work. *Id.* OFAC's second ruling on IEEE's activities highlights the uncertainties that the prohibition of substantive alteration or enhancement of a work has generated for publishers and authors.

4. Letter Regarding Funding Translation Projects

In July 2004, OFAC issued an interpretive ruling stating that it would be permissible for a U.S. person to fund the translation of already-published literary works by Iranian writers, evidently on the theory that reproducing, dubbing or translating existing works would not substantially alter or enhance them, which OFAC reiterated would not be allowed. Works not yet published were not addressed. 7/6/04 OFAC Ruling (Brodsky Decl. Ex. E).

5. Interpretive Ruling on Articles and Commentary in Newspapers

Most recently, on July 19, 2004, OFAC issued another contradictory interpretation of the exemption for "information and informational materials" – this time, in response to a query from the American Society of Newspaper Editors ("ASNE"). ASNE inquired whether U.S. newspapers could (1) translate a completed article or op-ed commentary by a writer in a sanctioned country into English; (2) edit such a work for space reasons by deleting superfluous text but make no substantive changes, additions or rearrangement of text; (3) edit it solely to correct grammar, syntax or spelling errors; and (4) substantively edit it to make it more cohesive, efficient, argumentative or effective, in the same manner that it would for one of its own writers. OFAC responded that all four activities would be permissible, even substantive editing, which it had earlier ruled impermissible. OFAC made no effort to square its ruling with its regulations, which bar substantive alteration, but merely stated that "*offering substantive edits* to the work's content ... to make the work more understandable to the newspaper's readers and to make the work conform to the newspaper's editorial standards *would not constitute substantive or artistic alteration or enhancement* of the article or commentary." 7/19/04 OFAC Ruling (Brodsky Decl. Ex. F) (emphasis added). OFAC did not explain why "substantive editing" would not constitute "substantive alteration or enhancement." Nor did the letter explain OFAC's dramatic departure from its prior rulings or why newspapers should be treated differently from books and journals.

Faced with such inconsistency, publishers are left to wonder which rulings to follow and which transactions remain prohibited.

There is no uncertainty, however, about other prohibitions in the OFAC Information Regulations. OFAC has consistently maintained that American publishers may not enter into agreements to publish new works or substantially revised works by authors in the targeted nations. Americans may not pay them advances; Americans may not co-author works with them; and Americans may not engage in marketing activities for new or existing works written by authors in the target nations. And OFAC has consistently maintained that Americans may not "substantively or artistically alter or enhance" such works, although its inconsistent rulings have left the meaning of that phrase unclear.

E. The Plaintiffs

The plaintiffs represent thousands of American publishers, authors, editors, translators and others integral to the publishing process.

The Association of American University Presses ("AAUP") is the trade organization for non-profit scholarly publishers. Its 124 member publishers – the presses affiliated with research universities, scholarly societies, foundations, museums and non-degree-granting research institutions – publish the vast majority of scholarly books in this country and a wide range of academic journals. Givler Decl. ¶¶ 2-3.

The Professional/Scholarly Publishing Division of the Association of American Publishers ("PSP") includes the publishers of the vast majority of materials created and used by scholars and professionals in the United States in science, technology, medicine, business, and law, in the form of books, journals, computer software, databases and CD-ROMs. Their publications and their publishing processes, including the peer review of research results and

other scholarship, form an integral part of worldwide research in nearly every field. Brodsky Decl. ¶¶ 3-4.

PEN American Center ("PEN"), the non-profit association of authors, editors, translators, and literary agents, has approximately 2,700 members who strive for the unimpeded flow of ideas and information throughout the world. In addition to representing the interests of its members, PEN funds and operates a program to promote the translation and publication in the United States of works by authors in other countries, including countries subject to trade sanctions. Declaration of Salman Rushdie, President of the Board of Trustees of PEN, dated Sept. 22, 2004, submitted herewith ("Rushdie Decl.") ¶¶ 1-2, 7-8, 43-60.

Arcade Publishing ("Arcade") is an independent book publisher based in New York that publishes fiction and nonfiction by authors from around the world. Declaration of Richard Seaver, President and Editor in Chief of Arcade, dated Sept. 22, 2004, submitted herewith ("Seaver Decl."), ¶ 1.

F. The Effects of the OFAC Information Regulations

1. The Scope and Impact of the Prohibitions

The OFAC Information Regulations drastically impede the free flow of information in every medium, created in whole or in part by individuals in Iran, Cuba, and Sudan. Of greatest concern to plaintiffs, as explained in the accompanying declarations of publishers, editors, authors and the organizations that represent them, the OFAC Information Regulations effectively make it illegal for American publishers to publish any books and, in many cases, journal articles, by authors in the restricted countries, because all the activities prohibited by the regulations are integral to the publishing process.

It is standard practice, for instance, for publishers of books and scholarly journals to enter into publishing agreements before new works or revised works are completed. They have to

engage in "transactions relating to information or informational materials not yet fully created" – which the regulations prohibit – to select and shape the works they publish in keeping with their editorial vision and publishing program. Publishers and their editors, often together with literary agents, collaborate with authors to develop the ideas and plan the topics, structure and approach for their works and generally must enter into a commercial relationship before a book or article is completed. Givler Decl. ¶¶ 22-24, 31; Brodsky Decl. ¶¶ 13, 26-29, 35; Rushdie Decl. ¶¶ 17, 24; Ross Decl. ¶¶ 22-24.

Authors, too, need to "engage in transactions" before they complete a work. Many could not devote the hundreds, if not thousands, of hours required to create a finished work without a prior assurance of publication. Brodsky Decl. ¶¶ 43-46; Givler Decl. ¶¶ 22-24, 29-30; Rushdie Decl. ¶ 61; Seaver Decl. ¶ 46. Publishers also routinely pay advances on royalties for new works or even for significant revisions of works published abroad. Compensation is a significant inducement for authors, as for all professionals, and individuals often cannot afford to spend the time necessary to write or translate without compensation. *Id.*

The prohibition against the substantive alteration or enhancement of a work also conflicts with the way American publishers of books and journals do their work. Substantive editing and, in many instances, expert peer review, form an integral part of the publication process for almost all authors, a function that is critical to bringing any work into conformity with a publisher's goals and standards, to ensure that it communicates effectively and will make a worthwhile contribution to knowledge. Publishers do more than merely "advise the ... author of the nature and extent of th[e] problems," which OPAC has approved. They also regularly "substantively rewrite or revise the manuscript for the authors to remedy those problems." 4/2/04 OFAC Ruling. Linguistic and cultural barriers for many authors from the restricted countries makes

such editing all the more important. Even when language and culture pose no problems, substantive editing is crucial, especially for the primary research publications that subject articles to rigorous peer review so that results may be published and relied upon by other researchers, but also for other scholarly and professional publications and for works for the general public, as well. Brodsky Decl. ¶¶ 14, 17-24, 30-37; Givler Decl. ¶¶ 25-28, 33-34; Seaver Decl. ¶¶ 47-48; Rushdie Decl. ¶ 18; Ross Decl. ¶¶ 26-38.

Publishers also substantively alter and enhance works by translating them – a process that is far from mechanical – and by adding photographs, artworks, explanatory notes, introductions or links to electronic files. Rushdie Decl. ¶¶ 19, 32-42, 53-54, 59; Brodsky Dec ¶ 38; Givler Decl. ¶¶ 35-39; Seaver Decl. ¶¶ 6-18, 28-32, 35-36. For reference works, photo essays and many other publications, such enhancements are often essential and can produce new works that offer readers far more insight and information than the original text alone. *See, e.g.*, Ackerman Decl. ¶¶ 10-11; Rushdie Decl. ¶ 42.

OFAC has maintained that any input that rises to the level of co-authorship is forbidden. The prohibition of enhancement therefore also bans authors from working jointly on publications with other specialists in their fields, whether in music, archaeology, history, medicine, or hundreds of other subjects. In scientific journals, in particular, collaboration and joint authorship are the rule more than the exception. By prohibiting collaborations, OFAC retards the advancement of knowledge in many fields. It forbids Americans from working with co-authors in countries to which Americans do not have free access to conduct research. Brodsky Decl. ¶¶ 8, 21, 23, 37, 59-61; Rushdie Decl. ¶¶ 20-23; Givler Decl. ¶¶ 14-15; Seaver Decl. ¶¶ 19-27; Ross Decl. ¶ 12-18.

The prohibition against marketing, which applies equally to pre-existing works and works not yet created, has the effect of rendering it impossible to publish a book created in whole or in part by an individual in a restricted country. Foreign authors who are unfamiliar with the American publishing industry often need literary agents to help them market their works to publishers. Moreover, book publishers cannot feasibly publish books without marketing them. They must at a very minimum describe their upcoming publications in marketing catalogs and allow their sales forces to promote them. They also have to be able to solicit press stories and reviews, place advertisements, and arrange readings and other appearances. If publishers could not market their works, publication would be pointless, because there would be no way to inform the public or the relevant profession that a publication is available. *See, e.g.*, Brodsky Decl. ¶¶ 39-41; Givler Decl. ¶¶ 40-41; Rushdie Decl. ¶¶ 45, 54-55, 57-58, 60; Seaver Decl. ¶¶ 42-44; Ross Decl. ¶¶ 39-41.

According to OFAC, journal publishers may promote a journal as a whole and thus avoid the marketing prohibition (*see* 9/30/04 OFAC Ruling), but book publishers cannot realistically publish a book without marketing the individual title, as OFAC has recognized. *See* 9/26/03 OFAC Ruling. Thus, even though the OFAC Information Regulations nominally permit the publication of fully created works from the restricted countries in the United States, OFAC has prohibited "marketing services" which it admits are essential to publishing them. *Id.*

The OFAC Information Regulations apply to written works of all kinds and on all subjects; they preclude the publication of works that can enhance our understanding of the world and of the countries under embargo in particular. Rushdie Decl. ¶¶ 9-11, 21, 28-29, 47-52, 58, 69; Givler Dec ¶¶ 10-16; Seaver Decl. ¶ 37. They prevent American scientists from learning of critical advances in medicine and other fields and from choosing the best collaborators in the

world for their publications. Brodsky Decl. ¶¶ 8, 23, 61; Givler Decl. ¶ 15; Ackerman Decl. ¶¶ 14, 26-27. They preclude publication of new books by dissidents and opposition leaders living under regimes the United States classifies as an "unusual and extraordinary threat" (which makes them subject to sanctions under IEEPA). They preclude publication of the countless works of other scholars and writers whose observations of their own cultures and environments can contribute to our understanding of the people and governments in the regimes our sanctions target and thereby inform our conduct of foreign affairs.

Ironically, many of the books and articles prohibited by OFAC cannot be published in the authors' native countries. Sudan, for example, does not have a well-developed publishing industry, and publication in the United States represents one of the only realistic chances for Americans to be exposed to a Sudanese author's work. Rushdie Decl. ¶ 23. Dissidents in the restricted countries may suffer for expressing their views. Because of the OFAC Information Regulations, however, dissidents who are not free to publish at home cannot publish here, either, where they might gain international attention and some measure of protection from harm. Rushdie Decl. ¶¶ 11, 25-29, 41, 49-51, 59; Givler Decl. ¶¶ 17, 32; Seaver Decl. ¶¶ 38-40.

2. Particular Projects That Have Been Affected

As a result of OFAC's recent enforcement and interpretations of its Information Regulations, several publishers have suspended or cancelled significant publishing projects in history, literature, science and the arts. Others are concerned about the possible consequences of continuing particular projects or wish to be able to publish works by authors in the affected countries. They do not want to face penalties or prosecution but they do not believe they should have to apply for permission to publish.[7]

[7] Brodsky Decl. ¶¶ 47-63; Givler Decl. ¶¶ 55-58; Rushdie Decl. ¶¶ 63-65; Seaver Decl. ¶ 51; *see also* Declaration of John G. Ackerman, Director of Cornell University Press, dated Sept. 22,

Particular publications that have been suspended or endangered following the 2003-04 OFAC rulings are described in declarations submitted herewith. Some examples follow:

- The University of Alabama Press ("UA Press"), a member of plaintiff AAUP, suspended the publication of *Dialogues in Cuban Archaeology*, a discussion among leading Cuban and American archaeologists. American and Cuban archaeologists have had few opportunities to exchange information in recent decades, and the draft manuscript had been applauded by peer reviewers as a breakthrough for the field. Ross Decl. ¶¶ 10, 12-18, 42-44.

- UA Press also suspended publication of *A Colossus on the Sand: The Slave Revolt of 1825 in Guamacaro and the Atlantic World*, by a Cuban scholar. Based on otherwise inaccessible material in the Cuban National Archives, the book would have provided an unprecedented opportunity for Americans to learn about a previously unstudied slave rebellion led by three African men in Cuba, which had a lasting influence on slavery and the resistance movement throughout the Atlantic region. Ross Decl. ¶¶ 10, 19-21, 42-44.

- *Mathematical Geology*, the journal of the International Association for Mathematical Geology and a member of plaintiff PSP, cancelled the publication of a paper by geologists at Shiraz University in Iran. The paper describes a novel methodology to facilitate the geophysical interpretation of mapping data that aims to advance earthquake prediction. Sharp Decl. ¶¶ 2, 4-15, 17.

- The Smithsonian Institution Press, a member of AAUP, suspended its plans to publish an English/Spanish edition of *The City of Columns*, by the acclaimed Cuban novelist and cultural writer Alejo Carpentier, which considers the unique historic architecture of Havana. The bilingual version would have combined the text with photographs by prominent American and Cuban photographers, an essay by a well-known Cuban cultural critic, and a preface by a prominent American architect. Mahler Decl. ¶¶ 8-27, 31; Rushdie Decl. ¶ 42.

- Cornell University Press ("CU Press"), another member of AAUP, suspended its plans to reprint its *Field Guide to the Birds of Cuba*, a successful international collaboration that combined text authored by Cuban ornithologists with illustrations by an American artist and innovative designs devised by CU Press.

2004 ("Ackerman Decl.") ¶ 22-24; Declaration of W. Edwin Sharp, Editor of *Mathematical Geology*, dated Sept. 3, 2004 ("Sharp Decl.") ¶¶16-18; Declaration of Scott Mahler, former Senior Editor of The Smithsonian Institution Press, dated Sept. 21, 2004 ("Mahler Decl.") ¶¶ 28-30; Declaration of Daniel J.J. Ross, Editor of the University of Alabama Press, dated Sept. 9, 2004 ("Ross Decl.") ¶¶ 46-47; Declaration of Janet M. Francendese, Editor-in-Chief of Temple University Press, dated Sept. 13, 2004 ("Francendese Decl.") ¶ 19; Declaration of William Breichner, Journals Publisher of the John Hopkins University Press, dated Sept. 21, 2004 ("Breichner Decl.") ¶ 18.

The *Field Guide* is an important resource for understanding bird species found in Cuba and the fragile ecosystems they inhabit, as well as the migration patterns of birds along the eastern coast of the Americas. Ackerman Decl. ¶¶ 8-21.

- Northwestern University Press has put on "hold" a project supported by PEN to publish a selection of twelve short stories written in Cuba during the past decade by young writers, some of whose works have not circulated freely because of political constraints. The book would include an introduction by the editors (two American comparative literature scholars) to help American readers more fully appreciate the translated works. Rushdie Decl. ¶¶ 59-60.

- The OFAC Regulations also threaten *The PEN Anthology of Contemporary Iranian Literature*, which PEN has sponsored and another plaintiff in this action, Arcade, has plans to publish. The anthology will contain writings by leading Iranian writers, poets, and critics created since the Iranian Revolution, many of which reflect the turmoil and repression of recent years. *The PEN Anthology* is a collaborative effort between Americans and Iranians; for example, the American scholar and editor Nahid Mozaffari is adding biographical and explanatory notes and an introductory essay for the book, providing historical and literary context to help American readers more fully appreciate the translated works. Rushdie Decl. ¶¶ 53-54; Seaver Decl. ¶¶ 5, 33-42.

- The Johns Hopkins University Press ("JHU Press") publishes both books and scholarly journals. Two of its journals have encountered quandaries created by the OFAC Information Regulations: the *Journal of Democracy* and *Technology and Culture*, which has received a promising manuscript from a professor at the University of Tehran in Iran that would require considerable substantive editing to be published. Breichner Decl. ¶¶ 5-16, 19-24.

- Temple University Press decided to forgo an exciting project, an *Encyclopedia of Cuban Music*, because of the OFAC Information Regulations. The *Encyclopedia* would have been the definitive work in its field and the product of the Cuban author's thirty-year study of the subject. Francendese Decl. ¶¶ 8-18.

There are countless examples of works that would interest and inform American readers but cannot be published because they would violate the OFAC Information Regulations. The works we are missing could include, for example, the writings of political prisoners in Cuba and Iran (Rushdie Decl. ¶¶ 22, 23); works by dissidents in Iran for the *Journal of Democracy* (Breichner Decl. ¶ 16); articles by Cuban scientists on research in infectious diseases (Brodsky Decl. ¶ 8); writings by people in Sudan about environmental disasters, religious and civil strife, and famine (Brodsky Decl. ¶ 8; Rushdie Decl. ¶ 23); articles by geologists in sanctioned

countries about their research (Sharp Decl. ¶ 25); and books that would illuminate pressing issues that face us in international affairs (Givler Decl. ¶¶ 13, 17; *see also* Seaver Decl. ¶ 40). The loss of such works harms American publishers, scholars and authors everywhere, and the American public.

ARGUMENT

I. THE OFAC INFORMATION REGULATIONS VIOLATE TWEA AND IEEPA AS AMENDED BY THE BERMAN AND FREE TRADE IN IDEAS AMENDMENTS

Twice now Congress has passed legislation forbidding OFAC from regulating the import and export of any and all materials protected by the First Amendment. The statutes, enacted with bipartisan support in Congress, declare that the President may not prohibit or regulate "directly or indirectly" such "information and informational materials," whether "commercial or otherwise" and "regardless of format or medium of transmission." IEEPA, 50 U.S.C. § 1702(b)(3); TWEA, 50 U.S.C. App. § 5(b)(4). The legislation "makes clear that all First Amendment protected materials and activities . . . are within the ambit of the statute's protection." 138 Cong. Rec. E1856-04, E1857. There are no carve-outs and no exceptions, except for specified national security statutes not challenged here. The prohibition on regulation is absolute, and OFAC's Information Regulations openly defy that unconditional ban. Where Congress has directly addressed a question, the Court must give effect to the unambiguously expressed intent of Congress and invalidate agency regulations that defy it. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

A. The Language and the Legislative History of the Amendments Preclude the Restrictions OFAC Has Imposed

The starting point for any analysis is the language of the statutes. Both TWEA and IEEPA now include the language of the Berman and Free Trade in Ideas amendments:

> The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly, the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds.

TWEA, 50 U.S.C. App. § 5(b)(4); IEEPA, 50 U.S.C. § 1702(b)(3).

This broad language, without exceptions, unmistakably conveys Congress's intent that all information and informational materials be excluded from direct or indirect regulation by OFAC. Not just pre-existing works but works not yet created and reduced to tangible form are protected. The addition of the term "information" alongside "informational materials" put to an end any doubt. The words "regulate or prohibit" and "directly or indirectly" further confirm that activities *incident to* the importation of information are also protected – including the necessary contracts, advances, substantive editing, other enhancements, and promotion of works imported or co-created. By prohibiting the ancillary steps needed for publishing, the OFAC Information Regulations effectively prohibit, and at the very least *indirectly* prohibit or regulate, the importation of information and information materials, contrary to Congress's specific instructions.

Each limitation OFAC has imposed contradicts Congress's amendments to TWEA and IEEPA. By restricting the exemption Congress created for all "information and informational materials" to works that are already in being, OFAC has ignored the Free Trade in Ideas Amendment and effectively read the word "information" out of the statute. One prominent reason Congress passed the Free Trade in Ideas Amendment was to overrule OFAC's interpretation that the exemption applied only to works that were already in existence, after the district court in *Capital Cities/ABC* had found the term "informational materials" in the Berman

Amendment to be ambiguous and agreed with OFAC that the statute authorized importing only tangible works already in being. OFAC had argued that the Berman Amendment's exemption should be confined to the general categories then listed in the statute as examples of "informational materials" and that "informational materials" should not include ideas and information protected by the First Amendment, as ABC argued:

> If Congress had intended to sweep this broadly it could easily and explicitly have done so, by providing that the Secretary no longer has authority under TWEA to prohibit the importation or exportation of any ideas and information protected by the First Amendment or, at a minimum, that the Secretary no longer has the authority to regulate telecommunications transmissions.

OFAC *Capital Cities/ABC* Brief at 14, Davis Decl. Ex. G. In enacting the Free Trade in Ideas Amendment, Congress did exactly that – it added language expressly stating that all "information and informational materials" are within the exemption's ambit, including works not yet in being, such as telecommunications transmissions.

Congress went even further to make its intent explicit. It added "news wire feeds" to the non-exclusive list of examples of activities covered by the exemption. News wire feeds are live broadcasts. Transactions to arrange them necessarily take place before the information to be imported would exist. The statute on its face thus contemplates the importation of information which is not "fully created or in existence" at the time of the transaction.[8]

Even if the statutory language were not so clear, the legislative history unmistakably confirms that Congress sought to protect all First Amendment-related activity and to extend such

[8] Commissioning an author to write a book is conceptually indistinguishable from a contract for a news wire feed; neither transaction involves a work that is "fully created or in existence" at the time of the transaction. Thus, ordinary tools of statutory construction bar OFAC's construction of TWEA and IEEPA. *See, e.g., U.S. Department of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982) (specific terms are "benchmarks for measuring" the general term when general words follow enumeration of particular classes of things).

protection to all works – not just previously existing works. The conference report to the Free Trade in Ideas Amendment is particularly clear:

> [The Berman Amendment] established that no embargo may prohibit or restrict directly or indirectly the import or export of information that is protected under the First Amendment of the U.S. Constitution. The language was explicitly intended, by including the words "directly or indirectly," to have broad scope. However, the Treasury Department has narrowly and restrictively interpreted the language in ways not originally intended. The present amendment is only intended to address some of those restrictive interpretations, for example limits on the type of information that is protected or on the medium or method of transmitting the information.
>
> The committee on conference intends these amendments to facilitate *transactions and activities incident to the flow of information and informational materials without regard to the type of information, its format, or means of transmission, and electronically transmitted information, transactions which must normally be entered into in advance of the information's creation.*

H.R. Conf. Rep. No. 103-482, at 239 (1994), *reprinted in* 1994 U.S.C.C.A.N. 398, 483. This last statement alone is dispositive. It confirms Congress's intent to preclude regulation of "transactions and activities *incident* to the flow of information and informational materials," such as the substantive editing, enhancement and promotion of written works. And it irrefutably demonstrates Congress's intent to overrule the work-in-being requirement that OFAC invented.

Other aspects of the legislative history confirm that Congress did not intend to limit in any way the exemption for "information and informational materials." First, the title of the Free Trade in Ideas Amendment itself conveys the principle repeated throughout the legislative history that both amendments were intended to foster the free trade in "ideas" as opposed to merely information in fixed form. Second, in explaining the rationale for the Berman Amendment, the House Foreign Affairs Committee expressly noted that the ABA House of Delegates had approved "the principle that no prohibitions should exist on imports to the United

States of ideas and information if their circulation is protected by the First Amendment." H.R. Rep. No. 100-4, pt. 3, at 113 (1987).

Similarly, Senator Mathias, upon his introduction of a precursor to the Berman Amendment, declared that the intent of the legislation was to remove "barriers that inhibit the free exchange of ideas across international frontiers." *See* 132 Cong. Rec. 6550, 6550 (1981). Congressman Berman's comments upon introducing the Free Trade in Ideas Amendment echoed the same objective (*see supra*, at 9-10),[9] as did the summary prepared to clarify the purpose of that legislation (*see supra*, at 10). Criticizing OFAC's overly narrow interpretation of the Berman Amendment, the summary explained that the Free Trade in Ideas Amendment was intended to make clear once and for all that the exemption extended to "*all First Amendment protected materials and activities.*" 138 Cong. Rec. E1856-04, E1857 (emphasis added). There is no indication in the legislative history that Congress intended to limit its exemption to fully completed works or to prohibit enhancements to or promotion of those works. Rather, the legislative history, like the statutory language, demonstrates the opposite – that the legislation was intended to bring within its scope all materials protected by the First Amendment and all transactions and activities incident to the import or export of any such materials, whether fully created or not. It is difficult to conceive how Congress could have made its intent any more apparent. If the language of the Berman Amendment was unclear, as OFAC once maintained, the Free Trade in Ideas Amendment eliminated any possible ambiguity.

[9] "The fact that we disapprove of the government of a particular country ought not to inhibit our dialog with the people who suffer under those governments." 138 Cong. Rec. E 1856-04, E 1857. Congress clearly intended that the views of authors in sanctioned countries would be disseminated in the United States.

B. The Unambiguously Expressed Intent of Congress Must Be Honored

Where a statute's language evinces a legislative purpose plainly at odds with an agency's interpretation, Congress's intent must be enforced. *See New York City Health and Hospitals Corp. v. Perales*, 954 F.2d 854, 862-63 (2d Cir. 1992). Because Congress has spoken clearly and repeatedly on the scope of TWEA and IEEPA's exemption for information and informational materials, any assessment of OFAC's construction of those statutes must "give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

> [A] reviewing court must first ask whether Congress has directly spoken to the precise question at issue. If Congress has done so, the inquiry is at an end; the court must give effect to the unambiguously expressed intent of Congress. But if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible.

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000). In this case, as described above, both the plain language of the statutes and their legislative history indicate that they are susceptible to only one reasonable interpretation.

Where other regulations have contradicted the legislation authorizing them, courts have not hesitated to invalidate them. The Supreme Court, for instance, in considering whether the FDA had the authority to regulate tobacco products under the Food, Drug, and Cosmetic Act ("FDCA"), applied the customary tools of statutory interpretation, beginning with the language Congress used in the FDCA and in subsequent relevant legislation and then examining the legislative histories of the FDCA and the other statutes. *Id.* The Court determined that construing the statute to include tobacco products would create internal conflicts within the Act and would not be consistent with subsequent congressional actions, especially in light of uncontradicted congressional statements in the legislative histories of those acts. The Court therefore concluded that Congress had directly spoken on the issue and precluded the FDA from

regulating tobacco products. *Id.* at 159. *See also MCI Telecom. Corp. v. AT&T*, 512 U.S. 218, 228 (1994) (rejecting FCC's construction of Communications Act of 1934).

Courts in this circuit, likewise, have not hesitated to invalidate agency regulations that directly contravene the statutes the agencies administer. Last year, in *Nutritional Health Alliance ("NHA") v. FDA*, 318 F.3d 92 (2d Cir. 2003), the Second Circuit held that the plain language of the FDCA unambiguously did *not* grant to the FDA the authority it sought to regulate the packaging of certain dietary supplements. Similarly, in *Tambe v. Bowen*, 839 F.2d 108 (2d Cir. 1988), the Court of Appeals struck down an agency regulation requiring state welfare agencies to correct erroneous underpayments of welfare benefits only if the recipients were receiving benefits at the time the error was discovered. The regulation was promulgated in response to Congress's enactment of the Omnibus Budget and Reconciliation Act ("OBRA"), which required states to "promptly take *all* necessary steps to correct *any* ...underpayment of aid" under the state's welfare plan. *Id.* at 109 (emphasis added). The court found this language to be "completely unrestrictive and unlimited" and found "no indication that Congress meant to make an exception for those who no longer were recipients of public assistance." *Id.* at 110. Following *Chevron*, the court held that "[t]he plain meaning of the statute could not be broader. Congress intended all underpayments to be corrected." *Id.* (internal quotations omitted).

The plain meaning of the Berman Amendment and Free Trade in Ideas Amendment could not be broader, either, and OFAC has added prohibitions in its Information Regulations that Congress not only did not intend but actually forbade. The prohibitions contradict the statutes even more plainly than the regulations in *Tambe* departed from OBRA, and far more plainly the environmental rule that was struck down in *American Mining Congress v. U.S. EPA*, 824 F.2d 1177 (D.C. Cir. 1987) (invalidating EPA rule that expanded the definition of "solid

waste" beyond the categories established by Congress). *See also New York City Health and Hospitals Corp. v. Perales,* 954 F.2d 854 (holding, pursuant to *Chevron*, that HHS regulation violated clear intent of Medicare and Medicaid statutes)*; New York State Department of Social Services v. Bowen*, 846 F.2d 129, 134 (2d Cir. 1988) ("[t]he deference ordinarily due the federal agency charged with interpreting a statute is unnecessary and inappropriate here where HHS's interpretation is not only inconsistent with the language of the Medicaid statute and its purpose ... but also in defiance of common sense"); *American Airways Charters, Inc. v. Regan*, 746 F.2d 865, 873 (D.C. Cir. 1984) (holding that OFAC requirement that company designated as Cuban national needed to apply for license to retain counsel "has gone beyond mere interpretation. It has effectively legislated in an area in which our tradition indicates that the lawmakers themselves – Congress – should speak with a clear voice in advance of administrative action.").

Even if the statutory language were ambiguous, OFAC's Information Regulations would fail at the second step of the analysis the Supreme Court required in *Chevron* because they are not based on a "permissible construction" of the Berman and Free Trade in Ideas Amendments. Far from reflecting a "reasonable interpretation" of congressional intent, they are "arbitrary [and] capricious [as well as] manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. Nothing in their language or legislative history can support a claim that Congress left a gap for OFAC to fill, especially by excluding an arbitrary subset of works from embargoed countries from the blanket exemption Congress enacted. Nor is there any justification for allowing some not-yet-completed works – such as telecommunications transmissions and news wire feeds – but excluding others – such as books. Nor is there any logical reason for OFAC effectively to prevent publishers from distributing the publications Congress enacted the statutes to encourage. Even if the OFAC Information Regulations could be viewed as an "interpretation" rather than a contradiction of the

statutes, they would still be invalid because they lead to such absurd results. *See, e.g., Aid Assoc. for Lutherans v. United States Postal Service*, 321 F.3d 1166 (D.C. Cir. 2003) (holding that even if statutory language were ambiguous, court would still find agency regulation invalid under the second *Chevron* step); *Nutritional Health Alliance v. FDA*, 318 F.3d at 104 (same).[10]

In this case, however, Congress has spoken precisely on the question at issue. OFAC's restrictions contradict TWEA and IEEPA directly, and they cannot stand.

II. THE OFAC REGULATIONS ARE UNCONSTITUTIONAL

The OFAC Information Regulations are unconstitutional on their face and as applied, on several grounds. First, they impose an unconstitutional burden on core First Amendment rights. The Regulations effectively amount to a total and therefore impermissible ban on books, a time-honored medium of expression, and none of the prohibitions can survive either exacting or even intermediate scrutiny. Second, they are unconstitutionally vague, an infirmity highlighted by OFAC's recent inconsistent interpretive rulings. Third, the licensing scheme contained in the OFAC Regulations imposes an impermissible prior restraint. As then-Judge Ginsburg admonished in *American Airways Charters*, 746 F.2d at 875-76, "[i]n enforcing section 5(b) of TWEA, OFAC must seek resolution of the paradox posed by the need for emergency power in a constitutional regime. We are a constitutional regime in which even emergency power is subject to limitations under our highest law" (internal quotes omitted).

[10] Moreover, if there were any ambiguity in the statute, it would have to be resolved in a way that would render the statute constitutional. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500, 507 (1979); *see also* Point II, below (the OFAC Information Regulations unconstitutionally restrict free speech); *Cernuda*, 720 F. Supp. at 1553 ("Congress amended the TWEA to exempt 'informational materials,' in order to prevent the statute from running afoul of the First Amendment.").

A. The OFAC Information Regulations Impose an Unconstitutional Burden on First Amendment Rights

1. The OFAC Information Regulations Burden Fundamental Rights Protected by the First Amendment

The OFAC Information Regulations burden core First Amendment rights, including freedom of speech and press. First, they infringe upon the rights of all those subject to U.S. jurisdiction to express themselves, including the rights of American authors to work with co-authors or other collaborators on joint projects and the rights of American publishers of books and journals to acquire, develop, edit, publish and market works of their selection in keeping with their publishing programs. The declarations of publishers, editors, authors and the organizations that represent them – AAUP, PSP and PEN – detail the burdens the Regulations impose on them and describe projects the regulations have directly blocked.

Second, the Regulations infringe upon the American public's right to receive ideas, which is now well entrenched in the law. *Virginia Pharmacy Bd. v. Virginia Consumer Council,* 425 U.S. 748, 756-57 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) ("It is now well established that the Constitution protects the right to receive information and ideas."); *Lamont v. Postmaster General*, 381 U.S. 301 (1965). As the Supreme Court recognized in *Kleindienst*, "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . . It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences which is crucial here." 408 U.S. at 763, quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-90 (1969).

The sweep of the OFAC Information Regulations is stunningly broad. They apply to all forms of information in every medium, including films, artworks, video transmissions and publications, created in whole or in part by Iranians, Cubans or Sudanese. Written texts such as books and articles have always, without question, fallen within the core of First Amendment

protection. The regulations also apply to speech on all topics, and they extend to "a potentially very large number of works." *Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105, 121 (1991). As the Supreme Court observed of a statute of similar breadth, "[t]he mere fact that the ordinance covers so much speech raises constitutional concerns." *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 165 (2002).

The most remarkable absurdity of the OFAC Information Regulations is that the dissident or critic who is not free to publish his or her criticisms of the governing regime at home cannot publish them here. History teaches us that dissidents often play the most critical of roles in bringing down repressive regimes. The works of Alexander Solzhenitsyn, Nelson Mandela and Bishop Desmond Tutu readily come to mind. Thus, core political speech, at the very center of the United States' conduct of foreign policy, is barred.

Moreover, as the accompanying declarations make clear, the OFAC Information Regulations effectively make it illegal for American publishers to publish books and many journal articles by authors in the restricted countries, including both pre-existing works and works not yet fully created, because all the activities prohibited are integral to the publishing process. The Supreme Court has made it abundantly clear that laws or regulations that interfere with the activities incident to speech impair First Amendment rights in the same fashion as regulations of the actual speech itself. Take, for example, OFAC's ban of the payment of advances. The Supreme Court has often recognized that a "prohibition on compensation unquestionably imposes a significant burden on expressive activity" and thus violates both the author's and publisher's First Amendment rights. *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 468-69 (1995); *Simon & Schuster,* 502 U.S. at 115. OFAC's prohibition on substantive alteration or enhancement of a work also directly impedes publication by

American publishers, interfering with their First Amendment rights to edit and otherwise enhance the publications they issue in keeping with their standards. *See Machleder v. Diaz*, 801 F.2d 46, 54-55 (2d Cir. 1986) (the editing process is protected by the First Amendment); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (Florida statute mandating right of reply for political candidates "fails to clear the barriers of the First Amendment because of its intrusion into the function of editors").

Likewise, the right to publish a book without the right to market a book is a hollow right. With one hand, OFAC has followed Congress's requirement that publications be exempted from the trade embargoes, at least if they are completed works; yet, with another, OFAC has prohibited the marketing of publications, in full recognition of the fact that publishing a book without marketing it is realistically impossible. 9/26/04 OFAC Ruling. Freedom of speech and the right to market one's speech are inseparable. The courts have long held that "[t]he sale of protected materials is also protected" by the First Amendment. *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996). "[L]iberty of circulating is as essential to [freedom of expression] as liberty of publishing; indeed, without the circulation, the publication would be of little value." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 768 (1988).

In sum, the OFAC Information Regulations impose sweeping and crippling restrictions on core First Amendment protected rights, to the detriment of authors, publishers, and the American public.

2. The OFAC Information Regulations Are Effectively a Near-Total Prohibition on a Valuable Medium of Expression

The OFAC Information Regulations are unconstitutional because they effectively create a near ban on an entire medium of communication for authors from the restricted countries. In *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (Stevens, J.), the Supreme Court examined a city

ordinance banning all residential signs except those falling within ten exceptions. Rather than approach the case asking whether the ordinance was content-neutral or not, the Court held that, where the practical effect of a statute is a "near-total prohibition" on a "uniquely valuable or important mode of communication," the statute is unconstitutional on the ground that it "simply prohibit[s] too much protected speech." 512 U.S. at 51, 53, 54-55. As the Court stated, "the danger [such statutes] pose to the freedom of speech is readily apparent – by eliminating a common means of speaking, such measures can suppress too much speech." *Id.* at 55; *see also Bery*, 97 F.3d at 696-97 ("The ordinance's effective bar on the sale of artwork in public places raises concerns that an entire medium of expression is being lost.").

Books, journals and other printed materials comprise a uniquely valuable and important mode of communication. It "requires no elaboration that the free publication and dissemination of books and other forms of the printed word furnish very familiar applications of the[] constitutionally protected freedoms [of liberty of the press and of speech]." *Smith v. California*, 361 U.S. 147, 150 (1959). The OFAC Regulations amount to a near-ban on these modes of communication for publications written by authors in the restricted countries. Given the realities of book publishing and the combined prohibitions against entering into transactions for not-yet-completed works, against making advance payments, against substantive alteration or enhancement of a work, and most particularly against marketing, neither new books nor completed books from the restricted countries can realistically be published here in conformity with the Regulations. For journals, as well, if the language of the regulations is given its ordinary meaning in keeping with OFAC's earlier interpretations, the ban on substantive alteration or enhancement of a work – which would include the regular rigorous peer review and editing practices of research and professional journals – renders it nearly impossible to publish

articles from restricted countries. In short, the OFAC Regulations cannot stand because they effectively prohibit "too much speech" that we have long valued.

3. The OFAC Information Regulations Cannot Survive Exacting Scrutiny

a. "Exacting Scrutiny" Is the Governing Standard

If OFAC's ban is not flatly invalid, the Information Regulations in any event cannot stand unless they survive "exacting" scrutiny. The Supreme Court has ruled repeatedly that either a prohibition on core speech or "a direct restriction on protected First Amendment activity" requires "exacting First Amendment scrutiny" – a standard on the level of strict scrutiny. *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 788-89 (1988). *See also N.A.A.C.P. v. Button*, 371 U.S. 415, 438-439 (1963); *First National Bank v. Bellotti*, 435 U.S. 765, 786 (1978) (hereinafter "*Bellotti*"); *Village of Schaumberg v. Citizens For a Better Environment*, 444 U.S. 620 (1980); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984).[11] In such cases, "'the State may prevail only upon showing a subordinating interest which is compelling.'" *Bellotti*, 435 U.S. at 786, quoting *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); *accord N.A.A.C.P. v. Button*, 371 U.S. at 439 (applying the same test); *In re Primus*, 436 U.S. 412, 432 (1978) (same); *see also U.S. v. Grace*, 461 U.S. 171, 177 (1983) (in a public forum, "an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest"). The Supreme Court has also required that the regulation be narrowly tailored to achieve its goals, employing the equivalent of a "least restrictive means" test and requiring a close "nexus"

[11] These decisions do not turn on whether or not the statutes at issue were content-based regulations of speech.

between the governmental interest and the means employed in the statute. *Riley*, 487 U.S. at 787-93; *see also Shelton v. Tucker*, 364 U.S. 479, 488-89 (1960).[12]

In *Riley*, for example, the Supreme Court reviewed the North Carolina Charitable Solicitations Act, which defined the *prima facie* "reasonable fee" that a professional fundraiser could charge a charity based on a percentage of the gross revenues solicited, as a way to discourage fraud. The Court held that the act restricted the amount of money a charity could spend on fundraising activity and hence directly restricted protected First Amendment activities. *Id.* Applying exacting scrutiny, the Court found that "using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud." 487 U.S. at 789. The Court cited *Schaumburg* for its holding that the government's interest in preventing fraud "could be sufficiently served by measures less destructive of First Amendment interests" (444 U.S. at 636-637) and concluded by stating that even if alternative laws requiring financial disclosures are "not the most efficient means of preventing fraud, we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency." 487 U.S. at 788, 795.

[12] The "exacting" scrutiny cases and the more recent "strict" scrutiny cases evolved out of the Supreme Court's early leafleting and handbilling cases, which held various bans on such fundamental personal rights to be unconstitutional. These decisions emphasized the framers' belief that the rights of freedom of speech and the press "lie[] at the foundation of free government by free men" and that courts must carefully "weigh the circumstances and [ ] appraise the substantiality of the reasons advance in support of the regulation." *Schneider v. State of New Jersey*, 308 U.S. 147, 161 (1939); *Martin v. Struthers*, 319 U.S. 141 (1943). As First Amendment jurisprudence has advanced in recent years, outright bans or direct regulations of speech have become increasingly rare, and strict scrutiny has come to be applied primarily to restrictions that discriminate on the basis of content. However, as *N.A.A.C.P v. Button* and the other decisions cited above teach, where direct regulations or prohibitions of core speech pose inherent dangers to free expression, the Court employs exacting scrutiny to prevent the unwarranted incursion on vital freedoms.

b. The Regulations Cannot Withstand Exacting Scrutiny

The OFAC Information Regulations cannot survive exacting scrutiny. Historically, the principal interest the government has asserted in support of the OFAC Regulations has been "to limit the flow of currency to specified hostile nations." *American Airways Charters*, 746 F.2d at 870-871; *Teague v. Regional Commissioner of Customs*, 404 F.2d 441, 445 (2d Cir. 1968). The government also has asserted an interest in "den[ying] [designated countries] outlet[s] for [their] goods in the United States market" and "prevent[ing] [designated countries] from receiving any economic benefit from transactions with" Americans. *American Airways Charters*, 746 F.2d at 870-871. National security interests are not at stake here because the protection from trade embargoes for information in TWEA and IEEPA does not protect any material otherwise controlled for export under various national security statutes. *See* TWEA, §50 U.S.C. App. §5(b)(4).

The government interest that can be asserted to justify the OFAC Information Regulations is necessarily shaped and delimited by the Berman Amendment and the Free Trade in Ideas Amendment. The amendments and their legislative histories reflect Congress's determination that this nation will be best served by safeguarding the full and free exchange of ideas with nationals of the designated countries. As Representative Berman stated, "[The Free Trade in Ideas Amendment] makes clear and explicit that *all First Amendment protected materials and activities* . . . are within the ambit of the statute's protection." (emphasis added); *see also* H.R. Conf. Rep. 103-482, 239, 1994 U.S.C.C.A.N. 398, 483. There can be no compelling government interest in banning new works but permitting works created last week. And, if Congress has concluded that this country's interests lie in the broad exchange of ideas, the government necessarily cannot have a compelling interest in forbidding the various

components of publishing that the OFAC Information Regulations also prohibit, such as editing and marketing.

Similarly, any assessment of the government's interests should begin with the recognition that what distinguishes this nation is a historic dedication as a democratic society to freedom of speech and of the press. "Diversity, dialog and exchange of ideas are the life-giving elements – the water and air – of American tradition; exclusion, restriction, repression of ideas are the features of far more troubled, less confident nations." 132 Cong. Rec. S3707-04 (1986).[13] It contradicts our nation's fundamental ideals to oppose repressive regimes – which we condemn for denying their citizens basic liberties – by limiting core First Amendment freedoms at home. As the Supreme Court recently affirmed in *Hamdi v. Rumsfeld*, "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." 124 S.Ct. 2633, 2648 (2004) (O'Connor, J.), quoting *United States v. Robel*, 389 U.S. 258, 264 (1967).

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[13] As a well known treatise likewise emphasizes:

> The relationship of free speech to democracy is well entrenched in the American constitutional tradition. James Madison proclaimed: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Judge Cooley, in his famous treatise on constitutional law, likewise located the purpose of the First Amendment in the value of an informed citizenry: "The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."

Rodney Smolla, *Smolla and Nimmer on Freedom of Speech*, §2:27 at 2-26.2 - 2-27.

Further, any government interest OFAC may assert here is belied by a host of distinctions and exemptions in the regulations and OFAC's interpretive rulings, which make the remaining prohibitions irrationally underinclusive. "Exemptions from an otherwise legitimate regulation of a medium of speech . . . may diminish the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994); *see also Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002), citing *The Florida Star v. B.J.F.*, 491 U.S. 524, 541-542 (1989) (Scalia, J., concurring in judgment) ("[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited."); *see also Simon & Schuster*, 502 U.S. at 119-20 (holding Son-of-Sam law unconstitutional where distinctions drawn by statute in focusing only on books rather than all fruits of a crime undercut state's asserted interest).

Thus, while broadly speaking, the government may have a general interest in forbidding the flow of currency to restricted nations, that interest cannot explain a selective prohibition of payments for works not yet fully created at the time of the transaction, while payments for imported books or other completed works are allowed. In enacting the Berman Amendment and the Free Trade in Ideas Amendment, Congress has already endorsed the principle that "the insignificant sums of money that may be realized by foreign governments from trade in books, works of art and other informational materials cannot be a valid reason for curtailing the rights of Americans." 138 Cong. Rec. E1856-04, E1857 (Congressman Berman introducing Free Trade In Ideas Amendment as sponsor).

Likewise, although the government may have an interest, generally speaking, in preventing designated countries from having an outlet for their goods in the U.S. market, that

interest is fatally undercut here by the fact that TWEA, IEEPA and the OFAC Regulations all permit the importation of finished books and the publication of completed works. The distinction OFAC has drawn between completed works and not-yet-completed works ignores the fact that the very same types of goods (*i.e.*, books and journal articles) are being given an outlet in the United States. Moreover, these are speech "goods," not widgets, and the government does not have any interest, let alone a compelling, constitutionally acceptable interest, in denying those subject to U.S. jurisdiction the right to publish, edit, promote, and read writings and other creative works from anywhere in the world, including the designated countries.

We anticipate that the principal argument advanced in support of the OFAC Information Regulations will be that they serve the government's alleged interest in "prevent[ing] [designated countries] from receiving any economic benefit [or services] from transactions with" Americans because publishing new works, substantively altering works and marketing them may provide a different amount of economic benefits or services to nationals of the designated countries. There is an inherent problem with such an assertion: the government may not "take[] the *effect* of the [regulation] and posit[ ] that effect as the State's interest. If accepted, this circular defense can sidestep judicial review of almost any statute, because it makes all statutes look narrowly tailored." *Simon & Schuster*, 502 U.S. at 120 (emphasis in original).

Instead, the government must anchor its aim of withholding benefits or services to some larger goal that constitutes a valid compelling governmental interest. Otherwise, the government has merely described the effect of the regulations. However, if a larger goal is posited – such as undermining hostile governments – the required "nexus" is absent, since it strains credulity for the government to argue that denying editing, collaboration and marketing "services" to academics in archaeology, music, science or history – let alone human rights activists and

political dissidents – enhances our efforts to undermine the governments of the restricted regimes, especially when the import and publication of completed works from those countries is permitted.

Underinclusiveness, too, undermines any assertion of a government interest in preventing the designated countries from receiving economic benefits and services. Once newspapers are permitted to provide substantive editing "services" to an article or commentary from a designated country – as OFAC informed ASNE (*see* 7/19/04 OFAC Ruling) – the government cannot advance a compelling government interest in preventing other publishers – of books, for instance – from doing the same. In fact, "law[s] that 'target[] individual publications within the press' must surmount a heavy burden to satisfy First Amendment strictures." *Bery*, 97 F.3d at 696-697 (citations omitted); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987)(holding tax exemption for newspapers and various magazines but not general interest magazines unconstitutional for discriminatory treatment of some members of the press).

Any such justification for the marketing ban – which applies to both completed and not-yet-completed works – also fails, because even in OFAC's view, the Berman Amendment exempted the importation of finished books from restricted countries and exempted the publication of completed works from such countries in the name of promoting First Amendment freedoms. The government can have no interest in crippling publishers in their ability to distribute works embraced by Congress because of the contributions they can make to public discourse. OFAC's own interpretive rulings also undercut the strength of any supposed government interest because OFAC has stated that journal publishers may market a journal containing a new article by an author in a restricted country – just not the article itself. 9/30/03 OFAC Ruling at 2; Brodsky Decl. Ex. C; Givler Decl. ¶ 50.

Such formalistic distinctions demonstrate the weakness of the government's interest in the first instance in preventing the marketing of information and informational materials created by authors in these countries. If the ideas reflected in such informational materials are valued, broad dissemination would seem to be the goal, not the problem. If anything, the government has a strong interest in seeing that such works are distributed to as wide an audience as possible.

Deference to OFAC is not warranted here merely because this case involves the executive branch's conduct of foreign affairs; indeed, for several reasons, deference is less appropriate here than in other circumstances. *See Baker v. Carr,* 369 U.S. 186, 211-12 (1962) ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, . . . its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."). First, Congress, OFAC's source of authority, has spoken clearly in the field and defined the government's true interests, taking into account both foreign policy and First Amendment concerns. *Kalantari v. WITV,* 352 F.3d 1202, 1209 (9th Cir. 2003) ("The IEEPA exemption for informational materials is a general limitation on the President's authority"). Second, this case does not involve matters of national security. Nor does this case involve the power to exclude aliens from physically entering the United States – a unique power long held to be "exercised exclusively by the political branches of government." *Kleindienst*, 408 U.S. at 765-66. Here, only the ideas and information of aliens are being excluded.

Further, the OFAC Information Regulations interfere with American foreign policy because they endanger our compliance with international treaties that protect freedom of expression. The application of trade sanctions to literature and other information cannot be

squared with America's national commitments to uphold the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the American Convention on Human Rights. They guarantee, in almost identical terms, the right to freedom of thought and expression, which "includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice." American Convention on Human Rights, Nov. 22, 1969, art. 13, 1144 U.N.T.S. 123, 9 I.L.M. 673. The American Declaration of the Rights and Duties of Man adds that every person has the right "to participate in the benefits that result from intellectual progress." American Declaration of the Rights and Duties of Man, Mar. 30-May 2, 1948, art. XIII, O.A.S. Res. XXX, O.A.S. Off. Rec. OEA/Ser/.L./V/I.4 Rev (1965). The OFAC Information Regulations put the United States in dubious company internationally. *See* Rushdie Decl. ¶¶ 66-68. As the Supreme Court has twice recently reminded us, treaties also carry moral authority that should not be defied. *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2767 (2004); *Hamdi*, 124 S.Ct. at 2641 (discussing the Geneva Conventions).

Finally, the Supreme Court recently affirmed the critical role of the courts in examining executive actions when constitutional rights are at stake, even where national security is implicated. *Hamdi*, 124 S.Ct. 2633 (O'Connor, J.) (detention of enemy combatant without meaningful opportunity to contest detention before neutral decisionmaker violates constitutional right of due process); *Rasul v. Bush*, 124 S.Ct. 2686 (2004). In the words of the Supreme Court, while, "[w]ithout doubt, our Constitutional recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned . . . for making them . . . it is equally vital that our calculus not give short shrift to the values that this country holds dear." *Hamdi*, 124 S.Ct. at 2647. "Whatever power the United States Constitution envisions for the Executive

in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake . . . . '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.'" *Id.* at 2650. Even during the height of the Cold War, the U.S. Supreme Court struck down regulations promulgated by the Secretary of Treasury and enforced by the Postmaster General requiring an addressee to request receipt of "communist political propaganda" on the ground that "[t]he regime of this Act is at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment." *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This Court should reach the same conclusion.

4. Even if Intermediate Scrutiny Were Applied, the OFAC Information Regulations Cannot Stand

All of the same arguments doom the OFAC Information Regulations under the intermediate scrutiny test enunciated in *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968), which requires that the government demonstrate a substantial interest to justify a burden on First Amendment protected rights. First, though, we briefly review why *O'Brien* does not provide the governing standard here.

a. The *O'Brien* Standard Does Not Apply Here

Several older cases reviewing First Amendment challenges to TWEA or OFAC regulations employed the *O'Brien* test.[14] Given the nature and structure of the OFAC

[14] *Veterans and Reservists for Peace in Vietnam v. Regional Commissioner of Customs*, 459 F.2d 676 (3rd Cir. 1972); *Teague v. Regional Commissioner of Customs*, 404 F.2d 441 (2d Cir. 1968), *cert. denied*, 394 U.S. 977(1969); *Capital Cities/ABC v. Brady*, 740 F. Supp. 1007 (S.D.N.Y. 1990); *American Documentary Films v. Secretary of the Treasury*, 344 F. Supp. 703 (S.D.N.Y. 1972). These are troubled precedents on several grounds: the writ of certiorari was denied in *Teague* only because the petition arrived late as the result of a blizzard; the two dissenting Supreme Court Justices examining the merits believed the restrictions on speech were

Information Regulations as a direct regulation of speech and an effective ban on speech, however, this case must be governed by *Ladue, Riley,* and the other decisions cited in Section II(A)(3) above, many of which post-date all but one of those older decisions. Moreover, the U.S. Supreme Court has recently made clear that the *O'Brien* test – at times extended beyond its roots – should be applied only to regulations of "expressive conduct" and not to regulations of speech or other pure First Amendment activity. *Bartnicki v. Vopper,* 532 U.S. 514, 526-27 (2001).[15]

Here, the OFAC Information Regulations directly target and prohibit the commissioning of publications, the payment of advances, and the substantive alteration or enhancement of information – all "pure speech" activities, not "expressive conduct" or "symbolic speech." The OFAC Information Regulations are thus a direct regulation of First Amendment protected activity – *i.e.*, they focus on speech – rather than being a general regulation of conduct that incidentally sweeps up speech.[16]

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unconstitutional. 394 U.S. 977 (1969). And Congress passed the Free Trade in Ideas Act in a strong repudiation of *Capital Cities/ABC*'s approach to the OFAC Information Regulations. It is also noteworthy that in *Capital Cities/ABC*, the district court ruled on the constitutionality of the OFAC Information Regulations under the First Amendment without the benefit of briefing on the topic by *Capital Cities/ABC.* OFAC *Capital Cities/ABC* Brief at 15, Davis Decl. Ex. G.

[15] *Bartnicki* rejected the application of the *O'Brien* test to a subsection of comprehensive legislation governing the use of electronic surveillance because "the naked prohibition against disclosures is fairly characterized as a regulation of pure speech. Unlike the prohibition against the use of the contents of an illegal interception . . . subsection (c) is not a regulation of conduct. . . . As the majority below put it, if the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct." 532 U.S. at 526-27; *see also Buckley v. Valeo*, 424 U.S. 1, 15-17 (1976).

[16] *Teague* and the other decisions from the 1960's and 1970's cited above predate the Berman Amendment and thus the creation of the OFAC Information Regulations specifically targeting at speech. Moreover, their analysis was necessarily very different, since Congress had not yet expressed the view, embodied in the Berman and Free Trade in Ideas Amendments, that a broad exchange in ideas most benefits this country's foreign policy goals.

b. The OFAC Information Regulations Cannot Withstand Intermediate Scrutiny

Even if the Court were to apply *O'Brien*, OFAC cannot justify its intrusion on the First Amendment rights of authors, publishers and the public. First, *O'Brien* requires that the government show a "substantial" interest, 391 U.S. at 376-77, and OFAC cannot do so for all the reasons outlined above. Indeed, the government must carry the burden of demonstrating that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996); *U.S. v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995). Especially where the regulations impair a broad swath of historically valued speech, the court "must be astute to examine the effect of the challenged legislation and must weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the regulation." *Watchtower Bible*, 536 U.S. at 163.

OFAC also cannot surmount the other elements of the *O'Brien* test. The government interest must be "unrelated to the suppression of free expression." 391 U.S. at 377. The activities banned in the OFAC Information Regulations are so directly targeted at speech, and the alleged interests are so thoroughly undermined by Congress's amendments and pronouncements, that the regulations hardly can be said to have as their aim any interest apart from the suppression of speech. Moreover, many have rightfully questioned whether these regulations and their antecedents are really content-neutral, including Senator Matthias, who objected to the fact that the regulations "can be used to restrict the import and export of information on the basis of the political doctrines contained in the information." 132 Cong. Rec. S3707-04. Whatever the protestations of content-neutrality by the courts examining the TWEA in the 1970's, the decisions are filled with references to "Red Chinese literature" and "the struggle between the free

and the communist worlds."[17] Further, here, of course, the *effect* of OFAC's regulations is decidedly not content-neutral. Americans may only publish the works that have met with the approval of the governments the sanctions are intended to undermine – and not the works silenced by such regimes. OFAC is effectively ratifying and enforcing their censorship regimes in the United States.

The last prong of the *O'Brien* test requires that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377. Once again, there is no government interest consistent with the Berman Amendment and Free Trade in Ideas Amendment that makes it essential to so severely restrict the First Amendment activities the OFAC Regulations bar; to the contrary, a broad dialogue between the peoples of the United States and the restricted countries only furthers our foreign policy goals, as Congress determined. Limiting what may be published in the United States to what may be published in the target nations does not serve any imaginable interest of the United States.

Additionally, "just as in the area of time, place or manner regulations the Supreme Court requires that the government regulation leave open adequate 'alternative channels' of communication, it is a fair reading of *O'Brien* that government regulations which effectively choke off expression by particular speakers on some issues will not satisfy the [last] prong of the test." Rodney Smolla, *Smolla and Nimmer on Freedom of Speech* §9:17 at 9-26 – 9-27 (2004); *see also O'Brien*, 391 U.S. at 388-89 (Harlan, J., concurring) ("this [test] does not foreclose consideration of First Amendment claims in those rare instances when an 'incidental' restriction on expression . . . in practice has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate"). As detailed

[17] *Veterans and Reservists For Peace In Vietnam*, 459 F.2d at 679; *Teague*, 404 F.2d at 445.

above, the OFAC Information Regulations do exactly that, harming authors, publishers and the public. For all these reasons, the significant intrusions on First Amendment activities in the OFAC Information Regulations cannot be justified under the *O'Brien* test.

B. The OFAC Regulations Are Unconstitutionally Vague

On their face, the OFAC regulations are void for vagueness because they both "fail to provide the kind of notice that will enable ordinary people to understand what conduct [they] prohibit[]" and they "authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Kolander v. Lawson*, 461 U.S. 352, 357 (1983); *Smith v. Goguen,* 415 U.S. 566, 572-76 (1974). Either one of these two independent factors alone is sufficient to invalidate a statute or regulation.

The Supreme Court has routinely invalidated vague laws imposing criminal penalties on these grounds, often in response to facial challenges – particularly where, as here, First Amendment rights are implicated.[18] A "more stringent vagueness test" applies if "the law

[18] *See, e.g.*, *Morales*, 527 U.S. at 64 (holding loitering ordinance that afforded "too much discretion to the police and too little notice to citizens" unconstitutionally vague); *Reno v. ACLU*, 521 U.S. 844 (1997) (holding Communications Decency Act of 1988, which sought to protect minors from harmful material on the Internet, unconstitutionally vague); *Kolander*, 461 U.S. at 361 (holding criminal statute permitting police to stop and question individuals loitering on the street and require "credible and reliable" identification unconstitutionally vague on its face because it "encourag[ed] arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute"); *Smith*, 415 U.S. 566 (holding statute which subjects to criminal liability anyone who publicly treats the flag contemptuously unconstitutionally vague); *Gooding v. Wilson*, 405 U.S. 518, 529 (1972) (holding Georgia statute prohibiting use of "opprobrious words or abusive language tending to cause a breach of the peace" unconstitutionally vague on its face); *Coates v. Cincinnati*, 402 U.S. 611, 611-12, 614 (1971) (holding Cincinnati ordinance making it a criminal offense for three or more people to assemble on a sidewalk and "conduct themselves in a manner annoying to persons passing by" unconstitutionally vague on its face).

interferes with the right of free speech or of association." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).[19]

Where a vague enactment, such as the OFAC regulations, "abuts upon sensitive areas of First Amendment freedoms, it operates to inhibit the exercise of those freedoms." *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (internal citations omitted). The Supreme Court "has long recognized that ambiguous meanings cause citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Hoffman Estates*, 455 U.S. at 494 n.6 (internal citations omitted); *see also Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589, 604 (1967) ("The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform [the public] what is being proscribed"); *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963) ("The threat of sanctions may deter ... almost as potently as the actual application of sanctions"). Coupled with the threat and stigma of severe criminal penalties, the OFAC regulations and interpretive rulings induce publishers to construe the regulations conservatively and self-censor, invariably inhibiting dissemination of works not even prohibited by the regulations. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 872 (1997) ("The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas and images").[20] Self-censorship has already occurred, as book projects have been

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[19] *See also Coates*, 402 U.S. at 616; *Smith*, 415 U.S. at 573 ("Where a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts"); *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963) ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms").

[20] While courts are far less tolerant of vague laws that impose criminal sanctions, even a law only imposing civil sanctions on speech will be struck down if it does not provide fair warning of what is proscribed. *Hoffman Estates*, 455 U.S. 489, 498-99, 503 (1982). *See, e.g., Stephenson v. Davenport Community School District*, 110 F.3d 1303, 1308-10 (8th Cir. 1997) (holding school

abandoned or suspended and journal articles have been withdrawn from publication. *See generally* Brodsky Decl.; Francendese Decl.; Givler Decl.; Mahler Decl.; Ross Decl; Rushdie Decl.; Sharp Decl.

1. The OFAC Regulations Are Unconstitutionally Vague Because They Provide No Notice As To What Conduct Is Prohibited

The OFAC regulations are unconstitutionally vague because they do not clearly and precisely define what conduct is prohibited in words of common understanding. *Morales*, 527 U.S. at 58. They give publishers, co-authors and others no clear principles to guide them in determining when works they publish or promote are transformed from the facially permissible category of works "fully created and in existence" to the prohibited world of works that have been "substantively altered or enhanced." The alterations and enhancements to a work that routinely occur as a part of the publishing process run along a continuous spectrum; the point at which editing and the peer review process contribute "substantive" alterations and enhancements as opposed to "non-substantive" alterations and enhancements is not a comprehensible normative standard but rather an untethered subjective judgment, and hence no standard at all. *See Coates*, 402 U.S. at 614; *Morales*, 527 U.S. at 59, citing *Connally v. General Constr. Co.*, 269 U.S. 385, 395 (1926) (vagueness is exacerbated where terms are elastic and dependent on circumstances). "No one may be required at peril or life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). *See also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("because we assume that man is free to steer between

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district's civil regulations prohibiting gang symbols void for vagueness where term "gang" was undefined); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 689-90 (8th Cir. 1992) (holding law forbidding store owners from renting "violent" movies to adolescents unconstitutionally vague).

lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly").

OFAC's inconsistent rulings vividly illustrate the vagueness of the OFAC Information Regulations and significantly exacerbate the problem. As reviewed in greater detail above and in the Declarations of Peter J. Givler and Marc H. Brodsky, OFAC's interpretive rulings dated Sept. 15, 2003, Sept. 26, 2003 and Sept. 30, 2003 applied an expansive definition to the terms "substantive alteration or enhancement." These rulings stated that "collaboration on and editing of manuscripts submitted by [Iranian authors], including activities such as the reordering of paragraphs or sentences, correction of syntax, grammar, and replacement of inappropriate words by U.S. persons, prior to publication, may result in a substantively altered or enhanced product, and is therefore prohibited . . . unless specifically licensed." Brodsky Decl. Exs. A, B and C.

OFAC's April 2, 2003 "clarification" of the Sept. 30 ruling reversed course on the meaning of this key phrase and stated that "style and copy editing" is, in fact, permitted and that peer reviewers are allowed to make recommendations to authors on "expand[ing] their approach, delet[ing] sections of the manuscript, or otherwise generally improv[ing] it." It held firm, however, in stating that "substantive [] re-writ[ing] or rev[ising] of the manuscript" or a "collaborative interaction" that results in "co-authorship or the equivalent thereof," would constitute a violation of the regulations. Brodsky Decl. Ex. D. The ruling does not address the majority of publishing activities that few would argue *do* add substantive value, in which publishers, agents, editors and authors engage on a daily basis. *See, e.g.*, Rushdie Decl. ¶¶ 19, 40, 42; Brodsky Decl. ¶ 54; Givler Decl. ¶¶ 48-49. Furthermore, the ruling approves a peer review process that, in the opinion of publishers, regularly results in "substantive or artistic

alteration or enhancement" of a work, one of the very activities the regulations expressly prohibit. *Id.*

OFAC's July 19, 2004 interpretative ruling so patently contradicted its prior letters and the regulations on "substantive alteration" as to deprive them of all meaning. Without any explanation, OFAC ruled that "substantive edit[ing]" does *not* constitute "substantive alteration or enhancement." (Brodsky Decl. Ex. F) One year earlier OFAC had ruled that correcting grammar constituted substantive enhancement of a work, but OFAC now pronounced that the regulations permitted "substantive edits to the work's content to make the piece more cohesive, efficient, argumentative or effective; in essence, the American newspaper [could] edit[] the content and ideas of the work in the same manner that it would for one of its own writers." *Id.*

Such ambiguity creates extraordinary confusion as to what will or will not be deemed to be prohibited conduct and encourages self-censorship.[21] *See* Rushdie Decl. ¶¶ 62, 64; Brodsky Decl. ¶¶ 48-57; Givler Decl. ¶¶ 42-53; Seaver Decl. ¶¶ 49-50; Ackerman Decl. ¶¶ 18-21. OFAC's interpretive rulings are inconsistent with each other and with the regulations. Given its nonsensical interpretations and the vagueness of the actual regulations, publishers are left to test, at their peril, what constitutes "substantive or artistic alteration or enhancement." Contradictory rulings do not provide fair notice and therefore have been found to deny the public due process. *See, e.g., General Electric Co. v. EPA*, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995) (holding that EPA did not provide fair warning of its interpretation of regulations, which taken with EPA policy statements were unclear and where EPA itself struggled to provide a definitive reading, EPA could not hold company responsible for actions charged); *Chalmers v. City of Los Angeles*,

[21] The inadequacy of guidance as to which activities may be permitted is only exacerbated by the fact that the OFAC Director's rulings are non-binding and may be withdrawn at any time. *See, e.g.*, 31 C.F.R. §§ 500.503, 501.803, 560.502.

762 F.2d 753 (9th Cir. 1989) (holding that city's contradictory and vague ordinances regarding vending activities violated street vendor's due process rights by failing to provide fair notice). The "separation of legitimate from illegitimate" publishing activities "calls for more sensitive tools" – and more consistency – than OFAC has supplied. *See Gooding v. Wilson*, 405 U.S. 518, 528 (1972).

2. The OFAC Regulations Are Unconstitutionally Vague Because They Authorize and Encourage Arbitrary and Discriminatory Enforcement

The OFAC regulations are void for vagueness for the separate and independent reason that they authorize arbitrary and discriminatory enforcement. *Kolander*, 461 U.S. at 357-58. They grant OFAC officials complete discretion whether to grant or deny a license, as well as whether and when to enforce violations of the regulations and the appropriate punishment for violators. *See generally* Reporting, Procedures and Penalties Regulations, 31 C.F.R. §§ 501.703(a), 501.706(a), 501.708, 501.709, 501.713 (2004). As the Supreme Court has stated, "[w]here . . . there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law." *Papachristou v. City of Jacksonville,* 405 U.S. 156, 170 (1972); *Grayned*, 408 U.S. at 108 (holding civil antipicketing ordinance unconstitutional and stating that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them"); *Smith*, 415 U.S. at 574-75.

The recent spate of interpretative rulings from OFAC, as well as OFAC's decision to reverse course and grant Ry Cooder a special license only after President Clinton exerted political pressure on his behalf, demonstrate the inconsistent and discriminatory determinations that result from the absence of clear guidelines in the regulations. As these demonstrate, the broad terms effectively allow the OFAC Director to create standards on a case-by-case basis

when granting or denying licenses, and when enforcing the regulations to punish violations. This is constitutionally impermissible. *See Gooding v. Wilson*, 405 U.S. at 528. The regulations provide no barrier to prevent OFAC officials from applying their own personal, arbitrary predilections to prohibit or penalize publishers' conduct on an *ad hoc* basis, including in a content-based fashion. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991) ("the question here is not whether discriminatory enforcement occurred here . . . but whether the rule is so imprecise that discriminatory enforcement is a real possibility"). For all these reasons, the OFAC Regulations are unconstitutionally vague on their face.

C. The Licensing Scheme in the OFAC Regulations Imposes an Impermissible Prior Restraint Against Speech Protected by the First Amendment

The licensing scheme embodied in the OFAC Regulations, 31 C.R.F. § 501.801 (2004), also renders them facially invalid as an unconstitutional prior restraint against protected speech. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *City of Lovell v. City of Griffin*, 303 U.S. 444 (1938). "Prior restraints involve either an administrative rule requiring some form of license or permit before one may engage in expression, or a judicial order directing an individual not to engage in expression, on pain of contempt." Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech*, §15.1 at pp. 15-4 – 15-5 (2004); *see also id.* The OFAC Regulations impose exactly such an administration rule requiring a "special license" from the government before individuals and publishers may publish works and/or engage in routine publishing practices otherwise prohibited by the regulations. Reporting, Procedures and Penalties Regulations, 31 C.F.R. § 501.801 (2004). Moreover, like the worst of prior restraints, the OFAC Regulations offer no standards governing issuance of a license (*Lakewood, supra*; *Lovell, supra*); the government concedes that they involve a sheer "discretionary licensing determination by OFAC." OFAC *Capital Cities/ABC* Brief at 27, Davis Aff., Ex. G. To make

matters worse, such special licenses may be amended or revoked at any time. 31 C.F.R. §501.803. Further, OFAC has the right to exclude any particular person or transaction from operation of any general or specific license. *See, e.g.* Iranian Transactions Regulations, 31 C.F.R. § 560.502 (2004).

The doctrine against prior restraints arose out of the emphatic rejection of just such licensing schemes requiring permission to publish from the English crown.

> The struggle for freedom of the press [historically] was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing." And the liberty of the press became initially a right to publish without a license what formerly could be published only with one. While this freedom from previous restraint on publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was the leading purpose in the adoption of [the First Amendment.]

Lovell, 303 U.S. at 451-452; *see also Near v. Minnesota*, 283 U.S. 697, 713-714 (1931).

A prior restraint is "the most serious and least tolerable infringement" of First Amendment rights and is "presumptively unconstitutional." *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 558-559 (1976); *Southeastern Promotions, Ltd v. Conrad*, 420 U.S. 546, 558-559 (1975); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (any request for a prior restraint on expression "comes to this Court bearing a heavy presumption against its constitutional validity"); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (same). Where, as here, the prior restraint involves expression in the form of pure speech, the presumption of unconstitutionality is "virtually insurmountable." *Nebraska Press Assoc.*, 427 U.S. at 558 (White, J., concurring). Indeed, in its more than two hundred years of existence, the U.S. Supreme Court has never upheld a prior restraint on pure speech, since publication must

demonstrably threaten an interest more important than the First Amendment itself. *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226-27 (6th Cir. 1996).[22]

The reasons behind this nation's forceful rejection of prior restraints are well established. Except in the case of time, place and manner restrictions with clear, express "neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered," *Lakewood*, 486 U.S. at 760, "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great." *Southeastern Promotions*, 420 U.S. at 553. Moreover, "[w]ithout these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression." *Lakewood*, 486 U.S. at 758.

Further, as the Supreme Court has noted, "the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *Lakewood*, 486 U.S. at 757. Indeed, "[p]roof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas" *Thornhill v. State of Alabama,* 310 U.S. 88, 97 (1940).[23] This principle "derives from an

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[22] "An injunction cannot be distinguished from a licensing system for the purposes of the First Amendment because they both purport to stop a person from speaking unless and until some branch of the government permits him to speak. Thus, the Supreme Court has specifically and unequivocally demanded that the government show the most compelling reason for *any* prior restraint on speech." *Taucher v. Rainer*, 237 F. Supp.2d 7, 13 (D.D.C. 2002)(emphasis in original). *See also Lowe v. Securities and Exchange Commission*, 472 U.S. 181, 204-05 (1985) (noting that exclusion for publishers from SEC provisions requiring licensing of investment advisors should be read broadly to conform to the dictates of *Near* and *Lovell* regarding prior restraints).

[23] Thus, regardless of whether any of the plaintiffs in this case have applied for and been denied a license, plaintiffs have standing to challenge the regulations on their face. *Lakewood*, 486 U.S.

appreciation of the character of the evil inherent in a licensing system . . . . It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Id.* Thus, like all prior restraints, the vice of the OFAC licensing scheme is that it inhibits speech both directly – by the denial of a license to publish a particular work – and indirectly, by inducing excessive caution on the part of publishers.

In this instance, the concern that certain speakers will be favored over others is not merely academic. As reviewed at pp. 14-15 and 18, *supra*, OFAC has permitted newspaper publishers to engage in editing practices forbidden to others and has bowed to political pressure from President Clinton in reversing its own denial of a license to Ry Cooder to record an album of Cuban music with Cuban musicians. Such disparate treatment of speakers is the very evil condemned under our Constitution.

OFAC cannot overcome the heavy presumption against the constitutional invalidity of its licensing provisions. As the Supreme Court has held, "In order to be held lawful, [the government's] action, first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and second, must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech." *Southeastern Promotions*, 420 U.S. at 559. "The Court has tended to recognize only a narrow number of situations in which prior restraints might be permissible, such as restraints against

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at 755-56 ("when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license"); *Freedman v. Maryland*, 380 U.S. 51, 56 (1965) ("[i]n the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license").

obscenity, or to protect imminent threats to national security, or as a last resort to protect a defendant's right to a fair trial, and has suggested that outside these narrow 'exceptions,' no prior restraints at all should be permitted." Rodney Smolla, *Smolla and Nimmer on Freedom of Speech*, §15.7 at 15-10.1 – 15-10.2; *see also Near v. Minnesota*, 283 U.S. at 716 (listing exceptions and stating that "the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases.") Another such exception is for the "regulation of time, place, or manner related to the nature of the facility or applications from other users." *Southeastern Promotions*, 420 U.S. at 555. Even with time, place and manner regulations, there must be "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969).

The OFAC regulations do not fall within one of the few narrowly defined exceptions, including the exception for imminent threats to national security. *See Near*, 283 U.S. at 716. Even in *New York Times Co. v. United States*, 403 U.S. 713, where the government alleged that publication of the Pentagon Papers, a classified study on the "History of U.S. Decision-Making Process on Viet Nam Policy," would harm national security, the customary deference to the executive branch in the conduct of foreign affairs did not override the presumptive unconstitutionality of a prior restraint. *See also id.* at 726 (Brennan, J., concurring) (describing extremely narrow nature of exception for imminent threats to national security).

OFAC's attenuated concerns that the hard currency paid to individual authors in the restricted countries – sums already deemed insignificant by Congress (see p. 10, *supra*) – will

allow their governments to harm the United States' interests do not remotely qualify under the demanding standards set out in *Near* and *New York Times Co.*[24]

Even assuming, *arguendo*, that the OFAC Regulations fell within a recognized exception to the rule against prior restraints, they do not meet the required procedural requirements set forth in *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965), and reiterated in *Southeastern Promotions*, 420 U.S. at 559-560. "First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor." *Id.* at 560. *Cf. Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (requirement that recipient of Communist propaganda apply to post office to receive mail created an "affirmative obligation which we do not think the Government may impose"). Second, "[a]ny restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest period compatible with sound judicial resolution."[25] Third, "the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Freedman*, 380 U.S. at 59; *Southeastern Promotions,* 420 U.S. at 561-63; *see FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (striking down portions of Dallas licensing scheme regulating adult-oriented establishments because it did not provide for prompt judicial review). The OFAC regulations must be declared invalid under the

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[24] A few decisions from the 1970's upholding prior OFAC regulations, discussed above (n. 14), briefly refer to the prior restraint issue, but none address it directly, and none can be squared with the jurisprudence outlined above.

[25] *Freedman*, 380 U.S. at 58; *see also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (striking down portions of Dallas licensing scheme regulating adult-oriented establishments in part because it did not provide a definite time limit in which officials must grant or deny license); *Cantwell v. State of Connecticut*, 310 U.S. 296, 306 (1940) (holding that availability of judicial review to rectify abuses in licensing system did not save ordinance from condemnation on grounds that it was prior restraint); *Artistic Entertainment, Inc. v. City of Warner Robins*, 223 F.3d 1306, (11th Cir. 2000), *cert. denied*, 124 S.Ct. 2017 (2004).

First Amendment since they do not fall within any of the recognized exceptions to the rule against prior restraints and do not contain any of the necessary safeguards against censorship.

III. A PRELIMINARY INJUNCTION IS WARRANTED AND NECESSARY TO LIFT OFAC'S RESTRICTIONS ON FREE SPEECH

The chilling effect of the OFAC Information Regulations has been demonstrated. Publishers have suspended the publication of books and withdrawn articles from publication. Authors, editors and translators cannot freely pursue their self-expression. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 374 (1976). "Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed." *Bronx Household of Faith v. Board of Education of the City of New York*, 331 F.3d 342, 349-50 (2d Cir. 2003). The regulations here directly limit speech, so irreparable injury may be presumed, though the presumption is not necessary because the irreparable harm is so clear.

Even if the many examples of the regulations' effect on speech were not sufficient to establish irreparable harm, the very existence of a licensing scheme for First Amendment freedoms causes irreparable harm. In *Tunick v. Safir*, 209 F.3d 67, 70 (2d Cir. 2000), for example, the Second Circuit held that requiring an artist to apply for a city permit to conduct a photography session in public caused irreparable harm. Similarly, an ordinance requiring visual artists to apply for vendor's licenses to sell their work in public places caused irreparable harm. *Bery v. City of New York*, 97 F.3d at 693-94.

The plaintiffs here seek to exercise rights protected by the First Amendment and by the Berman and Free Trade in Ideas Amendments. Rights to expression created by statute as well as by the Constitution are properly protected by preliminary injunctions. *See, e.g., McClellan v. Cablevision of Conn., Inc.*, 149 F.3d 161 (2d Cir. 1998) (preliminary injunction should have been

granted to protect rights created by Cable Communications Policy Act). Plaintiffs have established the clear likelihood of their success on the merits of their challenge to the OFAC Information Regulations on both statutory and constitutional grounds. Given that clear likelihood of success and the irreparable harm that must be presumed, a preliminary injunction is needed to prevent the irreparable violation of plaintiffs' rights from continuing any longer. *Bronx Household of Faith*, 331 F.3d at 350.

CONCLUSION

For the reasons set forth above and in the accompanying declarations, plaintiffs request that defendants be preliminarily and permanently enjoined from enforcing the OFAC Information Regulations and their related licensing provisions, because they contradict the Berman Amendment and the Free Trade in Ideas Amendment and violate the First Amendment to the Constitution.

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Respectfully submitted,

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