INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
ICDR CASE NO. 01-20-0000-6787

NAMECHEAP, INC.

And

INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS

INDEX TO DOCUMENTS SUBMITTED WITH ICANN'S MOTION TO DISMISS

Exhibit	Description
R-17	Compilation of correspondence on ICANN's website regarding the Change of Control Request.
R-18	Namecheap's Domain Name Price and Registration
RLA-1	*Fernandez v. Leidos, Inc.*, 127 F. Supp. 3d 1078 (E.D. Cal. 2015)
RLA-2	*Thorne v. Pep Boys Manny Moe & Jack Inc.*, 980 F.3d 879 (3d Cir. 2020)
RLA-3	*Whitmore v. Arkansas*, 495 U.S. 149 (1990)

Ex. R-17

1. PIR's Application for Indirect Change of Control, 14 November 2019

14 November 2019

VIA FEDEX AND ICANN NAMING SERVICES PORTAL

Internet Corporation for Assigned Names and Numbers
12025 E. Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536
registrylegalnotices@icann.org

Re: Public Interest Registry – Notice of Indirect Change of Control and Entity Conversion

ICANN:

Public Interest Registry ("PIR") hereby provides ICANN with thirty (30) calendar days advance notice of its planned indirect change of control, described below, pursuant to Section 7.5 of each of the Registry Agreements between PIR and ICANN – a list of which is enclosed.

On 11 November 2019, PIR entered into an equity purchase agreement whereby Ethos Capital, LLC ("Ethos Capital"), acting through its affiliate Purpose Domains Direct, LLC, will, subject to the satisfaction of closing conditions, acquire 100% of the equity interests of PIR (the "Transaction"). A chart showing the current and post-Transaction structure of PIR is attached. PIR anticipates the closing of the Transaction to occur as soon as possible after the earlier of: (x) receipt of ICANN's consent to the Transaction or (y) the end of the required notice period under the Registry Agreements.

As part of and immediately before the consummation of the Transaction, PIR will undergo a statutory conversion and name change from Public Interest Registry to Public Interest Registry, LLC. The management and operations of PIR will remain unchanged throughout the process.

Ethos Capital is committed to furthering PIR's mission and values that have long distinguished it from other registries, including its deep commitment to community support and activities, high ethical standards, leadership in anti-abuse activities, and quality domain registrations. Ethos Capital also intends to create a PIR Stewardship Council, on which it will invite prominent and respected community members to serve, dedicated to upholding PIR's core founding values and providing continued support through a variety of community programs.

I trust we have provided all pertinent information, but please feel free to reach out if you have any questions or require additional information regarding this indirect change of control.

Sincerely,

PUBLIC INTEREST REGISTRY

Brian Cimbolic
Vice President, General Counsel

cc: John Jeffrey john.jeffrey@icann.org
Cyrus Namazi cyrus.namazi@icann.org
Jon Nevett jon@pir.org

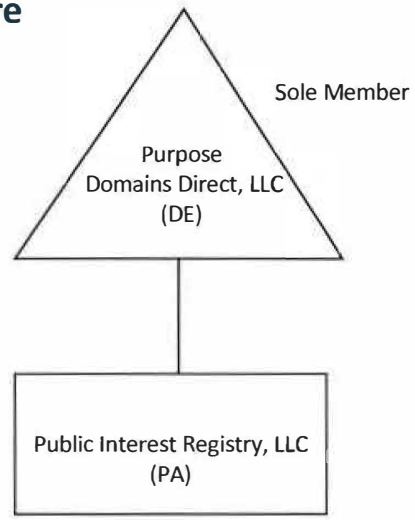
ICANN Registry Agreements with Public Interest Registry

1. Registry Agreement, dated June 30, 2019, between ICANN and PIR, pursuant to which PIR operates .org.
2. Registry Agreement, dated March 6, 2014, by and between ICANN and PIR, as amended by the 2017 Global Amendment to Registry Agreements, effective as of July 31, 2017, pursuant to which PIR operates .ngo.
3. Registry Agreement, dated March 6, 2014, by and between ICANN and PIR, as amended by the 2017 Global Amendment to Registry Agreements, effective as of July 31, 2017, pursuant to which PIR operates .ong.
4. Registry Agreement, dated November 14, 2013, by and between ICANN and PIR as amended by Amendment No. 1, effective as of August 14, 2014, and further amended by the 2017 Global Amendment to Registry Agreements, effective as of July 31, 2017, pursuant to which PIR operates .xn--c1avg (Cyrillic script).
5. Registry Agreement, dated November 14, 2013, by and between ICANN and PIR as amended by Amendment No. 1, effective as of April 20, 2014, and further amended by the 2017 Global Amendment to Registry Agreements, effective as of July 31, 2017, pursuant to which PIR operates .xn--i1b6b1a6a2e (Devanagari script).
6. Registry Agreement, dated November 14, 2013, by and between ICANN and PIR as amended by the 2017 Global Amendment to Registry Agreements, effective as of July 31, 2017, pursuant to which PIR operates .xn--nqv7f (Chinese 2-character script).
7. Registry Agreement, dated November 14, 2013, by and between ICANN and PIR as amended by the 2017 Global Amendment to Registry Agreements, effective as of July 31, 2017, pursuant to which PIR operates .xn-nqv7fs00ema (Chinese 4-character script).

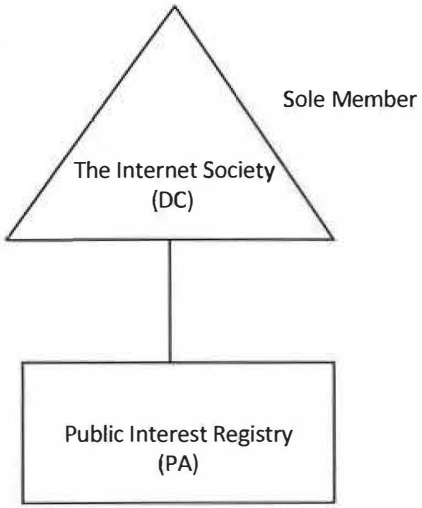
Ownership Structure

Attached

Planned PIR Ownership Structure



Previous PIR Ownership Structure



PIR Indirect Change of Control Information

The following information was submitted to ICANN on 14 November 2019 via the Naming Services Portal regarding the planned indirect change of control Public Interest Registry will undergo.

TLDs

1. .org
2. .ngo
3. .ong
4. .xn--c1avg
5. .xn--i1b6b1a6a2e
6. .xn--nqv7f
7. .xn-nqv7fs00ema

DUMs

1. .org - 10M
2. .ngo - 3,800
3. .ong - 3,800
4. .xn--c1avg - 1,100
5. .xn--nqv7f - 235
6. .xn--i1b6b1a6a2e – 78
7. .xn-nqv7fs00ema – N/A

Overview of Name Change and Conversion:

Public Interest Registry will undergo a legal conversion to Public Interest Registry, LLC, under Pennsylvania law - its place of domicile. This type of legal conversion is not an assignment. The converted entity is the same entity as it was before the conversion, just a different legal type.

As stated in the Pennsylvania Consolidated Statutes (15 Pa.C.S.A. § 356):

> **§ 356. Effect of conversion**
> **(a) General rule.--** When a conversion becomes effective, all of the following apply:
> (1) The *converted association* is:
> (i) Organized under and subject to the organic law of the converted association.
> (ii) *The same association without interruption as the converting association.*
> (iii) Deemed to have commenced its existence on the date the converting association commenced its existence in the jurisdiction in which the converting association was first created, incorporated, formed or otherwise came into existence, except for purposes of determining how the converted association is taxed.

Upon conversion, the entity will be known as Public Interest Registry, LLC. We understand ICANN will want to paper the updated name, and trust that simple one-page document between the parties that acknowledges the name change should be sufficient to update the Registry Agreements.

Overview of Indirect Change of Control:

This transaction does not involve the assignment of assets, or a merger/consolidation, by a Registry Operator. Public Interest Registry will remain the Registry Operator under its Registry Agreements. Public Interest Registry, LLC, will undergo an indirect change of control at its member level, whereby Purpose Domains Direct, LLC, will acquire 100% of the equity interests in Public Interest Registry, LLC, from The Internet Society – the previous sole member of Public Interest Registry. A chart showing the previous and planned structure is included.

The directors of Purpose Domains Direct, LLC, are [redacted], [redacted], and [redacted]. The sole member of Purpose Domains Direct, LLC is Purpose Domains Holdings, LLC.

Entity Information for Purpose Domains Direct, LLC:

1. Legal form of the entity – LLC
2. The specific national or other jurisdiction under which the entity was formed - Delaware
3. Attach evidence of the assignee's establishment as the entity described above. – DE Certificate of Formation included.
4. If the assignee entity is publicly traded, provide the exchange and symbol. – N/A
5. If the assignee entity is a subsidiary, provide the parent company. – Ethos Capital, LLC is the controlling entity.
6. DE 7670477
7. Address and Contact Information: [redacted]

Control Information for Purpose Domains Direct, LLC:

1. Directors:

[redacted]

[redacted]

The Directors each attest that none of the events listed in online application for change of control have occurred or are applicable.

2. Shareholder: sole member of Purpose Domains Direct, LLC is Purpose Domains Holdings, LLC.

Authorized Signatory:

Jonathon Nevett
CEO
[redacted]

There are no updates to the PIR / ICANN points of contact associated with this indirect change of control.

Change to Public Registry Contact Information:

Update Registry Operator name to Public Interest Registry, LLC. No other changes.

9

Delaware

The First State

I, JEFFREY W. BULLOCK, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF FORMATION OF "PURPOSE DOMAINS DIRECT, LLC", FILED IN THIS OFFICE ON THE TWENTY-FOURTH DAY OF OCTOBER, A.D. 2019, AT 1:45 O`CLOCK P.M.

Jeffrey W. Bullock, Secretary of State

7670477 8100
SR# 20197717118

Authentication: 203860406
Date: 10-24-19

You may verify this certificate online at corp.delaware.gov/authver.shtml

10

State of Delaware
Secretary of State
Division of Corporations
Delivered 01:45 PM 10/24/2019
FILED 01:45 PM 10/24/2019
SR 20197717118 - File Number 7670477

CERTIFICATE OF FORMATION
OF
PURPOSE DOMAINS DIRECT, LLC

This Certificate of Formation is duly executed and filed by the undersigned, an authorized person, to form a limited liability company under the Delaware Limited Liability Company Act (6 *Del.C.* § 18-101, *et seq.*) (the "Act").

I. The name of the limited liability company is "Purpose Domains Direct, LLC".

II. The address of the limited liability company's registered office in the State of Delaware is Corporation Service Company, 251 Little Falls Drive, Wilmington, County of New Castle, Delaware 19808. The name of the limited liability company's registered agent for service of process in the State of Delaware at such address is Corporation Service Company.

IN WITNESS WHEREOF, the undersigned has executed this Certificate of Formation of Purpose Domains Direct, LLC as of the 24th day of October, 2019.

By: /s/ Todd Boudreau
Todd Boudreau
Authorized Person

2. ICANN Request for Additional Information, 9 December 2019

We have completed an initial review of the submitted information and have a request for additional information. Pursuant to the .org Registry Agreement, responses should be provided within 15 days of the receipt of this request but please let us know if that creates a difficulty for you. Once all additional information is provided, ICANN has up to 30 days to review the materials.

COVER LETTER

1. This document states that "… before the consummation of the Transaction, PIR will undergo a statutory conversion and name change from Public Interest Registry to Public Interest Registry, LLC". If the conversion and entity name is changed before the change of control, then a Registry Operator name change must first be processed so that all submitted information for the change of control is consistent with the new name.

1.1. We note that you stated, "we understand ICANN will want to paper the updated name, and trust that simple one-page document between the parties that acknowledges the name change should be sufficient to update the Registry Agreements." We have asked several clarifying questions below about the process by which PIR will be changing its legal form and legal name. Once provided, we will be able to provide direction about how to best process a name change request.

PROPOSED OWNERSHIP STRUCTURE AND INDIVIDUALS

Several entities are named in the submission. For the avoidance of doubt, please provide the following:

2. Two comprehensive corporate organizational charts:

2.1. The first chart should reflect the current ownership (or membership) structure. The chart should indicate the percentage of ownership each entity or individual has within the others listed on the chart.

2.2. The second chart should document the proposed post-transaction ownership structure. It must illustrate the relationship between all entities or individuals that will have any indirect or direct ownership/control over the registry operator as well as all affiliates (as defined in the Registry Agreement) of said entities. The chart should include the percentage of ownership each will have after the proposed transaction closes. Please ensure that this includes Ethos Capital, LLC and any entities controlling Ethos Capital (as "control" is defined in the Registry Agreement).

3. For each entity listed in the proposed post-transaction organization chart, please provide the full legal name, principal place of business, directors and officers, shareholders and percentage of ownership they each have. For each individual listed, please provide their position/title, full names, date of birth, country of birth and current country of residence.
4. For all entities and affiliates listed in the proposed post-transaction organization chart, provide proof of establishment.
5. Although the submitted documentation states that "none of the events listed in the online application for change of control have occurred or are applicable", a response for each specific question was not provided. Please provide a response for each of the following

questions related to the background for the proposed shareholders, entities or directors and officers named in number two above and indicate whether any of them:

5.1. Within the past ten years, has been convicted of any crime related to financial or corporate governance activities, or has been judged by a court to have committed fraud or breach of fiduciary duty, or has been the subject of a judicial determination that is the substantive equivalent of any of these.

5.2. Within the past ten years, has been disciplined by any government or industry regulatory body for conduct involving dishonesty or misuse of funds of others.

5.3. Within the past ten years has been convicted of any willful tax-related fraud or willful evasion of tax liabilities.

5.4. Within the past ten years has been convicted of perjury, forswearing, failing to cooperate with a law enforcement investigation, or making false statements to a law enforcement agency or representative.

5.5. Has ever been convicted of any crime involving the use of computers, telephony systems, telecommunications or the Internet to facilitate the commission of crimes.

5.6. Has ever been convicted of any crime involving the use of a weapon, force, or the threat of force.

5.7. Has ever been convicted of any violent or sexual offense victimizing children, the elderly, or individuals with disabilities.

5.8. Has ever been convicted of the illegal sale, manufacture, or distribution of pharmaceutical drugs, or been convicted or successfully extradited for any offense described in Article 3 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

5.9. Has ever been convicted or successfully extradited for any offense described in the United Nations Convention against Transnational Organized Crime (all Protocols).

5.10 Has been convicted, within the respective timeframes, of aiding, abetting, facilitating, enabling, conspiring to commit, or failing to report any of the listed crimes (i.e., within the past 10 years for crimes listed in (5.1) - (5.4) above, or ever for the crimes listed in (5.5) – (5.9) above).

5.11 Has entered a guilty plea as part of a plea agreement or has a court case in any jurisdiction with a disposition of Adjudicated Guilty or Adjudication Withheld (or regional equivalents) within the respective timeframes listed above for any of the listed crimes (i.e., within the past 10 years for crimes listed in (5.1) - (5.4) above, or ever for the crimes listed in (5.5) – (5.9) above).

5.12 Is the subject of a disqualification imposed by ICANN and in effect at the time of this application.

6. Cross-ownership information was not provided. Please disclose any cross-ownership interests in registrars and/or registrar resellers, that may exist for any of the entities named in the responses to number one and number two, (collectively, the "Cross-ownership Parties") above, specifically:

6.1. Is there any ownership interest the Cross-ownership Parties hold in any registrar or reseller of registered names?

6.2. Is there any ownership interest that a registrar or reseller of registered names holds in the Cross-ownership Parties?

6.3. Are there any relationships under common control with, control or controlled by any registrar or reseller of registered names?

6.4. If any of the above are Yes please explain. If referencing a registrar, please include an IANA ID.

Note: ICANN retains the right to refer any identified relationships to a competition authority prior to change of control of the Registry Operator if it is determined that any such cross-ownership interests could raise competition issues.

TRANSACTION DOCUMENTS AND INFORMATION

7. Please answer the following questions and provide any relevant documentation, if any: Was PIR aware at any time during the negotiations and finalization of the renewal of the .org Registry Agreement (effective 30 June 2019) that ISOC was engaged in discussions for or planning the sale of PIR or its assets? To the best of your knowledge, was ISOC engaged in discussions for or planning the sale of PIR or its assets at the time of the renewal of the .org Registry Agreement?
8. Please provide a copy of the Equity Purchase Agreement, dated November 11, 2019, pursuant to which Ethos Capital is indirectly acquiring 100% of the equity interests of PIR, together with all ancillary agreements necessary to determine the effect of the proposed transaction.
9. Please provide a schedule detailing the allocation/distribution of the purchase price among interested parties, including owners, members and consultants. Please include information on how the transaction will be funded and how that will affect the financial state of PIR and its ability to operate a secure and stable registry and fund the initiatives recently announced to support the .org community going forward (for example, will PIR incur debt obligations in connection with the transaction).
10. Please provide copies of all filings made by PIR with the Pennsylvania Secretary of State to effect its conversion to an LLC.
11. Please provide a copy of the notice to the Pennsylvania Attorney General regarding the proposed sale to Ethos Capital, LLC, including all additional documents and information provided to the Pennsylvania Attorney General in connection with its review of the proposed sale.
12. Please provide the proposed organizational documents to be implemented for PIR post-closing.
13. Please provide relevant financial information (e.g. audited financial statements) and organizational documents of the post-transaction beneficial owner of PIR, confirming that PIR will maintain sufficient financial resources to fund operations, including financial statements of the ultimate parent entity of PIR following the consummation of the transaction.
14. Please provide a list of ongoing transaction-related litigation involving the transaction parties or their related entities.
15. Please provide a list of all entities or individuals that have a financial, beneficial or controlling interest in the transaction.
16. Please provide a list of all former directors, officers or employees of ICANN that you are aware of that are or have been involved in, have advised on or otherwise have an interest in the transaction.

17. Please provide a list of all current directors, officers or employees of ICANN, if any, that are or have been involved in, have advised on or otherwise have an interest in the transaction.

FINANCIAL QUESTIONS

18. Please provide the financial information requested in Exhibit A. Please consider the term "assignee" to refer to Public Interest Registry LLC.

TECHNICAL OPERATIONS

19. Please identify the current provider for each of the critical functions of the registry (as defined in Spec 10 of the Registry Agreement) and state whether there will be a change to the provider for each of the critical functions as a result of the proposed transaction.

THE .ORG COMMUNITY

20. In order to support PIR's recent public statements about programs or initiatives to promote/protect the .org community, please provide any controls or representations in the transaction documents (or otherwise) in relation to protecting the .org community.

21. Please provide information on how PIR and the proposed new controlling entities of PIR address the original criteria evaluated in the designation of ISOC/PIR as the operator of .org. Please include reference to any controls or representations in the transaction documents (or otherwise) regarding these criteria. Please confirm whether any funds from the Verisign endowment remain available for use.

EVALUATION FEES

22. Please acknowledge that any fees associated with evaluation of this Assignment or Change of Control request must be paid before the request can be approved.

COMMUNITY INQUIRIES

23. We note the heavy interest of many members of the .org community and ask that you consider responding to the community questions attached as Exhibit B.

ATTESTATION OF FULL AND TRUTHFUL DISCLOSURE

24. We note that PIR attested to several conditions in the submission. However, we noticed that you did not attest to the following: "I attest that the requested change only affects the ownership or shareholder(s) of Registry Operator and the Registry Operator does not change." Please provide an explanation for this omission.
25. Please include an attestation of full and truthful disclosure in the same manner as provided in the initial submission with respect to the additional information provided pursuant to this request.

EXHIBIT A

Provide responses to each of the questions below with attachments.

1. Financial Statements: provide
audited or independently certified financial statements for the most recently completed fiscal year for the assignee, and
audited or unaudited financial statements for the most recently ended interim financial period for the assignee for which this information may be released.

For newly-formed assignee, or where financial statements are not audited, provide:
the latest available unaudited financial statements; and
an explanation as to why audited or independently certified financial statements are not available.

At a minimum, the financial statements should be provided for the legal entity listed as the assignee.

Financial statements are used in the analysis of projections and costs. A complete answer should include:
balance sheet;
income statement;
statement of shareholders equity/partner capital;
cash flow statement, and
notes to the financial statements including the accounting standard used to prepare the statements.

2. Projections Template: provide financial projections for costs and funding using Template 1, Most Likely Scenario available at http://newgtlds.icann.org/en/applicants/agb/fin-proj-template-28dec11-en.xls. Note, if certain services are outsourced, reflect this in the relevant cost section of the template. The template is intended to provide commonality among gTLD applications and thereby facilitate the evaluation process.

A complete answer is expected to be no more than 10 pages in addition to the template.

3.(a)Costs and capital expenditures: in conjunction with the financial projections template, describe and explain:
the expected operating costs and capital expenditures of setting up and operating the proposed registry;
any functions to be outsourced, as indicated in the cost section of the template, and the reasons for outsourcing;
any significant variances between years in any category of expected costs; and
a description of the basis / key assumptions including rationale for the costs provided in the projections

template. This may include an executive summary or summary outcome of studies, reference data, or other steps taken to develop the responses and validate any assumptions made.

As described in the Applicant Guidebook, the information provided will be considered in light of the entire application and the evaluation criteria. Therefore, this answer should agree with the information provided in Template 1 to:
1) maintain registry operations,
2) provide registry services described above, and
3) satisfy the technical requirements described in the Demonstration of Technical & Operational Capability section. Costs should include both fixed and variable costs.

Answers must demonstrate a conservative estimate of costs based on actual examples of previous or existing registry operations with similar approach and projections for growth and costs or equivalent. Attach reference material for such examples.

A complete answer is expected to be no more than 10 pages.

3.(b) Describe anticipated ranges in projected costs. Describe factors that affect those ranges.

A complete answer is expected to be no more than 10 pages.

4.(a) Funding and Revenue: Funding can be derived from several sources (e.g., existing capital or proceeds/revenue from operation of the proposed registry).

Describe:
I. How existing funds will provide resources for both:
a) start-up of operations, and
b) ongoing operations;

II. the revenue model including projections for transaction volumes and price (if the assignee does not intend to rely on registration revenue in order to cover the costs of the registry's operation, it must clarify how the funding for the operation will be developed and maintained in a stable and sustainable manner);

III. outside sources of funding (the assignee must, where applicable, provide evidence of the commitment by the party committing the funds). Secured vs unsecured funding should be clearly identified, including associated sources of funding (i.e., different types of funding, level and type of security/collateral, and key items) for
each type of funding;

IV. Any significant variances between years in any category of funding and revenue; and

V. A description of the basis / key assumptions including rationale for the funding and revenue provided in the projections template. This may include an executive summary or summary

outcome of studies, reference data, or other steps taken to develop the responses and validate any assumptions made; and

VI. Assurances that funding and revenue projections cited in this application are consistent with other public and private claims made to promote the business and generate support. Answers must demonstrate:

- A conservative estimate of funding and revenue; and
- Ongoing operations that are not dependent on projected revenue.

A complete answer is expected to be no more than 10 pages.

4.(b) Describe anticipated ranges in projected funding and revenue. Describe factors that affect those ranges.

A complete answer is expected to be no more than 10 pages

5.(a) Contingency Planning: describe your contingency planning:
Identify any projected barriers/risks to implementation of the business approach described in the application and how they affect cost, funding, revenue, or timeline in your planning;
Identify the impact of any particular regulation, law or policy that might impact the Registry Services offering; and
Describe the measures to mitigate the key risks as described in this question. A complete answer should include, for each contingency, a clear description of the impact to projected revenue, funding, and costs for the 3-year period presented in Template 1 (Most Likely Scenario).
Answers must demonstrate that action plans and operations are adequately resourced in the existing funding and revenue plan even if contingencies occur.

A complete answer is expected to be no more than10 pages.

5.(b) Describe your contingency planning where funding sources are so significantly reduced that material deviations from the implementation model are required. In particular, describe:
how on-going technical requirements will be met; and
what alternative funding can be reasonably raised at a later time. Provide an explanation if you do not believe there is any chance of reduced funding. Complete the financial projections Template 2, Worst Case Scenario available at http://newgtlds.icann.org/en/applicants/agb/fin-proj-template-28dec11-en.xls)

A complete answer is expected to be no more than 10 pages, in addition to the template.

5.(c) Describe your contingency planning where activity volumes so significantly exceed the high projections that material deviation from the implementation model are required. In particular, how will on-going technical requirements be met?

A complete answer is expected to be no more than 10 pages.

6.(a) Provide a cost estimate for funding critical registry functions on an annual basis, and a rationale for these cost estimates commensurate with the technical, operational, and financial approach described in the application.

The critical functions of a registry which must be supported even if a registry's business and/or funding fails are:
(1) DNS resolution for registered domain names
Assignee should consider ranges of volume of daily DNS queries (e.g., 0-100M, 100M-1B, 1B+), the incremental costs associated with increasing levels of such queries, and the ability to meet SLA performance metrics.

(2) Operation of the Shared Registration System
Assignee should consider ranges of volume of daily EPP transactions (e.g., 0-200K, 200K-2M, 2M+), the incremental costs associated with increasing levels of such queries, and the ability to meet SLA performance metrics.

(3) Provision of Whois service
Assignee should consider ranges of volume of daily Whois queries (e.g., 0-100K, 100k-1M, 1M+), the incremental costs associated with increasing levels of such queries, and the ability to meet SLA performance metrics for both web-based and port-43 services.

(4) Registry data escrow deposits
Assignee should consider administration, retention, and transfer fees as well as daily deposit (e.g., full or incremental) handling. Costs may vary depending on the size of the files in escrow (i.e., the size of the registry database).

(5) Maintenance of a properly signed zone in accordance with DNSSEC requirements.
Assignee should consider ranges of volume of daily DNS queries (e.g., 0-100M, 100M-1B, 1B+), the incremental costs associated with increasing levels of such queries, and the ability to meet SLA performance metrics.

List the estimated annual cost for each of these functions (specify currency used). A complete answer is expected to be no more than 10 pages.

EXHIBIT B

1. Are the stewardship measures proposed for the new PIR sufficient to protect the interests of the dot org community? What is missing?
2. What level of scope, authority and independence will the proposed Stewardship Council possess? Will dot org stakeholders have opportunities to weigh in on the selection of the Council and development of its bylaws and its relationship to PIR and Ethos?
3. What assurances can the dot org community have that Ethos and PIR will keep their promises regarding price increases? Will there be any remedy if these promises are not kept?
4. What mechanisms does PIR currently have in place to implement measures to protect free speech and other rights of domain holders under its revised contract, and will those mechanisms change in any way with the transfer of ownership and control? In particular, how will PIR handle requests from government actors?
5. When is the planned incorporation of PIR as a B corp? Are there any repercussions for Ethos and/or PIR if this incorporation does not take place?
6. What guarantees are in place to retain the unique character of the dot org as a home for non-commercial organizations, one of the important stewardship promises made by PIR when it was granted the registry?
7. Did ISOC receive multiple bids for PIR? If yes, what criteria in addition to price were used to review the bids? Were the ICANN criteria originally applied to dot org bidders in 2002 considered? If no, would ISOC consider other bids should the current proposal be rejected?
8. How long has Ethos committed to stay invested in PIR? Are there measures in place to ensure continued commitment to the answers above in the event of a resale?
9. What changes to ICANN's agreement with PIR should be made to ensure that dot org is maintained in a manner that serves the public interest, and that ICANN has recourse to act swiftly if it is not?

3. PIR Response to ICANN's Request for Additional Information, 20 December 2019

PIR's response to ICANN's request for additional information included the following information (along with other confidential information not published here).

- **PIR's planned statutory conversion and name change.**

  - The planned statutory conversion and associated name change of PIR will occur substantially simultaneously with closing of the Transaction. PIR has provided drafts for ICANN's prior review of the documentation regarding the statutory conversion and associated name change to be filed at closing. PIR also will promptly provide ICANN with finalized copies of such documents upon their submission to the Commonwealth of Pennsylvania.
  - We understand ICANN's published instructions to be that, if a name change occurs in conjunction with an indirect change of control, both the name change and the indirect change of control should be handled through the single indirect change of control process.[3]
  - As a matter of law, "Public Interest Registry, a Pennsylvania nonprofit corporation" will be the same entity as "Public Interest Registry, LLC." There will not be a "new" entity or "assignee" involved in this indirect change of control. The conversion will be effectuated pursuant to Subchapter E of Part I, Chapter 3, of Title 15 Pa.C.S.A. As a matter of law, Public Interest Registry, LLC, will be "the same association without interruption" as Public Interest Registry.[4] All property of Public Interest Registry will continue to be vested in Public Interest Registry, LLC "without reversion or impairment, and the conversion shall not constitute a transfer of any of that property."[5]
  - All debts, obligations and other liabilities of Public Interest Registry will continue as debts, obligations and other liabilities of Public Interest Registry LLC as a matter of law.[6] Any requests regarding the financials of Public Interest Registry, LLC are necessarily the same as requests for the financials of PIR.
  - PIR is providing financial information to fully demonstrate that the continued security of registry operations will not be in jeopardy by this Transaction in the spirit of full transparency. If anything, the infusion of outside resources only acts to strengthen PIR's position in the competitive marketplace.
  - PIR is a mature registry with known costs and base of revenue, rather than an applicant for a yet-to-be-launched gTLD without a proven track record. Many of the questions in Exhibit A are taken from the New gTLD Applicant Guidebook, some referencing "applicant" and the Applicant Guidebook. As such, many of the requests set forth in ICANN's Exhibit A do not apply to a fully functioning, legacy gTLD registry operator (e.g. startup operations, anticipated costs, projections, etc.). PIR trusts the financial information and other documentation

[3] "If the change is the result of a direct or indirect change of control of the registry operator, the assigning registry operator needs to utilize the appropriate Assignment process." https://www.icann.org/en/system/files/files/registry-operator-name-change-25sep17-en.pdf

[4] 15 Pa.C.S.A. 356(a)(1).

[5] 15 Pa.C.S.A. 356(a)(2).

[6] 15 Pa.C.S.A. 356(a)(3).

provided herein is sufficient to demonstrate its financial ability to continue to provide secure registry services.

- **Background of the proposed shareholders, entities or directors and officers of acquiror.**

- The ownership chart provided by PIR in its application for indirect change of control illustrates the current membership structure of PIR and the post-Transaction ownership structure. As indicated in the chart, The Internet Society is currently the sole member of PIR (i.e. 100% control).
- PIR and Purpose Domains Direct, LLC, the post-transaction direct parent of PIR, will each establish a Board of Managers with five seats (each, the "Board"). The Board will include the CEO of PIR (currently Jon Nevett), two seats selected by Ethos Capital, and two seats selected by one or more minority equity holders.[7] The Board will act by majority vote (i.e. Ethos Capital together with the PIR CEO can control the management and affairs of PIR). None of the minority investors will have any special rights or preferences other than standard minority investor approval rights and preferences.
- The management team of PIR will remain in place and continue to operate the business of PIR in a manner consistent with past practices in furtherance of the .ORG community.
- The investors in this Transaction do not include any ICANN registry operators or registrars, nor is ABRY Partners an investor.
- The Internet Society ("ISOC") has created a newly formed supporting organization, Connected Giving Foundation, a non-profit Pennsylvania entity ("CGF"), for which it serves as its sole member. CGF is expected to be a Section 501(c)(3) public charity. Prior to, but in tandem with the closing of the Transaction, CGF will become a member of PIR and upon the conversion of PIR to PIR LLC, ISOC will no longer be a member of PIR LLC, and CGF will be the sole member of PIR LLC. Immediately thereafter, CGF will then sell its 100% membership in PIR to Purpose Domains Direct, LLC. CGF's purpose is to ensure the ongoing financial stability of ISOC, whose mission is to support and promote the development of the Internet around the world – an Internet that is open, globally- connected, secure and trustworthy and that is a resource to enrich people's lives, and a force for good in society. With the funds generated by the Transaction and paid to CGF, ISOC will be well positioned to continue its charitable mission by investing in programs that build and support the communities that make the Internet work, advance the development and application of Internet infrastructure, technologies, and open standards, and advocate for policy that is consistent with its vision for the Internet.
- None of the entities or individuals listed herein have, within the past ten years, been convicted of any crime related to financial or corporate governance activities, or has been judged by a court to have committed fraud or breach of fiduciary duty, or has been the subject of a judicial determination that is the substantive equivalent of any of these.

[7] The contemplated Board has expanded from 3 to 5 seats from the original Notice filed to ICANN.

- None of the entities or individuals listed herein have, within the past ten years, been disciplined by any government or industry regulatory body for conduct involving dishonesty or misuse of funds of others.
- None of the entities or individuals listed herein have, within the past ten years, been convicted of any willful tax-related fraud or willful evasion of tax liabilities.
- None of the entities or individuals listed herein have, within the past ten years, been convicted of perjury, forswearing, failing to cooperate with a law enforcement investigation, or making false statements to a law enforcement agency or representative.
- None of the entities or individuals listed herein have ever been convicted of any crime involving the use of computers, telephony systems, telecommunications or the Internet to facilitate the commission of crimes.
- None of the entities or individuals listed herein have ever been convicted of any crime involving the use of a weapon, force, or the threat of force.
- None of the entities or individuals listed herein have ever been convicted of any violent or sexual offense victimizing children, the elderly, or individuals with disabilities. None of the entities or individuals listed herein have ever been convicted of the illegal sale, manufacture, or distribution of pharmaceutical drugs, or been convicted or successfully extradited for any offense described in Article 3 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.
- None of the entities or individuals listed herein have ever been convicted or successfully extradited for any offense described in the United Nations Convention against Transnational Organized Crime (all Protocols).
- None of the entities or individuals listed herein have been convicted of aiding, abetting, facilitating, enabling, conspiring to commit, or failing to report any of the listed crimes (i.e., within the past 10 years for crimes listed in (5.1) - (5.4) above, or ever for the crimes listed in (5.5) – (5.9) above).
- None of the entities or individuals listed herein have, entered a guilty plea as part of a plea agreement or has a court case in any jurisdiction with a disposition of Adjudicated Guilty or Adjudication Withheld (or regional equivalents) within the respective timeframes listed above for any of the listed crimes (i.e., within the past 10 years for crimes listed in (5.1) - (5.4) above, or ever for the crimes listed in (5.5) – (5.9) above.
- None of the entities or individuals listed herein to their respective knowledge are the subject of a disqualification imposed by ICANN and in effect at the time of this application.

- **PIR's knowledge during the negotiations and finalization of the renewal of the .org Registry Agreement (effective 30 June 2019) that ISOC was engaged in discussions for or planning the sale of PIR or its assets.**

- No, PIR was not aware that ISOC was engaged in discussions regarding the potential sale of PIR or its assets at the time of the negotiation and finalization of the renewal of the .ORG Registry Agreement. The negotiations over the .ORG Registry Agreement were handled by PIR without ISOC involvement and ended in February

2019, with the final version of the ultimately signed agreement being posted for public comment on March 18, 2019. In July 2019, ISOC first informed PIR that ISOC had previously received offers for the purchase of PIR or its assets and had determined that such offers were not in the interests of ISOC or PIR. PIR was not made aware of those discussions at the time they occurred. In September 2019, ISOC informed PIR that ISOC had received an offer for PIR that ISOC was contemplating entertaining. PIR was not involved in any process ISOC may have run with regards to the potential sale of the .ORG registry prior to September 2019,

- **Transaction funding and its affect if any on the financial state of PIR and its ability to operate a secure and stable registry.**

- The purchase price as publicly announced is $1.135 billion, and will be financed through a combination of cash from equity partners and a $360 million term loan facility entered into by lenders to Purpose Domains Direct, LLC, the borrower and post-transaction direct parent of PIR. These lenders are established U.S. financial institutions, each of which has in excess of $50 billion in assets under management and none of which is affiliated with Ethos Capital. The final purchase price, taking into account standard adjustments and the payment of Transaction-related fees and expenses, all as set forth in the Equity Purchase Agreement, will be paid to CGF, the seller of the membership interests in PIR. ISOC is the sole member of CGF and will use the funds in furtherance its mission to support an open, globally-connected, secure, and trustworthy Internet.
- PIR has sufficient operational cash flow to service the loan incurred by Purpose Domains Direct, LLC, to pay taxes, and to continue to operate a secure and stable registry and fund its recently announced initiatives to support the .ORG community. As you may know, PIR has contributed tens of millions of dollars annually to ISOC (contributions it will no longer be making to ISOC after the Transaction) in amounts more than twice that which will be required to service the debt obligations.
- PIR anticipates that the shift in tax status from a non-profit entity to a for-profit entity will not adversely impact PIR's finances or its ability to provide registry services.

- **Financial Information demonstrating that PIR will maintain sufficient financial resources to fund operations:**

- PIR is providing its most recent audited financial statement for 2018, along with its IRS Form 990.[8] This information more than demonstrates that PIR has sufficient financial resources to fund operations post-Transaction. Given PIR's longevity and its known and solid financial performance over the past 16 years in operating the .ORG registry, information regarding an equity investor does not seem pertinent. PIR does not rely on its current equity owner for funding, and given its base of consistent revenue generation, will similarly not require funding post-Transaction. As demonstrated through the Form 990 (and each of PIR's previously Form 990s, all of

[8] https://thenew.org/org-people/about-pir/resources/990-annual-report/

which are publicly available), PIR's revenue more than sustains its operations, a fact which will not change following the Transaction.

- We note that the registry operator is not changing in this indirect change of control per ICANN's requirements.[9] PIR remains the registry operator and has the proven financial wherewithal to ensure the registry remains secure, reliable, and stable. Further, as illustrated in the documents provided herein, PIR is under no burdensome financial restrictions that would hinder its financial ability to continue to securely operate its registries. The amounts PIR currently contributes to ISOC will more than cover any debt obligations and taxes, and leave a substantial amount to invest in the growth of .ORG.

- **Any on-going litigation.**

- To PIR's knowledge, there are no ongoing transaction-related litigation matters involving the transaction.

- **Former directors, officers or employees of ICANN that are or have been involved in, have advised on or otherwise have an interest in the transaction.**

- Nora Abusitta-Ouri currently serves as the Chief Purpose Officer of Ethos Capital. Allen Grogan and Fadi Chehade are acting as advisors to Ethos Capital. Each of them is a former ICANN officer, and Fadi Chehade is a former ICANN Board member as well.

- Joe Abley is the current CTO of PIR, and former Director of DNS Operations at ICANN. Suzanne Woolf is a Senior Director at PIR and is a former ICANN Board member.

- **Current directors, officers or employees of ICANN, if any, that are or have been involved in, have advised on or otherwise have an interest in the transaction.**

- None.

- **Critical registry functions of the registry.**

- There will be no change to any of the critical functions of the registry. Afilias will continue to serve as PIR's back-end registry service provider and DNS provider for all of its TLDs. Iron Mountain will continue to act as PIR's escrow agent.

- **Programs or initiatives to promote/protect the .org community. ISOC/PIR's response to community interest.**

[9] https://www.icann.org/en/system/files/files/change-of-control-guide-13dec17-en.pdf

- PIR and Ethos Capital hosted a webinar on December 19, 2019 to discuss safeguards and controls that will be implemented for the .ORG Community upon consummation of the Transaction, including a PIR Stewardship Council, a commitment to anchor PIR in a Public Benefit LLC, and a commitment on domain registration pricing codified in a Certificate of Formation. A copy of the slides from that webinar are provided, and the recording can be accessed here: https://www.pscp.tv/w/1zqKVElpoXWxB
- More information on Ethos' commitment to protecting the .ORG community can be found here: https://www.keypointsabout.org/blog/strengthening-org-for-the-future

- **Criteria of evaluation used by ISOC; availability of Verisign endowment.**

- PIR was informed by ISOC that it did not exclusively apply the 2002 ICANN assessment criteria for new gTLD applications, because several conditions in the registry environment have changed since then, and many of the criteria do not in fact apply to a fully functioning registry operator. PIR believes, and has been informed that ISOC also believes, that applicable criteria from 2002 are met by the proposed Transaction in the following ways:

  • Ethos Capital is well-positioned to preserve a stable, well-functioning .ORG registry. ISOC believes Ethos Capital plans to invest in PIR as evidenced by the fact they are paying a significant premium for PIR in order to be able to do so. Ethos Capital has announced that they plan to make no short-term changes to PIR's registry management, and have committed to maintaining existing relationships and agreements.

  • PIR's ability to comply with ICANN-developed policies remains unchanged.

  • Ethos Capital's involvement will increase competition for registration services, because Ethos Capital is another company joining the marketplace with the intent to offer enhanced services to the market. Ethos Capital intends to offer the market high- quality, competitive registry services with an attractive customer value proposition, as PIR has throughout its history.

  • The Transaction represents a commitment to differentiation of the .ORG TLD, and other TLDs that PIR operates, from the rest of the TLD marketplace. That appears to us to be the value in which Ethos Capital wishes to invest.

  • Over the years, PIR has adopted mechanisms for promoting their registries operation in a manner that is responsive to the needs, concerns, and views of the relevant Internet user community, such as the PIR Advisory Council. Those mechanisms were part of what Ethos Capital seemed to desire in PIR, and they have announced investment in such mechanisms.

- There was no requirement in the 2002 process that the .ORG Registry Operator be a non-profit itself.

- No funds remain available for use from the Verisign endowment.

- **Cross-ownership interests in registrars and/or registrar resellers.**

- This transaction will not trigger any cross-ownership for purposes of Section 2.9(b) of the Registry Agreement, i.e., PIR will not as a result of this transaction become an Affiliate or reseller of any ICANN accredited registrar.

Summary

PIR, ISOC, and Ethos Capital would like to take this opportunity to assure the .ORG community that there are no agreements in place pursuant to which we anticipate control being granted to any other entity or individual, and there are no springing rights that would be triggered by any future event that would make any minority investor a majority investor.

We commit to maintaining as much transparency as one might reasonably expect, consistent with the principles set forth in ICANN's DIDP.

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Los Angeles, CA 90094-2536
USA
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+1 310 823 8649

9 December 2019

Andrew Sullivan
President and CEO, ISOC
Email: sullivan@isoc.org

Jon Nevett
CEO, PIR
Email: jon@pir.org

Subject: Transparency

Dear Andrew and Jon:

We are writing regarding Public Interest Registry's (PIR) 14 November 2019 notification relating to the proposed acquisition of PIR (the "Request"). As we are sending PIR a detailed request for additional information today, we wanted to encourage you to answer these questions fully and as transparently as possible.

As you are well aware, transparency is a cornerstone of ICANN and how ICANN acts to protect the public interest while performing its role. In light of the level of interest in the recently announced acquisition of PIR, both within the ICANN community and more generally, we continue to believe that it is critical that your Request, and the questions and answers in follow up to the Request, and any other related materials, be made public.

While PIR has previously declined our request to publish the Request, we urge you to reconsider. We also think there would be great value for us to publish the questions that you are asked and your answers to those questions. We will of course provide you with the opportunity to redact portions of the documents that you believe contain personally identifiable information before posting and renew that offer here.

As you, Andrew, ISOC's CEO stated publicly during a webcast meeting in which you participated on 5 December 2019, you are uncomfortable with the lack of transparency. Many of us watching the communications on this transaction are also uncomfortable.

In sum, we again reiterate our belief that it is imperative that you commit to completing this process in an open and transparent manner, starting with publishing the Request

and related material, and allowing us to publish our questions to you, and your full responses.

We look forward to hearing from you on this matter, as soon as possible. Please let us know if you would like to discuss.

Sincerely,

John Jeffrey
General Counsel & Secretary

cc: Brian Cimbolic, VP, General Counsel, PIR
Email: brian@pir.org

To: Maarten Botterman, Chair of the Board, ICANN
Cc: Göran Marby, President and CEO, ICANN
From: Noncommercial Stakeholders Group (NCSG)

9 December 2019

RE: Impact of the ORG Sale on Noncommercial Registrants

Dear Mr. Botterman,

We are writing on behalf of the Non-Commercial Stakeholders Group (NCSG) in relation to ISOC's sale agreement of the Public Interest Registry (PIR) to Ethos Capital. As you are no doubt aware, last month the Internet Society (ISOC) announced that Ethos Capital was acquiring all of the assets of PIR, including the ORG TLD.

We are directly affected by this change of ownership. Nonprofits and individual registrants everywhere rely on ORG domain names for their email, websites, campaigns, and fundraising. These domains cannot easily be switched to another provider as years of organizational equity and Internet presence and identity have been built around them.

Our critical requests to the ICANN board are these:

- **A.** ICANN has an obligation to enter into negotiations with Ethos Capital to ensure that its operation of the ORG domain conforms to criteria upon which the original award of ORG was contingent (we discuss those criteria below);
- **B.** ICANN in turn should make decisions about the future of the ORG TLD only after consulting with impacted registrants and the global non-commercial Internet community (we outline our concerns below); and
- **C.** Modifications to the Registry Agreement will be required in order to allay our concerns and mitigate negative impact on registrants.

The continuing obligations of the ORG award

Let us remind ICANN about the following facts regarding the original award of ORG to PIR.

On 20 May 2002, ICANN issued an RFP for the reassignment of ORG. The criteria for selection were set out here. Among those criteria were:

- 4. Differentiation. Proposals were supposed to "promote and attract registrations from the global noncommercial community."
- 5. Responsiveness to the needs, concerns, and views of the noncommercial Internet user community. Proposals were supposed to have "specific mechanisms" for achieving this responsiveness and supportiveness.
- 6. High levels of support from ORG registrants. The RFP said that support from "those actually using ORG domain names for noncommercial purposes, will be a factor in the evaluation of the proposals."

The ORG reassignment was a highly competitive process. Eleven serious proposals were submitted. Underlining the importance of noncommercial community support, ICANN's CEO at the time, Stuart Lynn, asked the NCSG's predecessor, known at the time as the Noncommercial Domain Name Holders Constituency of the DNSO, to conduct reviews to rank the many applicants on the basis of how well they complied with these criteria. Our process ranked the ISOC/PIR proposal second in a field of 11. Link to the evaluation report.

Ultimately, the Internet Society's PIR won the award largely due to its performance on the RFP criteria 4, 5, and 6, as well as the reputation of the Internet Society as an appropriate steward for the domain. And indeed, during its tenure as the ORG delegee, PIR conformed to the many commitments it made to be responsive to the needs of noncommercial registrants. Further, PIR's status as a nonprofit qualified it for a US$5 million endowment to defray its operating and startup costs.

However, 16 years later, PIR has proposed re-assigning the award to another organization that has made none of those commitments, and is not a nonprofit. In effect, ISOC is monetizing the tremendous value inherent in an established TLD with millions of registrants without any assurances that the original criteria of the award will continue to be met.

ICANN cannot simply rubber stamp this major change of control.

We are not contesting, per se, ISOC's desire to secure its financial future and eliminate its dependency on DNS business. We do, however, believe that there was a very explicit *quid pro quo* attached to the original award regarding service to the noncommercial community. *It is ICANN's duty to ensure that those criteria continue to be met.*

Our Requests for ORG

We are, therefore, demanding that Ethos Capital submit an updated proposal to ICANN, which should be made subject to public comment. The proposal should specify how its operation of the ORG domain will continue to meet the obligations to noncommercial registrants contained in the original RFP.

Due to Ethos Capital's for-profit nature and potentially transient interest in the domain, we are demanding more than verbal promises: we are requesting that the Registry Agreement be modified in ways that will protect existing and future ORG registrants. Specifically, we want to see:

- A revised notification procedure in which wholesale price increases of any amount give ORG registrants 6 months to renew their domains for periods of up to 20 years at the pre-existing annual rate. Implementation of this revised notification procedure must be obligatory to both PIR as well as any registrar through which .org domain names are registered and/or renewed.
- A strong commitment that the administration of the ORG domain will remain content-neutral; that is, the registry will not suspend or take away domains based on their publication of political, cultural, social, ethnic, religious, and personal content, even untrue, offensive, indecent, or unethical material, like that protected under the U.S. First Amendment.
- An elimination of the URS procedure within the ORG domain, as the rights protection mechanisms specific to the URS were appropriate only for new domains.

If Ethos Capital is unwilling or unable to make the commitments described above, the NCSG asks that ICANN exercise its right in article 7.5 of the ORG Registry Agreement and withhold its approval for ISOC to assign its rights and obligations to Ethos Capital.

Our Requests re: NGO and ONG

As new TLDs awarded during the more recent ICANN process, NGO and ONG do not trigger the same continuing obligations as ORG. They were, however, awarded by ICANN as a "community" TLD with specific policies outlined in Specification 12 of the Registry Agreement. According to ICANN's Registry Transition Process, a Registry Transition takes place whenever there is "a change in the contracting party of a gTLD Registry Agreement with ICANN." Further, the transition process states that:

> "If the Registry Agreement defines any community that must be consulted at time of transition, ICANN will consult them at this stage. In these cases, there must be support for the proposed successor from the relevant community for the process to continue to transition."

Therefore, ICANN will have to consult with ONG and NGO registrants, to see whether they demonstrate support for the proposed successor.

Request

The ORG situation is unique because of its origins in a competitive RFP that was specifically earmarked for noncommercial registrants. How ICANN handles this case, however, will have enormous precedential consequences for the stability of the DNS and ICANN's own reputation and status. Changes in ownership are likely to be increasingly common going forward. Domain name users want stability and predictability in their basic infrastructure, which means that the obligations, service commitments and pricing cannot be adjusted dramatically as ownership changes. We sincerely urge the ICANN board to step up and meet its clear obligations to ensure that ORG continues to fulfill the conditions of its delegation and that the noncommercial registrants are consulted and protective modifications in the RA are made.

December 17, 2019

Maarten Botterman, Board Chair
ICANN Board Members
Goran Marby, CEO
John Jeffries, General Counsel
Cyrus Nemazi, SVP, Global Domains Division
Via E-Mail
With Attachment

Re: Change in Control of the .ORG Registry

Dear ICANN Board and Leadership,

We write to thank ICANN for requesting that Public Interest Registry (PIR) and the Internet Society (ISOC) provide more information to ICANN about the proposed sale of PIR to Ethos Capital. We appreciate ICANN's call for transparency into this secretive deal. We encourage ICANN to go further, and withhold its approval for this change in control of the .ORG registry, unless and until PIR makes concrete and binding commitments to operate the registry in the best interests of noncommercial civil society registrants.

We enclose a letter signed by over 400 nonprofit entities / NGOs who are registrants in the .ORG top-level domain. The signatories include Access Now, Open Society Foundations, Communications Workers of America, Girl Scouts of the USA, Greenpeace, Human Rights Watch, the League of Women Voters, the National Council of Nonprofits, Oxfam, the European Climate Foundation, Derechos Digitales, the Gulf Centre for Human Rights, ICT Watch Indonesia, Integrity Watch Afghanistan, Media Foundation for West Africa, and many more.

The signatories on this letter are digital rights organizations, tech-focused groups, food banks and hunger relief organizations, co-ops, community art galleries and theaters, local humane societies, youth groups, community centers, mental health clinics, fitness groups, churches and religious organizations, libraries, unions and trade groups, violence prevention organizations, human rights and aid agencies, outdoor, environmental, and wildlife protection groups, radio stations, and research foundations.

They are joined by over 18,000 individuals who have added their names to the letter. These organizations and individuals are concerned about the sale of PIR and the way it has been conducted to date.

Many of the organizations signing the enclosed letter have used domain names in .ORG as the foundation of their online identities for years, if not decades. The difficulty of

changing to a different top-level domain—which approaches impossibility for some—makes them vulnerable to the policy and business practices of the .ORG registry operator.

The .ORG registry is unique. It is recognized the world over as the home of NGOs and other groups that act for the public good. Many .ORG registrants work to hold governments *and* corporations to account. They face all of the risks inherent in speaking truth to power, including becoming targets for censorship and repression. Eighteen years ago, ICANN proposed to find a new operator for .ORG, to achieve a "registry returned . . . to its originally intended function as a registry operated by and for non-profit organizations." When ISOC founded PIR to fill that role, the previous operator, Verisign, gave the new registry operator $5 million "to be used to fund future operating costs of the non-profit entity designated by ICANN as successor operator of the .ORG registry."

The speed and secrecy of the proposed sale cast doubt on PIR's ability to maintain the level of service it has provided to nonprofit registrants in the past once it becomes a privately owned, for-profit concern. As a newly-formed entity, Ethos Capital has no track record of operating in the public interest. We also know little to nothing about Ethos's investors, their goals, and whether those goals are compatible with the charge ICANN gave to PIR at its founding. In particular, we are concerned that PIR may wield the threat of domain suspension to influence the political, social, religious, journalistic, or personal expression of .ORG registrants and their users at the request of corporations or governments. And to all of the nonprofit registrants who cannot readily switch domains, PIR will have no accountability once its links to ISOC are severed.

The vague representations Ethos and PIR have made to date about accountability and stewardship are woefully insufficient to earn the trust of the .ORG community. The .ORG registry agreement should not come under Ethos's control without the company first earning that trust. This requires transparency, as you have requested. It also requires specific, legally binding commitments to safeguard the rights of NGOs and other non-commercial registrants against financial exploitation and arbitrary censorship. We stand ready to help in defining those commitments. If PIR is unable or unwilling to make such commitments before completing its change of control, ICANN should exercise its right under Section 7.5 of the Registry Agreement to withhold consent to that change in control, terminate the Agreement, and begin a process to find a capable and trustworthy steward of the .ORG domain.

Very truly yours,

Cindy Cohn, Executive Director
Mitchell L. Stoltz, Senior Staff Attorney
Cara Gagliano, Staff Attorney
ELECTRONIC FRONTIER FOUNDATION

Internet Society
Attn: Andrew Sullivan, President and CEO
11710 Plaza America Drive, Suite 400
Reston, VA 20190

Dear Mr. Sullivan,

We urge you to stop the sale of the Public Interest Registry (PIR) to Ethos Capital.

Non-governmental organizations all over the world rely on the .ORG top-level domain. Decisions affecting .ORG must be made with the consultation of the NGO community, overseen by a trusted community leader. If the Internet Society (ISOC) can no longer be that leader, it should work with the NGO community and the Internet Corporation for Assigned Names and Numbers (ICANN) to find an appropriate replacement.

The 2019 .ORG Registry Agreement represents a significant departure from .ORG's 34-year history. It gives the registry the power to make several policy decisions that would be detrimental to the .ORG community:

- **The power to raise .ORG registration fees without the approval of ICANN or the .ORG community.** A .ORG price hike would put many cash-strapped NGOs in the difficult position of either paying the increased fees or losing the legitimacy and brand recognition of a .ORG domain.
- **The power to develop and implement Rights Protection Mechanisms unilaterally, without consulting the .ORG community**. If such mechanisms are not carefully crafted in collaboration with the NGO community, they risk censoring completely legal nonprofit activities.
- **The power to implement processes to suspend domain names based on accusations of "activity contrary to applicable law."** The .ORG registry should not implement such processes without understanding how state actors frequently target NGOs with allegations of illegal activity.

A registry could abuse these powers to do significant harm to the global NGO sector, intentionally or not. We cannot afford to put them into the hands of a private equity firm that has not earned the trust of the NGO community. .ORG must be managed by a leader that puts the needs of NGOs over profits.

When ISOC originally proposed transferring management of .ORG to PIR in 2002, ISOC's then President and CEO Lynn St. Amour promised that .ORG would continue to be driven by the NGO community—in her words, PIR would "draw upon the resources of ISOC's

extended global network to drive policy and management." As long-time members of that global network, we insist that you keep that promise.

Select signers:

Access Now
America's Service Commissions
American Alliance of Museums
American Council on Exercise
American Federation of Musicians of the U.S. and Canada
American Physical Society
American Society of Association Executives
April
Association of Junior Leagues International, Inc.
Center for Internet and Human Rights
Code for America
Communications Workers of America
Consumer Reports
Creative Commons
Crisis Text Line
Derechos Digitales
DoSomething.org
Electronic Privacy Information Center
European Center for Not-for-Profit Law Stichting (ECNL)
European Climate Foundation
Farm Aid
Fédération FDN
Feeding America
Fight for the Future
Free Software Foundation
Front Line Defenders
German Foundation for Data Protection
Girl Scouts of the USA
Greenpeace
Gulf Centre for Human Rights
Human Rights Watch
HURIDOCS
Integrity Watch Afghanistan
Internet Archive
Internet Policy Observatory Pakistan
Internet Sans Frontières
Internet Society Jakarta Chapter
Internet Society Netherlands Chapter
Jobs With Justice
Karisma Foundation
League of Women Voters
Meals on Wheels America
Media Foundation for West Africa
Mennonite Central Committee
MoveOn
Nat'l Conference on Public Employee Retirement
National Council of Nonprofits
NTEN
OCANDS
Open Knowledge Foundation
Open Society Foundations
Open Technology Institute
Oxfam
Palante
Philippine Human Rights Information Center
Public Citizen
Public Knowledge
Public Library of Science (PLOS)
R Street Institute
Redes Ayuda
Sierra Club
TechSoup
TEDIC NGO
Telecommunities Canada
The Association of Flight Attendants-CWA (AFA)
The Union of Concerned Scientists
Transparency International (Germany)
Ushahidi Inc.
VolunteerMatch
Volunteers of America
Web Foundation
Wikimedia Foundation
YMCA of the USA
Youth and Philanthropy Initiative (YPI) Canada
YWCA USA

350.org
50by40.org
A Blessing to One Another
A Bunch of Hacks
A New Beginning Animal Rescue
A1K.org
Access Now
Affiliation of Multicultural Societies and Service Agencies of British Columbia
African Academic Network on Internet Policy
African Freedom of Expression Exchange (AFEX).
AfroLeadership
Agaric Tech Cooperative
Agile France
Albertine Watchdog
All Faiths
Allegheny RiverStone Center for the Arts
Alliance for Morris County Parks
Alternatives-et-Autogestion.org
Alternatives, Inc
America's Service Commissions
American Alliance of Museums
American Bible Society
American Council on Exercise
American Federation of Musicians of the United States and Canada
American Physical Society
American Political Science Association
American Society of Association Executives
Anarchist Group Amsterdam
Ann Martin Center
APpeas Associação Portuguesa de promoção do envelhecimento ativo e saudável
April
Aquilenet
Arab American Association of New York (AAANY)
ARTabilityAZ
arXiv.org
Aspiration
Association Artistique Alexandre Roubtzoff
Association for the Advancement of Sustainability in Higher Education (AASHE)
Association of Junior Leagues International, Inc.
Astra Labs
ASUTIC (Senegal ICT Users Association)
Auroville Foundation
Austin Baroque Orchestra
Australian Play, Imagination, and Learning Institute
Autimatisering
AvaCon
AvRM
Bangladesh NGOs Network for Radio and Communication(BNNRC)
Barracon Digital
Basic Internet Foundation
Battle of Homestead Foundation
Bay Area Mashers
Berkeley Institute for Free Speech Online
Better Future for All
Bike Walk Montana
Blueprint for Free Speech
Bridgewell Inc
Bring Your Own Ideas LTD
British Columbia Aviation Council
Business & Human Rights Resource Centre
C4 Atlanta
California Association of Nonprofits (CalNonprofits)
Capital Region Community Foundation
Cargografias.org
CASA New Orleans
Center for Digital Resilience
Center for Innovative Thinking, Inc
Center for Internet and Human Rights
Centro de Documentación en Derechos Humanos "Segundo Montes Mozo S.J." (CSMM)
Centro Latinoamericano de Investigaciones Sobre Internet
Centrum Cyfrowe Foundation
Chaotikum e.V.
Chestnut Creek School of the Arts
Child Saving Institute, Inc.
Children's Alliance of Montana
Children's Law Center Inc
Chilliwack Arts & Cultural Centre Society
Chordoma Foundation
Circus Freaks
Cita Press
City of Anacortes
CiviCRM
Civllsphere
Clever Octopus Inc
Clinton-Gratiot Habitat for Humanity ReStore
CN Guidance and Counseling Services
Co-op Source
Code for America
Codeando Mexico
Codeberg e.V.
Colorado Nonprofit Association
Communications Workers of America
Communities United Against Police Brutality
Community Action Center
Community Tech Network
Completely KIDS
Computer Aid International
concordion.org
Connecticut Community Nonprofit Alliance
Consumer Action
Consumer Reports
Council of Michigan Foundations
Coworker.org
Creative Commons
Crisis Text Line
Cybertelecom
Cycle On Hawaii
Daily Bread Food Bank
daltonbookclub.org
Daniel 2:28, Inc.
Datenschutzraum e.V.
Defending Rights & Dissent
Demand Progress Education Fund
Derechos Digitales
Design Action Collective
Digital Empowerment Foundation
Digital Rights Foundation, Pakistan
Digital Rights Watch
Digital Society School
Digitale Gesellschaft
Dioamore.org
Domain Name Rights Coalition
DoSomething.org
Downtown Aurora Visual Arts
Drayton Avenue Cooperative Preschool
DroidWiki.org
Droit et Justice
Dutch Virtual Reality Foundation

Eastern Orthodox Committee on Scouting
ECO
Ecumenical Council of Bishops and Apostolic Leadership
EDRi
EL SPACE
Electronic Frontier Finland
Electronic Frontier Foundation
Electronic Privacy Information Center
Elypia CIC
Empower Success Corps
epicenter.works
Erinyes.org.au
Erzsébet: The Opera
Esperanto.org
EU.org
European Center for Not-for-Profit Law Stichting (ECNL)
European Climate Foundation
European Institute of Golf Course Architects
Executive Service Corps of the United States
Fablab LCube
Family Residences and Essential Enterprises, Inc
Farm Aid
FDN
Fédération FDN
Feeding America
Fight for the Future
FIRE - The Foundation for Individual Rights in Education
Fondation Jaluo Du Congo/RDC (FOJAC)
Fondation Litteraire Fleur de Lys
Form & Function Digital Co-operative
Fourth Estate
Free Expression Myanmar
Free Software Foundation
freeCodeCamp.org
Freie Software Freunde e. V.
Front Line Defenders
FrOSCon e.V.
fundación Via Libre
Funding the Next Generation
Galveston Urban Ministries
Gateway Environmental Initiative
Geany e.V. Association
Geek's Home
GenLit.org
GeoCommunities
German Foundation for Data Protection
Gestalt Institute of the Gulf Coast
Girl Scouts of the USA
GiveInternet.org
Global Care Impact
Global Forum for Media Development (GFMD)
GNOME Foundation
Gökova Akyaka'yı Sevenler Derneği
Good4Trust.org
GrantStation
GreatFire.org
Greenpeace
Gulf Centre for Human Rights
Habilitation Information Vocation & Education
Hackerspace Istanbul
Harmonized Initiatives of Media for the Spread of Good Nutrition in Region 8
Heard Museum
Holistic Ministry of Children of the Horn of Africa
Holy Name Housing Corporation
Hope 24/7
Hopelink
Hospice Help Foundation
Hostingvereniging Soleus
House of Mercy
Huerto Roma Verde, La Cuadra genera ciudad A.C.
Human Rights Measurement Initiative
Humanitarian FOSS Project
Humanitarian Press Foundation, Yemen
HURIDOCS
i freedom Uganda Network
ICT Watch - Indonesia
Ideen Hoch Drei e.V
Immigrant Rights Action
Immigrant Solidarity DuPage
Immunize Nevada
Independent Sector
Index on Censorship
Indybay
Information Ecology
Initiative für Netzfreiheit
Integrity Watch Afghanistan
Interaction International
Interfaith Cincy
International Trade Union Confederation (ITUC)
Internet Archive
Internet of Ownership
Internet Policy Observatory Pakistan
Internet Sans Frontières
Internet Society Jakarta Chapter
Internet Society Netherlands Chapter
Internet Systems Consortium
IO Cooperative Inc.
ION Medical Safety
Ionic 6
Iron Work Farm in Acton, Inc.
IT for Change
Jennifer Ann's Group
Job Connection, Inc
Jobs With Justice
JUMP Math
Kalvos & Damian's New Music Bazaar
Karisma Foundation
Kentucky Nonprofit Network
Killeen Lodge #1125 A.F. & A.M.
KnowledgeFlow Cybersafety Foundation
LA SEMILLA
LA Tech4Good
Learn Nigeria Laws
Liberty and Peace NOW! Human Rights Reporters
LibreFoodPantry
Life Transformation for Africa Initiative
Link Centre
LinuxFr
Liquid Legal Institute e.V.
Little Brothers Friends of the Elderly, San Francisco
Livermore Pride
LUX Center for the Arts
Main Street Productions, Inc. dba the Westfield Playhouse
MaineShare
Maison des utilisateurs de Logiciels Libres de Montréal
Majal.org
MakeKnowledge
Manchester Acupuncture Studio
MapLight
MariaDB Foundation
Mary McDowell Friends School
MasterNewMedia.org
Meals on Wheels America
Media Alliance
Media Foundation for West Africa

Members of Churches of Christ for Scouting
Memphis Leadership Foundation
Mennonite Central Committee
Message Agency
Metamath
MidwayUSA Foundation
Minnesota Council of Nonprofits
MMD Gira ubukire
Modern Wizard Quarterly
Montana Afterschool Alliance
Montana Federation of Public Employees (MFPE)
Montana Independent Living Project
Montana Nonprofit Association
Multnomah County Library
Myanmar ICT for Development Organisation
nadir.org
National Conference on Public Employee Retirement Systems
National Council of Nonprofits
National Human Services Assembly
National Voluntary Organizations Active in Disaster
Nederlandse Vereniging voor Veganisme (Dutch Vegan Society)
NEEMFest Productions
Neponset River Watershed Association
New Jersey Association of Mental Health and Addiction Agencies, Inc.
New York Avant-Garde Festival Archive Site
New York Council of Nonprofits
Next in Nonprofits
Ngetha Media Association for Peace (NMAP)
NICVA
Niko Niko Taishi
Nonprofit New York
North Carolina Center for Nonprofits
North Carolina Justice Center
North Dakota Association of Nonprofit Organizations
North Shore Child & Family Guidance Center
Northbridge Technology Alliance
Northwest Progressive Institute
Nouveaux Voisins
NTEN
O Foundation
OCANDS
Odorheiu Secuiesc Community Foundation
Ohev Sholom Talmud Torah Congregation
Ökostadt Rhein-Neckar e.V.
OMACAN
Ontario Nonprofit Network
Open Aid Alliance
Open Knowledge Foundation
Open MIC (Open Media and Information Companies Initiative)
Open Society Foundations
Open Source Initiative
Open Source Matters, Inc.
Open State Foundation
Open Technology Institute
openinverter.org
Opportunity Resource Fund
Our First Right
Oxfam
Özgür Yazılım Derneği
P.R.A.Y. Publishing
p≡p foundation
Padirac Innovation
Palante Technology Cooperative
Paleoaerie.org
Parinux
Participatory Budgeting Project
Pastoralists Indigenous Non Governmental Organization's (PINGO's) Forum
PATH North Dakota, Inc.
Patterson School Foundation
PDX Privacy
People For People
Pesticide Action Network North America
Philadelphia Recorder Society
Philippine Human Rights Information Center
Phoenix Rising Equine Rescue & Rehabilitation
Pinelands Preservation Alliance
Pirate Parties International
Piratpartiet Sverige
Platoniq
Policy Research and Innovation
Premium Traffic Limited
Presentation House Theatre
Project WET Foundation
Providers' Council
Proyecto sobre Organización, Desarrollo, Educación e Investigación (PODER)
Public Citizen
Public Knowledge
Public Library of Science (PLOS)
Qurium Media Foundation
R Street Institute
Radically Open Security
Radio Free
Rainforest Action Network
Redes Ayuda
RedesAyuda
Refugee Women's Network
Regular Baptist Ministries
Replicant
Review.org, LLC
ritimo
River Cities Humane Society for Cats
Roadrunner Food Bank, Inc.
SafeHouse Denver
Salam Academy
Salt Works Student Ministries
San Francisco Lyric Chorus
San Francisco Public Health Foundation
San Juan Community Matters
SANE Project
School on Wheels
Second Harvest Asia
Second Harvest Japan
SELFHTML e.V.
Shifter
Side by Side, Inc
Sierra Club
Simple Machines
Skiftet
Sociality - Cooperative for Digital Communication Greece
Society for Nonprofits
Softcatalà
Software For Good
Software Freedom Law Center India
South Florida Tech For Seniors
Southern Environmental Law Center
Springfield Area Arts Council
Stajl IT
State Theatre, Inc.
STEPSABQ.org
Stiftung Albumin-Carrier-Therapie
Stin Priza Coop

Stratosphere Research Laboratory
Stuart Center
Sud-Ouest.org
Sugarloaf: The North Shore Stewardship Association
Sursiendo, Comunicación y Cultura Digital
Sustainable Fisheries Partnership Foundation
Talking Talons Youth Leadership
TechSoup
Tecker International LLC
TEDIC NGO
Telecommunities Canada
Telecommunities Canada
Texas Criminal Justice Coalition
The Apache Software Foundation
The Association of Flight Attendants-CWA (AFA)
The Bioscience Resource Project
The Boys' Latin School of MD
The Centre for Developmental Neurobiology
The Children's Treehouse Foundation
The Document Foundation
The Environmental Center
The Henry Ford
The Humane Society of Elmore County
The Inetta Fund
The IO Foundation
The League of Women Voters of the United States
The Los Haro Project
The MRC Centre for Neurodevelopmental Disorders
The Oxalosis & Hyperoxaluria Foundation
The Parallax
The Tor Project
The Union for Contemporary Art
The Union of Concerned Scientists
Theosophical Society in Seattle
Thetford Academy
Thibodaux Playhouse, Inc
ThinkShout
Thirring Institute for Applied Gravitational Research
Tioga Opportunities, Inc
To'nihaiyilya- Growing Our Dreams
Together SC
Trans Lifeline
Transnational Institute
Transparency International (Germany)
Tulsa Hub Syndicate
Tupelo Arts Council
Tutanota
United Methodist Communications
United Way of Butte and Anaconda
United Way of the Lewis and Clark Area
Ushahidi Inc.
Videre Est Credere
VolunteerMatch
Volunteers of America
Waag | Technology & Society
Washington Trails Association
Watcan Foundation
Web Foundation
West Hartford Symphony Orchestra of West Hartford, CT
West Virginia Nonprofit Association
Wikimedia Foundation
WikiReal
Win Without War
WITNESS
Women LISTEN, Inc.
WonderArts Vermont
Wooden Shoe Books
Woolsack
Xpdojo.org
YMCA of the USA
Ynternet.org
YODET
Yonkers Community Action Program, Inc
Your Digital Rights
Youth and Philanthropy Initiative (YPI) Canada
YWCA USA
Zanmi Lakay
Zazim
Zir Chemed
_artundweise kunst- und denkraum

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www.ohchr.org • TEL: +41 22 917 9543 / +41 22 917 9738 • FAX: +41 22 917 9008 • E-MAIL: registry@ohchr.org

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association

REFERENCE:
OL OTH 60/2019

20 December 2019

Dear Mr. Marby,

We are writing in our capacities as the United Nations (UN) Special Rapporteur on freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and association, pursuant to Human Rights Council resolutions 34/18 and 41/12.

As independent human rights experts appointed and mandated by the United Nations Human Rights Council to report and advise on human rights issues falling within the scope of our mandates, we are sending to you this letter under the communications procedure of the Special Procedures of the United Nations Human Rights Council to seek clarification on information we have received.[1] Special Procedures mechanisms can intervene directly with Governments and other stakeholders (including companies) on allegations of abuses of human rights that come within their mandates by means of letters, which include urgent appeals, allegation letters, and other communications. The intervention may relate to a human rights violation that has already occurred, is ongoing, or which has a high risk of occurring. The process involves sending a letter to the concerned actors identifying the concerns, the applicable international human rights norms and standards, and questions of the mandate-holder(s), and a request for follow-up action. Communications may deal with individual cases, general patterns and trends of human rights violations, cases affecting a particular group or community, or the content of draft or existing legislation, policy or practice considered not to be fully compatible with international human rights standards.

We wish to urge ICANN to take steps to review carefully the proposed transfer by the Internet Society (ISOC) of the Public Interest Registry (PIR) and all its assets to a private equity firm, Ethos Capital. The proposed deal raises serious questions about the ability of civil society organizations and other public interest-minded individuals and

[1] Further information about the communication procedure is available at: http://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx

entities to continue to enjoy the space for the exercise of the rights to freedom of expression and association offered by the .ORG domain managed by the PIR.

We were pleased to see that ICANN, in a 9 December letter, urged ISOC and Ethos Capital to commit to transparency. Such transparency is necessary, but on its own insufficient, as it must be combined with rigorous review by ICANN to determine whether this deal will promote freedom of expression and access to information online or interfere with the ability of civil society organizations to have a voice in online space. If the answer is negative, or even ambiguous, we would urge ICANN not to authorize the transfer of the PIR to Ethos Capital. We would especially urge ICANN to take into account human rights considerations as it reviews the proposed deal. In particular, we want to highlight a few normative principles and concrete steps that should be central to ICANN's review – and indeed should have been central to the considerations of ISOC to sell the PIR in the first place.

For background, the UN Human Rights Council has mandated a Special Rapporteur on freedom of opinion and expression, since the inception of the mandate in 1993, to "gather all relevant information, wherever it may occur, relating to violations of the right to freedom of opinion and expression". The mandate holders have focused considerable attention on the ways in which the Internet promotes the right of everyone, as Article 19 of the Universal Declaration of Human Rights provides, to "seek, receive and impart information and ideas through any media and regardless of frontiers."

In addition, the Council has mandated the Special Rapporteur on the rights to freedom of peaceful assembly and association to "seek, receive and respond to information from Governments, nongovernmental organizations, relevant stakeholders and any other parties …, with a view to promoting and protecting the rights to freedom of peaceful assembly and of association". This mandate recently examined the important role played by the digital space in the expansion of the civil society sector.

While the Universal Declaration and the International Covenant on Civil and Political Rights, which strengthens the guarantees of freedom of opinion and expression and the right to association, impose obligations on States, the Human Rights Council has also understood that non-state corporate actors increasingly implicate the enjoyment of human rights.

Thus, in 2011, the Human Rights Council adopted the UN Guiding Principles on Business and Human Rights. The Guiding Principles provide that all businesses have a responsibility to respect human rights, to avoid causing or contributing to adverse human rights impacts, and to seek to mitigate human rights violations that may be directly linked to their operations. In order to meet these responsibilities, the Guiding Principles emphasize that companies should implement policy commitments to meet their human rights responsibilities, due-diligence processes to identify, mitigate, and prevent abuses, and remedy processes to account for potential violations. In addition, companies should disclose policy decisions that implicate freedom of expression and allow users, civil society members, and peer companies to consult on the implementation of transparency measures.

These principles and norms of international human rights law provide a framework for our own concerns with the proposed sale of the PIR to a private equity firm. Substantial reporting has raised questions about the opacity of the deal and its failure to involve those most concerned – in particular civil society organizations that have registered .ORG sites – in the evaluation of the proposed transaction. In our view, these are questions that directly implicate the freedom of expression and the ability for civil society organizations to have a place online that is not subject to the pressures of a commercial environment that could very well silence them.

First, the proposed deal has been anything but transparent. ISOC's agreement to sell the PIR to a well-connected private equity firm was not the subject to any prior notice or evaluation by concerned organizations or members of the public. Such opacity runs counter to the UN Guiding Principles. In particular, Principle 21 of the Guiding Principles provides that "business enterprises should be prepared to communicate [their human rights commitments] externally, particularly when concerns are raised by or on behalf of affected stakeholders." The amount of communication from the parties to the deal, ISOC and Ethos Capital, has been marginal at best. As a result, any review should require the parties to open up the deal to full review by ICANN and all interested stakeholders, whether civil society, governmental or inter-governmental.

Second, because of the lack of transparency, it is unknown whether the parties to the deal undertook any kind of actions to perform human rights due diligence. The Guiding Principles (Principle 15) call for businesses to adopt a "due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights." They further call upon businesses to "identify and assess any actual or potential adverse human rights impacts with which they may be involved," including by "draw[ing] on internal and/or independent external human rights expertise" and "involve[ing] meaningful consultation with potentially affected groups and other relevant stakeholders" (Principle 18). There has been nothing in the public record to suggest that ISOC or Ethos Capital conducted anything like human rights diligence. How will the transaction implicate current .ORG registrants? How will it implicate future registrants? Will there be changes in the management of the domain that might, over time, prove costly for non-profit organizations and thus undermine their ability to make use of it? These are just a few of the overarching questions that human rights due diligence should address. We would suggest that such due diligence is essential to ensuring protection of freedom of expression and association – and further that, given the lack of a record of such actions, ICANN may be best placed to perform that function for this proposed deal.

Third, we also have concerns about this proposed deal on the merits. This is all the more surprising because ISOC has long managed the PIR with a steady hand and according to multi-stakeholder principles. As a result, the PIR has long offered a trusted platform for organizations to build a safe and secure online presence. PIR management of the .ORG domain has been essential for non-commercial organizations, and the .ORG domain remains an important tool for non-profit and non-governmental organizations to disseminate their work and offer services online that they may not otherwise be in a position to afford. Unfortunately, the lack of transparency, coupled with ICANN's lifting of the price caps on registry fees earlier this year, cause us serious concern about the future management of the .ORG domain. There has been little in the public record to

demonstrate that the kinds of constraints exercised by the PIR will continue when placed under the management of a private equity firm designed to maximize shareholder value rather than the public interest. It is with this in mind that we strongly urge ICANN not only to require total transparency for the approval of the deal but also to conduct a rigorous analysis of the protections for freedom of expression and association moving forward.

Many in civil society have raised a number of very serious concerns about this proposed deal, concerns that we share. We will not repeat those concerns here but would only urge ICANN to fully involve those views and those organizations – that is, all interested stakeholders – in the evaluation of the proposed transfer of the PIR to Ethos Capital. At a minimum, it seems that the deal requires a public call for comment and a genuine engagement with the views of concern.

As you perform that review, we stand ready to provide any support you deem necessary and appropriate.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would therefore be grateful for your observations on the following matters:

1. Please provide information any additional information that may be relevant.
2. Please provide information on the measures taken to ensure the transparency of the deal in accordance with the UN Guiding Principles on Business and Human Rights
3. Please provide information on whether any human rights due diligence has been made, as required by the UN Guiding Principles on Business and Human Rights.
4. Please provide information on measures taken to include the views of all relevant stakeholders in the process moving forward.

Please accept, Mr. Marby, the assurances of our highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Clement Nyaletsossi Voule
Special Rapporteur on the rights to freedom of peaceful assembly and of association

7 January 2020

Stephanie Perrin, Chair
Noncommercial Stakeholder Group

RE: Impact of the ORG Sale on Noncommercial Registrants

Dear Stephanie,

Thank you for your letter dated 9 December 2019, which has been posted to the ICANN Correspondence page. Transparency is a cornerstone of ICANN and how ICANN acts to protect the public interest while performing its role. As you may have now seen, ICANN's CEO and President, Göran Marby, and I recently published a blog to clarify ICANN org's process for reviewing the proposed acquisition of Public Interest Registry pursuant to the Registry Agreements.

ICANN takes its responsibility in evaluating this proposed transaction very seriously. ICANN org team and the Board are working together to evaluate the proposed acquisition to ensure that the registry remains secure, reliable, and stable.

The information received will be thoroughly evaluated to ensure we have a full understanding of the proposed transaction. In accordance with the Registry Agreement, ICANN will apply a standard of reasonableness in making its determination on whether to provide or withhold its consent to the request.

Thank you for your continued input into this topic.

Sincerely,

Maarten Botterman
Chair, ICANN Board of Directors

17 January 2020

Public Interest Registry
1775 Wiehle Avenue, Suite 100
Reston, VA 20190
Attention: Jon Nevett, President and CEO

RE: Request for Additional Information

Dear Jon:

In a letter dated 20 December 2019, Public Interest Registry ("PIR") responded to ICANN's request for certain additional information related to PIR's notice for an indirect change of control resulting from the proposed acquisition of PIR (the "Transaction").

Thank you for the information provided and PIR's desire to act in the spirit of cooperation so that ICANN has a full understanding of the Transaction.

This letter confirms the agreement between ICANN and PIR that ICANN's 30 calendar day response time set forth in Section 7.5(d) of the .org Registry Agreement (and each of the other registry agreements between PIR and ICANN) shall be extended by an additional 30 days to 17 February 2020. As discussed, ICANN will be requesting further information regarding the Transaction. For the avoidance of doubt, ICANN's request for additional information will not extend the 17 February 2020 deadline for ICANN to provide or withhold consent to PIR's proposed change of control.

ICANN is not providing or withholding its consent at this time and PIR agrees that ICANN shall not be "deemed" to have consented under any of PIR's registry agreements as a result of this extension. Please provide your agreement by signing below.

Respectfully,

Cyrus Namazi
ICANN
Senior Vice President, Global Domains Division

ACKNOWLEDGED AND AGREED:

_____

Jon Nevett
President and CEO
PIR

Cc: Brian Cimbolic, Vice President and General Counsel, PIR
John Jeffrey, General Counsel, ICANN

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+1 310 823 8649

14 February 2020

Public Interest Registry
1775 Wiehle Avenue, Suite 100
Reston, VA 20190
Attention: Jon Nevett, President and CEO

RE: Request for Additional Information

Dear Jon:

In a letter dated 20 December 2019, Public Interest Registry ("PIR") responded to ICANN's request for certain additional information related to PIR's notice for an indirect change of control resulting from the proposed acquisition of PIR (the "Transaction").

Thank you for the information provided and PIR's continued desire to act in the spirit of cooperation so that ICANN has a full understanding of the Transaction.

In a letter dated 17 January 2020, ICANN and PIR agreed to extend ICANN's 30 calendar day response time until 17 February 2020. This letter confirms the agreement between ICANN and PIR that ICANN's 30 calendar day response time set forth in Section 7.5(d) of the .org Registry Agreement (and each of the other registry agreements between PIR and ICANN) shall be further extended to 29 February 2020. As discussed, ICANN will be requesting further information regarding the Transaction. For the avoidance of doubt, ICANN's request for additional information will not extend the 29 February 2020 deadline for ICANN to provide or withhold consent to PIR's proposed change of control.

ICANN is not providing or withholding its consent at this time and PIR agrees that ICANN shall not be "deemed" to have consented under any of PIR's registry agreements as a result of this extension. Please provide your agreement by signing below.

Respectfully,

John Jeffrey
ICANN
General Counsel and Secretary

ACKNOWLEDGED AND AGREED:

_____

Jon Nevett
PIR
President and CEO

cc: Brian Cimbolic, Vice President and General Counsel, PIR
Cyrus Namazi, Senior Vice President, GDD, ICANN

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19 February 2020

Public Interest Registry
1775 Wiehle Avenue, Suite 100
Reston, VA 20190
Attention: Jon Nevett, President and CEO

RE: Request for Additional Information

Dear Jon:

In a letter dated 20 December 2019, Public Interest Registry ("PIR") responded to ICANN's request for certain additional information related to PIR's "Notice for an Indirect Change of Control and Entity Conversion" resulting from the proposed acquisition of PIR (the "Transaction").

Thank you for the information provided and PIR's continued desire to act in the spirit of cooperation so that ICANN has a full understanding of the Transaction.

ICANN has additional requests and/or questions related to PIR's response to the initial request. Please see Attachment A. In light of your failure to extend the timeline to a date beyond 29 February 2020, please respond or as soon as possible to allow us the time to review your responses. We still believe that in light of these requests and the California Attorney General's questions an extension to 20 April 2020 is warranted.

ICANN would like to publish this letter with Attachment A on Friday, 21 February 2020. If you believe that anything in this additional request is confidential, please let us know before 4pm, Pacific and if there are redactions, provide us with a redacted version of Attachment A for publication.

Respectfully,

John Jeffrey
General Counsel and Secretary

Cc: Brian Cimbolic, Vice President and General Counsel, PIR
Russ Weinstein, Senior Director, gTLD Accounts & Services, ICANN

ATTACHMENT A

PROPOSED OWNERSHIP STRUCTURE AND INDIVIDUALS

1. Questions 2.2 and 3 from Initial Request:

ICANN's initial request asked for information on all entities and individuals that will have any indirect or direct ownership/control over the registry operator as well as all affiliates of such entities. The information should include percentage of ownership. In addition, for each such entity or individual, ICANN requested additional information, including ownership.

"Affiliate" and "Control" are both defined in Section 2.9(c) of the PIR Registry Agreements. Control is not limited to percentage of share ownership and includes control through serving as a member of a board, by contract, credit arrangement or otherwise.

From the information provided, it appears that a number of entities/individuals may have a "control" relationship post-transaction or otherwise have minority interests with the right to appoint two individuals to the Board of Managers of Purpose Domains Investments, LLC (and each of its subsidiaries, including PIR). The post-transaction organizational chart provided as Attachment 3 includes references to these minority investors.

Please provide the identity of the minority investors and a representation with respect to each minority investor regarding whether such investor has the ability to exercise control over PIR. Please provide the information previously requested (in this question and in others) for all entities with control over PIR.

Please also provide information relating to Affiliates as originally requested and specific percentage of ownership figures rather than simply greater of lesser than 50%.

2. Question 3 from the Initial Request:

ICANN requested certain information regarding the directors and officers of the post-transaction entities (and Affiliates). PIR has provided information with respect to four individuals who will serve on the Board of Managers of Purpose Domains Investments LLC.

- There are five seats on that Board of Managers. Please identify the fifth director.
- Please confirm that each of the subsidiaries of Purpose Domains Investments LLC will have its own Board of Managers that will be made up of the same individuals listed as the Board of Managers for Purpose Domains Investments LLC.
- Please confirm if the Board of Managers for the subsidiaries of Purpose Domains Investment LLC will have the identical voting rules/rights as those described for Purpose Domains Investment LLC.

Please also provide the requested information, if any, on the directors/officers of all other entities above Purpose Domain Investments LLC and any other "control" entities.

3. Question 4 and 5 from the Initial Request:

ICANN requested certain information and requested that certain questions be answered for entities and individuals listed in the post-transaction chart. Please confirm that responses already provided pertain to each entity and individual set forth in the "Purpose Domains Control Structure Chart (Post-Closing)" provided in Attachment 3, including the minority investors. Please supplement the information where necessary. Please provide the LLC Agreement and other organizational documents for each entity.

TRANSACTION DOCUMENTS AND INFORMATION

4. Question 7 from the Initial Request:

PIR's response indicated that Ethos Capital submitted a proposal to acquire PIR in September 2019. The Attachment 1 letter states that ISOC and PIR received a proposal from Ethos Capital in September 2019. PIR's response did not indicate whether any prior proposals were made or whether any prior discussions occurred. Did PIR inquire of either Ethos Capital or ISOC whether Ethos Capital (or any of its affiliates or representatives) approached ISOC concerning a transaction prior to submitting the proposal in September 2019? If not, please inquire and provide information relating to the date and substance of any such prior communication. If inquiry was made, please confirm that no such prior communications occurred, and that the September 2019 proposal by Ethos Capital was the first proposal or communication received by ISOC and/or PIR concerning Ethos Capital's interest in acquiring PIR.

5. Question 9 from the Initial Request:

Please confirm that all funds to be received by Connected Giving Foundation will be held for the purposes discussed in PIR's response and that no such funds have been earmarked or are intended to be distributed to enrich any individual or entity (other than fees and expenses of advisors to the transaction).

ICANN requested information on how the proposed transaction will be funded and how that will affect the financial state of PIR. PIR provided certain information regarding a term loan facility of $360M, but no information concerning the equity financing commitments referenced in the EPA.

With respect to the term loan, PIR is a guarantor of the credit facility subscribed by its parent. What are the terms of this credit facility and of the guarantee that PIR LLC will provide?

Please provide information concerning the structure and terms of the equity financing. In addition, please describe Ethos Capital's (and other control entities) intent as it relates to capital distribution from PIR following the closing, and whether any of the organization documents of Purpose Domains Investments, LLC (and affiliates) contain any restrictions on such distributions (if so, please describe).

Please provide information regarding what commitments Ethos Capital has made to fund PIR' operations on an ongoing basis. Please include whether any such commitments are set forth in any transaction documents or elsewhere.

In addition, the responses indicate PIR's belief that Ethos Capital will be a responsible owner and fully intends to support the public interest and the .ORG community. However, none of the materials discuss or disclose Ethos Capital's investment intent as it relates to its exit strategy for the investment. Please disclose.

PIR states that the "structure of the transaction is expected to result in significant tax deductions, and PIR is expected to generate taxable losses that should offset net taxable income for the next several years." Please provide information that explains how the "structure of the transaction" will generate such losses.

6. Question 11 from the Initial Request:

ICANN requested copies of all documents and information provided to the Pennsylvania Attorney General. PIR's response included, as Attachment 1, a letter to the Pennsylvania AG from PIR's counsel but it excluded all exhibits. Please provide the exhibits to Attachment 1 (which were not otherwise provided elsewhere) and/or other information sent to the Pennsylvania AG as requested or provide a justification for not providing these documents.

7. Question 12 from the Initial Request:

One of the post-closing organizational documents provided at Attachment 8 is the draft LLC Agreement for PIR LLC when Connected Giving Foundation will be the sole member. Please confirm if the same form of LLC Agreement will be used when Purpose Domains Direct LLC becomes the sole member of PIR. If not, please provide the LLC Agreement to be implemented post-closing.

FINANCIAL QUESTIONS

8. Questions 13 and 18 from the Initial Request:

PIR provided 2018 audited financials but did not provide financial information for the post-transaction beneficial owner of PIR as requested. PIR has also made a number of general statements about its anticipated financial performance post-transaction. We make the following inquiries and requests:

- PIR is currently a 501(c)(3) charitable corporation. What are the tax impacts of the conversion of PIR from a nonprofit corporation to an LLC and what are the financial implications of such tax impacts?
- Please provide the anticipated financial impacts of the transaction (at the date of closing of the transaction) for PIR's parent entities and for PIR LLC, and "post-transaction" pro-forma financial statements for PIR LLC, including cash flow statements, for each of the years one through five, and for years six through ten in the aggregate. Any financial expense, of any nature, whether debt and/or equity service or otherwise, should be separately displayed. Any tax expense should also be separately displayed.

THE .ORG COMMUNITY

9. Questions 20 and 21 from the Initial Request:

The Stewardship Council:

- What documents will authorize or empower the Stewardship Council? What authority will this Council have? Please provide more detail on its role and authority and any documentation to support this.
- What is the role of public comment or other community input on the role of the Stewardship Council, its members and its decisions?
- What will be included in the charter of the Stewardship Council? How will community input be sought on such charter?
- What are the criteria for membership on the Stewardship Council? Will Council members be compensated or have expenses reimbursed? Will there be a conflict of interest policy for members?
- Has PIR or Ethos (or their representatives or agents) approached anyone to date to be a member of the Stewardship Council?

The Advisory Council:

- How is the Stewardship Council different from the Advisory Council and what is the authority of the Advisory Council? Or does the Stewardship Council replace the Advisory Council? Please provide information of the role of the Advisory Council and any documentation to support this.
- Did PIR or ISOC consult with the Advisory Council about the proposed sale of PIR to Ethos Capital or any other party? If so, please provide information on how the input was solicited and the outcome of that consultation (e.g. was a recommendation made by the Advisory Council)?
- If a recommendation or other input was provided by the Advisory Council, did the PIR Board act consistently with such recommendation/input or against such recommendation/input?

Public Benefit Corporation Status:

- Please provide more information on the assertion that PIR will be "anchored in a Public Benefit LLC". Will this be a legal entity or a public benefit certification? What commitments will be part of the public benefit status?
- Will any public benefit commitments, principles and/or requirements be set forth in any of PIR's organizational documents, LLC Agreement or other documents? If so, please provide details and any documentation, including information on funding commitments/requirements to meet these commitments (i.e. what structures are in being put in place to back up the commitments PIR is making to the .org community).
- Will any such commitments include the protection of free speech and an obligation to protect non-commercial community members on other issues (for example, a prohibition against the monetization of data)?

Domain Registration Pricing:

- Please provide details on the commitment on domain registration pricing and where that commitment will be set forth in writing and what entity will have the authority to enforce such commitments.
- Please also provide detail on what is meant by PIR's public statements that it will not increase fees by more than "10% per year *on average*".

Transparency Principles:

- Please provide detail on the "adoption of transparency principles" mentioned in Attachment 10. Include any documentation where these principles can be found, including information on who holds the authority to uphold these principles.

Differentiation of .org from TLDs intended for commercial purposes:

- PIR states that the proposed transaction represents a commitment to differentiation of the .org TLD. Please provide more detail on that statement.
- In addition, please provide details on any commitments intended to differentiate the .org TLD. Please provide documentation where these commitments are or may be set forth.

Responsiveness to the needs of the non-commercial community:

- Please provide more information on "mechanisms" mentioned in your responses for promoting the registries in a manner that is responsive to the needs of the community and more information on the "announced investment" by Ethos Capital mentioned in the responses. Please provide any documentation to support these commitments and any future investments, including information on who holds the authority to uphold these commitments.
- How will the input of the community be taken into consideration in regards to these mechanisms?
- Do these mechanisms include commitments related to the protection of free speech and the protection of data?

With respect to each of these important matters listed above regarding protection of the .org community, will these protections be set up in a manner to be binding not only on PIR and the proposed new owners (Ethos Capital) but also on any future owners of PIR? And if so, please provide information on how.

DOCUMENTATION/FILINGS WITH PENNSYLVANIA AUTHORITIES

PIR has provided information regarding the status of various filings with Pennsylvania authorities (including the PA Secretary of State, PA Dept of State, PA Attorney General and the PA Court of Common Pleas). Please provide copies of all filings with PA authorities and any responses or decisions issued from such authorities as such filings or responses/decisions are issued.

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21 February 2020

Public Interest Registry
1775 Wiehle Avenue, Suite 100
Reston, VA 20190
Attention: Jon Nevett, President and CEO

RE: Request for Additional Information

Dear Jon:

In a letter dated 20 December 2019, Public Interest Registry ("PIR") responded to ICANN's request for certain additional information related to PIR's notice for an indirect change of control resulting from the proposed acquisition of PIR (the "Transaction"). In a letter dated 19 February 2020, ICANN sent an additional request for information regarding the Transaction.

Thank you for the information provided to date and PIR's continued desire to act in the spirit of cooperation so that ICANN has a full understanding of the Transaction.

In a letter dated 14 February 2020, ICANN and PIR agreed to extend ICANN's 30 calendar day response time until 29 February 2020. This letter confirms the agreement between ICANN and PIR that ICANN's 30 calendar day response time set forth in Section 7.5(d) of the .org Registry Agreement (and each of the other registry agreements between PIR and ICANN) shall be further extended to 20 March 2020. For the avoidance of doubt, ICANN's request for additional information will not extend the 20 March 2020 deadline for ICANN to provide or withhold consent to PIR's proposed change of control.

ICANN is not providing or withholding its consent at this time and PIR agrees that ICANN shall not be "deemed" to have consented under any of PIR's registry agreements as a result of this extension. Please provide your agreement by signing below.

Respectfully,

John Jeffrey
ICANN
General Counsel and Secretary

ACKNOWLEDGED AND AGREED:

Jon Nevett
President and CEO
PIR

Cc: Brian Cimbolic, Vice President and General Counsel, PIR
Russ Weinstein, Senior Director, gTLD Accounts & Services, ICANN

March 4, 2020

BY ELECTRONIC MAIL

Internet Corporation for Assigned Names and Numbers (ICANN)
12025 Waterfront Drive, Suite 300
Los Angeles, CA. 90094-2536
ATTN: John Jeffrey, General Counsel and Secretary

Re: February 19, 2020 Second Request for Additional Information

Dear John:

We are in receipt of ICANN's February 19, 2020 letter providing Public Interest Registry with a set of additional questions related to our November 14, 2019 notice to ICANN regarding a proposed indirect change of control. We provide our answers in the enclosed.

Best regards,

PUBLIC INTEREST REGISTRY

Brian Cimbolic
Vice President, General Counsel

Enclosure

cc: Russ Weinstein, Senior Director, gTLD Accounts & Services, ICANN
Jon Nevett, President and CEO, Public Interest Registry

Response to February 19, 2020 Questions

Public Interest Registry (**"PIR**") is providing its responses to ICANN's February 19, 2020 set of additional questions ("**ICANN's Questions**") regarding PIR's proposed indirect change of control (the "**Transaction**"). At the outset, we note again that many of ICANN's Questions are outside the scope of its review for an indirect change of control and deviate from the ICANN-published process.[1] Regardless, we understand that members of the community have concerns regarding this Transaction and the future of .ORG. In order to further address community concerns, we answer virtually all of ICANN's Questions publicly and without redactions; only one Exhibit is provided just to ICANN due to contractual confidentiality restrictions.

To address the concerns raised by members of the .ORG Community, on February 21, Ethos Capital, LLC ("**Ethos**") announced a series of proposed contractually binding commitments in the form of an amendment to Specification 11 of the .ORG Registry Agreement to include new Public Interest Commitments (the "**PIC**"). As a result, these commitments would become legally binding and enforceable by ICANN, as well as by members of the community through ICANN's Public Interest Commitment Dispute Resolution Procedure ("**PICDRP**") following the consummation of the Transaction. Ethos also provided clarity on the .ORG Stewardship Council and released the Council's Charter. Both of those documents are enclosed as **Attachment 1** and **Attachment 2**, respectively. PIR and Ethos will continue to engage with the .ORG community around these commitments.

PIR already has provided more information and documentation to ICANN, and released more information publicly, for this indirect change of control than any other change of control (whether direct or indirect) in the history of ICANN. With these responses, we now consider the diligence production process complete and await ICANN's decision to consent to the Transaction or to withhold consent on or before March 20, 2020.

In response to ICANN's Questions:

The .ORG Community

As noted above, in response to concerns raised by stakeholders in the .ORG Community, Ethos has proposed several key contractually-binding commitments to protect the .ORG Community to be enacted following the consummation of the Transaction. These safeguards in the form of a PIC (an amendment to Specification 11 of the .ORG Registry Agreement) and the Stewardship Council Charter address the primary concerns raised regarding the Transaction, including its effect on: (1) affordability; (2) policies regarding freedom of expression; (3) policies regarding monetization of registrant and .ORG user data; and (4) PIR's continued commitment to transparency and to the .ORG Community.

Public Interest Commitments

The PIC provides the following safeguards for the protection of the .ORG Community:

1 See ICANN's Change of Control Guide, Appendix D: https://www.icann.org/en/system/files/files/change-of-control-guide-13dec17-en.pdf.

1. ***Price Constraints***. For a period of 8 years from the Effective Date of the current Registry Agreement (roughly 7 years from now) fees charged to registrars for initial or renewal registration of a .ORG domain name would not increase by more than 10% per year on average, under a formula that does not permit front loading of those price increases. This voluntary price constraint would not change the notice requirements in the Registry Agreement of any price increase and the ability for registrants to renew names for up to ten years.

2. ***Stewardship Council; Free Expression and Data Use***. Formation of a .ORG Stewardship Council comprised of independent members of the .ORG Community, with specific authority to veto proposed modifications to PIR's policies regarding freedom of expression and protection of customer information. The .ORG Stewardship Council also would have authority to veto any changes to the .ORG Stewardship Council charter that would diminish the .ORG Stewardship Council's rights with respect to policies in these two areas.

3. ***Community Enablement Fund***. Establishing and funding a Community Enablement Fund under the direction of the .ORG Stewardship Council to help support the financing of initiatives undertaken in support of .ORG registrants.

4. ***Annual Reporting***. Publishing an annual report assessing PIR's compliance with the PIC and the ways in which PIR pursued activities for the benefit of .ORG registrants during the preceding year.

Because these would be in a PIC that would become part of the .ORG Registry Agreement, the legally binding commitments outlined above would follow .ORG regardless of who operates .ORG or who owns PIR.

Advisory Council/.ORG Stewardship Council

PIR has maintained for years an Advisory Council (the "**AC**") to provide strategic advice in the policy arena to PIR in order to help focus on the needs of nonprofits and mission driven entities around the world. The AC has been important to the success of PIR over the years and PIR is tremendously appreciative of the AC's efforts. This is particularly true because the AC is a group of geographically diverse participants, who have participated in earnest in meetings at all hours of the night at their local time. Due to the limited charter remit of the AC and the highly sensitive nature of the Transaction, the AC was not consulted prior to entering into the purchase agreement. PIR has subsequently updated the AC on several occasions regarding the Transaction.

The .ORG Stewardship Council is intended to carry out the important mission of the AC, but with a broader scope and more direct authority and responsibility with respect to .ORG. The .ORG Stewardship Council will be established via: (a) a general commitment in the PIC; and (b) a council Charter describing in more detail principles and protocols for the administration and operation of the Council.

The .ORG Stewardship Council would have the following specific authorities:

- The .ORG Stewardship Council would have the power to veto changes to .ORG policies proposed by PIR in two areas:
  (1) policies and procedures to provide appropriate limitations and safeguards against restriction of free expression in the .ORG domain name space, consistent with the values of the .ORG community; and
  (2) appropriate limitations and safeguards regarding use or disclosure of registration data or other personal data of .ORG domain name registrants or users of .ORG domain names.
- PIR would reserve the right at all times to ensure compliance with applicable laws and regulations.
- The .ORG Stewardship Council also would have authority to veto any changes to the .ORG Stewardship Council charter that would diminish the .ORG Stewardship Council's rights with respect to policies in these two areas.
- The Council also would have the right to veto (a) proposed changes to the statement of vision and values of the .ORG Community Enablement Fund and (b) PIR's proposed allocation of appropriations from the .ORG Community Enablement Fund.

There would be seven members of the .ORG Stewardship Council. Five of the initial council members would be appointed by the PIR Board; the remaining two council members and all subsequent members may be nominated for appointment by each of the PIR Board and a Nominating Committee established by the .ORG Stewardship Council, and will be subject to approval by both the PIR Board and the .ORG Stewardship Council.

.ORG Community Outreach

PIR and Ethos just announced that they are running a Public Engagement regarding the PIC, the .ORG Stewardship Council and anchoring PIR in a Public Benefit LLC framework. Members of the .ORG Community are invited to provide their feedback and inputs in each of these key areas. Please see www.keypointsabout.org for more information.

PIR, Ethos and ISOC have also engaged in extensive .ORG Community outreach. On March 3, Ethos and PIR conducted an online engagement session titled "The Legal Enforceability of Ethos' Public Interest Commitment (PIC)." Similarly, on February 27, Ethos and PIR conducted an online engagement session titled "The Future of .ORG" in conjunction with the release of the PIC, and PIR promoted the both events on multiple occasions via social media channels. Slides from those sessions are included as **Attachment 3.** PIR's CEO also provided an update to the At-Large Advisory Committee's Consolidated Policy Working Group (CPWG) on February 26. A copy of that recording is available here: https://community.icann.org/display/atlarge/2020-02-26+Consolidated+Policy+Working+Group+Call. PIR's CEO also spoke about the PIC and .ORG Stewardship Council with the ICANN Non-Commercial Stakeholder Group on March 4th. Previously, PIR and Ethos conducted a Community Webinar on December 19 to answer questions and address .ORG Community concerns. Erik Brooks of Ethos, Andrew Sullivan of the Internet Society ("**ISOC**") and Jon Nevett of PIR joined a community call organized by

NTEN and joined by the Electronic Frontier Foundation on December 5. A copy of that recording is available: https://vimeo.com/377655043 and a transcript was posted at KeyPointsAbout.org/Events. Ethos and PIR have offered to conduct a session at ICANN 67 in person and are happy to participate remotely now that the meeting has shifted to a virtual meeting.

Additionally, PIR representatives have written a number of blogs and essays to the community addressing the sale. These include:
"The Future of .ORG" by PIR CEO Jon Nevett;
"Reflecting on Community Recommendations to Improve .ORG" by PIR Vice President of Policy Paul Diaz; and
".ORG Will Thrive Under Ethos Capital" by Vice Chair of PIR Board of Directors Jeff Bedser.

Ethos has written several pieces as well. These include:
"Strengthening .ORG for the Future" and "Firm Commitments to .ORG Community" by Ethos CEO Erik Brooks;
"What Makes Ethos Capital A Responsible Steward of PIR?" by Ethos Chief Purpose Officer Nora Abusitta-Ouri (published in The NonProfit Times);
"A Stronger PIR and .ORG: Standing Behind Our Commitments," also by Nora Abusitta-Ouri; and "Explaining the Legal Enforceability of the PIC Proposed by Ethos for .ORG" by Ethos legal advisor, Allen Grogan.

Pieces by The Internet Society include:
"The Sale of PIR: The Internet Society Board Perspective" by Chair of ISOC Board of Trustees Gonzalo Camarillo;
"Answering Key Questions" by ISOC CEO Andrew Sullivan;
"Here's How We Can Truly #SaveDotOrg" by ISOC Trustee Mike Godwin; and
"Why I voted to Sell .ORG" by ISOC Trustee Richard Barnes.

Andrew Sullivan participated in a forum at American University about the sale on February 11 alongside Marc Rotenberg (Electronic Privacy Information Center), Mitch Stoltz (Electronic Frontier Foundation) and Benjamin Leff (Washington College of Law). The webcast for the session is available at: https://youtu.be/NEDeQt-gJNQ. ISOC Trustee Mike Godwin wrote a blog prior to the event entitled, "Looking Forward to 'The Conversation We Should Be Having.'" And Andrew Sullivan wrote a follow up blog to the event entitled, "The Sale of .ORG Registry: Continuing the Conversation We Should Be Having."

Public Benefit LLC

Ethos still plans to pursue the Public Benefit LLC status previously announced. Given the comprehensive protections embodied in the PIC, the statement of public benefit now is expected to be broader. The Public Benefit LLC framework that we previously proposed raised concerns from some community members who expressed the belief that those commitments could be modified at any time. In response to those concerns, as well as calls from community members to ensure that our commitments are made in a way that is legally binding and enforceable, we have since proposed to make these commitments in the form of a Public Interest Commitment that will become part of Specification 11 to PIR's Registry Agreement with ICANN. These

commitments will be legally enforceable both by ICANN and by members of the community pursuant to the PICDRP process, and will not be subject to unilateral modification by PIR. Again, however, we still will pursue anchoring PIR in a Public Benefit LLC, but with what is known as a general statement of public benefit, rather than the specific items now addressed by the PIC.

Proposed Ownership Structure and Individuals

PIR already has disclosed, both directly to ICANN and through its public disclosure, the proposed ownership structure for this Transaction. However, we are happy to elaborate on the additional clarifying questions posed by ICANN.

ICANN has requested the identity of the equity investors in the transaction, including any with the right to appoint members to the PIR Board. No equity investor other than Ethos-controlled vehicles owns, or has the option to own, more than 50%. Please see **Exhibit A**, which provides a list of the equity investors and highlights those which hold greater than 15% equity interests and/or who have the right to appoint one or more members to the PIR Board. Because this information is the subject of non-disclosure agreements with minority investors, Exhibit A is disclosed in confidence to ICANN only. However, we point out that Ethos would control the investment in PIR. The minority investors listed in Exhibit A are all North American family or institutional investors.

Ethos has the right to appoint two of the voting members on the PIR Board. Erik Brooks will initially have two votes on the PIR Board. Ethos may allocate the two votes to Erik Brooks, which is a common practice, or it may appoint someone else to the PIR Board following the closing of the Transaction. For the avoidance of doubt, if Ethos fills its second allotted slot to the PIR Board, it will not be with Fadi Chehadé.

As previously stated in our response to questions in December, the Board for the subsidiaries of Purpose Domains Investments, LLC will be the same individuals and will have identical voting rules/rights as those of Purpose Domains Investments, LLC.

Transaction Documents and Information

ISOC has informed PIR that there was no offer or communication from Ethos before September 2019, and PIR also did not receive any offer or communication from Ethos before that time. ISOC also has confirmed to PIR that "all funds to be received by CGF will be held for the purposes discussed in PIR's earlier response and no such funds have been earmarked or intended to be distributed to enrich any individual or entity (other than fees and expenses of advisors to the transaction)." For the sake of transparency and as previously disclosed, we note that PIR has established a modest staff retention program that is separate from the funds received by Connected Giving Foundation ("**CGF**") as part of this Transaction. This program was created as a retention tool during a time of turmoil and uncertainty for PIR staff while they assist with both the Transaction itself and the subsequent transition. This sort of plan is common in transactions such as this one and, as a best practice, the PIR Board had the plan reviewed and approved by an independent compensation firm. To be clear, none of the proceeds received by CGF will be paid to any individual at ISOC or PIR.

PIR Financial Stability

Following the Transaction, PIR will have a conservative capital structure with debt equal to approximately 30% of total capitalization. For purposes of comparison, this debt level is comparable to the median of the S&P 500 and far below what is typical in the average private equity transaction.

PIR is a cash flow positive business that in recent years has consistently generated tens of millions of dollars in surplus revenue. Last year PIR contributed more than $50M to ISOC. In future years, these contributions will no longer flow to ISOC, leaving PIR with significant financial resources not previously available to it. PIR would be obligated to pay back the credit facility (see below). Interest expense on PIR's new credit facility (detailed further below) for the first year post-Transaction will amount to $20-25 million. As a result, post-Transaction PIR will have tens of millions of free cash flow to invest in .ORG's infrastructure, develop new products and services, finance initiatives such as the .ORG Community Enablement Fund, as well as cover any tax burden.[2] Further, while PIR no longer will be a 501(c)(3) organization post-Transaction, due to the structure of the Transaction, it will generate tax deductions and losses reducing any potential cash leakage. As this illustrates, PIR's financial situation following the Transaction will be highly stable and ISOC's funding will be substantially more diversified. Anyone who asserts otherwise is ignoring the simple math detailed here. Because PIR is a healthy, self-sustaining business that will have access to its revenue post-Transaction, there are no commitments to fund operations because such commitments are unnecessary.

Equity Structure

The equity investment has a typical fund structure wherein investors will make cash contributions that are used to fund the purchase price. At the closing of the Transaction, the amount of equity financing (described above) plus the amount of debt financing (described below) will be sufficient to pay the purchase price owed to the seller and pay Transaction expenses. The seller, CGF (whose Sole Member is ISOC) will then be able to use the funds for its ongoing 501(c)(3) mission.

Following the closing of the Transaction, the Ethos investors will be eligible to receive capital distributions if any are made. The investment is structured with long-term capital with a 10+ year investment horizon so that Ethos and the PIR management team have adequate time to build

[2] After PIR's conversion to a limited liability company that is wholly-owned by the seller, CGF (whose sole member is ISOC), the Transaction will be treated for tax purposes as a taxable asset acquisition by the buyer of all of PIR's assets. When a taxpayer buys assets, the taxpayer is required to allocate the aggregate purchase price among those assets, including intangible assets and goodwill, based on their relative fair market values. U.S. tax law generally allows taxpayers to amortize the cost basis of acquired intangibles and goodwill on a straight line basis over 15 years. Those amortization deductions reduce taxable income. Based on the projections of PIR's taxable income, those amortization deductions will be greater than PIR's taxable income for the first few years following the acquisition. U.S. tax law generally permits, with certain limitations, taxpayers to carry forward tax losses (which are created generally to the extent that deductions exceed taxable income within a taxable period) to offset taxable income in later years. However, despite these early deductions pursuant to U.S. tax law, PIR is projected to allocate a very significant amount of taxable income to its beneficial owners over time.

better services and expand geographically. This will be done using approved annual budgets and following a strategic business plan for PIR.

Capital distributions from PIR are limited by state laws, by restrictions under the credit facility and by provisions in the organizational documents of Purpose Domains Investments, LLC. After payment of annual operating expenses, including payments to lenders, it is intended that significant additional amounts will remain and be available for reinvestment back in PIR. PIR and its direct and indirect parents are under no obligation to return capital to investors during the investment period.

ICANN requested that PIR provide the LLC Agreement for each entity. These agreements are subject to non-disclosure obligations; some are not final and still the subject of ongoing negotiations; and disclosure of these agreements is not warranted.

Credit Facility Information

A summary of the terms of the credit facility follows:

Credit parties: Purpose Domains Direct, LLC ("**Borrower**"); Purpose Domains Holdings, LLC (guarantor and direct parent of Borrower); Public Interest Registry LLC (guarantor and direct subsidiary of Borrower). Note that guarantors are jointly and severally liable for all amounts owed under the $360M credit facility.

Security: first priority lien on all assets of the credit parties, including equity of Borrower and Public Interest Registry LLC, subject to certain exclusions.

Maturity: 5.5 years after the Transaction closes

Principal amount and payment schedule: $10 million revolving credit facility (undrawn at closing) and $360 million term loan facility.

Interest rate: as follows

	ABR+	LIBOR+
Term loan	4.00%	5.00% (LIBOR floor 1.00%)
Revolving credit	3.00%	4.00% (LIBOR floor 0.00%)

Because PIR will be profitable from a cash perspective as described above, PIR will be fully capable of servicing the financial obligations (including the repayment obligations under the credit facility).

Ethos Exit Strategy

Ethos does not have a defined exit strategy for its investment in PIR. Ethos intends to remain an investor in PIR for years to come. If Ethos considers an exit, the Stewardship Council would remain in place, because the PIC would remain binding upon any successor. This is one of the reasons Ethos has committed to the .ORG Stewardship Council in the PIC as those requirements will follow .ORG regardless of who the Registry Operator is or who owns PIR. Any exit strategy would take into account all relevant conditions at the time, including factors such as PIR's financial performance, growth potential and competitive market conditions. It is not possible to predict what an exit might look like years down the line.

Financial Questions

Both Ethos and PIR fully expect PIR (and .ORG) to remain in an excellent financial position after the Transaction. The conversion of PIR to a limited liability company is expected to be treated as a reorganization for U.S. federal income tax purposes, in which PIR's sole member, a Pennsylvania non-profit corporation, will be treated as owning all of the assets and liabilities of PIR, and PIR will be treated as a disregarded entity for U.S. federal income tax purposes. As a disregarded entity, PIR will have the same character for U.S. federal income tax purposes as its sole member, which will be CGF at the time of conversion. There should not be any financial implications as a result of this conversion.

To the extent ICANN is seeking Ethos's detailed financial projections for PIR for ten years, any such projections would necessarily be highly speculative and of extremely limited value. Based on PIR's seventeen-year history and the financials involved in this Transaction, PIR will remain a healthy, cash flow-positive business for the indefinite foreseeable future and no additional infusion of capital would be required to operate PIR successfully.

Documents/Filings with the Pennsylvania Authorities

We previously provided our letter to the Pennsylvania Attorney General's office to ICANN. We have not yet begun the Pennsylvania Orphans' Court approval process; when that process begins, the filings made there are accessible by the public. To effectuate the conversion, a Statement of Conversion will be filed with the Pennsylvania Department of State. That filing will also be accessible by the public.

Summary

PIR and Ethos have provided significantly more information than what is required by ICANN's processes. We look forward to ICANN's final decision to consent or withhold its consent to this Transaction on or before March 20, 2020.

ATTACHMENT 1

SPECIFICATION 11

PUBLIC INTEREST COMMITMENTS

The following provisions are proposed to be added to the .ORG Registry Agreement in a new Section 4 of Specification 11.

4. Registry Operator agrees to perform the following specific public interest commitments, which commitments shall be enforceable by ICANN and through the PICDRP. Registry Operator shall comply with the PICDRP. Registry Operator agrees to implement and adhere to any remedies ICANN imposes (which may include any reasonable remedy, including for the avoidance of doubt, the termination of the Registry Agreement pursuant to Section 4.3(e) of the Agreement) following a determination by any PICDRP panel and to be bound by any such determination. Nothing in Section 4 of this Specification shall limit any obligations of Registry Operator under this Specification. In the event Section 4 of this Specification conflicts with the requirements of any other provision of the Registry Agreement (including any Section of this Specification), such other provision shall govern.

i. **Affordability.** As of the Effective Date (June 30, 2019), the price Registry Operator charges to ICANN-accredited registrars for .ORG initial domain name registrations or renewal(s) of domain name registrations is US$9.93 (the "Service Fee"). At all times during the period ending eight (8) years following the Effective Date, the maximum allowable Service Fee (the "Applicable Maximum Fee") that Registry Operator may charge to registrars for .ORG initial domain name registrations or renewal(s) of domain name registrations shall be calculated in United States dollars rounded to the nearest cent according to the following formula:

$$\text{Applicable Maximum Fee} = \$9.93 \times (1.10^{n})$$

Where n is equal to the whole number of years elapsed since the Effective Date (by way of example, at December 31, 2019, n = 0; at June 30, 2020, n = 1; at June 30, 2021, n = 2).

To provide a worked example calculation, as of June 30, 2021, the Applicable Maximum Fee shall be calculated as:

$$\$9.93 \times (1.10^{2}) = \$12.02$$

ii. **.ORG Stewardship Council.**

a. Registry Operator will maintain a body to provide strategic advice and oversight regarding certain key policies and functions of Registry Operator affecting .ORG and its community (the ".ORG Stewardship Council"). No employee, director or member of Registry Operator shall serve on the .ORG

Stewardship Council. The .ORG Stewardship Council will have authority to provide independent advice on and a binding right to veto modifications proposed by Registry Operator to Registry Operator's policies in the .ORG domain name space regarding: (x) censorship and freedom of expression; and (y) use of .ORG registrant and user data (the "Designated Policies"), in each case in accordance with the .ORG Stewardship Council charter (the "Charter"). Notwithstanding the foregoing, Registry Operator reserves the right at all times to ensure compliance in its sole judgment with applicable laws, policies and regulations.

b. The initial Charter has been established by Registry Operator's board of managers. Any proposed amendment to the Charter that diminishes the .ORG Stewardship Council's right to provide advice on and veto modifications to the Designated Policies shall be submitted to a vote by the .ORG Stewardship Council, and, if such proposed amendment is rejected by a vote of two thirds or more of all members of the .ORG Stewardship Council, Registry Operator will not implement such amendment.

iii. **Community Enablement Fund.** Within 90-days following the date this version of the Specification is appended to the Registry Agreement and becomes effective, Registry Operator will establish a "Community Enablement Fund" to provide support for initiatives benefitting .ORG registrants and approved by the .ORG Stewardship Council. The commission, charter, and funding of the Community Enablement Fund will be established by Registry Operator's board of managers with input from the .ORG Stewardship Council. The .ORG Stewardship Council will be responsible for providing recommendations and advice regarding the Community Enablement Fund. Appropriations from the .ORG Community Enablement Fund will be subject to approval of the PIR Board.

iv. **Annual Public Report.** Registry Operator will produce and publish annually a report that assesses Registry Operator's compliance with Section 4 of these Public Interest Commitments and the ways in which Registry Operator pursued activities for the benefit of the registrants of .ORG domain names during the preceding year.

ATTACHMENT 2

.ORG Stewardship Council Charter

[●], 2020

The following principles and protocols will govern the administration and operation of the .ORG Stewardship Council (the ".ORG Stewardship Council"), a body established by the Board of Managers (the "PIR Board") of Public Interest Registry, LLC ("PIR") to provide strategic advice and oversight regarding key policies and functions of PIR affecting the .ORG community.

I. .ORG Stewardship Council Duties and Responsibilities

The .ORG Stewardship Council will have such duties and responsibilities as the PIR Board may assign from time to time, and as such duties and responsibilities may be modified by the PIR Board from time to time, but in any event including those specified below. The .ORG Stewardship Council will at all times act, and make its recommendations in accordance with, all applicable law.

Responsibility 1: Advice and Recommendations Regarding Freedom of Expression

The PIR Board will from time to time seek advice and recommendations from the .ORG Stewardship Council regarding any changes to PIR policies proposed by the PIR Board concerning appropriate limitations and safeguards regarding censorship of free expression in the .ORG domain name space, consistent with the values of the .ORG community and with PIR's Anti-Abuse Policy. The .ORG Stewardship Council will have dispositive veto authority over any such changes as set forth in Principle 12 below.

Responsibility 2: Advice and Recommendwations Regarding Use of Data

The PIR Board will from time to time seek advice and recommendations from the .ORG Stewardship Council regarding any changes to PIR policies proposed by the PIR Board concerning appropriate limitations and safeguards regarding use or disclosure of registration data or other personal data of .ORG domain name registrants and users, consistent with the values of the .ORG community and with PIR's Anti-Abuse Policy. The .ORG Stewardship Council will have dispositive veto authority over any such changes as set forth in Principle 12 below.

Responsibility 3: Strategic Advice Regarding Other PIR Policies

The .ORG Stewardship Council will provide the PIR Board or its designee, upon request of the PIR Board, with independent strategic advice and recommendations to help guide PIR in considering and balancing the best interests of all .ORG stakeholders, including customers, employees, vendors, the Internet community, the public and PIR investors, in order to help the PIR Board assess how it can promote values that serve the mission-driven goals of the .ORG community. This may include independent advice and recommendations regarding services and programs to be provided by PIR to serve and promote the .ORG community. This will not, however, include advice or recommendations regarding day-to-day operational matters, financial or budgeting matters, or pricing of PIR services.

Responsibility 4: .ORG Community Enablement Fund Advice

The .ORG Stewardship Council will provide recommendations and advice regarding a .ORG Community Enablement Fund established by PIR to provide support for initiatives benefitting .ORG registrants that are consistent with the mission and values of the .ORG community. The .ORG Stewardship Council will review (i) from time to time, any changes to the statement of vision and values of the .ORG Community Enablement Fund (the "Fund Value Statement") that are proposed by the PIR Board, and (ii) at least once annually, PIR's proposed allocation of appropriations from the .ORG Community Enablement Fund ("Proposed Fund Appropriations")

II. .ORG Stewardship Council Policies and Procedures

Principle 1

The .ORG Stewardship Council will seek advice and input from members of the .ORG registrant community regarding key policies and functions of PIR affecting the .ORG community.

Principle 2

The .ORG Stewardship Council shall provide independent advice to the PIR Board, undertaking such analysis as the .ORG Stewardship Council sees fit and considering such factors as the .ORG Stewardship Council determines appropriate.

The .ORG Stewardship Council shall not, however, have legal authority to act for PIR or the PIR Board, except that the .ORG Stewardship Council will act for PIR with respect to the .ORG Community Enablement Fund as specified herein and in accordance with the .ORG Community Enablement Fund's governing documents.

Principle 3

The .ORG Stewardship Council shall report its findings and recommendations in a timely manner to the PIR Board through the Chair (as defined below), or in the absence or incapacity of the Chair, through the Vice-Chair (as defined below).

Principle 4

The .ORG Stewardship Council shall consist of seven (7) voting members (collectively, "Members", and each a "Member"), including the Chair.

Members will be selected from among authorities knowledgeable in the fields of mission-driven, charitable and non-profit organization management, social entrepreneurship, community development, economic empowerment, social advocacy, human rights, philanthropy and related subjects of concern to the .ORG community. Five (5) of the inaugural Members shall be selected and appointed by the PIR Board or its designee. The remaining two (2) inaugural Members, and all subsequent Members, including in the case of vacancies due to resignation, may be nominated for appointment by each of the PIR Board and a Nominating Committee established by the .ORG

Stewardship Council, and will be subject to approval by both the PIR Board and the .ORG Stewardship Council.

Members will serve for staggered overlapping terms of three years; provided, that each of the inaugural Members will serve a term of either one, two, or three years as determined by the PIR Board.

Members also may resign at any time by written notice to each of the .ORG Stewardship Council and the PIR Board.

Principle 5

The .ORG Stewardship Council will have a Chairperson (the "Chair"), a Vice Chairperson (the "Vice-Chair") and a Recording Secretary, each of whom will be elected for one-year terms by simple majority vote of Members. Elections will be held at the first meeting of the new membership year. The .ORG Stewardship Council may designate additional officers as it deems necessary or appropriate.

The Chair may call for the creation of Committees and Working Groups to address any matter within the functions and responsibilities of the .ORG Stewardship Council.

If the Chair is absent from any meeting or part thereof, the Vice-Chair shall perform the functions of the Chair; provided, that, if the Vice-Chair also is absent, the .ORG Stewardship Council shall elect an interim Chair for that meeting or that part of the meeting.

If the Chair can no longer perform the functions of the office, the .ORG Stewardship Council shall designate the Vice-Chair to perform those functions pending election of a new Chair; provided, that if the Vice-Chair also is incapacitated or the position is vacant, the .ORG Stewardship Council shall elect an interim Chair to perform those functions pending the election of a new Chair.

Principle 6

The .ORG Stewardship Council shall meet at least twice annually in person on such dates and at such locations as are determined by the Chair and notified to Members in accordance with Principle 6 below.

In addition to the designated semi-annual meeting, the .ORG Stewardship Council may meet additionally as often as Members deem appropriate. Additional .ORG Stewardship Council meetings may be convened (i) in the discretion of the Chair, at the request of any Member or (ii) at the request of the PIR Board.

Principle 7

Meetings of the .ORG Stewardship Council shall be convened by the Chair, or in the case of vacancy or incapacity of the Chair, the Vice-Chair, by written notice (including, without limitation, notice by email) issued (i) in the case of in person meetings, not less than twenty-eight (28)

calendar days prior to the meeting date, (ii) in the case of electronic meetings, not less than ten (10) calendar days prior to the meeting date or (iii) in the case of emergency (as determined by the Chair or the other Member calling such meeting), not less than five (5) calendar days prior to the meeting date, unless, in each case, such notice period is waived by all Members. Attendance at a .ORG Stewardship Council meeting without objection prior to the start of such meeting shall be deemed waiver of notice requirements.

Telephonic attendance shall be deemed to constitute attendance in person.

Principle 8

Online and electronic meetings of the .ORG Stewardship Council may be conducted via any secure communications, including email, web-based communications and teleconference platforms that can be accessed by all Members.

Principle 9

A proposed agenda for each .ORG Stewardship Council meeting shall be communicated to Members prior to the meeting.

Requests for items to be included in the agenda of a forthcoming meeting shall be communicated by any Member and/or the PIR Board to the Chair in writing, which may include by email.

Principle 10

There shall be no attendance or voting by proxy. Members may only be represented at .ORG Stewardship Council meetings, whether in person or electronic, by Members themselves and not by designated representatives.

Principle 11

A quorum of the .ORG Stewardship Council shall consist of a simple majority of Members. A quorum shall only be necessary for any meeting at which a decision or decisions must be made.

Principle 12

With respect to any proposed change to PIR policy described in Responsibility 1 and/or Responsibility 2 above (a "Designated Policy Change"), if two-thirds or more of all Members vote against such proposed Designated Policy Change, PIR will refrain from implementing such proposed Designated Policy Change. Additionally, any proposed amendment to this .ORG Stewardship Council Charter that would diminish the .ORG Stewardship Council's right to provide advice on and approve a Designated Policy Change also shall be submitted to a vote by the .ORG Stewardship Council, and, if such proposed amendment is rejected by a vote of two-thirds or more of all Members, PIR will refrain from implementing such amendment. Notwithstanding the foregoing, PIR and the PIR Board reserve the right at all times in their sole judgment to take actions

consistent with PIR's Anti-Abuse Policy and to ensure compliance with applicable laws, policies and regulations.

With respect to any proposed change to the Fund Value Statement described in Responsibility 4 above ("Fund Value Statement Change"), if two-thirds or more of all Members vote against such proposed Fund Value Statement Change, PIR will refrain from implementing such proposed Fund Value Statement Change.

With respect to Proposed Fund Appropriations described in Responsibility 4 above, if two-thirds or more of all Members vote against such Proposed Fund Appropriations, the PIR Board will revise and resubmit Proposed Fund Appropriations to the .ORG Stewardship Council for another vote by the Members.

With respect to all other matters, the .ORG Stewardship Council will work on the basis of seeking consensus among its membership. Consistent with United Nations practice[1], consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection. Where consensus is not possible, the Chair shall convey the full range of views expressed by Members to the PIR Board.

Principle 13

Minutes of all meetings of .ORG Stewardship Council shall be maintained in PIR's corporate books and records. All decisions and recommendations of the .ORG Stewardship Council that are communicated to the PIR Board shall be made public.

[1] In United Nations practice, the concept of "consensus" is understood to mean the practice of adoption of resolutions or decisions by general agreement without resort to voting in the absence of any formal objection that would stand in the way of a decision being declared adopted in that manner. Thus, in the event that consensus or general agreement is achieved, the resolutions and decisions of the United Nations meetings and conferences have been adopted without a vote. In this connection, it should be noted that the expressions "without a vote", "by consensus" and "by general agreement" are, in the practice of the United Nations, synonymous and therefore interchangeable.

ATTACHMENT 3

.ORG COMMUNITY ENGAGEMENT

THE LEGAL ENFORCEABILITY OF THE PUBLIC INTEREST COMMITMENT

Tuesday, March 3, 2020
15:00 – 15:30 EST/ 20:00 – 20:30 UTC

AGENDA

- *Welcome and Introductions*
- *Overview and Explanation of the Public Interest Commitment (PIC)*
- *Participant Q&A*

DEFINITION OF A PIC

A Public Interest Commitment (PIC) is embodied in Specification 11 of ICANN's new gTLD Registry Agreement and thus is part of the contract between ICANN and a Registry Operator.

Broadly speaking,
there are two categories of contractually- binding PICs.

- *Some PICs are mandatory and are listed in Specification 11 of every base gTLD Registry Agreement.*
- *The second form of PIC is sometimes referred to as a "voluntary PIC" because it is entered into voluntarily by an individual Registry, rather than mandated or negotiated by ICANN. The PIC proposed by Ethos and PIR fits into this second, voluntary category.*

Once a PIC made voluntarily is incorporated into the Registry Agreement, then it, just like other portions of the Registry Agreement, cannot be subject to unilateral modification or revocation by PIR.

Any change or amendment to a PIC would be subject to the amendment procedures established in the Registry Agreement, which would include a public comment period and Board approval.

OVERVIEW OF PUBLIC INTEREST COMMITMENT (PIC)

4

PIC COMMITMENTS ON PRICE

Affordability of .ORG Domain Names

Fees charged to registrars for initial or renewal registration of a .ORG domain name will not increase by more than 10% per year on average for eight years from the start of the current Registry Agreement, under a precise formula that does not permit front-loading of those price increases.

Through this commitment, .ORG will become one of the only TLDs to have a price restriction and it will remain one of the most affordable domains in the world.

There is no requirement to increase .ORG prices up to the maximum price. In fact, .ORG pricing is constrained by the competitive market of registrars and registrants, and the growing market for many other new domains such as .foundation and .charity

5

OVERVIEW OF PUBLIC INTEREST COMMITMENT (PIC)

6

PIC COMMITMENTS ON STEWARDSHIP COUNCIL

.ORG Stewardship Council

The Stewardship Council will have authority to provide independent advice — and a binding right to veto modifications proposed by PIR to PIR's policies regarding:

1. *Anti-abuse measures and freedom of expression*
2. *Use of .ORG registrant and user data.*

The Council will have specific authority to veto any proposals or modifications that would limit the Council's oversight in these areas. No employee, director or member of PIR shall serve on the Council.

PIC COMMITMENTS ON COMMUNITY ENABLEMENT FUND

Community Enablement Fund

The Community Enablement Fund will provide support for initiatives benefitting .ORG registrants and approved by the Council.

The commission, charter, and funding of the Fund will be established by PIR's Board with input from the Council.

The Council will be responsible for providing recommendations and advice regarding the Fund. Appropriations from the Fund will be subject to approval of the PIR Board.

It is anticipated that PIR will contribute $10 million to the Fund over the remaining life of the current Registry Agreement.

PIC COMMITMENTS ON ANNUAL REPORT

Annual Report

PIR will produce and publish annually a report that assesses PIR's compliance with the PIC commitments and the ways in which PIR pursued activities for the benefit of the registrants of .ORG domain names during the preceding year.

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.org

ETHOS CAPITAL

Q&A

THANK YOU

THE FUTURE OF .ORG: COMMUNITY ENGAGEMENT

Thursday, February 27, 2020
15:00 – 16:00 EST/ 20:00 – 21:00 UTC

AGENDA

- *Welcome and Introductions*
- *Overview of Accountability Initiatives*
- *Explanation of the Public Interest Commitment (PIC)*
- *Addressing Key Questions*
- *Participant Q&A*

OVERVIEW OF ACCOUNTABILITY INITIATIVES

3

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Any change or amendment to a PIC would be subject to the amendment procedures established in the Registry Agreement, which would include a public comment period and Board approval.

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It is anticipated that PIR will contribute $10 million to the Fund over the remaining life of the current Registry Agreement.

PIC COMMITMENTS ON ANNUAL REPORT

Annual Report

PIR will produce and publish annually a report that assesses PIR's compliance with the PIC commitments and the ways in which PIR pursued activities for the benefit of the registrants of .ORG domain names during the preceding year.

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ADRESSING KEY QUESTIONS

PRICING COMMITMENTS

- *Question 1: Will Ethos impose egregious price increases that will be too expensive for non-profits?*
- *Question 2: Why is the commitment to maintaining prices for 8 years?*

✓ *RESOLUTION:*
✓ *Legally-binding commitment to limit maximum price increase for .ORG to **no more than** 10% per year on average.*
✓ *8 year review seems reasonable as .COM will be reviewed in 4 years and .NET will be reviewed in 3 years.*
✓ *.ORG pricing will always be constrained by a highly competitive market, including competition with .COM, .NET, .FOUNDATION and .CHARITY.*
✓ *And there is extra protection in that a registrant can renew for up to 10 years if there is any increase.*

ACCOUNTABILITY TO AND INVESTMENT IN THE .ORG COMMUNITY

- *<u>Question 1</u>: How can a PE firm retain the unique character of .ORG as a home for mission-driven organizations?*
- *<u>Question 2</u>: What can Ethos do for the .ORG community that PIR hasn't been able to do under the Internet Society's ownership?*

✓ *<u>RESOLUTION</u>:*

✓ *Commitment in PIC to establish an independent Stewardship Council and Community Enablement Fund to support the .ORG community.*

✓ *Ethos will dramatically increase the investment in .ORG and its community.*

.ORG CONTINUING TO OPERATE AS THE EXEMPLARY REGISTRY

- *<u>Question 1:</u> Under Ethos, what will prevent PIR from selling registrant data and breaking privacy laws?*
- *<u>Question 2:</u> Under Ethos, will PIR regulate content?*

✓ *<u>RESOLUTION:</u>*

✓ *PIR's management team will remain in place to continue operating .ORG in the same, responsible manner under Ethos.*

✓ *The Stewardship Council will be able to veto modifications to PIR's anti-abuse measures and freedom of expression and the use of .ORG registrant and user data.*

✓ *Unauthorized sale of registrant data would constitute a breach of PIR's Registry Agreement with ICANN and a violation of various privacy laws around the world, exposing PIR to possible termination of the .ORG Registry Agreement, legal action by government regulators, and private claims by individuals.*

Q&A

THANK YOU

Los Angeles Headquarters
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USA
+1 310 301 5800
+1 310 823 8649

17 March 2020

Public Interest Registry
1775 Wiehle Avenue, Suite 100
Reston, VA 20190
Attention: Jon Nevett, President and CEO

RE: Request for Additional Information

Dear Jon:

This letter confirms the agreement between ICANN and PIR that ICANN's response time set forth in Section 7.5(d) of the .org Registry Agreement (and each of the other registry agreements between PIR and ICANN) shall be further extended to 20 April 2020.

For the avoidance of doubt, ICANN's request for additional information will not extend the 20 April 2020 deadline for ICANN to provide or withhold consent to PIR's proposed change of control.

ICANN is not providing or withholding its consent at this time and PIR agrees that ICANN shall not be "deemed" to have consented under any of PIR's registry agreements as a result of this extension. Please provide your agreement by signing below.

Respectfully,

John Jeffrey
ICANN
General Counsel and Secretary

ACKNOWLEDGED AND AGREED:

_____

Jon Nevett
President and CEO
PIR

Cc: Brian Cimbolic, Vice President and General Counsel, PIR
Russ Weinstein, Senior Director, gTLD Accounts & Services, ICANN

20 March 2020

Maureen Hilyard, ALAC Chair
At-Large Advisory Committee

RE: ALAC Advice to the ICANN Board on the ISOC/PIR Issue

Dear Maureen,

Thank you for providing the At-Large Advisory Council's (ALAC) comment on 31 January 2020 and for our discussions during ICANN67. We understand your interest in the proposed change of control of Public Interest Registry (PIR) from the Internet Society (ISOC) to Ethos Capital, and your consideration given to individual end users as well as the security of and trust in the .ORG TLD.

Under the .ORG Registry Agreement, PIR must obtain ICANN's prior approval before any transaction that would result in a change of control of the registry operator. PIR formally notified ICANN of the proposed transaction on 14 November 2019 and ICANN has since and continues to thoroughly evaluate the proposed transaction to ensure that the .ORG registry remains secure, reliable, and stable. The Registry Agreement requires a standard of reasonableness for ICANN's determination about whether to provide or withhold its consent to the request. In order to evaluate the request and bring additional transparency, ICANN requested further information from PIR and ISOC about the proposed transaction, including information about the party acquiring control and whether it meets the ICANN-adopted registry operator criteria. As of 17 March 2020, PIR has agreed to extend the deadline for ICANN to respond to 20 April 2020.

We acknowledge ALAC's recommendation to the ICANN Board to consider facilitating an amendment to the .ORG Registry Agreement that captures the intentions of the 2002 RFP and encourages the space to remain a trusted TLD for non-profit entities and individuals. We understand that your guidance is intended to maintain the public trust by ensuring that explicit requirements are included in the .ORG Registry Agreement.

Ethos Capital issued a press release on 21 February 2020 and an update on 16 March 2020 announcing its proposal to the .ORG community to add contractual commitments related to pricing limitations, safeguarding against censorship and added accountability in the form of Public Interest Commitments (PICs) to the .ORG Registry Agreement. We encourage those interested to also communicate their views about the registry operations and/or policies directly to PIR, Ethos Capital, and/or ISOC.

ICANN appreciates your input on this topic.

Sincerely,

Maarten Botterman
Chair, ICANN Board of Directors

Los Angeles Headquarters
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536
USA
+1 310 301 5800
+1 310 823 8649

3 April 2020

Public Interest Registry
1775 Wiehle Avenue, Suite 100
Reston, VA 20190
Attention: Jon Nevett, President and CEO

RE: Request for Additional Information/ Questions re: Public Interest Commitments

Dear Jon:

In letters dated 20 December 2019 and 4 March 2020, Public Interest Registry ("PIR") responded to ICANN's request for certain additional information related to PIR's "Notice for an Indirect Change of Control and Entity Conversion" resulting from the proposed acquisition of PIR (the "Transaction"). In addition, in an e-mail dated 16 March 2020, PIR shared its revised proposed Public Interest Commitments ("PICs").

Thank you for the information provided and PIR's continued desire to act in the spirit of cooperation so that ICANN has a full understanding of the Transaction.

ICANN has additional requests and/or questions related to PIR's responses. Please see Attachment A. I would like to stress that the information requested is necessary for ICANN to complete its diligence in connection with the Transaction. Please answer every question individually and if the answer to a question is "none", please state that. Prior to 20 April 2020, ICANN org and Board need to understand if any questions remain unanswered so that we can consider the materiality of that issue to the totality of ICANN's decision.

In addition, ICANN has a number of clarifying questions in relation to the proposed PICs. Answers to these questions will help us evaluate the PICs and their enforceability. ICANN is concerned about being put in a position to enforce provisions of the PICs that are unclear and accordingly less clear than other provisions of our agreements. Please see Attachment B. Again, please answer the questions individually.

If based upon your review of our questions, you believe that you could provide any clarifications to your PICs, please try to do so, if at all possible, quickly. We would like to post your PICs for a public notice period, consistent with other PIC's that have been incorporated in registry operator agreements. Ideally, we would be in a position to post any revised PICs before the end of the day, on 7 April 2020.

ICANN will publish this letter with Attachments on 6 April 2020. If you believe that anything in this additional request is confidential, please let us know before 2:00pm PST, and if there are redactions, provide us with a redacted version of the Attachments for publication.

Respectfully,

John Jeffrey
General Counsel and Secretary

Cc: Brian Cimbolic, Vice President and General Counsel, PIR
Theresa Swinehart, Senior Vice President, Multistakeholder Strategy & Strategic Initiatives, ICANN
Russ Weinstein, Senior Director, gTLD Accounts & Services, ICANN

ATTACHMENT A

PROPOSED OWNERSHIP STRUCTURE AND INDIVIDUALS

1. "Controlling" Parties – ICANN has previously requested information regarding the entities that will "control" PIR upon consummation of the proposed transaction. ICANN has specifically requested that PIR provide the entities and individuals that will "control" PIR post-transaction as that is defined in PIR's registry agreements. PIR has provided some information regarding share ownership but has not provided the specific information regarding "control". Please provide this information, or confirm that "control" is limited to Purpose Domains Feeder I, LP ("Feeder"), Ethos Purpose GP, LLC (as general partner of Feeder), Ethos Capital, LLC., and Erik Brooks (as sole owner and manager of Ethos Group GP, LLC and Ethos Capital LLC).

2. "Affiliates" – ICANN has previously requested information regarding the "Affiliates" of the "controlling entities", as the term "Affiliate" is defined in PIR's registry agreements. PIR has not provided this information. Please provide this information for all "controlling entities" or confirm that the "controlling entities" have no Affiliates (other than the entities set forth in the "Purpose Domains Control Structure Chart (Post-Closing)" previously provided to ICANN and Erik Brooks).

3. Directors/Officers – Please provide the names of the directors/officers of all "controlling entities" and if there are no directors/officers of a particular entity, then please provide that information. Please include a statement as to whether Purpose Domains Feeder, LLC, Ethos Purpose GP, LLC and Ethos Capital, LLC have a Board of Managers or similar structure. If yes, please include the members of these Boards in the answer to this request.

4. In ICANN's original information request (Question 5), ICANN requested that certain questions be answered for entities and individuals listed in the post-transaction chart (which was to include all "controlling entities" and affiliates). Please confirm that limited responses provided in PIR's 20 December 2019 response pertain to each entity and individual set forth in the "Purpose Domains Control Structure Chart (Post-Closing)" provided in Attachment 3, including the minority investors. Please supplement the information to answer the list of questions for the all "controlling entities" and their directors/officers.

TRANSACTION DOCUMENTS AND INFORMATION

5. PIR states that "Because PIR will be profitable from a cash perspective as described above, PIR will be fully capable of servicing the financial obligations (including the repayment obligations under the credit facility)." Can you please provide more detail on PIR's current plans with respect to the repayment of the $360m term loan at the maturity date in light of Ethos Capital's ten plus investment horizon for PIR? Is it anticipated that the loan will be

repaid through the operating cash flow of PIR and, if so, please provide documentation supporting such projected cash flow at the time of maturity of the loan? Is it Ethos Capital's intent that the loan will be repaid through a refinancing of the debt at maturity and, if so, please provide documentation supporting projected cash flow to repay any replacement debt at its maturity? Please also see request # 12.

6. Please provide the LLC Agreements and Partnership Agreements of the entities below Ethos Purpose GP, LLC in the "Purpose Domain Control Structure Chart (Post-Closing)". Review of these documents will provide necessary information for ICANN to complete its review of the proposed transaction.

7. Regarding capital distributions, PIR states that the "Ethos investors" will be eligible to receive capital distributions if any are made, but does not discuss Ethos Capital's intention as it relates to distributions. Is there a current intention to provide such capital distributions (including through a dividend recapitalization) to any entity or person, particularly prior to the repayment of the debt incurred in connection with the transaction? Please also confirm that, for purposes of your response, that "Ethos Investors" is referring to Mr. Brooks, Ethos Capital, LLC and the minority investors identified to ICANN in your response dated 4 March 2020.

8. PIR states that capital distributions are limited in several ways, but provides little detail on those limitations. Please specifically describe these limitations or restrictions, including any limitations imposed under: (a) state law, (b) credit facilities, (c) under PIR's organizational documents or (d) any other arrangements or agreements which limit or restrict PIR's ability to make capital distributions.

9. PIR states that "PIR and its direct and indirect parents are under no obligation to return capital to investors during the investment period." Please provide detail on this statement. What is the duration of the investment period? Are the referenced "investors" the minority investors identified in PIR's response dated 4 March 2020, as well as Ethos Capital, LLC and Erik Brooks?

10. PIR states that "PIR's financial situation following the Transaction will be highly stable". This statement is not verifiable as part of ICANN's due diligence review of the proposed transaction without PIR and Ethos Capital providing the financial information requested by ICANN. Please see request #12.

11. In ICANN's previous request for additional information, we asked that PIR provide the exhibits to the letter sent to the Pennsylvania AG by PIR's counsel (which were not otherwise provided). In the alternative, we asked for a justification for not providing these exhibits. This request was not addressed nor were the exhibits provided. Please answer.

FINANCIAL AND TAX QUESTIONS

12. PIR has not provided the requested post-transaction financial information that has been previously requested. Without this information, ICANN cannot assess the financial condition of PIR LLC post-transaction, which is an important element of ICANN's review. Accordingly, please provide projected pro-forma financial statements, including cash flow statements, for PIR LLC for each of the calendar years ended 31 December 2020 through 2025, presuming that the $360-million loan maturity would occur by 31 December 2025. If PIR's fiscal year ends on a date other than 31 December, please provide such financial information as of the end of such fiscal years (beginning with the fiscal year ending in 2020). Any financial expense, of any nature, whether debt and/or equity service or otherwise, should be separately displayed. Any tax expense (or benefit) should also be separately displayed.

THE .ORG COMMUNITY

13. **The Stewardship Council:**
    - What is the role of public comment or other community input on the role of the Stewardship Council, its members and its decisions?
    - Will Council members be compensated or have expenses reimbursed? Will there be a conflict of interest policy for members?
    - Has PIR or Ethos (or their representatives or agents) approached anyone to date to be a member of the Stewardship Council?

14. **Conversion to LLC/Public Benefit Corporation Status:**
    - Can you tell us what steps you have taken and any information that you have gained about the conversion of the non-profit?

    - In the event ICANN's decision were to be conditioned on the change of control not being effectuated until approval of the transaction and/or entity conversion by the Pennsylvania court and other relevant PA authorities, could PIR provide specific language that would be appropriate under PA law for this condition?

    - Please confirm whether post-closing PIR, LLC will be organized under Pennsylvania law as a public benefit corporation. If so, what public benefit commitments will be included in the organizational documents?

15. **Transparency Principles:**
    - Please provide detail on the "adoption of transparency principles" mentioned in previous information provided by PIR. Include any documentation where these principles can be found, including information on who holds the authority to uphold these principles.

16. **Differentiation of .org from TLDs intended for commercial purposes:**
    - PIR has stated in past information that the proposed transaction represents a commitment to differentiation of the .org TLD. Please provide more detail on that statement.
    - In addition, please provide details on any commitments intended to differentiate the .org TLD. Please provide documentation where these commitments are or may be set forth.

17. **Responsiveness to the needs of the non-commercial community:**
    - Please provide more information on "mechanisms" mentioned in your previous responses for promoting the registries in a manner that is responsive to the needs of the community and more information on the "announced investment" by Ethos Capital mentioned in the responses. Please provide any documentation to support these commitments and any future investments, including information on who holds the authority to uphold these commitments.
    - How will the input of the community be taken into consideration in regards to these mechanisms?

DOCUMENTATION/FILINGS WITH PENNSYLVANIA AUTHORITIES

Please provide copies of any additional filings with Pennsylvania authorities (including the PA Secretary of State, PA Dept of State, PA Attorney General and the PA Court of Common Pleas) and any responses or decisions issued from such authorities as such filings or responses/decisions are issued.

ATTESTATION OF FULL AND TRUTHFUL DISCLOSURE

Please provide an attestation of full and truthful disclosure in the same manner as provided in the initial submission with respect to all additional information provided.

ATTACHMENT B
Clarifying Questions on Proposed PICs

Affordability

1. Several readers have found the pricing formula to be confusing. Why was the formula in the proposed PIC chosen and not the formula from the previous .org registry agreement? Is there a way to clarify the commitments made under this proposed PIC?

2. For clarity on the proposed formula to be enforced through the PIC, could PIR include a chart listing the possible Applicable Maximum Fee for each year?

3. For clarity, does the Applicable Maximum Fee apply to any and all domain names, including those that could be considered "premium"?

4. Why is the PIC commitment only for 8 years and not the length of the registry agreement?

5. We notice that no changes were made to the proposed Affordability PIC after the close of the .org community input period. Was community input received on this PIC and how was it addressed?

Stewardship Council

6. When will the Stewardship Council be operative?

7. We note in the proposed PIC that the Stewardship Council has veto rights over "modifications" to "designated policies". What are the current policies related to these two designated areas over which the Council would have modification veto rights? Can you provide more detail on what policies would be considered "designated" and how many policies PIR believes will fall into the designated areas? Is any change to these policies sent to the Stewardship Council for consideration? What is the Stewardship Council's role with respect to establishing these policies at the start or initiating new policy development? What role, if any, would the Stewardship Council have with respect to PIR's application and enforcement of these policies?

8. In regard to enforceability of this proposed PIC, would PIR consider including a notification obligation to ICANN when a modification is presented to the Council, what the proposed modification entails and whether the Council approved or vetoed?

9. Will the Stewardship Council be kept apprised of PIR's enforcement of "designated policies" and, if so, how? What do you see as ICANN's role in the event of a dispute between the Stewardship Council and PIR with respect to whether PIR's interpretation of a "designated policy" in any particular instance amounts to a modification of that policy?

10. Why were the "designated policies" chosen as the ones over which the Council would have veto authority? What was the criteria used to scope the authority of the Stewardship Council in relation to the policies of .org? Was .org community input received on which policies to give the Council veto authority over and how was that input addressed?

11. How was the 2/3 vote criteria (versus a majority vote criteria) chosen for the Council's ability to veto (i) a designated policy modification and (ii) modifications to the charter which would diminish the Council's authority?

12. The proposed PIC provides that "no employee, director or member" of PIR will serve on the Stewardship Council. The PIC also provides that the Council will provide "independent" advice. How else will PIR ensure that the members of the Council are "independent"? For instance, would PIR consider also providing that family members, officers, affiliates and shareholders should also not serve on the Council? Will the Council have a Conflict of Interest policy? In regard to enforceability of this PIC, will PIR provide ICANN and the .org community with the names and affiliations of all members proposed for the Council and a copy of any conflict of interest policy?

13. The proposed PIC states that "PIR reserves the right to ensure compliance in its sole judgment with applicable laws, policies and regulations". What "policies" are intended to be applicable? Is it intended to be "ICANN policies" as stated in the revised charter?

14. We note that the proposed PIC does not include a number of the features of the role and rights of the Stewardship Council which are contained in the charter. Why is that? We also note that the proposed PIC does not address the Council's role with respect to the "Statement of Public Benefit", Fund Value Statement and the Proposed Fund Appropriations (each included in the charter). How is PIR documenting its commitment to the Council's role, rights, and authority?

15. How will .org community input be solicited and incorporated in the work of the Council? How is PIR documenting its commitment to .org community input being solicited and considered and by whom will that be enforceable?

16. Does the Council have the right to request and obtain documentation or other information necessary for it to carry out its duties?

Community Enablement Fund

17. We note the proposed PIC to establish this Fund but no commitment to the amount of funds to support the initiatives of this Fund. Wouldn't a funding commitment over the

term of the registry agreement be necessary in order to make it meaningful and enforceable as a commitment to the community?

18. Was there community input on the threshold initiatives that should be supported by this Fund? If so, how was it addressed?

Annual Public Report

19. We note the proposed PIC for an annual report but there is no detail on what would be provided in this report. Can greater detail on what the report would include be provided in the PIC? In addition, as noted above, for the proposed Fund PIC to be meaningfully enforceable, a funding commitment is necessary and that should include transparent reporting of the funding provided and how the funding is spent.

Revisions to PICs

20. Does the reference to "ICANN's applicable public comment process" refer to the current public comment process for Registry Agreement amendments?

Enforceability

21. For all of the areas discussed within these Clarifying Questions, what does PIR perceive to be enforceable by ICANN through the PIC? Please identify what PIR understands as the scope and limitations of ICANN's PIC enforcement power.

Other Questions

22. These proposed PICs seem only to be applicable to .org. Or are they also proposed with respect to PIR's other TLDs?

23. Based on our review of public dialogue and our discussions, several other matters have been raised. Would you consider adding provisions in the proposed PICs related to (i) an obligation to conduct a "public interest impact assessment" for new products and services to ensure no harm to non-commercial organizations and to share these assessment reports publicly in an annual transparency report, (ii) empowering the Stewardship Council to have authority with respect to not only vetoing changes to free speech polices but also reviewing the interpretation and execution of decisions made under these policies that affect free speech, and (iii) inclusion of a separate transparency report (along with the annual public report) which would include the assessment reports (noted above) as well as the number of takedown notices PIR has received from governments, private entities or individuals and the actions taken.

Subject: Re: PIR Change of Control - Updated PIC
Date: Tuesday, April 7, 2020 at 10:57:56 AM Pacific Daylight Time
From: Brian F. Cimbolic
To: John Jeffrey
CC: Peg Rettino, Jon Nevett

John:

As we discussed yesterday, Ethos is updating the proposed PIC based on input in your April 3rd letter. In making these changes, they specifically focused on changes that go to the clarity and enforceability of the PICs as you mentioned in your letter. We will address all of ICANN's questions related to the PIC in our written responses to Attachment B of your letter. At this point, Ethos has proposed a PIC based on concerns raised by the community; revised the PIC after we conducted a public engagement process with the community; and now are making further revisions based on ICANN's input.

Attached are the revisions to the PIC in both clean and redline forms. The specific changes made are as follows:

1. Included a pricing table to provide further clarity around the applicable Maximum Service Fee in any year;
2. Clarified that the Stewardship Council must be up and running within 6 months of the PIC being appended to the Registry Agreement. ICANN's question around timing for the Council was helpful and this clarification was made to allow the nomination and selection process (being run by an independent search firm) to run its course;
3. Clarified that no equity owner or immediate family member of any PIR employee, officer, director or equity owner shall serve on the Council;
4. Clarified in the Stewardship Council PIC that the reservation of rights to comply with "policy" meant "ICANN policy," not some broader carve out;
5. Agreed to transparency reporting being required in our Annual Report, showing the number of domains acted upon via our Anti-Abuse Policy or through court order; and
6. Clarified that for amendment, the PIC must go through the then applicable public comment period for revisions to PICs.

We appreciate the constructive suggestions and significant changes were made based on ICANN's input

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Los Angeles Headquarters
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536
USA
+1 310 301 5800
+1 310 823 8649

16 April 2020

Public Interest Registry
1775 Wiehle Avenue, Suite 100
Reston, VA 20190
Attention: Jon Nevett, President and CEO

RE: Request for Additional Information

Dear Jon:

This letter confirms the agreement between ICANN and PIR that ICANN's response time set forth in Section 7.5(d) of the .org Registry Agreement (and each of the other registry agreements between PIR and ICANN) shall be further extended to 4 May 2020.

ICANN is not providing or withholding its consent at this time and PIR agrees that ICANN shall not be "deemed" to have consented under any of PIR's registry agreements as a result of this extension. Please provide your agreement by signing below.

Respectfully,

John Jeffrey
ICANN
General Counsel and Secretary

ACKNOWLEDGED AND AGREED:

_____

Jon Nevett
President and CEO
PIR

cc: Brian Cimbolic, Vice President and General Counsel, PIR
Theresa Swinehart, Senior Vice President, MSSI and GDD, ICANN
Russ Weinstein, Senior Director, gTLD Accounts & Services, ICANN

ICANN's Consent to Change of Control Withheld

1 May 2020

Public Interest Registry ("PIR" or the "Registry Operator")
1775 Wiehle Avenue
Suite 100
Reston, VA 20190
US

RE: Change of Control of Registry Operator for Multiple TLDs

Dear Jonathon Nevett,

In a letter dated 14 November 2019, Public Interest Registry provided notice of an "Indirect Change of Control and Entity Conversion" and requested ICANN's written consent pursuant to the Registry Agreements for those top-level domains ("TLDs") identified in Attachment A, attached hereto.

Following review of the information provided, and pursuant to the terms of Section 7.5 of the Registry Agreements, in accordance with the 30 April 2020 resolution by the ICANN Board of Directors, which is posted at https://www.icann.org/resources/pages/2020-board-meetings, ICANN hereby withholds consent to the proposed "Indirect Change of Control and Entity Conversion" of PIR for all Registry Agreements listed in Attachment A.

ICANN reserves all of its rights and remedies under the Registry Agreements.

Please advise if you have any questions.

Respectfully,

Russ Weinstein

Russ Weinstein
Sr. Director, gTLD Accounts and Services
Internet Corporation for Assigned Names and Numbers (ICANN)

Attachment A

TLD	Date of Registry Agreement
.org	30 June 2019
.ngo	6 March 2014
.ong	6 March 2014
xn--c1avg	14 November 2013
xn--i1b6b1a6a2e	14 November 2013
xn--nqv7f	14 November 2013
xn--nqv7fs00ema	14 November 2013

Ex. R-18

Ex. R-18

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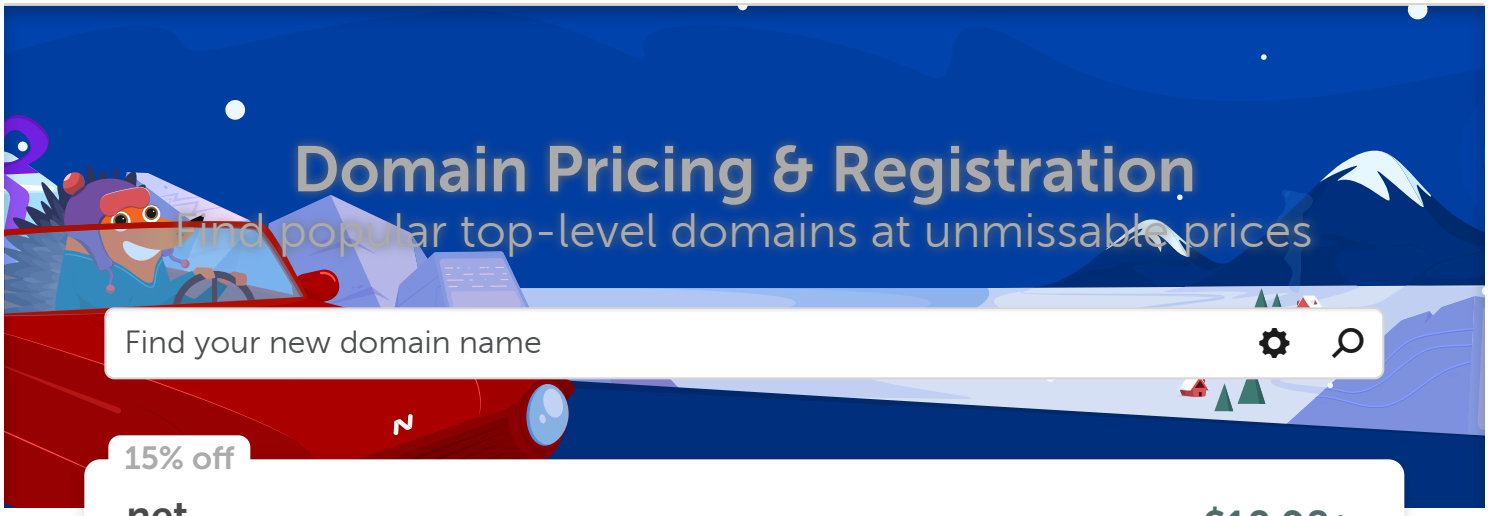

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Registration

$10.98/yr
~~$12.98/yr~~

.com
Registration

$8.88/yr

29% off

.org
Registration

$9.18/yr
~~$12.98/yr~~

29% off

.eu
Registration

$4.98/yr
~~$6.98/yr~~

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3 reasons to choose Namecheap.

Ex. R-18

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Popular domains
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Free Privacy Protection for life and so much more.

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and helpful guidance

Expert help and advice, whenever you need it.

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1 Year

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Register	Renew	Transfer
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Buy more domains, save more money.

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$0.99 domains

Find a popular domain at a bargain price.

Get a $0.99 domain →

Free Products And Services

Everybody loves free stuff!

- **Free privacy protection for life →**
  Keep your data safe with WhoisGuard Privacy Protection.
- **Free email address →**
  Enjoy a 2-month free trial, ready for use when you sign up.
- **Free DNSSEC security →**
  Protect your website visitors from fraudulent activity.

“Five stars from me.”

Great prices. Many carts to choose from and the best online-tech support by text that I have ever dealt with. Five stars from me.

Pamela W.

Hear more from our customers →

Guidance With Every Step

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Easy Domain Management

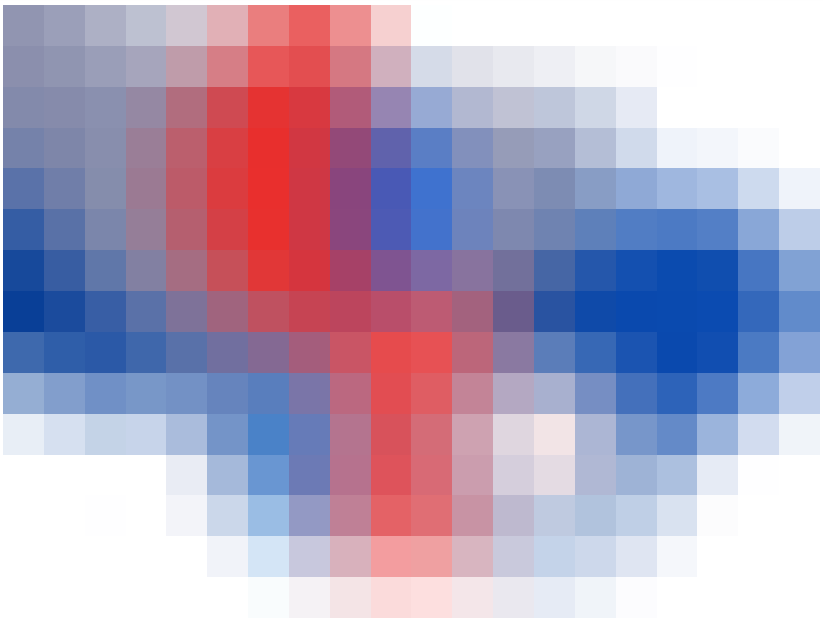
After purchase, you can head straight to your Namecheap account panel and start using your domain. The account panel is uncluttered and easy to use, so you can quickly concentrate on the things that matter.

Easy Set-Up

Your free email address is ready and waiting for you. Got a thriving social media or ecommerce page already set up? Use URL forwarding to direct your visitors to your Instagram, Weebly or

Ex. R-18

Find your new domain name



We Are Here To Help

Your domain carries your brand, public image, and professional reputation. As well as 24/7 customer support, we provide everything you need to develop your personal or business site, including answers to questions like:

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What makes a good domain name? →

How do I choose the right Top-level Domain? →

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FAQS

- **What is a normal or reasonable price for a web domain?**
- **What are the most popular TLDs that I can get at affordable prices?**
- **Where can I find the cheapest domains?**
- **Do you have any domain promotions/discounts?**
- **Do I need to renew my domain after transfer? How much does it cost?**
- **Why do I need to pay for the domain renewal after I've registered it?**
- **Can I renew an expired domain? How much does it cost?**
- **Will there be a redemption fee?**

Ex. R-18

Find your new domain name

Disclaimers

- ICANN (the Internet Corporation for Assigned Names and Numbers) charges a mandatory annual fee of $0.18 for each domain registration, renewal or transfer. This will be added to the listed price for some domains, at the time of purchase. See full list of affected domains →
- You'll receive a WhoisGuard subscription absolutely FREE with every eligible domain registration or transfer. WhoisGuard subscription expiration is based on purchase date rather than activation date. WhoisGuard provides subscription pursuant to its Services Agreement with Namecheap. Terms and conditions apply. Visit the WhoisGuard Agreement page for further details.
- Due to the registry restrictions, WhoisGuard cannot be used with certain TLDs. Check WhoisGuard page for the full list.
- You receive an exclusive PositiveSSL Certificate offer (valid for the first year only) with every new product purchase except domain renewals, or purchase or renewals of any other SSL certificates. Further restrictions may apply.
- DNS features mentioned are applicable only if your domain uses Namecheap DNS service.
- DNSSEC is available with all eligible domains as part of Basic or Premium DNS services.
- Special offer applies to new first-year registrations only and is valid for a limited time.
- Please note that premium domain names are not eligible for the promotion and prices may differ to those shown.

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RLA-1

127 F.Supp.3d 1078
United States District Court,
E.D. California.

Martin FERNANDEZ on Behalf
of Himself and All Others
Similarly Situated, Plaintiff,
v.
LEIDOS, INC., Defendant.

No. 2:14–cv–02247–GEB–KJN.
|
Signed Aug. 27, 2015.
|
Filed Aug. 28, 2015.

Synopsis

Background: Former military serviceman brought putative class action against government contractor, alleging that contractor failed to properly protect personally identifiable information and private health information entrusted to it in connection with obtaining health care and asserting claims for violation of California Confidentiality of Medical Information Act (CMIA), Unfair Competition Law, and state common law. Contractor moved to dismiss for lack of subject matter jurisdiction and failure to state a claim.

Holdings: The District Court, Garland E. Burrell, Jr., Senior District Judge, held that:

alleged identity theft was not fairly traceable to contractor's data breach for purposes of standing;

risk of identity theft did not constitute injury in fact for purposes of standing;

serviceman's allegations that his privacy was invaded were insufficient to allege injury in fact for purposes of standing;

allegations that serviceman was deprived of value of personal information were insufficient to allege injury in fact for purposes of standing;

allegations that value of serviceman's healthcare was diminished were insufficient to allege injury in fact for purposes of standing; and

serviceman failed to state claim for violation of the CMIA.

Motion granted.

Procedural Posture(s): Motion to Dismiss; Motion to Dismiss for Failure to State a Claim; Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Attorneys and Law Firms

***1081** Timothy G. Blood, Blood Hurst & O'Reardon LLP, San Diego, CA, Richard L. Coffman, The Coffman Law Firm, Beaumont, TX, for Plaintiff.

Kenneth Lee Chernof, Arnold & Porter, LLP, Washington, DC, Sharon Mayo, Arnold & Porter LLP, San Francisco, CA, for Defendant.

ORDER GRANTING DEFENDANT'S DISMISSAL MOTION UNDER RULES 12(b)(1) AND 12(b)(6)

GARLAND E. BURRELL, JR., Senior District Judge.

Defendant moves under Federal Rules of Civil Procedure ("Rules") 12(b)(1) and 12(b)(6) for dismissal of Plaintiff's putative class action, arguing under Rule 12(b)(1): "Plaintiff lacks Article III standing [to pursue his claims] because he has not alleged a cognizable injury[ ] in[ ] fact traceable to any action by [Defendant], and the Court therefore lacks subject matter jurisdiction." (Def.'s Mem. P. & A. Supp. Mot. Dismiss ("Mot.") 2:9–10, ECF No. 21.) Plaintiff alleges subject matter jurisdiction under 28 U.S.C. §§ 1332(a) and 1332(d).

***1082** Plaintiff's allegations include the following:

> [This is a] California consumer class action to secure redress .... [for the] betray[al of] Plaintiff's and [putative] Class Members' trust.... In September 2011, [Defendant] ... fail[ed] to properly safeguard and protect [Plaintiff's and putative Class Members' personally identifiable information ("PII") and private health information ("PHI")], and publicly disclos[ed] their PII/PHI without authorization (the "Data Breach"), in violation of ... the California Confidentiality of Medical Information Act ("CMIA") (CAL. CIV. CODE § 56, et seq.), California Unfair Competition Law (CAL. BUS. & PROF. CODE § 17200, et seq.), and California common law.
>
> Plaintiff and [putative] Class Members are current and former United States military servicemen, servicewomen, and the family members of these servicemen and women....
>
> The United States Department of Defense ... contracted with [Defendant] to provide ... electronic information management and data security services for safeguarding and protecting Plaintiff's and [putative] Class Members' PII/PHI, all of which was entrusted to [Defendant] in connection with obtaining health care coverage....
>
> [O]n September 12, 2011, Plaintiff's and [putative] Class Members' PII/PHI .... was contained on backup data tapes transported in an unsecure manner by [Defendant's] newly hired, low-level employee in his personal vehicle. The data tapes were taken from the [employee's] vehicle while it was parked in downtown San Antonio, Texas, and left unattended for over eight hours.
>
> ....
>
> A thief or thieves broke into the [Defendant's] employee's ... vehicle, which had no special protections for the information, and took the ... backup data tapes, thereby gaining information worth millions of dollars, which the thief or thieves subsequently sold, transferred, opened, read, mined, and otherwise used without Plaintiff's and [putative] Class Members' authorization.

(Compl. ¶¶ 1–4, 56.)

> The wrongfully disclosed PII/PHI included, *inter alia,* Plaintiff's and [putative] Class Members' Social Security numbers, addresses, dates of birth, telephone numbers, and personal health data—including private medical records, health provider information, laboratory test results, medical diagnoses, and prescription medication information.... Plaintiff's and [putative] Class Members' PII/PHI was ... either unencrypted or improperly partially encrypted.

(*Id.* ¶ 5.)

Defendant argues:

> This case follows closely on the heels of the rejection by the U.S. District Court for the District of Columbia of the same and similar class action claims brought by 31 other plaintiffs represented by Plaintiff's counsel [in] *In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.* [45 F.Supp.3d 14] (D.D.C. May 9, 2014). [The *SAIC* court] held that those plaintiffs lacked Article III standing because, consistent with the holdings of the vast majority of courts addressing similar fact patterns, 'the mere loss of data—without evidence that it has been either viewed or misused—does not constitute an injury sufficient to confer standing.' [*SAIC,* 45 F.Supp.3d] at [19].

(Mot. 1:12–19.)

Article III of the Constitution limits the jurisdiction of federal courts to actual "Cases" and "Controversies." U.S. Const. art. III, § 2. " 'One element of the case-or-controversy requirement' is that plaintiff [ ] ***1083** 'must establish that [he has] standing to sue.' " *Clapper v. Amnesty Int'l USA,* —— U.S. ——, 133 S.Ct. 1138, 1146, 185 L.Ed.2d 264 (2013) (quoting *Raines v. Byrd,* 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997)). To satisfy Article III standing,

> the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (citations omitted) (internal quotation marks,

brackets and ellipses omitted). "Moreover, if ... the named plaintiff[ ] purporting to represent a class [has not] established the requisite of a case or controversy with the defendant[ ], [he] may [not] seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton,* 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974).

> "Under Rule 12(b)(1), a defendant may challenge the plaintiff's jurisdictional allegations in one of two ways. A 'facial' attack accepts the truth of the plaintiff's allegations but asserts that they are insufficient on their face to invoke federal jurisdiction. The district court resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction.
>
> A 'factual' attack, by contrast, contests the truth of the plaintiff's factual allegations, usually by introducing evidence outside the pleadings. When the defendant raises a factual attack, the plaintiff must support h[is] jurisdictional allegations with 'competent proof,' under the same evidentiary standard that governs in the summary judgment context. The plaintiff bears the burden of proving by a preponderance of the evidence that each of the requirements for subject-matter jurisdiction has been met. With one caveat, if the existence of jurisdiction turns on disputed factual issues, the district court may resolve those factual disputes itself.

Leite v. Crane Co., 749 F.3d 1117, 1121–22 (9th Cir.2014) (internal citations quotations omitted). Defendant's jurisdictional challenge is a "facial" attack of the pled allegations, which means that Defendant "asserts that the allegations contained in [the] complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer,* 373 F.3d 1035, 1039 (9th Cir.2004).

"The party asserting jurisdiction bears the burden of establishing subject matter jurisdiction on a Rule 12(b)(1) motion to dismiss." *MCI Commc'ns Servs., Inc. v. City of Eugene, OR,* 359 Fed.Appx. 692, 697 (9th Cir.2009); *see also Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) (stating: "Federal courts are of limited jurisdiction.... It is to be presumed that a cause [of action] lies outside of this limited jurisdiction ... and the burden of establishing the contrary rests upon the party asserting jurisdiction.")

I. DISCUSSION

a. Actual Identity Theft, Identity Fraud and/or Medical Fraud

Defendant argues Plaintiff's actual injury allegations are insufficient to sustain his burden of establishing Article III standing. ***1084** Plaintiff alleges he has experienced "actual identity theft, identity fraud, and/or medical fraud" because of having his PII/PHI stolen. (Compl. ¶ 9.) Specifically, Plaintiff alleges as follows:

> [I]n April 2012, Fernandez secured employment as an armaments/logistics government contractor at Travis Air Force Base in north central California, subject to obtaining the appropriate security clearance. Fernandez, however, could not obtain the required security clearance because certain addresses at which he never lived, and certain large purchases he never made, appeared on his credit reports and did not match his actual previous addresses listed on his employment application. The fraudulent entries on his credit reports logically could only be the direct and/or proximate result of the Data Breach. Because he could not obtain the required security clearance, Fernandez lost the government contractor position, which paid $55,000$60,000 per year
>
> Fernandez also experienced other forms of identity theft and[ ] identity fraud, including: (i) multiple attempted logins to his Microsoft and Yahoo accounts requiring him to change his passwords and login information several times, and (ii) notification by his bank, Bank of America, that someone posing as Fernandez attempted to open a bank account in a Bank of America branch in San Diego, California, using his wrongfully disclosed and compromised PII/PHI.
>
> [Additionally,] Fernandez has received an ongoing and increasing stream of electronic mail and regular mail advertisements from drug companies, Canadian online pharmacies, and other health care providers specifically targeting three medical conditions from which he suffers. Fernandez did not receive the type and volume of such targeted advertisements prior to the Data Breach. These advertisements logically could only be the direct and/or proximate result of the data thieves and their customers buying, selling, opening, reading, mining, and using Fernandez's PII/PHI wrongfully disclosed in the Data Breach.
>
> [Further,] Fernandez was informed that several other persons named 'Martin Fernandez' with his birthdate had been treated at the clinic for medical conditions from which Fernandez does not suffer. Fernandez also has been involved in a lengthy dispute with the Veterans Administration regarding the proper amount of compensation for his injured eye. Fernandez has been required to go through multiple levels of appeal. At each appellate level, however, a determination could not be made because Fernandez's medical records are lost and incomplete. The Veteran Administration's inability to make a determination, in turn, has delayed and reduced the amount of Fernandez's compensation for his injury.

(Compl. ¶¶ 17–20.)

Defendant responds to Plaintiff's actual identity theft, identity fraud and/or medical fraud allegations as follows:

> Plaintiff's alleg[ation] that in April 2012 he 'lost [a] government contractor position' for which he had applied, due to an inability to 'obtain the required security clearance,' due to erroneous information in a credit report, which Plaintiff surmises 'logically could only be the direct and/or proximate result of the Data Breach,' ....

> **[consists of a] 'highly attenuated chain' of events and inferences ... [and] reeks of implausibility....** [E]ven if errors on a credit report could be deemed to suggest some kind of fraudulent use of Plaintiff's identity by some unknown person at some point in the past, they in no way suggest [Defendant] or the September 2011 ***1085** backup tape theft had anything to do with it.
>
> ....
>
> [Further,] **[t]he Complaint omits the dates of erroneous addresses and purchases on the credit report** (information that is typically reflected on the face of a credit report), **leaving the reader to guess whether those errors even arose after, rather than before, the [Data Breach].**
>
> ....
>
> Plaintiff **makes only a vague claim that the unspecified errors [on his credit report] harmed him indirectly by inducing the Government to deny him a security clearance which in turn allegedly prevented him from getting a job.** But this, too, defies plausibility. Plaintiff does not attempt to explain why the Government would deny a security clearance to an otherwise eligible veteran of our Armed Forces because of the type of routine errors in credit reports that affect a significant percentage of the American population.

(*Id.* 7:19–8:19) (emphasis added).

Defendant also argues Plaintiff lacks standing to bring his claims based on

> [the] alleg[ation] that someone unsuccessfully attempted to log-in to his email accounts and that someone unsuccessfully attempted to open a bank account in his name. Compl. ¶ 18 However, the backup tape theft cannot plausibly explain these attempts. The backup tapes did not include e-mail addresses. Compl. ¶ 5 (listing information on the backup tapes). And the Complaint does not explain how *failed* attempts to access Plaintiff's e-mail or open a bank account in his name could have injured Plaintiff.

(*Id.* 8:20–25) (emphasis in original).

Defendant further argues:

> "Plaintiff['s] alleg[ation] of an 'ongoing and increasing stream of electronic mail and regular mail advertisements from drug companies' .... lack [s] any plausible connection to the [D]ata [B]reach because the stolen backup tapes did not include email addresses.... **Plaintiff does not otherwise link the [advertisements] to the tapes, claim that the [marketers] have personal or private information found on the tapes, or even allege that his [home address] was unlisted and hence would have been difficult for marketers to locate absent the assistance of the data**

> **thief.** In other words, Plaintiff seems to simply be one among the many of us who are interrupted in our daily lives by unsolicited [advertisements]. [Plaintiff's] harm, consequently, cannot plausibly be linked to the tapes.

(*Id.* 8:26–9:7.) (internal quotation marks and citations omitted) (emphasis added).

Defendant also argues Plaintiff's allegation "that 'there was confusion regarding his appointment' at a recent visit to ... [a] VA Clinic ... [when] 'several other persons named Martin Fernandez with his birthdate [were] treated at the clinic for medical conditions from which Fernandez does not suffer ...' " (*id.* 9:8–11), is not an injury in fact fairly traceable to the Data Breach as follows:

> **[O]ther than temporary 'confusion,' Plaintiff does not explain how the treatment of others with his name constitutes injury for the purpose of Article III standing. Moreover, [this] theory of standing requires the Court to indulge in an incredible chain of assumptions:** that after the backup tape theft in San Antonio, Texas, an individual accessed his information on the backup tapes, then transferred that information to multiple individuals who happened to be in Southern California and wanted a way to obtain free health care, each of whom then falsely posed as ***1086** Martin Fernandez to obtain free health care in the very same clinic ... that the real Martin Fernandez, who resides in Elk Grove, would later happen to visit for medical care. **Plaintiff's need to resort to such an outlandish and 'highly attenuated chain' of events ... only highlights his utter inability to satisfy Article III's requirements.**

(*Id.* 9:11–21) (emphasis added). Lastly, Defendant argues:

> **Plaintiff['s] alleg[ation] that his 'medical records are lost and incomplete' ... has no plausible connection with the [Data Breach]. After all, the stolen tapes were backup tapes, not unique originals.** Plaintiff offers no explanation as to how the theft of the backup tapes could cause his medical records to be incomplete or lost.

(*Id.* 9:22–25) (emphasis added).

Plaintiff's allegations that someone attempted to open a bank account in his name, attempted to log in to his email accounts, and that he received an increased number of email advertisements targeting his medical conditions do not allege injuries in fact fairly traceable to the Data Breach, since Plaintiff has not alleged that bank account information or email addresses were on the stolen backup data tapes. (*See* Compl. ¶ 5) (describing the information contained on the backup data tapes). If certain "information [is] not on the [stolen] tapes ... Plaintiff[ ] cannot causally link [the use of that information] to the [Data Breach]." *SAIC,* 45 F.Supp.3d at 32; *see also id.* at 33 (finding the plaintiffs did not have standing based on allegations concerning the misuse of their bank accounts where they "proferr[ed] no plausible explanation for how the thief would have acquired their banking information.").

In addition, Plaintiff's allegation that he could not obtain the required security clearance for a job he sought since his credit report

contained addresses at which he never lived, and purchases he never made, which in turn caused him to lose that job opportunity, requires judicial endorsement of a standing theory "that require[s] guesswork as to how [an] independent decisionmaker[ ] ... exercise[d] [its] judgment" in denying Plaintiff a security clearance. *Clapper,* 133 S.Ct. at 1150 ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors.")

Further, Plaintiff's allegation that he was injured when he received an increasing number of regular mail advertisements after the Data Breach targeting his medical conditions is not plausibly alleged as an injury fairly traceable to the Data Breach. Plaintiff has not alleged that his home address is not publicly available and therefore **"would have been difficult for marketers to locate absent the assistance of the data thief."** *SAIC,* 45 F.Supp.3d at 33 (emphasis added) (finding a plaintiff did not have standing where he did not "allege that his home phone number was unlisted.") Moreover, Plaintiff has not alleged that the medical conditions from which he suffers, and to which the advertisements are allegedly targeted, were listed in his medical records before the Data Breach.

Additionally, Plaintiff has not alleged facts from which a plausible inference could be drawn that the medical treatment of others with his name and birthdate for different medical conditions than Plaintiff has, which allegedly caused "confusion," (Compl. ¶ 20), is an injury fairly traceable to the Data Breach.

Nor has Plaintiff "establish[ed] standing [based on lost medical records] because only *backup* tapes were stolen from the ***1087** SAIC employee's car," *SAIC,* 45 F.Supp.3d at 32 (emphasis in original), and Plaintiff has not alleged facts from which a plausible inference could be drawn that the theft of backup tapes caused the entirety of his medical records to become incomplete or lost.

For the stated reasons, Plaintiff has not shown he has standing to bring actual identity theft, identity fraud and/or medical fraud claims.

b. Increased Risk of Harm

Defendant also argues that Plaintiff's allegations of "an imminent, immediate and continuing risk of identity theft, identity fraud and medical fraud—risks justifying expenditures for protective and remedial services for which he is entitled to compensation," (Compl. ¶ 9), constitute "[s]peculation and assumptions about future harm [which] cannot transform a threatened injury into a certainly impending one." (Mot. 10:4–10.) Specifically, Defendant argues: "Plaintiff alleges no facts plausibly suggesting that the thief ... recognized the [data] tapes for what they were, found a tape reader, acquired the proper software, deciphered the encrypted portions of the information, learned to read the information correctly, and then accessed Plaintiff's personal information...." (*Id.* 12:17–21.)

When an "alleged injury **has not yet occurred** .... [courts] ... must determine whether [the plaintiff's] alleged injury is **' imminent.'** An injury is imminent 'if the threatened injury is 'certainly impending,' or there is a 'substantial

risk' that the harm will occur.' " *Montana Environmental Information Center v. Stone–Manning,* 766 F.3d 1184, 1189 (9th Cir.2014) (emphasis added) (quoting *Clapper,* 133 S.Ct. at 1147; *Susan B. Anthony List v. Driehaus,* —— U.S. ——, 134 S.Ct. 2334, 2341, 189 L.Ed.2d 246 (2014)). **"[P]laintiffs bear the burden of pleading ... concrete facts showing that the defendant's actual action has caused the substantial risk of harm. Plaintiffs cannot rely on speculation about the unfettered choices made by independent actors not before the court."** *Clapper,* 133 S.Ct. at 1150 n. 5 (emphasis added).

Plaintiff has not shown there is a substantial risk that his PII/PHI will be imminently misused "in light of the attenuated chain of inferences necessary to find harm here." *Clapper,* 133 S.Ct. at 1150 n. 5. Specifically, Plaintiff's allegations concerning his increased risk of harm require "speculation ... [about the] decisions or capabilities of ... independent, unidentified actor [s],"—the data thief or thieves, and whether they intend to misuse Plaintiff's PII/PHI at some point in the future. *In re Zappos.com, Inc.,* 108 F.Supp.3d 949, 959, No. 3:12–CV–00325–RCJ–VP, 2015 WL 3466943, at *8 (D.Nev. June 1, 2015) (stating: "Should the person or persons in possession of Plaintiff's information choose not to misuse the data, then the harm Plaintiff[ ] fears will never occur.... Plaintiff's damages at this point rely almost entirely on conjecture.") As stated in *SAIC,*

> [T]here is simply no way to know [whether identity theft, identity fraud and/or medical fraud will occur] until either the [thief] is apprehended or the data is actually used. **Courts for this reason are reluctant to grant standing where the alleged future injury depends on the actions of an independent third party.**

SAIC, 45 F.Supp.3d at 25 (citing *Clapper,* 133 S.Ct. at 1150) (emphasis added).

Further, in light of the fact that Plaintiff waited thirty-six months after the Data Breach to file his Complaint, and that now almost four years has elapsed since the Data Breach, Plaintiff has not shown that any alleged risk of future identity theft, identity fraud, and/or medical fraud is imminent. ***1088** *See SAIC,* 45 F.Supp.3d at 34 (declining to find that there was "imminent ... harm," *inter alia,* since "given that thirty-four months have elapsed, either the malefactors are extraordinarily patient or no mining of the tapes has occurred.").

For the stated reasons, Plaintiff has not alleged facts from which a plausible inference could be drawn that he suffers from a substantial risk of imminent future harm of identity theft, identity fraud and/or medical fraud.

c. Standing Based on Invasion of Privacy or Breach of Confidentiality

Defendant argues Plaintiff's allegation that there has been a "breach of the confidentiality of his personal information .... is insufficient to establish Article III standing .... [since] Plaintiff does not allege any facts that plausibly

suggest anyone has accessed his personal information." (Mot. 12:25–13:6.) As stated in *SAIC:*

> For a person's privacy to be invaded, their personal information must, at a minimum, be disclosed to a third party. Existing case law and legislation support that common-sense intuition: If no one has viewed your private information (or is about to view it imminently), then your privacy has not been violated.

45 F.Supp.3d at 28 (finding "[the] disclosure and access of [the plaintiffs'] personal information is anything but certain. Rather, the information itself is locked inside tapes that require some expertise to open and decipher.") (citing statutes and cases).

Plaintiff has not alleged facts from which a plausible inference could be drawn that anyone has viewed his PII/PHI as a result of the Data Breach. Therefore, Plaintiff has not shown he has standing to bring his claims based on his allegations of invasion of privacy or breach of confidentiality.

d. Standing Based on Deprivation of Value of Plaintiff's Personal Information

Defendant argues Plaintiff's allegation of "standing based on [the] 'deprivation of the value of his [personal information] for which there is a well-established national and international market' .... [is] inadequate." (Mot. 13:22–24.) Specifically, Defendant argues:

> [Plaintiff] fails to allege that he has the ability to sell his personal information, that he has attempted to sell this information but could not do so because of the theft, or that he plans to sell this data in the future. Without any such allegations, Plaintiff's deprivation-of-value theory does not confer Article III standing.

(Mot. 14:8–11.)

Where the plaintiff has not alleged that he "attempted to sell his PII [;] that he would to do so in the future[;] or that he was foreclosed from entering into a ... transaction relating to his PII[ ] as a result of [the defendant's] conduct," the plaintiff has "not alleged facts sufficient to show [an] injury[ ] in [ ]fact based on the purported diminution in value of his PII." *Yunker v. Pandora Media, Inc.,* No. 11–cv–03113–JSW, 2013 WL 1282980, *4 (N.D.Cal. Mar. 26, 2013); *accord SAIC,* 45 F.Supp.3d at 30.

Here, Plaintiff has not alleged that he intended to sell his PII/PHI, that he plans to sell it in the future, that he is foreclosed from doing so because of the Data Breach, or that the data breach reduces the value of the PII/PHI he possesses. *See generally Green v. eBay Inc.,* 2015 WL 2066531, at *5 n. 59 (E.D.La. May 4,

2015) (stating: "Even if the Court were to find that personal information has an inherent value and the deprivation of such value is an injury sufficient to confer standing, Plaintiff has failed to allege facts indicating how ***1089** the value of his personal information has decreased as a result of the Data Breach"). Therefore, Plaintiff has not shown he has standing to bring his claims based on his allegation that he has been deprived of the value of his PII/PHI.

e. Standing Based on Plaintiff's Lost Benefit of the Bargain or Diminished Value of Products and Services Received

Defendant argues Plaintiff's allegations that he has standing to bring his claims based on the "diminished value of the healthcare products, medical insurance and/or medical services [he] purchased from [his healthcare provider]," (Compl. ¶ 97), and a "lost benefit of [his] bargain" (*id.* ¶ 119), "lack[ ] any explanation of how the value of Plaintiff's health care—which he received through [Plaintiff's healthcare provider], not from [Defendant]—has been diminished." (Mot. 14:17–18.)

In *SAIC,* the court found plaintiffs did not have standing to bring claims based on the allegation that the value of their healthcare was diminished as a result of the backup tape theft, stating:

> [The plaintiffs] do not maintain ... that the money they paid [to their healthcare provider] could have or would have bought a better policy with a more bullet-proof information-security regime. **Put another way, [the p]laintiffs have not alleged facts that show that the market value of their insurance coverage (plus security services) was somehow less than what they paid. Nothing in the Complaint makes a plausible case that [the p]laintiffs were cheated out of their premiums. As a result, no injury lies.**

SAIC, 45 F.Supp.3d at 30 (emphasis added).

This reasoning in *SAIC* is persuasive and is adopted. Here, Plaintiff has not alleged facts from which a plausible inference could be drawn that he has been injured by a loss in value of his insurance coverage, nor has he alleged that the value of his health care coverage after the Data Breach is less than what it was before the Data Breach. Therefore, Plaintiff has not shown he has standing to bring his claims based on these allegations.

f. Allegations Under the California Confidentiality of Medical Information Act ("CMIA")

Defendant also moves for dismissal under Rule 12(b)(1) of Plaintiff's CMIA claim, arguing: "Plaintiff fails to state a claim ... because [Defendant] is not the type of health-care entity covered by the CMIA." (Mot. 13:10–11.) This portion of the motion actually seeks dismissal under Rule 12(b)(6) and will be considered under that rule.

The Confidentiality of Medical Information Act ("CMIA") (Civ.Code § 56 et seq.) prescribes: **"[a] provider of health care, [a] health care service plan, or [a] contractor** shall not disclose medical information ...." and any such entity that "negligently creates, maintains, preserves, stores, abandons, destroys, or disposes of medical information ..." is liable under the CMIA. Cal. Civ.Code §§ 56.10, 56.101 (emphasis added). The CMIA states a **"contractor" is a "medical group, independent practice association, pharmaceutical benefits manager, or ... medical service organization [that] is not a health care service plan or provider of health care."** *Id.* § 56.05(d) (emphasis added). The CMIA states a "provider of health care" is **"any clinic, health dispensary, or health facility"** licensed under certain California codes, and that a "health care service plan" is "any entity regulated pursuant" to certain California health and safety code statutes. *Id.* § 56.05(m), (g) (emphasis added). Concerning Defendant's ***1090** status as a contractor, Plaintiff alleges:

> The United States Department of Defense ... contracted with [Defendant] to provide ... electronic information management and data security services for safeguarding and protecting Plaintiff's and [putative] Class Members' PII/PHI, all of which was entrusted to [Defendant] in connection with obtaining health care coverage
>
> ....
>
> [Defendant] provides scientific, engineering, systems integration, and technical services.

(Compl. ¶¶ 3, 24) (emphasis added).

Plaintiff has not alleged facts from which a plausible inference could be drawn that Defendant is an entity governed by CMIA. Therefore, this portion of Defendant's dismissal motion is granted.

II. CONCLUSION

For the stated reasons, all of Plaintiff's claims are dismissed under Rule 12(b)(1), except for Plaintiff's CMIA claim, which is dismissed under Rule 12(b)(6). Plaintiff has twenty days leave from the date on which this Order is filed to file an amended complaint addressing the referenced deficiencies in his Complaint.

All Citations

127 F.Supp.3d 1078

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RLA-2

980 F.3d 879
United States Court of
Appeals, Third Circuit.

Vickie THORNE, individually
and on behalf of all others
similarly situated, Appellant
v.
PEP BOYS MANNY MOE & JACK INC.

No. 20-1540
|
Argued September 22, 2020
|
(Filed: November 20, 2020)

Synopsis

Background: Tire buyer brought putative class action against independent tire dealer under National Traffic and Motor Vehicle Safety Act, alleging that dealer failed to register or provide appropriate means for registration of tires with manufacturer. The United States District Court for the Eastern District of Pennsylvania, J. Curtis Joyner, Senior District Judge, 2020 WL 605876, granted dealer's motion to dismiss for lack of standing. Buyer appealed.

Holdings: The Court of Appeals, Smith, Chief Judge, held that:

plaintiff failed to allege a tangible, economic injury sufficient for Article III standing;

alleged intangible harm did not bear a close relationship to a harm historically recognized as a basis for common-law suits of negligence per se and products liability;

Congress did not elevate lack of tire registration into an injury that was concrete;

alleged injury of infinitesimal increase in risk of harm to property or person if unregistered tires were recalled because of tire dealer's failure to register tires was insufficient to create an injury-in-fact;

plaintiff lacked Article III standing to seek restitution or disgorgement; and

plaintiff lacked Article III standing to seek injunctive relief.

Vacated and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss for Lack of Standing.

***882** On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. No. 2:19-cv-00393), District Judge: Honorable J. Curtis Joyner

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Before: SMITH, Chief Judge, McKEE, and JORDAN, Circuit Judges

OPINION OF THE COURT

SMITH, Chief Judge.

***883** However appropriate may have been Virginia Woolf's comparison of the unhappy Mrs. Dalloway to "a wheel without a tyre," Plaintiff Vickie Thorne considers *herself* aggrieved despite having equipped her car with two new tires.[1] Wheels are not an issue. What is at issue is a federal regulation that requires a tire dealer to help customers register their new tires with the manufacturer. That regulation was promulgated under the National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. § 30101, *et seq.* ("the Act"), and the Act's stated purpose is to reduce traffic accidents and their consequent human toll. Thorne's appeal turns on whether she can sue her tire dealer for ignoring its regulatory tire registration obligation.

1 Virginia Woolf, Mrs Dalloway 112 (Hogarth Press 1925).

The regulation prescribes three methods for tire dealers like Pep Boys Manny Moe & Jack Inc. to help register a buyer's tires. According to Thorne, Pep Boys failed to pursue any of the three when, or after, it sold her the tires. So she sued on behalf of a class of Pep Boys customers who similarly received no tire registration assistance. But Thorne's suit skidded to a halt when the District Court dismissed her complaint without leave to amend. The Court held that a dealer's failure to help register a buyer's tires in one of the three prescribed ways does not, by itself, create an injury in fact for purposes of Article III standing. We agree with that *ratio decidendi* but, because a district court has no jurisdiction to rule on the merits when a plaintiff lacks standing, we will vacate and remand for the District Court to dismiss Thorne's operative complaint without prejudice.

I. BACKGROUND

Congress passed the Act to "reduce traffic accidents and deaths and injuries resulting from traffic accidents." 49 U.S.C. § 30101; 80 Stat. 718. Congress later amended the Act to require that every tire dealer unaffiliated with a tire manufacturer "give a registration form (containing the tire identification number) to the first purchaser of a tire."[2] 49 U.S.C. § 30117(b)(2)(B). It also required a rulemaking to obligate dealers to keep certain records on tire sales, including each buyer's name and address and tire identification information. *Id.* § 30117(b)(3). Rulemaking merged these two requirements, providing three options for tire dealers to comply with their registration obligations:

(1) Give each buyer a registration form listing the tire identification number ("TIN") of each tire he or she bought and certain contact information of the dealer, for the buyer to then submit to the tire manufacturer;

(2) Record each buyer's name and address, the TIN of each tire he or she bought, and certain contact information for the dealer on a registration form, and mail it to the tire manufacturer at no charge to the buyer within 30 days; or

(3) Electronically submit to the tire manufacturer, by methods it has authorized, the same information in (2) ***884** at no charge to the buyer within 30 days.

See 49 C.F.R. § 574.8(a)(1)(i)–(iii).

2 We refer in this opinion to such unaffiliated dealers as simply "dealers." For purposes not relevant here, the statute distinguishes between "independent dealers" such as Pep Boys and those affiliated with tire manufacturers.

Widening the lens, the Act states how it interacts with other laws and is enforced. It preserves common-law causes of action, 49 U.S.C. § 30103(e), but does not confer an express private right of action. *See, e.g.*, *Ayres v. Gen. Motors Corp.*, 234 F.3d 514, 522–24 (11th Cir. 2000); *Mulholland v. Subaru of Am., Inc.*, 620 F. Supp. 2d 1261, 1265–66 (D. Colo. 2009). For administrative enforcement, the Act authorizes the Secretary of Transportation to decide whether a vehicle or vehicle equipment contains a safety-related defect or does not comply with minimum performance standards. *See* 49 U.S.C. §§ 30102(a)(10), 30118(a). Manufacturers must notify vehicle owners and dealers of any such defect or non-compliance, and the Secretary may *sua sponte* or on petition of an "interested person" hold a hearing on the sufficiency of notice. *Id.* § 30118(b), (e). "Interested person[s]" may participate in these hearings. *Id.* The Attorney General may also enforce the Act through a federal civil lawsuit to enjoin "a violation of this chapter or a regulation prescribed ... under this chapter." *Id.* § 30163(a). One who violates the Act, including the tire registration statute (§ 30117) "or a regulation prescribed thereunder, is liable to the United States Government for a civil penalty of not more than $21,000 for each violation." *Id.* § 30165(a)(1). Penalties for "a related series of violations" can reach $105 million. *Id.*

II. FACTS AND PROCEDURAL HISTORY

Thorne bought two tires from a Pep Boys store in Richmond, Virginia, in January of 2017. She claims that Pep Boys did not help register her tires with the manufacturer using any of the three prescribed methods. [3]

3 Thorne did not specifically allege in her complaint that Pep Boys disregarded Option 2, under which the dealer mails a buyer's completed registration form to the manufacturer. She alleged that she "was not handed a tire-registration form by Pep Boys," and her "invoice [did not] indicate that Pep Boys transmitted the federally-required information directly to the tire manufacturer." Am. Class Act. Compl. ¶ 53. She generally alleged that Pep Boys violated its registration

obligations and that her tires went unregistered, so we take her to be claiming that Pep Boys did not perform Option 2 either. For purposes of this appeal, Pep Boys does not claim to practice any of the three tire registration methods.

Thorne filed a class action complaint against Pep Boys in the Eastern District of Pennsylvania, alleging that Pep Boys violated its registration obligations under 49 C.F.R. § 574.8 and thus was liable to her on federal and state-law causes of action. Pep Boys moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The District Court determined that Thorne failed to allege a concrete injury in fact, dismissing her complaint without prejudice for lack of Article III standing.

Thorne then filed an amended class action complaint, bringing eight causes of action under federal warranty and state law.[4] She sought money damages, restitution, injunctive relief, and attorneys' fees. Pep Boys, she alleged, deprived her of the benefit of the bargain when it sold her tires without helping to register them because unregistered tires are worth less than registered tires. Thorne alternatively alleged intangible harm because her unregistered tires increase the risk to her person or property if she is unreachable upon her tires' recall. She did not allege ***885** any performance problems, physical defects, or recall associated with her tires.

4 Thorne's operative complaint seems to implicate Federal Rules of Civil Procedure 23(b)(2) or 23(b)(3), though it cites neither.

After Pep Boys again moved to dismiss, the District Court dismissed Thorne's amended complaint on Article III standing grounds. The District Court held that Thorne failed to sufficiently plead tangible financial harm because, as a matter of law, she did not bargain for compliance with the registration regulation. It also concluded that her alleged intangible harm was speculative and insufficiently concrete absent a recall of her tires. Citing *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102 (3d Cir. 2019), the District Court held that violation of 49 C.F.R. § 574.8's record-keeping requirement alone does not produce an injury in fact. This time, dismissal did not provide leave to amend.

III. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291 to review the dismissal of Thorne's amended complaint. A North Carolina resident, Thorne invoked 28 U.S.C. § 1332(d) to ground the District Court's exercise of diversity jurisdiction over her putative class action against Philadelphia-based Pep Boys.

But the District Court lacked jurisdiction if Thorne couldn't establish Article III standing. *See In re Schering Plough Corp. Intron/Temodar Cons. Class Act.*, 678 F.3d 235, 243 (3d Cir. 2012). Constitutional standing, which is properly tested under Rule 12(b)(1), may be challenged facially or factually. A facial challenge argues that the plaintiff's factual allegations cannot meet the elements of

standing. *Schering Plough*, 678 F.3d at 243; *see also In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 632 (3d Cir. 2017). Because that was the nub of Pep Boys's Rule 12(b)(1) motion, we take Thorne's factual allegations as true, view them in her favor, and perform a plenary review of the dismissal. *See Horizon*, 846 F.3d at 632.

IV. ANALYSIS

Derived from separation-of-powers principles, the law of standing "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013). Article III of our Constitution vests "[t]he judicial Power of the United States" in both the Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. This "judicial [p]ower" extends only to "Cases" and "Controversies." *Id.* art. III, § 2; *see also Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). To assure that judges avoid rendering impermissible advisory opinions, parties seeking to invoke federal judicial power must first establish their standing to do so. *Spokeo*, 136 S. Ct. at 1547.

The familiar elements of Article III standing require a plaintiff to have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* at 1547. Injury in fact is the " 'foremost' of standing's three elements"—and the one element at issue in this appeal. *Id.* (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 103, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)). To plead an injury in fact, the party invoking federal jurisdiction must establish three sub-elements: first, the invasion of a legally protected interest; second, that the injury is both "concrete and particularized"; and third, that the injury is "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S. Ct. at 1548 (quoting ***886** *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)); *see also Mielo v. Steak 'n Shake Ops.*, 897 F.3d 467, 479 n.11 (3d Cir. 2018). The parties do not dispute that Thorne has suffered invasion of a legally protected interest, so our injury-in-fact analysis focuses on the latter sub-elements.

As the party invoking federal jurisdiction, Thorne has the burden to establish standing "for each type of relief sought." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009); *see Finkelman v. Nat'l Football League*, 810 F.3d 187, 194 (3d Cir. 2016). Her arguments do not differentiate between the remedies she seeks. Still, we will consider her standing as to each remedy alleged, mindful of our task to "examine the allegations in the complaint from a number of different angles to see if [Thorne's] purported injury can be framed in a way that satisfies Article III." *See Mielo*, 897 F.3d at 479 (quoting *Finkelman*, 810 F.3d at 197).

A. Tangible Economic Injury

A "paradigmatic form[ ]" of injury in fact is economic injury. *Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d 286, 291 (3d Cir. 2005) (Alito, J.). "Standing always should

exist to claim damages, unless perhaps the theory of damages is totally fanciful." *Id.* (quoting WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 3531.4, at 847 n.7 (2005 Supp.)). Little surprise, then, that Thorne characterizes her tire purchase as an economic injury. But Thorne nowhere "allege[s] facts that would permit a factfinder to value the purported injury at something more than zero dollars without resorting to mere conjecture," *In re Johnson & Johnson Talcum Powder Prods. Litig.*, 903 F.3d 278, 285 (3d Cir. 2018), so she fails to plead a theory of economic harm sufficient to support standing.

The gravamen of Thorne's alleged economic injury is that she did not receive the benefit of her bargain when she bought tires from Pep Boys that then went unregistered. She alleged that "Class Members not only pay for the tires, but also pay the cost of Defendant's compliance with federal law." Am. Class Act. Compl. ¶ 9. And on appeal, she argues that "she paid Pep Boys for nondefective tires, and it instead provided her tires that were unregistered (because Pep Boys used none of the three mandated methods at the point of sale), and therefore the tires were defective, which is a tangible financial injury." Appellant's Br. 16. Thorne's benefit-of-the-bargain allegations do not support a viable theory of economic injury, and her product-defect argument blows right by the statute's defined terms.

1. *Unregistered tires not worth less than Thorne paid*. Thorne's benefit-of-the-bargain theory runs headlong into our case law. We start with *Johnson & Johnson*. There, the plaintiff claimed that when she bought baby powder, she was denied the benefit of her bargain because certain uses of the product "can lead" to an elevated risk of ovarian cancer. 903 F.3d at 281–82. Though the plaintiff might have expected "safe" baby powder, missing were allegations that the product was unsafe *as to her*, that she developed ovarian cancer, or that she was at risk of developing it as a result of using the baby powder. *Id.* at 289. We thus rejected the plaintiff's benefit-of-the-bargain theory of injury because she "failed to allege that the economic benefit she received from that powder was *anything* less than the price she paid." *Id.* at 290 (emphasis in original).

The same can be said for Thorne. Though she "pair[s] a conclusory assertion of money lost with a request that a defendant pay up," *Johnson & Johnson*, 903 F.3d at 288, that doesn't suffice. Her ***887** pleadings concede that the tires she bought from Pep Boys are functioning as intended and haven't been recalled. Unalleged, uncertain future events do not make her Pep Boys tires worth less at the time of purchase than equivalent registered tires. *See id.* at 289–90. And Thorne's thin allegation that Pep Boys prices the cost of complying with the registration obligation into its tires is undermined elsewhere in her complaint. For example, she formulates a supposedly common class question as: "[w]hether Defendant includes the cost of tire-registration compliance in the price of its tires." Am. Class Act. Compl. ¶ 65(d). Given her mixed messages on compliance costs, Thorne fails to intelligibly allege that she paid for more than she received. [5]

5 As bedrock for her requested injunction, Thorne alleged that she "and the Class members will likely

> purchase tires from Defendant again ... and still not receive the required tire-registration services." Am. Class Act. Compl. ¶ 134. We return to *Johnson & Johnson*: Thorne's desire to keep buying Pep Boys tires at prevailing prices makes it difficult to presume that she would pay more for registered tires. *See* 903 F.3d at 288–89.

Thorne's theory of economic harm also treads on *Finkelman*. As relevant here, Finkelman bought tickets to the Super Bowl in the resale market and then sued the NFL, alleging that he paid a higher price due to the NFL's practice of reserving nearly all tickets for teams and League insiders. 810 F.3d at 190–91, 199. We held that Finkelman's theory of economic injury stood on "nothing more than supposition" because we "ha[d] no way of knowing whether the NFL's withholding of tickets would have had the effect of increasing or decreasing prices on the secondary market." *Id.* at 200–01. For example, League insiders —who received their tickets for free—"might have been especially eager to resell their tickets," meaning that the NFL's practices may have effectively increased the supply and decreased the price of tickets in the resale market relative to a scenario in which the NFL sold more tickets to the public. *Id.* at 200.

Like Finkelman, Thorne propounds an economic injury that requires speculation about market or firm-level effects. Were Pep Boys to comply with its registration obligations, market factors might lead it to increase its tire prices accordingly. As Thorne recognizes, the submission-by-buyer method of compliance (Option 1) does not prohibit dealers from passing on registration costs to tire buyers. On the other hand, demand might be too elastic for Pep Boys to do so. We simply have no way of knowing. Rather than "application of basic economic logic," Thorne's theory of economic harm relies on "pure conjecture" about what Pep Boys's prices would be if it "sold its [tires] differently." *See Finkelman*, 810 F.3d at 201 (quotation omitted).

We recognize that one out-of-Circuit district court decision goes the other way. In *Exum v. National Tire & Battery*, 437 F. Supp. 3d 1141 (S.D. Fla. Jan. 28, 2020), a federal magistrate judge reasoned that purchasers of unregistered tires "have arguably purchased a less valuable product" and "can reasonably expect that the purchase price for those tires includes proper tire registration."[6] *Id.* at 1151–52. *Exum* is more properly considered an intangible harm case, and we will treat it as such. But it suffices here to note that *Exum* assigns economic value through mere conjecture, contrary to our Circuit's law. *See, e.g.*, *Johnson & Johnson*, 903 F.3d at 285; *Finkelman*, 810 F.3d at 201. ***888** At all events, Thorne alleges only that she generally expected, when buying the tires, to be "reachable" upon a recall, Am. Class Act. Compl. ¶ 55, not that she kicked the tires on the applicable regulations or was told at the point of sale that Pep Boys would take steps to help register the tires.[7] Lack of awareness of an affirmation at the time of purchase generally dooms a benefit-of-the-bargain theory of liability. *See, e.g.*, *Cipollone v. Liggett Grp., Inc.*, 893 F.2d 541, 566–68 (3d Cir. 1990) (applying New Jersey law), *rev'd on other grounds*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992); *Gross v. Stryker Corp.*, 858 F. Supp. 2d 466, 501–02 (W.D. Pa.

2012) (applying Pennsylvania law). We decline to adopt *Exum*'s economic harm analysis here.

6 The judge in *Exum* declined to follow the District Court's dismissal of Thorne's original complaint based on "the specific allegations raised" in Exum's complaint. 437 F. Supp. 3d at 1152. But the judge noted that the cases are "similar." *Id.*

7 Thorne has not alleged that Pep Boys lacks access to her contact information.

2. *Unregistered tires not defective*. Thorne also contends that we should presume suitable economic injury because an unregistered tire is per se defective under the Act. Interpreting the Act requires us to examine "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Nken v. Holder*, 556 U.S. 418, 426, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (quotation omitted). Bearing these factors in mind, we conclude that Thorne's construction of the statute falls flat because it offends the statutory definition of "defect," relies on grammatically flawed readings of related definitions, and would create illogical results.

First, the Act's definition of "defect" cannot bear the weight Thorne places on it. When a statute defines a term, we must follow that definition and "exclude[ ] unstated meanings of that term." *Meese v. Keene*, 481 U.S. 465, 484, 107 S.Ct. 1862, 95 L.Ed.2d 415 (1987) (citation omitted). The Act defines "defect" to mean "any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment." 49 U.S.C. § 30102(a)(3). The definition by its terms embraces faulty physical characteristics, not registration (*i.e.,* paperwork) deficiencies. Besides, other provisions of the Act suggest that non-compliance is not synonymous with defect. *See, e.g.*, 49 U.S.C. § 30118(b)(1) ("Secretary [of Transportation] may make a final decision that a motor vehicle or replacement equipment *contains a defect* related to motor vehicle safety *or does not comply with an applicable motor vehicle safety standard* prescribed [hereunder].") (emphases added); *id.* § 30116(a) ("If ... it is decided that the vehicle or equipment *contains a defect* related to motor vehicle safety *or does not comply* with applicable motor vehicle safety standards ....") (emphases added). The definition of "defect" and other provisions' contemplation of that term seriously undermine Thorne's reading.

Second, we decline Thorne's invitation to contort other related definitions in the Act. According to Thorne, noncompliance can amount to a defect because:

> [A] defect in original equipment or non-compliance of original equipment with a motor vehicle safety standard prescribed under this chapter, is deemed to be a defect or non-compliance of the motor vehicle in or on which the equipment was installed at the time of delivery to the first purchaser.

49 U.S.C. § 30102(b)(1)(F); Appellant's Br. 18. "[O]riginal equipment means motor vehicle equipment (including a tire) installed in or on a motor vehicle at the time of delivery to the first purchaser." *Id.* § 30102(b)(1)(C). For one thing, the defined term "motor vehicle safety standard" means "a minimum standard for motor ***889** vehicle or motor vehicle equipment performance." *Id.* § 30102(a)(10). Thorne never explains how deficient registration amounts to a performance issue. For another, Thorne's contention that the "first purchaser" of original equipment can be the first purchaser of a tire violates the last-antecedent rule. *See, e.g.*, *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 343, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005) (confirming that "a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows" (citation omitted)). In the definition of "original equipment," the term "first purchaser" immediately follows "a motor vehicle," not "a tire."

Third, Thorne's argument would create illogical results. Consider that the Act sometimes regards the maker of a new car as the manufacturer of the car's stock tires. It crafts the following limited definition applicable to, among others, the tire registration subsection: "[A] manufacturer of a motor vehicle in or on which original equipment was installed when delivered to the first purchaser is deemed to be the manufacturer of the equipment." 49 U.S.C. § 30102(b)(1)(G). But Thorne's interpretation of "original equipment" and "first purchaser" would mean that the manufacturer of a tire buyer's vehicle is considered the manufacturer of her replacement tires. Intuitively, and considered against the balance of the statute, such a result is absurd. "A basic principle of statutory construction is that we should avoid a statutory interpretation that leads to absurd results." *In re Kaiser Aluminum Corp.*, 456 F.3d 328, 330 (3d Cir. 2006). We read the Act to more sensibly treat aftermarket tires as "replacement equipment"—"motor vehicle equipment (including a tire) that is not original equipment." 49 U.S.C. § 30102(b)(1)(D). [8]

8 Betraying her arguments on appeal, Thorne pleaded that "44 million *original equipment tires for new passenger vehicles* and 201.6 million *replacement tires* for passenger vehicles" were sold in 2013. Am. Class Act. Compl. ¶ 20 (emphases added).

* * *

We conclude that Thorne has not alleged a tangible, economic injury that is sufficient for standing purposes. She has supported her benefit-of-the-bargain theory of injury with only speculative allegations that the tires she received from Pep Boys were worth less than what she paid for them. And her argument that unregistered tires are defective such that we may presume standing-worthy economic harm rests on a flawed reading of the Act. Because we reach this conclusion on de novo review, Thorne's argument that the District Court made erroneous factual findings is of no consequence. [9] We next analyze Thorne's standing under the *Spokeo* framework governing intangible injuries.

9 Thorne also argues that the District Court should not have required her to " 'allege any *additional* harm beyond

the one Congress has identified.' " Appellant's Br. 37 (quoting *Spokeo*, 136 S. Ct. at 1549). That's true as far as it goes. But the "*additional* harm" admonition "clearly presumes that the putative plaintiff had already suffered a *de facto* injury resulting from the procedural violation." *Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp.*, 879 F.3d 339, 343 (D.C. Cir. 2018). As we explain below, because the regulatory violation Thorne alleges is not itself a concrete injury, the language from *Spokeo* gets no traction here. *See Kamal*, 918 F.3d at 115.

B. Intangible Yet Concrete Injury

Intangible injuries sometimes qualify as concrete. To determine whether that's the case here, we analyze Thorne's claim to standing by searching for evidence (a) of a close relationship between the lack of tire registration and a harm historically recognized as a basis for common-law ***890** suits and (b) that Congress elevated the lack of tire registration to a legally cognizable, concrete injury. *See Spokeo*, 136 S. Ct. at 1549. Our Court has yet to decide whether a plaintiff must prevail on both inquiries, or if demonstrating just one is sufficient. *See, e.g.*, *Susinno v. Work Out World Inc.*, 862 F.3d 346, 351 (3d Cir. 2017) (declining to decide whether intangible injury that does not satisfy both congressional and historical inquiries can be concrete); *Horizon*, 846 F.3d at 637 (suggesting that satisfaction of historical inquiry alone "is likely to be sufficient to satisfy the injury-in-fact element of standing"). Yet we need not reach that question today. Thorne does not have the better of either argument.

1. *No historical analogue*. Thorne alleges two forms of intangible harm: the denial of tire registration assistance in itself, and the materially increased risk of an accident were she unreachable due to the lack of registration upon a recall of her tires. Though precedent does not require us to identify an exact historical analogue that could remedy the alleged harm, "we still require [that] the harm be 'of the same character of previously existing "legally cognizable injuries." ' " *Kamal*, 918 F.3d at 114 (quoting *Susinno*, 862 F.3d at 352). Thorne suggests two historical analogues as remedies for her alleged harms: negligence per se and products liability. [10] Neither suggestion is persuasive. [11]

10 Although Thorne tries to draw a historical line to statutory consumer protection actions, statutory actions *ipso facto* fall outside common law.

11 Thorne contends that she "argued below that her alleged harms bear a close relationship to traditional torts allowing consumers to sue over their purchase of defective products." Appellant's Br. 22 (citing ECF No. 29 at 10–11). But her argument to the District Court was cursory, contending only that "exposure to and harm from dangerous products" was traditionally a basis for suit in English and American courts. ECF No. 29 at 11. Her historical arguments are so fleeting that we could consider them forfeited. *See, e.g.*, *Pa. Dep't of Public Welfare v. U.S. Dep't of Health & Human Servs.*, 101 F.3d 939, 945 (3d Cir. 1996)

(holding that argument supported only by "conclusory assertions" in opening and reply brief was waived); *Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) ("An issue is waived unless a party raises it in its opening brief, and for those purposes 'a passing reference to an issue ... will not suffice ....' ") (quotation omitted). But we perceive no prejudice to Pep Boys from engaging with the merits of Thorne's undeveloped arguments and, given the countervailing authority, we choose to address them on the merits. *AstenJohnson, Inc. v. Columbia Cas. Co.*, 562 F.3d 213, 223 n.3 (3d Cir. 2009).

As for negligence per se, that doctrine is not a historical recognition of either of Thorne's alleged harms. It merely "establishes, by reference to a statutory scheme, the standard of care appropriate to *the underlying tort*." *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 193 F.3d 781, 790 (3d Cir. 1999) (citation omitted) (emphasis added). It permits a factfinder to consider the violation of a statute or ordinance as evidence of negligence. *Rolick v. Collins Pine Co.*, 975 F.2d 1009, 1015 (3d Cir. 1992), *cert denied*, 507 U.S. 973, 113 S.Ct. 1417, 122 L.Ed.2d 787 (1993). But a plaintiff cannot invoke the doctrine to transform statutory violations into proof of "liability for a separate underlying tort." *Bone Screw*, 193 F.3d at 791 (rejecting argument that "violations themselves form a cause of action"). Nor does negligence per se obviate the need to show proximate causation or damages. *See Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 998 (11th Cir. 2020) (Katsas, J., sitting by designation) (concluding that proffered historical tort analogues had "no relationship to harms traditionally remediable in American ***891** or English courts" because plaintiffs "jettison[ed] the bedrock elements of reliance and damages"). Negligence per se might help Thorne prove Pep Boys's breach of a standard of care *if* a tort action would otherwise lie at common law. But it says nothing about that standing-critical "if" question: whether any alleged *harm caused by the breach* could be remedied at common law.

Nor does Thorne's products-liability analogue resonate with us. Though she cites no specific regime, strict liability for defective products (at least in Pennsylvania, where Pep Boys is headquartered and Thorne sued) requires that "physical harm [be] caused to the ultimate user or consumer, or to his property." RESTATEMENT (2D) OF TORTS § 402A, *as adopted in Webb v. Zern*, 422 Pa. 424, 220 A.2d 853, 854 (1966). Without physical harm, neither of Thorne's alleged injuries bears a close relationship to harms that products-liability torts have historically remedied. *Compare Kamal*, 918 F.3d at 114 (determining that FACTA violation did not share close relationship with tort suits for unreasonable publicity or breach of confidence absent "disclosure to a third party"), *with Susinno*, 862 F.3d at 351–52 (noting that Congress "squarely identified" the harm of pre-recorded calls to cell phones and that such harm is "closely relate[d]" to common-law claim for intrusion upon seclusion).

2. *No evidence of Congress elevating either alleged harm.* Congress is "well positioned to identify intangible harms that meet minimum

Article III requirements," *Spokeo*, 136 S. Ct. at 1549, so we also consider whether it "expressed an intent to make [the] injury redressable." *Horizon*, 846 F.3d at 637. Thorne maintains that the Act's purpose of preventing accidents and injuries on the roadways validates private actions to enforce the tire registration requirements. The tire registration provisions for independent dealers do not identify their purpose. But what we glean from those provisions and from the statutory regime as a whole persuades us that Congress did not intend to give private attorneys general standing to redress the "injury" of unregistered tires.

First, the titles given to sections of the tire registration regulation and the relevant provision of the Act suggest that their purpose is information-gathering for recordkeeping. The title of a statute and the heading of a section are "tools available for the resolution of [ ] doubt" about the meaning of a statute. *Almendarez-Torres v. United States*, 523 U.S. 224, 234, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528–29, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947)). Here, the title of the tire registration regulation is "information requirements," 49 C.F.R. § 574.8, and the enabling statute is titled "[p]roviding information to, and maintaining records on, purchasers." 49 U.S.C. § 30117. Thorne impugns the District Court's characterization of the regulation as a "procedural record-keeping statute," Appellant's Br. 23, but that description is apt. Facially, these laws bear no direct relation to the Act's safety purposes.

Second, by connecting its safety goals to vehicle *performance*, the Act as a whole suggests no congressional intent to transmogrify the lack of registered tires into a concrete injury. In Chapter 301 of Title 49, entitled "Motor Vehicle Safety," Congress recognized the need "to prescribe motor vehicle safety standards" in an effort "to reduce traffic accidents and deaths and injuries resulting from traffic accidents." 49 U.S.C. § 30101; *accord Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, 781–82 (3d Cir. 1992). We emphasize that the Act defines "motor vehicle safety standard" ***892** as a minimum "performance" standard. 49 U.S.C. § 30102(a)(10). The definition of "motor vehicle safety" is likewise performance-focused, referring to "design, construction, or performance" of a motor vehicle or motor vehicle equipment. *Id.* § 30102(a)(9). Tires that suffer from no performance problems but are simply unregistered do not implicate the Act's purpose.

Third, the Act appears to favor public over private enforcement, both generally and as relevant to tire registration. It authorizes the Attorney General to sue in federal court to enjoin violations and levy civil penalties ranging from $21,000 to $105 million on those who violate the tire registration section "or a regulation prescribed thereunder." *See* 49 U.S.C. §§ 30163(a), 30165(a)(1). The Act also contains an administrative enforcement scheme under which the Secretary of Transportation "require[s]" dealers to register tires, and may conduct hearings on certain notice-related compliance issues in which "interested person[s]" may participate. *Id.* §§ 30117(b)(2)(B), 30118(e). By contrast, the Act is silent on private enforcement of the tire

registration regime, only broadly preserving common-law liability for non-compliance with (performance-based) motor vehicle safety standards.[12] *Id.* § 30103(e). In fact, this silence may have been purposeful; elsewhere the Act contemplates private-party vindication of rights. *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quotation omitted). For example, in the section immediately preceding the tire registration provision, the Act *does* set forth a private cause of action for a distributor or dealer to sue a manufacturer in federal district court over the value of certain parts or equipment. *Id.* § 30116(c) (establishing statute of limitations and remedies). If the Act reveals any relevant congressional judgment, it is to prioritize public enforcement over private redress for the "injury" of unregistered tires.

12 The lack of an express private right of action to sue for deficient tire registration, alone, is not what drives our standing analysis. Even when a plaintiff leverages a duty created by one statute to sue under other laws, an express private right of action in the duty-generating statute is neither necessary nor sufficient for standing. *See, e.g.*, *Steel Co.*, 523 U.S. at 96, 118 S.Ct. 1003 ("[T]he nonexistence of a cause of action was no proper basis for a jurisdictional dismissal.").

Thorne argues that committee reports and a consumer advocate's Congressional testimony exhibit a connection between tire registration and vehicle safety. But those nonstatutory data points fail to show that the congressional inquiry favors standing. Viewed at a high level of generality, every provision in a statute will relate to its overarching purpose. The real question is whether the alleged statutory violation is among the concrete harms Congress enacted the law to remedy. *See, e.g.*, *Trichell*, 964 F.3d at 999 ("[T]he harms against which the statute is directed [abusive debt collection] .... are a far cry from whatever injury one may suffer from receiving in the mail a misleading communication that fails to mislead.") (internal quotation omitted); *Kamal*, 918 F.3d at 115 ("[T]he FACTA provision [violation of which did not confer standing] was part of Congress's effort to prevent the concrete harm of identity theft."). Congress may have adopted tire registration procedures to decrease the risk of harm to concrete safety interests, but "[a] violation of one of th[ose] procedural requirements may result ***893** in no [such concrete] harm." *Spokeo*, 136 S. Ct. at 1550; *see also Kamal*, 918 F.3d at 117. The Act gives us no reason to conclude—but does provide reason to doubt—that Congress elevated the lack of tire registration into an injury that is concrete for Article III purposes.

* * *

Given the attenuation between lack of tire registration and the Act's purpose of reducing accidents, deaths, and injuries, only a definitive congressional judgment to elevate the former into a concrete injury would favor Article III standing under *Spokeo*'s congressional inquiry.

Thorne points to nothing that would aid her cause. In fact, the statute's titles, defined terms, and enforcement provisions suggest the opposite.

C. Speculative Injury

Even were we to assume that Thorne's alleged injury *is* sufficiently concrete, we must still address the third prong of injury-in-fact analysis—whether an alleged harm, even if concrete, is hypothetical or conjectural. *Spokeo*, 136 S. Ct. at 1548; *Johnson & Johnson*, 903 F.3d at 284. This element is intended to weed out claims that are nothing "more than an ingenious academic exercise in the conceivable." *United States v. Students Challenging Reg. Agency Procs. (SCRAP)*, 412 U.S. 669, 688–89, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); *see also Cottrell v. Alcon Labs.*, 874 F.3d 154, 168 (3d Cir. 2017).

Only Thorne's second alleged injury—an increased risk of harm to property or person if her unregistered tires are recalled—fits within this framework. To be sure, a "risk of real harm" may "satisfy the requirement of concreteness." *Spokeo*, 136 S. Ct. at 1549. But the "threatened injury must be certainly impending to constitute injury in fact." *Clapper*, 568 U.S. at 409, 133 S.Ct. 1138. And there must be at least a " 'substantial risk' that the harm will occur." *Id.* at 414 n.5, 133 S.Ct. 1138 (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153–54, 130 S.Ct. 2743, 177 L.Ed.2d 461 (2010)). Thorne posits only an infinitesimal increase in her chances of being injured because of Pep Boys's failure to register her tires, so any risk of harm—even if concrete—is no more than speculative.

In Thorne's telling, Pep Boys's failure to register her tires increased her risk of harm because, if the tire manufacturer recalls her tires, it will be unable to contact her. That, she contends, could lead to her continuing to drive on the recalled tires and having an accident attributable to the defect that prompted the recall. But, as in *Kamal*, this threat consists of a highly speculative chain of future events that does not constitute a material risk of harm. 918 F.3d at 116. For the threatened harm to transpire, the following independent events would need to occur:

1) The manufacturer discovers that a collection of tires, a subset of which Thorne bought from Pep Boys, contains a defect able to cause property damage or personal injury.

2) The manufacturer recalls the tires.

3) Thorne is still driving on the tires at the time of recall.

4) Thorne is otherwise still reachable from the information that should have been recorded on the registration form at the time of purchase.

5) Pep Boys, upon learning of the recall, does not supply the manufacturer with Thorne's contact information.

6) Thorne does not learn of the recall through other channels, such as media or consumer reports.

7) The defect prompting the recall causes Thorne to have an accident.

***894** This threatened injury is not "certainly impending," nor does it present a "substantial risk." *Clapper*, 568 U.S. at 409, 414 n.5, 133 S.Ct. 1138. This chain of conceivable events poses some new non-zero risk to Thorne, but her absolute chances of harm are miniscule. *See Thole v. U.S. Bank N.A.*, —— U.S. ——, 140 S. Ct. 1615, 1621, 207 L.Ed.2d 85 (2020) (citing *Clapper* for proposition that challenged act must have "substantially increased the risk" of harm to plaintiff). In other words, relative increase cannot be the measuring stick because whenever the plaintiff was at zero risk before the defendant acted, the percentage increase in her chances of harm is "infinite." *Trichell*, 964 F.3d at 1001 n.4. Without announcing where in the logical chain a concrete injury becomes too attenuated, we conclude that Thorne's alleged " 'at-risk' ... status" is too speculative to support standing. *Perelman v. Perelman*, 793 F.3d 368, 375 (3d Cir. 2015) (no standing to sue over risk of default on retirement obligations where plan's assets exceeded liabilities under accepted accounting method).

The authority Thorne musters does not compel a different conclusion. In *DiNaples v. MRS BPO, LLC*, 934 F.3d 275 (3d Cir. 2019), the defendant allegedly violated the Fair Debt Collection Practices Act (FDCPA) by printing on the outside of a debt collection letter a Quick Response code that, when scanned, revealed the plaintiff's account number. *Id.* at 278. We rejected the argument that a third party would first have to access and understand the disclosed information before the plaintiff could have standing. The FDCPA takes aim at the harm of privacy violations, and the chain of future events that would produce that harm only required one step: a third party scanning the code. For Thorne's future injury to occur, by contrast, up to seven steps must be daisy chained.

Nor do our data breach and privacy cases assist Thorne. *Horizon* dealt with the plaintiffs' standing to sue Horizon under the Fair Credit Reporting Act (FCRA) after unencrypted laptops containing their personal information were stolen from one of the company's facilities. 846 F.3d at 632. Congress in the FCRA identified as a cognizable injury unauthorized dissemination of personal information—harm closely related to invasion of privacy, which traditionally was a basis for a common-law suit. [13] *Id.* at 639–40. Rejecting the argument that the harm was too speculative, the *Horizon* court noted that "[t]he theft appears to have been directed towards the acquisition of such personal information," the laptops were unencrypted, and one plaintiff had been a victim of identity theft as a result of the breach. *Id.* at 639 n.19. *Horizon*, in which a malicious actor accessed the plaintiffs' protected personal information and committed identity theft, is a far cry from the case before us.

13 *St. Pierre v. Retrieval-Masters Creditors Bureau, Inc.*, 898 F.3d 351 (3d Cir. 2018), which Thorne's counsel cited at oral argument, has no purchase here for similar reasons. *See id.* at 357–58 (holding that exposure of plaintiff's credit account number through envelope window of debt collection letter " 'implicate[d] a core concern animating the FDCPA—the invasion of privacy'—and thus [wa]s closely related to" a traditional harm).

Similarly unavailing is *Long v. Se. Penn. Transp. Auth.*, 903 F.3d 312 (3d Cir. 2018). The *Long* plaintiffs alleged that the defendant, first, did not send them copies of their background checks before deciding not to hire them based on those background checks and, second, did not send them notices of their rights under the FCRA. *Id.* at 317. We held that the first alleged harm was sufficiently concrete: Suffering adverse employment action without the required consumer report was the ***895** very harm that Congress sought to prevent, and interference with the plaintiffs' ability to control their personal information was analogous to common-law invasion of privacy. *Id.* at 323–24. But the second alleged injury—lack of FCRA-required notice—was a bare procedural violation for which there was no standing. *Id.* at 325. We rejected the argument that the violation increased the risk that the plaintiffs' claims would lapse before they could sue. *Id.* Thorne's alleged harm from unregistered tires resembles the *Long* plaintiffs' second claimed injury much more than their first.

Finally, we acknowledge *Exum*'s decision that tire purchasers had Article III standing to sue for a dealer's failure to comply with the tire registration requirement. But the *Exum* opinion does not consider the level of attenuation in the logical chain from the lack of tire registration to property damage or a human toll. Instead, the judge's analysis ended with the determination that lack of tire registration increased the risk that a manufacturer would be unable to contact the owner of an unregistered tire about a recall. 437 F. Supp. 3d at 1151. But nothing in the Act suggests that the relevant congressional interest is contact with a tire owner. Instead, Congress was concerned with safe design, operation, and performance of motor vehicles. *Exum*'s rationale is unpersuasive.

* * *

If Pep Boys shirked its tire registration obligations, it committed only a "bare procedural violation" that caused neither actual harm nor a concrete material risk of harm. Even if Thorne's alleged harm associated with a future recall of her tires were concrete, her risk of actual injury is too speculative for Article III standing purposes. Thorne's allegations fail to establish an injury in fact, and so the District Court lacked jurisdiction over her claims for money damages.

D. Other Remedies

Thorne also sought "equitable relief including restitution and/or disgorgement" of revenues and profits Pep Boys obtained through its conduct. Am. Class Act. Compl. ¶ 113. And she requested injunctive relief to "prevent[ ] Defendant from selling unregistered tires or tires without registering those tires with the manufacturer or providing registration cards to consumers." Am. Class Act. Compl. ¶ 136. Thorne arguably forfeited her standing to seek those remedies because she presented only arguments in support of money damages. *See supra* note 11. Yet her operative complaint does allege facts targeted at restitution and injunctive relief, so we will consider her standing *vel non* for these remedies on the merits. *Mielo*, 897 F.3d at 479. Because *Johnson & Johnson* is instructive, and we see no need to reinvent the wheel, we conclude that Thorne again lacks standing.

1. *No standing to seek restitution or disgorgement.* Assuming Thorne can seek these remedies when she herself suffered no financial loss, the allegations supporting her request for restitution are conclusory and hinge on mere conjecture. She alleges that Pep Boys ignores its tire registration obligations to spend more time selling tires and is unjustly enriched by sales made during "the time it would have taken to register Class Members' tires." Am. Class Act. Compl. ¶ 8; *accord id.* ¶¶ 46, 103, 108–13. But standing doesn't flow from mere suspicion that a defendant made more money by allegedly shirking a legal obligation. To take just one example, the *Johnson & Johnson* plaintiff premised her restitution claim on allegations that the defendant managed to sell more baby powder than it would have had it properly ***896** informed consumers about the safety risks. 903 F.3d at 291. We saw no standing for two reasons that obtain here as well. First, the plaintiff failed to allege facts that would permit the conclusion that Johnson & Johnson made more sales than it would have. 903 F.3d at 292. That's also true of Thorne's allegations insofar as they offer nothing to ground her suspicion of ill-gotten gains, such as how long it would take Pep Boys to provide the required tire registration service relative to the total time required to consummate a tire sale. Second, both there and here, the plaintiff's theory of restitution belies her willingness, or the willingness of others, to buy the product despite awareness of the alleged risks. *Id.* at 291 & n.18; *see* Am. Class Act. Compl. ¶ 134 ("Plaintiff and the Class members will likely purchase tires from Defendant again or have the tires serviced, and still not receive the required tire-registration services."). We determine that Thorne lacks standing to seek restitution or disgorgement.

2. *No standing to seek injunctive relief.* Thorne premised her plea for injunctive relief on her allegation that she and other putative class members will purchase tires at Pep Boys again without receiving the required tire registration assistance. But we must "afford[ ] [Thorne] the dignity of assuming that she acts rationally, and that she will not act in such a way that she will again suffer the same alleged 'injury.' " *See Johnson & Johnson*, 903 F.3d at 293. "Pleading a lack of self-restraint may elicit sympathy but it will not typically invoke the jurisdiction of a federal court." *McNair v. Synapse Grp. Inc.*, 672 F.3d 213, 225 n.13 (3d Cir. 2012). Because her allegations reveal that she knows of Pep Boys's practices, Thorne's request for injunctive relief amounts to a " 'stop me before I buy again' claim" that precludes Article III standing. *Johnson & Johnson*, 903 F.3d at 292–93. We thus conclude that Thorne lacks standing to seek injunctive relief.

E. Dismissal

One final matter warrants our attention. The District Court dismissed Thorne's original complaint without prejudice, while dismissing her amended complaint "without leave to amend." JA16 & n.2. That disposition was incorrect. Dismissal for lack of standing reflects a lack of jurisdiction, so dismissal of Thorne's amended complaint should have been without prejudice. *See, e.g.*, *Kamal*, 918 F.3d at 119 (vacating with-prejudice dismissal of amended complaint and remanding for without-prejudice dismissal); *Cottrell*, 874 F.3d at 164 n.7 ("Because the absence of standing leaves the court without subject matter

jurisdiction to reach a decision on the merits, dismissals 'with prejudice' for lack of standing are generally improper.") (citing *Korvettes, Inc. v. Brous*, 617 F.2d 1021, 1024 (3d Cir. 1980).

Pep Boys is wary of Thorne filing more standing-free complaints, but we have no reason to question the professionalism or good faith of Thorne's counsel. And, of course, Federal Rule of Civil Procedure 11 always serves as a check against abuse of the litigation process. The specter of serial litigation cannot imbue the District Court with jurisdiction it otherwise lacks.

V. CONCLUSION

Thorne has no tangible, concrete injury because she hasn't specified how to value her alleged harm, why the tires she received were worth less than she paid for them, or how non-compliant tires are defective under the Act. Nor has she met the Article III standing requirements for intangible, concrete harms. Thorne hasn't shown a common-law analogue to either of her alleged harms. And neither the Act ***897** nor applicable standing caselaw suggests that Congress intended to repose authority in private attorneys general to enforce the tire registration regime. Even if Thorne could show an intangible but concrete injury, the chain of events necessary for any harm to materialize is speculative.

While we uphold the reasoning of the District Court in dismissing Thorne's operative complaint, we will vacate and remand for a without-prejudice dismissal.

All Citations

980 F.3d 879

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RLA-3

110 S.Ct. 1717
Supreme Court of the United States

Jonas H. WHITMORE, Individually and as Next Friend of Ronald Gene Simmons, Petitioner
v.
ARKANSAS et al.

No. 88–7146.
|
Argued Jan. 10, 1990.
|
Decided April 24, 1990.

Synopsis
Defendant who was sentenced to death for murder by the Circuit Court, Polk County, John S. Patterson, J., filed petition requesting expedited review of his waiver of direct appeal. The Arkansas Supreme Court, 298 Ark. 193, 766 S.W.2d 422,granted petition. Thereafter, the Arkansas Surpreme Court, 298 Ark. 255, 766 S.W.2d 423,denied a second death row inmate's motion to intervene and for stay of execution, and the second death row inmate petitioned for certiorari. The Supreme Court, Chief Justice Rehnquist, held that: (1) second death row inmate did not have individual standing to challenge validity of death sentence imposed on capital defendant who elected to forego his right of appeal to Arkansas Supreme Court, and (2) second death row inmate did not have standing as "next friend" of capital defendant in absence of evidence that capital defendant was unable to proceed on his own behalf.

Dismissed.

Justice Marshall filed dissenting opinion, in which Justice Brennan joined.

****1719 *149** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

After his trial on multiple murder charges, Ronald Simmons waived his right to direct appeal of his conviction and death sentence. The trial court conducted a hearing and determined that Simmons was competent to waive further proceedings. Pursuant to its rule that Arkansas law does not require a mandatory appeal in all death penalty cases, but that a defendant can forgo his direct appeal only if he has been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence, the State Supreme Court reviewed the competency determination and affirmed the trial court's decision that Simmons had knowingly and intelligently waived the right to appeal. The court then denied the motion of petitioner Whitmore—a death-row inmate convicted in a robbery-murder case, who had exhausted his direct appellate review, been denied state postconviction relief, and not yet sought federal habeas corpus relief—to intervene in the proceeding both individually and as Simmons' "next friend," concluding that Whitmore lacked standing. This Court granted

**1720 Whitmore's petition for certiorari on the questions whether a third party has standing to challenge the validity of a death sentence imposed on a capital defendant who has elected to forgo his right of appeal, and whether the Eighth and Fourteenth Amendments prohibit the State from carrying out a death sentence without first conducting a mandatory appellate review of the conviction and sentence.

Held: Whitmore lacks standing to proceed in this Court. Pp. 1722–1729.

(a) Before a federal court can consider the merits of a legal claim, the person seeking to invoke the court's jurisdiction must establish the requisite standing to sue. To do so, he must prove the existence of an Art. III case or controversy by clearly demonstrating that he has suffered an "injury in fact," which is concrete in both a qualitative and temporal sense. He must show that the injury "fairly can be traced to the challenged action," and "is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1926, 48 L.Ed.2d 450. Pp. 1722–1723.

(b) Whitmore does not have standing in his individual capacity based on a legal right to a system of mandatory appellate review assertedly granted to him personally and to Simmons by the Eighth Amendment. *150 His principal claim of injury in fact—that if he obtains federal habeas relief but is convicted and resentenced to death in a new trial, then, in light of Arkansas' comparative review in death penalty cases, he has a direct and substantial interest in having the data base against which his crime is compared to be complete and to not be arbitrarily skewed by the omission of Simmons' heinous crimes—is too speculative to invoke Art. III jurisdiction. Even assuming that Whitmore would eventually secure habeas relief and be convicted and resentenced to death, there is no factual basis on which to conclude that the sentence imposed on a mass murderer would be relevant to a future comparative review of his robbery-murder sentence. His theory is at least as speculative as other allegations of possible future injury that have been found insufficient to establish Art. III injury in fact. See, *e.g., O'Shea v. Littleton,* 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674. *United States v. SCRAP,* 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254, distinguished. Whitmore's further contention that, as an Arkansas citizen, he is entitled to the Eighth Amendment's public interest protections and has a right to invoke this Court's jurisdiction to insure that the State does not carry out an execution without mandatory appellate review raises only the generalized interest of all citizens in constitutional governance and is an inadequate basis on which to grant him standing. Nor does the uniqueness of the death penalty and society's interest in its proper imposition justify creating an exception to traditional standing doctrine, since the requirement of an Art. III case or controversy is not merely a traditional "rule of practice," but rather is imposed directly by the Constitution. Pp. 1723–1726.

(c) Whitmore's alternative argument that he has standing as Simmons' "next friend" is also rejected. The scope of any federal "next friend" standing doctrine, assuming that one exists absent congressional authorization, is no broader than the "next friend" standing

permitted under the federal habeas corpus statute. Thus, one necessary condition is a showing by the proposed "next friend" that the real party in interest is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability. That prerequisite is not satisfied where, as here, an evidentiary hearing shows that the defendant has given a knowing, intelligent, and voluntary waiver of his right to proceed, and his access to court is otherwise unimpeded. Pp. 1726–1729.

298 Ark. 193 and 255, 766 S.W.2d 422 and 423, certiorari dismissed.

REHNQUIST, C.J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, O'CONNOR, SCALIA, **1721 and KENNEDY, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post,* p. 1729.

Attorneys and Law Firms

***151** *Arthur L. Allen,* by appointment of the Court, 493 U.S. 804, argued the cause and filed a brief for petitioner.

J. Steven Clark, Attorney General of Arkansas, argued the cause for respondents. With him on the brief for respondent State of Arkansas was *Clint Miller,* Assistant Attorney General. *John Harris* filed a brief for respondent Simmons.*

* *Gary B. Born, Daniel J. Popeo,* and *Paul D. Kamenar* filed a brief for the Washington Legal Foundation et al. as *amici curiae* urging affirmance.

William Webster, Attorney General of Missouri, *John M. Morris* and *Stephen D. Hawke,* Assistant Attorneys General, *Don Siegelman,* Attorney General of Alabama, *Jim Jones,* Attorney General of Idaho, *Hal Stratton,* Attorney General of New Mexico, *Anthony J. Celebrezze, Jr.,* Attorney General of Ohio, *T. Travis Medlock,* Attorney General of South Carolina, and *Mary Sue Terry,* Attorney General of Virginia, filed a brief for the State of Missouri et al. as *amici curiae.*

Opinion

Chief Justice REHNQUIST delivered the opinion of the Court.

This case presents the question whether a third party has standing to challenge the validity of a death sentence imposed on a capital defendant who has elected to forgo his right of appeal to the State Supreme Court. Petitioner Jonas Whitmore contends that the Eighth and Fourteenth Amendments prevent the State of Arkansas from carrying out the death sentence imposed on Ronald Gene Simmons without first conducting a mandatory appellate review of Simmons' conviction and sentence. We hold that petitioner lacks standing, and therefore dismiss the writ of certiorari.

I

On December 28, 1987, Ronald Gene Simmons shot and killed two people and wounded three others in the course of a rampage through the town of Russellville, Arkansas. After police apprehended Simmons, they searched his home in nearby Dover, Arkansas, and discovered the

bodies of 14 members of Simmons' family, all of whom had been murdered. The State filed two sets of criminal charges against ***152** Simmons, one based on the two Russellville murders and the other covering the deaths of his family members.

Simmons was first tried for the Russellville crimes, and a jury convicted him of capital murder and sentenced him to death. After being sentenced, Simmons made this statement under oath: " 'I, Ronald Gene Simmons, Sr., want it to be known that it is my wish and my desire that absolutely no action by anybody be taken to appeal or in any way change this sentence. It is further respectfully requested that this sentence be carried out expeditiously.' " See *Franz v. State,* 296 Ark. 181, 183, 754 S.W.2d 839, 840 (1988). The trial court conducted a hearing concerning Simmons' competence to waive further proceedings, and concluded that his decision was knowing and intelligent.

As Simmons' execution date approached Louis J. Franz, a Catholic priest who counsels inmates at the Arkansas Department of Corrections, petitioned the Supreme Court of Arkansas for permission to proceed as Simmons' "next friend" and to prosecute an appeal on his behalf. The court held that Franz did not have standing as "next friend," because he had not alleged facts showing that he had ever met Simmons, much less that he had a close relationship with the defendant. It also rejected both his argument for standing under the Arkansas Constitution as an aggrieved taxpayer and his assertion that he should have standing as a concerned citizen to prevent an important legal issue from going unresolved at the appellate level.

In dicta, the court went on to state that Arkansas law does not require a mandatory appeal in all death penalty cases. It did note, however, that a defendant sentenced to death in Arkansas will be able to forgo his direct appeal "only if he has been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence." *Id.,* at 189, 754 S.W.2d, at 843. After reviewing the record of the trial court's competency hearing, the Supreme Court ***153** held that Simmons had made a knowing and intelligent waiver of his right to appeal. Franz and another Arkansas death row inmate, Darrel Wayne Hill, then applied in Federal District Court for a writ of habeas corpus to prevent Simmons' execution, but the petition was denied on the ground that Franz and Hill did not have standing. *Franz v. Lockhart,* 700 F.Supp. 1005 (ED Ark.1988), appeal pending, No. 89–1485EA (CA8).

****1722** The State subsequently tried Simmons for the murder of his 14 family members, and on February 10, 1989, a jury convicted him of capital murder and imposed a sentence of death by lethal injection. Simmons again notified the trial court of his desire to waive his right to direct appeal, and after a hearing, the court found Simmons competent to do so. The Supreme Court of Arkansas, pursuant to the rule established in *Franz,* reviewed the competency determination and affirmed the trial court's decision that Simmons had knowingly and intelligently waived his right to appeal. *Simmons v. State,* 298 Ark. 193, 766 S.W.2d 422 (1989). The court commended the trial court and Simmons' counsel for doing "an exceptional job in examining and exploring [Simmons'] capacity to understand the choice

between life and death and his ability to know and to intelligently waive any and all right he might have in an appeal of his sentence." *Id.,* at 194, 766 S.W.2d, at 423. The court also noted that Simmons' counsel "thoroughly discussed seven possible points that could be argued for reversal on appeal" and that Simmons acknowledged those points but "rejected all encouragement and suggestions to appeal." *Ibid.*

Three days later, petitioner Jonas Whitmore, another death row inmate in Arkansas, sought permission from the Supreme Court of Arkansas to intervene in Simmons' proceeding both individually and "as next friend of Ronald Gene Simmons." The court concluded that Whitmore had failed to show he had standing to intervene, and it denied the motion. *Simmons v. State,* 298 Ark. 255, 766 S.W.2d 423 (1989). ***154** Whitmore then asked this Court to stay Simmons' execution, which was scheduled for March 16, 1989. We granted a stay pending the filing and disposition of a petition for certiorari, 489 U.S. 1073, 109 S.Ct. 1522, 103 L.Ed.2d 828 (1989), and later granted Whitmore's petition for certiorari. 492 U.S. 917, 109 S.Ct. 3240, 106 L.Ed.2d 588 (1989).

II

A

This is not the first time we have encountered a third party seeking to prevent the execution of a capital defendant who has decided to forgo further judicial proceedings. In *Gilmore v. Utah,* 429 U.S. 1012, 97 S.Ct. 436, 50 L.Ed.2d 632 (1976), we considered an application for a stay of the execution of Gary Mark Gilmore, filed by his mother Bessie Gilmore after the defendant declined to request relief. A majority of the Court concluded that Gilmore had made a knowing and intelligent waiver of any federal rights available to him and, accordingly, allowed the execution to go forward. Four Members of the Court, however, felt that the standing and other constitutional issues raised by the application were substantial and would have given the matter plenary consideration. Since *Gilmore,* we have been presented with other applications from third parties for stays of execution, see *Lenhard v. Wolff,* 443 U.S. 1306, 100 S.Ct. 3, 61 L.Ed.2d 885, stay of execution denied, 444 U.S. 807, 100 S.Ct. 29, 62 L.Ed.2d 20 (1979); *Evans v. Bennett,* 440 U.S. 1301, 99 S.Ct. 1481, 59 L.Ed.2d 756, stay of execution denied, 440 U.S., at 987, 99 S.Ct. at 1986 (1979), but until the present case, we have not requested full briefing and argument and issued an opinion of the Court on this recurring issue.

Petitioner Whitmore asks this Court to hold that despite Simmons' failure to appeal, the Eighth and Fourteenth Amendments require the State of Arkansas to conduct an appellate review of his conviction and sentence before it can proceed to execute him. It is well established, however, that before a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue. Article III, of course, ***155** gives the federal courts jurisdiction over only "cases and controversies," and the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process. ****1723** See *Valley Forge*

Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471–476, 102 S.Ct. 752, 757–761, 70 L.Ed.2d 700 (1982). Our threshold inquiry into standing "in no way depends on the merits of the [petitioner's] contention that particular conduct is illegal," *Warth v. Seldin,* 422 U.S. 490, 500, 95 S.Ct. 2197, 2205–06, 45 L.Ed.2d 343 (1975), and we thus put aside for now Whitmore's Eighth Amendment challenge and consider whether he has established the existence of a "case or controversy."

Although we have acknowledged before that "the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it," *Valley Forge, supra,* 454 U.S., at 475, 102 S.Ct., at 760, certain basic principles have been distilled from our decisions. To establish an Art. III case or controversy, a litigant first must clearly demonstrate that he has suffered an "injury in fact." That injury, we have emphasized repeatedly, must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is "distinct and palpable," *Warth, supra,* 422 U.S., at 501, 95 S.Ct., at 2206, as opposed to merely "[a]bstract," *O'Shea v. Littleton,* 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974), and the alleged harm must be actual or imminent, not "conjectural" or "hypothetical." *Los Angeles v. Lyons,* 461 U.S. 95, 101–102, 103 S.Ct. 1660, 1664–1665, 75 L.Ed.2d 675 (1983). Further, the litigant must satisfy the "causation" and "redressability" prongs of the Art. III minima by showing that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1926, 48 L.Ed.2d 450 (1976); *Valley Forge, supra,* 454 U.S., at 472, 102 S.Ct., at 758–59. The e litigant must clearly and specifically set forth facts sufficient to satisfy these Art. III standing requirements. A federal court is powerless to create its own ***156** jurisdiction by embellishing otherwise deficient allegations of standing. See *Warth, supra,* 422 U.S., at 508, 518, 95 S.Ct., at 2210, 2215. [1]

1 In addition to the constitutional requirements of Art. III, the court has developed several now-familiar prudential limitations on standing. See *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 472–475, 102 S.Ct. 752, 758–760, 70 L.Ed.2d 700 (1982). These limitations are not involved in this case.

B

As we understand Whitmore's claim of standing in his individual capacity, he alleges that the State has infringed rights that the Eighth Amendment grants to him personally and to the subject of the impending execution, Simmons. He therefore rests his claim to relief both on his own asserted legal right to a system of mandatory appellate review and on Simmons' similar right. Under either theory, Whitmore must establish Art. III standing, see *Secretary of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 956, 104 S.Ct. 2839, 2846–47, 81 L.Ed.2d 786 (1984); *Singleton v. Wulff,* 428 U.S. 106, 112, 96 S.Ct. 2868, 2873, 49

L.Ed.2d 826 (1976), and we find that his allegations fall short of doing so.

Whitmore's principal claim of injury in fact is that Arkansas has established a system of comparative review in death penalty cases, and that he has "a direct and substantial interest in having the data base against which his crime is compared to be complete and to not be arbitrarily skewed by the omission of any other capital case." Brief for Petitioner 21. Although he has already been convicted of murder and sentenced to death, has exhausted his direct appellate review, see *Whitmore v. State,* 296 Ark. 308, 756 S.W.2d 890 (1988), and has been denied state postconviction relief, *Whitmore v. State,* 299 Ark. 55, 771 S.W.2d 266 (1989), petitioner suggests that he might in the future obtain federal habeas corpus relief that would entitle him to a new trial. If, in ****1724** that new trial, Whitmore is again convicted and sentenced to death, he would once more seek review of the sentence by the Supreme Court of Arkansas; that court would compare Whitmore's case with other capital cases to insure that the death penalty ***157** is not freakishly or arbitrarily applied in Arkansas. Petitioner asserts that he would ultimately be injured by the State Supreme Court's failure to review Simmons' death sentence, because the heinous crimes committed by Simmons would not be included in the data base employed for Whitmore's comparative review. The injury would be redressed by an order from this Court that the Eighth Amendment requires mandatory appellate review.

Petitioner's alleged injury is too speculative to invoke the jurisdiction of an Art. III court. Whitmore's conviction and death sentence are final, and his claim that he may eventually secure federal habeas relief from his conviction is obviously problematic. Nor, although the odds may well be better, can petitioner prove that if he were to obtain habeas relief, he would be retried, convicted, and again sentenced to death. And even were we to follow Whitmore this far down the path, it is nothing more than conjecture that the addition of Simmons' crimes to a comparative review "data base" would lead the Supreme Court of Arkansas to set aside a death sentence for Whitmore, whose victim died after he stabbed her 10 times, cut her throat, and carved an "X" on the side of her face. 296 Ark., at 317, 756 S.W.2d, at 895. In its comparative review of Whitmore's current sentence, the Arkansas court simply noted that defendants in similar robbery-murder capital crimes had also been sentenced to death. *Ibid.* Whitmore provides no factual basis for us to conclude that the sentence imposed on a mass murderer like Simmons would even be relevant to a future comparative review of Whitmore's sentence.

Whitmore's theory of injury is at least as speculative as others we have found insufficient to establish Art. III injury in fact. In *O'Shea v. Littleton, supra,* we held there was no case or controversy where residents of an Illinois town sought injunctive relief against a Magistrate and a Circuit Court Judge whom the plaintiffs claimed were engaged in a pattern and practice of illegal bondsetting, sentencing, and ***158** jury-fee practices in criminal cases. The allegation of respondents (plaintiffs) in that case amounted to a claim "that *if* respondents proceed to violate an unchallenged law and *if* they are charged, held to answer, and tried in any proceedings before petitioners, they will be

subjected to the discriminatory practices that petitioners are alleged to have followed." *Id.,* at 497, 94 S.Ct., at 676–77. That contention, which we think is analogous to Whitmore's, took us "into the area of speculation and conjecture," *ibid.,* and beyond the bounds of our jurisdiction.

We have likewise thought inadequate allegations of future injury contingent on a plaintiff having an encounter with police wherein police would administer an allegedly illegal "chokehol[d]," *Los Angeles v. Lyons,* 461 U.S., at 105, 103 S.Ct., at 1666–67, on the prospective future candidacy of a former Congressman, *Golden v. Zwickler,* 394 U.S. 103, 109, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969), and on police using deadly force against a person fleeing from an as yet uneffected arrest. *Ashcroft v. Mattis,* 431 U.S. 171, 172, n. 2, 97 S.Ct. 1739, 1740, n. 2, 52 L.Ed.2d 219 (1977). Recently in *Diamond v. Charles,* 476 U.S. 54, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986), we rejected a physician's attempt to defend a state law restricting abortions, because his complaint that fewer abortions would lead to more paying patients was " 'unadorned speculation' " insufficient to invoke the federal judicial power. *Id.,* at 66, 106 S.Ct., at 1705–06 (quoting *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S., at 44, 96 S.Ct., at 1927). Each of these cases demonstrates what we have said many times before and reiterate today: Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened ****1725** injury must be " 'certainly impending' " to constitute injury in fact. *Babbitt v. Farm Workers,* 442 U.S. 289, 298, 99 S.Ct. 2301, 2308–09, 60 L.Ed.2d 895 (1979) (quoting *Pennsylvania v. West Virginia,* 262 U.S. 553, 593, 43 S.Ct. 658, 663–64, 67 L.Ed. 1117 (1923)). See also *Lyons, supra,* 461 U.S., at 102, 103 S.Ct., at 1665; *United States v. Richardson,* 418 U.S. 166, 177–178, 94 S.Ct. 2940, 2946–2947, 41 L.Ed.2d 678 (1974).

Probably the most attenuated injury conferring Art. III standing was that asserted by the respondents in *United States v. SCRAP,* 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). There, an environmental ***159** group challenged the Interstate Commerce Commission's approval of a surcharge on railroad freight rates, claiming that the adverse environmental impact of the ICC's action on the Washington metropolitan area would cause the group's members to suffer " 'economic, recreational and aesthetic harm.' " *Id.,* at 678, 93 S.Ct., at 2411. The SCRAP group alleged that "a general rate increase would ... cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area." *Id.,* at 688, 93 S.Ct., at 2416. The Court held that those pleadings alleged a specific and perceptible harm sufficient to survive a motion to dismiss for lack of standing, but also indicated that the United States could have been entitled to summary judgment on the standing issue if it showed that "the allegations were sham and raised no genuine issue of fact." *Id.,* at 689, and n. 15, 93 S.Ct., at 2417, and n. 15.

Even under the analysis of the standing question in *SCRAP,* which surely went to the very outer limit of the law, petitioner's

asserted injury is not enough to establish jurisdiction. In *SCRAP,* the environmental group alleged that specific and perceptible harms—depletion of natural resources and increased littering—would befall its members imminently if the ICC orders were not reversed. That bald statement, even if incorrect, was held sufficient to withstand a motion to dismiss, because the plaintiffs in *SCRAP* may have been able to show at trial that the string of occurrences alleged would happen immediately. But Whitmore does not make —and could not responsibly make—a similar claim of immediate harm. We can take judicial notice of the fact that writs of habeas corpus are granted in only some cases, and that guilty verdicts are returned after only some trials. It is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his ***160** case. Thus, unlike the injury alleged in *SCRAP,* there is no amount of evidence that potentially could establish that Whitmore's asserted future injury is " 'real and immediate.' " See *O'Shea,* 414 U.S., at 494, 94 S.Ct., at 675. Moreover, as noted above, even if Whitmore could demonstrate with certainty that he would be retried, convicted, and sentenced, he has not shown that Simmons' convictions would be pertinent to his proportionality review in the Supreme Court of Arkansas.

Whitmore also contends that as a citizen of Arkansas, he is "entitled to the public interest protections of the Eighth Amendment," and has a right to invoke this Court's jurisdiction to insure that an execution is not carried out in Arkansas without appellate review. This allegation raises only the "generalized interest of all citizens in constitutional governance," *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 217, 94 S.Ct. 2925, 2930, 41 L.Ed.2d 706 (1974), and is an inadequate basis on which to grant petitioner standing to proceed. To dispose of this claim, we need do no more than quote our decision in *Allen v. Wright,* 468 U.S. 737, 754, 104 S.Ct. 3315, 3326, 82 L.Ed.2d 556 (1984): "This Court has repeatedly held that an asserted right to have the Government act in accordance with law is ****1726** not sufficient, standing alone, to confer jurisdiction on a federal court." Accord, *Valley Forge College v. Americans United,* 454 U.S., at 482–483, and 489–490, n. 26, 102 S.Ct., at 763–764, and 767–768, n. 26 ("Were we to recognize standing premised on an 'injury' consisting solely of an alleged violation of a ' "personal constitutional right" to a government that does not establish religion,' a principled consistency would dictate recognition of respondents' standing to challenge execution of every capital sentence on the basis of a personal right to a government that does not impose cruel and unusual punishment") (quoting *Americans United for Separation of Church & State, Inc. v. United States Dept. of Health, Education and Welfare,* 619 F.2d 252, 265 (CA3 1980) (citation omitted)); *Schlesinger, supra,* 418 U.S., at 216–227, 94 S.Ct., at 2929–2930; *United States v. Richardson, supra,* 418 U.S., at 176–177, 94 S.Ct., at 2946–2947.

***161** Perhaps recognizing the weakness of his claim for standing, petitioner argues next that the Court should create an exception to traditional standing doctrine for this case. The uniqueness of the death penalty and society's interest in its proper imposition, he maintains, justify a relaxed application of

standing principles. The short answer to this suggestion is that the requirement of an Art. III "case or controversy" is not merely a traditional "rule of practice," but rather is imposed directly by the Constitution. It is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case. We have previously resisted the temptation to "import profound differences of opinion over the meaning of the Eighth Amendment to the United States Constitution into the domain of administrative law," *Heckler v. Chaney,* 470 U.S. 821, 838, 105 S.Ct. 1649, 1659, 84 L.Ed.2d 714 (1985); *id.,* at 839–840, n. 2, 105 S.Ct., at 1659–60, n. 2 (BRENNAN, J., concurring), and restraint is even more important when the matter at issue is the constitutional source of the federal judicial power itself. [2] We hold that Whitmore does not have standing in his individual capacity to press an Eighth Amendment objection to Simmons' conviction and sentence.

[2] The cases relied upon by petitioner to establish that the strict requirement of standing, in some circumstances, is only a "rule of practice" that can be relaxed in view of countervailing policies are inapposite, because they concern *prudential* barriers to standing, not the mandates of Art. III. See *Eisenstadt v. Baird,* 405 U.S. 438, 445, 92 S.Ct. 1029, 1034, 31 L.Ed.2d 349 (1972); *Dombrowski v. Pfister,* 380 U.S. 479, 486–487, 85 S.Ct. 1116, 1120–1121, 14 L.Ed.2d 22 (1965); *United States v. Raines,* 362 U.S. 17, 22, 80 S.Ct. 519, 523, 4 L.Ed.2d 524 (1960). Because we conclude that petitioner has not established Art. III standing, we need not decide whether it would be appropriate in this type of action to relax the general prudential rule that a litigant "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin,* 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975).

C

As an alternative basis for standing to maintain this action, petitioner purports to proceed as "next friend of Ronald Gene Simmons." Although we have never discussed the concept ***162** of "next friend" standing at length, it has long been an accepted basis for jurisdiction in certain circumstances. Most frequently, "next friends" appear in court on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves. *E.g., United States ex rel. Toth v. Quarles,* 350 U.S. 11, 13, n. 3, 76 S.Ct. 1, 3, n. 3, 100 L.Ed. 8 (1955) (prisoner's sister brought habeas corpus proceeding while he was being held in Korea). As early as the 17th century, the English Habeas Corpus Act of 1679 authorized complaints to be filed by "any one on ... behalf" of detained persons, see 31 Car. II, ch. 2, and in 1704 the House of Lords resolved "[T]hat every Englishman, who is imprisoned by any authority whatsoever, has an undoubted right, by his agents, or friends, to apply for, and obtain a Writ of Habeas ****1727** Corpus, in order to procure his liberty by due course of law." See *Ashby v. White,* 14 How.St.Tr. 695, 814 (Q.B.1704). Some early decisions in this country interpreted ambiguous provisions of the federal habeas corpus statute

to allow "next friend" standing in connection with petitions for writs of habeas corpus, see, *e.g., Collins v. Traeger,* 27 F.2d 842, 843 (CA9 1928); *United States ex rel. Funaro v. Watchorn,* 164 F. 152, 153 (SDNY 1908),[3] and Congress eventually codified ***163** the doctrine explicitly in 1948. See 28 U.S.C. § 2242 (1982 ed.) ("Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended *or by someone acting in his behalf*") (emphasis added).[4]

3 One section of the former habeas corpus statute provided that "[a]pplication for writ of habeas corpus shall be ... *signed by the person for whose relief it is intended.*" Rev.Stat. § 754; 28 U.S.C. § 454 (1940 ed.) (emphasis added). Nevertheless, the *Collins* and *Watchorn* courts found an implicit authorization of "next friend" standing in § 760 of the revised statutes, which stated that "[t]he petitioner *or* the party imprisoned or restrained may deny any of the facts set forth in the return." Rev.Stat. § 760; 28 U.S.C. § 460 (1940 ed.) (emphasis added). At least one court concluded that "next friend" standing was not available under the old statute. *Ex parte Hibbs,* 26 F. 421, 435 (Ore.1886). Other courts recognized the ability of third parties to apply for a writ but did not make clear the basis for their decisions. *United States ex rel. Bryant v. Houston,* 273 F. 915, 916–917 (CA2 1921); *Ex parte Dostal,* 243 F. 664, 668 (ND Ohio 1917). When Congress added the words "or by someone acting in his behalf" to § 754 in 1948, the revisers noted that the change "follow[ed] the actual practice of the courts." Revisers' Notes to 28 U.S.C. § 2242 (1982 ed.).

4 Some courts have permitted "next friends" to prosecute actions outside the habeas corpus context on behalf of infants, other minors, and adult mental incompetents. See, *e.g., Garnett v. Garnett,* 114 Mass. 379 (1874) ("next friend" may bring action for divorce on behalf of an insane person); *Campbell v. Campbell,* 242 Ala. 141, 5 So.2d 401 (1941) (same); *Blumenthal v. Craig,* 81 F. 320, 321–322 (CA3 1897) ("next friend" was admitted by court to prosecute personal injury action on behalf of the plaintiff, who was a minor); *Baltimore & Ohio R. Co. v. Fitzpatrick,* 36 Md. 619 (1872) (same).

A "next friend" does not himself become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest. *Morgan v. Potter,* 157 U.S. 195, 198, 15 S.Ct. 590, 591, 39 L.Ed. 670 (1895); *Nash ex rel. Hashimoto v. MacArthur,* 87 U.S.App.D.C. 268, 269–270, 184 F.2d 606, 607–608 (1950), cert. denied, 342 U.S. 838, 72 S.Ct. 64, 96 L.Ed. 634 (1951). Most important for present purposes, "next friend" standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another. Decisions applying the habeas corpus statute have adhered to at least two firmly rooted prerequisites for "next friend" standing. First, a "next friend" must provide an adequate explanation—such as

inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action. *Wilson v. Lane,* 870 F.2d 1250, 1253 (CA7 1989), cert. pending, No. 89–81; *Smith ex rel. Missouri Public Defender Comm'n v. Armontrout,* 812 F.2d 1050, 1053 (CA8), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 781 (1987); *Weber v. Garza,* 570 F.2d 511, 513–514 (CA5 1978). Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, see, *e.g., Morris v. United States,* 399 F.Supp. 720, 722 (ED Va.1975), and it has been further ***164** suggested that a "next friend" must have some significant relationship with the real party in interest. *Davis v. Austin,* 492 F.Supp. 273, 275–276 (ND Ga.1980) (minister and first cousin of prisoner denied "next friend" standing). The burden is on the "next friend" clearly to establish the propriety of his status and thereby justify the jurisdiction of the court. *Smith, supra,* at 1053; *Groseclose ex rel. Harries v. Dutton,* 594 F.Supp. 949, 952 (MD Tenn.1984).

These limitations on the "next friend" doctrine are driven by the recognition that "[i]t ****1728** was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends." *United States ex rel. Bryant v. Houston,* 273 F. 915, 916 (CA2 1921); see also *Rosenberg v. United States,* 346 U.S. 273, 291–292, 73 S.Ct. 1152, 1161–1162, 97 L.Ed. 1607 (1953) (Jackson, J., concurring with five other Justices) (discountenancing practice of granting "next friend" standing to one who was a stranger to the detained persons and their case and whose intervention was unauthorized by the prisoners' counsel). Indeed, if there were no restriction on "next friend" standing in federal courts, the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of Art. III simply by assuming the mantle of "next friend."

Whitmore, of course, does not seek a writ of habeas corpus on behalf of Simmons. He desires to intervene in a state-court proceeding to appeal Simmons' conviction and death sentence. Under these circumstances, there is no federal statute authorizing the participation of "next friends." The Supreme Court of Arkansas recognizes, apparently as a matter of common law, the availability of "next friend" standing in the Arkansas courts, see *Franz v. State,* 296 Ark., at 184, 754 S.W.2d, at 840–841, but declined to grant it to Whitmore. Without deciding whether a "next friend" may ever invoke the jurisdiction of a federal court absent congressional authorization, we think the scope of any federal doctrine of "next friend" standing is no broader than what is ***165** permitted by the habeas corpus statute, which codified the historical practice. And in keeping with the ancient tradition of the doctrine, we conclude that one necessary condition for "next friend" standing in federal court is a showing by the proposed "next friend" that the real party in interest is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability.

That prerequisite for "next friend" standing is not satisfied where an evidentiary hearing shows that the defendant has given a knowing, intelligent, and voluntary waiver of his right to

proceed, and his access to court is otherwise unimpeded. See *Gilmore v. Utah,* 429 U.S., at 1017, 97 S.Ct., at 439 (STEVENS, J., concurring). Although we are not here faced with the question whether a hearing on mental competency is required by the United States Constitution whenever a capital defendant desires to terminate further proceedings, such a hearing will obviously bear on whether the defendant is able to proceed on his own behalf. The Supreme Court of Arkansas requires a competency hearing as a matter of state law, and in this case it affirmed the trial court's finding that Simmons had "the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence." *Simmons v. State,* 298 Ark., at 194, 766 S.W.2d, at 423. At oral argument, Whitmore's counsel questioned the validity of the waiver, but we find no reason to disturb the judgment of the Supreme Court of Arkansas on this point.

Simmons was questioned by counsel and the trial court concerning his choice to accept the death sentence, and his answers demonstrate that he appreciated the consequences of that decision. He indicated that he understood several possible grounds for appeal, which had been explained to him by counsel, but informed the court that he was "not seeking any technicalities." Tr. 15. In a psychiatric interview, Simmons stated that he would consider it " 'a terrible miscarriage of justice for a person to kill people and not be executed,' " ***166** *id.,* 1‹At 29, and there was no meaningful evidence that he was suffering from a mental disease, disorder, or defect that substantially affected his capacity to make an intelligent decision. See *Rees v. Peyton,* 384 U.S. 312, 314, 86 S.Ct. 1505, 1506–07, 16 L.Ed.2d 583 (1966). We therefore hold that Whitmore, having failed to establish that Simmons is unable to proceed ****1729** on his own behalf, does not have standing to proceed as "next friend" of Ronald Gene Simmons.

* * *

At the beginning of this century, the Court confronted a situation similar to this in which a concerned citizen sought to bring an ordinary civil action to secure relief for a condemned man. The Court's response on that occasion is equally apt today: "However friendly he may be to the doomed man and sympathetic for his situation; however concerned he may be lest unconstitutional laws be enforced, and however laudable such sentiments are, the grievance they suffer and feel is not special enough to furnish a cause of action in a case like this." *Gusman v. Marrero,* 180 U.S. 81, 87, 21 S.Ct. 293, 295, 45 L.Ed. 436 (1901).

Jonas Whitmore lacks standing to proceed in this Court, and the writ of certiorari is dismissed for want of jurisdiction. See *Doremus v. Board of Education of Hawthorne,* 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1952).

It is so ordered.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

The Court today allows a State to execute a man even though no appellate court has reviewed the validity of his conviction or sentence. In reaching this result, the Court does not address the constitutional claim presented by petitioner:

whether a State must provide appellate review in a capital case despite the defendant's desire to waive such review. Rather, it decides that petitioner does not have standing to raise that issue before this Court. The Court rejects petitioner's argument that he should be allowed to proceed ***167** as Ronald Gene Simmons' "next friend," relying on the federal common-law doctrine that a competent defendant's waiver of his right to appeal precludes another person from appealing on his behalf. If petitioner's constitutional claim is meritorious, however, Simmons' execution violates the Eighth Amendment. The Court would thus permit an unconstitutional execution on the basis of a common-law doctrine that the Court has the power to amend.

Given the extraordinary circumstances of this case, then, consideration of whether federal common law precludes Jonas Whitmore's standing as Ronald Simmons' next friend should be informed by a consideration of the merits of Whitmore's claim. For the reasons discussed herein, the Constitution requires that States provide appellate review of capital cases notwithstanding a defendant's desire to waive such review. To prevent Simmons' unconstitutional execution, the Court should relax the common-law restriction on next-friend standing and permit Whitmore to present the merits question on Simmons' behalf. By refusing to address that question, the Court needlessly abdicates its grave responsibility to ensure that no person is wrongly executed. I dissent.

I

This Court has held that the Constitution does not require States to provide appellate review of noncapital criminal cases. *Ross v. Moffitt,* 417 U.S. 600, 611, 94 S.Ct. 2437, 2444, 41 L.Ed.2d 341 (1974) (citing *McKane v. Durston,* 153 U.S. 684, 687, 14 S.Ct. 913, 914–15, 38 L.Ed. 867 (1894)). It is by now axiomatic, however, that the unique, irrevocable nature of the death penalty necessitates safeguards not required for other punishments.

> "Under the Eighth Amendment, the death penalty has been treated differently from all other punishments. Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction. The Court has accordingly ***168** imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality." ****1730** *Thompson v. Oklahoma,* 487 U.S. 815, 856, 108 S.Ct. 2687, 2710, 101 L.Ed.2d 702 (1988) (O'CONNOR, J., concurring in judgment) (citation omitted).

See also *Zant v. Stephens,* 462 U.S. 862, 884, 103 S.Ct. 2733, 2746–47, 77 L.Ed.2d 235 (1983) ("[B]ecause there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case' ") (quoting *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion)); *Eddings v.*

Oklahoma, 455 U.S. 104, 118, 102 S.Ct. 869, 878–79, 71 L.Ed.2d 1 (1982) (O'CONNOR, J., concurring) ("[T]his Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake").

This Court has consistently recognized the crucial role of appellate review in ensuring that the death penalty is not imposed arbitrarily or capriciously. In *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the Court upheld Georgia's capital sentencing scheme in large part because the statute required appellate review of every death sentence.

> "As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases." *Id.,* at 198, 96 S.Ct., at 2937 (joint opinion of Stewart, Powell, and STEVENS, JJ.).

***169** See also *id.,* at 211, 96 S.Ct., at 2942–43 (WHITE, J., joined by BURGER, C.J., and REHNQUIST, J., concurring in judgment) ("An important aspect of the new Georgia legislative scheme ... is its provision for appellate review ... in every case in which the death penalty is imposed"). The provision of automatic appellate review was also a significant factor in the Court's decisions that same Term upholding the capital sentencing schemes of Florida and Texas. See *Proffitt v. Florida,* 428 U.S. 242, 253, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (risk of arbitrary or capricious infliction of death penalty "is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted' ") (citation omitted); *Jurek v. Texas,* 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) ("By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law"). More recently, in *Zant v. Stephens, supra,* the Court stressed that its decision to uphold the Georgia death penalty statute "depend [ed] in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality." 462 U.S., at 890, 103 S.Ct., at 2749. Accord, *McCleskey v. Kemp,* 481 U.S. 279, 303, 107 S.Ct. 1756, 1772, 95 L.Ed.2d 262 (1987). See also *Clemons v. Mississippi,* 494 U.S. 738, 749, 110 S.Ct. 1441, 1448, 108 L.Ed.2d 725 (1990) ("[T]his Court has repeatedly emphasized that meaningful

appellate review of death sentences promotes reliability and consistency").

****1731** The existence of mandatory appellate review was also a significant factor in the Court's decision upholding California's capital sentencing scheme in *Pulley v. Harris,* 465 U.S. 37, 53, 104 S.Ct. 871, 880–81, 79 L.Ed.2d 29 (1984). Moreover, although the Court held that the Constitution does not require appellate courts to engage in ***170** proportionality review, it nevertheless acknowledged that *Gregg* "suggested that some form of meaningful appellate review is required." *Id.,* at 45, 104 S.Ct., at 877 (citing *Gregg, supra,* 428 U.S., at 153, 198, 204–206, 96 S.Ct., at 2909, 2936–37, 2939–2941 (joint opinion of Stewart, Powell, and STEVENS, JJ.)). See also *Pulley,* 465 U.S., at 49, 104 S.Ct., at 879 ("*Gregg* and *Proffitt* were focused not on proportionality review as such, but only on the provision of some sort of prompt and automatic appellate review"); *id.,* at 54, 104 S.Ct., at 881 (STEVENS, J., concurring in part and concurring in judgment) (stating that this Court's precedents establish that "some form of meaningful appellate review is constitutionally required").

Thus, much of this Court's death penalty jurisprudence rests on the recognition that appellate review is a crucial means of promoting reliability and consistency in capital sentencing. The high percentage of capital cases reversed on appeal vividly demonstrates that appellate review is an indispensable safeguard. Since 1983, the Arkansas Supreme Court, on direct review, has reversed in 8 out of 19 cases in which the death penalty had been imposed. See *Robertson v. State,* 298 Ark. 131, 137, 765 S.W.2d 936, 940 (1989) (Hickman, J., concurring); *Fretwell v. State,* 289 Ark. 91, 99, 708 S.W.2d 630, 634–635 (1986) (Hickman, J., concurring). Other States also have remarkably high reversal rates in capital cases. See, *e.g.,* Burt, Disorder in the Court: The Death Penalty and the Constitution, 85 Mich.L.Rev. 1741, 1792 (1987) (Florida Supreme Court set aside 47% of death sentences between 1972 and 1984); Dix, Appellate Review of the Decision to Impose Death, 68 Geo.L.J. 97, 144–145, and n. 437 (1979) (Texas Court of Criminal Appeals reversed conviction or invalidated death sentence in 33% of cases between October 1975 and March 1979); *id.,* at 111, and n. 92 (Georgia Supreme Court did same in 30% of capital cases between April 1974 and March 1979). Cf. *Barefoot v. Estelle,* 463 U.S. 880, 915, 103 S.Ct. 3383, 3406, 77 L.Ed.2d 1090 (1983) (MARSHALL, J., dissenting) (between 1976 and 1983, approximately 70% of capital defendants who had been denied federal habeas relief in district courts prevailed ***171** in courts of appeals); Greenberg, Capital Punishment as a System, 91 Yale L.J. 908, 918 (1982) (estimating that 60% of convictions or sentences imposed under capital punishment statutes enacted after *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), were reversed at some point in postconviction appeals process; in contrast, federal criminal judgments in noncapital cases had a reversal rate of 6.5%); U.S. Dept. of Justice, Bureau of Justice Statistics, Bulletin, Capital Punishment 1988, p. 1 (July 1989) (116 of 296 death row inmates sent to prison in 1988 had sentences vacated or commuted during that year). These statistics make clear that in the absence of some form of appellate review, an unacceptably high percentage of criminal

defendants would be wrongfully executed —"wrongfully" because they were innocent of the crime, undeserving of the severest punishment relative to similarly situated offenders, or denied essential procedural protections by the State. See Greenberg, *supra,* at 919–922 (listing numerous examples of death row inmates subsequently found to be not guilty and instances of capital convictions and sentences reversed for violations of federal or state law).

Our cases and state courts' experience with capital cases compel the conclusion that the Eighth and Fourteenth Amendments require appellate review of at least death sentences to prevent unjust executions. I believe the Constitution also mandates review of the underlying convictions. The core concern of all our death penalty decisions is that ****1732** States take steps to ensure to the greatest extent possible that no person is wrongfully executed. A person is just as wrongfully executed when he is innocent of the crime or was improperly convicted as when he was erroneously sentenced to death. States therefore must provide review of both the convictions and sentences in death cases.

II

Appellate review is necessary not only to safeguard a defendant's right not to suffer cruel and unusual punishment ***172** but also to protect society's fundamental interest in ensuring that the coercive power of the State is not employed in a manner that shocks the community's conscience or undermines the integrity of our criminal justice system. See *Gilmore v. Utah,* 429 U.S. 1012, 1019, 97 S.Ct. 436, 440, 50 L.Ed.2d 632 (1976) (MARSHALL, J., dissenting). Because a wrongful execution is an affront to society as a whole, a person may not consent to being executed without appellate review. See *id.,* at 1018, 97 S.Ct., at 439–40 (WHITE, J., dissenting) ("[T]he consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment"). As the District Court stated so compellingly on review of the habeas petition filed on Simmons' behalf by Reverend Louis Franz and Darrel Wayne Hill: "What is at stake here is our collective right as a civilized people not to have cruel and unusual punishment inflicted in our name. It is because of the crying need to vindicate that right, that basic value, that Simmons should be held unable 'to waive resolution in state courts' of the correctness of his death sentence." *Franz v. Lockhart,* 700 F.Supp. 1005, 1024 (ED Ark.1988) (quoting *Gilmore v. Utah, supra,* 429 U.S., at 1018, 97 S.Ct., at 439–40 (WHITE, J., dissenting)) (citation omitted), appeal pending, No. 89–1485EA (CA8). See also, *e.g., Commonwealth v. McKenna,* 476 Pa. 428, 441, 383 A.2d 174, 181 (1978) ("The doctrine of waiver ... was not ... designed to block giving effect to a strong public interest, which itself is a jurisprudential concern[, or to] allo[w] a criminal defendant to choose his own sentence.... The waiver rule cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue —the propriety of allowing the state to conduct an illegal execution of a citizen") (footnote omitted); *People v. Stanworth,* 71 Cal.2d 820, 834, 80 Cal.Rptr. 49, 59, 457 P.2d 889, 899 (1969) ("[W]e are not dealing with a right or

privilege conferred by law upon the litigant for his sole personal benefit. We are concerned with a principle of fundamental public policy. The law cannot suffer the state's interest and concern in the observance and enforcement of ***173** this policy to be thwarted through the guise of waiver of a personal right by an individual") (internal quotation marks omitted; citation omitted).

A defendant's voluntary submission to a barbaric punishment does not ameliorate the harm that imposing such a punishment causes to our basic societal values and to the integrity of our system of justice. Certainly a defendant's consent to being drawn and quartered or burned at the stake would not license the State to exact such punishments. Nor could the State knowingly execute an innocent man merely because he refused to present a defense at trial and waived his right to appeal. Similarly, the State may not conduct an execution rendered unconstitutional by the lack of an appeal merely because the defendant agrees to that punishment.

This case thus does not involve a capital defendant's so-called "right to die." When a capital defendant seeks to circumvent procedures necessary to ensure the propriety of his conviction and sentence, he does not ask the State to permit him to take his own life. Rather, he invites the State to violate two of the most basic norms of a civilized society —that the State's penal authority be invoked only where necessary to serve the ends of justice, not the ends of a particular individual, and that punishment be imposed only where the State has adequate assurance that ****1733** the punishment is justified. The Constitution forbids the State to accept that invitation.

Society's overwhelming interest in preventing wrongful executions is evidenced by the fact that almost all of the 37 States with the death penalty apparently have prescribed mandatory, nonwaivable appellate review of at least the sentence in capital cases. U.S. Dept. of Justice, Bureau of Justice Statistics, Bulletin, Capital Punishment 1988, p. 5 (July 1989); Carter, Maintaining Systemic Integrity in ***174** Capital Cases: The Use of Court–Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death, 55 Tenn.L.Rev. 95, 113–114 (1987). [1] The Arkansas Supreme Court is the only state high court that has held that a competent capital defendant's waiver of his appeal precludes appellate review entirely. *Franz v. State,* 296 Ark. 181, 196–197, 754 S.W.2d 839, 847 (1988) (Glaze, J., concurring and dissenting). Furthermore, since the reinstitution of capital ***175** punishment in 1976, only one person, Gary Gilmore, has been executed without any appellate review of his case. See *Gilmore v. Utah,* 429 U.S. 1012, 97 S.Ct. 436, 50 L.Ed.2d 632 (1976). Following Utah's execution of Gilmore, that State amended its law to provide for mandatory, nonwaivable appellate review. Utah Code Ann. § 77–35–26(10) (Supp.1989); see also Utah Code Ann. § 76–3–206(2) (1978). The extreme rarity of unreviewed executions in itself suggests the unconstitutionality of such killings. Cf. *Enmund v. Florida,* 458 U.S. 782, 788–796, 102 S.Ct. 3368, 3371–3376, 73 L.Ed.2d 1140 (1982) (finding unconstitutional Florida's death penalty for felony murder in part because only 8 of 36 jurisdictions authorized death for such a crime); *Coker v. Georgia,*

433 U.S. 584, 593–597, 97 S.Ct. 2861, 2866–2869, 53 L.Ed.2d 982 (1977) (striking down Georgia's provision for death penalty for rape of adult woman in part because Georgia was only State with such a provision).

1 Thirteen States, by statute, rule, or case law, explicitly provide that review of at least the capital sentence will occur with or without the defendant's election or participation. Ala.Code § 12–22–150 (1986); Cal.Penal Code Ann. § 1239(b) (West Supp.1990); *People v. Stanworth,* 71 Cal.2d 820, 832–834, 80 Cal.Rptr. 49, 58–59, 457 P.2d 889, 898–899 (1969); Del.Code Ann., Tit. 11, § 4209(g) (1987); *Goode v. State,* 365 So.2d 381, 384 (Fla.1978) (construing Fla.Stat. § 921.141(4) (1989)); Ill.Rev.Stat., ch. 110A, ¶ 606(a) (1987); *Judy v. State,* 275 Ind. 145, 157–158, 416 N.E.2d 95, 102 (1981) (construing Ind.Code § 35–50–2–9 (1988)); Mo.Rev.Stat. § 565.035 (1986); Nev.Rev.Stat. § 177.055(2) (1989); *Cole v. State,* 101 Nev. 585, 590, 707 P.2d 545, 548 (1985); N.J.Stat.Ann. § 2C:11–3(e) (West Supp.1989); *Commonwealth v. McKenna,* 476 Pa. 428, 439–440, 383 A.2d 174, 181 (1978) (construing predecessor statute to 42 Pa.Cons.Stat. § 9711(h) (1988)); Tenn.Code Ann. § 39–2–205 (1982); *State v. Holland,* 777 P.2d 1019, 1022 (Utah 1989) (construing Utah Code Ann. § 77–35–26(10) (Supp.1989)); see also Utah Code Ann. § 76–3–206(2) (1978); Vt.Rule App.Proc. 3(b). Twenty-two States' statutes or rules employ language indicating that their appellate courts must review at least the sentence in every capital case. Ariz.Rule Crim.Proc. 31.2(b); Colo.Rev.Stat. § 16–11–103(7)(a) (Supp.1989); Conn.Gen.Stat. § 53a–46b (1985); Ga.Code Ann. § 17–10–35 (1982); Idaho Code § 19–2827 (1987); Ky.Rev.Stat.Ann. § 532.075 (Michie 1985); La.Code Crim.Proc.Ann., Art. 905.9 (West 1984); Md.Ann.Code, Art. 27, § 414 (1987); Miss.Code Ann. § 99–19–105 (Supp.1989); Mont.Code Ann. § 46–18–307 (1989); Neb.Rev.Stat. § 29–2525 (1989); N.H.Rev.Stat.Ann. § 630:5(VI) (1986); N.M.Stat.Ann. § 31–20A–4 (1987); N.C.Gen.Stat. § 15A–2000(d)(1) (1988); Okla.Stat., Tit. 21, § 701.13 (Supp.1989); Ore.Rev.Stat. § 163.150(1)(g) (1989); S.C.Code § 16–3–25 (1985); S.D.Codified Laws § 23A–27A–9 (1988); Tex.Crim.Proc.Code Ann. § 37.071(h) (Supp.1990); Va.Code § 17–110.1 (1988); Wash.Rev.Code § 10.95.100 (1989); Wyo.Stat. § 6–2–103 (1988). Ohio's rule as to waiver is unclear. See Ohio Rev.Code Ann. § 2929.05 (1987). In *State v. Brooks,* 25 Ohio St.3d 144, 495 N.E.2d 407 (1986), however, both the Ohio Court of Appeals and Ohio Supreme Court reviewed the defendant's death sentence after the State Court of Appeals denied his motion to withdraw his appeal.

This Court has recognized in other contexts that societal interests may justify limiting a competent person's ability to waive a

constitutional protection. In *Singer v. United States,* 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965), for example, the Court upheld the constitutionality of ****1734** Federal Rule of Criminal Procedure 23(a), which conditions a defendant's waiver of his right to a jury trial on the approval of the court and the prosecution. The Court reasoned that "[t]he Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result." 380 U.S., at 36, 85 S.Ct., at 790–91. Society's interest, expressed in the Eighth Amendment, of ensuring that punishments are neither cruel nor unusual similarly justifies restricting a defendant's ability to acquiesce in the infliction of wrongful punishment. Although death may, to some death row inmates, seem preferable to life in prison, society has the right, and indeed the obligation, ***176** to see that procedural safeguards are observed before the State takes a human life. [2]

2 Underlying the Court's decision may be the assumption that a competent defendant would never waive his right to appeal unless he was guilty of the crime and deserved to die. See *Franz v. Lockhart,* 700 F.Supp. 1005, 1023 (ED Ark.1988), appeal pending, No. 89–1485EA (CA8). There is no reason to believe, however, that only defendants guilty of the most heinous crimes would choose death over life in prison.

III

Given that the Constitution requires mandatory, nonwaivable appellate review, the question remains whether Whitmore may seek relief in this Court on Simmons' behalf. This Court should take whatever measures are necessary, and within its power, to prevent Simmons' illegal execution. The common-law doctrine of next-friend standing provides a mechanism for doing so without exceeding the Article III limitations on our jurisdiction. [3] The Court's refusal to use that mechanism suggests that the Court's desire to eliminate delays in executions exceeds its solicitude for the Eighth Amendment.

3 The question whether Whitmore may act as Simmons' next friend in this Court is distinct from the question whether Whitmore could do so in the Arkansas Supreme Court. This Court cannot impose federal standing restrictions, whether derived from Article III or federal common law, on state courts. See *ASARCO Inc. v. Kadish,* 490 U.S. 605, 620, 109 S.Ct. 2037, 2047, 104 L.Ed.2d 696 (1989); *Department of Labor v. Triplett,* 494 U.S. 715, 729, 110 S.Ct. 1428, ——, 108 L.Ed.2d 701 (1990) (MARSHALL, J., concurring in judgment). The Court's holding thus affects only federal courts.

As the Court acknowledges, a next friend pursues an action on behalf of the real party in interest. *Ante,* at 1727. Simmons obviously satisfies the Article III and prudential

standing requirements. The Court therefore does not dispute that Whitmore, standing in for Simmons, would also meet these requirements. The Court refuses to allow Whitmore to act as Simmons' next friend, however, because he has not shown that Simmons "is unable to litigate his own cause due to mental incapacity, lack of access to court, or ***177** other similar disability." *Ante,* at 1728. The Court suggests, without holding, that a party asserting next-friend status must also prove that he is "truly dedicated to the best interests of the person on whose behalf he seeks to litigate," *ante,* at 1727, and perhaps, too, that he has "some significant relationship with the real party in interest," *ante,* at 1727. [4]

[4] Despite the Court's suggestion, I cannot believe that this Court would ever hold that a defendant judged incompetent to waive his right to appeal could be executed without appellate review on the ground that no one with a sufficiently close relation to him had stepped forward to pursue the appeal. Rather, a court would be required to appoint someone to represent such a defendant. See *Franz v. Lockhart, supra,* at 1011, n. 2. See also Carter, Maintaining Systemic Integrity in Capital Cases: The Use of Court–Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death, 55 Tenn.L.Rev. 95 (1987).

Assuming for the sake of argument that Simmons was competent to forgo petitioning this Court for review [5] and that Whitmore is ****1735** only minimally interested in Simmons' welfare, I would nevertheless permit Whitmore to proceed as Simmons' next friend. The requirements for next-friend standing are creations of common law, not of the Constitution. *Ante,* at 1727–1728. Thus, no constitutional considerations impede the Court's deciding this case on the merits. [6] The Court certainly ***178** has the authority to expand or contract a common-law doctrine where necessary to serve an important judicial or societal interest. Examples of the Court's exercise of that authority pervade our case law. See, *e.g., Harlow v. Fitzgerald,* 457 U.S. 800, 815–819, 102 S.Ct. 2727, 2736–2739, 73 L.Ed.2d 396 (1982) (abandoning subjective element of qualified immunity defense to avoid excessive disruption of government and to permit the resolution of insubstantial claims on summary judgment); *Anderson v. Creighton,* 483 U.S. 635, 645, 107 S.Ct. 3034, 3042, 97 L.Ed.2d 523 (1987) (stating that *Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action"); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326–333, 99 S.Ct. 645, 649–653, 58 L.Ed.2d 552 (1979) (discarding common-law doctrine of mutuality of parties and authorizing offensive use of collateral estoppel to protect litigants from burden of relitigating issues and to promote judicial economy). See also *Livingston v. Jefferson,* 15 F.Cas. 660, 663 (No. 8,411) (CC Va.1811) (Marshall, C.J., Circuit Judge) (common-law principle is "a principle of unwritten law, which is really human reason applied by courts, not capriciously, but in a regular train of decisions, to human

affairs, according to the circumstances of the nation, the necessity of the times, and the general state of things, [and is] susceptible of modification"). In this case, the magnitude of the societal interests at stake justifies relaxing the next-friend requirements to permit Whitmore to challenge Simmons' execution.

5 In determining Simmons' competency to waive his right to seek relief in this Court, the majority relies on the Arkansas trial court's finding that Simmons was competent to waive his right to appeal in *state* court. *Ante,* at 1728–1729. At no point, however, has any court determined that Simmons was competent to waive his right to petition this Court for a writ of certiorari. Legal competency is not static. Given that Simmons' life turns on this question, the Court should at least require a specific determination that he was competent to forgo petitioning this Court before it dismisses this case without reaching the merits.

6 The Court suggests that some restriction on next-friend standing is necessary to prevent a litigant who asserts only a generalized grievance from circumventing Article III's standing requirements. *Ante,* at 1728. But as long as the real party in interest satisfies those standing requirements, as Simmons clearly does, this Court will be presented with an actual case or controversy. If the Court's suggestion were true, it would necessitate abolishing next-friend standing entirely. In terms of Article III, a next friend who represents the interests of an incompetent person with whom he has a significant relation is no different from a next friend who pursues a claim on behalf of a competent stranger; both rely wholly on the injury to the real party in interest to satisfy constitutional standing requirements.

Relaxation of those requirements is especially warranted here because judicial consideration of the claim that the Constitution requires appellate review of every capital case would ***179** otherwise be virtually impossible. If a capital defendant desires appellate review, he will undoubtedly obtain that review in state court, see n. 1, *supra,* and, perhaps, in federal court on a petition for habeas corpus. If he waives his right to appeal and is found incompetent, a next friend will be allowed to pursue the appeal, again obviating the need to decide whether the Eighth Amendment requires mandatory, nonwaivable review. Although the fact that a constitutional issue will never be resolved may not justify carving out an exception to Article III's standing requirements, surely that fact, when considered with society's commitment to avoiding wrongful executions, provides ample cause for enlarging the scope of a federal common-law doctrine.

****1736** The only purpose the Court invokes for rigidly applying the restrictions on next-friend standing is preventing " 'intruders or uninvited meddlers' " from pursuing habeas corpus relief " 'as matter of course.' " *Ante,* at 1728 (quoting *United States ex rel. Bryant v. Houston,* 273 F. 915, 916 (CA2 1921)). This

purpose, however, does not justify refusing to allow Whitmore to proceed as Simmons' next friend in this Court.[7] First, the Court need not hold that all federal ***180** courts must relax restrictions on next-friend standing; the common-law rules could be altered only to the extent this Court deems necessary. If this Court were to hold that Whitmore has standing before it, and then, on the merits, that the Constitution requires some form of nonwaivable appellate review in state court, at least one level of review would be assured for each capital case. Such a decision would obviate the need for relaxing the restrictions in federal district courts and courts of appeals.[8]

7 Appeal to *stare decisis* similarly cannot relieve the Court of responsibility for today's disturbing decision. This case is the first opportunity for this Court to address the next-friend issue raised here with the benefit of full briefing by the parties. Four times the Court was presented with this question in the context of applications for stays of executions filed by parties other than the defendants. Three times the Court denied the applications. See *Gilmore v. Utah,* 429 U.S. 1012, 97 S.Ct. 436, 50 L.Ed.2d 632 (1976); *Evans v. Bennett,* 440 U.S. 987, 99 S.Ct. 1986, 60 L.Ed.2d 370 (1979); *Lenhard v. Wolff,* 444 U.S. 807, 100 S.Ct. 29, 62 L.Ed.2d 20 (1979). In *Gilmore,* the Court stated only that the competent defendant had knowingly and intelligently waived any federal rights. 429 U.S., at 1013, 97 S.Ct., at 437. In *Evans,* then-Justice REHNQUIST, in his capacity as Circuit Justice, stayed the execution pending consideration by the full Court. 440 U.S. 1301, 99 S.Ct. 1481, 59 L.Ed.2d 756 (1979) (in chambers). The Court then denied the application without opinion, 440 U.S. 987, 99 S.Ct. 1986, 60 L.Ed.2d 370 (1979), with Justice BRENNAN noting in his concurrence that a stay was not necessary because the State had not set an execution date, *ibid.* In *Lenhard,* the Court did not issue an opinion. 444 U.S., at 807, 100 S.Ct., at 29. In *Rosenberg v. United States,* 346 U.S. 273, 73 S.Ct. 1152, 97 L.Ed. 1607 (1953), however, the Court did consider the merits of an application to stay the executions of Julius and Ethel Rosenberg filed by counsel for a man who had no connection to the Rosenbergs and who had not participated in any proceedings related to their case until the stay proceedings in this Court. *Id.,* at 288–289, 73 S.Ct., at 1160–1161 (*per curiam*); *id.,* at 291, 73 S.Ct., at 1161–62 (Jackson, J., concurring) ("Edelman [the applicant] is a stranger to the Rosenbergs and to their case. His intervention was unauthorized by them and originally opposed by their counsel"). Justice Jackson's concurring opinion stated that the Court "discountenance[d] this practice" of considering an argument not originally pressed by the defendant's own counsel, where those counsel were vigorously contesting the defendants' death sentences. *Id.,* at 292, 73 S.Ct., at 1162. Far more importantly, however, the Court did not dismiss

the application on the ground that the applicant did not satisfy the common-law requirements of next-friend status, but addressed the application on its merits. *Id.,* at 289, 73 S.Ct., at 1160–61 (*per curiam*). See also *id.,* at 294, 73 S.Ct., at 1163 (Clark, J., concurring) ("Human lives are at stake; we need not turn this decision on fine points of procedure or a party's technical standing to claim relief"); *id.,* at 299–300, 73 S.Ct., at 1165–1166 (Black, J., dissenting) ("I cannot believe ... that if the sentence of a citizen to death is plainly illegal, this Court would allow that citizen to be executed on the grounds that his lawyers had 'waived' plain error. An illegal execution is no less illegal because a technical ground of 'waiver' is assigned to justify it"); *id.,* at 312, 73 S.Ct., at 1172 (Douglas, J., dissenting) ("[T]he question of an unlawful sentence is never barred. No man or woman should go to death under an unlawful sentence merely because his lawyer failed to raise the point").

8 The Court's decision today, which rests on federal common law developed in connection with habeas corpus cases, *ante,* at 1728, apparently applies to next-friend standing in habeas cases brought in federal district court as well as to petitions for certiorari submitted to this Court. Congress could amend the habeas statute (which provides only that "[a]pplication for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended *or by someone acting in his behalf,*" 28 U.S.C. § 2242 (emphasis added)) explicitly to permit next-friend suits in cases of this sort so as to ensure some form of review of capital cases.

***181** More fundamentally, however, the interest in preventing a suit by an "uninvited meddler" pales in comparison to society's interest in preventing an illegal execution. When, as here, allowing the "meddler" to press the condemned man's interests is the ****1737** only means by which the Court can prevent an unconstitutional execution, the Court should sacrifice the common-law restrictions rather than the defendant's life.

IV

The Court today refuses to address a meritorious constitutional claim by rigidly applying a technical common-law rule completely within its power to amend or suspend. It thereby permits States to violate the Constitution by executing willing defendants without requiring minimal assurance that their convictions were correct or their sentences justified. This decision thus continues the Court's unseemly effort to hasten executions at the cost of permitting constitutional violations to go unrectified. See, *e.g., Butler v. McKellar,* 494 U.S. 407, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990); *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). I dissent.

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