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

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

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

v.

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

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

BRIEF OF PLAINTIFFS-APPELLANTS

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July 22, 2020

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COMBINED CERTIFICATES

Certificate as to Parties, Rulings, and Related Cases

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

I. Parties and Amici Appearing Below

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

II. Parties and Amici Appearing in this Court

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

III. Rulings under Review

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

IV. Related Cases

Counsel are unaware of any related cases in this Court. This case is related to *District of Columbia v. Open Technology Fund*, Case No. 2020-CA-003185-B (D.C. Super. Ct. July 20, 2020).

Respectfully submitted,

/s/ Deepak Gupta
Deepak Gupta
Counsel for Plaintiffs-Appellants

July 22, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

** Authorities upon which we chiefly rely are marked with asterisks.*

GLOSSARY

OTF	Open Technology Fund
USAGM	U.S. Agency for Global Media

INTRODUCTION

Over the past month, the United States government has attempted to stage an unlawful takeover of Open Technology Fund, a private nonprofit organization dedicated to advancing global freedom of expression and association online. Even after the filing of this appeal, the government dramatically escalated its attempts to wrest control: It designated a new "Acting CEO"; tried to gain physical entry into OTF's offices; repeatedly made unexplained demands for immediate on-site inspections; and even made misrepresentations to the nonprofit's landlord. In several instances, federal officials have wielded the district court's order denying preliminary relief as if it were an order mandating an immediate takeover.

Just yesterday—on the same day that this Court entered an injunction pending appeal—the head counsel for the U.S. Agency for Global Media threatened Open Technology Fund's grant funding unless the organization permitted her to physically "inspect" OTF's office space today. This morning, during that "inspection," the agency's head counsel forced OTF's Vice President for Programs to answer questions, without counsel present, about the subject matter of this litigation. Declaration of Nathaniel Kretchun ¶¶ 1-3, 14. He was "particularly alarmed" that the lawyer also "asked questions about the citizenship status of OTF employees and contractors, some of whom work for free expression in repressive regimes and whose personal safety could be placed in jeopardy." *Id.* ¶ 3, 12.

To preserve the status quo, Open Technology Fund and four members of its board of directors seek a preliminary injunction barring any action to remove or replace its officers or directors. They are highly likely to succeed on the merits. As the district court correctly held, Congress gave the government no authority to remove OTF's officers or directors. JA385-92. The only source of authority on which the government relied below was a statutory provision covering "organization[s]" "authorized under" the International Broadcasting Act. 22 U.S.C. § 6209(d). But OTF was never "authorized under" the Act. Its founder, a private citizen, incorporated it in 2019 as a 501(c)(3) organization under District of Columbia law, without any "permission or authorization from Congress or from any part of the Executive Branch." JA 235-36. The statute "does not extend to OTF." JA392.

This is therefore not a situation where the "Government creates a corporation by special law" and "retains for itself permanent authority to appoint a majority of the directors." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 374, 399 (1995). Instead, Open Technology Fund is "at bottom a non-governmental entity, a private state-chartered corporation whose operational independence has been carefully protected by Congress." *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121, 1129 (D.C. Cir. 1985). That protection, this Court has held, "expressly prevent[s] a governmental takeover." *Id.* at 1125. Because OTF is a private organization dedicated to expressive activity, it is also protected by the First Amendment's guarantee of freedom of association. "There can be

no clearer example of an intrusion into the internal structure or affairs of an association" than a governmental attempt to "force[] the group to accept members it does not desire." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

Given all this, why did the district court deny relief? It relied on a source of authority not advanced by the government—a single sentence in OTF's now-superseded 2019 grant agreement, which it read in conjunction with the organization's bylaws to give the government plenary authority to replace its leadership. JA392-97. Although the district court found this sentence "ambiguous," JA393, it nevertheless concluded that it was best read as "allowing [agency] officials to be placed on the OTF board, presumably by" the agency head, JA395.

Lacking input from the parties on the meaning of this document, the district court's ruling rested on an evident misreading. *See* JA409 ¶¶ 2-6. The government has chosen not to defend the district court's rationale on appeal. Instead, the government advances yet another new justification for its attempted seizure: It contends that OTF's bylaws, merely by incorporating § 6209(d) of the International Broadcasting Act, somehow give the government *more* authority than § 6209(d) itself provides. This argument makes no sense. And it's not what the bylaws say. If it were, the result would be extraordinary. It would mean that a private, independent nonprofit organization had voluntarily ceded its core powers of corporate self-governance to the federal government, despite the absence of any statutory requirement that it do so and

without receiving any benefit in return. But Open Technology Fund did no such thing; its bylaws do not give the federal government any independent authority to remove or replace its leadership.

The government's position runs counter to foundational principles of American corporate governance dating back to Chief Justice Marshall's opinion in *Trustees of Dartmouth College v. Woodward*, under which it is presumed that the corporation is not subject to government takeover and that its directors are instead "invested with the power of perpetuating themselves." 17 U.S. 518, 649 (1819). The government's position also runs afoul of District of Columbia corporate law, which controls here. The Attorney General of the District of Columbia, in his capacity as nonprofit regulator, has deemed these attempts to remove and replace Open Technology Fund's officers and directors to be "*ultra vires* and illegal"—a conclusion that warrants deference. And if there were still any doubt, it must be resolved in favor of the First Amendment right to freedom of association. The government cannot point to a knowing, voluntary, and intelligent waiver of that right.

Because neither the statute nor the bylaws give Pack any power to fire or replace OTF's officers or directors, the plaintiffs are likely to succeed on the merits. They have also shown irreparable harm. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584-85 (1952) (upholding a preliminary injunction against an attempted government seizure of steel mills, which was "bound to result in many present and future

damages" that would be irreparable). The government's takeover "imperil[s] virtually every aspect of Open Technology Fund's operations and existence." JA200. Critically, OTF's ability to fulfill its mission depends on maintaining the trust of journalists and activists in repressive regimes from Tehran to Hong Kong, who view its independence from the government as essential to their personal safety. JA198. Each day that the government is allowed to continue its takeover effort jeopardizes their safety and further undermines OTF's hard-won trust—trust that may never fully be regained.

JURISDICTIONAL STATEMENT

On June 25, 2020, the plaintiffs moved for a preliminary injunction against Michael Pack, in his official capacity as CEO of the U.S. Agency for Global Media. ECF 4. The district court had jurisdiction under 28 U.S.C. § 1331 and denied the plaintiffs' motion on July 2, 2020. JA373. The plaintiffs filed their notice of appeal that same day. JA407. On July 7, 2020, the plaintiffs filed a motion for reconsideration of the denial of a preliminary injunction, which the district court denied the same day. ECF 26. One day later, on July 8, 2020, the plaintiffs filed an amended notice of appeal, incorporating the denial of the motion for reconsideration. JA546. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1) to review the district court's two decisions denying a preliminary injunction.

STATEMENT OF THE ISSUE

Open Technology Fund is a private, independent nonprofit organization, incorporated under the laws of the District of Columbia. Does the CEO of the United States Agency for Global Media have legal authority to remove or replace OTF's officers or directors under 22 U.S.C. § 6209(d) or the organization's own bylaws?

STATUTES AND REGULATIONS

The relevant statutes and regulations are included in the addendum to this brief.

STATEMENT OF THE CASE

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

Although Open Technology Fund could choose to operate through private funding, it has until now received grants for its work from the U.S. Agency for Global Media—the agency charged with funding the government's international-

broadcasting program. OTF is not, however, a government entity, but a private, nonprofit organization incorporated in the District of Columbia. This appeal is about whether, despite that fact, the agency has the power to summarily replace Open Technology Fund's leadership and take over the organization against its will.

A. Statutory background

"For nearly 80 years, international broadcasting sponsored by the United States" has been a "beacon of hope for those trapped within authoritarian regimes." JA374. Federally funded international broadcasting began with Voice of America, which countered Nazi disinformation during World War II, and since then gradually expanded to include Radio Free Europe, Radio Free Asia, the Middle East Broadcasting Networks, and other organizations that broadcast around the world. Cong. Research Serv., RL43521, *U.S. International Broadcasting* 1 (2016).

In the International Broadcasting Act of 1994, Congress "reorganized all existing U.S. international broadcasting services under a new Broadcasting Board of Governors." *Id.* at 3. The name "Broadcasting Board of Governors" originally referred to "both the independent federal agency that directs and oversees all U.S. government-funded non-military broadcasting, and the nine-member board" that, at the time, "provide[d] executive leadership for the agency." *Id.* at 5. The agency, on authority granted by Congress, later changed its name to the United States Agency for Global Media, or USAGM. JA380.

Congress amended the Act in 2016 to restructure the agency, relegating the nine-member board to an advisory role and transferring leadership to a new CEO appointed by the President. *See* 22 U.S.C. §§ 6203, 6204(a)(1)-(22), 6205; JA379-80. The CEO was given an enumerated set of powers to oversee the activities of agency-funded entities, including the authority to "make and supervise grants and cooperative agreements for broadcasting and related activities," 22 U.S.C. § 6204(a)(5), and to "allocate funds … among … grantees," *id.* § 6204(a)(6). Congress also gave the CEO authority "to incorporate a grantee"—to establish a new, government-created corporation eligible to receive grants. *Id.* § 6209(a)(1).

But Congress has also established and reaffirmed limits on the CEO's power over agency grantees, designed to ensure that those grantees would remain fundamentally private entities. Congress provided that nothing in the Act "may be construed to make … any … entity provided funding by the agency a Federal agency or instrumentality." *Id.* § 6209(c). It also required the CEO to "respect the professional independence and integrity" of grantees. *Id.* § 6204(b). Each grantee thus "operates under an express statutory mandate" that protects their "independence," *Wood ex rel United States v. Am. Inst. in Taiwan*, 286 F.3d 526, 531-32 (D.C. Cir. 2002), which this Court has previously interpreted to "expressly prevent[] a governmental takeover," *Ralis*, 770 F.2d at 1125. And while Congress recently empowered the CEO to appoint or remove officers and directors of certain entities, it limited that authority to

particular named broadcasting organizations ("RFE/RL Inc., Radio Free Asia, and the Middle East Broadcasting Networks") and organizations "authorized under" the Act—that is, organizations expressly authorized by statute, like Radio Free Afghanistan, 22 U.S.C. § 6215, or organizations directly incorporated by the CEO, *id.* § 6209(a)(1). *See id.* § 6209(d). Likewise, Congress authorized the CEO to condition an organization's grant agreement on the agency's "authority to name and replace the board," but only for grants to those same organizations. *Id.* § 6204(a)(20), (21).

B. Factual background

1. The roots of Open Technology Fund and its mission to advance freedom on the internet.

According to the federal government, "over two thirds of the world's population live in countries where the internet access is restricted, and that number is growing." JA249. Restrictions on internet freedom, including "advanced censorship and surveillance technologies," are not only "designed to stifle dissent, track minorities, and manipulate content online," but they also prevent journalists and audiences from "engag[ing] in and shar[ing] fact-based news online." JA248-49. "Technologies that provide access to blocked content, and safe and secure methods to share content," are therefore "critically important to getting information to target audiences that would otherwise be siloed by government censorship." JA249.

Open Technology Fund was founded to advance this important mission—to support "pioneering research, development, and implementation of cutting-edge

internet freedom technologies to respond to rapidly evolving censorship threats around the world." JA250; *see also* JA194-95. In its 2019 report to Congress, the U.S. Agency for Global Media explained that, since its founding, OTF has "reviewed and responded to nearly 5,000 requests seeking over $500 million in total." JA 264. And OTF's support for emerging technologies has achieved incredible results: It "has been responsible for helping fund some of the most widely used digital rights tools in the world, including the encrypted messaging app Signal and the anonymous internet browser Tor"—software that journalists, political activists, and ordinary citizens alike use to evade government censorship and surveillance around the world. Avi Asher-Schapiro, *Firings at U.S. non-profit spark concern among digital rights activists*, Reuters (July 2, 2020), https://reut.rs/30FB8Dg; *see* JA 259.[1] "Today, over two billion people globally use OTF-supported technology daily, and more than two-thirds of all mobile users have OTF-incubated technology on their device." JA 250.

Although originally incubated as a project within Radio Free Asia, Open Technology Fund incorporated in 2019 as an independent nonprofit organization. *See* JA 236, 249-50. Since then, the Agency for Global Media has emphasized to Congress that OTF's independence makes it more likely to fulfill its mission: "As an

[1] *See also* Open Tech. Fund, *Projects We Support*, https://perma.cc/E4U3-KRCM (last visited July 21, 2020).

independent organization, OTF is uniquely situated to responsibly and accountably support the U.S. government's internet freedom efforts at the pace and with the flexibility needed to empower innovation and compete against adversaries to a free and open internet." JA 251.

2. Open Technology Fund establishes itself as a private nonprofit organization, outside of government control.

OTF's founder, Libby Liu, created the organization in 2019 as a 501(c)(3) nonprofit corporation under District of Columbia law, without any "permission or authorization from Congress or from any part of the Executive Branch." JA235-36. The organization is not authorized under, or even mentioned in, the International Broadcasting Act. JA387-88. Nor was it created by the Agency for Global Media under the CEO's authority "to incorporate a grantee." 22 U.S.C. § 6209(a)(1). Open Technology Fund anticipated that it may "one day get express authorization from Congress that would put [it] on the same footing as congressionally-authorized grantees like Radio Free Europe and Radio Free Asia," but that has yet to occur. JA411. Instead, OTF was "incorporated as," and still "remains, an independent organization"—not "a government-created or government-controlled entity." JA 235-37.

Open Technology Fund is different from the congressionally authorized broadcasters in other ways as well. For starters, "OTF is not a broadcaster." JA375 n.1. It's an independent nonprofit that "advance[s] Internet freedom in repressive

environments" through technology. JA194. It doesn't "carry[] out radio broadcasting," 22 U.S.C. § 6208, or "provide ... news," *id.* § 6211. So it is not subject to the networks' obligations to broadcast news consistent with U.S. "foreign policy objectives" or provide a "clear and effective presentation" of U.S. policy. *Id.* § 6202. The relationship between Open Technology Fund and the government is solely a function of its choice to receive government funding as an "independent grantee," to meet needs "specific to OTF's unique mission." JA327. OTF receives funding from the Agency for Global Media not because it is a statutorily authorized broadcaster, but because the agency may give grants for "related activities" in addition to "broadcasting." 22 U.S.C. § 6204(a)(5). And it may give those grants not just to organizations authorized under the statute, but to private, independent organizations like OTF. *See id.* Open Technology Fund, in other words, is a private organization that "happens to receive federal funding"—"at least until now." JA236. And if OTF concludes that the U.S. government is no longer (or not currently) a reliable ally in its mission, it may forgo government funding in favor of private philanthropic support. JA277.

The bylaws of Open Technology Fund entitle it—as an independent, self-governing organization—to elect directors of its choosing. Directors are "elected by [OTF's] Board of Directors for three-year terms upon majority vote of the Board." JA494. Elections must be conducted with "notice to and in consultation with the USAGM Advisory Board," but neither the agency's board nor its CEO have

authority to veto OTF's selection. *Id.* Likewise, directors may be removed "for cause" by the vote of two-thirds of a quorum of directors, and "[a]ny vacancy occurring on the Board of Directors due to removal … may be filled by a majority vote of the remaining Directors." JA494-95. Officers, too, are elected "by majority vote of the Board of Directors," and "hold office until [a] successor is elected and qualified" or the officer's "earlier resignation or removal." JA498-49.

The bylaws also recognize the possibility that Open Technology Fund may, at some time in the future, be authorized by Congress. Thus, they permit "the appointment of a Federal official as Director or Officer by the USAGM [CEO]," but only "*provided that* such appointment … [is] *authorized* under the Act." JA504 (emphasis added). And they include additional provisions permitting the CEO to appoint and remove directors and officers, but only "as *may be* authorized by 22 U.S.C. 6203 et seq." JA494, 499 (emphasis added). A bill that would create such authorization was recently introduced in the House. *See* H.R. 6621, 116th Cong. (2020) ("Open Technology Fund Authorization Act").

It was the possibility that Congress might "one day" pass such an authorization that "guided [the founders'] intent" in adding that language to the bylaws. JA411. But the authorization has not been enacted, let alone gone into effect, and Open Technology Fund's founders "never understood either the grant agreement or the

bylaws to give the CEO of USAGM the power to remove or replace [its] officers or directors absent congressional authorization." JA412.

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

On June 4, 2020, the Senate confirmed Michael Pack as CEO of the U.S. Agency for Global Media. Within days, Pack "upended" the agency's grantees by unilaterally removing and replacing the operational heads and directors of Open Technology Fund and other agency-funded organizations. JA374-76.

Pack's "Wednesday night massacre" immediately provoked widespread, bipartisan outcry. JA375-76. In a letter issued the day before the district court's decision in this case, a bipartisan group of senators wrote to Pack to express their "deep concern" regarding his termination of the organizations' "qualified, expert staff" and "removal of their boards" "for no specific reason"—a move that "came without any consultation with Congress." Letter from U.S. Senators to Michael Pack, CEO, USAGM (Jul. 1, 2020) https://perma.cc/57AY-LLHK. The "credibility and independence" of the organizations, the senators wrote, is "critical" to those "living under repressive regimes." *Id.* As the district court acknowledged, the "[w]idespread misgivings about Pack's actions raise troubling concerns about the future of these great institutions … supporting freedom of opinion and expression in parts of the world without a free press." JA376.

For Open Technology Fund, Pack's attempted takeover "imperil[s] virtually every aspect of [the organization's] operations and existence," casting "essential day-to-day corporate functions" into doubt and threatening its ability "to function going forward." JA200. Even more importantly, it threatens the organization's "ability to protect … vulnerable communities facing repressive regimes." *Id.* Around the world, journalists and activists trust OTF "to safeguard their identities and enable their important work." *Id.* But that trust depends on the organization's independence and is undermined by even the perception that it has come under government control. JA529.

Since the news of Pack's actions became public, Open Technology Fund has been "inundated with emails from past, current, and prospective funding recipients—all expressing grave concern over the safety of their identities and their work in the hands of [OTF's] purported new leadership." JA198. "Each hour and day that this state of affairs persists causes lasting, irreversible damage to [the] organization, its reputation, and its effectiveness in performing its vital mission in service of global internet freedom." *Id.*

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

Open Technology Fund and four of its directors sued Pack and moved for a temporary restraining order and preliminary injunction preventing further interference in the organization's independence. *See* JA8-29; ECF 4. Pack, they argued, lacks

any legal authority to remove or replace officers or directors of this private nonprofit organization.

The district court denied the plaintiffs' motion, holding that they were unlikely to prevail on their claims. In reaching that conclusion, however, the court rejected the government's lead argument that Pack's statutory authority as CEO under 22 U.S.C. § 6209(d) gave him the power to replace OTF's officers and board. "Adoption of Pack's interpretation," the court wrote, "would mean that any grantee of the [agency]—no matter the size of the grant or independence of the grantee from the government—would, as a statutory matter, forfeit control over its board and officers to the whim of the CEO." JA386. Such a reading of the statute, the court concluded, would be untenable. JA392.

Instead, the court relied on a source of authority not advanced by the government at all—a single sentence from OTF's grant agreement, which the court read in conjunction with the organization's bylaws as giving Pack plenary authority to replace its leadership. JA392-97. Because this argument was raised for the first time in the district court's opinion, the parties had not briefed the issue of how to interpret that sentence. And though the Court found the sentence "ambiguous," it ultimately concluded that it was best read as "allowing USAGM officials to be placed on the OTF board, presumably by the USAGM CEO." JA393, 395. The court also

concluded that, "for substantially the same reasons," OTF had failed to show irreparable injury. JA402.

Since the district court's decision rested on a ground for which it "lacked the benefit of any briefing, evidence, or input from the parties," the plaintiffs moved for reconsideration—attaching evidence on the grant agreement's meaning. ECF 26 at 10. In the alternative, the plaintiffs moved for an injunction pending appeal. *Id.* at 1. The court denied both requests in a minute order later that day. JA545.

5. After the government engages in escalating attacks on OTF's independence, the D.C. Attorney General deems Pack's takeover unlawful and this Court grants an injunction pending appeal.

The plaintiffs immediately filed notices of appeal after both of the district court's orders. *See* JA407, 546.[2] Yet, despite this appeal, the government moved forward with its attempted takeover at full steam.

At 8pm on Friday, July 3, 2020—the day after the district court denied the TRO motion—the government attempted to appoint an "Acting CEO" of Open Technology Fund, James Miles, who lacks any background in global internet-freedom work or even in the field of technology. JA527, 534. In response, OTF's general counsel wrote that the organization does "not accept Mr. Miles as an officer or employee," leading to the existence of two dueling boards and CEOs—each claiming

[2] The plaintiffs do not appeal the portions of the district court's order that do not relate to Pack's authority to remove and replace OTF's officers and directors.

control. JA527-28, 534. This untenable situation has led the D.C. Attorney General to file a special proceeding in D.C. Superior Court to declare Pack's takeover unlawful. *See* 28(j) Letter (July 20, 2020), Ex. A. Under the District's Nonprofit Corporation Act, the D.C. Attorney General is the chief regulator of D.C.-incorporated nonprofit organizations. *See id.* (citing D.C. Code §§ 20-401.20, *et seq.*). The Attorney General takes the position that, under District law, "Pack lacks authority" to install new directors and officers, "making his removal and replacement of the Board and steps to remove officers *ultra vires* and illegal." *Id.* at 2.

The government has only escalated its attempts to wrest control of Open Technology Fund since the district court's order. These actions include efforts to obtain physical entry into OTF's offices in Washington, DC, including repeatedly insisting that the security guards allow them entry; demands for the key to those offices; multiple unexplained demands for an immediate on-site inspection of those offices at a time when OTF's staff is working remotely due to COVID-19; and efforts to directly pressure the organization's landlord, based on questionable representations, to turn over control of its office space to Pack's designates. *See, e.g.*, OTF Injunction Mot. 1; Cunningham Decl. ¶¶ 2, 6-17. And just two days ago, purported "Acting CEO" Miles ordered all Open Technology Fund staff to provide him with documents and records about OTF's operations by the end of this week. *See* 28(j) Letter (July 20, 2020), Ex. B.

Faced with these continued attacks, the plaintiffs moved for an injunction pending appeal to maintain the status quo while this Court considered the merits. In its opposition to this motion, the government no longer relied on Pack's authority under section 6209(d)—its main argument in the district court. *See* Injunction Opp. 9 (arguing that the Court "need not address the scope of the CEO's statutory power"); *see also id.* at 2, 16. The government also did not defend the district court's rationale—that the single sentence in OTF's grant agreement, in combination with its bylaws, provided Pack with remove-and-replace authority. Instead, the government argued for the first time that the bylaws themselves independently confer such authority on the agency's CEO—regardless of whether the statute does so—because, the government contended, OTF is "akin to" the broadcasting networks that the statute "mention[s] by name." *Id.* at 16. The government did not explain how OTF, which doesn't broadcast anything, is "akin to" a broadcasting network. Nor did it explain how the statute's reference to broadcasting networks meant that OTF's bylaws somehow granted the government extra-statutory power.

This Court granted the plaintiffs' motion for an injunction pending appeal. *See* Per Curiam Order (July 21, 2020). The motions panel held that the plaintiffs are likely to succeed on the merits because section "6209(d) does not grant [Pack] with the authority to remove and replace members of OTF's board." *Id.* at 1. Rejecting the government's assertion that OTF is "identical" to the broadcasting networks, the

panel emphasized that "OTF is not a broadcaster, is not mentioned in § 6209(d), and is not sufficiently similar to the broadcast entities expressly listed in § 6209(d) to fit within the statutory text." *Id.* at 1-2. And the panel also disagreed that the bylaws provide any independent authority to the agency's CEO, noting that they appear "only to reference the exercise of statutory authority, which does not seem to include control of OTF's board or operations." *Id.* at 2. Finally, the panel concluded that OTF "demonstrated irreparable harm because the government's actions have jeopardized OTF's relationships with its partner organizations, leading its partner organizations to fear for their safety." *Id.* "[A]bsent an injunction during the appellate process," it wrote, "OTF faces an increasing risk that its decision-making will be taken over by the government, that it will suffer reputational harm, and that it will lose the ability to effectively operate in light of the two dueling boards that presently exist." *Id.*

SUMMARY OF ARGUMENT

I.A. The plaintiffs are likely to succeed on the merits, because the federal government has no statutory authority to remove or replace the officers or directors of Open Technology Fund. The International Broadcasting Act gives the CEO of the United States Agency for Global Media remove-and-replace authority over three categories of organizations: (1) certain expressly named organizations, like Radio Free Europe and Radio Free Asia; (2) organizations established "through the

consolidation" of such named entities; and (3) "any organization … authorized under" the Act. 22 U.S.C. § 6209(d). Because Open Technology Fund falls outside these categories, the CEO does not have the power to remove or replace OTF's officers and directors—as the district court correctly held.

That Open Technology Fund receives grant funding from the federal government does not mean that it is subject to the CEO's control. Congress could have used language extending the CEO's remove-and-replace authority under § 6209(d) to all grantee organizations. But it did not—it limited that authority to only those organizations that are "authorized" under the Act. Indeed, as the district court concluded, if merely taking funds were sufficient to make an entity "authorized under" the Act, then "any grantee of the" agency would hand "control over its board and officers to the whim" of the government. JA386.

The government's interpretation of the CEO's remove-and-replace authority also raises serious constitutional concerns. The First Amendment protects the right to associate with other like-minded individuals for the purpose of furthering a common mission—as well as the freedom not to associate with people who are hostile to that mission. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). But, on the government's reading, § 6209(d) would allow the federal government to intrude into the internal affairs and governance of Open Technology Fund—an independent nonprofit dedicated to expressive activity—and

take control of OTF's decisions by firing its leadership and replacing its board of directors with a majority of federal-government officials. A nonprofit doesn't lose its First Amendment freedoms simply by accepting government funding. For this reason too, § 6209(d) should not be read to give the CEO remove-and-replace authority over Open Technology Fund.

I.B. Nor do the bylaws of Open Technology Fund provide the federal government with any independent authority to remove or replace the organization's officers or directors.

1. Longstanding principles of constitutional and corporate law establish that private corporations are self-governing and free from government takeover. *See Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819). The D.C. Nonprofit Corporations Act—which governs District-incorporated nonprofits—likewise sets forth a general presumption that the existing board of directors is responsible for the appointment and removal of directors and officers. *See* D.C. Code Ann. § 29-401.01 *et seq.* Thus, absent clearly expressed intent to the contrary, courts should presume that private corporations like Open Technology Fund have not voluntarily ceded their independence and internal governance to the government.

2. The government cannot show any such clear intent here. The plain text of the bylaws reserves control over Open Technology Fund officers and directors to the organization itself. Although the bylaws incorporate the International Broadcasting

Act, they do not confer any authority upon the CEO that he does not possess by virtue of the Act alone. This does not render the bylaws' statutory references meaningless. Because Open Technology Fund hoped at the time of its founding that it would someday be authorized by Congress, the bylaws include future-oriented language referring to the Act. The bylaws' text makes this clear—key phrases like "as may be authorized" and "provided that" indicate the future possibility that OTF will receive congressional authorization, which, in turn, would give the government remove-and-replace authority over OTF. But it does not have that authority now. Indeed, the D.C. Attorney General—in his capacity as regulator of nonprofits in the District—has deemed the attempted removal and replacement of Open Technology Fund's officers and directors to be illegal.

3. The district court incorrectly relied on Open Technology Fund's grant agreement to conclude that the government has authority over OTF's officers and directors—a conclusion that the government doesn't defend on appeal. Because the bylaws are unambiguous, the district court shouldn't have looked to extrinsic evidence like the grant agreement. In any case, the grant agreement supports the plaintiffs' position. It says nothing about the government's remove-and-replace authority—all it says is that Open Technology Fund's corporate documents should provide that "some or all" of the members of the Agency for Global Media Board of Governors "may" sit on OTF's board.

II. The government's attempted takeover of Open Technology Fund—and its continued, escalating attacks on the organization's independence while this appeal is pending—has caused OTF to suffer irreparable harm. Pack's hostile actions, and those of his designees, have led to reduced partnership and grant-making applications, uncertainty as to future funding rounds, delays in filing critical staff vacancies, and substantial resource burdens on OTF's leadership. Moreover, the takeover efforts have undermined Open Technology Fund's public perception as an independent and honest partner to journalists and activists fighting censorship in repressive regimes—causing partners around the world to withdraw their support and cooperation. Absent injunctive relief, these harms will be beyond remediation. Courts have recognized that an organization's loss of reputation and goodwill is an irreparable injury, and that preliminary relief is often warranted in corporate-control disputes. That is even more so when, as here, the dispute involves the government's attempted takeover of a private organization with an expressive mission. Such a takeover interferes with the First Amendment right of Open Technology Fund and its officers and directors to freely associate with each other—and courts uniformly hold that such constitutional harms are irreparable.

III. The balance of equities and the public interest also weigh strongly in favor of preliminary injunctive relief. The government will suffer no harm if the pre-takeover status quo is maintained until this case is completed. It identifies no urgency on

its side of the scale. And its takeover attempts not only threaten irreversible damage to Open Technology Fund—they interfere with the global public's access to a free internet and set back America's long-term foreign-policy interests.

STANDARD OF REVIEW

To obtain a preliminary injunction, the moving party "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). On appeal from a preliminary-injunction determination, this Court reviews the district court's legal conclusions as to each of the four factors de novo, and its weighing of the factors for abuse of discretion. *See League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 6-7 (D.C. Cir. 2016).

ARGUMENT

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

In the district court, the government's primary argument was that the International Broadcasting Act gives the government the power to remove and replace the officers and directors of Open Technology Fund, a private, independent nonprofit organization. But, as the district court held, the Act does no such thing. The statute's plain text provides that the agency's CEO has remove-and-replace authority over certain named organizations, organizations "established through the

consolidation of such entities," and organizations "authorized under this chapter"—and only those organizations. 22 U.S.C. § 6209(d). Because OTF doesn't fall within any of these categories, the statute does not give the CEO authority over its officers and directors. Indeed, such an interpretation would raise serious concerns about the government's interference with the plaintiffs' First Amendment right to freely associate—and to *not* associate—with whomever they wish.

But the district court did not end its analysis there. Although the government mainly relied on § 6209(d) as a basis for authority in the district court, the court invented its own justification. It held that the organization's bylaws, read together with a single sentence in a grant agreement, *independently* confer remove-and-replace authority on the agency's CEO. But without the benefit of briefing, evidence, or input from the parties on the meaning of the grant agreement, the court misinterpreted that document. The grant agreement and bylaws do not, in fact, confer any independent authority on the government.

On appeal, the government has not attempted to defend the court's reasoning. Instead, the government raises yet another new justification for its attempt to seize Open Technology Fund. By incorporating § 6209(d), it argues, OTF's bylaws give the CEO authority *beyond* that provided by § 6209(d) itself. But that makes no sense; nothing in the bylaws' language independently grants the government authority to remove and replace the organization's officers and directors. The government's

argument to the contrary conflicts with the plain text of the bylaws themselves. It conflicts with the District of Columbia's default rules governing nonprofits and foundational principles of corporate self-governance. And it conflicts with First Amendment free-association principles. Because neither the statute nor the bylaws give Pack any power to fire and replace Open Technology Fund's directors and officers, the plaintiffs are likely to succeed on the merits.

A. The government has no statutory authority to remove or replace OTF's officers or directors.

1. In the district court, the government argued that the main source of authority for Pack's attempted removal and replacement of Open Technology Fund's officers was the International Broadcasting Act, and more specifically 22 U.S.C. § 6209(d). But as the district court correctly held, "the USAGM CEO's § 6209(d) remove-and-replace authority does not extend to OTF." JA392.

The reason is apparent: Under § 6209(d), the agency's CEO may appoint or remove officers and directors of organizations in three categories: (1) "RFE/RL Inc., Radio Free Asia, and the Middle East Broadcasting Networks"; (2) "any organization that is established through the consolidation of" such named entities; and (3) "any organization … authorized under this chapter." 22 U.S.C. § 6209(d). Because Open Technology Fund is not named in § 6209(d) and was not "established through the consolidation of" any of the named entities, the only way it could fall within the scope of § 6209(d)'s remove-and-replace authority is if it were "authorized under" the Act.

But Open Technology Fund is not "authorized under" the Act. The CEO, therefore, has no authority to remove or replace OTF's officers or directors.

The International Broadcasting Act distinguishes between two groups of organizations: "grantees," 22 U.S.C. §§ 6204(b), 6209(c), and organizations "authorized" under the Act, *id.* §§ 6204(a)(21), 6209(d). The category of "grantees" is broad—encompassing any "entity provided funding by the agency." *Id.* § 6209(c). The category of organizations "authorized under" the Act is narrower, consisting only of those organizations that have received congressional authorization or that were incorporated by the CEO himself. The different terms mean different things. *See Nat'l Insulation Transp. Comm. v. I.C.C.*, 683 F.2d 533, 537 (D.C. Cir. 1982) ("[W]e presume that the use of different terminology within a statute indicates that Congress intended to establish a different meaning.").

"Authorization" is a term of art that refers to a congressional action establishing, continuing, or modifying an organization or program for some public purpose. Such "authorization laws" are frequently followed by congressional appropriations of funds. *See* Cong. Research Serv., RS20371, *Overview of the Authorization-Appropriations Process* 1 (2012); 1 U.S. Gov't Accountability Office, GAO-04-261SP, *Principles of Fed. Appropriations Law* 2-41 (2004). There are many examples of Congress authorizing the establishment of corporations for public purposes. *See, e.g.*, 47 U.S.C. § 396(b) (authorizing the Corporation for Public Broadcasting); Rail Passenger Service Act of 1970,

Pub. Law. No. 91-518, § 310, 84 Stat. 1327, 1330 (1970) (authorizing Amtrak). The International Broadcasting Act authorizes multiple organizations, including Radio Free Asia (22 U.S.C. § 6208) and Radio Free Afghanistan (*id.* § 6215). But Open Technology Fund is not among them.[3] In fact, it's not even mentioned in the statute. Nor was Open Technology Fund incorporated by the agency's CEO or anyone else in the government: It was incorporated solely by its founder, Libby Liu, without "permission or authorization from Congress or from any part of the Executive Branch." JA236. In a recent report to Congress, the agency acknowledged Open Technology Fund's status "as an independent non-profit organization." JA251. And, in this litigation, the government has conceded that OTF was not "established by or under the authority of Congress or the U.S. Agency for Global Media." ECF No. 12.

The government's reading—that *any* organization that receives a grant from the Agency for Global Media is "authorized under" the Act—is contradicted by the text of the Act itself, under which some provisions expressly apply to all grantees while others apply only to organizations authorized under the statute. For example, § 6204(b) provides that the CEO "shall respect the professional independence and

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

integrity" of all "grantees." And § 6209(c) applies to "Radio Free Europe, Radio Free Asia, or the Middle East Broadcasting Networks *or any other grantee or entity provided funding by the agency*." Congress could have used identical language in § 6209(d), the immediately following provision, to give the CEO remove-and-replace authority over all grantees. But it did not. Instead, it used a more limited construction, encompassing only those organizations "authorized under" the Act. Had Congress intended for this provision to apply to all grantees, "it knew how to do so." *Custis v. United States*, 511 U.S. 485, 492 (1994). But "where," as here, "Congress includes particular language in one section of a statute but omits it in another section of the same Act," it must be "presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

The government would ignore these intentional statutory distinctions and collapse the categories. But Congress distinguished between grantees and authorized organizations for good reason. As the district court concluded, if the mere receipt of funds were sufficient to make an entity "authorized under" the Act, then "any grantee of the" agency would hand "control over its board and officers to the whim" of the government. JA386.

2. Not only is the government's reading of the statute contrary to its plain language, its atextual interpretation would pose serious constitutional problems that a plain reading avoids. On the government's view, the statute allows an

unprecedented level of unwanted government intrusion into a private organization engaged in expressive activity.

Under the First Amendment, it is well established that "the ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012). But that "[f]reedom of association would prove an empty guarantee if associations could not limit *control over their decisions* to those who share the interests and persuasions that underlie the association's being." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574-75 (2000) (emphasis added). Thus, "a corollary of the right to associate is the right not to associate." *Id.*

"Government actions that may unconstitutionally burden this freedom may take many forms, one of which is intrusion into the internal structure or affairs of an association, like a regulation that forces the group to accept members it does not desire." *Dale*, 530 U.S. at 648. The government asks this Court to adopt a reading of the International Broadcasting Act that would permit it not only to intrude into the internal affairs of a private nonprofit—an intrusion the Supreme Court in *Dale* held itself violates the First Amendment—but to go even further, and "control" the organization's "decisions" by firing the organization's entire executive leadership and replacing its board of directors with a board consisting of a majority of federal-government officials. *Jones*, 530 U.S. at 574-75. It is hard to conceive of a government

action more hostile to associational freedom than a "hostile takeover" of a nonprofit organization engaged in expressive activity. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 692-93 (2010).

A nonprofit doesn't lose its First Amendment freedoms merely by accepting government funds. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214-15 (2013). If Congress were to pass a law tomorrow giving the Secretary of Health and Human Services the power to replace the board of any independent nonprofit that, for example, received government funding to combat AIDS, that law would be unconstitutional. If Congress allowed the Secretary of Transportation to replace Amtrak's board, on the other hand, there would be no such problem. In keeping with the long history of "Government-created and -controlled corporations over the years," when "the "Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation"—as it did with Amtrak—the corporation is effectively part of the government for First Amendment purposes. *Lebron v. Nat'l R.R. Passenger Corp.*, 115 S. Ct. 961, 972, 974 (1995). This basic distinction—between an impermissible government takeover of a private organization and the government's permissible control of its own creature—is baked into § 6209(d).

Unlike Amtrak, Open Technology Fund is not a government corporation. It's a private nonprofit. Its board of directors and officers, therefore, have the

constitutional right to associate with each other through their independent nonprofit organization for the common purpose of expressing and promoting their common views and mission—their commitment to "advance Internet freedom in repressive environments" worldwide; "counter attempts by authoritarian governments" to "control the Internet and restrict freedom of information and association online"; and "protect journalists, sources, and audiences from repressive surveillance and digital attacks." JA194-95. They also have the right *not* to associate with those they justifiably perceive as philosophically opposed to their mission and views. *See* JA198.

Because the government's reading thus presents a "substantial constitutional question," there must be "clear evidence that Congress actually intended" this result. *Peretz v. United States*, 501 U.S. 923, 930 (1991). Where "an alternative interpretation of the statute"—one that limits the statute's reach to organizations authorized by Congress—"is 'fairly possible,'" the courts are "obligated" to adopt that construction. *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001). Here, the alternative to the government's reading is not only "fairly possible," it is compelled by the plain text of the statute. There is only one plausible reading of the Act: The CEO's section 6209(d) authority to remove and replace officers and directors applies only to organizations that have received congressional authorization. It does not apply to Open Technology Fund.

B. Because the statute does not give USAGM authority over OTF, the bylaws' incorporation of the statute cannot either.

The district court held that although the International Broadcasting Act does not empower the government to take over a private nonprofit, OTF itself—through its bylaws—chose to grant the government that power. This would be an extraordinary, and extraordinarily unusual, choice. At the root of American corporate law is the principle that corporations are self-governing and free from government control. That fundamental independence has been established since the nineteenth century, when the Supreme Court held unconstitutional an attempted government takeover of Dartmouth College. *Dartmouth College* 17 U.S. at 649. As Chief Justice Marshall wrote, the College was a private entity, not a "civil institution, participating in the administration of government." *Id.* "Its trustees or governors were originally named by the founder, and invested with the power of perpetuating themselves." *Id.* The government, therefore, could not take it over. *See id.* Since *Dartmouth College*, the idea of government takeovers of private corporations has been virtually unheard of in American law and society. *See Youngstown*, 43 U.S. 579.

Such a takeover is even more problematic where, as here, the corporation in question is a nonprofit organization dedicated to expressive activity. In such cases, the First Amendment prohibits government "intrusion into the internal structure or affairs of an association." *Dale*, 530 U.S. at 647-48. This bedrock principle is also reflected in the default rules established by state corporate law, which in the District of

Columbia presume that a corporation's board of directors—not the government—is responsible for removing and appointing officers and directors. *See* D.C. Code §§ 29-406.08(b), (c); 29-406.10(a). For a private organization to voluntarily surrender its autonomy to the government would thus be a remarkable decision, one courts may not lightly assume an organization has made. A court may only conclude that an organization has ceded its independence if the government demonstrates the organization knowingly, voluntarily, and intelligently waived its First Amendment right to freedom of association. In other words, the government cannot take over a private organization unless the organization has clearly expressed its intent to allow the government to do so.

Open Technology Fund's bylaws contain no such clear expression of intent. To the contrary, the bylaws provide—in accordance with two hundred years of American corporate law—that OTF's officers and directors "shall be" appointed and removed by the OTF board. To be sure, the bylaws incorporate the International Broadcasting Act. But, as the district court itself held, nothing in that statute empowers the government to take over purely private nonprofits.

1. An organization cannot cede its independence and right of self-governance absent a clearly expressed intent to do so.

The deep-rooted principle that private organizations are independent of government is enshrined in state laws governing corporations. Because Open

Technology Fund is incorporated in the District of Columbia, the relevant law is the D.C. Nonprofit Corporation Act, D.C. Code § 29-401.01 *et seq.*, which "regulates the governance of nonprofit organizations incorporated under District of Columbia law." 28(j) Letter (July 20, 2020), Ex. A ¶ 10. The Act provides a series of default rules that govern D.C. nonprofits, including the "general presumption" "that the board of directors is responsible for removing directors." *Id*; *see* D.C. Code § 29-406.08(b), (c). Similarly, there is a general presumption that appointments to the board are determined by the existing board, *id.* § 29-406.10, as are the appointment and removal of officers, *id.* §§ 29-406, 29-406.43. Thus, in the absence of language clearly giving away control, it is a nonprofit's board of directors—not the federal government—that chooses its own directors and officers.

That baseline presumption of organizational independence is strengthened by the First Amendment principle of associational freedom—particularly where, as here, the organization is engaged in expressive activity. As explained above, under the First Amendment, the government's attempt to exercise "control over" an organization's leadership is the greatest possible "intrusion in the internal structure or affairs" of the organization—an "unconstitutional[] burden" on associational freedom. *Dale*, 530 U.S. at 647-48. Although constitutional rights may be waived by contract (or bylaws), doing so requires clear and convincing evidence that the waiver is "voluntary, knowing, and intelligently made." *D.H. Overmyer Co. v. Frick Co.*, 405 U.S.

174, 185, 187 (1972); *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993); *DNC v. RNC*, 673 F.3d 192, 205 (3d Cir. 2012). And when an incumbent board defends against an attempted takeover of a nonprofit organization—especially a *government* takeover—"deferential review of defenses is appropriate to permit associations to define and limit their membership in order to control the organization's expression." Reiser, *Nonprofit Takeovers: Regulating the Market for Mission Control*, 2006 B.Y.U. L. Rev. 1181, 1251 n.244 (citing *Dale*, 530 U.S. at 648).

2. The government has not shown that Open Technology Fund's bylaws clearly expressed an intent to cede the organization's independence to the government.

The government has not (and cannot) demonstrate that OTF knowingly, voluntarily, and intelligently ceded its independence to the government. To the contrary, OTF's bylaws unambiguously reserve to the organization itself control over its officers and directors.

a. "The principles governing the construction of contracts also govern the construction of by-laws." *C & E Servs., Inc. v. Ashland, Inc.*, 498 F. Supp. 2d 242, 265 (D.D.C. 2007); *see Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 361 (D.C. 2005). Thus, when interpreting corporate bylaws under District of Columbia law, the court must "look first to the actual language of the [bylaws] and give that language its plain meaning." *Id.* (quoting *Capital City Mortg. Corp. v. Habana Village Art & Folklore, Inc.*, 747 A.2d 564, 567 (D.C. 2000)). And where this plain meaning is unambiguous, courts

should stick to the text. *See 1230-1250 Twenty-Third St. Condo. Unit Owners Ass'n, Inc. v. Bolandz*, 978 A.2d 1188, 1191 (D.C. 2009).

The bylaws of Open Technology Fund are unambiguous: They do not provide any independent authority to the Agency for Global Media CEO to remove or appoint the organization's officers or directors. The bylaws provide that OTF's directors "shall be elected by the Board of Directors … upon majority vote" or "as *may be* authorized by 22 U.S.C § 6203 et seq. [the International Broadcasting Act]." JA148 (emphasis added). Similarly, directors may be removed "for cause" by a vote of two-thirds of directors, JA151, or "as *may be* authorized by 22 U.S.C. § 6203 et seq," JA148 (emphasis added). Officers can be appointed and removed in a similar manner, either by a vote of directors or "as *may be* authorized by 22 U.S.C. § 6203 et seq." JA153 (emphasis added). Finally, the bylaws state that "the appointment of a Federal official as Director or Officer by the USAGM [CEO] shall not be deemed a conflict of interest, *provided that* such appointment … [is] authorized under the Act." JA158 (emphasis added).

These provisions incorporate the International Broadcasting Act. But that's all they do. They do not confer any authority upon the CEO that he does not possess by virtue of the Act alone. When "a contract incorporates a regulation," the regulation "becomes a part of the contract … as if the words of that regulation were set out in full." *U.S. ex rel Dep't of Labor v. Ins. Co. of N. Am.*, 131 F.3d 1037, 1042 (D.C. Cir. 1997).

By providing that officers and directors may be appointed or removed "as may be authorized by 22 U.S.C. 6203 et seq.," Open Technology Fund thus effectively included a provision in its bylaws granting the agency's CEO appointment and removal authority, as the statute provides, over an "organization that is … authorized under" the Act. But Open Technology Fund is not "authorized under" the Act, so the bylaws do not give Pack that authority.

b. Contrary to the district court's conclusion, this plain-text reading does not render the bylaws' references to the statute meaningless. JA394. At the time its bylaws were enacted, Open Technology Fund was "hopeful that [it] would one day get express authorization from Congress that would put [it] on the same footing as congressionally-authorized grantees like Radio Free Europe and Radio Free Asia." JA411. Obtaining such authorization—which would statutorily assure OTF of its longevity, congressional support, and continued funding—would be a reasonable trade for giving up some measure of its independence. As its founder and incorporator, Libby Liu, explains, that expectation "guided [the founders'] intent in both the bylaws and the articles [of incorporation]." *Id.*

Open Technology Fund, in other words, drafted its bylaws with an eye towards the future, anticipating that Congress would someday authorize the organization. Then—and only then—would the CEO of the Agency for Global Media have remove-and-replace authority over OTF under § 6209(d). *See, e.g.*, Open Technology

Fund Authorization Act, H.R. 6621, 116th Cong. (2020). But Liu "never understood … the bylaws to give the CEO of [the agency] the power to remove or replace [OTF's] officers or directors *absent* congressional authorization of OTF." JA412 (emphasis added). "If we had been asked … to waive our right to govern ourselves as an independent organization in this manner," she says, "we would have declined." *Id.*

This future-oriented drafting is apparent from the plain text of the bylaws. The bylaws require that the appointment and removal of OTF's officers and directors operate "in compliance with" the Act "*as it may be amended from time to time*." JA147 (emphasis added). This language "reveal[s] a clear intention" that the bylaws incorporate "future changes in the regulation." *Peterson v. D.C. Lottery & Charitable Games Bd.*, 673 A.2d 664, 667 (D.C. 1996). And the key phrases in the provisions on which the district court relied—"may be" and "provided that"—indicate the *future possibility* that OTF will receive congressional authorization. *See Augustine Med., Inc. v. Progressive Dynamics, Inc.*, 194 F.3d 1367, 1371 (Fed. Cir. 1999) ("The phrase 'may have' is necessarily future-oriented. … [I]t implies a *future possibility* …."); *Wash. Props., Inc. v. Chin, Inc.*, 760 A.2d 546, 549 (D.C. 2000) ("[W]ords and phrases such as … 'provided that' … are commonly used to indicate that [the provision] has expressly been made conditional."). If the bylaws purported to independently grant authority to the agency's CEO—above and beyond what he possesses under the Act—there would be no need for this contingent language. Instead, in permitting appointment and removal of

officers and directors "as may be authorized by" the Act, the bylaws "continuously link" the government's authority under the bylaws to its authority under the Act, "so as to ensure ongoing parity between the two." *Jam v. Int'l Fin. Corp.*, 586 U.S. __, 139 S. Ct. 759, 768 (2019).

c. The Attorney General of the District of Columbia has come to the same conclusion: Open Technology Fund's bylaws do not "grant[] the USAGM CEO the authority to remove and replace OTF's Board of Directors or its officers." 28(j) Letter (July 20, 2020), Ex. A. On July 20, the D.C. Attorney General stepped in "to resolve [the] dispute between the two dueling Boards of Directors that has paralyzed the Open Technology Fund." Press Release, Office of the Attorney General for the District of Columbia, AG Racine Files Lawsuit to Resolve Presence of Dueling Boards at District Nonprofit Open Technology Fund (July 20, 2020) https://perma.cc/BKK8-URSJ. As a matter of District law, the Attorney General explained, Open Technology Fund's bylaws are "clear": "only the organization's Board of Directors—not USAGM, its leadership, or any other body—has the authority to appoint or remove OTF directors." *Id.*

D.C.'s Nonprofit Corporation Act gives the Attorney General a central role in nonprofit corporate governance, *see* D.C. Code § 29-401.60, supplementing his primary common-law authority in this sphere. *See Hooker v. Edes*, 579 A.2d 608, 612 (D.C. 1990); *He Depu v. Yahoo!*, 950 F.3d 897, 905 (D.C. Cir. 2020) (recognizing this

"traditionally" exclusive common-law authority). As the official "charged with its administration," his interpretations under the Act warrant "great deference." *Classified Directory Subscribers Ass'n v. Public Service Comm'n*, 383 F.2d 510, 514 (D.C. Cir. 1967). "No principle of corporation law" is "more firmly established than a State's authority to regulate domestic corporations." *CTS v. Dynamics Corp.*, 481 U.S. 69, 89 (1987). And "it is well within the State's role as overseer of corporate governance" to ensure that the lawful stakeholders have "an effective voice" *before* a "hostile takeover." *Id.* at 77, 91-92. This Court should give weight to the Attorney General's conclusion.

3. Open Technology Fund's grant agreement with the government further bolsters, rather than contradicts, OTF's independence.

The district court's conclusion that the bylaws must confer authority on the agency's CEO to appoint and remove Open Technology Fund's officers and directors—despite the bylaws' plain text to the contrary—is based on a misreading of OTF's 2019 grant agreement. But the district court should not have relied on the grant agreement in the first place. Open Technology Fund's bylaws are unambiguous. They should, therefore, be interpreted based on their plain terms, without resort to "extrinsic evidence." *Bolandz*, 978 A.2d at 1191.

In any event, the grant agreement supports *OTF*'s argument that the government lacks remove-and-replace authority over its officers and directors. Presumably for that reason, the government itself has not relied on the grant agreement as an

independent source of authority for Pack's actions. *See* JA205, 207; ECF 7 at 7-8. In doing so, the district court struck out on its own. But because the court lacked the benefit of any briefing, evidence, or input from the parties on how to interpret the agreement, the court misread it. The court relied on a single sentence in the agreement, which stated that Open Technology Fund's "articles of incorporation, by-laws or other constitutional documents shall provide that the Board of Directors of [OTF] *may* consist of some or all of the current members of the USAGM … and other technical experts, as appropriate." JA37 (emphasis added).[4] Although the court found this sentence "ambiguous," JA393, it ultimately concluded that it is best read as "allowing USAGM officials to be placed on the OTF board, *presumably by the USAGM CEO*," JA395.

This reading is manifestly wrong. The grant agreement does not require Open Technology Fund to give the CEO authority to appoint or remove OTF's officers and directors. It states only that "some or all" of the members of the USAGM Board of Governors "may" sit on OTF's board. It doesn't say anything about the CEO being able to appoint those members (or, for that matter, any members of OTF's

[4] The "members of the USAGM" referenced in the 2019 grant agreement refers to members of the USAGM Board of Governors—there are no members of USAGM itself. This error is remedied in the now-operative 2020 grant agreement, which requires that OTF's "articles of incorporation, by-laws or other constitutional documents shall provide that the Board of Directors of [] may consist of some or all of the current members of the USAGM Board of Governors … and other technical experts, as appropriate." JA342; *see also* JA409-10.

board). It doesn't even say that there *must* be USAGM board members on OTF's board—only that there "*may*" be.[5]

Contrary to the district court's conclusion, therefore, OTF's bylaws did not need to provide the government remove-and-replace authority to satisfy the grant conditions. OTF's bylaws satisfy the grant simply by not prohibiting members of the USAGM Board from sitting on the OTF board. Indeed, OTF has never permitted the government to appoint its directors or officers—and the government has never asserted that OTF is in violation of its grant agreement for that reason. *See* ECF 7 at 7-8 (government brief failing to even once mention the grant agreement as authority supporting Mr. Pack's actions).

Even assuming, as the district court did, that the grant agreement "means that OTF was required to adopt bylaws … allowing USAGM officials to be placed on the OTF board … by the USAGM CEO," JA395, at worst, Open Technology Fund would be in breach of its grant agreement by failing to include the required provision in its bylaws. It would not mean that the bylaws should be read to say something

[5] This permissive language is particularly notable when Open Technology Fund's grant agreement is compared to the grant agreements between the agency and the broadcast networks. These grant agreements all provide that the nonprofits' boards "*shall* consist of the current members of" the Board of Governors "and of no other members." JA65 (Radio Free Asia); JA92 (Radio Free Europe); JA122 (Middle East Broadcasting Networks).

they do not say. If the government believes OTF breached its grant agreement, it can sue OTF for breach of contract; it cannot just take over the organization.

* * *

The government has not rebutted the presumption, established both by D.C. law and the First Amendment, that corporations are self-governing, free from state intrusion into their internal affairs. Given that OTF's bylaws reserve for the organization—not the government—the power to appoint and remove its officers and directors, the government cannot possibly demonstrate that the organization yielded that power, let alone that it did so knowingly and voluntarily.

II. Absent injunctive relief, Open Technology Fund will continue to suffer irreparable harm to its operations, public perception as an independent voice for internet freedom, and First Amendment rights.

The district court found that Open Technology Fund failed to show irreparable harm "for substantially the same reasons that its case fails on the merits"—in other words, because the court believed OTF was unlikely to succeed on the merits, it held that OTF could not be irreparably harmed absent a preliminary injunction. JA402. That's wrong. This Court has held that "irreparable harm analysis" must "assume[], without deciding, that the movant *has* demonstrated a likelihood that the non-movant's conduct violates the law." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006) (emphasis added).

Under that requirement, there can be no doubt that the actions of Pack and his designees have resulted in irreparable harm to OTF—not only to its programs and operations, but also to its hard-earned reputation of independence from government control. And the government's interference with OTF's constitutional right to freely associate with like-minded individuals for a common mission further compounds the harm. Without a preliminary injunction, this harm will continue to accrue, irreversibly damaging an organization critical to advancing internet freedom worldwide.

1. The government's attempted takeover of Open Technology Fund has already caused the organization significant irreparable harm. Pack's hostile actions—which have continued to escalate even after the plaintiffs filed this appeal—"imperil virtually every aspect of [OTF]'s operations and existence," including its ability "to chart [its] own course as an organization"; its ability "to stay true to [its] mission and principles"; and its "ability to protect the vulnerable communities facing repressive regimes" that trust it "to safeguard their entities and enable their important work around the world." JA200. These actions have led to reduced partnership applications, uncertainty as to whether the organization will be able to open new funding rounds, and months of delays in hiring critical staff. *See* Cunningham Decl. ¶ 19. Pack's recent flurry of demands has also imposed substantial burdens on the organization's leadership and staff—forcing them to spend their time and energy

addressing his designees' unexplained requests for in-person office inspections, for example, and demands for documents and records, instead of carrying out OTF's core activities. *See id.*; JA216, 528-29. Because these "obstacles unquestionably make it more difficult for [OTF] to accomplish [its] primary mission," OTF has suffered "irreparable harm." *League of Women Voters*, 838 F.3d at 9.

The government attempts to dismiss these real-world harms, asserting that they're not "irreversible." Injunction Opp. 21-22. But Open Technology Fund has *already* lost research, grant-making, and partnership opportunities because of Pack's actions. *See* Cunningham Decl. ¶ 19. These lost opportunities can't be remedied by damages or "other corrective relief." *England*, 454 F.3d at 297-98. Nor can the opportunities that will continue to be lost should Pack be permitted to continue his takeover during the pendency of this lawsuit.

The government has also argued that any harms are illusory because Pack's newly designated board may decide to operate under the "same" bylaws, mission, and principles. Injunction Opp. 21. But this is a battle over the mission of an association dedicated to expressive freedom online. *See* Reiser, 2006 B.Y.U. L. Rev. at 1185 (noting that the "limitation" of a nonprofit's mission "will be of little comfort to" organizations "facing takeover activity" because "the expressions of mission in corporate charters are typically quite broad"). The members of Pack's "purported new Board not only lack expertise in the area of technology and internet freedom, but

have publicly aligned themselves with causes in direct conflict with many of the ideals that Open Technology Fund espouses and the communities that [OTF] supports." JA198. For good reason, OTF fears that after the government's "takeover, resources of the organization will be used by [the defendants] to advance goals different from, or even adverse to, the goals for which those resources were originally earned." Reiser, 2006 B.Y.U. L. Rev. at 1186. And any such actions taken before this case is finally resolved—eliminating longstanding research partnerships, or steering funding from existing grants to controversial projects, *see* Verma & Wong, *Trump Appointee Puts Internet Freedom at Risk, Critics Say*, N.Y. Times (July 4, 2020) https://perma.cc/89KJ-TK8G—can't be unwound later.

Thus, even where associational freedom isn't at stake, courts have repeatedly held that "in corporate control contests, the stage of preliminary injunctive relief, rather than post-contest lawsuits, is the time when relief can best be given." *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 42 (1977). Changes in corporate control "are often followed by … substantial changes in the structures of the enterprises involved." *F.T.C. v. Exxon Corp.*, 636 F.2d 1336, 1342 (D.C. Cir. 1980). "Once those changes occur, it is often impossible … to compel a return to the status quo, and the legality" of the takeover "may become essentially a moot question." *Id.* Thus, "[e]rring on the side of granting the injunction becomes especially imperative in corporate control contests because," later on, it may be "virtually impossible[] for a court to unscramble

the eggs." *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261 (2d Cir. 1989).[6] These rationales compelling preliminary relief in the ordinary takeover context are even more pronounced in an extraordinary case like this one, where the *federal government* is attempting to take over an *independent nonprofit* dedicated to freedom of expression.

In *Youngstown,* the Supreme Court famously upheld a preliminary injunction barring the federal-government takeover of privately owned steel mills absent statutory authority. 343 U.S. 579. The government argued that "no preliminary injunction should be issued because the companies had made no showing that their available legal remedies were inadequate or that their injuries from seizure would be irreparable." *Id.* at 584. But the Court had no trouble concluding that the steel companies had shown a likelihood of irreparable harm because "seizure and governmental operation of these going businesses were bound to result in many present and future damages of such nature as to be difficult, if not incapable, of measurement." *Id.* at

[6] *See also, e.g.*, *Pa Prof'l Liab. Joint Underwriting Ass'n v. Wolf*, 328 F. Supp. 3d 400, 411 (M.D. Pa. 2018) (finding that state government's "dismantling" of a nonprofit, including "ousting its board and president to be replaced by political appointees," constituted irreparable injuries "adequate to require preliminary injunctive relief"); *Simon Prop. Grp., Inc. v. Taubman Ctrs., Inc.*, 262 F. Supp. 2d. 794, 798-99 (E.D. Mi. 2003) (finding stay warranted as to an attempted corporate takeover because, "[w]ithout a stay," the party "would be free to move forward with its takeover bid," which would "irreversibly alter[]" the "status quo"); *Graphic Sciences, Inc. v. Int'l Mogul Mines Ltd.*, 397 F. Supp. 112, 114, 128 (D.D.C. 1974) (where corporation claimed that "defendants were and are engaged in a conspiratorial attempt to seize control" in a hostile takeover, court found that "[t]o refuse to issue a temporary injunction would be possibly to permit defendants to reap the benefits of their own wrongful action").

584-85. The harm here is more obviously irreparable: The government is attempting a permanent takeover of control of a corporation, not a temporary seizure of the means of production; the harm is not merely economic, but concerns the mission of an association dedicated to expressive activity; and the serious threat to the safety of partners in repressive regimes around the world makes the harm here particularly irreparable.

2. Apart from irreversibly damaging OTF's programs and operations, Pack's takeover efforts are more broadly undermining Open Technology Fund's public perception as an independent and honest partner to journalists and activists in repressive regimes around the world. *See* JA200, 529. As the motions panel explained, "the government's actions have jeopardized OTF's relationships with its partner organizations, leading its partner organizations to fear for their safety." Per Curiam Order at 2. And prospective partners, grantees, and applicants are now hesitant to work with OTF out of concerns that its independence has been compromised. *See, e.g.*, JA198-200, 529-30; Cunningham Decl. ¶ 19. In fact, OTF has already been denied the opportunity to sponsor a project on human-rights issues in Hong Kong because the applicant believed that "OTF has lost credibility as a result of Pack's recent actions." JA529-30. And these problems are likely to only get worse absent an injunction. *See* Cunningham Decl. ¶ 7.

The harms to Open Technology Fund's hard-won global trust and goodwill are "beyond remediation." *England*, 454 F.3d at 297. The government doesn't contest this, instead arguing only that these harms are too "amorphous" and based on "baseless fears" of "third part[ies]." Injunction Opp. 22. But that's both legally and factually wrong. First, the "[l]oss of intangible assets such as reputation and goodwill can constitute irreparable injury." *United Healthcare Ins. v. AdvancePCS*, 316 F.3d 737, 741 (8th Cir. 2002). That is particularly so for "loss of control" over an organization's "reputation" and "goodwill." *Herb Reed Enters. v. Fla. Entm't Mgmt.*, 736 F.3d 1239, 1250 (9th Cir. 2013). And second, the harm here is neither "amorphous" nor speculative. As noted, partners have already begun to cut ties with OTF because they no longer perceive it as an independent, honest broker. *See* JA529-30.

The reputational harm to Open Technology Fund—and in turn, the lasting damage to its effectiveness as a champion of global internet freedom—alone warrants injunctive relief. As the district court itself observed, "[i]f [the plaintiffs] are correct, the result will be to diminish America's presence on the international stage, impede the distribution around the world of accurate information on important affairs, and strengthen totalitarian governments everywhere." JA406. It's difficult to imagine harms more irreparable than that.

3. Finally, both Open Technology Fund and the individual board-member plaintiffs have suffered irreparable harm because the government has interfered with

their First Amendment right to freely associate with like-minded persons to further a common mission. *See Wolf*, 328 F. Supp. 3d at 411. The government has barely addressed these constitutional harms. Like the district court, it's simply dismissed them by referring to its arguments on the merits. Injunction Opp. 23 n.5.

Yet "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association" than the federal government's attempt to "force[] the group to accept members it does not desire." *Jaycees*, 468 U.S. at 623; *see also Dale*, 530 U.S. at 647-48. Sanctioning the government's attempted takeover of OTF would deprive it and the board-member plaintiffs of their First Amendment "freedom *not* to associate" with individuals who seek to undermine OTF's longstanding mission. *Jaycees*, 468 U.S. at 623 (emphasis added). And the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016); *see Elrod v. Burns*, 427 U.S. 347 (1976).

These constitutional concerns carry special weight here, where "Congress's intent has been manifest that" grant-funded organizations like Open Technology Fund "are to enjoy independence." *Ralis*, 770 F.2d at 1125. Transforming OTF from an independent organization "into [a] house organ[] for the United States

Government" would be "inimical to [its] fundamental mission." *Id.* For these reasons too, OTF has demonstrated irreparable injury.[7]

III. The remaining equitable factors also support a preliminary injunction.

The balance of the equities and public interest—which "merge when the Government is the opposing party"—likewise weigh in favor of injunctive relief here. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The government doesn't explain how it could possibly be harmed by having to wait until this lawsuit is completed before seizing control of a private nonprofit organization. That is because it cannot: The government will suffer *no* discernable harm if the pre-takeover status quo is maintained. There is no reason why Pack cannot wait until after the merits of this case are adjudicated before, for example, commandeering physical control of Open Technology Fund's vacant offices, installing a new CEO, or redirecting the organization's grant funding.

Yet the government has aggressively moved forward with its takeover efforts notwithstanding this appeal, wielding the district court's denial of preliminary relief as if it somehow were a final court order "mandating the immediate federal-

[7] The district court was also wrong to dismiss the serious irreparable harm to the ousted board-member plaintiffs based on federal-employment cases, which rest on the principle that "the [g]overnment has traditionally been granted the widest latitude in the dispatch of its own internal affairs." *Sampson v. Murray*, 415 U.S. 61, 83 (1974); *see* JA402-04. This isn't an employment case. It's a case about the government's intrusion into the internal affairs of a private nonprofit organization.

government takeover of OTF." Cunningham Decl. ¶ 3. Pack's "self-help" remedies here disrupt the regular litigation process and disrespect the courts' role to "provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help." *Talamini v. Allstate*, 470 U.S. 1067, 1070-71 (1985) (Stevens, J., concurring). Allowing Pack to unilaterally take over OTF—when the dispute turns entirely on whether he has that authority in the first place—cannot further the public interest.

In short, the government has "failed to point to any countervailing injury" to the public interest or "any exigency justifying its desire" to "immediately" seize Open Technology Fund. *Wolf*, 328 F. Supp. 3d at 412. By contrast, OTF will suffer long-term, irreversible damage to its reputation, operations, and ability to advocate for freedom of expression and association absent injunctive relief. Nor will the public interest be served by permitting a rogue executive-branch official to wield sweeping, unchecked, and unlawful power over a private nonprofit organization that Congress—by statute—prohibited him from wielding. That is particularly true when this overreach will cause lasting, irreparable harm to the global public—especially vulnerable groups in repressive and authoritarian societies—who suffer from the loss in integrity and public confidence that comes from OTF's diminished independence. As a result, as both the district court and the agency itself have recognized, OTF will lose the "flexibility needed to empower innovation and compete against adversaries

to a free and open internet," thereby harming the country's long-term foreign-policy interests and "diminish[ing] America's presence on the international stage." JA251, 406.

CONCLUSION

The district court's denial of the plaintiffs' motion for a preliminary injunction should be reversed.

Respectfully submitted,

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I hereby certify that on July 22, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

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