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. Global Media Agency,
Defendant-Appellee.

REPLY IN SUPPORT OF PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

The government doesn't deny that it will continue to aggressively push for an immediate federal takeover of OTF, a private nonprofit organization, while this appeal is pending. Unable to defend either the district court's rationale or its own stance below, the government now advances a convoluted new justification for the seizure of OTF. The threshold legal question is (or should be) straightforward: Does the government have any statutory authority to remove or replace OTF's officers or directors? But lacking confidence in its answer, the government now urges this Court to duck that question. It's easy to see why: The government's theory is that OTF should be deemed an "organization … authorized under" the statute—even though OTF *hasn't* been authorized under the statute—because it's "akin to"

the broadcasting networks "that are mentioned by name." Opp. 16. But OTF isn't a broadcasting network. The relevant statute, bylaws, and grants all reflect a fundamentally different relationship between the government and the broadcasting networks, on the one hand, and OTF, on the other. Just as importantly, OTF's bylaws do not independently confer on the government any authority that it lacks under the statute. Because OTF is therefore likely to succeed on the merits, and because the weighty harms of allowing a takeover now cannot be remedied by damages later, the status quo should be preserved while this appeal is pending.

I. OTF's relationship with the government is fundamentally different from that of the broadcasting networks.

The government's mantra (at 14, 20, 30) is that OTF is "identically situated" to the international broadcasting networks. Not so. 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. Any agency oversight over OTF is solely a function of OTF's *choice* to receive government funding as an "independent grantee," to meet needs "specific to OTF's unique mission." JA327. That funding exists because the agency may give grants not just for "broadcasting" but for other "related activities." 22

U.S.C. § 6204(a)(5). OTF is a private organization that "happens to receive federal funding"—"at least until now." JA236. If OTF concludes that the U.S. government is no longer a reliable ally in its mission, OTF may forgo government funding in favor of private philanthropic support. JA277.

In its grant agreements, the government recognizes OTF's distinct, independent status compared to the broadcasting networks. The networks' grants all require that their boards "*shall* consist of the current members of the [Agency's board] … and of *no other members*." JA65, JA92, JA122. OTF's grant, by contrast, does the opposite—it recognizes that OTF's board "*may* consist of *some or all* of the current members of the [Agency's board] … and other technical experts, *as appropriate*." JA37. This language—which "leaves … OTF to decide for itself" who sits on its board—"is a critical and intentional difference, reflective of OTF's independent status." JA411. The government ignores it.

Most importantly, unlike the networks, OTF has *never* received congressional authorization. OTF was incorporated by a private citizen without "permission or authorization from Congress or from any part of the Executive Branch." JA236, 245. She "never understood" the government to have "the power to remove or replace [OTF's] officers or directors absent congressional authorization." JA412.

II. The government offers no plausible reading of § 6209(d).

Statutory construction usually starts with the text. But the government jumps straight to canons of construction. Its lead argument (at 16) is that the (misquoted) phrase "*other* organizations … authorized under" the Act in § 6209(d) is a "catch-all phrase" that, following *noscitur a sociis* and *ejusdem generis*, "is properly construed as referring to organizations akin to those that are mentioned."

This argument depends on text that Congress didn't enact. Section 6209(d) does not say "*other* organizations"; it just says "organization[s]." Without the word "other," the government's invocation of the canons collapses. "[A]lmost all of the precedent invoking" *ejusdem generis* involves the word "other." *New Castle Cty., DE v. Nat'l Union Fire Ins. Co.*, 243 F.3d 744, 752 (3d Cir. 2001). The phrase "organization … authorized" does not reflect "general words" that can be read narrowly in light of "preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001). Rather, the phrase is *itself* a specific reference to "authorized" organizations—that is, as the district court recognized, organizations authorized by statute, like Radio Free Afghanistan, 22 U.S.C. § 6215, or incorporated by the CEO, *id.* § 6209(a)(1).

The statute isn't a list followed by a "catch-all." It's a list of three distinct categories: (1) the three named entities, (2) "any organization … established through the consolidation of such entities," and (3) "any organization … authorized under" the Act. In defining the third category, it isn't enough for the government to simply

rely on the first two; the phrase "organization … authorized under" must have its own meaning. The government offers none.

The "common thread" the government identifies among the named entities is that each is "authorized to operate as [a] United States international broadcaster[]." Opp. 17. But OTF isn't a "broadcaster" and isn't subject to the same "oversight" as the broadcast networks. The remaining commonalities—that the entities are "nonfederal" and "technically private"—would apply to any grant-funded corporation. The purpose of the canons is to *narrow* general terms to avoid giving them "unintended breadth"—not to extend their reach beyond the statute's subject. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

The government claims (at 18) that there is "nothing odd about" an interpretation of § 6209(d) that extends remove-and-replace authority to "any grantee of [] USAGM" because there are "only four nonfederal grantees"—the broadcasting networks and OTF. But the agency funds other nonprofits, including a civic organization that operates a daycare in the Philippines. *See* Gupta Decl., Ex. A. And nothing in the statute prevents the agency from issuing grants to additional organizations in the future. For the agency to possess remove-and-replace authority over such groups would be a surprising—and likely unconstitutional—result.

The government misses the constitutional significance of the line between entities that are "authorized" and those that aren't. If Congress passes a law tomor-

row giving the Secretary of Health & Human Services the power to replace the board of an independent nonprofit dedicated to government-funded AIDS work, that law would be unconstitutional. 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), and that includes the freedom from "intrusion into [its] internal structure or affairs," *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000). On the other hand, if Congress allows the Secretary of Transportation to replace Amtrak's board, there's no such problem because Amtrak is a "Government-created and -controlled corporation." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995). When the "Government creates a corporation by special law" and "retains for itself permanent authority to appoint a majority of [its] directors," it's effectively the government. *Id.* This basic distinction—between an impermissible government takeover and permissible control of the government's own creature—is baked into § 6209. A contrary reading invites constitutional problems that are best avoided.

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

The government's new position on appeal—that legal justification for a takeover of OTF arises from OTF's bylaws—depends on two mutually exclusive propositions. On the one hand, the government argues that this authority rests on the bylaws' incorporation of § 6209(d). On the other, it claims that this Court need

not decide whether § 6209(d) grants that authority because the bylaws independently provide it. Both cannot be true.

Because § 6209(d) does not grant remove-and-replace authority, to have any chance of showing that the bylaws *independently* provide takeover authority, the government would have to identify some language that does more than just incorporate § 6209(d). But it cannot. The provisions on which it relies (at 10-11) provide for appointments and removals "as *may be* authorized by," "in accordance with," or "pursuant to and in compliance with" the Act. None of that general language purports to independently grant appointment and removal authority. The government never claims otherwise. Despite its request that this Court refrain from interpreting § 6209(d), its argument (at 10) is only that the bylaws "incorporate" the "provisions of the Act," and that § 6209(d)—a "provision of the Act"—provides the authority.

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). To the extent that that the bylaws incorporate § 6209(d), they effectively include a provision granting the CEO appointment and removal authority over an "organization that is … authorized under" the Act. But OTF is not "authorized under" the Act. So the bylaws do not give Pack that authority.

The government argues (at 15) that the language in OTF's bylaws is "materially identical" to the language in the broadcasting networks' bylaws. But this ignores a key difference in OTF's bylaws, under which "the appointment of a Federal official as Director or Officer" by the Agency CEO "shall not be deemed a conflict of interest, *provided that* such appointment ... [is] authorized under the Act." JA158. The government (at 11) reads this provision as "*presuppos[ing]* that the CEO has the authority to appoint OTF's officers and directors." That is exactly backwards. The proviso is an express recognition of what OTF has argued all along: Its bylaws contemplate the CEO possessing this authority over OTF by statute only *if* ("provided that") the organization becomes authorized.

That conclusion does not, as the government argues, render the bylaws meaningless. OTF anticipated that it may "one day get express authorization from Congress." JA411. That future-oriented possibility "guided [its] intent" in drafting its bylaws. *Id.*

Finally, OTF's reading is reinforced by the D.C. Nonprofit Corporation Act's default rules and constitutional principles safeguarding freedom of association. The government barely grapples with either. Even if the bylaws' incorporation provisions were ambiguous (and they are not), these background principles would buttress OTF's reading. Mot. 16-18.

IV. OTF will continue to suffer irreparable harm without an injunction pending appeal.

The government doesn't mention or justify its escalating actions since this appeal was filed—including aggressive attempts to gain entry into and seize control of OTF's headquarters through misrepresentations to OTF's landlord. *See* Cunningham Decl. ¶¶ 9, 15. Nor does it commit to halting these actions. Absent an injunction, OTF faces continued attacks on its independence, *see* Aoun Decl., Ex. A, and this Court may lose its ability to adjudicate this appeal in an orderly manner.

The government claims (at 21-22) that the harms aren't "irreversible." But OTF has *already* lost research, grant-making, and partnership opportunities because of Pack's hostile actions—and more are sure to come. *See* Mot. 19 (citing declarations). These lost opportunities can't be remedied by damages or "other corrective relief." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297-98 (D.C. Cir. 2006). That Pack's "newly appointed board" may decide to "operate under the same bylaws" can't cure this harm. Opp. 21. This is a battle over the mission of an association dedicated to expressive freedom online. *See* Reiser, *Nonprofit Takeovers: Regulating the Market for Mission Control*, 2006 B.Y.U. L. Rev. 1181, 1185-86. 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. Any actions taken before this case is fi-

nally resolved—eliminating longstanding research partnerships, or steering funding from existing grants to controversial projects, *see* Verma & Wong, *Global Internet Freedom at Risk*, N.Y. Times (July 4, 2020)—can't be unwound later.

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." *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).

The 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. The irreparable harm flows not only from the loss of control but also the government's interference with the plaintiffs' First Amendment right to freely associate with like-minded people to further a common mission. *See Pa. Prof'l Liab.*

Joint Underwriting Ass'n v. Wolf, 328 F. Supp. 3d 400, 411 (M.D. Pa. July 18, 2018) (state government's attempted takeover of a nonprofit association, including "ousting its board and president to be replaced by political appointees," caused irreparable injury). There can be "no clearer example of an intrusion into the internal structure or affairs of an association." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). The government (at 23) dismisses this intrusion by citing the merits. But "irreparable harm analysis" must "assume[] … that the movant has demonstrated a likelihood that the non-movant's conduct violates the law." *England*, 454 F.3d at 303.

The government's attempted takeover has already undermined OTF's hard-won trust and goodwill with activists and journalists in repressive regimes around the world. *See* Mot. 19. The government doesn't contest this fact, instead arguing (at 22) that these harms are too "amorphous" and based on "baseless fears" of "third part[ies]." That's both legally and factually wrong. "Loss 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). And 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). Partners have begun to cut ties with OTF because they no longer perceive it as an independent, honest broker. JA529-30 (citing a recent example of a lost opportunity to advance Internet freedom in Hong Kong).

The government has "failed to point to any countervailing injury" to the public interest or "any exigency justifying its desire" to "immediately" seize OTF. *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 if this Court does not intervene to maintain the status quo pending appeal.

CONCLUSION

The Court should grant the injunction pending appeal.

Respectfully submitted,

/s/ Deepak Gupta

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I hereby certify that my word processing program, Microsoft Word, counted 2,599 words in the foregoing reply, exclusive of the portions excluded by Rule 32(g)(1). The document also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in proportionally spaced typeface in 14-point Baskerville font.

/s/ Deepak Gupta
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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2020, I electronically filed the foregoing reply 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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