

No. 08-103

In The
Supreme Court of the United States

REED ELSEVIER INC. *et al.*,

Petitioners,

v.

IRVIN MUCHNICK *et al.*,

Respondents,

LETTY COTTIN POGREBIN *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF *AMICI CURIAE* PUBLISHERS
IN SUPPORT OF REVERSAL**

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INTERESTS OF *AMICI CURIAE*

Amici are media publishers and organizations with two separate but related interests in this case.¹

First, *amici* have a strong interest in restoring and preserving the settlement invalidated by the Court of Appeals. *Amici* have published many thousands of articles that have been, or could be, presented in electronic databases and online archives. In the wake of this Court's decision in *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), legal uncertainty regarding the status of many of these articles required the stripping of archives and the difficult re-evaluation of previously disseminated information. The settlement painstakingly negotiated by the parties produced a welcome and important resolution to these complex, seemingly intractable problems. Some of the *amici* are "participating publishers"—publishers who are not parties to this litigation, but who have formally agreed to provide payments to freelance writers for past articles under the settlement's compensation agreement. See J.A. 150-51.² The Second Circuit's decision, however,

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, or their counsel, made a monetary contribution intended to fund the brief's preparation or submission. The parties' written consents accompany this brief.

² The Brief for the Muchnick Respondents incorrectly suggests that all participating publishers listed at J.A. 150-51 are "defendants." See Br. for Muchnick Resp'ts 5. Although the list at J.A. 150-51 includes some defendants in this action, it also includes a number of participating publishers who are not

once again has thrust into doubt the electronic display of extensive portions of media archives. *Amici* believe that the settlement in this case is lawful, and that it furthers important public policy objectives.

Second, *amici*, as owners of copyrights and disseminators of information, have a strong interest in the proper interpretation and enforcement of the nation's copyright laws. Copyright registration is a linchpin of the nation's copyright enforcement system. *Amici* believe that this mandatory precondition to instituting suit, whether jurisdictional or not, should be respected and rigidly enforced. The legal permissibility of the settlement in this case, which *amici* fully support, does not, and should not, rest on a weakening of this bulwark of intellectual property protection and enforcement.

The Newspaper Association of America (“NAA”) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The Associated Press (“AP”) is a global news agency organized as a mutual news cooperative under the Not-for-Profit Corporation Law of New York. AP has no parents, subsidiaries or affiliates

defendants or otherwise parties. None of the *amici* on whose behalf this brief is submitted is a party.

that have any outstanding securities in the hands of the public.

The Association of American University Presses is a membership organization representing 134 nonprofit scholarly publishers. Its members include presses affiliated with major research universities, scholarly societies, think tanks, and museums, and collectively they publish over 10,000 books and 880 journals in every field of scholarly endeavor.

Gannett Co., Inc. is an international news and information company that publishes 84 daily newspapers in the United States, including *USA Today*, and nearly 850 non-daily publications, including *USA Weekend*, a newspaper magazine. The company also owns 23 television stations and more than 100 web sites that are integrated with its publishing and broadcasting operations.

Hearst Corporation (www.hearst.com) is one of the nation's largest diversified media companies. Its major interests include: ownership of 15 daily and 49 weekly newspapers, including the *Houston Chronicle*, *San Francisco Chronicle* and *Albany Times Union*; interests in an additional 43 daily and 72 non-daily newspapers owned by MediaNews Group, including the *Denver Post* and *Salt Lake Tribune*; nearly 200 magazines around the world, including *Good Housekeeping*, *Cosmopolitan* and *O, The Oprah Magazine*; 29 television stations through Hearst-Argyle Television (NYSE: HTV) which reach a combined 18% of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E, History and ESPN; business publishing, including a minority joint venture interest in Fitch Ratings; Internet

businesses; television production; newspaper features distribution; and real estate.

Incisive Media, LLC is one of the world's fastest growing business-to-business information providers, serving the financial and professional services markets globally. Incisive Media's Legal division is the world's leading legal news and information organization. The division's products deliver timely and vital content to law firms, corporate attorneys, and legal professionals in North America, Europe and around the world. Incisive Media's integrated suite of products and resources includes: *Law.com*, *The American Lawyer.com*, *Legal Week*, *Legal Tech*, *Corporate Counsel*, *Law Journal Press*, *The National Law Journal*, *Law Technology News*, *New York Law Journal* and more.

Landmark Media Enterprises, LLC (formerly Landmark Communications) is a privately held media company headquartered in Norfolk, Virginia with interests in print and internet publishing, internet marketing/web services, and broadcast television.

Newsweek, Inc. publishes the weekly news and ideas magazines *Newsweek* and *Newsweek International* (distributed nationally and internationally, respectively), *Newsweek.com*, Arthur Frommer's *Budget Travel Magazine* (distributed nationally), and *BudgetTravel.com*.

North Jersey Media Group Inc. is an independent, family-owned printing and publishing company, parent of two daily newspapers serving the residents of northern New Jersey: *The Record* (Bergen County), the state's second-largest

newspaper, and *Herald News* (Passaic County). North Jersey Media Group also publishes more than 40 community newspapers serving towns across five counties in northern New Jersey.

The Washington Post, a wholly-owned subsidiary of The Washington Post Company, is a leading newspaper with a daily circulation of over 640,000 and a Sunday circulation of over 878,000.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The class action settlement between the parties in this case should be upheld. The settlement operates exactly as class action settlements can and should operate in complex civil disputes: it resolves, on a global and voluntary basis, difficult issues involving thousands of individuals and scores of publishers and databases, with a potential impact on many millions of users, readers and researchers. Any objections to the fairness or adequacy of the settlement could have been (and were) raised through the established mechanism of class action settlement adjudication—the opportunity to object and to opt out, with full notice of the settlement to affected parties. The Court of Appeals’ conclusion that the settlement must be jettisoned because the District Court lacked an independent jurisdictional basis for *adjudicating* a category of released claims included in the settlement is insupportable.

Amici respectfully suggest that in considering this case the Court should be cognizant of two important issues. First, the copyright registration provision, 17 U.S.C. § 411(a), sets forth a *mandatory* precondition to suit—one that, if not satisfied,

generally erects an absolute bar to pursuit of a copyright infringement claim. However this Court answers the question whether registration is “jurisdictional,” it should recognize the critical role registration plays as a prerequisite to litigation and as an indispensable element of any infringement claim. Congress has expressed that requirement in emphatic terms, and it has done so for sound and important policy reasons. That legislative choice must be respected.

Second, and contrary to the Court of Appeals’ understanding, the settlement in this case should be upheld whether or not the registration requirement is viewed as jurisdictional. If the requirement is viewed as mandatory but not jurisdictional, then the settlement should be upheld because the basis for the Court of Appeals’ *sua sponte* objection to the settlement evaporates. Even if the requirement is viewed as jurisdictional, however, the settlement should be upheld. A federal district court has the power, independent of its power to *adjudicate* a given claim, to approve a *release* of that same claim—so long as the released claim is part of a case that includes other claims over which the court has jurisdiction.

This case serves as a powerful illustration of the adverse effects of blurring the line between jurisdiction and release in the class action settlement context. The parties here worked long and hard to reach an agreement that would permit publishers to reopen their full archives to the public—a benefit to publishers, to authors, and to the general public. The matter had been finally resolved after years of intense negotiation and mediation, and all (including

amici) believed they could move forward. Now, in the wake of the Second Circuit’s ruling, a new era of uncertainty has dawned, and significant portions of the archives are closed once more. That result cannot be squared with the purposes behind the class action device or settlement law generally. Nor can it be reconciled with the nation’s interest in the broad dissemination and availability of information—a fundamental objective of the nation’s copyright system.

ARGUMENT

I. WHETHER “JURISDICTIONAL” OR NOT, THE REGISTRATION REQUIREMENT IS MANDATORY AND INFLEXIBLE.

The Copyright Act’s registration requirement is stated unambiguously and categorically: “[N]o civil action for infringement of the copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made” 17 U.S.C. § 411(a).

Amici respectfully submit that, in light of the critical purposes served by the registration requirement and the Copyright Act’s unequivocal directive, the question whether § 411(a) qualifies as jurisdictional has relevance only in a handful of cases: those in which the purported infringer (usually the defendant) either (1) fails to raise the lack of registration (forfeiture) or (2) affirmatively disavows reliance on the argument that lack of registration requires dismissal (waiver). Otherwise, if properly brought to the court’s attention, a failure to register requires dismissal of an infringement claim. That is

because the registration requirement plainly is *mandatory*.

**A. The Registration Requirement Is A
Linchpin Of Copyright Enforcement
Litigation.**

Formal notice of copyrighted materials has been a fundamental prerequisite of civil copyright infringement actions since 1790. *See* Br. for Pet’rs 33, A20-A26. A full century ago, the Copyright Act of 1909 provided: “No action or proceeding shall be maintained for infringement of copyright in any work *until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with.*” Copyright Act of 1909, ch. 320, § 12, 35 Stat. 1075, 1078 (emphasis added). The current copyright statute displays no less clarity and precision: “No civil action for infringement of the copyright in any United States work shall be instituted *until registration of the copyright has been made* in accordance with this title.” 17 U.S.C. § 411(a) (emphasis added).³

³ Under current law, registration not only is a prerequisite to suit but also forms the basis for any recovery of statutory damages and/or attorneys’ fees, *see* 17 U.S.C. § 412, and simplifies the owner’s evidentiary burden, *see* 17 U.S.C. § 410(c). Thus, while copyright *ownership* does not depend on registration, *see* 17 U.S.C. §§ 302(a), 408(a), registration is central to most civil suits for infringement of a copyrighted work. The exceptions to this general rule are carefully delineated by the express terms of the Copyright Act. *See, e.g.*, 17 U.S.C. § 101 (defining “United States work” for purposes of § 411(a)); 17 U.S.C. § 411(a) (exempting enforcement of “moral rights” under 17 U.S.C. § 106A from registration requirement and allowing suit where registration has been refused).

Congress’s determination to make registration the linchpin of civil copyright enforcement rests on at least two critical policy concerns. First, under the current system, registration “allow[s] the Copyright Office to make an initial judgment about the validity of copyrights, based on its experience and expertise, and to reduce the burdens of litigation by giving that judgment some weight in subsequent litigation.” *Torres-Negrón v. J & N Records, LLC*, 504 F.3d 151, 161 (1st Cir. 2007); *see also* Robert Wedgeworth & Barbara Ringer, *The Library of Congress Advisory Committee on Copyright Registration and Deposit – Letter and Report of the Co-Chairs*, 17 Colum.-VLA J.L. & Arts 271, 288 (1993) [hereinafter *ACCORD Report*] (“[S]creening of the application and deposit by the Copyright [O]ffice is intended to keep invalid copyright claims out of court and to provide a certified record and a solid basis for the ordering of proof.”).

Second, and more broadly, registration ensures “a comprehensive and reliable copyright database, available freely to the general public”—a resource that has become all the more valuable “[a]s the communications revolution gathers momentum.” *ACCORD Report, supra*, at 280. The point is to facilitate “business transactions such as transferring rights, and obtaining permissions or licenses, [and] resol[ution of] legal disputes, provi[sion of] biographical information, and so forth.” *Id.*

The registration requirement and the policies underlying it have been the subject of unusually rigorous public airing—in the form of proposals in the 1980s and 1990s to repeal the requirement and (successful) oppositions to such proposals. *See* 5

William F. Patry, *Patry on Copyright* § 17:79 (2009); *ACCORD Report, supra*, at 271 (explaining that Report is in response to repeal proposal). Even the proponents of repeal have acknowledged the importance of the policies underlying the requirement; their concerns have instead centered principally on treaty obligations and efficacy. *See* 5 Patry, *supra*, § 17:79 (discussing debates over whether § 411(a) should be repealed in face of the Berne Convention); *ACCORD Report, supra*, at 272 (expressing concerns about the efficacy of the registration requirement in promoting the aims it is meant to serve). Proponents of the registration system, for their part, have emphasized the two important objectives served by the registration requirement discussed above. For example, during a debate on repeal in the 1980's, Congressman Robert W. Kastenmeier, chair of the House Intellectual Property Subcommittee, testified before the Senate:

The objective of maintaining the flow of materials to the collections of the National Library through registration, the evidentiary use to the judicial system, the usefulness of the examining process, and the public interest of a comprehensive and open registry relating to the existence, ownership and exercise of copyrights all argue for continuation of this registration incentive.

The Berne Convention: Hearings on S. 1301 and S. 1971 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary, 100th Cong. 55 (1988) (statement of Robert W. Kastenmeier). Underscoring the interest in judicial economy, Ralph Mecham, Director of the Administrative Office of the United States Courts,

wrote to Congress during the same period on behalf of the Judicial Conference of the United States that repeal of § 411(a) would “likely [result in] increased difficulty in trying copyright cases.” *Berne Convention Implementation Act of 1987: Hearings on H.R. 1623 Before the Subcomm. On Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 100th Cong. 1225 (1988) (statement of Ralph Mecham); *see also U.S. Adherence to the Berne Convention: Hearings Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 99th Cong. 58-111 (1985) (statement of Donald C. Curran, Associate Librarian of Congress and Acting Register of Copyrights) (outlining multiple important policies served by the registration requirement).

Plainly, the longstanding requirement of registration as a prerequisite for infringement litigation serves important and widely recognized public purposes.⁴

B. The Registration Requirement Is Mandatory.

This Court has emphasized that some requirements of adjudication imposed by rule or statute, whether jurisdictional or not, are compulsory

⁴ Given the clarity with which the twin goals of judicial economy and free flow of information concerning copyright data have been articulated in the legislative history and elsewhere, the Muchnick Respondents’ assertions that “the registration requirement has nothing to do with adjudication of infringement actions,” Br. for Muchnick Resp’ts 32, and that its “primary function” is instead simply to ensure the completeness of the collection at the Library of Congress, *see id.* at 12-13, are erroneous.

if timely raised. The copyright registration requirement is one such mandatory requirement. As unambiguously reflected in the language of § 411(a), Congress has made the judgment that the policy goals of public access and judicial economy cannot be served if the registration requirement is enforced inconsistently.⁵

1. A Non-Jurisdictional Rule Can Nonetheless Be Mandatory.

This Court has taken special care in recent years to assess whether particular procedural rules or statutory requirements are genuinely “jurisdictional”—meaning that they “delineat[e] the classes of cases . . . falling within a court’s adjudicatory authority,” *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)—or are instead “claim-processing rules,” *id.* at 454, or “essential ingredients of a federal claim for relief,” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 503 (2006). As the Court has explained, the distinction matters because

[t]he objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment.

Id. at 506 (citation omitted). By contrast, a non-jurisdictional rule generally can be forfeited or waived. *See id.* at 507 (observing that objection that

⁵ The Muchnick Respondents (who opposed the settlement below on the merits) pepper their brief with suggestions that the registration requirement is a mere “formality.” *See, e.g.*, Br. for Muchnick Resp’ts 30. As explained below, these suggestions are unfounded.

claim lacks an essential element can only be raised “up to, but not beyond, trial on the merits”); *Kontrick*, 540 U.S. at 456 (“[A] claim-processing rule . . . [may] be forfeited if the party asserting the rule waits too long to raise the point.”).⁶

In training a discriminating eye upon rules and statutory requirements claimed to be “jurisdictional,” however, the Court has made clear that the label often is relevant *only* to that extent—that is, only insofar as it operates as shorthand for susceptibility to forfeiture and waiver. In all other respects, a “jurisdictional” rule and a “non-jurisdictional” one may well operate in identical fashion. A non-jurisdictional rule, no less than a jurisdictional one, may be “unalterable on a party’s application.” *Kontrick*, 540 U.S. at 456; *Eberhart v. United States*, 546 U.S. 12, 15, 19 (2005); *Arbaugh*, 546 U.S. at 503,

⁶ In some circumstances, even waiver or forfeiture will not preclude application of a non-jurisdictional rule. See *Day v. McDonough*, 547 U.S. 198, 209 (2006) (holding that district court could dismiss habeas petition for lack of timeliness even though State forfeited the limitations defense); *Kontrick*, 540 U.S. at 457 n.12 (observing that debtor may not be able to consent to assertion of time-barred objections to discharge, even though time limitation is non-jurisdictional); *Brooks-Ngwenya v. Indianapolis Pub. Sch.*, 564 F.3d 804, 808 (7th Cir. 2009) (*per curiam*) (“[C]ourts enforce mandatory (though nonjurisdictional) rules—even if the parties do not raise them—in a variety of ways.”) (emphasis added); Scott Dodson, *Mandatory Rules*, 61 Stan. L. Rev. 1, 6 & n.24 (2008) (listing other instances in which non-jurisdictional rules may be raised and applied by the court *sua sponte*); Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 Stan. L. Rev. 1457, 1497 (2006) (“Courts can still apply nonjurisdictional rules with rigidity and decide, for example, that even if a particular rule is nonjurisdictional, it still cannot be waived.”).

514 (acknowledging that numerosity requirement in Title VII’s employer definition, though not “jurisdictional,” is nonetheless an “essential element” of the plaintiff’s claim); *see also Greenlaw v. United States*, 128 S. Ct. 2559, 2572 (2008) (Alito, J., dissenting).

The Court’s discussion of mandatory rules in *Eberhart*, 546 U.S. 12, makes this point nicely. *Eberhart* held that the seven-day time limit set forth in Federal Rule of Criminal Procedure 33 for seeking a new trial is not properly labeled “jurisdictional,” and that a court thus has no obligation to reject as untimely a motion for a new trial filed outside the seven-day deadline unless the Government properly invokes the Rule. *See id.* at 19. In reaching this conclusion, however, this Court was careful to note that the Government had *not* properly invoked Rule 33, and that the outcome would have been different if it had. “[D]istrict courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked,” the Court explained, and proper invocation imposes on a district court a “mandatory” “duty” to apply the Rules as written. *Id.* at 17, 18.

Eberhart thus confirms that a procedural rule or (*a fortiori*) a statutory prerequisite to filing suit need not be “jurisdictional” in order to be “emphatic,” “inflexible,” and absolutely “mandatory” upon a party’s invocation thereof. *Id.* at 13, 18 (citations omitted). A requirement that falls within this category cannot be overridden or ignored by a court when it is properly invoked, *see id.* at 19; *United States v. Robinson*, 361 U.S. 220, 229-30 (1960); *Carlisle v. United States*, 517 U.S. 416, 419-33 (1996)

(holding that district court has no power to grant untimely motion for judgment of acquittal in face of prosecutor's objection), and is not otherwise susceptible to "equitable" limitations on its application. See *Dodson, supra*, at 9 ("[A] mandatory rule has the nonjurisdictional attributes of being waivable, forfeitable, and consentable, and a court has no obligation to monitor it sua sponte. However, if the rule is properly invoked by the party for whose benefit it lies, a court has no discretion to excuse noncompliance.").

That non-jurisdictional requirements may nonetheless be rigid and mandatory also is underscored by *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989). The issue in *Hallstrom* was whether a statutory provision requiring a plaintiff to give 60 days' notice to defendants before filing suit could be "disregarded by the district court at its discretion" when, as was the case in *Hallstrom*, notice had been given after suit was filed and defendants had been afforded 60 days to redress any purported violation before proceedings were resumed. *Id.* at 23-24. This Court, observing that the "language of [the notice] provision could not be clearer," *id.* at 26, held "that the notice and 60-day delay requirements [we]re mandatory conditions precedent to commencing suit" that were not susceptible to modification or excuse on equitable grounds. *Id.* at 27, 31. Because the Court concluded that dismissal of the suit was therefore required, it found it unnecessary to decide whether the requirement at issue technically qualified as "jurisdictional." *Id.* at 31.

2. *A Requirement Is Mandatory If, As With § 411(a), Congress Has Stated It In Emphatic Terms.*

Hallstrom offers important guidance in identifying requirements that, whether jurisdictional or not, qualify as mandatory. First, the provision at issue there stated its command in prohibitory terms: it said that “[n]o action may be commenced” prior to the end of the 60-day period. 42 U.S.C. § 6972(b)(1) (1982); see *Hallstrom*, 493 U.S. at 25-26. Under “a literal reading” of the provision, the Court concluded, “compliance with the 60-day notice provision is a mandatory, not optional, condition precedent for suit.” *Hallstrom*, 493 U.S. at 26. Second, because the 60-day period was linked to the date of filing suit and was not “triggered by the violation giving rise to the action,” the required delay was unlike a statute of limitations, and thus not “subject to equitable tolling.” *Id.* at 27.

The decision in *Kontrick v. Ryan*, 540 U.S. 443, similarly is instructive in determining whether a rule should be viewed as mandatory. *Kontrick* held that a time limitation set forth in the Bankruptcy Code could be forfeited if not raised in a timely fashion, but reserved on the issue whether, absent forfeiture, this non-jurisdictional rule “could be softened on equitable grounds.” *Id.* at 457. The Court explained that that question would have to be answered by reviewing the “form” of the rule at issue to determine whether it was stated so “emphatic[ally] . . . as to preclude equitable exceptions.” *Id.* at 458 (quotation marks omitted).

Applying *Hallstrom* and *Kontrick* to § 411(a), it is clear that the registration provision qualifies as

mandatory and inflexible. The text of the statute—which states categorically that “[n]o civil action for infringement of the copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made,” 17 U.S.C. § 411(a)—does not tie the precondition for suit to the date of infringement, *cf. Hallstrom*, 493 U.S. at 27, and could not be clearer or more straightforward. *See id.* at 26 (“The language of this provision could not be clearer.”); *see also* Dodson, *supra*, at 13 (“The word ‘shall,’ though not dispositive as to a jurisdictional characterization, normally does create a mandatory obligation.”).

Accordingly, *amici* respectfully submit that the language and purpose of § 411(a) point inexorably to the conclusion that the registration requirement is mandatory, inflexible, and emphatic—whether jurisdictional or not.

II. THE CLASS SETTLEMENT IN THIS CASE SHOULD BE UPHELD.

Whether properly characterized as “jurisdictional” or simply mandatory, the registration requirement merits vigilant enforcement. Vigilant enforcement, however, is in no sense inconsistent with permitting the compromise and *release*, as part of a class action settlement, of claims of unregistered copyright holders. If the registration requirement is mandatory but not jurisdictional, the premise of the Court of Appeals’ decision is untenable and the judgment should be reversed for that reason. Even if the registration requirement is characterized as jurisdictional, however, the requirement is not a prerequisite to the court’s power to approve the

parties' release of claims as one element of a global resolution of outstanding issues.⁷

**A. The Power Of Release Is Distinct
From The Power To Adjudicate.**

The distinction between the power to adjudicate and the power to release was made clear in *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996). The issue there was whether a Delaware state court class action settlement encompassing claims committed to the exclusive jurisdiction of the federal courts could effectively bar class members from later litigating those same claims in federal court. *See id.* at 369-72. The Court held first that a Delaware court, applying Delaware claim preclusion law, would have enforced the settlement. *See id.* at 378-79. It then concluded that nothing in *federal* law—including the provision

⁷ The Muchnick Respondents seem to agree that the District Court's power of release authorized it to approve a settlement of claims pertaining to unregistered works—even if the registration requirement is properly designated “jurisdictional.” Br. for Muchnick Resp'ts 44. They urge, however, that the Court not resolve the case on that basis without first reaching the question whether § 411(a) is jurisdictional. *See id.* at 45-46. This plea appears to rest at least in part on the faulty premise that, if § 411(a) is ruled non-jurisdictional, plaintiffs could “use . . . the class-action device . . . to seek *adjudication* of unregistered copyright infringement claims.” *Id.* at 46 (emphasis added). That is incorrect. As explained in Point I, *supra*, the registration requirement, even if not jurisdictional, is rigid and mandatory. It cannot be ignored or excused simply because the claims of unregistered copyright holders are asserted as part of a class action rather than individually. *Cf.* 28 U.S.C. § 2072(b) (providing that the Federal Rules of Civil Procedure “shall not abridge, enlarge or modify any substantive right”).

committing the federal claims to the exclusive jurisdiction of the federal courts—prevented upholding the settlement under the Full Faith and Credit Act, 28 U.S.C. § 1738. *Matsushita*, 516 U.S. at 381-82. To the contrary, the Court explained, the background presumption under federal law is that a court has the power to release even those claims over which it lacks subject matter jurisdiction. Nothing in the grant of exclusive federal jurisdiction altered that presumption:

While [the provision granting exclusive jurisdiction] prohibits state courts from adjudicating claims arising under the Exchange Act, it does not prohibit state courts from approving the release of Exchange Act claims in the settlement of suits over which they have properly exercised jurisdiction, *i.e.*, suits arising under state law or under federal law for which there is concurrent jurisdiction. . . . [T]he Delaware court never trespassed upon the exclusive territory of the federal courts, but merely approved the settlement of a common-law suit pursuant to state and nonexclusive federal law.

Id. (footnote omitted). Specifically addressing the objection that a court’s approval of a settlement entails some level of evaluation of the claims to be released, the Court concluded that “such assessment does not amount to a judgment on the merits of the claims,” and thus does not tread upon any *jurisdictional* rule. *Id.* at 382.

The reason that a release of claims—even when sanctioned and enforced by a court—neither depends on nor implicates the power to *adjudicate the merits* of those same claims is that the power of release is

predicated on the parties' agreement. See *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 522 (1986) (“[I]t is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree.”). At bottom, it is a matter of contract. Although there must of course be *some* jurisdictional basis for invoking the court’s adjudicatory powers in the first place, see *Matsushita*, 516 U.S. at 383, that initial “hook” suffices to trigger the power to release claims not falling within the scope of the court’s jurisdiction. See generally Judith Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. 593, 628 (2005) (referring to this phenomenon as a product of “the ‘alchemy of settlement’”).

The twin aspects of a court-sanctioned release—the jurisdictional hook on the one hand, and the parties’ broad agreement to resolve the dispute on the other—were explored at some length in *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir. 1994), a case that preceded *Matsushita* but that, like *Matsushita*, addressed whether a state court had the power to release claims concededly outside its subject matter jurisdiction. See *id.* at 1557. Rejecting the argument that the state court lacked such power, the panel observed that “the Delaware court did not purport to exercise any inherent power to release causes of action that it had no jurisdiction to entertain,” but instead “only acted to enter a settlement agreement that was initiated, negotiated, and adopted by the parties to a lawsuit that was properly before it.” *Id.* The Third Circuit acknowledged that a court-sanctioned release, unlike a release agreed to before any lawsuit could get

underway, “is not simply a contract entered into by private parties, but is one that has been given a stamp of approval by the court.” *Id.* Nonetheless, in the panel’s view, the only requirement that wrinkle entailed was that the court have “jurisdiction over the parties and the subject matter of the lawsuit”—not over every single claim subject to the release. *Id.* “While this rule of law may seem anomalous at first glance,” the court explained, “it is widely recognized that courts without jurisdiction to hear certain claims have the power to release those claims as part of a judgment.” *Id.* at 1563.

That statement of the law is unimpeachable. The Second Circuit itself, though professing in its decision to know of no support for the proposition that courts may release claims that they would lack jurisdiction to resolve on the merits, *see* Pet. App. 14a n.2, 24a n.7, has on at least two occasions embraced exactly that principle. In *Abramson v. Pennwood Investment Corp.*, 392 F.2d 759 (2d Cir. 1968), the court held that a state court’s release of a claim committed to the exclusive jurisdiction of the federal courts was entitled to preclusive effect in a federal suit asserting that same claim, because “[a]lthough the state court could not adjudicate the federal claim, it was within its powers over the corporation and the parties to approve the release of that claim as a condition of settlement of the state action.” *Id.* at 762. Then, in *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456 (2d Cir. 1982), the court applied the same rationale to uphold a *federal* settlement of claims purportedly committed to the exclusive jurisdiction of the *state* courts. *See id.* at 460; *see also Matsushita*, 516 U.S. at 382 (citing both *Abramson* and *TBK Partners* as cases

embracing rule *Matsushita* itself embraced); *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F.3d 355, 366 (3d Cir. 2001) (citing *TBK Partners* for proposition that “[i]t is now settled that a judgment pursuant to a class settlement can bar later claims based on the allegations underlying the claims in the settled class action . . . even though the precluded claim was not presented, and could not have been presented, in the class action itself”).⁸

B. Upholding Exercise Of The Release Power Is Particularly Appropriate Here Because This Case Presents No Question Of The Relationship Between State And Federal Courts.

The cases described above involved either federal court enforcement of the release of federal claims in settlements approved by state courts (*Matsushita*, *Grimes*, and *Abramson*) or the release of state claims

⁸ Many of the cases that recognize district courts’ power to release claims outside their subject matter jurisdiction state that the released claims must be based on the same “factual predicate as that underlying the claims in the settled class action.” *TBK Partners*, 675 F.2d at 460; *see also, e.g., In re Prudential Ins. Co.*, 261 F.3d at 366 (observing that the release power extends to state law “claims over which [the federal court] has no subject matter jurisdiction if the state claims arise from the same nucleus of operative facts as the claims properly before it”); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 33-34 (1st Cir. 1991). That requirement, if it is one, is satisfied here. The claims of unregistered copyright holders are based on the exact same factual underpinning as the claims of all other plaintiffs—the electronic reproduction of written works. *See N.Y. Times Co. v. Tasini*, 533 U.S. 483, 491-93, 499-500 (2001); Pet. App. 4a.

in a settlement approved by a federal court (*TBK Partners*).

TBK Partners was in an important sense a less complex case than *Matsushita*, *Grimes*, and *Abramson*: as noted, unlike those cases, *TBK Partners* presented the question of a *federal* court's power to release state claims, rather than enforcement of a state court's release of federal claims. The additional layer of analysis under the Full Faith and Credit Act thus was not implicated. *Cf. Grimes*, 17 F.3d at 1563-64 (noting that the rule permitting courts to release claims outside their jurisdiction is not "*limited* to federal courts entering judgments that release state claims that they would not have jurisdictional competency to entertain in the first instance," but also extends to state court releases of federal claims (emphasis added)).

And the instant case is even less complex than *TBK Partners*. Here, the issue is not whether one court has the power to release claims carefully and concededly committed to the jurisdiction of another within our federal system (an issue that necessarily raises sensitive comity concerns), but rather whether a *federal* court can release claims that all agree are committed to the exclusive jurisdiction of the *federal* courts but that lack an essential ingredient. That the District Court here had power to release the claims of unregistered copyright holders follows *a fortiori* from the long and unbroken line of precedents discussed above.

The conclusion that the release power was properly extended to the claims of unregistered copyright holders also follows from another important decision in this area, *Williams v. General*

Electric Capital Auto Lease, Inc., 159 F.3d 266 (7th Cir. 1998). The question in *Williams* was whether a federal district court in Illinois could enjoin pursuit in the Middle District of Florida of federal claims that had been settled in the Illinois action. *See id.* at 268. The problem was that the settled claims arguably had not been ripe, by Article III standards, at the time the settlement was entered. *Id.* at 273. Although the court suggested that the case might be difficult if the class members whose apparently unripe claims had been released by the settlement had lacked *standing* at the time of the settlement, it had no difficulty concluding that the Illinois court had the power to release the unripe claims. *See id.* at 273-74. This was so even though the released claims “were non-justiciable in the ‘case or controversy’ sense.” *Id.* at 274.

Here, there is no question that a “case or controversy” exists as to each and every class member. *See* Pet. App. 41a (Walker, J., dissenting). The only issue is whether the supposed *statutory* “jurisdictional” bar operated to strip the District Court of its ability to approve the contract the parties had made. If, as the *Williams* court held, Article III itself poses no obstacle to the release power (except, possibly, where constitutional standing is at issue), neither does § 411(a). *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287-89 (9th Cir. 1992) (holding that district court not only had power to release state law claims over which it arguably lacked jurisdiction but could release claims against a party that was not even named as a defendant in the action).

C. The Court Of Appeals' Decision Misapprehends The Nature And Contours Of The Release Power.

In concluding that a district court may not release claims that it would lack power to adjudicate, the Court of Appeals' decision ignored all of the authorities discussed above. Instead, the decision rested its undoing of the parties' agreement on three cases which say no more than that district courts cannot *adjudicate* (or agree to adjudicate) class claims that fail to satisfy certain statutory prerequisites to suit. See Pet. App. 22a-24a (discussing *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), *Weinberger v. Salfi*, 422 U.S. 749 (1975), and *Califano v. Yamaski*, 442 U.S. 682 (1979)).

The first case relied upon, *Zahn*, upheld a district court's determination not to certify as a class action a suit brought on behalf of individuals whose claims were valued at lower than the jurisdictionally mandated amount in controversy. See *Zahn*, 414 U.S. at 291.⁹ *Weinberger* and *Califano*, for their part, both involved defendants' challenges to judgments awarding relief to class members whose claims did not satisfy the administrative exhaustion requirement of the Social Security Act. See *Weinberger*, 422 U.S. at 774; *Califano*, 442 U.S. at 701. None of these cases bears on the question whether a court may approve a *release* of claims the parties have agreed to *settle*. All bear instead on the

⁹ Notably, in the case at bar, the *parties* agreed to a class definition. The District Court was never asked to, and never did, adjudicate the proper bounds of the class over any party's objection. See Pet. App. 6a-8a.

boundaries of the adjudicatory power, which this Court and others (including the Second Circuit) have confirmed in no uncertain terms is unrelated to the power of release.

The Court of Appeals' only effort to grapple with the distinction between jurisdiction and release in this case appears in a footnote near the end of the majority opinion. See Pet. App. 24a n.7. That footnote, *amici* respectfully submit, exposes the depth of the decision's confusion on the issue presented. It begins by citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), for the proposition that "the class action device cannot be used to enlarge the jurisdiction of the federal courts." Pet. App. 24a n.7. But *Amchem* expressly declined to resolve whether a district court could release claims of class members who concededly lacked constitutional standing—an Article III requirement running to the very heart of federal courts' jurisdiction—at the time the settlement was entered. See *Amchem*, 521 U.S. at 612-13. Thus, far from supporting the notion that a district court cannot release claims over which statutory "jurisdiction" is lacking, *Amchem* leaves open the possibility that the release power extends even to those claims over which Article III jurisdiction is lacking. See *Williams*, 159 F.3d at 274 ("[N]othing in the Supreme Court's *Amchem* decision suggested that the federal courts lacked the Article III power to settle future claims of class members." (emphasis omitted)).

To make matters worse, the Court of Appeals appended to its inapposite citation to *Amchem* the suggestion that, despite the reversal on jurisdictional grounds here, a district court might nevertheless in

the future release “claims that may not be ripe because the issue in such cases is standing, not jurisdiction.” Pet. App. 24a n.7. This gets the law exactly backwards: as *Amchem* itself confirms, if there is any doubt about the extent of the release power, it pertains to a court’s ability to release claims of class members with no “standing”—*not* claims over which subject matter jurisdiction is lacking for non-Article III-related reasons.

**D. This Case Powerfully Illustrates
The Adverse Effects Of Failing To
Adhere To The Release Rule.**

The rule that a district court, as part of a broad settlement and resolution of issues, can approve the release of claims outside its subject matter jurisdiction is not just a technical one rooted in theoretical distinctions between adjudication and contract. It has powerful policy underpinnings. And the adverse effects the rule is intended to avert are, unfortunately, starkly illustrated here.

The policy behind permitting courts to release not just the claims over which they have subject matter jurisdiction but also related claims they would lack power to adjudicate is to promote finality and avoid unnecessary litigation. “This rule of law serves the important policy interest of judicial economy by permitting parties to enter into comprehensive settlements that ‘prevent relitigation of settled questions at the core of a class action.’” *Grimes*, 17 F.3d at 1563 (quoting *TBK Partners*, 675 F.2d at 460); *see also Williams*, 159 F.3d at 274 (“It is not at all uncommon for settlements to include a global release of all claims past, present, and future, that the parties might have brought against each

other.”). That policy has particular force in the class action context. Broad class action settlements are necessary because defendants would otherwise face “nearly limitless liability from related lawsuits in jurisdictions throughout the country,” and thus have no incentive to enter into settlements at all. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 106 (2d Cir. 2005); *cf.* Br. for Pet’rs 3.

The Court of Appeals’ approach, by contrast, flouts the finality concern and promotes endless litigation over the same legal issues. If, as the court below held, any settlement of this action can properly encompass only those claims brought by authors with registered copyrights, then, of course, Petitioners are barred from reaching any court-sanctioned agreement with copyright holders who have yet to register their copyrights.¹⁰ This disability—which, notably, cannot be squared with the expectation of global settlement expressed by this Court in the *Tasini* case, *see Tasini*, 533 U.S. at 505—leaves publishers exposed to new actions (even class actions), based on the identical factual predicate underlying this action, every time an author who falls within the agreed-upon class definition registers her copyright.

As a practical matter, the prospect of such litigation will ensure that publishers’ electronic archives—portions of which had been shut down in response to this litigation—remain closed to the

¹⁰ Out-of-court releases presumably could be entered, but, even if otherwise possible, would have to be agreed to on an individual basis, without the benefit of the class settlement mechanisms.

public. Without a final agreement from all authors, and especially those with unregistered copyrights, the risk of litigation effectively precludes opening the archives. The practical necessity of closing significant portions of the archives benefits no one—not the publishers, not the authors, and certainly not the public. *Cf. Tasini*, 533 U.S. at 520-22 (Stevens, J., dissenting) (highlighting the harm to the public, to posterity, and to authors themselves if the global settlement the majority thought possible could not be reached).

This result not only is anathema to the policies underlying the release rule and class action settlements more broadly, but also carries a certain perversity. As this Court has emphasized, the nation’s copyright laws are “intended to increase and not to impede the harvest of knowledge.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 545 (1985). In upsetting the carefully negotiated, complex settlement between writers and publishers (including database providers), the Court of Appeals’ decision not only does violence to established principles of settlement and release, but also needlessly impedes the “harvest of knowledge” and the broad dissemination of information that our copyright framework is crafted to foster.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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