No. 10-545

IN THE

Supreme Court of the United States

LAWRENCE GOLAN, *et al.*,
Petitioners,
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Section 514 of the Uruguay Round Agreements Act of 1994 (Section 514**)** did something unique in the history of American intellectual property law: It "restored" copyright protection in thousands of works that the Copyright Act had placed in the Public Domain, where they remained for years as the common property of all Americans. The Petitioners in this case are orchestra conductors, educators, performers, film archivists and motion picture distributors, who relied for years on the free availability of these works in the Public Domain, which they performed, adapted, restored and distributed without restriction. The enactment of Section 514 therefore had a dramatic effect on Petitioners' free speech and expression rights, as well as their economic interests. Section 514 eliminated Petitioners' right to perform, share and build upon works they had once been able to use freely.

The questions presented are:

1. Does the Progress Clause of the United States Constitution prohibit Congress from taking works out of the Public Domain?

2. Does Section 514 violate the First Amendment of the United States Constitution?

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INTEREST OF *AMICUS CURIAE*[1]

Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF"), a nonprofit organization founded in 1981, publishes information of educational and historical value, both in print and on the internet. Eagle Forum ELDF has consistently advocated a limited federal government in adherence to the text of the U.S. Constitution, and self-

[1] This brief is submitted with the filed written consent of all parties. Pursuant to its Rule 37.6, counsel for *amicus curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

government by the people based on strict constructionism. Eagle Forum ELDF opposes interpretation of the Progress Clause[2] in a way that interferes with First Amendment rights. Eagle Forum ELDF filed several *amicus curiae* briefs against an expansive interpretation of the Progress Clause in the litigation culminating in the decision of this Court in *Eldred v. Ashcroft*, 537 U.S. 186 (2003). Eagle Forum ELDF also filed an *amicus curiae* brief in favor of the First Amendment and against a copyright claim in *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

STATEMENT OF THE CASE

A collection of orchestra conductors, publishers, educators, and others challenged the constitutionality of congressional removal of works from the public domain. Initially they challenged both the Copyright Term Extension Act, Pub. L. No 105-298, § 102(b), (d), 112 Stat. 2827, 2827-28 (1998), and Section 514 of the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, § 514, 108 Stat. 4809, 4976-81 (1994), as codified as amended at 17 U.S.C. §§ 104A, 109.

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[2] Eagle Forum ELDF uses the term "Progress Clause" rather than "Copyright Clause" because "progress" (unlike "copyright") is expressly used in this enumerated power, and there is no stand-alone "Copyright Clause." This Court's first express reference to a stand-alone, so-called "Copyright Clause" was not until 1973, and then with quotation marks around it. *See Goldstein v. California*, 412 U.S. 546, 548 (1973). Fewer than ten decisions of this Court since then have used the term "Copyright Clause," despite copyright issues arising more frequently.

Section 514 of the URAA – the subject of this appeal – removed works from the public domain in the United States and granted copyright protection to them. An example of a work affected by this law is "Peter and the Wolf," created in 1936 by the Soviet composer Sergei Prokofiev.

In the initial appeal below, the Tenth Circuit upheld the constitutionality of the Copyright Term Extension Act based on this Court's ruling in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), and found Section 514 of the URAA to be within congressional power under the Progress Clause. But the Tenth Circuit remanded to the district court to consider whether Section 514 of the URAA was a content-neutral or content-based restriction on speech, for the purpose of assessing whether it passed constitutional muster. *Golan v. Gonzales*, 501 F.3d 1179, 1196 (10th Cir. 2007) ("*Golan I*"). Subsequently finding it to be content-neutral, the Tenth Circuit upheld its constitutionality. *Golan v. Holder*, 609 F.3d 1076, 1081 (10th Cir. 2010) ("*Golan II*").

Section 514 of the URAA removes works from the public domain on any one of three grounds: if the work lost copyright protection due to a failure to comply with copyright formalities, a lack of subject matter protection in the case of sound recordings fixed before February 15, 1972, or a lack of national eligibility. See 17 U.S.C. § 104A(a),(h)(6)(C). But artists have already relied on access to these works as part of the public domain, such as a deceased plaintiff's creation of a sound recording based on compositions by Dmitri Shostakovich. *Golan II*, 609 F.3d at 1082. Section 514 does not, however, restore copyright to works that entered the public domain

due to expiration of the copyright term. 17 U.S.C. § 104A(h)(6)(B).

Plaintiffs pursued their facial challenge against this law, seeking an injunction against it. *Golan II*, 609 F.3d at 1081-1082. After the Tenth Circuit ruled against them, they petitioned here and *Amicus* Eagle Forum ELDF supports their challenge.

SUMMARY OF ARGUMENT

The First Amendment fully protects republication of what is in the public domain. Congress can no more prohibit republication of a work that has been in the public domain than it could ban a political book or speech. Withdrawing a work from the public domain is a form of censorship that is simply incompatible with the First Amendment.

As a separate ground for reversing the decision below, the Progress Clause itself does not authorize Congress to remove works from the public domain. Congress may do no more in this field than "promote the Progress of Science and useful Arts." U.S. CONST. ART. I, § 8, CL. 8. No such progress is promoted by granting copyright monopolies to works in the public domain. If anything, this sudden restriction on formerly free works expressly inhibits the very progress that the Constitution authorizes. The Tenth Circuit erred in applying a rational-basis standard in holding that Congress had not traversed the boundaries of its copyright power. *Golan I*, 501 F.3d at 1187. To the extent *Eldred* stands for the proposition that Congress may extend copyrights – constrained only by the deferential rational-basis standard of review – *Eldred* should be limited or overruled.

Finally, the Tenth Circuit erred in granting deference to foreign law at the expense of the U.S. Constitution. The First Amendment does not bend to accommodate foreign interests; the enumerated powers for Congress do not expand to harmonize with foreign laws. Conflicts with foreign law do not alleviate the obligations of Congress to remain faithful to the U.S. Constitution.

The net effect of Section 514 of the URAA is to deny public access to numerous works that have been in the public domain. This does not comport with the First Amendment or the Progress Clause, and cannot be justified in the name of harmonizing with foreign law. If Congress wants to bolster the rights of foreign writers and authors to advance a goal of harmony, then its approach must fit within one of its enumerated powers, such as using the Spending Clause to directly provide any value deemed appropriate.

ARGUMENT

I. THE FIRST AMENDMENT PROHIBITS TAKING WORKS OUT OF THE PUBLIC DOMAIN.

Material in the public domain is protected by the First Amendment, and Congress cannot censor speech about it based on private interests. "[O]nce the truthful information was … 'in the public domain' the court could not constitutionally restrain its dissemination." *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979). Just as one cannot unscramble an egg, Congress cannot withdraw information that has already entered the public square. First

Amendment protection is not something that can be granted and then taken away willy-nilly by Congress. To hold otherwise, as the lower court did, would be to fundamentally weaken the very foundation of the First Amendment. U.S. CONST. AMEND. I ("Congress shall make no law … abridging the freedom of speech ….").

Indeed, a primary motive for passing the First Amendment was precisely to combat this predictable expansion in government-granted copyright monopolies:

> "Though it is not declared that Congress have a power to destroy the liberty of the press; yet in effect, they will have it .... They have a power to secure to authors the right of their writings. Under this, they may license the press, no doubt; and under licensing the press, they may suppress it."

Ratification of the Constitution by the States, Pennsylvania, 2 The Documentary History of the Ratification of the Constitution 454 (1976) (quoting Pennsylvania Constitutional Convention Delegate Robert Whitehill on December 1, 1787). Today the "press" is increasingly the internet, and taking material out of the public domain of the internet is censorship, plain and simple. The notion of Congress somehow being able to choke off First Amendment rights in this way flies in the face of what the right of freedom of speech is all about.

It is axiomatic to First Amendment rights that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication

of the information, absent a need to further a state interest of the highest order." *Daily Mail*, 443 U.S. at 103. But the ruling below contradicts this principle by allowing one to "punish publication of the information" that has been lawfully obtained from the public domain but then subsequently taken away by Congress.

This Court struck down an attempt by a state to prohibit publication by a reporter of someone's name after learning of it in court, which is conceptually similar to finding something in the public domain. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast." *Id.* at 496. If a state cannot withdraw material from the public square consistent with the Constitution, then *a fortiori* neither can Congress.

The implications of narrowing First Amendment protections to allow Congress to remove material are troubling. If this slippery slope were allowed, then would anything be completely safe from government-mandated censorship? Works of the U.S. Government have long been in the public domain, but under the ruling below Congress could generate some new revenue by removing the most popular items (such as the American flag) and charging copyright fees for publishing them. Free speech would then be reduced to "Congress-allowed" speech, and that is simply incompatible with First Amendment principles.

A copyright, after all, amounts to a prior restraint on speech, and "[a]ny prior restraint on expression comes ... with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Put another way, "prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'ns v. Stuart*, 427 U.S. 539, 559 (1976). Numerous decisions of this Court have held likewise. "[I]t is the chief purpose of the [First Amendment] guaranty to prevent previous restraints upon publication." *Near v. Minnesota*, 283 U.S. 697, 713 (1931). "All ideas having even the slightest redeeming social importance," such as those concerning "'the advancement of truth, science, morality, and arts,'" are fully protected by the First Amendment. *Roth v. United States*, 354 U.S. 476, 484 (1957) (quoting 1 Journals of the Continental Congress 108 (1774)).

These robust First Amendment protections should not be circumvented based on a characterization of the copyright restriction as "content neutral." A ban on publicizing what happens in court proceedings may be content neutral, but it is plainly unconstitutional just as withdrawing material from the public domain under copyright should be. As one commentator has pointed out, "copyright law blithely ignores … basic principles of free speech jurisprudence that elsewhere go without saying," such as the "First Amendment principle ... against prior restraints." Jed Rubenfeld, The Freedom of Imagination: Copyright's Constitutionality, 112 YALE L.J. 1, 5-6, (2002). "In some parts of the world, you can go to jail for reciting a poem in public without

permission from state-licensed authorities. Where is this true? One place is the United States of America." *Id.* at 3 (footnote omitted).

Holding otherwise, as the Tenth Circuit has done, would cast doubt on the continued vitality of precedents prohibiting the copyrighting of judicial opinions and statutory requirements. *See, e.g.*, *Banks v. Manchester*, 128 U.S. 244, 254 (1888) (no copyrights allowed in court opinions); *Veeck v. SBCCI*, 293 F.3d 791, 799 (5th Cir. 2002) (*en banc*), *cert. denied*, 539 U.S. 969 (2003) (publishers cannot copyright statutory requirements). A straightforward basis for understanding why copyright cannot attach to judicial opinions and statutory requirements is that once they initially entered the public domain, they cannot be taken back out. While those decisions relied on other grounds (the *Veeck* court found statutory requirements to constitute non-copyrightable "facts", 293 F.3d at 801), allowing withdrawal of material from the public domain would cause legal difficulties. Could Congress grant copyright protection to these or other works that have passed into the public domain?

A Pandora's box of doctrinal difficulties would result if works could be pulled out of the public domain into copyright protection without violating the First Amendment. This Court has already rejected, in *Eldred*, the suggestion that copyrights are somehow "categorically immune from challenges under the First Amendment." *Eldred*, 537 U.S. at 221 (quotations omitted). A bright-line, principled approach is the best here: once something is in the public domain, the First Amendment ensures that it remains there.

II. THE PROGRESS CLAUSE DOES NOT AUTHORIZE CONGRESS TO REMOVE WORKS FROM THE PUBLIC DOMAIN, AND *ELDRED* SHOULD BE OVERRULED TO THE EXTENT ITS HOLDING IMPLIES OTHERWISE.

This Court has held that "Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available." *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966). This sound principle – based in the very same Progress Clause – should be extended to copyrights as well, and requires reversal of the judgment below.

The Progress Clause authorizes Congress to grant copyright monopolies only to the extent they "promote the Progress of Science and useful Arts." U.S. CONST. ART. I, § 8, CL. 8. Occasionally referred to as the "Copyright Clause," it actually uses the term "progress" rather than "copyright", and should be interpreted with that word choice in mind. Progress is what is to be promoted, not merely narrow private interests. Congress cannot impose what the Progress Clause does not authorize, and obstructing progress or enriching private parties in the name of copyright does not comport with the understood purpose of this clause. *Cf. Nevada Comm'n on Ethics v. Carrigan*, 2011 U.S. LEXIS 4379, *30 (June 13, 2011) (Alito, J., concurring) (emphasizing the understanding and precedents "during the founding era").

Nothing enacted during the founding era suggests that the People gave Congress *carte blanche* to create copyright monopolies on works already in the public domain. This Court observed that Thomas

"Jefferson, like other Americans, had an instinctive aversion to monopolies. It was a monopoly on tea that sparked the Revolution and Jefferson certainly did not favor an equivalent form of monopoly under the new government." *Graham*, 383 U.S. at 7. Pulling works out of the public domain is also economically illogical: it exacerbates transaction costs, which is harmful to overall efficiency. *See generally* Ronald Coase, "The Problem of Social Cost," 3 J. LAW & ECON. 1 (1960).

The American people are disadvantaged by removal from the public domain. "The level of information guaranteed by copyright law is merely the product of enforced scarcity, which might be good for the producers, but would surely not be good for the consumers who either pay higher prices for their enjoyment of new expression or forgo it entirely." Adam R. Fox, "The Economics of Expression and the Future of Copyright Law," 25 OHIO N.U.L. REV. 5, 15 (1999). Adam Smith's criticism of state-conferred monopolies in his *Wealth of Nations* applies here: under monopolies, "all the other subjects of the state are taxed … by the high price of goods." Adam Smith, *Wealth of Nations*, 814 (Random House: 1994, Cannon ed.).

It was error for the court below to rely heavily on inferences from *Eldred v. Ashcroft* in finding congressional power to withdraw material from the public domain, as done by Section 514 of the URAA. *Golan I*, 501 F.3d at 1186-87. To the extent this Court's ruling in *Eldred* suggests that Congress has the power to remove works from the public domain, that precedent should be overruled. No "progress" is

advanced by pulling works out of the public domain and granting monopolies in them.

In *Eldred*, the majority opinion held that Congress has authority to extend copyright protection for old works having terms that are about to expire, despite a lack of any new value or *quid pro quo* from the creator. 537 U.S. at 208-18. That decision essentially allowed Congress to define the scope of its own power, and then analyzed the exercise of such power under the least demanding rational-basis standard of review. *Id.* at 199-200, 205, 213. The *Eldred* majority so held despite acknowledging that "we have described the Copyright Clause as 'both a grant of power and a limitation,' and that 'the primary objective of copyright' is 'to promote the Progress of Science.'" *Id.* at 212 (quoting *Graham*, 383 U.S. at 5, and *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991)).

But as Justice Breyer explained in his dissent in *Eldred*, the enumerated copyright power places a more meaningful limitation on congressional attempts to expand copyright:

> The "monopoly privileges" that the Copyright Clause confers "are neither unlimited nor primarily designed to provide a special private benefit." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); cf., *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5 (1966). This Court has made clear that the Clause's limitations are judicially enforceable. *E.g.*, *Trade-Mark Cases*, 100 U.S. 82, 93-94, 25 L. Ed. 550, 1879 Dec. Comm'r Pat. 619 (1879). And, in assessing this statute for that

> purpose, ... take into account that the Constitution is a single document, that it contains both a Copyright Clause and a First Amendment, and that the two are related.

Eldred v. Ashcroft, 537 U.S. 186, 243-44 (2003) (Breyer, J., dissenting).

Commentators, too, have observed how expanding copyright protection "raises serious questions about copyright's continued fit with its incentive-for-original-expression rationale. It has also imposed an increasingly onerous burden on speech." Neil Weinstock Netanel, "Locating Copyright Within the First Amendment Skein," 54 STAN. L. REV. 1, 4 (2001). What possible incentive is created by taking works out of the public domain? None. Instead it impedes the use of those public domain works to create derivative works, which in turn would enrich both the producer and society as a whole.

Justice Breyer explained further how limitations on the copyright power are essential to its constitutional basis:

> Under the Constitution, copyright was designed "primarily for the benefit of the public," for "the benefit of the great body of people, in that it will stimulate writing and invention." ... [H.R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909)]. And were a copyright statute not "believed, in fact, to accomplish" the basic constitutional objective of advancing learning, that statute "would be beyond the power of Congress" to enact. *Id.*, at 6-7. Similarly, those who wrote the House Report on legislation ... said that "the constitutional purpose of copyright is to

> facilitate the flow of ideas in the interest of learning." H.R. Rep. No. 100-609, p.22 (1988) (internal quotation marks omitted).

Eldred, 537 U.S. at 247 (Breyer, J., dissenting). Judge Sentelle, in dissenting in part from the lower D.C. Circuit opinion in *Eldred*, described his "fear that the rationale offered by the government for the copyright extension, as accepted by the district court and the majority, leads to such an unlimited view of the copyright power as the Supreme Court rejected with reference to the Commerce Clause in *Lopez*." *Eldred v. Reno*, 239 F.3d 372, 381 (D.C. Cir. 2001) (Sentelle, J., dissenting), *aff'd*, 537 U.S. 186 (2003) (citing *United States v. Lopez*, 514 U.S. 549 (1995)).

This Court has emphasized that "the sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (emphasis added). That interest is utterly lacking in removing foreign works from the public domain in the United States. The merely "secondary consideration" of reward to the copyright owners – ones who already created the subject work – should not be the prevailing factor here. *Eldred*, 537 U.S. at 227 n.4 (Stevens, J. dissenting).

Put another way, "originality is a constitutional requirement" for protection under copyright, *Feist*, 499 U.S. at 346, and originality no longer exists for a work that has been in the public domain. Once originality is lost, it cannot be magically regained by a new Act of Congress any more than shattered glass may be rendered unbroken. This requirement of originality is inherent in the Progress Clause: "the

Court made it unmistakably clear that its terms presuppose a degree of originality." *Id.* (citing *The Trade-Mark Cases*, 100 U.S. 82 (1879) and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884)). "The originality requirement articulated in *The Trade-Mark Cases* and *Burrow-Giles* remains the touchstone of copyright protection today. It is the very premise of copyright law." *Feist*, 499 U.S. at 347 (quotations and citations omitted).

Removing material from the public domain has the same deleterious effect as extending copyright for already-created works: this denies the public the benefit of numerous works, particularly over the internet. Michael S. Hart, the director of an online publisher of works known as the Gutenberg Project, estimated with respect to copyright extension that the CTEA would "essentially prevent about one million books from entering the public domain over the next 20 years." Carl S. Kaplan, "Free Book Sites Hurt by Copyright Law," *N.Y. Times on the Web* (Oct. 30, 1998).[3] Neither Adam Smith nor the Founders like Thomas Jefferson would have supported giving Congress the power of harming so many people to the windfall of so few, based on the Progress Clause.

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[3] http://www.nytimes.com/library/tech/98/10/cyber/cyberlaw/30law.html (viewed 6/16/11).

III. THE TENTH CIRCUIT ERRED IN DEFERRING TO FOREIGN INTERESTS AT THE EXPENSE OF THE U.S. CONSTITUTION.

It was error for the Tenth Circuit to create a more deferential standard of review merely due to the existence of related foreign law and interests. The court below adopted "considerable deference to Congress" simply because its regulation of *domestic* free speech was based on foreign law. *Golan II*, 609 F.3d at 1085. The lower court did caution that "we do not suggest that Congress's decisions regarding foreign affairs are entirely immune from the requirements of the First Amendment." *Id.* In fact, no extra deference is justified based on foreign law, particularly with respect to application of the U.S. Constitution to domestic speech.

Foreign law cannot result in erosion of constitutional rights, or expansion of enumerated powers for Congress. "[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Reid v. Covert*, 354 U.S. 1, 16 (1957). Similarly, this Court has held that "[i]t would not be contended that [treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States …." *Id.* at 17-18 (quoting *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890)).

Section 514 of the URAA must still comport fully with the First Amendment, and must stand or fall based on the scope of congressional powers, no matter

how much harmony Congress purportedly seeks to bring to a foreign land. "'[R]ules of international law and provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions or requirements of the Constitution and cannot be given effect in violation of them.'" *Boos v. Barry*, 485 U.S. 312, 324 (1988) (quoting 1 Restatement of Foreign Relations Law of the United States 131, Comment a, p. 53 (Tent. Draft No. 6, Apr. 12, 1985)).

Neither foreign law nor an attempt to harmonize with it can do an end run around the Constitution. "It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument." *Reid*, 354 U.S. at 18. Section 514 of the URAA does not even rise to the status of a treaty, as it was not ratified pursuant to the Treaty Clause and it goes beyond what treaty obligations required. *See Petitioners Br.* at 51-61.

The First Amendment rights of Americans – and the constitutional limitations on congressional power in the Progress Clause – are not "proper subjects of negotiation between our government and the governments of other nations." *Geofroy*, 133 U.S. at 265. The goal of harmonizing with foreign law offers no added authority to regulate free speech, or to withdraw works from the public domain.

CONCLUSION

The judgment below should be reversed and Section 514 of the URAA should be declared unconstitutional under both the First Amendment and the Progress Clause.

Respectfully submitted,

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