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 JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* SUPPORTING PETITIONERS

JAMES L. HIRSEN
Counsel of Record
505 S. VILLA REAL DRIVE
SUITE 208
ANAHEIM HILLS, CA 92807
(714) 283-8880
hirsen@earthlink.net

DEBORAH J. DEWART
620 E. SABISTON DRIVE
SWANSBORO, NC 28584
(910) 326-4554
debcpalaw@earthlink.net

Counsel for Amicus Curiae

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF AMICI[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Tenth Circuit Court of Appeals should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation*, released in 2010.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The American system of government differs radically from the monarchies of past centuries and the regimes of foreign countries. Congress is only one of three independent, coordinate branches. The Constitution spells out its limited powers vis-a-vis the states and the people, and places additional restraints on its authority through the Bill of Rights.

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

This case intersects several constitutional provisions. While Section 514 of the Uruguay Round Agreements Act (17 U.S.C. § 104(A)) is primarily linked to the Progress Clause[2] (Art. I, § 8, cl. 8), it potentially touches the Commerce Clause (Art. I, § 8, cl. 3). And since Congress was implementing the Berne Convention, it also implicates the Treaty Clause (Art. II, § 2, cl. 2) along with the Necessary and Property Clause (Art. I, § 8, cl. 18). In addition to these basic grants of federal power, the First Amendment restrains Congress in its regulation of creative expression.

America's commitment to limited government mandates a global view of the applicable grants of power and limitations, not a compartmental approach focused on one piece of the Constitution. *Amicus curiae* maintains that Section 514 exceeds the powers of Congress because it jeopardizes core First Amendment rights and is not warranted by either the Progress Clause or an alternative source of power—the Commerce Clause or the power to implement a treaty.

ARGUMENT

I. SECTION 514 COMPROMISES CORE FIRST AMENDMENT RIGHTS OF THE AMERICAN PUBLIC.

Section 514 impacts a broad range of literary, musical, and other culturally significant works. Among the thousands of works affected, copyright restoration removed from the public domain numerous

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[2] Also known as the Copyright Clause.

works of Shostakovich, Prokofiev, Stravinsky and other venerable composers. It therefore became necessary for Kapp, Golan and other educators to cease utilizing and exposing their students to the formerly public domain works. The copyright restoration of the works has rendered the use of many of them cost-prohibitive. After listing a small selection of the works stripped from the public domain—"the tip of the iceberg"—one commentator observes that "[t]he universe of restored works is commercially and artistically far-reaching and may prove to be of considerable financial and creative significance over time." William Gable, *Restoration of Copyrights: Dueling Trolls and Other Oddities Under Section 104A of the Copyright Act*, 29 Colum. J.L. & Arts 181, 183 (Winter 2005) ("*Duelling Trolls*").

The First Amendment protects a wide range of expression. In addition to speech about political and other matters of public concern, it takes in the arts and entertainment—"serv[ing] a value similar to that fostered by the copyright laws—promoting the creation and dissemination of knowledge and cultural artifacts." Joseph P. Bauer, *ARTICLE: Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 Wash & Lee L. Rev. 831, 843 (Summer 2010) ("*Copyright and the First Amendment*"). This Court places artistic expression near the "core of the First Amendment." *Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007) ("*Golan II*"), citing *Ward v. Rock Against Racism,* 491 U.S. 781, 790 (1989) ("Music is one of the oldest forms of human expression.... Music, as a form of expression and communication, is protected under the First Amendment.")

"The Framers intended copyright itself to be the engine of Free Expression." *Harper & Row Publishers, Inc. v. Nation Enter.,* 471 U.S. 539, 558 (1985). The First Amendment and the Progress Clause were adopted in close proximity, suggesting they are compatible. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). Indeed they are—the limited monopoly granted to authors and inventors is the economic fuel that drives the "engine of free expression," advancing the public welfare. Case after case echoes this theme. *Fox Film Corp. v. Doyal,* 286 U.S. 123, 127 (1932) ("the primary object in conferring the monopoly lie[s] in the general benefits derived by the public from the labors of authors"); *Mazer v. Stein,* 347 201, 219 (1954) ("encouragement of individual effort by personal gain is the best way to advance public welfare"); *Twentieth Century Music Corp. v. Aiken,* 422 U.S. 151, 156 (1975) (copyright "promot[es] broad public availability of literature, music, and the other arts...the *ultimate aim* is, by this incentive, to stimulate artistic creativity for the general public good"); *Sony Corp. of Am. v. Universal City Studios, Inc.,* 464 U.S. 417, 429 (1984) ("*Sony*") ("[the Clause] is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."). The Progress Clause and the First Amendment both "enhanc[e] society's intellectual and cultural well-being." *Copyright and the First Amendment,* 67 Wash & Lee L. Rev. at 845.

In spite of ultimate goals served by the Progress Clause and First Amendment, a tension emerges because of divergent means. The First Amendment promotes unrestricted expression using words,

symbols, pictures, music, and other avenues of communication, whereas copyrights grant authors exclusive rights to reproduce and distribute, restricting and excluding others for a limited time. *Id.* at 846-847. This limited private monopoly often interferes with the broad rights shielded by the First Amendment. *Id*. at 844.

> The Copyright Act, since its inception, has spawned a subtle tension within the protective environment surrounding the freedom of speech.

Triangle Pubs., Inc. v. Knight-Ridder Newspapers, Inc., 445 F. Supp. 875, 881-882 (S.D. Fla. 1978). Intellectual property laws have been repeatedly amended as Congress attempts to balance the private interests of authors and inventors with the public's competing interest in the free flow of information and expression. *Sony*, 464 U.S. at 429.

When the Progress Clause and the First Amendment "operate at cross-purposes, the primacy of the First Amendment mandates that the Copyright Act be deprived of effectuation." *Triangle Pubs., Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. at 881-882. But courts do not always adhere to this hierarchy, even though this Court acknowledged in *Eldred* that that "the D.C. Circuit spoke too broadly when it declared copyrights 'categorically immune from challenges under the First Amendment.'" *Eldred v. Ashcroft*, 537 U.S. at 221. Instead, "courts have practically immunized copyright from First Amendment scrutiny." Brian Lee Pelanda, *Note and Comment: Copyright's "Traditional Contours" and "Bedrock Principles": Golan's Potential to Secure First*

Amendment Protection Over the Public Domain, 31 Whittier L. Rev. 547 (Spring 2010) ("*Copyright's Traditional Contours*").

In other areas of law, courts have been alert to First Amendment mandates:

> In a broad range of other cases, courts have unequivocally held that claims under both state and federal law are all subject to First Amendment constraints. *It is far from obvious why copyright should be singled out for different analysis and harsher treatment*.

Copyright and the First Amendment, 67 Wash & Lee L. Rev. at 835 (emphasis added). The supremacy of the First Amendment is evident across a wide spectrum of cases: *New York Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964) (libel action against public official requires proof of "actual malice" in light of free speech rights); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc*., 365 U.S. 127 (1961) (Sherman Act could not be applied so as to interfere with Petition Clause rights); *Bartnicki v. Vopper,* 532 U.S. 514, 535 (2001) (radio broadcast of intercepted phone conversation on a matter of public concern was protected by the First Amendment even though informants violated wire tap laws); *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (trespass law violated right of Jehovah's Witness member to distribute literature on a street in a company town). In *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818 (8th Cir. 2007), the First Amendment rights of a fantasy baseball game producer prevailed over major league players' state law rights of publicity. The producer used information that was already in the

public domain, and the court explained that "state law rights of publicity must be balanced against [F]irst [A]mendment considerations, and here we conclude that the former must give way to the latter." *Id*. at 823. The Sixth Circuit reached a similar conclusion in *ETW Corp. v. Jireh Publ'g, Inc*., 332 F.3d 915, 938 (6th Cir. 2003), holding that a sports artist's First Amendment rights trumped Tiger Woods' publicity claims—the artist had created and reproduced an action portrait of Woods' victory at the 1997 Masters Tournament.

In light of America's long tradition of guarding free expression, it is no wonder the United States postponed joining the Berne Convention for over a century. The Berne Act was signed in 1886, but the United States did not join the Convention until 1989. Its steadfast resistance can be traced, among other things, to the requirement that certain expired copyrights be restored. *Dueling Trolls*, 29 Colum. J.L. & Arts at 184-185. This mandate presented Congress with the grueling challenge of complying with both the Convention *and* the U.S. Constitution.

Section 514 poses a myriad of obstacles to the First Amendment liberties Americans cherish. Unlike *Luck's Music Library, Inc. v. Gonzales*, 407 F.3d 1262 (D.C. Cir. 2005), where plaintiffs failed to raise a First Amendment challenge, this case presents the issue head-on.

A. Section 514 Compromises The Public's Right To Freely Utilize The Public Domain.

A century ago, Congress enacted copyright legislation with the recognition that its purpose was not to protect the natural rights of authors, but to serve the *public* welfare. H. R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909). When the Berne Convention was implemented, Congress acknowledged that the primary objective of copyright law is "to secure for the public the benefits derived from the authors' labors." H. R. Rep. No. 100-609, p. 17 (1988) (internal quotation marks omitted). Monopoly privileges granted under the Progress Clause are ultimately intended "to allow the public access...after the limited period of exclusive control has expired." *Sony*, 464 U.S. at 429. Section 514 poses a critical threat to the public domain.

This case has significant potential to "establish the public's right to perpetual free utilization of public domain material." *Copyright's "Traditional Contours,"* 31 Whittier L. Rev. at 557.

1. The Public Has Vested Rights To The Public Domain—The Raw Material For New Expression.

When a copyright or patent expires, the right to copy "passes to the public...the public may use the invention or work at will and without attribution." *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33-34 (2003) ("*Dastar*"), citing *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230 (1964) ("*Sears*") and *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*,

489 U.S. 141, 150-151 (1989) ("*Bonito Boats*"). In *Dastar*, a producer (Dastar Corp.) had taken a creative work in the public domain—the Crusade television series—copied it, made minor modifications, and then produced its own video series. This Court rejected a cause of action against Dastar, because that would have "create[d] a species of mutant copyright law that limits the public's federal right to copy and use expired copyrights. *Bonito Boats*, supra, at 165." *Dastar*, 539 U.S. at 34 (internal quotation marks omitted).

The public domain and the First Amendment are "inextricably intertwined." *Copyright's "Traditional Contours,"* 31 Whittier L. Rev. at 571. The public has the unrestricted right to access and use works in the public domain—to read, perform, listen, or to fuel the creation of new works. The Tenth Circuit was correct when it explained that the *Golan* plaintiffs have *vested* First Amendment interests, and Section 514's interference with these rights must be scrutinized. *Golan II*, 501 F.3d at 1194.

When Congress enacted Section 514, it took a detour around its time-honored practice of protecting the public domain. The 1909 Copyright Act provided that "no copyright shall subsist in the original text of any work which is in the public domain." Copyright Act, Pub. L. No. 60-349, 35 Stat. 1075, 1077 (1909). The 1919 Act briefly departed from prior tradition but protected Americans who had relied on foreign works in the public domain—and expressly referenced this portion of the 1909 Act. Act of Dec. 8, 1919, cha. 11, 41 Stat. 368. Commentators have noted the historical foundations of the public domain and this Court's active role in policing it against legislative intrusion, e.g., Tyler T. Ochoa, *Origins and Meanings of the*

Public Domain, 28 U. Dayton L. Rev. 215, 255-256 (2002); Ruth L. Okediji, *Through the Years: The Supreme Court and the Copyright Clause,* 30 Wm. Mitchell L. Rev. 1633, 1646 (2004).

Copyright law essentially creates the public domain by "[allowing] the public access to the products of [the copyright holder's] genius after the limited period of exclusive control has expired." *Sony*, 464 U.S. at 429. The public domain, in turn, operates as "a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use." Jessica Litman, *The Public Domain*, 39 Emory L.J. 965, 968 (1990). The Founders valued free expression, and it is reasonable to conclude that they included the Progress Clause in the Constitution as a vehicle to ensure continuation of the public domain. L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 Emory L.J. 909, 949 (2003).

2. The Built-In Safeguards That Protect First Amendment Rights During The Monopoly Are Not An Adequate Replacement For The Rights The Public Has Forfeited.

Certain built-in safeguards guard the public's First Amendment interests during the protected monopoly. The idea/expression dichotomy ensures that, while specific expression may be copyrighted, the underlying facts and ideas may be freely communicated. *Harper & Row Publishers, Inc. v. Nation Enter.,* 471 U.S. at 556. *See Feist Publications, Inc. v. Rural Telephone*

Service Co., 499 U.S. 340 (1991) (white page directory cannot be copyrighted). The "fair use" doctrine permits limited use of copyrighted expression. These valuable protections "govern the distribution of rights between authors and the public from the moment a work is created and copyrighted until the copyright expires." *Golan II*, 501 F.3d at 1195.

These safeguards may help protect First Amendments rights *during* the life of a copyright, but they are hardly a satisfactory replacement for the public domain rights Congress snatched away from the public—*after* the copyright's expiration. At that point, the author has no greater rights than any member of the general public. The safeguards are no longer relevant, nor would they add anything to the public's unrestricted rights in the public domain. On the contrary, "[b]y withdrawing works from the public domain, § 514 leaves scholars, artists, and the public with less access to works than they had before the Act." *Golan II*, 501 F.3d at 1195. The "fair use" factors set forth in Section 107 do not even include what is arguably "the most compelling concern embodied in the First Amendment: the public interest, or even public necessity, in permitting unauthorized use of certain copyrighted material." *Copyright and the First Amendment,* 67 Wash & Lee L. Rev. at 855-856. At times it is necessary to reproduce the copyrighted work in its exact expression—for example, orchestras that perform the musical compositions of Prokofiev, Stravinsky, or Shostakovich. The fair use doctrine does nothing to restore the rights Section 514 has confiscated in such a case.

3. Copyrights Are Analogous To Patents In Terms Of The Initial Monopoly Rights And Ultimate Goal.

Most public domain discussions are found in patent cases, including *Sears*, *Graham*, and *Bonito Boats*. But in *Dastar*, this Court applied patent precedents to a copyright dispute. *Copyright's "Traditional Contours,"* 31 Whittier L. Rev. at 568, 574. Copyrights and patents are not identical, but it is their similarities—not their distinctions—that drive the outcome of this case.

The Progress Clause controls both copyrights and patent rights. Both limited monopolies exist to benefit the public—not the private authors or inventors. *Fox Film Corp. v. Doyal*, 286 U.S. at 127-128 ("A copyright, like a patent, is 'at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals and the incentive to further efforts for the same important objects.' *Kendall v. Winsor,* 21 How. 322, 327, 328; *Grant v. Raymond*, 6 Pet. 218, 241, 242."); *United States v. Paramount Pictures, Inc.,* 334 U.S. 131, 158 (1948) ("The copyright law, like the patent statutes, makes reward to the owner a secondary consideration."); *Bonito Boats,* 489 U.S. at 151 ("[T]he ultimate goal of the patent system is to bring new designs and technologies into the public domain through disclosure.")

Inventors and authors both offer something new and unique to enrich the public. "[T]he rights of patentees and copyright holders regarding initial grants and their expiration [are] synonymous," as this Court confirmed in *Dastar*. *Copyright's "Traditional*

Contours," 31 Whittier L. Rev. at 568, citing *Dastar*, 539 U.S. at 33-34. Patents require novelty and non-obviousness—an exception to the general rule that ideas may be freely exploited. *Bonito Boats,* 489 U.S. at 151. Copyrights require originality.

As this Court has explained, patents and copyrights are both part of a "carefully crafted [statutory] bargain" that ultimately culminates in new material being added to the public domain. *Id*. at 150-151 (patents); *Dastar*, 539 U.S. at 33-34 (copyrights). In both cases, rights pass to the *public* when the monopoly expires. *United States v. Dubilier Condenser Corp.,* 289 U.S. 178, 186-187 (1933) (patents) ("upon expiration...the knowledge of the invention inures to the people"); *Sears,* 376 U.S. at 230 (patents); *Bonito Boats,* 489 U.S. at 151 (patents); *Dastar*, 539 U.S. at 33-34 (copyrights). In each context, the public should receive the benefit of its bargain once the "congressionally mandated price" (*Bonito Boats*, at 152) has been paid in full—disclosure, in the patent context, and free access to the expression, where copyrights are involved.

In both contexts, the public domain warrants protection. A state may not use its unfair competition laws "to block off from the public something which federal law has said belongs to the public." *Sears,* 376 U.S. at 231-232. The public domain is equally inviolate where formerly copyrighted expression is involved:

> [T]he right to copy, and to copy without attribution, once a copyright has expired, like

> "the right to make [an article whose patent has expired]...passes...to the public."

Dastar, 539 U.S. at 33, quoting *Sears,* 376 U.S. at 230.

Some cases explain differences between patents and copyrights while still emphasizing the importance of public domain preservation. Patents guard knowledge, whereas copyrights protect expression but not the underlying facts or ideas. *Eldred v. Ashcroft*, 537 U.S. at 217 ("copyright gives the holder no monopoly on any knowledge"). Where patents are involved, "removal of existent knowledge from the public domain is a persistent danger" but "that danger...is not lurking within the retroactive expansion of copyrights." *Golan v. Gonzales*, No. 01-B-1854, 2005 WL 914754 (D. Colo. April 20, 2005) ("*Golan I*"), citing *Feist Publications, Inc. v. Rural Telephone Service Co.,* 499 U.S. at 349-350 ("Copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."); *Graham v. John Deere Co. of Kansas City,* 383 U.S. 1, 6 (1966) (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 condemns the removal of *knowledge* from the public domain—in the context of patents. Copyrights do not raise the same concerns about knowledge, but in both cases, the public has vested rights at stake after the expiration of a monopoly—either knowledge of an invention (patents) or free access to formerly copyrighted expression (copyrights). Both categories fall within the public

domain and merit protection. Congress deprives the public of vested rights when it removes content from the public domain—whether it is knowledge of an invention or the right to use works whose copyrights have expired.

B. Section 514 Impoverishes The Public By Chilling Future Expression.

Section 514 imposes a massive burden on those who have made investments in reliance on the continuing availability of the public domain—"reliance parties." The District Court in an earlier reiteration brushed aside the gravity of these reliance interests, concluding that "[t]hough URAA Section 514 grants many retroactive benefits to authors, it does not impose retroactive burdens upon the plaintiffs" or "alter the legal consequences of [their] completed acts." *Golan I*, at *50.

But the law also chills *future* expression—a prime First Amendment concern. Copyright laws and judicial pronouncements must be crafted carefully to avoid "the chilling effect that [some] decisions have had on would-be users of copyrighted materials: the speech that has not occurred because of fear of an infringement action." *Copyright and the First Amendment,* 67 Wash & Lee L. Rev. at 914.

Section 514 carves a huge chunk out of the public domain, restricting the material available for new creative works. Those building blocks are by definition "other people's speeches." *Eldred v. Ashcroft*, 537 U.S. at 221. The risk of future erosion of the public domain creates an environment of uncertainty and chills expression. The boundaries of copyright's limited

monopoly should be clear. "This clarity is essential to promote progress, because it enables efficient investment in innovation." *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co*., 535 U.S. 722, 730-731 (2002). The public's rights should be defined and stable, not constantly in danger of being snatched away by an act of Congress.

The law's inherent complexity is another contributing factor:

> Section 104A is a highly technical, opaque, ambiguous, internally inconsistent and often misinterpreted provision of the 1976 Copyright Act. "Restoration of copyright" alters our traditional notions of copyright protection and unsettles parties' reasonable expectations.... [S]ection 104A imposes strenuous discovery and evidentiary demands on courts and litigators.

Dueling Trolls, 29 Colum. J.L. & Arts at 231. The legislative history of this "fast track legislation" is "limited and sometimes contradictory." *Id*. at 187. It creates "myriad issues and questions" and promises to deliver even more—"which will increase geometrically in complexity." Nimmer, *The End of Copyright*, 48 Vand. L. Rev. 1385, 1404, 1420 (1995).

This "highly technical, convoluted" statute is "difficult to decipher and fraught with potential unintended consequences...creat[ing] numerous problems for copyright owners and users, litigators and courts." *Dueling Trolls,* 29 Colum. J.L. & Arts at 187. Among these problems are:

- Proof of originality for foreign works created years ago (*id*. at 191);
- Lack of U.S. registration—and consequently no presumption of a valid copyright (*id*. at 192);
- The threshold issue of "publication"—somewhere—for a work to have entered the public domain in the United States (*id*. at 197-198);
- Technical definitions and requirements for "reliance party" status (*id*. at 213).

These technical difficulties contribute to the erratic environment already created by Congress' improper erosion of the public domain. With the public domain at risk *and* mounting complexities in the application of the law, the cost of creating new works is prohibitive—chilling or even freezing free expression. This is a giant step backwards on the road to progress—the antithesis of what the Progress Clause demands.

C. Section 514 Compromises The Public's Right To *Receive* Expression.

> The First Amendment's extension of protection to the reader and listener as well as to the writer or speaker provides an interesting contrast to the concerns reflected by the copyright regime.

Copyright and the First Amendment, 67 Wash & Lee L. Rev. at 843 n. 46. The expression "coin" has two sides—the right to create and the right to receive. "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." *CBS, Inc. v. FCC*,

453 U.S. 367, 395 (1981) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)). Plaintiffs and other reliance parties include "a non-profit community orchestra...instructors, performers, publishers, and other cultural organizations." *Copyright's "Traditional Contours,"* 31 Whittier L. Rev. at 551. Although there are some commercial reliance parties—whose burden is anything but minimal—others are tax-exempt entities established under 26 U.S.C. § 501(c)(3) to serve exclusively *public* interests, including the dissemination of literary and artistic works. Their public beneficiaries have the right to continue enjoying the benefits for which these organizations were founded. Section 514 imposes harsh costs on the public, both in carving up the public domain and in imposing new financial burdens on public organizations set up to enrich the culture through the arts.

Persons denied access to the expression of others have standing to bring a constitutional challenge. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc*., 425 U.S. 748 (1976) (individual and two non-profits challenged advertising restrictions on prescription drugs). In *Va. State Bd. of Pharmacy*, this Court cited a long line of precedent upholding the First Amendment right to receive information and other expression: *Procunier v. Martinez*, 416 U.S. 396, 408-409 (1974) (right to receive correspondence from prison inmates); *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972) (professors had right to hear and debate author from Belgium); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (possession of obscene materials in privacy of home); *Thomas v. Collins*, 323 U.S. 516, 534 (1945) (workers had right to hear what labor organizer had to say); *Martin v. City of Struthers*, 319 U.S. 141, 143

(1943) (right of individual household to receive Jehovah's Witness literature). *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc*., 425 U.S. at 757.

D. Section 514 Compromises The Rights Of American Authors In Order To Enhance The Rights Of Foreign Authors.

Several decades ago, a Senate Foreign Relations Report, discussing reasons why the United States should not join the Berne Convention, observed that "[t]his revival of copyright under the retroactivity doctrine would have worked considerable prejudice to *American* motion picture, music, and publishing houses." S. Exec. Rep. No. 5, 83d Cong., 2d Sess. 3 (1954) (emphasis added); cited in *Dueling Trolls*, 29 Colum. J.L. & Arts at 183 n. 14. This warning was right on point: "Entire businesses, some built upon decades of previously legal use of foreign public domain materials, could be forced to close their doors." *Id*. at 184. Beyond this severe economic impact, there are concerns about the way Section 514 unconstitutionally reapportions First Amendment rights.

"[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). Unlike *Buckley*, Section 514 does not expressly address political campaigns or other public debates, but the analogy is evident. Just as the government may not "level the playing field" in a campaign (*Davis v. FEC*, 128 S. Ct. 2759, 2773-2774 (2008)), Congress may not create new inequities by

"extend[ing] protections to foreign authors that are not afforded United States authors, even in their own country." *Golan v. Holder*, 611 F. Supp. 2d 1165, 1177 (D. Colo. 2009) ("*Golan III*"). It is not merely the interests of reliance parties that clash with the foreign authors who benefit from restored copyrights. *See Golan v. Holder*, 609 F.3d 1076, 1084 (10th Cir. 2010) ("*Golan IV*"). It is also American authors who are similarly situated. The Tenth Circuit focused on the burden that Section 514 imposed on American reliance parties and found it congruent to (1) the burden Congress sought to impose on foreign reliance parties; and (2) the potential benefit to American authors who publish abroad. *Id.* at 1091. But unlike the foreign authors who benefit from Section 514, American authors are not granted copyright restoration or relief from their failure to follow copyright formalities. Section 514 "tak[es] the right to speak from some and giv[es] it to others." *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010).

A century ago, Congress enacted copyright legislation with the recognition that its purpose was not to protect the natural rights of authors, but to serve the *public* welfare. H. R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909). When the Berne Convention was implemented, Congress acknowledged that the primary objective of copyright law is "to secure for the public the benefits derived from the authors' labors." H. R. Rep. No. 100-609, p. 17 (1988) (internal quotation marks omitted). Monopoly privileges granted under the Progress Clause are ultimately intended "to allow the public access...after the limited period of exclusive control has expired." *Sony*, 464 U.S. at 429. Section 514 poses a critical threat to the public domain.

This case has significant potential to "establish the public's right to perpetual free utilization of public domain material." *Copyright's "Traditional Contours,"* 31 Whittier L. Rev. at 557.

II. SECTION 514 VIOLATES THE CONSTRAINTS THE CONSTITUTION PLACES ON THE FEDERAL GOVERNMENT—BOTH BY AFFIRMATIVE GRANTS OF POWER AND EXPRESS PROHIBITIONS.

The U.S. Constitution has created a federal government of enumerated powers. *United States v. Lopez,* 514 U.S. 549, 552 (1995); Art. I, § 8. Those powers are "defined and limited." *Marbury v. Madison,* 5 U.S. 137, 176 (1803) (Marshall, C. J.). The American system separates the three coordinate branches of government and divides power between the federal and state governments. This careful demarcation of authority protects our basic liberties and guards against tyranny. *Gregory v. Ashcroft,* 501 U.S. 452, 458 (1991).

Every law Congress enacts must be based on at least one of its enumerated powers. *United States v. Morrison,* 529 U.S. 598, 607 (2000). If the federal government's powers were not restricted by Article I, judicial analysis could move straight to the Bill of Rights to determine whether there is some applicable limitation, bypassing the threshold question of whether Congress had the power to act in the first place. SYMPOSIUM: *Constitutional Challenges to Copyright: Alternatives to the Copyright Power: The Relationship of the Copyright Clause to the Commerce Clause and the Treaty Power*, 30 Colum. J.L. & Arts 287, 293-294 (2007) ("*Constitutional Challenges to*

Copyright"). Moreover, if one Clause with broad implications could stretch congressional power—the Commerce Clause, for example—the other enumerations would be superfluous. *United States v. Lopez,* 514 U.S. at 588 (Thomas, J., concurring).

The American system of enumerated federal powers is a critical reference point for this case. But from that point forward, the waters are murky and courts must wade in carefully to craft and apply some basic principles.

First, there is inevitable overlap among Article I's enumerated powers. Precedents establish that Congress is not *automatically* forbidden from taking action under an alternative source of authority, *provided* the independent requirements of the latter are satisfied. *United States v. Moghadam*, 175 F.3d 1269, 1278 (11th Cir. 1999). The Eleventh Circuit upheld an anti-bootlegging statute under the Commerce Clause because it was evident from the context that Congress, focused on interstate and international commerce, intended to deal with deleterious economic effects on the recording industry. *Id*. at 1276.

The mere fact that one grant of authority cannot sustain a law does not mean that another one cannot. The various powers enumerated in Article I, § 8 are generally independent of one another. *Id*. at 1277. In *Heart of Atlanta*, this Court upheld provisions in the Civil Rights Act of 1964 that regulated public accommodations for interstate travelers—under the Commerce Clause. *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 250 (1964). Congress did not violate any independent constitutional

provisions—on the contrary, the Act facilitate the exercise of fundamental rights. Similarly, Congress can use its Spending Clause authority, U.S. Const. art. I, § 8, cl. 1, to condition its appropriation of funds on a state's agreement to impose restrictions that Congress could not legislate directly. *South Dakota v. Dole,* 483 U.S. 203, 207 (1987). This merely encourages state action without coercing it or violating another part of the Constitution.

But courts must look at the bigger constitutional picture and consider whether Congress may exercise power under one clause so as to avoid affirmative limitations that would preclude it from passing identical legislation under another clause. *United States v. Moghadam*, 175 F.3d at 1277 (considering whether the Commerce Clause could enable legislation that could not be passed under the Copyright Clause); *United States v. Martignon*, 492 F.3d 140, 141 (2d Cir. 2007) (same—considering a law that prohibited the unauthorized recording of performances and subsequent trafficking in bootlegged phonorecords). When the Tenth Circuit initially considered this case, it recognized that "legislation promulgated pursuant to the Copyright Clause must still comport with other express limitations of the Constitution." *Golan II*, 501 F.3d at 1187. As this Court stated:

> Article I of the Constitution grants Congress broad power to legislate in certain areas. Those legislative powers are, however, limited not only by the scope of the Framers' affirmative delegation, but also by the principle that they

> may not be exercised in a way that violates other specific provisions of the Constitution.

Saenz v. Roe, 526 U.S. 489, 508 (1999) (internal quotation marks omitted). *See also Buckley v. Valeo,* 424 U.S. at 132 ("Congress has plenary authority in all areas in which it has substantive legislative jurisdiction so long as the exercise of that authority does not offend some other constitutional restriction.") (internal citation omitted).

Some of the Article I, § 8 powers contain affirmative prohibitions that must be respected—regardless of the source of Congress' power. Congress could not sidestep the "uniform laws" mandate of the Bankruptcy Clause by purporting to act under the Commerce Clause, even though bankruptcy is "intimately connected with the regulation of commerce." *Railway Labor Executives' Ass'n v. Gibbons,* 455 U.S. 457, 466 (1982) ("*Gibbons*"). It would not be appropriate for Congress to evade the originality inherent in the "writings" requirement of the Progress Clause by extending copyright-like protection to unoriginal works. Paul J. Heald, *The Vices of Originality,* 1991 Sup.Ct. Rev. 143, 168-75. Here, Congress should not be able to circumvent the "limited times" and "public purpose" mandates of the Progress Clause by resort to the Commerce Clause or its power over international affairs.

There may appear to be some tension between cases like *Heart of Atlanta* and *Moghadam,* allowing the use of an alternative source of power, and those like *Gibbons*, which demonstrate that "in some circumstances [one clause] cannot be used to eradicate a limitation placed upon Congressional power in

another grant of power." *United States v. Moghadam*, 175 F.3d at 1279-1280. In *Gibbons*, context and legislative history confirmed that Congress had enacted a *bankruptcy* law, exercising its powers under the Bankruptcy Clause. *Gibbons,* 455 U.S. at 466-467. But in *Martignon*, the outcome turned on the fact that the bootlegging statute was *not* a *copyright* law. *United States v. Martignon*, 492 F.3d at 152. Here, there is no dispute that Section 514 is a copyright law.

Ordinarily the limitations—not the powers per se—are alternative. Litigants typically argue that numerous constitutional violations have occurred in a particular case, but even *one* violation is sufficient to strike a statute. *Constitutional Challenges to Copyright,* 30 Colum. J.L. & Arts at 295. One of the implicit constraints on any exercise of congressional power is the limitations found elsewhere the Constitution, including the Bill of Rights. Where Progress Clause power is at issue, First Amendment limits are particularly relevant. *Copyright and the First Amendment,* 67 Wash & Lee L. Rev. at 876. And the "traditional contours" may be "too cramped an approach," allowing "far too great a deference to Congress in weighing important constitutional values." *Id*. at 880-881. In other contexts, this Court has not been so willing to defer to Congress—e.g., striking down campaign finance regulations as inconsistent with First Amendment rights in *Citizens United v. FEC*, 130 S. Ct. at 913. *Id*. at 881 n. 266.

The Progress Clause is "both a grant of Power and a limitation." *Bilski v. Kappos*, 130 S. Ct. 3218, 3252 (2010), *Eldred v. Ashcroft*, 537 U.S. at 212, both quoting *Graham v. John Deere Co*., 383 U.S. at 5. This "qualified authority" contrasts with the practices of the

English Crown in granting monopolies to court favorites at the expense of the public. *Id*. In America, limited monopolies exist solely to benefit the public by providing incentives for invention and creative expression. This Court should take a global view of the Constitution in this case. Not only is Section 514 out of step with the Progress Clause, as Petitioners argue—it is not warranted by other potentially relevant Clauses, and it impoverishes the American public by compromising core First Amendment rights.

III. THE COMMERCE CLAUSE DOES NOT JUSTIFY AN END-RUN AROUND THE LIMITATIONS INHERENT IN THE PROGRESS CLAUSE.

The Government briefly presumes—in a footnote—that the Commerce Clause is an alternate source for Congress' authority to enact Section 514. Opp. Pet. 17, n. 9. This presumption glosses over this Court's continuing commitment to a limited federal government: "*Lopez* emphasized...that even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds." *United States v. Morrison,* 529 U.S. at 608, citing *United States v. Lopez,* 514 U.S. at 557. Commerce Clause power must be related to interstate or international commerce. *United States v. Lopez,* 514 U.S. at 551 (school zone gun restrictions not related to commerce); *United States v. Morrison,* 529 U.S. at 610 (gender-motivated crimes—same); *Gonzales v. Raich,* 545 U.S. 1, 35-36 (2005) (Scalia, concurring) (non-economic activity cannot be regulated on the basis of a "remote chain of inferences").

Section 514 is a *copyright* regulation. Unlike cases that cite the Commerce Clause as a legitimate source of power, this case does not involve an inherently *commercial* regulation. One of this Court's early cases addressed Congress' authority to enact trademark legislation. *In re Trade Mark Cases*, 100 U.S. 82 (1879). The Copyright Clause could not sustain the 1876 law because "the ordinary trade-mark has no necessary relation to invention or discovery." *Id.* at 94. The law was enacted to protect businesses, not to advance innovation or authorship. *Id*. Under the prevailing view of the Commerce Clause, Congress lacked authority to legislate regarding trademarks not used in interstate commerce. But trademarks are inherently commercial. Under today's more expansive view of the Commerce Clause, that Clause might provide a viable alternate to the Progress Clause. *United States v. Moghadam*, 175 F.3d at 1278.

Other copyright-commerce crossover cases implicate intrinsically commercial matters. *Heart of Atlanta* regulated commercial transactions—discriminatory practices in public accommodations (meals/lodging) that impeded interstate travel. *Heart of Atlanta Motel v. United States*, 379 U.S. at 247-248. The Second Circuit upheld a law that restricted the importation of foreign-manufactured English language literary works. *Authors League of America, Inc. v. Oman,* 790 F.2d 220 (2d Cir.1986). Two circuit cases have involved the unauthorized sale and recording of live performances. The Eleventh Circuit observed that "[t]he link between bootleg compact discs and interstate commerce and commerce with foreign nations is self-evident." *United States v. Moghadam*, 175 F.3d at 1276. The Second Circuit, similarly, found that "regulation of bootlegging is necessary at the

federal level because of its interstate and international commercial aspects." *United States v. Martignon*, 492 F.3d at 152. Both *Moghadam*[3] and *Martignon* involved live performances, rather than "writings," and the statutes challenged were commercial in nature—not copyright laws per se.

When the Commerce Clause is invoked as an alternate source of authority, the statute's purpose should be legitimate and constitutional. The quasi-copyright legislation in *Moghamad* was "in no way inconsistent with" and "further[ed] the purpose of the Copyright Clause to promote the progress of the useful arts by securing some exclusive rights to the creative author." *United States v. Moghadam*, 175 F.3d at 1280. The civil rights legislation in *Heart of Atlanta* was a legitimate means to facilitate the exercise of rights guaranteed by the Thirteenth, Fourteenth, and Fifteenth Amendments. *Heart of Atlanta Motel v. United States*, 379 U.S. at 276-277 (Black, J., concurring). The Enforcement Clause (§ 5 of the Fourteenth Amendment) provided an alternate and perhaps even more appropriate source of congressional authority to implement those rights. *Id*. at 280 (Black, J., concurring); *id*. at 293 (Goldberg, J., concurring).

Caution is required so as not to transgress affirmative limitations on the power of Congress. If a statute falls within the scope of a particular Clause—the Bankruptcy Clause in *Gibbons*, the

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[3] The statute in this case may have violated the Progress Clause's "limited times" requirement, but the court declined to raise that issue sua sponte in light of the Moghadam's failure to challenge the law on that basis. *United States v. Moghadam*, 175 F.3d 1269, 1281 (11th Cir. 1999).

Progress Clause in *Martignon* and in this case—the limits of that clause should be strictly observed. *United States v. Martignon*, 492 F.3d at 149 (concluding that Congress exceeds its Progress Clause power when "the law it enacts is an exercise of the power granted Congress by the Copyright Clause and the resulting law violates one or more specific limits of the Copyright Clause"). The Eleventh Circuit acknowledged the argument that:

> [S]ome of the grants of legislative authority in Article I, § 8 contain significant limitations that can be said to represent the Framers' judgment that Congress should be affirmatively prohibited from passing certain types of legislation, no matter under which provision.

United States v. Moghadam, 175 F.3d at 1279. That is exactly the rationale this Court employed in holding that "[u]like the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform through the United States." *Gibbons,* 455 U.S. at 468. This Court refused to exploit the Commerce Clause to sustain a non-uniform *bankruptcy* law. Applying the *Gibbons* reasoning to this case mandates a comparable conclusion:

> If this Court "were to hold that Congress had the power to enact [Section 514] pursuant to the Commerce Clause, [it] would eradicate from the Constitution a limitation on the power of Congress to enact [copyright] laws"—namely, the "limited times" restriction.

Gibbons, 455 U.S. at 469.

There is no dispute that Section 514 is a *copyright* regulation. "The language of the [Progress] Clause itself compels [this Court] to hold that such a [copyright] law is not within the power of Congress to enact." *Id.* at 471.

IV. THE TREATY CLAUSE DOES NOT JUSTIFY AN END-RUN AROUND EITHER THE FIRST AMENDMENT OR THE PROGRESS CLAUSE LIMITATIONS.

The Treaty Clause, U.S. Const., Art. II, § 2, cl. 2, authorizes the President to make Treaties with the advice and consent of the Senate. It does not expressly empower Congress to legislate, but "treaties made pursuant to that power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.' *Missouri v. Holland,* 252 U.S. 416, 433 (1920)." *United States v. Lara*, 541 U.S. 193, 201 (2004). Section 514 is not itself part of a treaty, but it was enacted to implement portions of the Berne Convention.

Courts ordinarily grant broad deference to the other branches of government in handling foreign affairs. But in spite of that deference, no international treaty can broaden the limited, enumerated powers of the federal government:

> No 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.

Boos v. Berry, 485 U.S. 312, 324 (1988), quoting *Reid v. Covert*, 354 U.S. 1 (1957) (Treaty Clause does not permit violation of Sixth Amendment rights).

The relationship between the Treaty Clause and the Progress Clause (or other constitutional provisions) is a matter of debate. Some would argue for a "subservience view" wherein the Treaty Clause is subject to the constraints of the Progress Clause. Others would contend for an "expansive autonomous view" with few restraints on the treaty power. A moderate "limited autonomous view" falls somewhere in between the "easy polarities" of the former and the "unfettered autonomy" of the latter view. *Constitutional Challenges to Copyright,* 30 Colum. J.L. & Arts at 298-302. Yet even the most expansive position "regards the Treaty Clause as a broad authority, wholly unconstrained by most other restraints on governmental action *except by restrictions that take the form of prohibitory words such as the First Amendment*." *Id*. at 298 (emphasis added). Fundamental American rights are not so easily displaced by an international agreement. That is particularly true in light of the discretion within the Berne Convention itself, allowing countries flexibility to comply with their own constitutions (Art. 18(3) provides that "respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle"). Even if the government's international powers could trump rights conferred by the Progress Clause—a proposition Petitioners do not concede—the First Amendment is a pillar of American freedom that cannot be dismantled by invoking Treaty Clause power.

This Court's precedents illuminate the Treaty Clause's relationship to other constitutional restraints on federal legislative power. The State of Missouri was unsuccessful in its challenge to the Migratory Bird Treaty Act of 1918, claiming an unconstitutional interference with state rights under the Tenth Amendment. But wild birds are not in anyone's possession, and the treaty "[did] not contravene any prohibitory words to be found in the Constitution." *Missouri v. Holland*, 252 U.S. at 433. This case contrasts with *Reid*, where allowing a civilian (military wife living abroad) to be tried and convicted by court martial would have contradicted explicit constitutional rights protected by the Fifth and Sixth Amendments. According to this Court, "[t]he United States is entirely a creature of the Constitution...[i]ts power and authority have no other source." *Reid v. Covert*, 354 U.S. at 5-6.

The Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, cannot salvage Section 514. In *Missouri v. Holland*, the treaty was valid and did not conflict with the Constitution, so Congress could legitimately enact legislation to implement it. *Missouri v. Holland*, 252 U.S. at 432. But in *Reid*, the Necessary and Proper Clause could not be hijacked to extend military jurisdiction to persons beyond those described in U.S. Const. art. I, § 8, cl. 14—"the land and naval forces." *Reid v. Covert*, 354 U.S. at 21. Similarly, Section 514 clashes with both the Progress Clause and the First Amendment. It is neither *necessary*—Congress had broad discretion to comply with the Constitution—nor is it constitutionally *proper*.

Certain basic principles are essential to maintaining the structure of American democracy: the

limits on federal power in Article I and the affirmative prohibitions in the Bill of Rights. Congressional power over foreign affairs does not justify either an expansion of its enumerated powers or encroaching on the rights guaranteed to Americans. An interest recognized in international law is not necessarily "compelling" for First Amendment purposes merely because it involves foreign relations. *Boos v. Berry*, 485 U.S. at 324. America's fundamental system dictates that no international agreement can override the Constitution unless it is properly amended:

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.

Reid v. Covert, 354 U.S. at 14.

CONCLUSION

Section 514 is an unconstitutional expansion of the limited, enumerated powers granted to Congress. It exceeds the limits imposed by the Progress Clause as well as affirmative prohibitions in the First Amendment. Congress cannot constitutionally trade away the American public's rights of free expression to public domain materials, so that the heirs of foreign authors can reclaim private interests in copyrights. This Court should declare the statute invalid and ensure that congressional power is confined within its constitutional boundaries.

Respectfully Submitted,

James L. Hirsen
Counsel of Record
505 S. Villa Real Drive
Suite 208
Anaheim Hills, CA 92807
(714) 283-8880
hirsen@earthlink.net

Deborah J. Dewart
620 E. Sabiston Drive
Swansboro, NC 28584
(910) 326-4554
debcpalaw@earthlink.net

Counsel for Amicus Curiae