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No. 10-545

IN THE

Supreme Court of the United States

LAWRENCE GOLAN, *et al.*,

Petitioners,

—v.—

ERIC H. HOLDER, JR., *et al.*,

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL COALITION FOR COPYRIGHT PROTECTION IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

With the written consent of all parties, reflected in letters on file with the Clerk, the International Coalition for Copyright Protection (ICCP) submits this brief as *amicus curiae*, pursuant to Rule 37 of the Rules of this Court.[1]

The ICCP is an unincorporated association formed by authors, illustrators, artists, songwriters, film distributors and publishers to advocate for protection of copyrights. ICCP's members depend upon copyright protection to exercise some legal control over the use of their creative work and to ensure that they receive adequate compensation when that work is published or performed.

ICCP's members own copyrights that have been restored in the United States pursuant to Section 514 of the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994). ICCP members also depend upon copyright protection in the European Union and other foreign countries, the extent of which depends upon the degree of protection afforded under United States law.

Members of the ICCP include Independent-International Picture Corporation, Dam Things Holding APS, Action Publishing, and Author Services Inc.

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[1] No counsel for a party authored the brief in whole or in part, and no person or entity, other than the *amicus curiae* or its members, made a monetary contribution to the preparation or submission of the brief.

The ICCP has filed *amicus* briefs in the two appeals in this case before the United States Court of Appeals for the Tenth Circuit. The ICCP also filed an *amicus curiae* brief in this Court in *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

SUMMARY OF ARGUMENT

Congress enacted Section 514 of the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified at 17 U.S.C. §§ 104A, 109(a)), as part of a broad and complex statute addressed to the foreign trade and commerce of the United States. In doing so, Congress acted pursuant to its enumerated power under Article I, Section 8, Clause 3 of the Constitution to regulate foreign commerce, and to implement an international treaty ratified by the Senate under the treaty power, Article II, Section 2, Clause 2.

Section 514 is a small component of a massive piece of international trade legislation, the vast majority of which has nothing to do with copyrights. Thus, even though Section 514 of the statute pertains to copyrights, Congress had the power to enact it independent of its authority under the Copyright Clause of the Constitution, Article I, Section 8, Clause 8. While *amicus* agrees with the United States and the Tenth Circuit that Congress' power to enact Section 514 is also supported by the Copyright Clause, petitioners incorrectly pose that question as necessarily determinative of this case. Treating Section 514 exclusively as copyright legislation ignores the historical context in which Congress enacted the entire URAA in furtherance of broad foreign policy and foreign economic goals.

To be sure, Congress cannot act under its foreign commerce or treaty powers in derogation of other specific constitutional restrictions on its power. Nothing in the Copyright Clause or any other provision of the Constitution, however, prohibited

Congress from enacting Section 514. Petitioners' strained effort to invoke the "limited times" language contained in the Copyright Clause is facially without merit. Section 514 *only* provides copyright protection to works for "limited times." Indeed, the duration of the copyright term provided for by Section 514 is precisely the same as the duration of copyrights in the United States generally, a "limited time" that the Court upheld as constitutional in *Eldred*. None of the copyright terms "restored" by Section 514 are longer, broader, or more onerous than those at issue in *Eldred*.

Eldred also mandates rejection of petitioners' argument that the "progress" preamble to the Copyright Clause prohibited enactment of Section 514. The preamble is hortatory in nature and contains no language limiting Congress' power to act under the Copyright Clause, despite petitioners' repeated efforts to interject into the language of the preamble the restrictive word "only" where it does not exist. In *Eldred*, the Court held that the preamble did not prohibit Congress from extending the term of copyright protection to already existing works, rejecting the argument that such an extension did not promote "progress" in a meaningful manner. In so holding, the Court affirmed that determination of whether copyright legislation is likely to promote "progress" in the arts or sciences is committed to the discretion of Congress, not the judiciary. *A fortiorari*, the Preamble to the Copyright Clause does not restrict Congress' power to act under the Foreign Commerce and Treaty Clauses.

Nor does the First Amendment prohibit Congress from enacting Section 514 as part of a

sweeping piece of international economic regulation. The copyrights encompassed by Section 514, whether authorized by the Copyright Clause or the Foreign Commerce Clause, are subject to the same traditional, historical, and statutory limitations as those that apply to all copyrights, including the fair use doctrine and the idea/expression dichotomy. Accordingly, as in *Eldred,* there is no reason for the Court to undertake further scrutiny under the First Amendment. Petitioners assert that their "reliance" and property interests in works that have been in the public domain require a heightened standard of First Amendment protection, but those concepts have no place in First Amendment jurisprudence, nor is there such a thing as "vested" First Amendment rights or a category of "vested" rights holders who possess greater First Amendment rights than other actual or potential speakers.

Even under intermediate First Amendment scrutiny, there can be no question that Section 514 is constitutionally valid legislation. Because Section 514 addresses issues of foreign affairs and foreign commerce, the government's explication of its foreign policy interest in implementing the statute must be granted significant deference under the well-established case law applicable to such matters. The identification and nature of the foreign policy interest of the United States at issue should be left to the discretion of the political branches of government.

Finally, petitioners and the *amici* supporting them fail to recognize the substantial ways in which Section 514 expands the incentives and opportunity for speech and public debate. Their assertion that

Section 514 will create "instability" in the public domain and therefore lead to a parade of horribles makes no sense. Section 514 has been in effect for almost 15 years. Google (and its book project), Wikipedia, and various of the other projects and industries that supposedly will be devastated by Section 514 were all created after January 1, 1996, the effective date of the statute restoring copyrights. The rules created by Section 514 have been in place for the last 15 years – the period in which the Internet took root, the digital revolution occurred, and the public gained access to an unprecedented amount of information and speech.

ARGUMENT

I. SECTION 514 IS A VALID EXERCISE OF THE FOREIGN COMMERCE CLAUSE AND TREATY POWER.

A. The URAA Is Trade Legislation Enacted Under Congress' Foreign Commerce Clause Powers.

The 1994 URAA is as pure a piece of foreign trade legislation as could be imagined. The URAA required thousands of changes to United States statutes and tariffs to implement the Uruguay Round Agreements that created the World Trade Organization ("WTO") and the modern global trade regime. Section 514 (along with the handful of other copyright provisions of the URAA) is but one small part of this massive international trade legislation. In the URAA, Congress approved not only the WTO Agreement, but also eighteen (18) separate trade-related economic agreements, covering such topics as agriculture, textiles, government procurement,

investments, subsidies, trade in services, and tariffs. 19 U.S.C. § 3511(a), (d). Only one of those agreements, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), concerns intellectual property. Copyright was only one small part of TRIPs, which also deals extensively with patents, trademarks, geographical indications, industrial designs, and trade secrets. *See id.* § 3511(d)(15); TRIPs, 33 I.L.M. 81 (1994). The title itself explains that TRIPs is concerned with "*trade-related* aspects of intellectual property." Thus, the fact that the URAA included provisions addressing copyrights did not mean that Congress was acting pursuant to its Copyright Clause powers in enacting such provisions, let alone pursuant exclusively to such powers.

Statements accompanying the passage of the URAA demonstrate the obvious, that Congress was acting pursuant to its powers over foreign commerce. In the President's letter to Congress transmitting the proposed URAA and related documents, he stated, "The Uruguay Round Agreements are the broadest, most comprehensive trade agreements in history. They are vital to our national interest and to economic growth, job creation, and an improved standard of living for all Americans."[2] *See* S. Rep. No. 103-412, at 3 (1994) ("The Uruguay Round of multilateral trade negotiations is by far the most

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[2] Message from the President of the United States Transmitting the Uruguay Round Trade Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements, H.R. Doc. No. 103-316, at 1 (1994).

ambitious and comprehensive round of multilateral trade negotiations in the history of the GATT.... tackl[ing] new areas, such as services, intellectual property rights, and investment, reflecting the growing complexity of the world trading system."); *see id.* at 2-5; H.R. Rep. No. 103-826(I), at 16 (1994) ("These agreements ... will lead to increased levels of world and U.S. output, trade, real income, savings, investment, and consumption.").[3]

The leading copyright commentator recognized that the URAA was enacted pursuant to and fell well within Congress' Foreign Commerce Clause powers.

> Evidently, Congress felt that its authority to regulate international commerce authorized it to enact the bill and obviated the need to be explicit about the matter. Given how broadly Congress' commerce power historically has been construed, that assumption is safe.... [*United States v. Lopez*, 514 U.S. 549 (1995)] does not remotely threaten the viability of this trade law, given how close to the core of economic activity the Uruguay Round Agreements lie.

4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 18.06[C][3][a], at 18-81 (2004) (foot-notes omitted) (hereinafter "Nimmer"); *see also* 3

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[3] The URAA was enacted under "fast-track" trade legislation pursuant to section 1103 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2903. *See* 19 U.S.C. § 3511(a).

Nimmer § 9A.07[B], at 9A–80-81; *see Golan v. Holder*, 609 F.3d 1076, 1081 (10th Cir. 2010).[4]

B. Section 514 of the URAA, Which Implements Treaty Obligations, Is an Exercise of the Treaty Power.

With respect to Section 514 itself, Congress clearly stated that it was acting to implement the United States' treaty obligations under the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 27, 99th Cong., 2d Sess. (1986) – a quintessential exercise of the Treaty Power – whereas there is no mention or indication that Congress considered itself to be acting pursuant to the Copyright Clause.[5] *See*

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[4] Because the Tenth Circuit upheld Section 514 as a valid exercise of Congress' Copyright Clause authority, the United States does not address the Foreign Commerce Clause in its brief, while reserving the right to do so if necessary in the future, *see* Brief for the Respondents ("Resp. Br.") at 33-34 n.15, and describing the URAA as "foreign trade" legislation, *id.* at 5. The statute at issue is constitutional if authorized under any enumerated constitutional power. *See, e.g.*, *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948).

[5] The Berne "Convention governs the international enforcement of copyright law. Since its entry into force in 1886, the Convention requires member countries to afford the same copyright protections to foreign copyright holders that they provide to their own citizens. Convention, Art. 5. The United States ratified the Convention in 1988." *Luck's Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107, 109 (D.D.C. 2004) (internal citations omitted), *aff'd*, 407 F.3d 1262 (D.C. Cir. 2005). There are now 164 Contracting Parties to the Berne Convention. *See* http://www.wipo.int/treaties/ (last viewed July 31, 2011).

S. Rep. No. 103-412, at 225 ("The [TRIPs] Agreement requires WTO countries to comply with Article 18 of the Berne Convention. While the United States declared its compliance with the Berne Convention in 1989, it never addressed or enacted legislation to implement Article 18 of the Convention."); *Luck's Music Library, Inc. v. Gonzales*, 407 F.3d 1262, 1262-63 (D.C. Cir. 2005) ("§ 514 of the [URAA] implements Article 18 of the Berne Convention for the Protection of Literary and Artistic Works."); *Luck's Music*, 321 F. Supp. 2d at 109 n.1 (describing implementation of Berne Convention obligations, including Article 18, through Title V of URAA, which implemented TRIPs); TRIPs, art. 9(1), 33 I.L.M. at 87;[6] 3 Nimmer, § 9A.07[B], at 9A–80 (acknowledging Treaty Power rationale for Section 514); *Golan*, 609 F.3d at 1081 (Congress enacted URAA "in order to comply with these international agreements"); Resp. Br. at 5 ("Section 514 . . . implements Article 18 of Berne").

The Berne Convention is a "Treaty" within the meaning of the Treaty Clause. U.S. Const. art. II, § 2, cl. 2. The President presented the Convention to the Senate, which ratified it by a two-thirds vote, the President signed the treaty, and it was deposited with WIPO. *See* 134 Cong. Rec. S16939 (Oct. 20, 1988); 24 Weekly Comp. Pres. Doc. 1405 (Nov. 5, 1988); http://www.wipo.int/treaties/. Congress expressly declared the Berne Convention not to be self-executing, however, and it thus required

[6] The GATT Secretariat characterized TRIPs as "the most important multilateral agreement on intellectual property rights negotiated in this century." (quoted in 4 *Nimmer* § 18.06[A], at 18-49).

implementing legislation in order for the United States to carry out its international obligations. *See* 17 U.S.C. § 101 note (Berne Convention; Congressional Declarations, Pub. L. 100-568, § 2(1)) ("The Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto (hereafter in this Act referred to as the 'Berne Convention') are not self-executing under the Constitution and laws of the United States.")

GATT Members, including the United States, were obligated to comply with TRIPs by January 1, 1996. TRIPs, art. 65(1), 33 I.L.M. at 107; Presidential Proclamation 6780, 60 Fed. Reg. 15,845, 15,846 (March 23, 1995), at 5(c). Therefore, in order to comply with the Uruguay Round Agreements and TRIPs, the United States was required to implement the Berne Convention, including Article 18. TRIPs, art. 9(1), 33 I.L.M. at 87. One of the primary goals of the WTO Agreement was to prevent GATT Members, including the United States, from picking and choosing among the provisions of TRIPs (and hence of the Berne Convention, arts. 1-21) with which they would comply. TRIPs art. 72, 33 I.L.M. at 110 (reservations from TRIPs require consent of all other WTO Members). Section 514 goes no further than Article 18, providing protection only for otherwise copyrightable *foreign* works whose term of protection has not yet expired in the country of origin, and that

further meet the specified criteria set out in 17 U.S.C. § 104A(h)(6)(C).[7]

The Treaty Power is a distinct delegation of enumerated power to the Executive and the Senate. As Justice Holmes explained in *Missouri v. Holland*, 252 U.S. 416 (1920):

> Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States…. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, a power which must belong to and somewhere reside in every civilized government is not to be found.

Id. at 433 (internal quotations omitted); *see id.* at 432 (citing U.S. Const. art. VI, cl. 2, which distinguishes "Laws of the United States which shall be made in Pursuance" of the Constitution, from "all Treaties made, or which shall be made, under the Authority of the United States"); *United States v. Lara*, 541 U.S. 193, 201 (2004); *see also* L. Tribe, *American Constitutional Law* 227 (2d ed. 1988) ("*Missouri v.*

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[7] Section 514 also provides specific protections to reliance parties that are not required by the Convention or TRIPs. *See* 17 U.S.C. § 104A(d)(2)-(4), (e)(2).

Holland thus views the treaty power as a delegation of authority to federal treaty-makers independent of the delegations embodied in the enumeration of Congress' own powers."); L. Henkin, *Foreign Affairs and the United States Constitution* 191 (2d ed. 1996) ("What [Holmes] said, simply, was that the Constitution delegated powers to various branches of the federal government, not only to Congress; the Treaty Power was delegated to the federal treaty-makers, a delegation additional to and independent of the delegations to Congress.").

"If [a] treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." *Holland*, 252 U.S. at 432; *see Lara*, 541 U.S. at 201 (same). The Berne Convention is plainly a valid treaty, *see, e.g., Eldred*, 537 U.S. at 195, in that, first, the subject matter of the treaty is one "requiring national action" concerning United States relations with foreign powers, and concerns a power that "must belong to and [] reside" in the national government, *Holland*, 252 U.S. at 433 (internal quotations omitted), and second, the Constitution contains no "prohibitory words" barring the treaty's terms. *Id.* Section 514, as a statute that implements a portion of the Berne Convention, is accordingly a valid exercise of congressional authority.[8]

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[8] *Amicus* the Cato Institute argues that *Missouri v. Holland* should be overruled and that Congress' enumerated powers cannot be extended or added to by international treaty. That question is not raised by this case, however, because in acting to implement the Berne Convention – the treaty in this case – Congress also acted pursuant to its foreign commerce

C. The URAA Is a Valid Exercise of Congress' Power to Regulate Commerce with Foreign Nations, Especially Where Congress Acts To Carry Out Foreign Commerce Obligations Created by a Treaty of the United States.

The URAA is international trade legislation, as shown above, and Section 514 of that Act is a valid exercise of Congress' power "to regulate Commerce with foreign Nations." U.S. Const. art. I, § 8, cl. 3. Section 514, as part of this trade legislation, regulates the economic terms pursuant to which certain foreign informational materials can be imported into and distributed within the United States.

"The plenary authority of Congress to regulate foreign commerce . . . is well established." *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 59 (1974). "Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979). International traffic in copyrighted materials is no less subject to Congress' Foreign Commerce Clause authority than international traffic in any other commodity. *See Bd.*

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and copyright powers. Accession to the Berne Convention and passage of Section 514 do not expand any area of congressional power, or alter the balance of powers between the federal government and the states. The treaty addresses two areas – copyright and foreign commerce – clearly entrusted by the Constitution to the national government.

of Trustees of Univ. of Illinois v. United States, 289 U.S. 48, 56 (1933) (Foreign Commerce Clause "'comprehend[s] every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend.'") (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

The fact that the foreign commerce regulated by Section 514 involves copyrights does not diminish Congress' Foreign Commerce Clause authority. A statute arguably within the ambit of two grants of congressional power may be authorized by one of those grants even if not authorized by the other. Thus, in *The Trade-Mark Cases*, 100 U.S. 82, 93-94 (1879), the Court held that a nineteenth-century criminal trademark statute was not within Congress' Copyright Clause authority – the power, the Court inferred, that Congress had intended to exercise in enacting the statute. *Id.* at 94. The Court next considered whether regulation of trademarks was permissible under the Commerce Clause. *Id.* at 95. Although the Court invalidated the statute under the then-prevailing narrow interpretation of Congress' Commerce Clause power, modern trademark protection, though presumably still unsupported by the Copyright Clause, "is built entirely on the Commerce Clause [as it now is construed]." *See United States v. Moghadam*, 175 F.3d 1269, 1278 (11th Cir. 1999).

To similar effect is *Board of Trustees of University of Illinois*, *supra*. There, the Court rejected the University of Illinois' contention that it should be exempt from paying customs duties on the

theory that they constituted taxes from which the University, as a state instrumentality, was immune. *See id.*, 289 U.S. at 57-58. The Court explained: "It is true that the taxing power is a distinct power; that it is distinct from the power to regulate commerce. It is also true that the taxing power embraces the power to lay duties. But because the taxing power is a distinct power and embraces the power to lay duties, it does not follow that duties may not be imposed in the exercise of the power to regulate [foreign] commerce." *Id.* at 58 (internal citations omitted).

The lower courts also have recognized that in appropriate circumstances the Foreign Commerce Clause may authorize legislation where other Article I powers, particularly the Copyright Clause, would not suffice. In *Authors League of Am., Inc. v. Oman*, 790 F.2d 220 (2d Cir. 1986), for example, the Second Circuit considered a constitutional challenge to the so-called "manufacturing clause," a now defunct statute that denied full copyright protection to English-language non-dramatic literary materials manufactured outside of the United States or Canada. *See id.* at 221; 17 U.S.C. § 601 (1985). Congress' objective in so limiting the scope of copyright protection, the court explained, was "to protect domestic labor and manufacturers in the printing and publishing industry. This legislation seeks to encourage the use of American printers[.]" *Authors League of Am.*, 790 F.2d at 221. In rejecting the plaintiffs' argument that the challenged provision was beyond Congress' authority because the statute had only a tenuous connection to the promotion of progress in science, the court explained:

"the copyright clause is not the only constitutional source of congressional power that could justify the manufacturing clause. In our view, denial of copyright protection to certain foreign-manufactured works is clearly justified as an exercise of the legislature's power to regulate commerce with foreign nations." *Id.* at 224; *see also Moghadam*, 175 F.3d at 1280 ("[I]n some circumstances the Commerce Clause indeed may be used to accomplish that which may not have been permissible under the Copyright Clause.").

To be sure, Congress may not act under its foreign commerce or treaty powers in a manner specifically prohibited by another constitutional provision. *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982). The *Gibbons* rule does not apply in this case, however.

In *Gibbons,* the Court declared unconstitutional a statute giving employees of a recently insolvent railroad preferential treatment in the disbursement of assets from the bankruptcy estate because the statute violated the express requirement that Congress may only enact "*uniform* Laws on the subject of Bankruptcies throughout the United States." U.S. Const., art. I, § 8, cl. 4 (emphasis added). The Court held that such a non-uniform bankruptcy law could not be enacted under the independent authority of the Commerce Clause. "[I]f we were to hold that Congress had the power to enact non-uniform bankruptcy laws pursuant to the Commerce Clause," the Court explained, "we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws." *Gibbons*, 455 U.S. at 468-69.

In contrast, where the interstate or foreign Commerce Clauses would allow Congress to enact legislation not authorized by another specific grant of power under Article I, but not explicitly prohibited by the latter grant, the cases discussed above make clear that Congress may act pursuant to the Commerce Clauses. Thus, although trademark law gives "exclusive rights" to "writings" in a manner that exceeds the authority granted by Article I, § 8, cl. 8, *see The Trade-Mark Cases*, 100 U.S. at 94, protection of trademarks is nonetheless permissible under the modern interpretation of the commerce power because the Copyright Clause does not *prohibit* Congress from so acting.

So too with the URAA. Even if it were true – and it is not – that the URAA's restoration of copyrights is not authorized by the Copyright Clause standing alone, the legislation is nonetheless a valid exercise of the foreign commerce power. Nothing in the Copyright Clause can be read as prohibiting copyright restoration in a manner comparable to the Bankruptcy Clause's express limitation requiring enactment only of "uniform" bankruptcy laws.

Petitioners advance only two arguments as to why and how Section 514, if authorized by the Foreign Commerce and Treaty Clauses, would be invalid because it contravenes the Copyright Clause.

First, they assert that it fails the "limited times" requirement of the Copyright Clause. The restored copyrights at issue, however, are indisputably for "limited times" – in fact, they are *ipso facto* for limited times that are *shorter* than those held constitutional in *Eldred*. (A restored

URAA copyright ends at what would be the end of its Copyright Term Extension Act term – the term explicitly approved in *Eldred* – but is shorter in overall duration because of intervening years out of copyright prior to restoration.) The words "limited times" simply do not mean *continuous* or *uninterrupted* limited times, and petitioners have provided no authority for their insertion of these additional concepts. This case does not present, and the Court does not need to address, the situation in which Congress restored copyrights in works after the maximum statutory "limited times" expired – Section 514 only restores works that are still within the "limited times" set out in the Copyright Act and upheld in *Eldred.*

Second, petitioners assert that the preamble to the Copyright Clause ("to promote the Progress of Science and useful Arts") prohibits restoration of copyright, even though the preamble contains no such prohibitory or limiting language. That petitioners must resort to the legerdemain of attempting to interject the word "only" into the preamble – they misleadingly write that Congress is empowered to secure copyrights "*only* to 'promote the [p]rogress' of knowledge and learning," Brief for the Petitioners ("Pet. Br.") at 3, 15 – demonstrates the weakness of their textual position. Unsurprisingly, no court has interpreted the preamble in that manner, and *Eldred* rejects such a reading. *See Eldred*, 537 U.S. at 211-22; *see also Authors League of Am.*, 790 F.2d at 224 (plaintiff's claim that enactment of manufacturing clause did not promote "progress" was irrelevant, including because statute was authorized under Foreign Commerce Clause). In

any event, as *Eldred* recognized, the determination as to whether a particular statute promotes or hinders "progress" of knowledge and learning is a quintessential political question textually committed exclusively to the political branches; the judiciary is particularly ill-suited to second guess Congress on such a matter.

In the absence of a specific limitation in the Copyright Clause – which does not exist – Section 514 is clearly a valid exercise of the foreign commerce and treaty powers. *See Moghadam,* 175 F.3d at 1273-82 (holding that "anti-bootlegging" provision of URAA, 18 U.S.C. § 2319A, which prohibits unauthorized distribution of recordings of live performances, was constitutional exercise of Congress' Commerce Clause authority, even though it protected "unfixed" performances and thus was beyond Congress' power under Copyright Clause); *United States v. Martignon*, 492 F.3d 140, 152-53 (2d Cir. 2007) (same).[9]

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[9] *Moghadam* did not raise the question whether the anti-bootlegging provision, which on its face was perpetual and contained no term limitation whatsoever, was specifically prohibited by the "limited Times" provision of the Copyright Clause. *But see KISS Catalog* v. *Passport Int'l Products*, 350 F. Supp. 2d 823 (C.D. Cal. 2004), *vacated in part on reconsideration*, 405 F. Supp. 2d 1169 (C.D. Cal. 2005).

II. THE URAA DOES NOT VIOLATE THE FIRST AMENDMENT.

A. The URAA Does Not Raise First Amendment Concerns Unresolved in *Eldred.*

As the Court stated definitively in *Eldred*, "copyright's built-in First Amendment accommodations" – the idea/expression dichotomy and the Fair Use defense – render additional First Amendment scrutiny of copyright legislation unnecessary when the law in question has not "altered the traditional contours of copyright protection." *Eldred*, 537 U.S. at 219-21.

Amicus agrees with the government that Section 514 does not alter "the traditional contours of copyright protection." *See* Resp. Br. at 35-37. The copyrights encompassed by Section 514, whether authorized by the Copyright Clause or the Foreign Commerce Clause, are subject to the same traditional, historical, and statutory limitations as those that apply to all copyrights, including the fair use doctrine and the idea/expression dichotomy. Accordingly, as in *Eldred,* there is no reason for the Court to undertake further scrutiny under the First Amendment.

We emphasize here that the Court should reject petitioners' argument that the ordinary First Amendment analysis is changed by the "vested" or "reliance" First Amendment interests petitioners purport to identify.

Petitioners repeatedly attempt to introduce an argument they abandoned or waived in the lower

courts: that Section 514 confiscates vested economic rights they obtained by investing in projects involving works for which the statute restored copyright protection. Thus, from the outset of their Brief, petitioners complain, *e.g.,* that they "lost . . . the expected return on significant investments" (Pet. Br. at 2); that they "depend upon the public domain for their livelihood" (*id.* at 10); that "Section 514 also destroys substantial business investments by petitioners" (*id.* at 11); that petitioners "invested substantial time, effort and money" (*id.* at 17); that Congress "expropriated the investment they made" (*id.*); that Congress "confiscated" their "invest[ment]" (*id.* at 44); and that "Section 514 takes away vested . . . rights" (*id.* at 45). Petitioners' complaint originally asserted violations of their rights under the Fifth Amendment, Pet. App. 148-52, but, after the district court dismissed that claim, petitioners abandoned it on appeal.[10]

Instead, petitioners here argue that this alleged damage to their property interests infringes upon what they call their "vested" First Amendment rights. Petitioners assert that they (as "reliance" parties who made or intended to make use of restored works while they were in the public domain) or, alternatively, the "public" at large obtained some vested, quasi-proprietary First Amendment right when foreign works entered the public domain in the

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[10] Not only have petitioners thus long since waived any Takings claim here; they have not followed the correct procedural posture to present such a claim. *See, e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 689 (1981).

United States. *See, e.g.*, Pet. Br. at 45 ("Section 514 takes away *vested* and *established* public speech rights.") (emphasis added).

As set forth below, petitioners' argument has no basis in First Amendment doctrine and has been rejected by the Court. A citizen has the same First Amendment interest in making a speech, whether or not he or she was able to do so in the past, and whether or not he or she invested economic resources in being able to do so in the future. From a First Amendment perspective, the limitations imposed on future speech because of the "restored" copyright regime contained in Section 514 are conceptually indistinguishable from those imposed by copyrights or copyright term extensions in general. Petitioners nakedly assert (and assume) that speech that was out of copyright for a period of time is somehow different, but neither their brief nor any of the sixteen *amicus* briefs supporting them identifies a First Amendment difference that has conceptual coherence or grounding in precedent or other authority. Because both categories of speech have the same First Amendment value, petitioners' First Amendment challenge is foreclosed by *Eldred*.

Petitioners' private reliance theory posits two classes for First Amendment purposes: Those with "vested" First Amendment rights and those without such rights. There is simply no jurisprudential basis, however, for creating two classes of speakers, some of whom have greater First Amendment rights than others, based on whether or not a person previously has spoken or has invested in speech. Neither petitioners nor their supporters cite any authority for the concept of "vested" First Amendment rights.

Petitioners' alternative theory posits that the "public" has some kind of ownership right in the public domain, and that this ownership right grants the "public" a greater First Amendment right in making some kinds of speeches (restored works) than in other kinds of speeches (works that remained in copyright). Again, however, there is no basis either for declaring that the public *owns* the public domain – *i.e.*, has some kind of property right in it – or that such property right, if it exists, has First Amendment meaning. On a practical level, petitioners' theory leads to absurd results, such as, for example, that American citizens would have a greater *First Amendment* right to play symphonies by Soviet composers (whose works, pre-restoration, were in the public domain as a matter of law) than by American composers. It is one thing to say that *copyright* law provides different results with respect to the two kinds of work, based on whether or not the authors followed formalities, or whether or not a nation joined Berne; it is another thing altogether to say that the two kinds of expression have different First Amendment statuses.

Petitioners' arguments are particularly problematic because the "vested" First Amendment rights they assert seem to derive from economic expenditure or proprietary ownership of the public domain. In other words, those who have invested, or expect an economic return, obtain a property right to speak, whereas those who do not expect such a return lack such a right.

Freedom of speech is a liberty interest, however, not a property interest. *See, e.g.*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777-80

(1978). Thus, "a property interest in a means of communication does not enlarge or diminish the First Amendment protection of that communication," *Friedman v. Rogers*, 440 U.S. 1, 12 n.11 (1979), and the impact that a regulation will have on a speaker's business is simply irrelevant to any First Amendment analysis. *See, e.g.*, *Bellotti*, 435 U.S. at 784 (whether speaker can "prove, to the satisfaction of a court, a material effect on its business or property" not relevant to First Amendment analysis); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) ("'The inquiry for First Amendment purposes is not concerned with economic impact'") (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 78 (1976) (Powell, J., concurring)); *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 903 (9th Cir. 2007) ("The establishment of a vested property right is irrelevant to [a First Amendment] challenge.") (citing *Rutan v. Republican Party of Ill.,* 497 U.S. 62, 72 (1990)).

"Vested" rights and "reliance" interests are property law concepts that may be relevant in the Due Process or Takings context, but do not apply to the First Amendment. Under the First Amendment, courts do not weigh the government's interests against a person's private economic "reliance" or proprietary interests; they weigh the government's interests against the *public's* interest in unfettered speech. *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213-14 (1997) ("*Turner II*").[11] In

[11] Non-economic "reliance" and expectation interests are similarly irrelevant to the First Amendment analysis. For instance, there are all sorts of time, place and manner regulations on speech that governments *could* constitutionally

Turner II, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and the other governing cases cited by both parties, this Court nowhere incorporated property interests into its First Amendment analysis. *See, e.g.*, *Turner II*, 520 U.S. at 213-14 (citing *Ward*, 491 U.S. at 799).[12]

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enact, but have not implemented. Speakers' "reliance" on the absence of past regulation, however, does not give them a right to be exempt from otherwise constitutional future legislation, if and when passed. *See, e.g.*, *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding restriction on speech within 100 feet of entrance to health care facilities, even though petitioners had engaged in "sidewalk counseling" within 100 feet of entrances to abortion clinics prior to enactment of statute); *Frisby v. Schultz*, 487 U.S. 474 (1988) (sustaining ordinance that prohibited picketing "before or about" any residence after noting that appellees had engaged in precisely the same kind of activity prior to enactment of ordinance).

[12] Petitioners take out of context *dicta* from *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33-34 (2003), referring to a "federal right" to "copy and to use" works in the public domain. No one disputes the existence of such a right – which *Dastar* identified as a copyright right, not a First Amendment right, in the course of analyzing the Lanham Act, not the Copyright Act – but here, the works in question are *not* in the public domain, because Congress restored copyrights in them. *Dastar* itself refers to that possibility, *see id.* at 34 ("When Congress has wished to create such an addition to the law of copyright, it has done so with much more specificity . . . .") The *Dastar* dicta makes the non-controversial statement that unless the Copyright Act prohibits copying of a work, individuals have a right to copy the work; it says nothing about which works the Copyright Act may or may not prohibit from being copied.

B. To the Extent the First Amendment Requires Additional Balancing of the Government's Interest in Enacting Section 514, the Court Must Defer to the Political Branches' Identification of the Foreign Policy Interests of the United States.

As set forth above, First Amendment scrutiny of the URAA is not necessary because the statute preserves the "traditional contours" of copyright. To the extent intermediate (or other) scrutiny is applied, however, including because enactment of Section 514 was constitutionally authorized but altered the "traditional contours" of copyright, the governmental interest that is to be weighed must be evaluated in the appropriate foreign policy context. Petitioners' attempt to substitute their own or the judiciary's judgment for that of the political branches as to what are the international obligations and foreign and economic policy interests of the United States must be rejected. In the foreign policy arena, it is the political branches' determination of the nature and importance of the government's interest that must be accorded great deference.

1. The Political Branches, Not the Judiciary, Determine the Nature and Extent of the Government's "Interest" on Questions of Foreign Policy.

The implementation of treaties and the regulation of foreign trade, which form a part of the foreign policy of the United States, come within the purview of the political branches, and any determination of a treaty's requirements – or the consequences of non-compliance – requires the courts

to give great weight to the Executive Branch's reasonable views. *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184 & n.10 (1982). Moreover, when Congress and the Executive act together in the arena of international affairs, as is the case with respect to Section 514, their power is at its highest. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 386 (2000); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative – 'the political' – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.").

Instead of deferring to the political branches' reasonable interpretation of Berne and its requirements, however, petitioners and the *amici* supporting them ask the Court to accept their own, alternative readings of what the Treaty means and what it requires. As the court of appeals recognized, however, the construction of Berne and its requirements, and the extent to which interpreting and implementing Berne in a particular way impacts international trade, are *themselves* foreign policy interests of the United States, and therefore compel deference to the government's position. *See, e.g.*, *Golan*, 609 F.3d at 1081, 1085 (citing cases); *Sumitomo*, 457 U.S. at 184-85 ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."); *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 168 (1999) ("Respect is ordinarily due the

reasonable views of the Executive Branch concerning the meaning of an international treaty."); *O'Connor v. United States*, 479 U.S. 27, 33 (1986); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961).

Similarly, petitioners and their *amici* repeatedly contend that the United States does not have a valid foreign policy interest in protecting the copyright interests of United States citizens abroad, and is acting only on behalf of "private economic" interests, apparently because the government did not supply "specific factual data." The Executive is entitled to substantial deference regarding its determination of the foreign policy interests, including foreign economic interests, of the United States, however, and petitioners advocate the wrong standard in asking this Court to evaluate the substantiality of the government's foreign policy interest. *See, e.g.*, *Regan v. Wald*, 468 U.S. 222, 242 (1984) ("Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'") (holding deprivation of liberty interest justified by Executive's determination of foreign policy interest) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)). The United States has instituted WTO dispute resolution proceedings to compel international adherence to Article 18 of Berne, *see, e.g.*, Resp. Br. at 48 n.22, and in such circumstances it is plain error to posit, over the government's objections, that the United States has not established it has a legitimate foreign policy interest in the reciprocal protection of United States citizens' Article 18 rights abroad.

Of course, a statute is not shielded from First Amendment scrutiny simply because the government has a powerful foreign policy interest in the legislation. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) ("[The Constitution] most assuredly envisions a role for all three branches when individual liberties are at stake").[13] But in determining what the government's foreign policy interest *is* for purposes of applying a First Amendment balancing test, the courts are required to give great deference to the political branches, as the Tenth Circuit recognized in its second opinion below. *Golan*, 609 F.3d at 1084-85.[14] As has been noted previously in the Foreign Commerce Clause context, "This Court has little competence in determining precisely when foreign nations will be offended by particular acts, and even less competence in deciding how to balance a particular risk of retaliation against the sovereign right of the United

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[13] No one, including *amicus*, is suggesting that the Court should abdicate the judicial role because a case involves foreign policy matters. *See Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2727 (2010). Rather, the point is that if courts defer to the government's expression of its interest when the government is directly restricting core liberty rights (such as the right to travel in *Regan v. Wald*), then surely the government's expression of the United States' interest in implementing international trade legislation is entitled to equal deference.

[14] That a government action, taken in pursuit of foreign policy interests, deprives persons of their vested *property* rights does not invalidate the government action – rather, it creates a right of recovery against the government, under the Takings clause or otherwise. *See Dames & Moore v. Regan*, 453 U.S. 654, 689 (1981).

States as a whole[.]" *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983). Such questions are entrusted to the discretion of the political branches, and petitioners are not entitled to use the courts as a forum for debating with the government what the *actual* foreign policy interest of the United States might be in enacting a restoration regime.

Petitioners consistently have attempted to remove this case from the foreign policy context, despite the fact that, at its core, Section 514 deals with the implementation of a treaty (Berne) and an international agreement with its own dispute resolution mechanisms (TRIPs), and was implemented as a small part of wide-ranging trade legislation. If the Court deems it necessary to apply intermediate scrutiny to Section 514, however, in doing so it should pay appropriate deference both to the political branches' determination of the United States' actual interests in the conduct of foreign relations, and to the Executive's treaty interpretation. In balancing the amount of speech affected against the government's interest in complying with Berne and effectuating the foreign policy of the United States, it is the political branches' position, not petitioners', that should be placed on one side of the scale.

When properly analyzed, the government's substantial interest in enacting Section 514 clearly outweighs the corresponding restrictions on speech, as the United States persuasively argues in its brief. *See* Resp. Br. at 42-53.

C. Section 514 Expands the Incentives and Opportunity for Speech and Public Debate

Petitioners and their *amici* consistently assert that Section 514 is antithetical to the public purposes of copyright, particularly in the digital age. In doing so, they elide certain important distinctions: Restoration of copyright, for instance, does not prohibit "influence" by restored works on new works, or the use of scenes a faire; it does not stop the public from reading, listening to, or viewing copies of works that are already in existence. Nor does Section 514 eliminate the special rules applicable to libraries, certain charities, and their collections, which allow them to reproduce and distribute works that remain under copyright. *See, e.g.*, Copyright Act § 108, 17 U.S.C. § 108.

More importantly, however, Section 514 substantially supports and encourages creativity and speech in critical ways overlooked by petitioners and integral to the digital age.

One of the remarkable things about the Internet is that it provides the previously unimaginable opportunity for cheap and wide-ranging distribution of works and archives in digital format. Many authors and their heirs are happy to make their works available in such a format, *provided, however, that the protections of copyright remain available to preserve the author's economic interests*. If foreign authors' works are not protected in the United States, however, they will be less likely to make such works digitally available, because by releasing physical control they are also giving up economic control. The end result is that the public is

deprived of access to the works – access that otherwise would have been granted, perhaps even under an open or creative commons license.

Imagine a renowned European photographer or artist whose pictures were published in a newspaper fifty years ago without U.S. registration or notice. In the absence of restoration, those works would be unprotected by copyright in the U.S. – but even if they could be located, the copies available will likely be of low quality and in low resolution. The artist might be more than willing to post high resolution digital images on the Internet, except for the fact that in the United States such images would not be protected by copyright, thereby undermining the artist's ability to control the works artistically and exploit them economically. Thus, the *absence* of copyright actually deprives the public of access to an important body of speech. And although petitioners and their supports tend to focus mostly on low economic value works such as orphan works, the truth is that in the absence of restoration it is high value, in demand works that are most likely to be held back from the public at large, precisely because they have an ongoing economic value that cannot be defended if they are both accessible *and* unprotected by copyright.

It is also fully evident that the passage of Section 514 has not had *any* negative effect on the digital commons. Most of the *amici* who tell this Court that their businesses will be threatened or ruined by Section 514 *started* those businesses *after* the provision's enactment. (Google, for instance, was founded in 1998.) Restoration did not deter them from doing so, it did not prevent the development of

the Internet, and it did not deter them or anyone else from investing in the spread of knowledge, digitally or otherwise. Restoration apparently did not even concern any of them enough for them to bring a suit challenging the law. The *amici* say that Section 514 destroys the incentive to invest, but in actuality they made the economic decision to do precisely that, calculating that any risks posed by restoration were smaller than the relatively minor costs involved in challenging the law.[15]

Authors and their successors, who have an economic, artistic, and emotional interest in their works of authorship, are more often than not the primary drivers of ongoing creative uses of those works. They fight to keep them alive, evolving, and vibrant, including because of their copyright interest in doing so. There is no reason to think that copyright owners will not make similar efforts to push for the development of new and derivative uses of restored works, merely because they are restored, or to conclude that the societal benefits of those efforts will be less valuable than the endless "aggregation" of others' creative content that sometimes appears to be the ultimate goal of

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[15] Google, for example, which acknowledges that it has copied approximately 1,000,000 restored works, cites no Section 514 litigation to which it is a party. As the government notes, only approximately 50,000 restoration notices were filed in the Copyright Office during the primary window for doing so. Resp. Br. at 41. Neither petitioners nor their *amici* have identified any material number of direct notices that have been subsequently sent to individual parties, indicating that the actual risk of "instability" with respect to restored works going forward is pretty low.

petitioners and their supporters. In any event, Congress has made the decision that restoration of copyright is likely to lead to these positive societal goals, a determination precisely of the type that this Court in *Eldred* held should not be undermined or second guessed.

Conclusion

For the foregoing reasons, the decision of the Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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