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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., ATTORNEY GENERAL, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 514 of the Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4976, which restores copyright protections to certain foreign works that were previously in the public domain due to a failure to comply with various since-repealed prerequisites to copyright protection under United States law, violates the Copyright Clause of the Constitution.

2. Whether the URAA's restoration of copyright protections in furtherance of international copyright objectives violates the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-42) is reported at 609 F.3d 1076. The opinion of the district court (Pet. App. 43-69) is reported at 611 F. Supp. 2d 1165. A prior opinion of the court of appeals (Pet. App. 70-109) is reported at 501 F.3d 1179. A prior opinion of the district court (Pet. App. 110-152) is unreported but is available at 2005 WL 914754.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2010. On August 24, 2010, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including October 20, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Copyright Clause of the Constitution confers upon Congress the “Power * * * To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. Art. I, § 8, Cl. 8.¹ The First Amendment provides in pertinent part that “Congress shall make no law * * * abridging the freedom of speech.” U.S. Const. Amend. I.

2. The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), *concluded* July 24, 1971, S. Treaty Doc. No. 27, 99th Cong., 2d Sess. (1986), 1161 U.N.T.S. 3, has been “the major multilateral agreement governing international copyright relations” “[f]or more than 100 years.” S. Rep. No. 352, 100th Cong., 2d Sess. 2 (1988) (*Berne Report*); see Uruguay Round Agreements Act (URAA), S. Rep. No. 412, 103d Cong., 2d Sess. 225-226 (1994) (*URAA Report*). The United States joined the Berne Convention in 1989, and 164 countries are now parties. See World Intellectual Property Organization, *Contracting Parties*, at http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15.

Because there is no such thing as “an ‘international copyright’ that will automatically protect an author’s writings throughout the world,” U.S. Copyright Office, *Circular 38a, International Copyright Relations of the United States* 1 (Nov. 2010), international agreements such as the World Trade Organization Agreement on

¹ Although petitioners refer to the “Progress Clause” (Pet. 2 n.1), we adhere to the terminology used by this Court in *Eldred v. Ashcroft*, 537 U.S. 186, 211 (2003), and refer to the clause as the “Copyright Clause,” and to the phrase “To promote the Progress of Science and useful Arts” as “the preamble.”

Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, H. Doc. No. 316, 103d Cong., 2d Sess. 1621 (1994), 186 U.N.T.S. 299, and the Berne Convention are essential to protect the rights of domestic authors abroad. If the United States has not established copyright relations with a foreign country, a work first published in that country ordinarily will not be entitled to copyright protection here unless the author or coauthor is a national or domiciliary of the United States or another country that has copyright relations with the United States. The absence of an agreement establishing copyright relations also means that the foreign country will be under no obligation to offer copyright protection to U.S. works. The United States' adherence to such international agreements and compliance with their terms therefore "secure[s] the highest available level of multilateral copyright protection for U.S. artists, authors and other creators." *Berne Report 2*.

The Berne Convention generally requires each party to afford foreign copyright holders the same protections the country affords to its own nationals. Article 18 of the Convention requires parties to restore copyright protections to certain unprotected foreign works whose copyright terms have not yet expired in the country of origin.² Such works may have lacked protection in the

² Article 18 provides:

- (1) This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expir[ation] of the term of protection.
- (2) If, however, through the expir[ation] of the term of protection which was previously granted, a work has fallen into the public do-

United States due to the absence of national eligibility or subject-matter protection, or because of a failure to abide by certain required formalities, such as affixing a copyright notice. *URAA Report* 225-226. As a matter of United States law, such copyright formalities have since been repealed and are no longer required of any author. See, *e.g.*, Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7, 102 Stat. 2857 (eliminating requirement that copyright notice be affixed to work).

In 1994, Congress enacted the Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, § 514, 108 Stat. 4976. Section 514 of the URAA implements Article 18 of the Berne Convention, as that provision is incorporated into the TRIPS Agreement, by restoring the copyrights for foreign holders whose works (1) remain protected under the law of the country where the work was originally published or created; (2) were denied copyright protection in the United States due to a lack of national eligibility, failure to comply with statutory formalities, or (in the case of certain sound recordings) lack of prior subject-matter protection; and (3) are still within the copyright term they would ordinarily have enjoyed if they had been created or published in

main of the country where protection is claimed, that work shall not be protected anew.

(3) The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.

(4) The preceding provisions shall also apply in the case of new accessions to the Union and to cases in which protection is extended by the application of Article 7 or by the abandonment of reservations.

Berne Convention, *supra* p. 2, Art. 18, 1161 U.N.T.S. at 41-42.

the United States. See 17 U.S.C. 104A(a) and (h)(6).³ The URAA thus restores protection for foreign works that were previously ineligible for protection or whose authors were unfamiliar with the technicalities of United States law. Restoration does not extend the copyright term; rather, each restored copyright expires on the same day as if the work had been protected since its creation. 17 U.S.C. 104A(a)(1)(B).

In enacting the URAA, Congress provided certain protections for parties who had previously exploited the foreign works. First, these “reliance parties” receive immunity for any act that occurred before the restoration and that would otherwise have constituted infringement. 17 U.S.C. 104A(d)(1)-(2). Second, although restoration is automatic, copyright holders can enforce a restored copyright only after notifying reliance parties of their intent to do so—either through the Copyright Office within 24 months of restoration, or by directly notifying a particular reliance party. 17 U.S.C. 104A(d)(2)(A)-(B). Absent such notice, any reliance party can continue to treat the work as if it was not copyrighted. Third, even after receiving notice, a reliance party may continue to exploit an existing work for an additional year. 17 U.S.C. 104A(d)(2)(A)(ii) and

³ Title V of the URAA implements the TRIPS Agreement, which requires World Trade Organization (WTO) members to comply with Article 18 of the Berne Convention. See *URAA Report* 225. WTO dispute-settlement proceedings, which include the possible application of trade sanctions, apply to the TRIPS Agreement, thus subjecting implementation of Article 18 of the Berne Convention to additional forms of enforcement. See *Joint Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the H. Comm. on the Judiciary, and the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary on H.R. 4894 and S. 2368*, 103d Cong., 2d Sess. 131 (1994).

(B)(ii). Finally, if a reliance party has created a “derivative work” based on a work subject to a restored copyright, it can continue to exploit the derivative work indefinitely if it pays reasonable compensation to the copyright owner. 17 U.S.C. 104A(d)(2)(B) and (d)(3).

3. Petitioners seek to use, copy, or sell, in ways that normally would constitute infringement, works whose copyrights were restored under Section 514 of the URAA. Petitioners brought this action alleging, *inter alia*, that the URAA violates the Copyright Clause and the First Amendment.⁴

a. On April 20, 2005, the district court granted the government’s motion for summary judgment, holding that Section 514 of the URAA does not violate the Copyright Clause or the First Amendment. Pet. App. 110-152. After engaging in an extensive historical analysis, the court rejected petitioners’ contention that the Copyright Clause categorically precludes Congress from restoring copyrights “to works that have passed into the public domain.” *Id.* at 116. The court further determined that, in enacting Section 514 of the URAA, Con-

⁴ Petitioners also alleged that the Sonny Bono Copyright Term Extension Act (CTEA), Pub. L. No. 105-298, 112 Stat. 2827, violated the Copyright Clause and the First Amendment. Proceedings were stayed after this Court granted certiorari to review a similar challenge to the CTEA in *Eldred v. Ashcroft*, 534 U.S. 1126 (2002). The Court ultimately rejected that challenge. See 537 U.S. 186. The district court subsequently granted the government’s motion to dismiss petitioners’ CTEA claims (Pet. App. 148-152), the court of appeals affirmed (*id.* at 79-81), and petitioners do not pursue those challenges in their petition (Pet. 7 n.2). Petitioners also initially alleged that Section 514 of the URAA violates their substantive due process rights. The district court granted summary judgment in favor of the government on that claim (Pet. App. 156-158), and petitioners did not challenge that ruling on appeal.

gress was “attempting to promote protection of American authors by ensuring compliance with the Berne Convention within our own borders,” and that this “constitutionally-permissible end” survived rational-basis scrutiny. *Id.* at 147. The district court also rejected petitioners’ First Amendment challenge, seeing “no need to expand upon the settled rule that private censorship via copyright enforcement does not implicate First Amendment concerns.” *Id.* at 148.

b. The court of appeals affirmed in part and reversed in part. The court agreed that Section 514 of the URAA does not exceed Congress’s authority under the Copyright Clause, but it vacated the district court’s First Amendment ruling and remanded for further proceedings. Pet. App. 70-109.

The court of appeals rejected petitioners’ assertion that extending “copyright protection to works in the public domain eviscerates any limitations imposed by” the Copyright Clause. Pet. App. 82. The court explained that the argument was “similar to one the *Eldred* plaintiffs raised, and like the *Eldred* Court, we are mindful that ‘a regime of perpetual copyrights [clearly is] not the situation before us.’” *Id.* at 82-83 (quoting *Eldred*, 537 U.S. at 209). The court of appeals further concluded that implementation of “the Berne Convention, which secures copyright protections for American works abroad, is [not] so irrational or so unrelated to the aims of the Copyright Clause that it exceeds the reach of congressional power.” *Id.* at 85 (citing *Eldred*, 537 U.S. at 208).

With respect to petitioners’ First Amendment challenge, the court of appeals read *Eldred* as suggesting that Congress’s exercise of its Copyright Clause power is subject to First Amendment review “if it ‘altered the

traditional contours of copyright protection.’” Pet. App. 86-87 (quoting *Eldred*, 537 U.S. at 221). The court determined that one of those “traditional contours” is “the bedrock principle of copyright law that works in the public domain remain there,” and it concluded that Section 514 “alters the traditional contours of copyright protection by deviating from this principle.” *Id.* at 87. The court of appeals further held that once the foreign works entered the public domain, petitioners (and the public more generally) acquired “vested First Amendment interests in the expressions,” and that First Amendment scrutiny is required to determine whether Section 514 impermissibly interferes with those interests. *Id.* at 102; see *id.* at 100-102. The court of appeals therefore remanded for further proceedings, instructing the district court to consider whether Section 514 is content-based or content-neutral, and to apply the corresponding level of scrutiny. *Id.* at 107-109.

c. After further discovery in the district court, the parties filed cross-motions for summary judgment. The district court granted petitioners’ motion and denied the government’s motion, holding that Section 514 violates petitioners’ First Amendment rights. Pet. App. 43-69.

Pursuant to the court of appeals’ instructions on remand, the parties agreed, and the district court held, that Section 514 is content-neutral and therefore subject to intermediate scrutiny. Pet. App. 51-52. The district court recognized that, under intermediate scrutiny, speech restrictions must be “narrowly tailored to serve a significant government interest,” and a court must give deference to Congress’s judgment. *Id.* at 52-53 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (*Turner II*)). The government identified three substantial interests advanced by Section 514: (1)

complying with the Berne Convention, (2) protecting the interests of American authors abroad, and (3) correcting historical inequities facing foreign authors who have lost copyrights through no fault of their own. *Id.* at 56.

With respect to the government’s first interest, the district court agreed that implementation of the Berne Convention is an “important governmental interest.” Pet. App. 56-57. The court also recognized that “the idea/expression dichotomy and the fair use doctrine” limit the restrictions on speech that copyright protection entails, and that Section 514 provides additional protections to “reliance parties,” leaving unprotected only “speech that involves copying more than one year after notice has been filed, and any derivative works made after notice is filed and without payment of a royalty.” *Id.* at 59. The court nevertheless concluded that Section 514 is “substantially broader than necessary.” *Id.* at 57 (citation omitted). The district court’s conclusion rested primarily on the court of appeals’ opinion on the initial appeal, which the district court read as holding that petitioners’ interest in copying foreign works “is deserving of full First Amendment protection,” *id.* at 58; the district court’s belief that the Berne Convention grants member nations discretion on how to protect “reliance parties” while implementing Article 18, *id.* at 60-61; and the court’s conclusion that, contrary to the opinion of the government’s expert, Congress could have “permanently ‘except[ed] parties, such as [petitioners], who have relied upon works in the public domain,’” *id.* at 62 (citation omitted).

The district court rejected the government’s second interest—protecting the copyrights of American authors abroad—finding “this justification” “largely intertwined” with the first. Pet. App. 62-63. The district

court also was skeptical that other countries would provide reciprocal protections to American authors whose works had entered the public domain, because of the absence of “specific factual data” supporting Congress’s reasoning. *Id.* at 64-65. Finally, the court rejected the third governmental interest (*i.e.*, correcting historical inequities) because it believed that Section 514 itself created inequity by providing greater protection to foreign works that have entered the public domain than to the public-domain works of domestic authors. *Id.* at 67-68.

d. The court of appeals reversed. Pet. App. 1-42. The court agreed with the district court that Section 514 of the URAA is content-neutral and therefore subject to intermediate scrutiny. *Id.* at 11. Because it concluded that the government has a “substantial interest in protecting American copyright holders’ interests abroad, and Section 514 is narrowly tailored to advance that interest,” the court of appeals did not reach the validity of the government’s other two asserted interests. *Id.* at 12-13 & n.6.⁵

The court of appeals had “no difficulty” in “concluding that the government’s interest in securing protections abroad for American copyright holders” is an important interest unrelated to the suppression of free expression. Pet. App. 13. Relying on this Court’s decision in *Eldred*, the court of appeals stated that the First Amendment “bears less heavily when speakers assert the right to make other people’s speeches.” *Id.* at 14 (quoting *Eldred*, 537 U.S. at 221). The court recognized that Congress’s predictive judgments are entitled

⁵ The court of appeals rejected petitioners’ contention, raised on their cross-appeal from the district court’s judgment, that Section 514 of the URAA is facially unconstitutional. Pet. App. 39-42.

to “substantial deference,” and that such deference is especially warranted where, as here, the judgment involves other Branches’ assessment of foreign affairs. *Id.* at 16-18. After an extensive review of the record, the court of appeals concluded that “Congress had substantial evidence from which it could reasonably conclude that the ongoing harms to American authors were real and not merely conjectural.” *Id.* at 19. The court also found substantial evidence that Section 514 would alleviate such harms to American authors. The court relied on, *inter alia*, testimony “from a number of witnesses that the United States’ position on the scope of copyright restoration—which necessarily includes the enforcement against reliance parties—was critical to the United States’ ability to obtain similar protections for American copyright holders.” *Id.* at 24.

The court of appeals found that Section 514 is narrowly tailored to serve the government’s interest, and that the burdens imposed on “reliance parties” are exactly “congruent” to the benefits afforded American copyright holders. Pet. App. 30-31. The court declined to decide precisely what level of protection for reliance parties the Berne Convention requires or permits. *Id.* at 32. The court explained that, even assuming that Section 514 provides greater protection for foreign authors than the Berne Convention requires, the legislation might induce other nations to provide comparable protections to American authors, thereby serving a substantial interest of the United States. See *ibid.*

The court of appeals concluded that, “[a]t its core,” petitioners’ First Amendment challenge “‘reflect[s] little more than disagreement over the level of protection’ that reliance parties should receive,” Pet. App. 38 (quoting *Turner II*, 520 U.S. at 224), and disagreement with

Congress's chosen balance "between [the interests of] American copyright holders and American reliance parties," *id.* at 38-39. The court explained that, although petitioners "may have preferred a different method of restoring copyrights in foreign works, * * * that is not what the Constitution requires." *Id.* at 38.

ARGUMENT

The court of appeals correctly held that Section 514 of the URAA does not violate the Copyright Clause or the First Amendment. That decision does not conflict with any decision of this Court or any other court of appeals. The court of appeals' decision is fully consistent with the only other appellate ruling that has examined the validity of Section 514 under the Copyright Clause; petitioners' disagreement with the court of appeals' First Amendment ruling is largely factbound; and the First Amendment holding would be subject to affirmance on alternative grounds. Further review is not warranted.

1. Both of the courts of appeals that have decided the question have held that Section 514 of the URAA does not exceed Congress's authority under the Copyright Clause. See Pet. App. 1-42; *Luck's Music Library, Inc. v. Gonzales*, 407 F.3d 1262 (D.C. Cir. 2005). Petitioners nevertheless contend (Pet. 19-28) that extending copyright protection to any works in the public domain crosses a constitutional "bright line" and that Congress categorically lacks authority to enact such legislation.⁶

⁶ Contrary to petitioners' contentions (Pet. 11, 21), the government did not "urge[]" such a "bright line" rule in *Eldred*. To the contrary, when Justice Breyer asked about "something" that "is already in the public domain," Solicitor General Olson explained that "I would not want to rule that out." 10/09/2002 Tr. 28-29. In later suggesting that

Petitioners argue that any conferral of copyright protection to works that were previously in the public domain violates the Copyright Clause's requirements that copyrights be granted only for "limited Times" (Pet. 20-23) and only to "promote the Progress of Science and useful Arts" (Pet. 24-28). Those contentions lack merit.

a. The restored copyrights at issue here are granted for "limited Times." The term for a restored copyright is the same length as the term for domestic copyrights that this Court upheld in *Eldred*. To be "limited," the *Eldred* Court explained, the copyright term need not be "forever 'fixed' or 'inalterable'"; rather, it must be "'confin[e]d within certain bounds,' 'restrain[ed],' or 'circumscribe[d].'" 537 U.S. at 199 (citations omitted; brackets in original). Section 514 of the URAA is so confined. The protection of a restored work expires on the very day it would have expired had the author been nationally eligible for protection, or successful in complying with the relevant formalities, at the time the work was created. Indeed, a foreign author whose U.S. copyright is restored by the URAA will have a shorter term of copyright protection than a U.S. author whose work was created on the same day, since the term of protection for the foreign author's copyright will begin at a later date but both copyrights will expire simultaneously.

Petitioners contend (Pet. 23) that restoration of copyright protection to works in the public domain is contrary to the history and tradition of United States copyright law. As the district court (Pet. App. 121-143) and the D.C. Circuit (*Luck's Music Library*, 407 F.3d at

there was a "bright line" for works already in the public domain, Solicitor General Olson was responding to a question about works as to which the statutory copyright term had previously "expired." *Id.* at 44.

1265) explained, that is incorrect as a historical matter.⁷ But even if such restoration were unprecedented, that departure from historical practice would not cast doubt on the fact that copyrights restored pursuant to Section 514 are for “limited Times” as the Copyright Clause requires. Rather, as in *Eldred*, 537 U.S. at 222, “[b]eneath the facade of their inventive constitutional interpretation,” the crux of petitioners’ argument is a policy disagreement with Congress. Cf. Pet. App. 38.

b. Petitioners contend (Pet. 24-28) that Section 514 is inconsistent with the preamble to the Copyright Clause (which authorizes Congress to act “To promote the Progress of Science and useful Arts”) because the preamble imposes a “public purpose” requirement and Section 514 (in petitioners’ view) serves only the private

⁷ The restoration of copyright in unprotected works began with the first copyright act in 1790, which provided copyright protection for “any map, chart, book or books already printed within these United States.” Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124. In extending copyright to all works already published in the United States, the First Congress “anticipated the removal of some works from the public domain,” and “evidently determined that such a practice was constitutionally permissible.” Pet. App. 135; see *Luck’s Music Library*, 407 F.3d at 1265. In the twentieth century, both Congress and the Executive provided for the restoration of foreign works on multiple occasions. See, e.g., An Act to Amend and Consolidate the Acts Respecting Copyright, ch. 320, § 8, 35 Stat. 1077 (authorizing the President to determine whether a foreign nation granted sufficient copyright protection to American works, in which case the foreign citizens would receive reciprocal protection in the United States); Act of Dec. 8, 1919, ch. 11, 41 Stat. 368 (authorizing restoration of copyright protection to foreign works published abroad without the necessary formalities after World War I); Emergency Copyright Act of 1941, ch. 421, 55 Stat. 732 (authorizing restoration of copyright to foreign works when the author was “temporarily unable to comply with [copyright formalities] because of the disruption or suspension of facilities essential for such compliance” during World War II).

interests of American authors. Petitioners did not raise their “public purpose” argument below, and they identify no decision in which any court has interpreted the preamble as a limitation on the power of Congress. See *Eldred*, 537 U.S. at 211 (noting that the plaintiffs in that case did not suggest “that the Clause’s preamble is an independently enforceable limit on Congress’s power”).

In *Eldred*, this Court rejected the heightened standard of review proposed by the dissent and instead reaffirmed that courts should ask only whether Congress rationally exercised its legislative authority. 537 U.S. at 204-205. The Court made clear “that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.” *Id.* at 212; *id.* at 205 (“[I]t is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . in order to give the public appropriate access to their work product.”) (citation omitted; brackets in original). As the court of appeals correctly held, Section 514 satisfies that appropriately deferential standard of review.⁸

The statute at issue in *Eldred* extended the duration of existing copyright terms in order to, *inter alia*, conform United States law to the practice of the European Union countries and “ensure that American authors would receive the same copyright protection in Europe as their European counterparts.” 537 U.S. at 205-206.

⁸ Petitioners rely on *Kelo v. City of New London*, 545 U.S. 469 (2005), which addressed the “public use” requirement of the Fifth Amendment. But the Court in *Kelo* recognized that even where a “public use” restriction was explicit in the text of the constitutional provision, the Court must still defer to legislative judgments. *Id.* at 483-484. And, as the Court further noted, “the government’s pursuit of a public purpose will often benefit individual private parties.” *Id.* at 485.

Likewise, Congress enacted Section 514 of the URAA to attain indisputable compliance with the Berne Convention and to ensure that American authors would receive reciprocal copyright protections in other member nations. Although petitioners suggest (Pet. 27) that endeavoring to protect American authors abroad is an impermissible “private” purpose, this Court in *Eldred* declined to “second-guess” an analogous legislative determination. 537 U.S. at 205, 208. The Court recognized that “[t]he economic philosophy behind the [Copyright] [C]lause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors,” and that “[r]ewarding authors for their creative labor and ‘promot[ing] . . . Progress’ are thus complementary.” *Id.* at 212 n.18 (citations omitted; brackets in original).

Petitioners rely in part (Pet. 24, 28) on this Court’s statement in *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966), that “Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.” Petitioners’ reliance on *Graham* is misplaced. The Court in *Graham* addressed “an invention’s very eligibility for patent protection,” not the duration or restoration of protection for which an invention was otherwise eligible. *Eldred*, 537 U.S. at 202 n.7. Moreover, this Court has often recognized “that patents and copyrights do not entail the same exchange” and that, in light of the distinctions between the two kinds of intellectual property, “one cannot extract from language in [the Court’s] patent decisions” the constitutional rules applicable to copyright cases. *Id.* at 216-217. For those reasons, and for all the reasons discussed by the court of

appeals (Pet. App. 83-85) and the D.C. Circuit (*Luck's Music Library*, 407 F.3d at 1266), *Graham* does not support petitioners' argument.⁹

2. The court of appeals also correctly concluded that Section 514 of the URAA does not violate the First Amendment. The court's application of the well-settled intermediate-scrutiny standard to the particular statute at issue here does not conflict with any decision of this Court or any other court of appeals. See Pet. 15 (acknowledging that no other court of appeals has addressed the First Amendment claim asserted by petitioners). Further review is especially unwarranted because the court of appeals' decision would be subject to affirmance on alternative grounds.

a. The parties agree that Section 514 of the URAA is a content-neutral statute and that, to the extent any First Amendment scrutiny is warranted (see pp. 21-25, *infra*), intermediate scrutiny is the applicable standard. A content-neutral statute "will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at

⁹ The Copyright Clause is merely one of Congress's enumerated powers. Section 514 also can be justified as, for example, an exercise of the power to regulate foreign commerce. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964); *United States v. Moghadam*, 175 F.3d 1269, 1277-1279 (11th Cir. 1999) (stating that *Heart of Atlanta Motel* and its progeny "suggest that in some circumstances the Commerce Clause can be used by Congress to accomplish something that the Copyright Clause might not allow"), cert. denied, 529 U.S. 1036 (2000). The court of appeals and the district court did not address the Foreign Commerce Clause or other sources of congressional authority to enact Section 514, but they provide alternative grounds for affirmance.

189. Where, as here, protection of the government’s interests requires predictive judgments about the likely conduct of foreign sovereigns, deference to the political branches is particularly appropriate. See *id.* at 195 (“courts must accord substantial deference to the predictive judgments of Congress”) (citation omitted); *Regan v. Wald*, 468 U.S. 222, 242 (1984) (discussing courts’ “classical deference to the political branches in matters of foreign policy”). Applying those principles, the court of appeals correctly held that Section 514 does not violate the First Amendment.

The quantity of speech affected by Section 514 of the URAA is relatively small. Notwithstanding Section 514, petitioners remain free to discuss the ideas expressed in any work as to which copyright protection has been restored; to make “fair use” of the relevant works; to continue to exploit existing works until one year after notice has been given; and to exploit derivative works indefinitely so long as petitioners pay reasonable compensation. See pp. 5-6, *supra*. Even beyond those safeguards, Title 17 contains a host of other exclusions from a copyright holder’s enforcement rights. See 17 U.S.C. 108-122 (2006 & Supp. III 2009). For example, Section 110 of Title 17 precludes infringement actions for certain musical performances undertaken for nonprofit, educational, or charitable purposes. And, as this Court recognized in *Eldred*, 537 U.S. at 221, the First Amendment “bears less heavily when speakers assert the right to make other people’s speeches,” as petitioners do here.¹⁰

¹⁰ Petitioners contend (Pet. 15-17, 31-32) that the court of appeals erred in relying in part on the fact that petitioners seek to make “other people’s speeches”—a contention they claim was rejected by the first court of appeals’ panel. But the first panel did not purport to reject the view that the First Amendment “bears *less heavily* when speakers

Section 514 furthers three important governmental interests: (1) attaining indisputable compliance with international agreements, (2) obtaining legal protections for American copyright holders' interests abroad, and (3) remedying past inequitable treatment of foreign authors who lost or never obtained copyrights in the United States. The court of appeals focused exclusively on the second interest, but the other two interests provide alternative grounds for affirmance.

Petitioners acknowledge (Pet. 30-31, 35) that “[p]articipating in and complying with Berne may represent an important [g]overnment interest,” and that “there may have been substantial evidence suggesting the failure to comply with Berne would subject the United States to trade sanctions and other real harms.” They nevertheless suggest (Pet. 29-31) that Section 514 cannot be sustained on that basis because, in their view, Section 514 was “unnecessary” to comply with the Berne Convention. But in acting to ensure this country’s compliance with its treaty obligations, and to avoid the harms that perceived noncompliance might entail, Congress was not limited to the measures that a court might deem essential to avoid a treaty violation. Rather, Congress could reasonably seek to build in a margin of safety by affording to foreign authors some protections that the Berne Convention might or might not require, in order to ensure *indisputable* compliance with the

assert the right to make other people’s speeches.” *Eldred*, 537 U.S. at 221 (emphasis added). And while the economic reliance interests in *Eldred* may have been different, the First Amendment interests in making another person’s speech are the same. In any case, any conflict between the interlocutory and final decisions of a court of appeals in the same case would not warrant this Court’s review. Cf. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

Convention. Based on all of the evidence in the record, Congress could reasonably have determined that any “restoration” that allowed reliance parties to continue exploiting otherwise restored works unchecked, on a permanent basis, would fall short of its legislative purpose of ensuring unassailable compliance with the Berne Convention. See Sam Ricketson & Jane C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* 343 (2d ed. 2006) (explaining that to comply with Article 18, “a situation must eventually be reached when the work is protected in relation to all persons,” including reliance parties).

Petitioners contend (Pet. 29-33) that the court of appeals erred in finding “important” the government’s interest in securing protection to American authors abroad. They argue (Pet. 30) that the court “made no attempt to explain how providing these benefits to U.S. authors could or would provide any benefits to the U.S. public, or why it is appropriate for reliance parties like [p]etitioners to bear any burden on their speech rights for the sake of enriching U.S. authors.” But as the court of appeals explained, “[s]ecuring foreign copyrights for American works preserves the authors’ economic and expressive interests” (including the constitutionally recognized freedom not to speak), and “[t]hese interests are at least as important or substantial as other interests that [this] Court has found to be sufficiently important or substantial to satisfy intermediate scrutiny.” Pet. App. 14-15 (citing *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984)).

Petitioners also argue (Pet. 35) that “the [g]overnment did not meet its burden of demonstrating there was any real harm or threat that would justify imposing any restrictions on the speech rights of [p]etitioners or

the public.” See Pet. 34-37. But, as the court of appeals held, the record proves otherwise. The testimony before Congress demonstrated that “the United States’ position on the scope of copyright restoration—which necessarily includes the enforcement against reliance parties—was critical to the United States’ ability to obtain similar protections for American copyright holders” abroad. Pet. App. 24; see *id.* at 18-29 (detailing testimony). According appropriate deference to predictive judgments by the political branches and to their primacy in the realm of foreign relations, the court of appeals reasonably concluded that Congress’s judgment was supported by substantial evidence. *Id.* at 28-29. Indeed, it stands to reason that member nations would be unlikely to grant full copyright protection to the works of American authors if the United States were to grant a permanent license to all reliance parties. Cf. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009) (challenger cannot “demand a multiyear controlled study” to support commonsense conclusion). Petitioners of course disagree with Congress’s balancing of these competing interests, but such disagreement does not render that legislative judgment unconstitutional. Pet. App. 38; *Eldred*, 537 U.S. at 222 (“Beneath the facade of their inventive constitutional interpretation, petitioners forcefully urge that Congress pursued very bad policy.”).

b. In any event, review of the court of appeals’ application of intermediate scrutiny to Section 514 of the URAA is not warranted because Section 514 should not have been subject to First Amendment scrutiny in the first instance. This Court stated in *Eldred* that when “Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny

is unnecessary.” 537 U.S. at 221. In its initial opinion in this case, the court of appeals concluded that Section 514 was subject to further First Amendment scrutiny under that standard because “the traditional contours of copyright protection include the principle that works in the public domain remain there and * * * [Section] 514 transgresses this critical boundary.” Pet. App. 90. That analysis reflects a misreading of *Eldred*.¹¹

Read in context, this Court’s reference to the “traditional contours of copyright protection” describes the two First Amendment accommodations built into copyright law: the “idea/expression dichotomy” (*i.e.*, the principle that federal copyright law “distinguishes between ideas and expression and makes only the latter eligible for copyright protection”) and the doctrine of “fair use.” 537 U.S. at 219-220; see 17 U.S.C. 102(b), 107. After describing “these traditional First Amendment safeguards,” 537 U.S. at 220, the Court in *Eldred* explained that, “when speakers assert the right to make other people’s speeches * * *, copyright’s built-in free speech safeguards are generally adequate to address” any resulting First Amendment concerns, *id.* at 221. Although it recognized that copyright protections are not “categorically immune from challenges under the First Amendment,” the Court concluded that “when * * * Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.” *Ibid.* The clear thrust of that discussion is that, so long as Congress preserves the idea/expression dichotomy and the established “fair use” defense, any incidental burden on expression that copy-

¹¹ As discussed above (p. 14 & n.7, *supra*), the court of appeals also misread the relevant history.

right protection entails raises no First Amendment concern. The Court did not announce a new rule—never before articulated in its jurisprudence—that a potential First Amendment violation occurs whenever Congress expands the scope of copyright protection in a way that “deviates from [a] time-honored tradition,” Pet. App. 98.¹²

The court of appeals’ reading is inconsistent with *Eldred*, with the views of every other court to consider this issue, and with established First Amendment doctrine. First, although the *Eldred* Court certainly considered the copyright term extensions at issue to be consistent with past practice, 537 U.S. at 200-204, it did not dispose of the First Amendment question on those grounds. Instead, the Court discussed at length the unique features of copyright law that secure First Amendment values. The Court did not suggest, let alone hold, that “deviat[ion] from [a] time-honored tradition” (Pet. App. 98) triggers First Amendment scrutiny. Second, every other court to consider this issue after *Eldred* has held that First Amendment scrutiny is unwarranted in this area so long as the idea/expression dichotomy and the “fair use” doctrine are retained. See *Kahle v. Gonzales*, 487 F.3d 697, 700 (9th Cir. 2007) (holding that “traditional First Amendment safeguards such as fair

¹² Indeed, the Court in *Eldred* stressed that copyright protection also exists to serve First Amendment values; its purpose is “to promote the creation and publication of free expression,” 537 U.S. at 219, by supplying “the economic incentive to create and disseminate ideas,” *ibid.* (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (*Harper & Row*)). The power to restrict others’ exploitation of a work, including the creation of derivative works from the original, similarly protects a First Amendment interest *not* to speak. See *Harper & Row*, 471 U.S. at 559-560.

use and the idea/expression dichotomy are sufficient to vindicate the speech interests affected by” the challenged copyright statutes), cert. denied, 552 U.S. 1096 (2008); *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 631 (7th Cir. 2003) (“The First Amendment adds nothing to the fair use defense.”), cert. denied, 543 U.S. 816 (2004); *Luck’s Music Library, Inc. v. Ashcroft*, 321 F. Supp. 2d 107, 119 (D.D.C. 2004) (holding that “Congress has not altered the traditional contours of copyright protection” because the URAA “does not alter First Amendment accommodations such as the idea/expression dichotomy or the fair-use doctrine”).

Third, mere “deviat[ion]” from past copyright practice is irrelevant to First Amendment values. For example, Congress’s elimination in 1988 of the requirement to affix a copyright notice surely departed in some sense from traditional copyright protection (which had long required such notice), but it raised no meaningful First Amendment issue. What matters for First Amendment analysis is whether Congress has altered copyright’s traditional First Amendment safeguards—fair use and the idea/expression dichotomy—so as to create obstacles to others’ use of copyrighted material in the course of making their own speech. That is why the Court in *Eldred* referred to the “traditional contours of copyright protection.” 537 U.S. at 221 (emphasis added); see *Kahle*, 487 F.3d at 700 (upholding copyright extensions that “left intact ‘built-in First Amendment accommodations’ such as the idea/expression dichotomy and fair use”) (quoting *Eldred*, 537 U.S. at 219).

Section 514 of the URAA leaves these traditional safeguards of First Amendment interests intact.¹³ Under Section 514, the idea/expression dichotomy and the doctrine of fair use apply to the restored copyrights of foreign authors in just the same way that they apply to the copyrights of American authors. More generally, copyrights restored pursuant to Section 514 last for precisely the same term, expire on precisely the same day, and offer substantially the same protections against others' exploitation as the copyrights granted to American authors under the pre-existing statutory scheme. Indeed, the only meaningful difference between restored and other copyrights is that the holders of restored copyrights obtain somewhat *less* protection against certain types of infringement, since Section 514 affords "reliance parties" an opportunity for continued exploitation of a restored work if no notice is provided, a one-year grace period after notice is provided, and the right to exploit derivative works indefinitely by paying reasonable compensation. See *Luck's Music Library*, 321 F. Supp. 2d at 119.

¹³ In contrast, "[e]liminating the fair use doctrine" and "expanding copyright protection to cover facts" and ideas (Pet. 32) would, by definition, directly alter the "traditional contours of copyright protection" identified in *Eldred*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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