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 OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members, dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Founded in 1920, the ACLU has vigorously defended free speech for over ninety years, and has appeared before this Court in numerous First Amendment cases, both as direct counsel and as *amicus curiae*.

STATEMENT OF THE CASE

This case involves the constitutionality of a federal law, Section 514 of the Uruguay Round Agreements Act of 1994 ("Section 514"), Pub. L. No. 103-465, § 514, 108 Stat. 4809, 4976–81 (1994) (codified as amended at 17 U.S.C. §§ 104A, 109). Section 514 amended the Copyright Act to bestow copyright protection on certain foreign works that previously were in the public domain. In doing so, it has altered the traditional contours of copyright protection and affected the ability of copyright to serve as an engine of free expression.

Section 514 has granted U.S. copyright protection to millions of foreign works.[2] *See*

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[1] The parties have submitted blanket consents to the filing of *amicus* briefs. Pursuant to Rule 37.6, none of the parties authored this brief in whole or in part, and no one other than *amicus* or its counsel contributed money or services to the preparation or submission of this brief.

[2] Section 514 provides copyrights to foreign works that were formerly in the public domain in the United States because of a failure to comply with formalities imposed by U.S.

Marybeth Peters, Register of Copyrights, *The Year in Review: Accomplishments and Objectives of the U.S. Copyright Office*, 7 Fordham Intell. Prop. Media & Ent. L.J. 25, 31 (1996). That includes works by Shostakovich, Stravinsky, Prokofiev, Virginia Woolf, J.R.R. Tolkien, C.S. Lewis, T.S. Eliot, Federico Fellini, Alfred Hitchcock, and Picasso. These works were previously in the public domain and could be freely used by anyone, without restraint.

Section 514 creates a temporary and limited safe harbor for individuals who had previously used the formerly-public domain works or who had created derivative works based on these works (collectively, "reliance parties"). 17 U.S.C. §§ 104A(d)(2)–(4). These reliance parties are given a one-year grace period dating from actual or constructive notice of restoration, during which they will be safe from an infringement lawsuit for selling or otherwise disposing of previously-made copies of the newly-protected works. *Id.* at § 109(a). After the grace period expires, any uses of the material, including sales of works made pre-restoration, will subject reliance parties to infringement lawsuits. *Id.* at §§ 104A(d)(2)(A)(ii)(I), (d)(2)(B)(ii)(I). Those who previously created a derivative work based on a restored work are permitted to continue using or

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copyright law, a lack of subject matter eligibility, or a lack of national eligibility. *See* 17 U.S.C. §§ 104A(a), (h)(6)(C). The statute uses the term "restored works," but it also grants new copyright protection to works previously in the public domain because they had never obtained copyrights in the United States. *See id.* at § 104A(h)(6).

selling such derivative works after the granting of copyright protection, but they must now pay the copyright holder "reasonable compensation" to do so. *Id.* at § 104A(d)(3)(A).

Congress enacted Section 514 to implement a provision of the Berne Convention for the Protection of Literary and Artistic Works. The Berne Convention requires each signatory country to provide foreign copyright holders the same protections that the country affords to its own nationals. *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and as amended Sept. 28, 1979, 102 Stat. 2853, 1161 U.N.T.S. 3. In particular, Article 18 of the Convention requires signatories to bestow copyright protection on certain unprotected foreign works whose copyright is still valid in the country of origin. It provides discretion for signatories to enter into special conventions with other countries regarding this provision or to make unilateral determinations about the implementation of the provision. The United States signed the Berne Convention in 1989, but did not implement Article 18 until Section 514 was adopted in 1994. Article 18 was originally not implemented in the U.S. in part because of concerns over the constitutionality of granting copyright protection to works in the public domain. *See* H.R. Rep. No. 100-609, at 51 (1988), *quoted in* William F. Patry, 7 *Patry on Copyright* § 24:21 (2008).

Petitioners are orchestra conductors, educators, performers, publishers, film archivists,

and motion picture distributors who rely on artistic works in the public domain for their livelihoods. They perform, adapt, distribute, and sell public domain works. Following enactment of Section 514, many of those public domain works became copyrighted, meaning that Petitioners were prevented from using the works unless they obtained permission from and paid licensing fees to the new copyright holders—fees that are cost-prohibitive for many Petitioners.

Petitioners thereafter filed this lawsuit challenging, among other things, the constitutionality of Section 514 on the ground that it violates the Copyright Clause, U.S. Const. art. I, § 8, cl. 8, and the First Amendment. The district court granted summary judgment to the government on all claims, holding that the Copyright Clause did not preclude Congress from restoring copyrights to public domain works and that there was "no need to expand upon the settled rule that private censorship via copyright enforcement does not implicate First Amendment concerns." *Golan v. Gonzales*, No. Civ. 01-B-1854 (BNB), 2005 WL 914754, at *14, *17 (D. Colo. April 20, 2005).

On appeal, the Tenth Circuit agreed that the Copyright Clause had not been violated, but reversed on the First Amendment claim, holding that Congress's exercise of the Copyright Clause power is subject to First Amendment review "if it 'altered the traditional contours of copyright protection.'" *Golan v. Gonzales*, 501 F.3d 1179, 1187 (10th Cir. 2007) (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003)). The Tenth Circuit then

concluded that First Amendment scrutiny is required in this case because Section 514 "alters the traditional contours of copyright protection" by eviscerating the "bedrock principle of copyright law that works in the public domain remain there." *Id.* at 1187-88.

On remand, the parties agreed that Section 514 was content-neutral and that intermediate scrutiny should be applied to the First Amendment claim. Applying that standard, the district court granted summary judgment to Petitioners on the ground that Section 514 is "substantially broader than necessary," primarily because Congress could have permanently exempted the reliance parties from being bound by the statute rather than only granting a one-year grace period. *Golan v. Holder*, 611 F. Supp. 2d 1165, 1177 (D. Colo. 2009).

The Tenth Circuit reversed. It held that the statute did not violate the First Amendment because the government had a "substantial interest in protecting American copyright holders' interests abroad," *Golan v. Holder*, 609 F.3d 1076, 1084 (10th Cir. 2010), and Section 514 was narrowly tailored to advance that interest, *id.* at 1090-91.

This Court subsequently granted *certiorari* on both the Copyright Clause and First Amendment claims.

SUMMARY OF ARGUMENT

Amicus agrees with Petitioners that Section 514 violates the First Amendment and that the government could have achieved its

legitimate interests without so significantly burdening First Amendment rights. Rather than repeat Petitioners' arguments, this brief will address the threshold issues of whether the statute substantially burdens Petitioners' and the public's First Amendment rights and whether First Amendment scrutiny applies to copyright statutes like Section 514.[3]

1. Section 514 imposes a substantial burden on Petitioners' and the public's First Amendment rights. It removes millions of works—both famous and obscure—from the public domain and places them under private control, meaning that Petitioners and the public can no longer freely perform, adapt, share, distribute, or otherwise use those works as they see fit. In doing so, Section 514 trenches upon the public domain, which has long been viewed as providing the building blocks for future creativity in music, art, entertainment, literature, and other intellectual and cultural enterprises. That Petitioners may not have been the original creators of some of the affected speech does not negate all First Amendment interests or make the First Amendment rights at stake insignificant. Those who publish, disseminate, perform, or adapt the works of others have long been entitled to First Amendment protection against government-imposed restrictions on the exercise of that right.

[3] This brief does not address the Copyright Clause question before the Court.

2. Because Section 514 imposes a substantial burden on speech, it must withstand First Amendment scrutiny. As this Court has frequently noted, copyright law generally promotes First Amendment values by encouraging free expression. The Copyright Clause does not, however, confer an exemption from the First Amendment. To the contrary, the First Amendment applies whenever Congress exercises one of its enumerated powers under Article I of the Constitution, including when it acts pursuant to the Copyright Clause. Limiting First Amendment scrutiny only to copyright laws directly affecting the principle of fair use or the idea/expression dichotomy would create a new category of wholly unprotected speech. Such an approach would be at odds with this Court's decision in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), and with the Court's aversion to creating new categories of unprotected speech. Because fair use and the idea/expression dichotomy are not sufficient to address all free speech concerns that copyright laws such as Section 514 can raise, further First Amendment scrutiny is necessary and appropriate for Section 514 and other copyright laws that alter the traditional contours of copyright protection.

ARGUMENT

I. SECTION 514 IMPOSES A SIGNIFICANT BURDEN ON SPEECH THAT IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION.

The express intent and effect of Section 514 is to remove certain works from the public domain and to transfer ownership of them back to their original creator. The result is that Petitioners and the public can no longer perform, adapt, share, distribute, or otherwise use these works without restriction. Because of the financial costs imposed by this restoration of copyrights, Petitioners and most members of the public will no longer be able to use many of these works at all. Even those with the financial means to use the works may not be able to do so if the restored copyright holder decides not to permit use of the material. As a result, innumerable previously permitted core First Amendment activities—musical and dramatic performances, literary adaptations, and film showings and distributions, to name a few—must cease.

The government has attempted to minimize Section 514's impact on First Amendment interests by claiming both that the quantity of speech affected is small and that the speech in question is entitled to limited, if any, First Amendment protection because it consists entirely of "other people's speeches." *See* BIO at 18. Neither contention has merit. Because Section 514 removes a significant quantity of speech from the public domain, it imposes a substantial burden on the free speech interests of

Petitioners and the public that are entitled to the full protection of the First Amendment.

A. Section 514 Impacts A Significant Quantity Of Valuable Speech.

The impact of Section 514 will be felt on thousands upon thousands of works previously held in the public domain. Over 50,000 registration notices have been filed by the new foreign copyright holders with the U.S. Copyright Office since passage of Section 514. *See* http://www.copyright.gov/gatt.html (listing notices and the titles of each work). The actual number of affected works is much greater than 50,000. By the government's own estimate, "[t]he works that qualify for copyright restoration probably number in the millions." *See* Peters, *supra*, at 31.

Although many of these works are obscure, some are widely acknowledged as classics in their respective fields. The works affected include symphonies by Shostakovich, Stravinsky, Prokofiev, and Rachmaninoff; books by J.R.R. Tolkien, Joseph Conrad, George Orwell, Virginia Woolf, C.S. Lewis, and H.G. Wells; poems by T.S. Eliot, including *The Waste Land*; films by Federico Fellini and Alfred Hitchcock; and artwork by M.C. Escher and Picasso, including Picasso's *Guernica*. Indeed, because the United States and Russia did not afford copyright protection to each other's citizens until 1973, every single work published in Russia before that year has been affected by Section 514 since none

of them was previously copyrightable in the United States due to a lack of "national eligibility." This includes, among many others, classic musical works such as Prokofiev's *Peter and the Wolf*, Shostakovich's *Symphony No. 5*, and Stravinsky's *Petroushka*.

All of these works were previously in the public domain, free to be used by anyone, without any restraint, financial or otherwise. With the passage of Section 514, that all changed. Now, after the filing of a boilerplate notice form by the new copyright holder (or his or her heirs or estate), use of these works is prohibited without the express permission of the copyright holder and the payment of licensing fees. Many copyright holders may refuse to permit their works to be used at all. *See, e.g.*, *Shloss v. Sweeney*, 515 F. Supp. 2d 1068, 1072 (N.D. Cal. 2007) (heir to James Joyce estate refused to permit professor to quote from passages of *A Flower Given to My Daughter* in scholarly work). Even if the copyright holder chooses to permit the work's use, the licensing fees will often be prohibitive for many potential users, as the Record in this case demonstrates. *See, e.g.*, *Golan*, 609 F.3d at 1082. The result will be that people across the United States who want to perform, share, and distribute these works will not be able to do so. In turn, their audiences will be deprived of the ability to hear, read, and see these invaluable works of music, literature, and the visual arts. The greatest impact will almost certainly be felt in small towns and economically depressed cities, and in drama and music programs in schools and colleges, where there

simply will not be sufficient resources to pay the demanded license fees. Thus, while it may still be possible for the New York Philharmonic or the Boston Pops to perform *Peter and the Wolf* for children in New York or Boston, children in many other towns and cities across the country may never get the opportunity to experience a performance of this music. In short, contrary to the government's assertion, Section 514's impact on First Amendment interests will be substantial, not minimal, and it will reach all of us.

B. Section 514 Imposes A Significant Burden On Speech Because Of The Importance Of The Public Domain.

The reason Section 514 is so harmful to free speech is because of the critical role that the public domain—from which these works have been removed—plays in the creative and intellectual process. The principal purpose of copyright and patents is to benefit the public; one of the ways that is achieved is by providing incentives to individuals to develop and to create works of art and science. *See, e.g.*, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) ("The monopoly created by copyright thus rewards the individual author in order to benefit the public." (internal quotation marks omitted)); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.");

Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.").

Preserving the public domain is critical to ensuring that this "ultimate aim" is achieved. The promise that after a limited period of exclusivity, the entire contents of copyrighted works will enter the public domain where they will be freely available to everyone for expressive use is integral to copyright, and is as important as its incentive function. That is because public domain works are the building blocks for future artists, inventors, and scientists, enriching them with ideas, inspirations, and foundations upon which to build new creations and inventions. *See, e.g.*, *White v. Samsung Elecs. Am. Inc.*, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting from denial of reh'g en banc) ("Nothing today . . . is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before."); James Boyle, *The Public Domain: Enclosing The Commons Of The Mind* 39 (2008) ("[T]he public domain is the basis for our art, our science, and our self-understanding. It is the raw material from which we make new inventions and create new cultural works."); William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 66-67 (2003) ("Creating a new expressive work typically involves borrowing or building on material from a prior body of works, as well as adding original expression to it."); Richard R. Nelson & Sidney G.

Winter, *An Evolutionary Theory of Economic Change* 130 (1982) (stating that artistic, scientific, and practical innovation "consists to a substantial extent of a recombination of conceptual and physical materials that were previously in existence").

Famous examples abound regarding how the public domain has been used: Shakespeare borrowed titles, plots, characters, and sometimes even verbatim language from existing plays, histories, and biographies, *see* Richard A. Posner, *The Little Book of Plagiarism* 51–74 (2007); T.S. Eliot, John Milton, and James Joyce similarly created works based upon significant borrowing from prior authors, *see* Landes & Posner, *supra*, at 59-61; Mozart created variations on Salieri, Gluck, and others, *see* Daniel Heartz, *From Garrick to Gluck: Essays on Opera in the Age of Enlightenment* 64 (John A. Rice ed., 2004); Beethoven built upon the works of Diabelli, *see* Maynard Solomon, *Late Beethoven: Music, Thought, Imagination* 11 (2004); and even Disney, one of the leading voices for stronger copyright protections, has created numerous works based principally on public domain material, *see* Edward Lee Lamoureux, *Intellectual Property Law and Interactive Media* 45 (2009).

Far from being a depository for unimportant works not deserving of copyright protection, therefore, the public domain is critical to our cultural and intellectual heritage and future. *See, e.g.*, Boyle, *supra*, at 41 ("The public domain is the place we quarry the building blocks of our culture. It is, in fact, the majority of our

culture."); Jessica Litman, *The Public Domain*, 39 Emory L.J. 965, 968 (1990) ("The public domain should be understood not as the realm of material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use."). Section 514 directly impacts this critical source of inspiration and ideas, literally taking a chunk of it away from all of us. By removing thousands and likely millions of works from the public domain, Section 514 has made it that much more difficult for future artists and inventors to create the next great work, and for the public to reap the benefits of their creativity and genius.

Copyright is an engine for free expression because it fuels and nurtures the generative process. It provides the impetus to get things moving, which leads to the creation of new works, which in turn leads to even more works, and so on. As the Tenth Circuit aptly explained, the copyright system furthers expression by establishing a sequence for creative works to move from "1) creation; 2) to copyright; 3) to the public domain." *Golan*, 501 F.3d at 1189; *see also id*. at 1183 ("These imaginative works inspire new creations, which in turn inspire others, hopefully, ad infinitum. This cycle is what makes copyright 'the engine of free expression.'" (citation omitted)). By altering this sequence and taking works out of the public domain, Section 514 has broken this creative cycle that has proven so critical to the development of creative works for centuries.

C. The Speech Affected By Section 514 Is Entitled To Full First Amendment Protection.

The government attempts to make these significant First Amendment burdens disappear by asserting that the speech affected by Section 514 is entitled to limited, if any, First Amendment protection because it consists entirely of "'other people's speeches.'" *See* BIO at 18 (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003)). That claim is factually and legally incorrect.[4]

First, works in the public domain—the material affected by Section 514—are not "other people's speeches." They are the public's speech. Each of us "owns" everything in the public domain. We are all free to use anything in it, however we see fit, with no restrictions imposed by anyone—including the original creator or his or her descendants or heirs. *See, e.g.*, *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33-34 (2003) ("[O]nce the . . . copyright monopoly has expired, the public may use the . . . work at will and without attribution."); *Am. Tobacco Co. v. Werckmeister*, 207 U.S. 284, 299-300 (1907) (observing that widespread publication of a work without copyright protection "render[s] such work common property" (internal quotation marks omitted)); *see also Golan*, 501 F.3d at 1192-

[4] The government's even more extreme claim that the speech at issue in this case is entitled to no First Amendment scrutiny once it is determined that neither the fair use nor the idea/expression doctrines apply is addressed in Part II, *infra*.

93 ("In other words, each member of the public—'anyone'—has a non-exclusive right, subject to constitutionally permissible legislation, to use material in the public domain."). Thus, by using a work in the public domain, Petitioners and the public are not making "other people's speeches"—even if someone else originally created that work—any more than a person driving his or her car is driving "other people's cars" merely because Chevrolet or GM "made" the car that he or she owns.

Second, even if the public did not own these works, it would still be incorrect to state that Section 514 *only* affects people making "other people's speeches." The government's assertion is based on the erroneous premise that all Petitioners and the public are doing with these public domain works is merely copying them verbatim and nothing more. That is not correct. An orchestra that performs Shostakovich's *Symphony No. 5* or a poet that recites T.S. Eliot's *The Waste Land* is engaged in an interpretive exercise that is itself expressive. Thus, although it is true that Francis Scott Key originally wrote the lyrics for what became the *Star-Spangled Banner*, it is equally true that Jimi Hendrix's electric guitar-solo at Woodstock in 1969, Marvin Gaye's soul rendition before the 1983 NBA All-Star Game, Igor Stravinsky's controversial rendition with the Boston Symphony in 1944, José Feliciano's equally controversial Latin-infused acoustic guitar version at the 1968 World Series, and Roseanne Barr's infamous version before a baseball game in 1990, are each their "own" speech, not just "someone else's" speech.

Indeed, the government's argument completely overlooks the fact that derivative works—themselves copyrightable if they possess sufficient originality, *see* 17 U.S.C. § 103(b)—are covered by Section 514. Derivative works are by definition not just "other people's speeches," even if they build upon someone else's original creation.

Finally, the First Amendment applies even to speech affected by Section 514 that could, as a factual matter, accurately be said to consist solely of repeating other people's speech. Unlike copyright and patents, First Amendment rights do not depend on a speaker saying or doing anything original or novel. The government's argument to the contrary ignores numerous decisions from this Court establishing that full First Amendment protection is afforded against government-imposed restrictions on speech even when the speaker is not the first person to utter the expression at issue.

As an initial matter, the Court has made clear that the First Amendment protects not just the right to speak in the first instance, but the right to publish and to circulate or distribute such speech—written by oneself or by others—and that such expressive activities enjoy the same level of First Amendment protection as does the author's original speech. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (quoting *Ex parte Jackson*, 96 U.S. 727, 733 (1877)); *see also Int'l*

Soc. for Krishna Consciousness v. Lee, 505 U.S. 672, 702-03 (1992) (Kennedy, J., concurring) ("We have long recognized that the right to distribute flyers and literature lies at the heart of the liberties guaranteed by the Speech and Press Clauses of the First Amendment."); *Martin v. City of Struthers*, 319 U.S. 141, 146-47 (1943) ("Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.").

Bartnicki v. Vopper, 532 U.S. 514 (2001), makes this point crystal clear. In that case, the Court considered an as-applied challenge to the constitutionality of a provision making it illegal to disclose a tape recording of an illegally-intercepted conversation—a conversation exclusively composed, by definition, of "other people's speeches." *See id.* at 517. The government argued that the disclosure and the publishing of the recording was expressive conduct, not speech. *Id.* at 527. The Court rejected that argument, concluding that "the naked prohibition against disclosures is fairly characterized as a regulation of pure speech." *Id.* at 526. Indeed, "'If the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.'" *Id.* at 527 (citation omitted).

If the government were correct that lesser First Amendment protections adhere to those not

engaging in their own original speech, people who distribute Bibles or other religious literature, or people who stand in a public park or on a public sidewalk quoting from the Bible, would not be entitled to full First Amendment protection. That is not and should not be the law. *See, e.g.*, *Murdock v. Pennsylvania*, 319 U.S. 105, 109-10 (1943) (holding that the hand-distribution of religious literature by workers "has the same claim as the others to the guarantees of freedom of speech and freedom of the press" and that "spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types"); *Schneider v. Town of Irvington*, 308 U.S. 147, 165 (1939) (invalidating ordinance enforced against a member of the Jehovah's Witnesses who was arrested for handing out cards citing Biblical passages). These individuals handing out Bibles or reciting their favorite Biblical passages did not, of course, originally write those materials—*i.e.*, in the government's view, they were merely delivering "other people's speeches." Their speech is nevertheless entitled to the full protection of the First Amendment and not, as the government is now proposing, some lesser form of protection.

Numerous other examples abound where the First Amendment protects the rights of individuals utilizing speech originally made by "other people." For example, wearing t-shirts or other expressive articles of clothing—almost all of which are made by other people, with someone else's original words on them—indisputably

entitles the wearer to the full protection of the First Amendment. Thus, in *Cohen v. California*, 403 U.S. 15 (1971), the Court held that Paul Cohen could not be convicted of a crime for wearing a jacket emblazoned with an anti-Vietnam War slogan on its back, even though he was certainly not the first to utter that infamous three-word saying and he likely did not make the jacket himself. *See id.* at 16; *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (upholding First Amendment right of students to wear black armbands in school). It is similarly beyond question that individuals have the full First Amendment right to place signs with political slogans on their lawns, in their windows, or on their cars, even though the vast majority of those signs and slogans are first created and conceived by others, such as a political candidate. *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 45-46, 55 (1994) (holding that a city ordinance banning the display of almost all residential signs is unconstitutional, where respondent had displayed signs proclaiming "Say No to War in the Persian Gulf, Call Congress Now" and "For Peace in the Gulf" in her private yard, and noting that "residential signs have long been an important and distinct medium of expression"). Even political protests—clearly a realm fully protected by the First Amendment—often involve protesters repeating speech first uttered by others, whether it be by holding up picket signs and banners, wearing t-shirts and buttons, or chanting and singing. *See, e.g.*, *Edwards v. South Carolina*, 372 U.S. 229, 235, 241 (1963) (stating that, "[t]he circumstances in

this case reflect an exercise of these basic constitutional rights in their most pristine and classic form," where a crowd gathered in front of the South Carolina State House in protest, singing "I Shall Not Be Moved" and various religious songs).

One of the reasons the First Amendment protects this speech is that by choosing which words to publish, to distribute, and to repeat—and which *not* to use—a non-original speaker is making his or her own expressive, communicative choices, deciding what speech he or she believes is valuable and worthy of distribution to others. "Thus, through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [a cable operator] seeks to communicate messages on a wide variety of topics and in a wide variety of formats." *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986); *see also Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) ("When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity."). In other words, one can engage in expressive activities not just by creating one's own original programming, but also by deciding which "speech by others" to disseminate. *See, e.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 570 (1995) ("[T]he presentation of an edited compilation of speech generated by other persons is a staple of most newspapers' opinion pages, which, of course, fall squarely within the core of First Amendment security.").

The Court has likewise made clear that the same words can have very different meanings and convey very different messages depending on where the speech is made and the identity of the speaker—regardless of who first uttered the words. As the Court explained in *City of Ladue*:

> Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. . . . A sign advocating 'Peace in the Gulf' in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom window or the same message on a bumper sticker of a passing automobile. An espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.

512 U.S. at 56-57. In other words, even if two people say exactly the same things, they can send two entirely different messages, each of which is deserving of full First Amendment protection, regardless of whether the second speaker was merely repeating the words of the first.[5]

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[5] The government's argument also ignores that the right to hear—the right to "receive information and ideas"—is as strongly protected by the First Amendment as is the right to speak. *See, e.g.*, *Bd. of Educ. v. Pico*, 457 U.S. 853, 866–

The Court's decision in *Eldred* is not to the contrary. To be sure, that decision states that the First Amendment "bears less heavily when speakers assert the right to make other people's speeches," 537 U.S. at 221, but that statement was made in the context of an asserted right to use other people's copyrighted works in the future, not works that have been in the public domain. Unlike in *Eldred*, therefore, the First Amendment right asserted here is the right to continue engaging in speech on the same terms that existed before Section 514 was enacted. The government itself properly acknowledged the constitutional significance of that distinction in *Eldred*. *See Golan*, 501 F.3d at 1194 n.4 (discussing the government's response to certain questions during the *Eldred* oral argument, and stating that, "The Solicitor General replied that although such an act was not inconceivable, the public domain likely presented a 'bright line'

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67 (1982); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756–57 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). This right to receive information does not depend on whether the person providing the information is making "other people's speeches" or his or her own original speech. It focuses exclusively on the right of the reader or listener to see or hear the speaker's words, whatever their source might be. Even if the government were right that the speakers affected by Section 514 had reduced First Amendment interests because they were merely propounding other people's speeches, Section 514 would still have a substantial harmful impact on First Amendment rights because it prevents readers and listeners from receiving the information and ideas that they otherwise would have received.

because once '[s]omething . . . has already gone into the public domain [ ] other individuals or companies or entities may then have acquired an interest in, or rights to be involved in disseminating [the work.]'" (quoting Tr. of Oral Arg. at 44, *Eldred v. Ashcroft,* 537 U.S. 186 (2003) (No. 01–618))). The government was right then; it is wrong now.

II. FIRST AMENDMENT SCRUTINY APPLIES TO COPYRIGHT LAWS LIKE SECTION 514 THAT ALTER THE BALANCE BETWEEN COPYRIGHT AND FREE SPEECH.

Copyright laws regulate speech. They determine who can speak and what people can say. At the same time, copyright can itself be speech-enhancing. Copyright regulates speech for the express purpose of creating new speech. *See, e.g.*, *Eldred*, 537 U.S. at 219 ("[C]opyright's purpose is to promote the creation and publication of free expression."); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights 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 in 'Science and useful Arts.'"). In this manner, despite its speech-restrictive aspects, copyright is intended to serve as an "engine of free expression." *Harper & Row*, 471 U.S. at 558.

To ensure that it does so, the carefully-calibrated balance between the Copyright Clause

and the First Amendment must be heeded. Thus, although in general "copyright's limited monopolies are compatible with free speech principles," *see Eldred*, 537 U.S. at 219, that does not mean that copyright laws will never cross the line and violate the First Amendment by upending the delicate balance established by the Constitution.

Recognizing this possibility, the Court in *Eldred* refused to immunize copyright laws from all First Amendment protection. 537 U.S. at 221 ("We recognize that the D.C. Circuit spoke too broadly when it declared copyrights 'categorically immune from challenges under the First Amendment.'" (citation omitted)). In *Eldred* itself, the Court found "further First Amendment scrutiny . . . unnecessary" because it concluded that the copyright extension law at issue in that case did not "alter[] the traditional contours of copyright protection." *Id.* Implicit in that holding is a recognition that "further First Amendment scrutiny" is both necessary and appropriate when congressional action "alter[s] the traditional contours of copyright protection" in a significant way.

Section 514 does precisely that. As the Tenth Circuit succinctly explained:

> [A] limited copyright attaches at the moment a work is created. When the copyright expires at the end of the statutory period, the work becomes part of the public domain. Until § 514, every statutory scheme preserved the same sequence. A

> work progressed from 1) creation; 2) to copyright; 3) to the public domain. Under § 514, the copyright sequence no longer necessarily ends with the public domain: indeed, it may begin there. Thus, by copyrighting works in the public domain, the URAA has altered the ordinary copyright sequence.

Golan, 501 F.3d at 1189 (footnote omitted). In so doing, Section 514 "transformed the ordinary process of copyright protection and contravened a bedrock principle of copyright law that works in the public domain remain in the public domain." *Id*. at 1192.

The government cannot seriously dispute that Section 514 "alter[s] the traditional contours of copyright protection" by providing such protection to works that had previously been in the public domain. Instead, the government accuses the Tenth Circuit of "misreading" *Eldred*. BIO at 22. But it is the government that misreads *Eldred* by arguing that "so long as Congress preserves the idea/expression dichotomy and the established 'fair use' defense, any incidental burden on expression that copyright protection entails raises no First Amendment concern." BIO at 22-23.

Contrary to the government's assertion, *Eldred* makes clear that laws affecting fair use or the idea/expression dichotomy are not the only ones that can implicate First Amendment interests: "To the extent such assertions raise First Amendment concerns, copyright's built-in

free speech safeguards are *generally* adequate to address them." *Eldred*, 537 U.S. at 221 (emphasis added). The clear import of that statement is that although fair use and the idea/expression dichotomy (*i.e.*, "copyright's built-in free speech safeguards") are often (*i.e.*, "generally") sufficient to ameliorate First Amendment concerns, that is not always the case. This interpretation is entirely consistent with the conclusion reached by the Eleventh Circuit in a case decided before *Eldred*. *See Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1263 (11th Cir. 2001) ("[T]he balance between the First Amendment and copyright is preserved, *in part*, by the idea/expression dichotomy and the doctrine of fair use." (emphasis added)); *id.* at 1265 (stating that fair use and the idea/expression dichotomy ensure that "courts *often* need not entertain related First Amendment arguments in a copyright case" (emphasis added)).

The Court's discussion of the "supplement[al]" First Amendment protections contained in the statute at issue in *Eldred*, *see* 537 U.S. at 220, similarly makes clear that fair use and the idea/expression dichotomy are not the only vehicles through which First Amendment interests are accommodated in the copyright context. Other copyright principles, such as the first-sale doctrine, *see* 17 U.S.C § 109(a); *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350-51 (1908), which ensures that libraries can share their materials with patrons, and, of course, the "bedrock principle of copyright law that works in the public domain remain in the public domain," *Golan*, 501 F.3d at 1192, have also long provided

critical First Amendment protections and helped preserve the proper balance between copyright and free speech. Where, as here, these or other fundamental principles implicating First Amendment interests are affected by copyright legislation, further First Amendment scrutiny must be applied.

In essence, the government is trying to obtain a subset of the categorical immunization for copyright laws that this Court has already rejected. Having been defeated in its effort to exempt all copyright laws from any First Amendment scrutiny in *Eldred*, the government is now attempting to create a similar categorical exception to the First Amendment for any copyright laws that do not eviscerate fair use or the idea/expression dichotomy. In other words, "The claim is not just that Congress may regulate [copyright] subject to the First Amendment, but that [copyright laws] are outside the reach of that Amendment altogether—that they fall into a 'First Amendment Free Zone.'" *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010) (citation omitted). The Court should again resist this request to create a broad new category of speech beyond the reach of the First Amendment.

The Court has recognized a very limited number of narrowly-defined "historic and traditional categories" of speech that are outside the protections of the First Amendment, *see Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment), including defamation, incitement, obscenity, and child

pornography, *see Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-46 (2002). The Court's modern jurisprudence, however, has evinced a distinct disfavor towards creating new categories of unprotected speech. "Our decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation and for obscenity," not opened the door to the creation of additional categories of wholly unprotected speech. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (citations omitted); *see also Stevens*, 130 S. Ct. at 1585-87 (rejecting government's attempt to add "depictions of animal cruelty" as a new category of unprotected speech); *Free Speech Coal.*, 535 U.S. at 246 (declining to recognize virtual child pornography "as an additional category of unprotected speech"); *Texas v. Johnson*, 491 U.S. 397, 417 (1989) (holding that there is not a "separate juridical category" for the American flag); *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (declining to find that an "outrageous" political cartoon was the "sort of expression . . . governed by any exception to the general First Amendment principles"); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (rejecting prior precedent that commercial speech was entirely beyond the protections of the First Amendment); *Cohen*, 403 U.S. at 24 ("[W]e cannot overemphasize that . . . most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions.").

The Court's "hesitancy" to "mark off new categories of speech for diminished constitutional

protection" reflects appropriate "skepticism about the possibility of courts' drawing principled distinctions to use in judging governmental restrictions on speech and ideas." *See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 804-05 (1996) (Kennedy, J., concurring in part and dissenting in part). As the Court recently explained:

> Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that "depictions of animal cruelty" is among them.

Stevens, 130 S. Ct. at 1586.

Nor is there any reason to conclude that "copyright laws not directly affecting fair use or the idea/expression dichotomy" is such a historically unprotected category. As the Tenth Circuit correctly recognized, far from being historically unprotected, the speech affected by the government's proposed new category—"unrestrained artistic use of these [public domain] works"—has long been protected by the First Amendment. *See Golan*, 501 F.3d at 1193 (discussing Supreme Court cases holding that "music," "motion pictures, programs broadcast by

radio and television, . . . live entertainment, such as musical and dramatic works," and "pictures, films, paintings, drawings, and engravings" are protected by the First Amendment (citations omitted)).

What the government is essentially arguing is that it has the unrestrained authority to designate, on an ad hoc basis, speech that is outside the protection of the First Amendment, so long as fair use and the idea/expression dichotomy are preserved. That cannot be permissible. If it were, it would mean that Congress would have free rein to enact whatever copyright legislation it desires, without any possibility of First Amendment judicial review, so long as Congress simply left intact the principles of fair use and the idea/expression dichotomy. Suppose that Congress enacted a viewpoint-based copyright law—e.g., a law providing copyright protection to works praising Congress, but denying any protection for works criticizing Congress. Such a law would plainly violate the First Amendment requirement of viewpoint neutrality. *See, e.g.*, *Johnson*, 491 U.S. at 414 (holding that viewpoint discrimination is not permissible). Under the government's view, however, the law would not only be beyond the reach of the First Amendment, it would not even be subject to any judicial review because it would not affect fair use or the idea/expression dichotomy.

Other copyright laws raising serious First Amendment concerns having no impact on fair use or the idea/expression dichotomy are not hard

to imagine. For example, Congress could enact a law conditioning copyright eligibility upon a promise by the potential copyright holder to refrain from ever engaging in abusive or indecent speech in the future. Such a law would likely be struck down as a prior restraint, *see Near v. Minnesota*, 283 U.S. 697, 713-14 (1931), as well as for being unconstitutionally vague, *see Gooding v. Wilson*, 405 U.S. 518, 527 (1972) (holding that a statute prohibiting "abusive" speech is vague), overbroad, *see Reno v. ACLU*, 521 U.S. 844, 876-79 (1997) (invalidating regulation of "indecent" speech on the Internet because, among other things, it was overbroad), and for imposing an unconstitutional condition on speech, *see Perry v. Sinderman*, 408 U.S. 593, 597 (1972). Under the government's approach, however, because the law would not implicate fair use or the idea/expression dichotomy, it would not even be subject to any First Amendment scrutiny by a court. "Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well." *R.A.V.*, 505 U.S. at 384.

That copyright laws that impose a substantial burden on speech, but have no impact on fair use or the idea/expression dichotomy, must comport with the First Amendment should come as no surprise. *See, e.g.*, *Stevens*, 130 S. Ct. at 1585 ("The Constitution is not a document 'prescribing limits, and declaring that those limits may be passed at pleasure.'" (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 178 (1803))); *Saenz v. Roe*, 526 U.S. 489, 508 (1999) ("Article I of the Constitution grants Congress broad power

to legislate in certain areas. Those legislative powers are, however, limited not only by the scope of the Framers' affirmative delegation, but also by the principle that they may not be exercised in a way that violates other specific provisions of the Constitution." (internal quotation marks omitted)); *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) ("Congress has plenary authority in all areas in which it has substantive legislative jurisdiction so long as the exercise of that authority does not offend some other constitutional restriction." (citation omitted)).[6]

"[C]opyright is intended to increase and not to impede the harvest of knowledge." *Harper & Row*, 471 U.S. at 545. Where, as here, copyright legislation defines the scope of copyright in a manner that alters the delicate balance between copyright and free speech by imposing a substantial burden on speech that cannot be ameliorated by the principle of fair use or the idea/expression dichotomy, further First Amendment scrutiny is necessary to ensure that the appropriate constitutional balance is maintained. *See, e.g.*, *Eldred*, 537 U.S. at 221; *NAACP v. Button*, 371 U.S. 415, 438 (1963) (holding that where speech is at issue, laws must be narrowly drawn to ensure that First

[6] That Congress enacted Section 514 to implement a treaty, as part of its foreign affairs powers, also does not mean that the statute can thereby bypass First Amendment scrutiny. *See, e.g.*, *Boos v. Barry*, 485 U.S. 312, 324 (1988); *Reid v. Covert*, 354 U.S. 1, 16 (1957). That issue need not be reached in this case, however. As Petitioners point out, Br. for Pet'rs at 45-54, Section 514 as written is not necessary for the U.S. to comply with its treaty obligations.

Amendment rights are not unnecessarily infringed).

That is precisely why this Court rejected the categorical immunization rule created by the D.C. Circuit in the *Eldred* case and established the principle that copyright laws that "alter[] the traditional contours of copyright protection" must withstand "further First Amendment scrutiny." *Eldred*, 537 U.S. at 221. The Court should similarly resist the request here to create a new categorical exemption for copyright laws that do not affect fair use or the idea/expression dichotomy.

CONCLUSION

The judgment of the court of appeals should be reversed. The Court should also reject the government's arguments that Section 514 does not substantially burden First Amendment interests and that First Amendment scrutiny is not available for this copyright statute.

Respectfully submitted,

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