

No. 01-

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IN THE

Supreme Court of the United States

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ERIC ELDRED, *et al.*,

*Petitioner,*

v.

JOHN D. ASHCROFT, In his official capacity  
as Attorney General,

*Respondent.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the  
District of Columbia Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTIONS PRESENTED**

Did the D.C. Circuit err in holding that Congress has the power under the Copyright Clause to extend retrospectively the term of existing copyrights?

Is a law that extends the term of existing and future copyrights “categorically immune from challenge[] under the First Amendment”?

May a circuit court consider arguments raised by *amici*, different from arguments raised by a party, on a claim properly raised by a party?

**PARTIES TO THE PROCEEDINGS AND  
CORPORATE DISCLOSURE STATEMENT**

The parties to the proceedings in the United States Court of Appeals for the District of Columbia Circuit were petitioners Eric Eldred, Eldritch Press, Higginson Book Company, Jill A. Crandall, Tri-Horn International, Luck's Music Library, Inc., Edwin F. Kalmus & Co., Inc., American Film Heritage Association, Moviestream, Inc., Dover Publications, Inc., and Copyright's Commons, and Janet Reno in her official capacity as Attorney General of the United States and her successor, John D. Ashcroft. None of these parties is either publicly held or affiliated with an entity that is so held. The Eagle Forum Education and Legal Defense Fund, L. Ray Patterson, Laura N. Gasaway, and Edward Walterscheid, as well as the Sherwood Anderson Literary Estate Trust, Sherwood Anderson Foundation, the American Society of Composers, Authors, and Publishers, AmSong, Inc., the Association of American Publishers, Inc., Broadcast Music, Inc., the Motion Picture Association of America, the National Music Publishers' Association, Inc., the Recording Industry Association of America, Inc., and the Songwriters Guild of America appeared as *amici curiae* in the Court of Appeals.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioners Eric Eldred, Eldritch Press, Higginson Book Company, Jill A. Crandall, Tri-Horn International, Luck's Music Library, Inc., Edwin F. Kalmus & Co., Inc., American Film Heritage Association, Moviestart, Inc., Dover Publications, Inc., and Copyright's Commons respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

### **OPINIONS BELOW**

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. 1a) is reported at 239 F.3d 372. The order denying the petition for rehearing and for rehearing en banc (App. 24a) is reported at 255 F.3d 849. The memorandum opinion of the district court (App. 34a) is reported at 74 F. Supp. 2d 1.

### **JURISDICTION**

The judgment of the United States Court of Appeals was issued on February 16, 2001, and the petition for rehearing and for rehearing *en banc* was denied on July 13, 2001. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Patent and Copyright Clause 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.

The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." *Id.*, amend. I.

The pertinent provisions of the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998)

(codified at 17 U.S.C. § 304), and the other copyright laws cited in this petition are reprinted in the appendix. App. 40a - 67a.

### STATEMENT OF THE CASE

This case is about the limits on Congress' Copyright Clause power. The Constitution gives Congress the power to "promote the Progress of Science" by granting "exclusive Right[s]" "to Authors" for "limited Times." U.S. Const., art. I, cl. 8. In establishing this power, the Framers intended that copyright terms be, as Justice Story described them, "short," and that after that "short interval," creative works would fall into the public domain "without restraint." Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 502, at 402 (R. Rotunda & J. Nowak eds., 1987).

Congress has now found a clever way to evade this simple constitutional command. By repeatedly extending the terms of existing copyrights—as it has eleven times in the past forty years<sup>1</sup>—Congress has adopted a practice that defeats the Framers' plan by creating in practice an unlimited term. These extensions were initially brief (one or two years). In 1976, the extension was nineteen years. Pub. L. No. 94-553, §304, 90 Stat. 2572. In the statute at issue in this case, the Sonny Bono Copyright Term Extension Act ("CTEA"), Pub. L. No. 105-298,

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<sup>1</sup> See Pub. L. No. 87-668, 76 Stat. 555 (1962); Pub. L. No. 89-142, 79 Stat. 581 (1965); Pub. L. No. 90-141, 81 Stat. 464 (1967); Pub. L. No. 90-416, 82 Stat. 397 (1968); Pub. L. No. 91-147, 83 Stat. 360 (1969); Pub. L. No. 91-555, 84 Stat. 1441 (1970); Pub. L. No. 92-170, 85 Stat. 490 (1971); Pub. L. No. 92-566, 86 Stat. 1181 (1972); Pub. L. No. 93-573, Title I, § 104, 88 Stat. 1873 (1974); Pub. L. No. 94-553, § 304, 90 Stat. 2572 (1976); Pub. L. No. 105-298, § 102(b), 112 Stat. 2827 (1998). This pattern is radically different from the history of copyright during the Republic's first 150 years. In the first hundred years of copyright, Congress extended the term of copyrights once. Act of February 2, 1831, §§ 1-2, 4 Stat. 36. In the next fifty years, Congress again extended the terms only once. Act of March 4, 1909, § 4, 35 Stat. 1075, 1076. While these earlier extensions also applied to existing copyrights, the first extension in 1831 cannot be attributed to the Framers (no Framers sat in Congress in 1831), and two extensions in 150 years cannot be held to be a constitutionalized practice.

112 Stat. 2827 Congress has extended the term of existing and future copyrights by twenty years. *Id.* § 102(b).

Because of the CTEA, works originally authored in 1923 that would have fallen into the public domain in 1998 could now remain under copyright until 2019—a term of 95 years. And because of the CTEA, future copyrights will now extend for the life of the author plus 70 years (which for an author who produced in the pattern of Irving Berlin would mean a term of 140 years), or in the case of works for hire, 95 years. These terms contrast against the Framers’ initial term of just 14 years, renewable once only if the author survived. Act of May 31, 1790, § 1, 1 Stat. 124.

Petitioners are various individuals and businesses that rely upon the public domain for their livelihood. Some, such as the lead plaintiff Eric Eldred, build free Internet libraries based upon public domain works; others, such as Dover Press, publish public domain works in high-quality commercial editions. All depend upon a rich public domain to support their work, and many make their work freely available to others.

In January 1999, petitioners filed a facial challenge to the CTEA, arguing (a) that its retrospective aspect (extending the terms of existing, or “subsisting,” copyrights by twenty years) exceeded Congress’ power under the Copyright Clause, violated the First Amendment, and violated the public trust doctrine, and (b) that its prospective aspect (extending the terms of future copyrights by twenty years) violated the First Amendment. The United States moved for judgment on the pleadings, and petitioners cross-moved for summary judgment. The District Court upheld the statute and dismissed the case. App. 34a. Petitioners appealed the rulings on its Copyright Clause and First Amendment claims.

The Court of Appeals, over the dissent of Judge Sentelle, affirmed the District Court’s judgment. App. 1a. The court first rejected petitioners’ First Amendment argument. While the court held that petitioners had standing to raise a First Amendment challenge to both the prospective and retrospective aspects of the

CTEA, App. 4a, the court held the substance of petitioners' claim barred by circuit precedent and this Court's decision in *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985). App. 5a-7a. According to the circuit court, *Harper & Row* established that there is no "first amendment right to exploit the copyrighted works of others." App. 8a. By challenging a statute that extends the term of subsisting copyrights, petitioners, the court held, were "by definition" asserting a "first amendment right to exploit the copyrighted works of others." *Id.* Petitioners' claim was therefore indistinguishable from the defendant's claim in *Harper & Row*. App. 5a-8a. The circuit court thus transformed the narrow holding of *Harper & Row* into a general rule that "copyrights are categorically immune from challenges under the First Amendment." App. 6a. (interpreting D.C. Circuit authority). (The court did not explain how its reasoning would apply to petitioners' First Amendment challenge to future copyrights, which, because applying to works that have not yet been created, "by definition" cannot be the assertion of a "first amendment right to exploit the copyrighted works of others.")

The court also rejected petitioners' Copyright Clause claims. First, the court rejected petitioners' argument that extending the term of subsisting copyrights would violate the "originality" requirement of the Copyright Clause, which limits copyright to works that are "original." *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991). Though the court acknowledged that extending a copyright to a work that had fallen into the public domain would violate the "originality" requirement, App. 8a, it held that extending the terms of subsisting copyrights would not. App. 8a-9a.

Second, the court rejected petitioners' argument that the "limited Times" condition should be read in light of the Copyright Clause's grant of power—"To promote the Progress of Science." So understood, retrospective extensions would not be "limited" in a constitutional sense. To bar retrospective extensions as unlimited in a constitutional sense. App. 10a. Instead, the court held that the grant of power "To promote the Progress of Science" does not restrict the scope of Congress'

power *at all*. The circuit court therefore interpreted the “limited Times” condition independently of the requirement that Congress “promote the Progress of Science,” and held that an extension (or multiple extensions) of a “limited” term was permissible so long as the extension itself was limited. App. 10a-14a.

Finally, in rejecting petitioners’ Copyright Clause claim, the court refused to consider an argument of *Amicus* Eagle Forum that the “promote [] Progress” requirement is an independent constraint on Congress’ power. The court held instead that it should not reach *Amicus*’s argument because petitioners had not expressly adopted it in their brief. App. 11a.<sup>2</sup> In response to Judge Sentelle’s two dissents, however, the court stated that, had it reached the argument of *Amicus*, it would have rejected that argument. App. 11a, App. 25a. That argument has therefore not been waived in this Court. See *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (“[i]t suffices for our purposes that the court below passed on the issue presented”).

Judge Sentelle dissented from the panel’s decision with respect to the Copyright Clause claims. App. 16a. Following this Court’s approach in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), Judge Sentelle reasoned that a court must find the “outer limits” to a power granted Congress. To find this “outer limit,” Judge Sentelle asked whether “the rationale offered in support of [the extension of power] has any stopping point.” App. 16a (Sentelle, J., dissenting). In this case, the answer was “no.” The government had argued that any extension would be constitutional so long as it was “limited.” App. 18a. That

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<sup>2</sup> Petitioners expressly endorsed the argument of *Amicus* at oral argument before the D.C. Circuit. Tr. of Oral Arg. 17-18; App. 29a. In light of circuit authority, petitioners did not believe it was necessary to view the “grant of power” as an independent “substantive” constraint on Congress’ Copyright authority. App. 11a. Petitioners continue to agree with Eagle Forum that the CTEA is unconstitutional under either the narrow rule that petitioners have advanced, or under the broader argument endorsed by Eagle Forum.

“rationale,” Judge Sentelle reasoned, led to an “unlimited view of the copyright power”—just the same sort of “unlimited view” that this Court had “rejected with reference to the Commerce Clause in *Lopez*.” App. 17a.

Instead, Judge Sentelle maintained that the proper limit to Congress’ power is found by “returning to the language of the clause itself”—in particular, its “grant of power.” Interpreting that language, Judge Sentelle wrote:

[I]t is impossible that the Framers of the Constitution contemplated permanent protection, either directly obtained or attained through the guise of progressive extension of existing copyrights. . . . Extending existing copyrights is not promoting useful arts, nor is it securing exclusivity for a limited time.

App. 18a-19a.<sup>3</sup> Thus, Judge Sentelle concluded, a law that purports to extend the term of a subsisting copyright is beyond Congress’ Copyright Clause power. App. 19a.

Petitioners filed for rehearing and rehearing *en banc*. The panel declined rehearing, and the D.C. Circuit denied rehearing *en banc*. App. 24a. Judge Sentelle, joined by Judge Tatel, dissented from the denial of rehearing *en banc*. Judge Sentelle argued that *en banc* review was merited both because the rule of the panel “effectively eliminates any role for *amicus curiae* in the practice of this circuit,” App. 28a (Sentelle, J., dissenting), and, “more importantly,” because “the Court’s construction of the Copyright Clause . . . renders Congress’ power under Art. I, § 8, cl. 8, limitless despite express limitations in the terms of that clause.” App. 31a. As Judge Sentelle wrote,

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<sup>3</sup> See also Jane C. Ginsburg, *Copyright Legislation for the “Digital Millennium,”* 23 Colum.-VLA J.L. & Arts 137, 171 (1999) (extending term of existing works “cannot enhance the quantum of creativity from the past, but it can compromise the creativity of the future, by delaying for twenty years the time at which subsequent authors may freely build on these works.”); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281, 329 n.192 (1970) (arguing that an “additional incentive to produce is irrelevant”).

Once a work is published . . . extending the copyright term does absolutely nothing to induce further creative activity by the author—and how could it? The work is already published [and a] simple finding by Congress to the contrary is not sufficient to demonstrate that the exercise of that power is “necessary and proper.”

*Id.*

### REASONS FOR GRANTING THE WRIT

As this Court has made increasingly clear, Congress’ power is constrained by both express and implied limitations in the Constitution’s grants of power. These constraints can inhere “in the very language” of the grant itself. *United States v. Lopez*, 514 U.S. 549, 553 (1995) (commerce clause); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) (“the same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power”). They can be found in the express terms conditioning particular grants of constitutional power. *Railway Labor Executives’ Ass’n v. Gibbons*, 455 U.S. 457 (1982) (uniformity requirement in bankruptcy clause). Or they can flow from “presupposition[s]” that the Constitution “confirms.” *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) (11th Amendment).

The power at issue in this case is also and likewise constrained. Congress’ power to grant “exclusive right[s],” incident to the power “To promote the Progress of Science,” is expressly limited by the text of the Copyright and Patent Clause. It is expressly limited by the First Amendment. And it is impliedly limited to works that are “original.” *Feist Publ’ns v. Rural Tel. Sen. Co.*, 499 U.S. 340, 345 (1991).

These limitations were established by the Framers to assure a rich public domain, and to avoid the temptation to corruption that state-backed monopolies (as the Framers understood copyrights to be<sup>4</sup>) inevitably invite. They thus effected a regime that requires

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<sup>4</sup> See 1 THE REPUBLIC OF LETTERS 512, 566 (James Morton Smith ed., 1995). Jefferson was strongly opposed to the Constitution’s grant of power to

that monopolies over speech only be granted as a *quid pro quo* for producing something new—as this Court described it, for producing something that “add[s] to the sum of useful knowledge.” *Graham v John Deere Co.*, 383 U.S. 1, 6 (1966). *See also Brenner v. Manson*, 383 U.S. 519, 534 (1966) (describing “[t]he basic *quid pro quo* contemplated by the Constitution”). *See generally* Paul J. Heald and Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1162-63 (2000) (describing “*quid pro quo* principle”).

The question in this case is whether this same power to grant monopolies as a *quid pro quo* for creating original works can also be used to grant monopolies to “something already in existence,” *Trade-Mark Cases*, 100 U.S. 82, 94 (1879)—*quid pro nihilo*. The court below held that it can, finding that extensions of subsisting terms were constitutional so long as each extension is limited. App. 9a-11a.

This holding nullifies the Framers’ plan. By abstracting the term “limited Times” from the full text of the Copyright Clause, the circuit court has rendered meaningless the Framers’ plain and express intent to restrict the duration of monopolies over speech. Under the authority of this case, Congress can now continue the

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Congress to create monopolies. As he wrote to Madison, “It is better . . . to abolish . . . Monopolies, in all cases, than to do it in any . . . . The saying there shall be no monopolies lessens the incitements to ingenuity, which is spurred on by the hope of a monopoly for a limited time, as of 14 years; but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression.” 13 THE PAPERS OF THOMAS JEFFERSON 442-43 (Julian P. Boyd ed., 1956). Madison’s response concedes the general fear. “With regard to Monopolies they are justly classed among the greatest nuisances in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced?” *Id.* at 21. *See also* Paul J. Heald and Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1150, 1160-62 (2000) (describing the suspect nature of a grant of power to secure monopolies).

practice of extending the term of subsisting copyrights without limit. It can thus achieve a perpetual copyright term “on the installment plan.” Statement of Professor Peter Jaszi, *The Copyright Term Extension Act of 1995: Hearings on S.483 Before the Senate Judiciary Comm.*, 104th Cong. (1995), available at 1995 WL 10524355, at \*6.

The “installment plan” was not the Framers’ plan, and this Court should grant review to reverse this holding—both because of the significance of the issues at stake, especially as it they affect the emergence of the Internet, and because of the conflicts in the lower courts that this case evinces about the nature of Congress’ Copyright Power.

Because of the CTEA, an extraordinary range of creative invention will be blocked from falling into the public domain until at least 2019—or longer if Congress extends the copyright term again. Thus, just at the time that the Internet is enabling a much broader range of individuals to draw upon and develop this creative work “without restraint,” Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 502, at 402, extensions of copyright law are closing off this medium to a broad swath of our common culture.<sup>5</sup>

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<sup>5</sup> The significance of the CTEA is only multiplied by the other changes that Congress has made to copyright law. Because protection is automatic, and there is no longer any requirement of renewal, *see* Pub. L. 102-307, title I, § 102(a) & (d), 106 Stat. 264, 266 (repealing renewal requirement), an extraordinary range of creative work now falls into a regulatory black hole—unusable because the “owners” of this property are unknown or unknowable, and because the law criminalizes the use of such material without the copyright owner’s permission. *See* No Electronic Theft Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678 (“NET Act”), amending 17 U.S.C. § 506(a). These changes dramatically affect the work of artists, researchers, and archivists, as well as commercial entities that draw upon and reuse aspects of our culture. Rather than the rich public domain the Framers envisioned, upon which any may draw “without restraint,” the effect of these changes is to create a mine field of regulations, extending copyright more broadly than at any time in our history. *See also* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 *Stan. L. Rev.* 1, 13-20 (2001) (describing how the

This Court should also grant review to resolve the confusion among the circuits both about the scope of Congress' Copyright Clause and about the interaction between Congress' copyright power and the First Amendment. The decision below conflicts with the Fifth Circuit's interpretation of Congress' copyright power, and reveals tensions with other circuits about the same power. The decision also conflicts with the Eleventh Circuit's approach to resolving alleged conflicts between the Copyright Clause and the First Amendment. This case provides the Court with an opportunity to resolve both dimensions of this confusion in authority.

**I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS ABOUT THE LIMITS ON CONGRESS' POWER UNDER THE COPYRIGHT AND PATENT CLAUSE.**

The Copyright and Patent Clause gives 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.

As this Court has held, the Copyright Clause is “both a grant of power and a limitation.” *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989) (“a grant of power and certain limitations upon the exercise of that power”). The “grant of power,” as Judge Sentelle described it in dissent below, is the power “[t]o promote the progress of science and useful arts.” App. 16a (Sentelle, J., dissenting). The means for exercising that power are those specified in the “by” clause—through “exclusive Right[s]” to “Authors” for their “Writings” for “limited Times.”

The issue in this case is whether this “grant of power” also constrains Congress' Copyright Clause power—as this Court has

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expansion of copyright law should alter the “definitional balance” with the First Amendment).

held, for example, of Section 5 of the Fourteenth Amendment. *Kimel v. Florida Bd. of Regents*, 528 U.S. at 81 (“the same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power”). Petitioners have argued that, at a minimum, the “promote [] Progress” requirement should inform the interpretation of the balance of the Clause, including the “limited Times” condition. *Cf. Wheaton v. Peters*, 33 U.S. (8 Peters) 591, 661 (1834) (Copyright Clause to be interpreted “with the words and sentences with which it stands connected”). So understood, a term is “limited” if it can reasonably be said to “promote the Progress of Science.” Retrospective terms, which grant protection for work already in existence, could not in this sense be “limited.”

*Amicus* Eagle Forum advanced a more expansive claim—that the “grant of power” should itself limit Congress’ copyright authority, independent of the limitations expressed in the “by” clause. Under this reading, even if a copyright term were properly “limited,” it must also be shown to “promote[] Progress.”

The Court of Appeals rejected both arguments. Considering itself bound by its own circuit precedent, *Schnapper v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981), the court rejected the argument that “the introductory language of the Copyright Clause constitutes a limit on congressional power.” App. 10a. The D.C. Circuit thereby “erase[d],” as Judge Sentelle wrote in dissent to the denial of rehearing *en banc*, “half of the Copyright Clause—indeed, that half which defines the very power bestowed.” App. 33a.

The Court of Appeals’ holding contradicts this Court’s authority, conflicts with the rule of the Fifth Circuit, and is in tension with the approach of at least four other circuits.

#### **A. The Decision Below Conflicts With Authority Of This Court**

As petitioners have argued, this Court has expressly held that the Patent and Copyright Clause is “both a grant of power and a limitation.” *Graham*, 383 U.S. at 5. The “limitation” referenced

in *Graham*, however, is not just the express limitation within the “by” clause—that terms are to be “limited,” or that copyrights are to be granted to “Authors” for their “Writings.” Instead, this Court has recognized important substantive limitations on Congress’ Copyright Clause power that can *only* be understood to flow from the “promote the Progress of Science” requirement. The holding by the court below that “the introductory language” imposed no “limit” on Congress’ Copyright Clause power contradicts this authority.

1. In *Graham* this Court explained that it would be beyond Congress’ constitutional power to grant a patent to a work in the public domain. As the Court wrote, “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.” 383 U.S. at 6. The court below indicated the same principle would limit Congress’ power, “*mutatis mutandis*,” with respect to copyrights. App. 9a. *Accord Bonito Boats*, 489 U.S. at 146; *Gates Rubber Co. v. Bando Chem. Indus.*, 9 F.3d 823 (10th Cir. 1993).<sup>6</sup>

In both cases, however, the only possible source of such a restriction is the “promote the Progress of Science” requirement itself. There is no “public domain clause” in the Constitution. Works in the public domain clearly have “Authors”; they certainly include “Writings”; and Congress could plainly authorize such public domain copyrights for a “limited time.” Absent the requirement that Congress “promote the Progress of Science,” there would be no Copyright Clause reason to restrict Congress’ power over the public domain. Yet this Court has clearly and repeatedly indicated that such a power is beyond Congress’ Patent and Copyright Clause power. *See, e.g.*,

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<sup>6</sup> The court below so indicated, even though the government informed the court during oral argument that Congress has purported to remove copyrighted works from the public domain. *See* Tr. of Oral Arg. 37-38, referring to the Uruguay Round Agreements Act, Pub. L. No. 103-465, § 514 (codified at 17 U.S.C. §§ 104A, 109(a)).

*Graham*, 383 U.S. at 6; *Bonito Boats*, 489 U.S. at 146. That conclusion is flatly inconsistent with the holding below.<sup>7</sup>

Likewise with the requirement of “originality”: As this Court has held, the only “Writings” that Congress may authorize for copyright protection are those that are “original.” *Feist Publ’ns*, 499 U.S. at 345. “Originality” is a constitutional requirement—the “*sine qua non* of copyright. . . .” *Id.* As the *Trade-Mark Cases* held, the patents and copyrights clause power cannot extend to “something already in existence,” 100 U.S. at 94 (1879), only something new.

But the Patent and Copyright Clause does not mention the term “original,” and there is no doubt that under a literal reading of the term “Writings,” “Writings” could include original as well as non-original works. If there is a constitutional limitation on the scope of the “Writings” to which Congress may extend copyright, then this limitation must derive from the “promote the Progress of Science” requirement. There is no other textual source for this restriction on Congress’ otherwise plenary power. This conclusion again, however, flatly contradicts the conclusion of the Court of Appeals below.

These two lines of authority compel the conclusion that the “promote the Progress of Science” requirement constrains Congress’ power under the Copyright Clause. Whether it constrains Congress’ power by narrowing the scope of the terms within the “by” clause, including the “limited Times” condition, or, as *Amicus* Eagle Forum argued, by independently constraining Congress’ copyright authority, the conclusion of the court below to the contrary is clearly wrong. The D.C. Circuit’s opinion has rendered the “To promote the Progress of Science” requirement of the Copyright Clause mere “surplusage.” *Lopez*, 514 U.S. at 589 (Thomas, J., concurring). The Framers and this Court clearly intended that it be much more.

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<sup>7</sup> The Court of Appeals recognized the tension between the circuit authority, *Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981), and this Court’s opinion in *Graham*. See Tr. of Oral Argument 29-31.

**B. The Decision Below Conflicts With The Rule Of The Fifth Circuit And With Authority From Other Circuits**

The decision below also contradicts the rule of the Fifth Circuit, and is in tension with the approach of at least four other circuits.

In *Mitchell Brothers Film Group v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979), the Fifth Circuit addressed the question whether Congress could constitutionally grant copyrights to obscene works. *Cinema Adult Theater* argued that obscene works did not “promote the progress of Science and useful Arts,” and were therefore not authorized under Congress’ power “to promote the Progress of Science.” *Id.* at 860.

The Fifth Circuit rejected *Cinema Adult Theater*’s argument—but not because it believed Congress free of any constraint from the “promote[] Progress” requirement. To the contrary, the Court expressly acknowledged that while the “words of the copyright clause” do not require that *individual* copyrights be shown to “promote science or useful arts,” they plainly do “require that *Congress* shall promote those ends.” *Id.* at 859 (emphasis added) (citations omitted). And while the Court recognized that Congress has broad discretion in selecting the means that it believes may promote progress, the Fifth Circuit clearly recognized that “Congress’ power under this Clause is *limited to action that promotes the useful arts.*” *Id.* at 860 (emphasis added).

The Seventh Circuit has embraced the same rule. In interpreting the scope of a claimed patent monopoly, then-Judge Stevens wrote for the Seventh Circuit,

The source and purpose of the statutory monopoly must be kept in mind. “An author’s ‘Writing’ or an inventor’s ‘Discovery’ can, in the constitutional sense, only extend to that which is his own. It may not be broadened to include matters within the public domain. *The congressional power to grant monopolies for ‘Writings and Discoveries’ is likewise*

*limited to that which accomplishes the stated purpose of promoting ‘the Progress of Science and useful Arts.’”*

*Frantz Mfg. Co. v. Phenix Mfg. Co.*, 457 F.2d 314, 327 n.48 (7th Cir. 1972) (emphasis added)(quoting *Lee v. Runge*, 404 U.S. 887, 890 (1971) (Douglas, J., dissenting from denial of certiorari)). The Seventh Circuit also followed a similar principle in a subsequent case interpreting the scope of joint authorship under the Copyright Act. That question should be resolved, the court held, by “focus[ing] on how well the test promotes the primary objective of the Act. This objective is not to reward an author for her labors, but ‘to promote the Progress of Science and useful Arts.’” *Erickson v. Trinity Theatre*, 13 F.3d 1061, 1069 (7th Cir. 1994). See also *J.L. Mott Iron Works v. Clow*, 82 F. 316, 320 (7th Cir. 1897) (“Under the constitution, the power lodged with congress is not unlimited, but is restricted to the promotion of the progress of science and useful arts.”).

The Ninth Circuit has followed the same method to narrow the scope of joint authorship. In *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 1999), the court indicated that “[t]he Constitution establishes the social policy that our construction of the statutory term ‘authors’ carries out. The Founding Fathers gave Congress the power to give authors copyrights in order ‘to promote the progress of Science and useful arts.’”

The Second Circuit, too, has followed this method to guide the interpretation of the scope of “fair use.” “Fair use” is a limitation on the scope of copyright. The Second Circuit has interpreted this limitation in light of constitutional purpose: “to serve [the] purpose [‘to promote the Progress of Science’], ‘courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder’s interest in a maximum financial return to the greater public interest in the development of art, science, and industry.’” *Rosemont Enter. Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966)(citing *Berlin v. E.C. Publs.*, 329 F.2d 541, 544 (2d Cir. 1964) (Kaufman, J.)).

Finally, the Eleventh Circuit has applied a similar method to interpret the scope of Section 201(c) of the Copyright Act, governing contributions to collective works. It is in light of “fundamental principles,” the court wrote, that the words of the Copyright Act are to be interpreted. *Greenberg v. Nat’l Geographic Soc’y*, 244 F.3d 1267, 1271 (11th Cir. 2001) (“In all cases involving copyright law, we understand that any interpretation and application of the statutory law must be consistent with the copyright clause of the United States Constitution . . . That clause is a limitation, as well as a grant, of the copyright power.”) (citing Heald and Sherry, *supra*, 2000 U. Ill. L. Rev. 1119 (arguing the grant of power in the Copyright Clause constitutes a limit on Congress’ copyright power, and concluding that retrospective extensions of copyright violate the Copyright Clause)).

The rule of the Fifth Circuit, and the approach of the Second, Seventh, Ninth, and Eleventh, is flatly inconsistent with the D.C. Circuit’s conclusion that “the introductory language of the Copyright Clause constitutes [no] limit on congressional power.” App. 10a. The conclusion of the Fifth Circuit is also inconsistent with the apparent rule of the Eighth Circuit. In a case that predates *Feist*, the Eighth Circuit held:

[A]lthough the promotion of artistic and scientific creativity and the benefits flowing therefrom to the public are purposes of the Copyright Clause, *those purposes do not limit Congress’s power to legislate in the field of copyright.*

*Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128, 130 (8th Cir. 1985) (emphasis added).

This conflict will have significance far beyond the narrow issues of this case. Whether Congress is constrained by the plain language of the Copyright Clause will determine the scope of Congress’ power to pass legislation to protect databases, or further to withdraw work from the public domain. Relying upon the view that the Constitution does not constrain it, some in Congress are presently pushing to expand the monopoly protections copyright law grants, without concern for whether

these expansions truly “promote [] Progress.” *See, e.g.*, The Collections of Information Antipiracy Act, H.R. 354, 106th Cong., 1st Sess. (1999) (extending copyright-like protection to facts within databases, *Feist* notwithstanding); Yochai Benkler, *Constitutional Bounds of Database Protection*, 15 Berkeley L. & Tech. J. 535, 575-87 (2000). Thus, waiting to clarify this conflict will only increase the costs of resolving it later.

By ignoring the “grant of power” and the purposes expressed in that grant, Congress has found a way to evade the Framers’ clear intent. The D.C. Circuit has ratified that evasion. And Congress will now continue to act in reliance upon this ratification.

**II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS ABOUT THE RELATIONSHIP BETWEEN CONGRESS’ COPYRIGHT POWER AND THE RESTRICTIONS OF THE FIRST AMENDMENT.**

Petitioners have raised a First Amendment challenge to both the retrospective and prospective aspects of the CTEA. They argue that both aspects are content neutral regulations of speech and the press, and therefore subject to intermediate scrutiny. Under intermediate scrutiny, petitioners submit, neither the retrospective nor the prospective extension of the copyright term “advances important governmental interests” without burdening “substantially more speech than necessary.” *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997). *See also Bartnicki v. Vopper*, 121 S. Ct. 1753, 1760-61 (2001); *United States v. O’Brien*, 391 U.S. 367, 382 (1968).

The D.C. Circuit, however, refused to apply ordinary First Amendment analysis to the CTEA, holding instead that *Harper & Row* in effect established a special First Amendment “immunity” for copyright legislation. App 5a-8a. Under the D.C. Circuit’s rule, there can be no First Amendment challenge to a copyright statute, as any challenge to a copyright statute is simply a demand for access to particular copyrighted works. Such a demand, the circuit court held, was rejected in *Harper &*

*Row*. Thus it follows, the court concluded, that “copyrights are categorically immune from challenges under the First Amendment.” App. 6a.

The D.C. Circuit’s application of *Harper & Row* is clearly mistaken. It is also in direct conflict with the approach of the Eleventh Circuit. And, more importantly, it evinces a confusion that *Harper & Row* has engendered about whether the First Amendment imposes any constraint on Congress in its enactment of legislation under the Copyright Clause.<sup>8</sup> This conflict is another reason this Court should grant review in this case.

**A. The D.C. Circuit Has Mistakenly Expanded The Reach Of This Court’s Decision In *Harper & Row***

In *Harper & Row*, this Court was asked to craft a public figure exception in the enforcement of a copyright. *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 555-56 (1985). Harper & Row had an exclusive right to President Gerald Ford’s autobiography. The Nation Magazine “scooped” part of that work without the copyright owner’s consent. In defending against the enforcement of the copyright, The Nation argued that because the matter was of such public importance, First Amendment interests should trump Harper & Row’s copyright interests. The Nation would therefore be excused from liability for trespassing on Harper & Row’s right. The Nation did not argue that the copyright was invalid, or that copyright law could not extend to works such as this. It simply demanded that the First Amendment give it the right to trespass on the copyright owner’s property.

This Court rejected The Nation’s argument. As the Court explained, copyright functions as an “engine of free expression,” *id.* at 558, by creating an incentive to produce speech that

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<sup>8</sup> Professor Netanel attributes this confusion both to a misreading of the scope of *Harper & Row* and to a failure of courts to account for changes in First Amendment doctrine that would affect the interaction between the Copyright Clause and the First Amendment. *See* Netanel, *supra*, at 7-12.

otherwise would not be produced. If a work lost its copyright protection simply because it became important, that would destroy much of the speech-inducing effect that copyright law produces. Thus, so long as copyright law regulates expression rather than ideas, *Harper & Row* holds that there is no First Amendment right to trespass on an otherwise legitimate copyright. *Id.* at 558-59. Private owners of intellectual property protected by copyright are able to exercise their rights free of the restrictions of the First Amendment, just as private owners of real property are generally able to exercise their rights free of the restrictions of the First Amendment. *Cf. Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (no first amendment right to trespass on real property).

The overwhelming majority of courts applying the *Harper & Row* rule have done so in the same factual context: In these cases, *Harper & Row* is relied upon to deflect a purported First Amendment right of access to otherwise legitimately copyrighted material.<sup>9</sup>

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<sup>9</sup> See, e.g., *Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d 1110, 1115-16 (9th Cir. 2000) (infringement case rejects First Amendment defense) (citing *Harper*); *Religious Tech. Ctr. v. Henson*, 1999 U.S. App. Lexis 11828, at \*3 (9th Cir. 1999) (in “copyright infringement action” court relies upon *Harper* to hold “the Copyright Act already embrace[s] First Amendment concerns”); *Cable/Home Comm. Co. v. Network Prod., Inc.*, 902 F.2d 829, 850 (11th Cir. 1990) (rejecting “First Amendment affirmative defense regarding . . . copyright . . . violations,” court held “first amendment is not a license to trammel on legally recognized rights in intellectual property”) (citing *Harper*) (citations omitted); *New Era Publ’ns v. Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989) (in injunction action to stop publication of allegedly infringing work, court rejects First Amendment defense: “Our observation that the fair use doctrine encompasses all claims of first amendment in the copyright field . . . never has been repudiated.”) (citing *Harper*); *United Video v. FCC*, 890 F.2d 1173, 1190-91 (D.C. Cir. 1989) (court rejects petitioners’ demand for access to copyrighted works “paid for and authorized under the compulsory licensing scheme” of the Copyright Act, holding “cases in which a first amendment defense is raised to a copyright claim do not utilize [intermediate scrutiny]”) (citing *Harper*); *Los Angeles Times v. Free Republic*, 2000 U.S. Dist. Lexis 5669, at \*78 (C.D. Ca. 2000) (rejecting defendant’s First Amendment defense to copyright infringement,

The court below has now expanded this unexceptional holding to cover any First Amendment challenge within the domain of copyright—not just to the enforcement of a particular copyright, but also to a challenge of the statutes under which copyrights are established. Because there is no First Amendment right to trespass, the court below has held that there can be no First Amendment right to challenge the legal rule under which the property rights are set.

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court held “courts have generally interpreted this discussion in *Harper & Row* to mean that First Amendment considerations are subsumed within the fair use analysis”); *Wojnarowicz v. American Family Ass’n*, 745 F. Supp. 130, 146-47 (S.D.N.Y. 1990) (in infringement action, court rejects First Amendment defense) (citing *Harper*); *Consumers Union of United States v. New Regina Corp.*, 664 F. Supp. 753, 761 n.10 (S.D. N.Y. 1987) (in infringement action, court rejects First Amendment defense) (citing *Harper*). Other courts have reached the same conclusion without applying *Harper* directly. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001) (in infringement action, “First Amendment concerns in copyright are allayed by the presence of the fair use doctrine”); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 74-75 (2d Cir. 1999) (rejecting First Amendment defense to injunction enforcing copyright); *Twin Peaks Prod., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1378 (2d Cir. 1993) (in an infringement action, court concludes “the fair use doctrine encompasses all claims of first amendment in the copyright field”); *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986) (rejecting First Amendment defense for parodists); *Roy Export Co. v. CBS*, 672 F.2d 1095, 1099-1100 (2d Cir. 1982) (in infringement action, court concludes “no Circuit that has considered the question . . . has ever held that the First Amendment provides a privilege in the copyright field distinct from the accommodation embodied in the “fair use” doctrine); *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Poster., Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979) (in infringement action, “first amendment is not a license to trammel on legally recognized rights in intellectual property”); *Wainwright Sec. Inc. v. Wall Street Transcript Co.*, 558 F.2d 91, 95 (2d Cir. 1977) (in infringement action, court rejects First Amendment defense); *Georgia Television Co. v. TV News Clips of Atlanta*, 718 F. Supp 939, 947 (N.D. Ga. 1989) (in infringement action, court holds “conflicts between interests protected by the first amendment and copyright laws thus far have been resolved by application of the fair use doctrine”) (citations omitted); *Walt Disney Co. v. Powell*, 698 F. Supp. 10, 12 (D.D.C. 1988), *vacated in part*, 897 F.2d 565 (D.C. Cir. 1990) (First Amendment “gives no right to steal another’s statutorily protected intellectual property”).

That conclusion cannot follow—as the D.C. Circuit’s own authority in the context of abortion protester cases shows.<sup>10</sup> In those cases, the D.C. Circuit has rightfully held that there “is no general First Amendment right to trespass.” *NOW v. Operation Rescue*, 37 F.3d 646, 655 (D.C. Cir. 1994). But the absence of a “First Amendment right to trespass” cannot mean that an abortion protester cannot challenge the law or injunction establishing the property right that is allegedly trespassed upon. State action *establishing* property rights is fully subject to First Amendment scrutiny, even if private action *exercising* these state established rights is subject to a narrower First Amendment rule. The D.C. Circuit’s conclusion to the contrary is simply mistaken. *Cf. Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 737 (1996) (in reversing the D.C. Circuit’s finding of no state action, this Court held that, though editorial decisions by cable system operators are not themselves state action, a statute giving operators such discretion is fully subject to First Amendment review).

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<sup>10</sup> That it does not follow can also be seen in the source of the *Harper & Row* rule itself. As many have noted, this Court in *Harper & Row* drew its “definitional balance” from the work of noted copyright scholar Melville Nimmer. *See e.g.*, Netanel, *supra*, at 11-12. Nimmer had first proposed this “balance” between the First Amendment and copyright in an important article published in 1970. Melville B. Nimmer, *Does Copyright Abridge The First Amendment Guarantees of Free Speech And Press?*, 17 UCLA L. REV. 1180 (1970). In that article, Nimmer argued that so long as copyright protected expression only, there should ordinarily be no First Amendment claim that could be raised against the assertion of a copyright. *See id.* at 1197-99.

But in the very same article, Nimmer goes on to address the First Amendment interests affected by a retrospective extension of copyright. He concluded, as petitioners have argued, that such an extension would violate the First Amendment. *Id.* at 1194-95. His “definitional balance” therefore cannot be read to preclude this conclusion.

**B. The Opinion Below Conflicts With The Rule Of The Eleventh Circuit.**

The decision below, refusing to apply ordinary First Amendment analysis to a statute modifying the Copyright Act, is in direct conflict with the Eleventh Circuit.

In *CBS Broadcasting Inc. v. EchoStar Communications Corp.*, No. 00-15378, 2001 WL 1081599 (11th Cir. Sept. 17, 2001), the Court of Appeals for the Eleventh Circuit upheld a provision of the Satellite Home Viewer Act, 17 U.S.C. § 119, and Satellite Home Viewer Improvement Act of 1999 (“Improvement Act”), Pub. L. No. 106-133, § 1001 *et seq.*, 113 Stat. 1537, 515 (West Supp. 2001), against a First Amendment challenge. The Improvement Act gave satellite carriers the right to a compulsory license for network programming delivered to private homes in “unserved households.” *Id.* at \*1. Defendant EchoStar challenged the statutory scheme, arguing that the distinction the statute drew was content based, and unjustified under the First Amendment.

The Eleventh Circuit rejected EchoStar’s First Amendment claim. Unlike the D.C. Circuit, however, the Eleventh Circuit reached this conclusion by applying ordinary First Amendment analysis to the challenged statute. The court treated the Improvement Act as a content neutral regulation of speech. *Id.* at \*14. It thus proceeded to apply intermediate scrutiny to that content neutral copyright regulation, concluding that the restrictions served important governmental interests unrelated to the suppression of speech, and that those restrictions on “First Amendment freedoms [were] no greater than is essential to the furtherance of” those interests. *Id.* at \*14-16.

Although defendant EchoStar was defending against a copyright infringement action brought by CBS and others, *id.* at \*1, and although the Eleventh Circuit, like the D.C. Circuit, treated *Harper & Row* as setting the framework for its analysis, *id.* at \*13, unlike the D.C. Circuit, the Eleventh Circuit did not treat *Harper & Row* as exhausting First Amendment analysis of the Improvement Act. Instead, the Eleventh Circuit expressly

weighed the defendant's First Amendment interest according to ordinary First Amendment analysis. Intermediate scrutiny *of the statute* was appropriate, the court held, even though *Harper & Row* had rejected a First Amendment right to trespass *on particular copyrights*. *Id.* at \*15.

Petitioners asked both courts below to apply the same test to the CTEA. Both courts refused. But under the reasoning of the Eleventh Circuit, petitioners would have been entitled to intermediate scrutiny. Indeed, petitioners' claim for intermediate scrutiny would have been stronger analysis than the defendant's in *EchoStar*. Unlike that defendant, petitioners do not claim a right to use otherwise legitimately copyrighted material; petitioners instead argue that the material at issue cannot legitimately be copyrighted. We challenge a statute that purports to create copyrights in a manner that is inconsistent with the First Amendment. But unlike the Court of Appeals for the Eleventh Circuit, neither the District Court nor the D.C. Circuit applied intermediate review of the CTEA. Instead, both courts treated *Harper & Row* as exhausting First Amendment analysis of a copyright statute.

This Court should grant review in this case to resolve this conflict. If *Harper & Row* indeed establishes the rule that copyright law is "immune from challenges under the First Amendment," then that rule is not being followed in at least the Eleventh Circuit, as *EchoStar* demonstrates, nor possibly within the Second Circuit. *See Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 327-29 (S.D.N.Y. 2000) (applying intermediate scrutiny to Digital Millennium Copyright Act) (appeal pending). If, instead, *Harper & Row* simply establishes that the exercise of a copyright by a copyright holder is not subject to intermediate First Amendment scrutiny, then the decision below will short-circuit ordinary First Amendment review of copyright legislation in a range of related cases. As this confusion follows from *Harper & Row* itself, this Court should grant review to clarify the scope of the principle announced in *Harper & Row*.

Petitioners submit that outside the context of a First Amendment challenge to the assertion of an otherwise legitimate

copyright (*i.e.*, a First Amendment right to trespass), ordinary First Amendment analysis should apply. There is no textual reason to exempt copyright law from ordinary First Amendment analysis. Nor is there any history to suggest that the Framers imagined copyright law to be exempt from First Amendment review. To the contrary, at least some expected that the First Amendment would be a check against unrestrained copyright power.<sup>11</sup> If a *sui generis* trademark law gets ordinary First Amendment review, *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987), and regulations of the treasury governing currency get ordinary First Amendment review, *Regan v. Time, Inc.*, 468 U.S. 641 (1984), then petitioners submit that copyright law is also constrained by the ordinary rules of the First Amendment.<sup>12</sup>

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<sup>11</sup> As a delegate to the Pennsylvania ratifying convention argued, in support of a First Amendment,

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

<sup>2</sup> THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: PENNSYLVANIA 454 (Merrill Jensen ed., 1976).

<sup>12</sup> For a catalogue of contexts in which the First Amendment has been held to constrain private rights, see Netanel, *supra*, at n.12 (including private rights of privacy, protection against intentional infliction of emotional distress, libel, trademark, tortious interference with business relations, right of publicity, and trade secret protection).

**CONCLUSION**

For the forgoing reasons, petitioners submit that this Court should grant review in this case to reverse the holding of the D.C. Circuit with respect to Congress' power to grant copyrights retrospectively under the Copyright Clause. Petitioners would also ask this Court to remand the case to the District Court to apply intermediate scrutiny under the First Amendment to both the retrospective and prospective aspects of the CTEA.<sup>13</sup>

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<sup>13</sup> This case also presents a question for review about whether a Court of Appeals must ignore an argument made by an *Amicus* for a claim properly raised simply because a party has not expressly adopted that argument in its brief. In the court below, *Amicus* Eagle Forum argued that the “promote the Progress of Science” clause was an independent constraint on Congress’ Copyright Clause power. While petitioners expressly embraced that argument at oral argument, App. 29a (Sentelle, J., dissenting), the D.C. Circuit held that *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring), required that it could not consider the argument of *Amicus*. This conclusion is wrong as an application of *Ashwander*, but this Court need not resolve this error. Because there is no doubt that petitioners have raised and properly preserved the claim that the extension of copyright terms is beyond Congress’ Copyright Clause power, App. 31a (Sentelle, J., dissenting), and because the court below nonetheless considered and rejected the argument of *Amicus*, App. 11a-12a, 25a, there is technically no need for the Court to review this question in this appeal. Nonetheless, petitioners raise the question, and would defend the *Amicus*’s right, to give this Court the opportunity to clarify the role of *amici* in argument.

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