No. 01-618

IN THE
Supreme Court of the United States

ERIC ELDRED, ET AL.,
Petitioners,

v.

JOHN D. ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL,
Respondent.

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

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BRIEF *AMICI CURIAE* OF COPYRIGHT LAW PROFESSORS IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Does the language of Art. 1, § 8, cl. 8 of the Constitution, giving Congress "power…To promote the Progress of Science and useful Arts" impose substantive constraints on Congress's enactments under that clause?

2. Are copyright laws "categorically immune" from First Amendment scrutiny?

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INTERESTS OF AMICI CURIAE[1]

This brief *amici curiae* in support of the petition is submitted pursuant to Rule 37 of the Rules of this Court. Counsel for petitioner and respondent have consented to the filing of this brief. Their consent letters have been filed with the Clerk of the Court.

Amici are copyright law professors at American universities. Jessica Litman is Professor of Law at Wayne State University. Dennis Karjala is Professor of Law at Arizona State University. Laura N. Gasaway is the Director of the Law Library and Professor of Law at University of North Carolina. Keith Aoki is Professor at the University of Oregon School of Law. Stephen R. Barnett is Professor of Law at the University of California at Berkeley. Ann Bartow is Assistant Professor of Law at the University of South Carolina School of Law. James Boyle is Professor of Law at Duke University. Dan L. Burk is the Julius E. Davis Professor of Law at the University of Minnesota. Julie E. Cohen is Professor of Law at Georgetown University Law Center. Shubha Ghosh is Associate Professor of Law at University at Buffalo Law School, State University of New York. Paul Heald is the Allen Post Professor of Law at the University of Georgia. Lydia Pallas Loren is Associate Professor of Law at Northwestern School of Law, Lewis and Clark College. Michael J. Madison is Assistant Professor of Law at the University of Pittsburgh. Michael J. Meurer is Associate Professor of Law at Boston University School of Law. Tyler T. Ochoa is Associate Professor and Co-Director of the Center for Intellectual Property Law at Whittier Law School. L. Ray Patterson is the Pope Brock Professor of

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

Law at the University of Georgia. Malla Pollack is Visiting Associate Professor and Visiting Scholar at Northern Illinois University College of Law. R. Anthony Reese is Assistant Professor of Law at the University of Texas at Austin. Pamela Samuelson is the Chancellor's Professor of Law at the University of California at Berkeley. Alfred C. Yen is the Associate Dean for Academic Affairs and Professor of Law at Boston College Law School. Diane L. Zimmerman is Professor of Law at New York University School of Law.

Amici are deeply concerned with the integrity of copyright law and with the constitutional goals of promoting authorship and innovation and of encouraging the broad dissemination of works of authorship. They are concerned that Congress should grant rights to copyright owners in a manner that is consistent, rather than in conflict, with those goals. In their capacity as educators, amici make extensive use both of works protected by copyright and works in the public domain.

INTRODUCTION

Amici support petitioners' argument that the court of appeals erred in rejecting petitioners' challenges to the Copyright Term Extension Act based on the Copyright Clause and the First Amendment. Amici submit this brief to make the Court aware of the importance of the decision below and its potential to do significant damage in a wide range of copyright cases.

SUMMARY OF ARGUMENT

The Court of Appeals for the D.C. Circuit erred in holding that the initial language of the Copyright Clause imposes no substantive limit on congressional power. In

reaching this result, the court of appeals ignored the decisions of this Court on the scope of the constitutional power to enact patent and copyright laws. The lower court compounded its error by concluding that copyright laws are immune from challenge under the First Amendment. If the D.C. Circuit's opinion is allowed to stand, then any law purporting to be enacted pursuant to the Copyright Clause will be insulated from constitutional limitations. Nothing in the text of the Constitution or in this Court's decisions supports such a result.

ARGUMENT

I. CONGRESS'S POWER TO ENACT COPYRIGHT LEGISLATION IS CONSTRAINED BY THE LANGUAGE OF THE CLAUSE THAT GRANTS THAT POWER.

The Copyright Term Extension Act was enacted pursuant to Congress's power under the Patent and Copyright Clause, which provides:

> The Congress shall have 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.

The Constitutional text does two things. First, it empowers Congress to enact statutes that "promote the Progress of Science and useful Arts," much as other clauses of Art. 1, § 8 empower Congress to enact statutes that "regulate Commerce . . . among the several States," or that "establish Post Offices and Post Roads." Second, it sharply limits the *means* Congress may adopt to achieve that end: Congress, in exercising this power, is limited to "securing

for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

In this case, the court of appeals held that the Constitutional language granting Congress the power to "promote the Progress of Science and useful Arts" is mere surplusage. According to the court of appeals, this language imposes no limit on Congress's power to enact statutes under the clause. The court of appeals gave no authority in the text of the Constitution or the opinions of this Court to support its extraordinary view. It concluded that this rule was required by its holding in *Schnapper v. Foley*, 667 F.2d 102 (D.C.Cir. 1981). *See Eldred v.* Reno, 239 F.3d 372, 378 (D.C. Cir. 2001). But this view is plainly mistaken.

It is well-settled that the Constitutional language conferring a power on Congress constrains the scope of that power. That is the very purpose of the Constitutional text: The "powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). In the Commerce Clause context, the Court has been clear: "limitations on the commerce power are inherent in the very language of the Commerce Clause." *United States v. Lopez*, 514 U.S. 549, 553 (1995)(discussing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824)). Elsewhere, the Court has been similarly emphatic that Congress's power is "set in the clause which confers it." *United States v. Butler*, 297 U.S. 1, 66 (1936). The "language of the Constitution itself," for example, mandates that Congress exceeds its Spending Clause power "to lay and collect taxes . . . to pay the debts and provide for the common defense and general welfare," U.S. Const., Art. I, § 8, cl. 1, if its action is not in fact intended to serve the "general welfare." *South Dakota v. Dole*, 483 U.S.

203, 207 (1987). Similarly, the Court held in *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 471 (1982), that "[t]he language of the Bankruptcy Clause," granting Congress power to "establish Uniform Laws on the subject of Bankruptcies," compelled a holding that Congress had no power to enact nonuniform bankruptcy laws. Although the Constitutional text may not be the end of the Court's analysis in assessing the scope of congressional power, it is always the beginning. *See Boerne v. Flores*, 521 U.S. 507, 519 (1997).

The Constitutional text could not be more plain that the power conferred on Congress by Art. I, § 8, cl. 8 is a "power . . . To promote the Progress of Science and useful Arts." If an enactment cannot plausibly be said to be directed toward those goals, therefore, it is outside the scope of the power. This Court expressly so held in *Graham v. John Deere*, 383 U.S. 1 (1966), in which it articulated the constitutional constraints on Congress's patent power:

> At the outset it must be remembered that the federal patent power stems from a specific constitutional provision which authorizes the Congress "To promote the Progress of ... useful Arts, by securing for limited Times to ... Inventors the exclusive Right to their ... Discoveries." Art. I, § 8, cl. 8. The clause is both a grant of power and a limitation. This qualified authority, unlike the power often exercised in the sixteenth and seventeenth centuries by the English Crown, is limited to the promotion of advances in the "useful arts." It was written against the backdrop of the practices -- eventually curtailed by the Statute of Monopolies -- of the Crown in granting

> monopolies to court favorites in goods or businesses which had long before been enjoyed by the public. The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, 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. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must "promote the Progress of ... useful Arts." This is the *standard* expressed in the Constitution and it may not be ignored.

Graham v. John Deere, 383 U.S. 1, 5-6 (1966) (emphasis in original; footnote and citation omitted). *See also Trade-Mark Cases*, 100 U.S. 82, 93 (1879); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661 (1834)(interpreting the word "secure" in the Copyright Clause by reference to "the words and sentences with which it stands connected" and noting that the clause's application to both authors and inventors precluded finding that either had a perpetual right at common law); Edward C. Waltersheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. INTELL. PROP. L. 315, 381-83 (2000). The Court of Appeals for the D.C. Circuit failed to advance any reason that the clause granting Congress the power to enact patent and copyright laws should be read to limit Congress's power to enact patent legislation, but to impose

no limit whatsoever on Congress's power to enact copyright legislation. Rather, the D.C. Circuit concluded that its reading of the Constitution was compelled by its earlier decision in *Schnapper v. Foley*, a decision that does not even mention this Court's opinion in *John Deere.*

Nor would it have made sense for the court of appeals to hold that the same Constitutional language is limiting in patent cases, but meaningless in copyright cases. This Court has frequently invoked that very language in explaining the scope of the copyright laws. As this Court has repeatedly reminded lower courts, "[t]he primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'" *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349 (1991). *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526-27 (1994); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 428-29, 431-32 (1984); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). *Accord Harper & Row v. Nation Enterprises*, 471 U.S. 539, 546 (1985).

This misunderstanding has implications that reach far beyond the question whether the Copyright Term Extension Act contravenes Article I, § 8, cl. 8 of the Constitution. In recent years Congress has enacted a number of innovative copyright laws that seek to extend copyright owners' control of their works. Several of these laws depart from the traditional copyright model, and arguably exceed the scope of Congress's copyright power. In 1998, for example, Congress enacted a law forbidding individuals from circumventing technological protection in order to gain unauthorized access to a protected work, regardless of whether the reason for seeking unauthorized access was to copy protected expression or to view unprotected facts, ideas, processes, systems. *See Digital*

Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2863 (1998), (codified as amended at 17 U.S.C. § 1201). The law, further, prohibits anyone from supplying a device or service designed to assist in circumventing technological protection. *Id.* The district court for the Southern District of New York has held that this law is not subject to the fair use privilege. *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 219 (S.D.N.Y. 2000)("If Congress had meant the fair use defense to apply to such actions, it would have said so.").

In 1993, 1994, and again in 1998, Congress enacted laws that restored copyright protection to works that had entered the public domain. *See North American Free Trade Agreement Implementation Act*, Pub. L. No. 103-182, 107 Stat. 2057, 2115 (1993); *Uruguay Round Agreements Act*, Pub. L. No. 103-465, 108 Stat. 4809, 4976 (1994), (codifed as amended at 17 U.S.C. § 104A); *Sonny Bono Copyright Term Extension Act*, Pub. L. No. 105-298, 112 Stat. 2827 (1998)(codified in 17 U.S.C. §§ 104A, 302, 303, 304). *See also Golan v. Ashcroft*, No. 01-B-1854 (D. Colo., filed Sept. 19, 2001)(challenging constitutionality of copyright restoration). Congress has considered and the House of Representatives has on three occasions passed legislation that would extend intellectual property protection under Title 17 to the factual content of collections of information. *See* H.R. 354, 106th Cong., 1st Sess. (1999); H.R. 2281, §§ 501-502 , 105th Cong, 2d Sess. (Engrossed House Bill 1998); H.R. 2652, 105th Cong., 1st Sess. (1997).

According to news reports, Congress is currently considering legislation that would prohibit the manufacture, sale, or distribution of any computer or other

digital device[2] unless it incorporates government-certified copyright-protection technology. *See Security Systems Standards and Certification Act* (Staff Working Draft, Aug. 6, 2001). *See, e.g.*, Dan Gillmor, *Entertainment Control Freaks have an Ally in Microsoft*, San Jose Mercury News (Oct. 24, 2001); *Proposed Hollings Bill on Copyright Alarms Internet Libertarians*, Washington Internet Daily (September 11, 2001); *Cyber Security: Hearing Before the House Science Committee*, 107th Cong., 1st Sess. (October 10, 2001)(testimony of Eugene H. Spafford, Professor of Computer Science, Purdue University).

Some or all of these laws may be comfortably within the limitations of Congress's copyright power, but, under the analysis adopted by the court of appeals, that determination would never be made. Nothing in the Constitutional text or in this Court's decisions supports such a result.

II. COPYRIGHT LAWS ARE NOT CATEGORICALLY IMMUNE FROM FIRST AMENDMENT SCRUTINY

The lower court's conclusion that copyright laws are never subject to First Amendment challenge compounds the gravity of its error. The court read its own earlier opinion in *United Video, Inc. v. F.C.C.*, 890 F.2d 1173 (D.C. Cir. 1989), as having held "that copyrights are categorically immune from challenges under the First

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[2] SSSCA § 109 defines the devices subject to the prohibition to include: "any machine, device, product, software, or technology, whether or not included with or as part of some other machine, device, product, software, or technology, that is designed, marketed or used for the primary purpose of, and that is capable of, storing, retrieving, processing, performing, transmitting, receiving, or copying information in digital form."

Amendment." *Eldred*, 239 F.3d at 375. It concluded that that opinion, and this Court's decision in *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985), represented "insuperable bars" to plaintiffs' First Amendment challenge, 239 F.3d at 375, or, indeed, any First Amendment challenge to any copyright law.

In *Harper & Row*, this Court rejected the claim that the First Amendment required it to recognize a special privilege to quote the protected expression of former public officials. It examined the copyright law and found that existing law amply accommodated the First Amendment interests asserted by respondent. 471 U.S. at 559-60. In view of the fact that the Framers intended copyright to be the "engine of free expression," *id*. at 558, this Court held that the idea/expression dichotomy and the privilege of fair use already embodied in the copyright statute supplied sufficient protection for First Amendment interests to obviate the need for a special public official privilege. Far from holding copyright laws immune from First Amendment scrutiny, this Court subjected the law to First Amendment scrutiny and found it fully consistent with the First Amendment's requirements. *Id*. at 555-60.

The court of appeals read *Harper & Row* to preclude First Amendment examination of copyright laws. The illogic of that view is clear. Most obviously, this Court's holding in *Harper & Row* was predicated on the existence of the idea/expression dichotomy and the fair use doctrine to accommodate the First Amendment concerns raised in that case. Were Congress to enact a law repealing or limiting sections 102(b) or 107 of the copyright statute, the teaching of *Harper & Row* is that that law would be in serious jeopardy under the First Amendment. But that is hardly the only First Amendment issue that could arise. A repeal of section 105, which withholds copyright from

government works, plainly would require First Amendment analysis. (This is not fanciful; the United States, in fact, asserts ownership of copyright in United States government works abroad.) A law withholding copyright protection from any text expressing terrorist sentiments would similarly be vulnerable to First Amendment challenge. Interpreting *Harper & Row* as creating a categorical First Amendment immunity, thus, is insupportable.

The current copyright statute has been amended repeatedly since 1985. *See Work Made For Hire and Copyright Corrections Act of 2000*, Public L. 106-379, 114 Stat. 1444 (1999); *Intellectual Property and Communications Omnibus Reform Act of 1999*, Public L. 106-113, 113 Stat. 1501, 1501A-521 (1999); *Digital Theft Deterrence and Copyright Damages Improvement Act*, Public L. 106-160, 113 Stat. 1774 (1999); *Digital Millennium Copyright Act*, Public L. 105-204, (1998); *No Electronic Theft (NET) Act*, Public L. 105-147, 111 Stat. 2678 (1997); *Anti-counterfeiting Consumer Protection Act* , Public L. 104-153, 110 Stat. 1386, 1388 (1996); *Digital Performance Right in Sound Recordings Act*, Public L. 104-39, 109 Stat. 336 (1995); *Audio Home Recording Act*, Public L. 102-563, 106 Stat. 4237 (1992); *Copyright Renewal Act*, Public L. 102-307, 106 Stat. 264 (1992); *Computer Software Rental Amendments*, Public L. 101-650, 104 Stat. 5089, 5134 (1990); *Copyright Remedy Clarification Act*, Public L. 101-553, 104 Stat. 287 (1990). It is not the same law as the law before the Court in 1985. To hold that a particular copyright statute is fully consistent with the First Amendment is a far cry from establishing that any copyright law ever enacted will always be consistent with the First Amendment. *See* Neil Netanel, *Locating Copyright Within the First Amendment Skein*, 54 Stanford L. Rev. 1, 12-29 (2001).

Congress has recently enacted, or is now considering, a variety of statutes posing First Amendment issues that cannot be avoided by a talismanic invocation of *Harper & Row*. Section 1201 of the copyright statute, enacted in 1998, protects works from unauthorized access without regard to the idea/expression dichotomy, and has been interpreted by the district court for the Southern District of New York to be immune from any defense based on fair use. *See Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 321-24 (S.D.N.Y. 2000); *see also Felten v. Recording Industry Association of America*, No. CV-01-2669 (D.N.J. filed June 6, 2001)(seeking declaratory judgment that § 1201 does not prohibit publication of computer scientist's scholarly research paper). The House of Representatives has passed legislation extending intellectual property protection under Title 17 to collections of factual information. *See, e.g.*, H.R. 354, 106th Cong., 1st Sess. (1999). Under the reasoning of the court of appeals, no First Amendment challenge could be brought against any of these enactments. That position has no support in logic nor in this Court's precedents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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