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

BRIEF OF *AMICI CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND AND THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC. IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. 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?

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

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INTEREST OF *AMICI CURIAE* [1]

Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981, which publishes educational materials both in print and on the internet. Eagle Forum ELDF's objective is to facilitate participation in the process of self-government so

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

that America will continue to be a land of limited government, respect for family integrity, public and private virtue, and free enterprise. In particular, Eagle Forum ELDF opposes expansion of federal power under the Copyright Clause, and defends First Amendment interests against encroachment by copyrights.

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit organization dedicated to defending the practice of private medicine. Founded in 1943, AAPS publishes a newsletter, journal and internet-based materials, in furtherance of its goals of limited government and the free market. The interests of AAPS include defending First Amendment rights against interference by copyright law, and opposing retroactive extension of intellectual property protection for any innovation, including prescription drugs.

SUMMARY OF ARGUMENT

Nothing beats a government-conferred monopoly, and a few special interests obtained one in the unprecedented single-day passage of the Sonny Bono Copyright Term Extension Act ("CTEA"). On October 7, 1998, the Senate Judiciary Committee approved the CTEA by unanimous consent. 144 Cong. Rec. S11672 (1998). That same day, the full Senate passed the bill by unanimous consent, without even a roll call. *Id.* S11673. Still during the same day, the House passed it by voice vote under suspension of the rules. 144 Cong. Rec. H9946 (1998). President Clinton subsequently signed it into law. Pub. L. No. 105-298, 112 Stat. 2827 (1998). Limited government, competition, future innovation and free speech were all pummeled in the stampede.

The CTEA extended the copyright on future *and existing* works by a remarkable twenty additional years. This additional period alone far exceeds the entire term of 14 years provided in the first copyright law. Act of May 31, 1790, § 1, 1 Stat. 124. The CTEA thereby thwarts competitive and free

speech uses of 75-year-old works for another twenty years. Moreover, this was the eleventh time in the past forty years that Congress has extended the copyright term. If such federal overreaching is upheld, then Congress could repeatedly extend copyright restrictions on existing works for periods totaling decades or even centuries.

That is plainly not what the Framers intended in granting Congress its copyright power. The Copyright Clause limits congressional authority to grants of "limited Times" that "promote the Progress of Science." U.S. Const. art. I, § 8, cl. 8. Government-granted monopolies are economically disfavored, as the Framers recognized. *See, e.g.*, *Graham v. John Deere Co.*, 383 U.S. 1, 7 (1966) ("Jefferson, like other Americans, had an instinctive aversion to monopolies. It was a monopoly on tea that sparked the Revolution and Jefferson certainly did not favor an equivalent form of monopoly under the new government."). The CTEA's expansion of a copyright monopoly for existing works is neither "limited" in times nor in promotion of "Progress". This represents a government-conferred monopoly beyond an enumerated power of Congress.

A retroactive extension of copyright term also runs afoul of the right to free speech. Anglo-American copyright law has a history of controlling and censoring speech hostile to the view of the Crown. Retroactive extension of copyright term is an unconstitutional censorship of speech utilizing long-existing works. The CTEA prolongs the ability of a few to block use by the public of works that lost their creative value long ago. Like other misuses of copyright, including attempts to own and sell access to legal regulations, the CTEA is inconsistent with the First Amendment and it was error for the court below to hold otherwise.

Amici also object to the lower court's reliance on foreign law as a justification for the CTEA. Under that approach, few constitutional limits on federal power would be meaning-

ful, as Congress could expand its power to harmonize with foreign countries in endless ways. But foreign governments are obviously not subject to the U.S. Constitution, and it makes little sense to cite their rules as justification for domestic legislation. Conceptually, there is never a need to dilute principles of limited American government in order to accommodate different standards elsewhere. Moreover, the alleged harmonization is a fiction, as the term extension actually increased the disparity with foreign law for many copyright holders.

ARGUMENT

The Copyright Clause guards against state-conferred monopolies, which are economically deleterious and disruptive of free speech. Its text expressly restrains congressional authority, in both purpose and effect. Supreme Court precedents reinforce these limits on copyright. The First Amendment further narrows federal power in this field, as the public enjoys free speech rights in works that can no longer be called original. The court below erred in rejecting these essential restraints on federal power.

I. THE COPYRIGHT CLAUSE EXPRESSLY LIMITS CONGRESSIONAL POWER CONCERNING GOVERNMENT-CONFERRED MONOPOLIES.

Congress does not have *carte blanche* to grant monopolies, as the British king granted monopolies to his favorite courtiers to accord them private enrichment. The Copyright Clause restricts congressional 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. This clause expressly contains two essential restraints on Congress with respect to copy-

rights: their purpose must be to "promote the Progress," as in creating incentives for new works, and they must be "for limited Times," as in the 1790 copyright act. *See, e.g.*, *Goldstein v. California*, 412 U.S. 546, 555 (1973) ("The clause thus describes both the objective which Congress may seek and the means to address it.").

These restrictions on purpose and means are essential to ensure that Congress encourage creative and innovative works, rather than inhibit them through state-conferred monopolies over speech. The plain meaning of these limitations should be applied here. *See, e.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44, 116 n.13 (1996) (Souter, Ginsburg and Breyer, JJ., dissenting) (noting that "plain meaning is the Man of Steel"); Monaghan, *Our Perfect Constitution*, 56 N. Y. U. L. Rev. 353, 383-384 (1981) ("For the purposes of *legal* reasoning, the binding quality of the constitutional text is itself incapable of and not in need of further demonstration"). *Cf. United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989) (holding that "there generally is no need for a court to inquire beyond the plain language of the statute").

A. The Plain Meaning of the Copyright Clause Limits Congressional Power to Grant Copyright Monopolies.

"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) (Marshall, C.J.) (emphasis added). The enumerated federal powers, once defined, are thus also "limited" by their very terms. "The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise" of *Marbury* quoted above. *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997). "Departing from their parliamentary past, the Framers adopted a written Constitution that further divided authority at the federal level so that the Constitution's provisions would

not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the legislature's self-restraint." *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).

For enumerated powers, the language of the enumeration provides the restraining parameters. "[L]imitations on the commerce power are inherent in the very language of the Commerce Clause." *United States v. Lopez*, 514 U.S. 549, 553 (1995) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824)). This tenet of limited government applies with even greater force to the Copyright Clause, where federal overreaching can harm discourse and communications vital to our society. As with the Commerce Clause, congressional overreaching pursuant to the Copyright Clause is untenable. "Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate" under the Commerce Clause. *Lopez*, 514 U.S. at 564. That observation applies *a fortiori* to the Copyright Clause.

Among all the Section 8 powers granted to Congress, only the Copyright Clause places express limits on the acceptable means. Such a pronounced limitation must be afforded particular weight, as this Court has held in an analogous context. "Unlike the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform through the United States. . . . Thus, if we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws." *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 468-69 (1982). *Cf. Freytag v. Commissioner*, 501 U.S. 868, 877 (1991) ("Our cases consistently have expressed 'a deep reluctance to interpret a

statutory provision so as to render superfluous other provisions in the same enactment.'") (quoting *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990)).

This Court has already so held in the copyright context: "the monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to promote a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). Copyright law must "motivate the creative activity of authors and inventors by the provision of a special reward, and [] allow the public access to the products of their genius after the limited period of exclusive control has expired." *Id.* Chief Justice Hughes declared that "[t]he *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." *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (quoted in *Sony*, 464 U.S. at 429 and in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), emphasis added).

The limited authority of Congress under the Copyright Clause is to induce creators to produce and then release their work to the public. "*As the text of the Constitution makes plain*, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product." *Sony*, 464 U.S. at 429 (emphasis added). Congress lacks the power to enrich the owners of old works that have already been released. Federal law may induce publication by enacting new copyright entitlements, but may not repeatedly thwart public access for old works that have already been published and fulfilled their mission of "promot[ing] the progress of science and useful arts." The "reward to the author or artist" must

"serve[] to induce release to the public of the products of his creative genius." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

The retroactivity of CTEA violates both its utilitarian purpose (to promote progress) and its limitation on time. No creative progress is induced by prolonging the copyright of a work published long ago. "As employed, the terms 'to promote' are synonymous with the words 'to stimulate,' 'to encourage,' or 'to induce.'" *Goldstein*, 412 U.S. at 555. Extending the copyright on works dating back to 1923 obstructs, rather than promotes, creative use of the old works by others. It does nothing to advance an important public purpose, and merely promotes the "special private benefit" precluded by *Sony*. The CTEA is unconstitutional in granting a monopoly entitlement to old works. *Cf. City of Boerne*, 521 U.S. at 536 ("Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution."). Where, as in *Morrison*, there is no plausible federal justification for the legislation, invalidation is necessary. *See Morrison*, 529 U.S. at 607 ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.").

The *post hoc* extension in the copyright duration of the old works likewise runs afoul of the "limited times" constitutional requirement. This extension is the legal equivalent of a referee suddenly adding time onto the game clock as the final buzzer sounds, which rightly caused a national furor in the 1972 Olympic basketball game between the United States and the Soviet Union. *See* 93 Cong. Rec. S15896 (1974) (statement of Sen. Pearson concerning the Olympic incident). If "limited" means anything at all, it precludes the repeated increases in time reflected by the CTEA. If upheld, Congress could repeatedly extend patent terms on prescription drugs invented long ago, thereby frustrating competition and affordable public access to the medication.

Congress lacks any copyright authority once an old work has been widely published. "[C]opyright law ultimately serves the purpose of enriching the general public through access to creative works [and] it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994). Once copyright serves its purpose by inducing public release of the work, Congress has satisfied its only permissible objective under the Copyright Clause. CTEA cannot legally enrich the copyright holders further. Former Senate Judiciary Committee Chairman Orrin Hatch is mistaken in his view that federal "copyright protection should be expanded unless the extent of such protection would hamper creativity or the wide dissemination of works." Senator Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. Pitt. L. Rev. 719, 735 (1998). Federal copyright entitlements require affirmative inducement to create, not merely lack of proof of new harm.

The Framers' limitation on congressional power to grant monopolies pursuant to the Copyright Clause helps limit their deleterious effect. *Cf. United States v. Von's Grocery Co.*, 384 U.S. 270, 274 (1966) ("From this country's beginning there has been an abiding and widespread fear of the evils which flow from monopoly—that is the concentration of economic power in the hands of a few."). Under monopolies, "all the other subjects of the state are taxed very absurdly in two different ways; first, by the high price of goods, which, in the case of a free trade, they could buy much cheaper; and secondly, by their total exclusion from a branch of business, which it might be both convenient and profitable for many of them to carry on." Adam Smith, *Wealth of Nations*, 814 (Random House: 1994, Cannon ed.).

Monopoly power over speech is particularly noxious, and disfavored by the Constitution. The Anglo-American origins of copyright monopolies are traceable to a desire to censor

rather than inspire. "Modern Anglo-American copyright law is traceable to the English Crown's desire in the early sixteenth century to censor the content of literary works." Note, *Exploitative Publishers, Untrustworthy Systems, and the Dream of the Digital Revolution for Artists*, 114 Harv. L. Rev. 2438, 2441 (2001). The scholarly refrain for legal restraints on congressional overreaching in this area has now risen to a fever pitch, and rightly so. In the context of music, one commentator aptly concluded that "using the courts and United States Copyright laws to maintain the recording industry status quo while protecting the coffers of big business, will perpetuate a mode of conducting business, and ultimately a society, that is contrary to the fundamental spirit of capitalism." Hunt, *Comment: In a Digital Age, the Musical Revolution Will be Digitalized*, 11 Alb. L.J. Sci. & Tech. 181, 201-2 (2000).

B. *Feist* and Its Precedents Prevent Congress From Retroactively Extending Copyrights in Old Works.

This Court has established that "[o]riginality is a constitutional requirement." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991). It is far more than a statutory restraint; it is a constitutional limitation of the enumerated power itself. Based on the language of the Copyright Clause, "the Court made it unmistakably clear that its terms presuppose a degree of originality." *Id.* (citing *The Trade-Mark Cases*, 100 U.S. 82 (1879) and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884)). Congress simply lacks power under the Copyright Clause to extend copyright to works lacking in originality. "The originality requirement articulated in *The Trade-Mark Cases* and *Burrow-Giles* remains the touchstone of copyright protection today. It is the very premise of copyright law." *Feist*, 499 U.S. at 347 (quotations and citations omitted).

But "originality" for a reproducible work fades over time, particularly after the author has departed. Congressional fiat cannot, simply by saying so, bestow the constitutional requisite of originality on old, often-used works. *See Lopez*, 514 U.S. at 557 ("'Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'") (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring)). *Cf. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (applying Eleventh Amendment to limit Congressional power under the Commerce Clause).

Works created in 1923, for which the copyright term was about to expire in the absence of the CTEA, can hardly be deemed "original" in 2002. Legally and artistically, their originality is exhausted, and Congress cannot breathe it back into them. There is no plausible basis for finding that these works retain sufficient originality to satisfy the constitutional requirement.

The court below acknowledged that "'[t]he *sine qua non* of copyright is originality.'" *Eldred v. Reno*, 239 F.3d 372, 376 (D.C. Cir. 2001), *cert. granted sub nom. Eldred v. Ashcroft*, 122 S. Ct. 1062 (2002) (quoting *Feist*, 499 U.S. at 345). But works created long ago by deceased authors, which are on the verge of losing their copyright protection, lack sufficient originality. This Court held that "Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available." *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966) (construing narrowly the holding in *McClurg v. Kingsland*, 42 U.S. (1 How.) 202 (1843)). Likewise, Congress lacks power to enact copyright term extension for works created long ago, facing expiration of their term.

The decision below erred in finding adequate originality for old works. It cited the Copyright Act of 1790, which extended protection to existing works. 239 F.3d at 377. Act of May 31, 1790 § 1, 1 Stat. 124. But that law merely federalized copyright law for the new government, and does not support the windfall for 75-year-old works under the CTEA. The court below relied on its crabbed view of *Feist* and the "originality" requirement, declaring that "[a]ll they tell us is that facts, like ideas, are outside the ambit of copyright." *Id.* Quite the contrary, the limitation on government power embodied in the Copyright Clause protects public access to works beyond the narrow category of facts and ideas.

The brilliance of *Feist* and its precedents lies not merely in the fact/expression dichotomy, but in its recognition that the Constitution sharply limits federal copyright power. "The primary objective of copyright is *not* to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.'" *Feist*, 499 U.S. at 349 (quoting U.S. Const. art. I, § 8, cl. 8, and citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), emphasis added). The Copyright Clause is thus *not* there for Congress to reward the owners of creative works of the past. It is there to promote progress, particularly by the unknown creators of the future. Their efforts are hindered, not helped, by locking up old works and barring their free and convenient use.

The fact/expression distinction is by no means the only limitation on federal power concerning copyrights. Many works are beyond the scope of the Copyright Clause regardless of whether they are perceived to constitute "facts" under *Feist*. Judicial decisions are surely expressive, yet they may not be copyrighted. *Banks v. Manchester*, 128 U.S. 244 (1888). "The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it

is a declaration of unwritten law, or an interpretation of a constitution or a statute." *Id.* at 253 (citation omitted). While that decision cited the copyright statute, it made clear that its limitation was constitutional. "[T]his court . . . was unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right." *Id.* at 254 (quotation omitted). There are many works that are or should also be beyond federal copyright reach, including statutes, regulations and government-mandated questionnaires, as well as old works with expiring copyright terms.

C. The Court Below Erred in Relying on Preservation as a Justification for Copyright Extension.

The court below strained mightily to find any possible public benefit from retroactive copyright extension. The most it could cite, however, was an alleged incentive for preserving 75-year-old motion pictures. "The Congress found that extending the duration of copyrights on existing works would, among other things, give copyright holders an incentive to preserve older works, particularly motion pictures in need of restoration." *Eldred*, 239 F.3d at 379 (citing S. Rep. No. 104-315, at 12 (1996)). This purported basis cannot withstand scrutiny, and if sustained would eliminate all meaningful limits on federal copyright power.

Preserving old works utterly fails to satisfy the constitutional requirements of "originality" or promotion of progress. Preservation is no more original than the compilation found unworthy of copyright protection in *Feist*. 499 U.S. at 364 (holding that "copyright rewards originality, not effort"). Preservation fails to promote progress within the meaning of the Copyright Clause, regardless of its value as "sweat of the brow." *Id.* at 354 ("Without a doubt, the 'sweat of the brow' doctrine flouted basic copyright principles.").

Many activities create economic value, but that does not qualify them for copyright protection. Functions played by printers, copiers, distributors, book stores, libraries, museums, internet websites, radio stations, etc., are productive and worthy of compensation. But, as the lower court itself acknowledged, originality is the *sine qua non* of copyright. *Eldred*, 239 F.3d at 376 (quoted above). Preservation of old works does not qualify.

Nor does the court below explain what net public benefit would result from extending copyright protection to 75-year-old movies. The Register of Copyrights testified that there is no evidence of any economic value, whether in preservation or otherwise, to retroactive extension in copyright. *See* written testimony of Marybeth Peters, Register of Copyrights, before the Senate Judiciary Committee on S. 483, Sept. 20, 1995, *available in* 1995 WL 557187 (F.D.C.H.) at 71 ("[T]here are no meaningful statistics to assist in determining the cost of extending the term and the benefits to be gained. Thus, on a pure economics analysis at this point it would be difficult to support.").

Furthermore, the preservation argument would justify perpetual extensions of duration by Congress. Every twenty years, Congress could cite this reason for extending copyrights on old works for another twenty years. Surely, at some point, prior to passage of yet another 100 years, this Court would invalidate the frustration of constitutional purpose entailed in perpetual extensions. The only issue would be how many extensions would be allowed. The CTEA represents the eleventh time in the past forty years that Congress has extended the copyright term, which is far beyond any reasonable or "limited times." *See Petitioners' Petition for a Writ of Certiorari*, *Eldred v. Ashcroft*, No. 01-618, Statement of the Case ¶ 2 & n.1 (Oct. 11, 2001) (citing the statutes). If Congress wants to grant an entitlement for those who preserve old movies, it must do so outside of the Copyright Clause.

Internet technology, moreover, has made the preservation argument factually untenable. Internet websites are actively preserving old works—made possible by *expiration* of their copyrights. *See, e.g.*, http://www.promo.net/pg/ (the Gutenberg Project, striving to preserve 10,000 old books online). The director of the Gutenberg Project, Michael S. Hart, estimated that the CTEA would "essentially prevent about one million books from entering the public domain over the next 20 years." Kaplan, *Free Book Sites Hurt by Copyright Law*, N.Y. Times on the Web, Oct. 30, 1998(http://www.nytimes.com/library/tech/98/10/cyber/cyberlaw/30law.html). There are numerous other public-domain preservation projects, many of which are far more prolific than copyright-inspired efforts. *See* Travis, *Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment*, 15 Berkeley Tech. L.J. 777, 855 & n.399 (2000).

Copyrights retard and obstruct public access to old works, because the revenue is too small relative to the transaction costs of tracking down, negotiating and paying heirs who may claim an interest in the copyright. A vast number of copyrighted works—including thousands of songs, for example—are out of print and unavailable in any form at any price. Current law does not require a copyright owner, as a condition of keeping his copyright, to ensure that the work remains available. Expiration of copyrights enables such material to be posted on the internet, thereby reaching a new audience and a new generation.

From an economic perspective, the alleged benefit of government-conferred copyright monopolies may be vastly overrated, and possibly harmful. *See, e.g.*, Fox, *The Economics of Expression and the Future of Copyright Law*, 25 Ohio N.U.L. Rev. 5, 15 (1999) ("[T]he level of information guaranteed by copyright law is merely the product of enforced scarcity, which might be good for the producers, but would surely not be good for the consumers who either pay

higher prices for their enjoyment of new expression or forgo it entirely."); *see also John Deere*, 383 U.S. at 7 (Jefferson "argued forcefully that 'the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression.'") (quoting V Writings of Thomas Jefferson, at 47 (Ford ed., 1895)). Extending an entitlement to old works to the copyright holders perpetuates elevated transaction costs, frustrating free and efficient public access to the works, such as over the internet. Inefficiency and lost creativity by future artists are the result. *See generally*, Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1 (1960). In addition, the substantial costs of prolonged state-conferred monopolies, criticized by Adam Smith in *Wealth of Nations*, are even worse in our electronic age.

Trademark law provides ample continuing protection to legitimate reliance on commercial value in old works. *See, e.g., Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165 (1995) (holding that patents must expire, but "trademarks may be renewed in perpetuity") (citing *Kellogg Co. v National Biscuit Co.*, 305 U.S. 111, 119-20 (1938) (Brandeis, J.)). If, for example, the Walt Disney Company saw its copyright in Mickey Mouse expire, it could still maintain the exclusive right to use the image of Mickey Mouse as a trademark to identify all its products, from movies to theme parks to Peter Jennings and Ted Koppel.

II. FEDERAL LAW THAT EXTENDS THE TERM OF EXISTING AND FUTURE COPYRIGHTS IS NOT "CATEGORICALLY IMMUNE FROM CHALLENGE[] UNDER THE FIRST AMENDMENT."

The court below erred in holding that "copyrights are *categorically immune* from challenges under the First Amendment." *Eldred*, 239 F.3d at 375 (emphasis added). There is no justification or precedent for this categorical

denial of the Free Speech Clause to non-obscene, peaceful communications. Relevant authority is markedly in favor of the First Amendment.

This Court has applied principles of free speech to invalidate regulation of campaign expenditures, restrictions on commercial speech and excesses of libel law. Copyright law cannot and should not escape the same fate. *See, e.g.*, *See Buckley v. Valeo*, 424 U.S. 1 (1976) (applying First Amendment to campaign regulation); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757 (1976) (applying First Amendment to commercial speech); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 342 (1974) (applying First Amendment to libel law); *New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964) (same).

A. The First Amendment Limits New Expansions in Copyright Law.

A cited reason for supporting the First Amendment was to limit possible excesses under the Copyright Clause. "'Though 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.'" Ratification of the Constitution by the States, Pennsylvania, 2 The Documentary History of the Ratification of the Constitution 454 (1976) (quoting Pennsylvania Constitutional Convention Delegate Robert Whitehill on December 1, 1787). There is no exception to the First Amendment in favor of beneficiaries of federally conferred copyrights.

Politics often leads culture, and politically charged works dominate our heritage. Julia Ward Howe woke up one night with her inspiration to write the Battle Hymn of the Republic, and it has been sung in town meetings and churches ever since. Thomas Nast created his cartoon of Uncle Sam and it

quickly became part of the public consciousness. Monopolies to control the publication and distribution of these and other parts of our political and social culture are only permissible if carefully limited in duration.

Copyright law is increasingly used to suppress and censor speech. For example, an author who published interviews sympathetic to legal abortion invoked copyright to sue a priest over his quotations of them. *See Maxtone-Graham v. Burchaell*, 803 F.2d 1253 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987). A manufacturer attempted to suppress thousands of pages of potentially embarrassing litigation documents by citing copyright law. *See Grundberg v. Upjohn Co.*, 137 F.R.D. 372 (D. Utah 1991). *See also United Christian Scientists v. Christian Science Bd. of Dirs.*, 829 F.2d 1152, 1156 n.18 (D.C. Cir. 1987) (Christian Scientists' use of copyright to block an unorthodox version of Mary Baker Eddy's writings); *Religious Tech. Ctr. v. Netcom Online Commun. Servs.*, No. C-95-20091, 1997 U.S. Dist. LEXIS 23572, *6-*24 (N.D. Cal. Jan. 3, 1997) (Scientology-affiliated organizations' use of copyright against a critic). Though the statutory "fair use" doctrine is helpful in such cases, the First Amendment is the ultimate—and essential—defense to misuses of copyright to silence opponents.

"Fair use" and other statutory exceptions are inadequate to guarantee free speech rights for all misuses of copyright. This Court has held, for example, that Congress may not confer copyright on original judicial opinions. *Banks v. Manchester*, discussed *supra*. Under the same reasoning, the State should likewise be precluded from granting copyrights in other legal requirements, such as original statutes or regulations. Surely there is a constitutional right to freely restate, debate, and listen to legal requirements without fear of copyright violation. *See Buckley v. Valeo*, 424 U.S. at 14 ("a major purpose of th[e First] Amendment was to protect the free discussion of governmental affairs") (quotations

omitted); *Lamont v. Postmaster Gen'l*, 381 U.S. 301 (1965) (upholding a First Amendment right to receive information); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (noting the preparation of "the people for an intelligent exercise of their rights as citizens").

Justice Douglas emphasized, in the context of inhibiting ideas, how the First Amendment sharply limits the scope of copyright law: "Serious First Amendment questions would be raised if Congress' power over copyrights were construed to include the power to grant monopolies over certain ideas . . . . The arena of public debate would be quiet, indeed, if a politician could copyright his speeches or a philosopher his treatises and thus obtain a monopoly on the ideas they contained. We should not construe the copyright laws to conflict so patently with the values that the First Amendment was designed to protect." *Lee v. Runge*, 404 U.S. 887, 892-93 (1971) (Douglas, J., dissenting from denial of certiorari) (citation omitted).

The view of the court below that copyrights are "categorically immune" from the First Amendment distorts the law concerning speech about legal requirements. 239 F.3d at 375. In *Practice Mgmt. Info. Corp. v. AMA*, 121 F.3d 516 (9th Cir. 1997), *cert. denied*, 524 U.S. 952 (1998), the court upheld a copyright for a legal requirement but then invalidated it on the grounds of misuse. In *Building Officials & Code Admin. v. Code Technology, Inc.*, 628 F.2d 730 (1st Cir. 1980), the court held that it "cannot see how . . . copyright protection can be squared with the right of the public to know the law to which it is subject." *Id.* at 735. More recently, in *Veeck v. Southern Bldg. Code Congress Int'l, Inc.*, 241 F.3d 398 (5th Cir.), *reh'g en banc granted*, 268 F.3d 298 (5th Cir. 2001), a divided court could not find a traditional exception to copyright for privately developed legal requirements. The dissent shoehorned the subject matter into the "idea" portion of the idea/expression dichotomy, and denied copyright

enforcement on that basis. *Id.* at 415-17 (Little, J., dissenting). In each of these cases, the fiction that copyrights are categorically immune from the First Amendment causes enormous distortions. Applying the Free Speech Clause directly to invalidate copyrights for legal requirements is more straightforward, and essential to enable unfettered debate of public policy. Otherwise, *Amicus* AAPS would be unable to post and critique medical billing requirements due to the chilling effect of copyright claims in those requirements by the American Medical Association. *See Practice Mgmt. Info. Corp. v. AMA*, 121 F.3d at 520 & n.8.

More recently, the Eleventh Circuit discussed essential First Amendment limitations on copyright in the context of the book "Gone With the Wind." *See Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (discussing First Amendment protections woven into copyright law in holding copyright may not be used to censor or shield a work from public comment). The *Houghton Mifflin* court refrained from allowing the use of copyright to chill free speech. "'Freedom of speech . . . requires the preservation of a meaningful public or democratic dialogue, as well as the uses of speech as a safety valve against violent acts, and as an end in itself.'" *Id.* at 1263 (quoting 1 Nimmer on Copyright § 1.10[B][1] (2001)). The current statutory doctrine of fair use, passed in 1976, accommodated only the First Amendment concerns that had been judicially created as of that time. 268 F.3d at 1264 ("Until codification of the fair-use doctrine in the 1976 Act, fair use was a judge-made right developed to preserve the constitutionality of copyright legislation by protecting First Amendment values."). That fair use exception is helpless against congressional overreaching like the CTEA, and the First Amendment must remain fully applicable.

Expansive application of copyright law has become an impediment to scrutinizing and improving the materials mandated for children in school. In *C.N. v. Ridgewood Board*

of Education, 146 F. Supp. 2d 528 (D.N.J.), *aff'd in part and rev'd in part*, 281 F.3d 219 (3d Cir. 2001), a public school administered a questionnaire that was offensive to parents without ever distributing it to them. Litigation ensued through the appellate level, but the copyrighted questionnaire remains unpublished so that the general public remains unaware of its contents. Neither the questionnaire nor many other state-mandated materials are available for scrutiny on the internet, often due to copyright claims. *Amicus* Eagle Forum ELDF is unable to post state-mandated, non-academic questionnaires on its website due to interference by copyright with free speech, thereby sharply reducing public access to and scrutiny of government-related activities and documents.

The CTEA is one of many unwarranted attempts to expand the scope of copyright law, chilling speech in the process. The First Amendment necessarily restrains this overreaching, and categorical immunity for copyright must be rejected.

B. The First Amendment Must Limit Copyright Restraints on Certain Categories of Expression, Including Old Works.

"It is not what you say, but how you say it" is a familiar aphorism. When dealing with matters of public concern, those expressions are squarely within the ambit of the First Amendment. Judicial opinions, for example, are highly expressive and yet surely within the full right of the public to recite, publish, and even resell. Testimony before Congress, whether concerning new legislation or an investigation, is also expressive and yet subject to free recitation. Statutes, regulations, and other legal requirements must trigger application of the First Amendment to any restrictions on republication. Their expression is fundamental to their meaning.

Repeating or publishing what transpires in a courtroom must also be subject to First Amendment protections. Dramatic courtroom testimony in a colorful case can be highly expressive, and yet the public must have full rights to

it. Could the heirs of William Jennings Bryan claim title to his testimony during the famous Scopes trial in 1925? The First Amendment must allow republication by anyone.

The court below relied on the oft-cited idea/expression dichotomy to hold that the First Amendment does not apply to expressions, and only protects ideas and facts. But the First Amendment cannot be so narrow in scope. In many circumstances there must be a right to publish expressions regardless of whether the speaker consents. When those expressions implicate issues of public interest, for example, such right is paramount. *See Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (holding in favor of a broadcaster of an illegally taped conversation because "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern"). It would have been impossible to separate the provocative expression from the underlying substance on that phone call. *See id.* at 518-19 (describing the highly expressive, tape-recorded comments).

Only in *Harper & Row, Pub., Inc. v. Nation Enter.*, 471 U.S. 539 (1985), has this Court applied the idea/expression dichotomy to reject a First Amendment claim to copyrighted material. There, a filched portion of former President Ford's memoirs found its way to The Nation magazine, which published without approval 300-400 words verbatim as part of a 2,250-word article. This Court held, 6-3, that The Nation lacked a First Amendment right to publish verbatim the snippets from the memoirs, implying that it could only publish the underlying ideas. *Id.* at 556-57.

The *Harper & Row* decision should be narrowed to its unique facts, which included The Nation having scheduled publication to scoop a more complete release in Time magazine. *Id.* at 541. Its narrow holding is that the First Amendment cannot "effectively destroy any expectation of copyright protection in the work of a public figure." *Id.*

at 557. The broader principle should survive: there can be a First Amendment right in expressions. Expression is often more important than content, and to translate to another expression can change its meaning. For example, The Nation published the following from former President Ford's memoirs: Ford said he pardoned President Nixon in order "to get the monkey off my back one way or the other." *Id.* at 573 & n.10. The Nation also published Ford's regret for his "cowardice" in not defending Vice President Rockefeller against conservative criticism. *Id.* at 570 & n.1. There is no way to precisely paraphrase those and other expressions in Ford's memoirs, and the First Amendment safeguards their recitation.

Similarly, the First Amendment protects many uses of old works that have been part of our social fabric for 75 years or longer. In the absence of legitimate trademark protection, the Free Speech Clause protects republication of Santa Claus, Uncle Sam, Mickey Mouse and Bugs Bunny, after a reasonably limited time, as surely as it protects other social discourse. Under the CTEA, the familiar depiction of Santa Claus would not have entered the public domain until 1973. Zeitlin, *Strangling Culture with a Copyright Law*, N.Y. Times, Apr. 25, 1998, at A15 ("Dennis Karjala, law professor at the University of Arizona, has noted that under the new law our roly-poly Santa Claus, originally created by the 19th-century cartoonist Thomas Nast, would not have gone into the public domain until 1973. Even the United States Government would have had to pay royalties to use Nast's Uncle Sam in all of this century's wars."). There is no categorical immunity for old works from the First Amendment.

C. The First Amendment Right of Public Access Precludes Retroactive Extension of Copyright Term.

The First Amendment also protects the right to receive and access old copyrighted material, in addition to the right to

republish it. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (guaranteeing right to information on public events, including trials); *Linmark Assoc. v. Township of Willingboro*, 431 U.S. 85, 92 (1977) (establishing right to receive commercial speech); *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) ("'It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.'") (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386-90 (1969)).

Copyright extensions, particularly retroactive ones, cannot be immune from these general principles guaranteeing First Amendment rights of access. The costly availability of the old work from the copyright holder is not an adequate substitute. This Court has emphasized that:

> We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is. Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated.

Virginia State Bd. of Pharmacy, 425 U.S. at 757 n.15. *See also Lamont v. Postmaster Gen'l*, 381 U.S. 301 (1965) (upholding a First Amendment right to receive information); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) ("This freedom [of speech and press] . . . necessarily protects the right to receive. . . .").

The perpetual extension in copyrights for works, released to the public long ago, directly implicates the First Amendment right of access to those works.

III. THE ALLEGED HARMONIZATION WITH FOREIGN LAW IS NEITHER A LEGITIMATE CONSTITUTIONAL BASIS NOR A FACTUAL ONE.

Limitations on enumerated powers are not subject to the views of foreign nations. The lower court erred in relying on harmonization with foreign law as a justification for the CTEA. Under that approach, few constitutional limits on state power would be meaningful, as Congress could expand federal legislation to harmonize with foreign countries in endless ways. As Judge Sentelle declared below, "[n]either the European Union nor its constituent nation states are bound by the Constitution of the United States. That Union may have all sorts of laws about copyrights or any other subject which are beyond the power of our constitutionally defined central government." 239 F.3d at 384 (Sentelle, J., dissenting). Legal globalization cannot dilute constitutional restraints.

Nor is harmonization an accurate description of the CTEA. The court below explained its legal globalization as follows:

> The Act matches United States copyrights to the terms of copyrights granted by the European Union, see Council Directive 93/98, art. 7, 1993 O.J. (L 290) 9; in an era of multinational publishers and instantaneous electronic transmission, harmonization in this regard has obvious practical benefits for the exploitation of copyrights. This is a powerful indication that the CTEA is a 'necessary and proper' measure to meet contemporary circumstances rather than a step on the way to making copyrights perpetual; the force of that evidence is hardly diminished because, as the dissent correctly points out, the EU is not bound by the Copyright Clause of our Constitution.

239 F.3d at 379. In addition to being infirm as a constitutional argument, harmonization also fails factually.

For anonymous and pseudonymous works, the CTEA actually increased the disparity in terms between the United States and the European Union, thereby demonstrating that harmony is not the justification. *Compare* CTEA § 102(b), 17 U.S.C. § 302(c) (increasing by twenty years the terms, from 75 to 95 years from first publication and from 100 to 120 years from creation, whichever is shorter) *with* Council Directive 93/98, 1993 O.J. (L 290) art. 1, para. 3 (70 years from publication). The CTEA increases the disparity for works for hire also. *Compare* CTEA § 102(b), 17 U.S.C. § 302(c) (increasing by twenty years the terms, from 75 to 95 years from first publication and from 100 to 120 years from creation, whichever is shorter) *with* Council Directive 93/98, 1993 O.J. (L 290) art. 1, para. 4 (most European countries do not protect works for hire; those that do use a term of 70 years from publication). In addition to these disparities, there are many fundamental differences between American and European copyright law, such as a denial of "fair use" doctrine in Europe. *See* Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 Wash. & Lee L. Rev. 33, 51 (1997) (European "moral rights are utterly incompatible with fair use."). One commentator has concluded that "[i]n reality, [the CTEA] term extension does little to truly 'harmonize' United States and European copyright law, and this rationale, therefore, does not support term extension." Gifford, *The Sonny Bono Copyright Term Extension Act*, 30 Univ. Memphis L. Rev. 363, 394 (2000).

As Professor William Patry, former Counsel to the Sub-committee on Intellectual Property & Judicial Administration for the House of Representatives, observed:

> [T]he United States existed with an unharmonized term of protection from 1888 until 1978 without any untoward effects. If harmonization is so important, it is baffling that United States negotiators did not seek (or seek to acquiesce in) a basic international standard of life plus seventy in the Uruguay Round of the General

> Agreement on Tariffs and Trade (GATT). If life plus seventy had been set as the GATT standard, United States trade negotiators could have come to Congress and argued that term extension had to be put in the fast-track GATT-implementing legislation. But no such effort was made or even contemplated because the harmonization argument is entirely *post hoc*.

Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 Notre Dame L. Rev. 907, 930 (1997).

The U.S. Constitution is fundamentally different from the rules of the European Union and virtually every other country. The Copyright Clause takes a more limited view of intellectual property than other jurisdictions, thereby allowing creativity and competition to flourish. Europe, for example, generally does not allow the "fair use" that is constitutionally required in the United States. *See* Gifford, *supra*, 30 Univ. Memphis L. Rev. at 394. Congress lacks power to make American copyright law more similar to a foreign model that the Constitution never embraced.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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