

[ORAL ARGUMENT IS REQUESTED]

No. 05-1259

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LAWRENCE GOLAN, RICHARD KAPP, S.A. PUBLISHING CO., INC.,
d/b/a ESS.A.Y. RECORDINGS, SYMPHONY OF THE CANYONS, RON HALL, d/b/a
FESTIVAL FILMS, and JOHN McDONOUGH, d/b/a TIMELESS VIDEO
ALTERNATIVES INTERNATIONAL,

Plaintiffs-Appellants,

v.

ALBERTO R. GONZALES, in his official capacity as Attorney General
of the United States, and MARYBETH PETERS, Register of
Copyrights, Copyright Office of the United States,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
HON. LEWIS T. BABCOCK, C.J.

BRIEF FOR THE APPELLEES

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF PRIOR OR RELATED APPEALS	
STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUES	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	2
A. Constitutional and Statutory Background	2
B. Facts of the Case	7
C. District Court Proceedings	8
SUMMARY OF ARGUMENT	14
STANDARD OF REVIEW	18
ARGUMENT	18
I. SECTION 514 OF THE URAA DOES NOT VIOLATE THE FIRST AMENDMENT	18
A. Section 514 Of The URAA Preserves The Existing Speech-Protective Safeguards of Copyright Law	18
B. Plaintiffs' Alternative Standard Rests On A Misreading Of <u>Eldred</u> And Should Be Rejected	23
1. <u>Eldred</u> Does Not Establish a "Historical- Novelty" Standard	23
2. A Historical-Novelty Standard Would be Incompatible with First Amendment Doctrine, as well as Unmanageable	26
II. SECTION 514 OF THE URAA IS WITHIN THE POWER OF CONGRESS UNDER THE COPYRIGHT CLAUSE	28
A. The Text Of The Copyright Clause Supports Congress' Power To Enact Section 514 Of The URAA	28

B.	History Confirms The Constitutionality Of Section 514 Of The URAA	32
1.	The First Congress Began a Tradition of Restoring Copyright in 1790	32
2.	Restoration Was Viewed as Constitutional Throughout the Nineteenth Century	42
3.	Twentieth-Century Statutes Continued the Practice of Restoring Copyrights	47
C.	Section 514 Of The URAA Is Consistent With The Supreme Court's Ruling In <u>Graham</u>	51
1.	Plaintiffs' Argument Rests on a Misreading of <u>Graham</u>	51
2.	The Constitution Provides More Lenient Standards for the Awarding of Copyrights than for the Awarding of Patents	55
III.	PLAINTIFFS' CLAIM THAT THE CTEA VIOLATES THE "LIMITED TIMES" REQUIREMENT IS FORECLOSED BY THE SUPREME COURT'S HOLDING IN <u>ELDRED</u>	56
	CONCLUSION	61
	STATEMENT REGARDING ORAL ARGUMENT	
	CERTIFICATE OF COMPLIANCE	
	CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases:	Page
<u>Blanchard v. Sprague</u> , 3 F. Cas. 648 (C.C. Mass. 1839)	44, 54
<u>Burrow-Giles Lithographic Co. v. Sarony</u> , 111 U.S. 53 (1884)	34
<u>Caliga v. Inter Ocean Newspaper Co.</u> , 215 U.S. 182 (1909)	39
<u>Dastar Corp. v. Twentieth Century Fox Film Corp.</u> , 539 U.S. 23 (2003)	50
<u>Donaldson v. Becket</u> , 98 Eng. Rep. 257 (H.L. 1774)	37
<u>Eldred v. Ashcroft</u> , 537 U.S. 186 (2003)	<u>passim</u>
<u>Eldred v. Reno</u> , 239 F.3d 372 (D.C. Cir. 2001)	2, 13
<u>Elliott Industries Ltd. Partnership v. BP America Production Co.</u> , 407 F.3d 1091 (10th Cir. 2005)	13, 18, 29
<u>Evans v. Eaton</u> , 8 F. Cas. 846 (C.C. Pa 1816), <u>rev'd on other grounds</u> , 16 U.S. (3 Wheat.) 454 (1818)	44
<u>Evans v. Jordan</u> , 8 F. Cas. 872 (C.C. Va. 1813), <u>aff'd</u> , 13 U.S. (9 Cranch) 199 (1815)	43, 54
<u>Evans v. Robinson</u> , 8 F. Cas. 886 (No. 4,571) (C.C. Md. 1813)	44, 54
<u>Globe Newspaper Co. v. Walker</u> , 210 U.S. 356 (1908)	38, 39
<u>Golan v. Ashcroft</u> , 310 F. Supp.2d 1215 (D. Colo. 2004)	2
<u>Golan v. Gonzales</u> , 2005 WL 914754 (D. Colo. Apr. 20, 2005)	2
<u>Graham v. John Deere Co. of Kansas City</u> , 383 U.S. 1 (1966)	11,16-17, 51-55

<u>Grant v. Raymond</u> , 31 U.S. (6 Pet.) 218 (1832)	45
<u>Harper & Row, Publishers, Inc. v. Nation Enters.</u> , 471 U.S. 539 (1985)	18, 19, 20, 22, 24
<u>Jordan v. Dobson</u> , 13 F. Cas. 1092 (C.C. Pa. 1870)	44, 46
<u>Kahle v. Ashcroft</u> , 2004 WL 2663157 (N.D. Cal. Nov. 19, 2004)	26
<u>Luck's Music Library, Inc. v. Ashcroft</u> , 321 F. Supp. 2d 107 (D.D.C. 2004), <u>aff'd on other</u> <u>grounds</u> , 407 F.3d 1262 (D.C. Cir. 2005) . . .	25-26, 48-49
<u>Luck's Music Library, Inc. v. Gonzales</u> , 407 F.3d 1262 (D.C. Cir. 2005)	15, 28, 29, 31, 34, 41, 45, 49
<u>Marbury v. Madison</u> , 5 U.S. (1 Cranch) 137 (1803)	18, 57
<u>McClurg v. Kingsland</u> , 42 U.S. (11 How.) 202 (1843)	11, 45
<u>Millar v. Taylor</u> , 98 Eng. Rep. 201 (K.B. 1769)	37
<u>Monell v. Dept. of Soc. Servs.</u> , 436 U.S. 658 (1978)	57
<u>Oklahoma ex rel. Dept. of Human Servs. v.</u> <u>Weinberger</u> , 741 F.2d 290 (10th Cir. 1983)	39, 60
<u>San Francisco Arts & Athletics, Inc. v. United</u> <u>States Olympic Comm.</u> , 483 U.S. 522 (1987)	24
<u>Singer Mfg. Co. v. June Mfg. Co.</u> , 163 U.S. 169 (1896)	50
<u>Suntrust Bank v. Houghton Mifflin Co.</u> , 268 F.3d 1257 (11th Cir. 2001)	25
<u>Tenet v. Doe</u> , 125 S. Ct. 1230 (2005)	59
<u>The Fire-Extinguisher Case</u> , 21 F. 40 (C.C. Md. 1884)	45, 49
<u>Turner Broad. Sys., Inc. v. FCC</u> , 520 U.S. 180 (1997)	27

<u>United States v. Monts</u> , 311 F.3d 993 (10th Cir. 2002), <u>cert. denied</u> , 538 U.S. 938 (2003)	32
<u>United States v. Nelson</u> , 383 F.3d 1227 (10th Cir. 2004)	59
<u>United States v. Turner</u> , 52 U.S. (11 How.) 663 (1850)	39
<u>Wheaton v. Peters</u> , 33 U.S. (8 Pet.) 591 (1834)	36-41

Constitution:

United States Constitution:

Art. I, § 8, cl. 8	2, 29
First Amendment	2, 8, 14-15, 18-28
Fifth Amendment	8, 13
Copyright Clause	passim
Due Process Clause	8

Statutes:

Act Concerning Patents for Useful Inventions § 3, 4 Stat. 559 (July 3, 1832)	45
Act for the Relief of Levi H. Corson, ch. 57, 9 Stat. 763 (Feb. 19, 1849)	42
Act for the Relief of Oliver Evans, ch. 13, 6 Stat. 70, 70-71 (Jan. 21, 1808)	43
Act for the Relief of William Gale, ch. 131, 6 Stat. 895 (Mar. 3, 1843)	44
Act for the Relief of John Goulding, ch. 88, 12 Stat. 904 (May 30, 1862)	44
Act for the Relief of the Heirs of William Graham, ch. 187, 20 Stat. 542 (June 11, 1878)	44-45
Act for the Relief of William Tod Helmuth, ch. 534, 18 Stat., pt. 3, at 618 (June 23, 1874)	42
Act for the Relief of Mrs. William L. Herndon, ch. 99, 14 Stat. 587 (May 24, 1866)	43

Act for the Relief of Judson Jones, ch. 29, 30 Stat. 396 (Feb. 17, 1898)	42
Act for the Relief of Mistress Henry R. Schoolcraft, ch. 16, 11 Stat. 557 (Jan. 25, 1859)	43
Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124	12, 16, 32, 36, 42
Act of July 3, 1832, 4 Stat. 559	12
Act of Dec. 7, 1919, Pub. L. No. 66-102, 41 Stat. 368-69	12, 47-48, 49
Act to Amend and Consolidate the Acts Respecting Copyright, Pub. L. No. 60-349, § 8, 35 Stat. 1075 (Mar. 4, 1909)	47
§ 15, 35 Stat. 1078-79	48
Act to Renew the Patent of Thomas Blanchard, ch. 213, 6 Stat. 589 (June 30, 1834)	44
Copyright Amendments Act of 1992, Pub. L. No. 102-307, § 102(a)(2)(A)(ii), 106 Stat. 264 (June 26, 1992)	4
Berne Convention Implementation Act of 1988, Pub. L. 100-568, 102 Stat. 2853, § 7 (Oct. 31, 1988)	4, 5
Article 18	4, 5
Emergency Copyright Act of 1941, Pub. L. No. 77-258, 55 Stat. 732 (Sept. 25, 1941)	12, 48, 49
Uruguay Round Agreements Act, § 514, Pub. L. No. 103-465, 108 Stat. 4809, 4976-4981 (1994)	2
17 U.S.C. § 104A	2, 6, 7, 31, 32
17 U.S.C. § 104A(a)	6
17 U.S.C. § 104A(d)(1)-(2)	7, 32
17 U.S.C. § 104A(d)(2)(A)-(B)	7
17 U.S.C. § 104A(d)(3)	7
17 U.S.C. § 104A(h)(6)	6, 29
17 U.S.C. § 104A(h)(6)(B)	31
17 U.S.C. § 107	20
17 U.S.C. § 109(a)	2

Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998)	2
17 U.S.C. §§ 301-04	2, 7
17 U.S.C. § 302(a)	7
17 U.S.C. § 302(b)	7
17 U.S.C. § 302(c)	7
28 U.S.C. § 1291	1
28 U.S.C. § 1331	1

Regulations:

32 Fed. Reg. 10,341 (July 12, 1967)	49
62 Fed. Reg. 20,211 (Apr. 25, 1997)	8
62 Fed. Reg. 20,220 (Apr. 25, 1997)	8

Presidential Proclamations:

41 Stat. 1790 (1920)	48
42 Stat. 2271-78 (1922)	48
58 Stat. 1129-31 (1944)	48
61 Stat. 1057-58 (1947)	48
61 Stat. 1065-66 (1947)	49
64 Stat. A385 (1949)	49

Legislative Materials:

<u>Joint House and Senate Comm. Hearings on the URAA, 103rd Cong. 191 (1994)</u>	6
H.R. Rep. No. 77-619 (July 21, 1941)	49
S. Rep. No. 100-352 (1988), reprinted in 1988 U.S.C.C.A.N. 3706	4
S. Rep. No. 103-412 (1994)	4

Miscellaneous:

Bruce W. Bugbee, <u>Genesis of American Patent and Copyright Law</u> (1967)	33, 41
1 William Crosskey, <u>Politics and the Constitution in the History of the United States</u> (1953)	41
P. J. Federico, <u>The Patent Trials of Oliver Evans</u>	

(Part I), 27 J. Pat. Off. Soc'y 586 (1945)	43
Lyman Ray Patterson, <u>Copyright in Historical Perspective</u> (1968)	41
Edward C. Walterscheid, <u>To Promote the Progress of Science and Useful Arts</u> , 2 J. Intell. Prop. L. 1 (1994)	41
2 <u>Nimmer on Copyright</u> § 1.05[A][2] n.10	47
8 Melville B. Nimmer & David Nimmer, <u>Nimmer on Copyright</u> App. 7[C][4] at App. 7-19, Aplt. App. 2074	33
28 Op. Att'y Gen. 222 (1910)	47
29 Op. Att'y Gen. 64 (1911)	47

STATEMENT OF PRIOR OR RELATED APPEALS

We are aware of no prior or related appeals.

STATEMENT OF JURISDICTION

Plaintiffs-appellants invoked the jurisdiction of the district court over this action arising under the Constitution and laws of the United States pursuant to 28 U.S.C. § 1331. The district court entered final judgment in favor of defendants-appellees (collectively, "the Government") on May 12, 2005. Appellants' Appendix ("Aplt. App.") 2353. Plaintiffs filed a timely appeal on May 27, 2005, Aplt. App. 2356, which was timely amended, Aplt. App. 2359. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Section 514 of the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809, 4976-4981 (codified as amended at 17 U.S.C. §§ 104A, 109(a) (1994)) is consistent with the Copyright Clause and the First Amendment.

2. Whether Eldred v. Ashcroft, 537 U.S. 186 (2003), which upheld the constitutionality of the Sonny Bono Copyright Term Extension Act ("CTEA"), Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended at 17 U.S.C. §§ 301-04 (1998)), forecloses Copyright Clause challenges to the length of copyright terms established by that Act.

STATEMENT OF THE CASE

Plaintiffs seek to use, copy or sell works whose copyrights were extended under the CTEA, or restored under Section 514 of the URAA, in ways that normally would constitute infringement of

copyright. They brought this action to challenge the constitutionality of both statutes, alleging that the provisions exceeded the power of Congress under the Copyright Clause and violated the First Amendment.

Proceedings were stayed after the Supreme Court granted certiorari to review a similar challenge to the CTEA in Eldred v. Reno, 239 F.3d 372 (D.C. Cir. 2001), eventually rejecting the challenge in Eldred v. Ashcroft, 537 U.S. 186 (2003). Plaintiffs subsequently filed an amended complaint, and the district court granted and denied in part the Government's corresponding motion to dismiss. Golan v. Ashcroft, 310 F. Supp. 2d 1215 (D. Colo. 2004) ("Golan I"); Aplt. App. 317. The Government subsequently moved for summary judgment, and plaintiffs moved for partial summary judgment. The district court granted the Government's motion, denied that of plaintiffs, and entered final judgment for the Government. Golan v. Gonzales, 2005 WL 914754 (D. Colo. Apr. 20, 2005) ("Golan II"); Aplt. App. 2321-55.

STATEMENT OF FACTS

A. Constitutional And Statutory Background

1. The Constitution grants to Congress the power "[t]o 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 relevant part that

"Congress shall make no law . . . abridging the freedom of speech, or of the press."

2. There is no such thing as "an 'international copyright' that will automatically protect an author's writings throughout the world." U.S. Copyright Office, Circular 38a (revised June 2004). If the United States has not established copyright relations with a foreign country, works published in that country are not necessarily entitled to copyright protection here, and residents of that country are often free under foreign law to copy and redistribute American works at will.

To protect the rights of their authors abroad, the vast majority of nations have established copyright relations through bilateral or multilateral treaties. Section 514 of the URAA partially implements one such treaty, the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"). "For more than 100 years," the Berne Convention has been "the major multilateral agreement governing international copyright relations." S. Rep. No. 100-352, at 2 (1988), reprinted in 1988 U.S.C.C.A.N. 3706, 3707 ("Berne Report"); see also S. Rep. No. 103-412, at 225-26 (1994) ("URAA Report").¹ The Convention requires that member states accord

¹ The URAA was the implementing legislation for the General Agreement on Tariffs and Trade 1994 ("GATT"), which established the World Trade Organization ("WTO"). Title V of the Act implements the Agreement on Trade-Related Aspects of Intellectual Property Rights, which requires WTO members, inter alia, to comply with Article 18 of the Berne Convention. See S. Rep. No.

foreign authors copyright protections no less favorable than those accorded their own nationals, and establishes a minimum level of protection that all members must provide. A total of 159 countries are now members of the Berne Convention.²

Membership and compliance by the United States therefore "secure[s] the highest available level of multilateral copyright protection for U.S. artists, authors and other creators." Berne Report at 2, reprinted in 1988 U.S.C.C.A.N. at 3707.³

Article 18 of the Berne Convention requires that member nations restore copyright protections to certain unprotected foreign works whose copyright terms have not yet expired. Such works may have lacked protection in the United States due to a lack of national eligibility, the absence of subject-matter protection, or a failure to abide by formalities of U.S. law, such as affixing a copyright notice or filing a timely renewal application. URAA Report at 225. These copyright formalities have since been repealed, and are no longer required of any author. See Copyright Amendments Act of 1992 ("1992 Act"), Pub. L. No. 102-307, § 102(a)(2)(A)(ii), 106 Stat. 264 (providing for automatic renewal of copyright term); Berne Convention

103-412, at 225 (1994).

² See World Intellectual Property Organization, Treaties Database: Contracting Parties, at http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15.

³ The United States joined the Berne Convention in 1989, but did not pass legislation implementing Article 18 until required to do so by the GATT in 1994. See URAA Report at 225.

Implementation Act of 1988 ("BCIA"), Pub. L. No. 100-568, § 7, 102 Stat. 2853 (eliminating requirement that copyright notice be affixed to work). The URAA thus restores protection for the works of foreign authors previously ineligible for protection or unfamiliar with the technicalities of American law.⁴

Under Section 514 of the URAA (codified as amended at 17 U.S.C. § 104A), copyright may be restored in works that: (1) remain protected under the law of the country where the work was originally published or created; (2) were denied copyright protection in the United States due to a lack of national eligibility, failure to comply with statutory formalities, or (in the case of certain sound recordings) lack of prior subject-matter protection; and (3) are still within the remainder of the copyright term they would ordinarily have enjoyed if created or published in the United States. See 17 U.S.C. § 104A(a), (h)(6). Restoration does not extend the term of a copyright; rather,

⁴ In enacting the URAA, Congress was well aware of the difficulties facing foreign authors:

As difficult as it has been for American authors to comply with the strict formalities [of copyright law], it has been even more difficult for foreign authors. Many lost their U.S. copyrights to the public domain without having sought to exploit their works here, or without being aware of the requirements of our law. Now that we have essentially eliminated formalities from our copyright system, it is appropriate to restore these copyrights and redress the draconian effects of our prior law.

Joint House and Senate Comm. Hearings on the URAA, 103d Cong. 191 (1994) (statement of Shira Perlmutter).

copyrights restored under the URAA expire on the same day that they would have had the work had been protected since its creation. Id. at § 104A(a).

Congress also provided in the URAA for the protection of parties who made use of foreign works before the copyrights in those works were restored. These "reliance parties" are given immunity for any act prior to the restoration of the work that would otherwise have constituted infringement. 17 U.S.C. § 104A(d)(1)-(2). Copyright holders must notify reliance parties of their intent to enforce a restored copyright, id. § 104A(d)(2)(A)-(B); give reliance parties a year to use or sell copies of a restored work already in existence at the time of the notice, id.; and allow reliance parties, in exchange for reasonable compensation, to continue to exploit derivative works created prior to enactment of the URAA, id. § 104A(d)(2)(B), (d)(3).

3. The CTEA, codified at 17 U.S.C. §§ 301-304, extended by 20 years the term of existing and future copyrights generally. Works by natural authors are now entitled to a copyright term of the life of the authors plus 70 years. Id. § 302(a), (b). Anonymous or pseudonymous works, as well as works made for hire, enjoy a copyright term of 95 years from the year of first publication, or 120 years from the year of creation, whichever expires first. Id. § 302(c).

B. Facts Of The Case

Plaintiffs seek to make use of others' copyrighted works. Some plaintiffs operate non-profit enterprises, while others do not. Plaintiff John McDonough, for example, operates a business in which he duplicates and sells copies of various films. Second Amended Compl. 25-26, Aplt. App. 450-51. Under the URAA, he is no longer able to retain for himself the full profits of his exploitation of works such as Night Train to Munich. The producer and distributors of this film, released in the United Kingdom in 1940, had been denied copyright protection due to a failure to satisfy the formal requirements of the relevant Copyright Act. See Second Amended Compl. 26, Aplt. App. 451. Copyright in the film was restored in 1997.⁵ To profit from the duplication or sale of copies of this film, McDonough must now seek a license from the copyright owner, like all those who wish to duplicate and resell for their own benefit the copyrighted works of other authors. Similarly, because of the copyright extension granted by the CTEA, McDonough will be required to seek licenses to copy and sell existing copyrighted works for a longer period of time, until their newly extended terms expire. See First Amended Compl. 33, Aplt. App. 50.

⁵ See Copyright Restoration of Works in Accordance With the Uruguay Round Agreements Act, 62 Fed. Reg. 20,211, 20,220 (Apr. 25, 1997).

C. District Court Proceedings

1. Plaintiffs brought this action alleging that the URAA and the CTEA violated the Copyright Clause and the First Amendment. The Government moved to dismiss. After the Supreme issued its decision in Eldred v. Ashcroft, 537 U.S. 186 (2003), plaintiffs filed their First Amended Complaint, Aplt. App. 18, in which they presented four claims. First, they claimed that the URAA exceeds the power granted to Congress by the Copyright Clause, in that the restoration of copyright in existing foreign works neither "promote[s] the Progress of Science and the useful Arts" nor meets the constitutional requirement of originality.⁶ Id. at 52-53. Second, they claimed that the URAA violates their free speech rights under the First Amendment. Id. at 53-54. Third, they claimed that the URAA violates the Due Process Clause of the Fifth Amendment. Id. at 54-57. Finally, they claimed that the copyright terms established by the CTEA -- though approved by the Supreme Court in Eldred -- are too long to be considered "limited Times" and are therefore "effectively or virtually perpetual." Id. at 57-58.

2. The Government renewed its motion to dismiss, Aplt. App. 62, which the district court granted with respect to plaintiffs' CTEA claim. Golan I, Aplt. App. 317. As the district court

⁶ On appeal, plaintiffs do not argue that the URAA violates either the preamble to the Copyright Clause or the originality requirement, but instead limit their argument to the question of "limited Times." Aplt. Br. 47.

observed, although the petitioners in Eldred did not themselves raise the argument that the CTEA terms were "'effectively or virtually perpetual,'" Aplt. App. 319, the Supreme Court had addressed that issue sua sponte as well as in response to Justice Breyer's dissent, stating that "'a regime of perpetual copyrights clearly is not the situation before us,'" Aplt. App. 320 (quoting Eldred, 537 U.S. at 209) (further internal citation omitted). Earlier copyright extensions, the Supreme Court held, "'did not create perpetual copyrights, and neither did the CTEA.'" Aplt. App. 320 (quoting Eldred, 537 U.S. at 210). In fact, the Court had specifically rejected Justice Breyer's economic argument that the CTEA's copyright term was "'virtually perpetual,'" and doubted whether the "'architects of our Nation, in framing the 'limited Times' prescription, thought in terms of the calculator rather than the calendar.'" Ibid. (quoting Eldred, 537 U.S. at 210 n.16). The district court therefore concluded that it was bound by the Supreme Court's holding that "the extension of the copyright term in the CTEA was constitutional, in that it was not effectively or virtually perpetual, despite the fact that the Petitioners [in Eldred] did not directly challenge the time-span provided for in the CTEA." Ibid.

However, the district court found that plaintiffs' first three claims regarding the URAA were each legally cognizable, and

denied the motion to dismiss with respect to those claims. Aplt. App. 320-25. Plaintiffs subsequently filed a Second Amended Complaint, adding Marybeth Peters as a defendant and removing any claims regarding the CTEA. Aplt. App. 426.

3. The Government moved for summary judgment, Aplt. App. 327, and plaintiffs also moved for partial summary judgment, contending that the URAA violated the Copyright Clause. Aplt. App. 1986. The district court granted the motion of the Government, denied the motion of plaintiffs, and entered final judgment for the Government. Golan II, Aplt. App. 2321.

a. The district court first held that Congress had power to enact the URAA under the Copyright Clause. Id. at 2324-44. It noted that Congress "may grant exclusive rights to authors and inventors only for limited times . . . and only for original intellectual conceptions of the author." Id. at 2324. The Copyright Clause did not, however, impose the "additional limitation" that copyrights "cannot be restored" by Congress "to works that have passed into the public domain." Id. at 2325. The fact that under any given statutory regime (which Congress can always amend) "the public domain is indeed public does not mandate that the threshold across which works pass into it cannot be traversed in both directions." Ibid.

To support its holding, the district court examined a variety of precedents in the context of patents. It noted that

the primary case cited by plaintiffs regarding the public domain, Graham v. John Deere Co. of Kansas City, 383 U.S. 1 (1966), concerned not the restoration of intellectual property rights, but rather the constitutional conditions under which Congress could grant such "protection in the first place." *Aplt. App.* 2327. The remaining cases cited by plaintiffs determined "the boundaries of authors' statutory rights," and stood only for the "unremarkable rule" that under a particular statutory system, individuals cannot claim exclusive rights over materials Congress has put in the public domain. *Id.* at 2326-27. However, when the invention itself is constitutionally suitable for patent protection, "[t]he Supreme Court has held that Congress may permissibly grant retroactive patent protection to an inventor who has failed to secure such protection at the time of the invention." *Id.* at 2327 (citing McClurg v. Kingsland, 42 U.S. 202, 206 (1843), and Eldred, 537 U.S. at 202-03).⁷ Moreover, the district court held that the Constitution places even fewer constraints on the copyright power of Congress: while over-inclusive patents may remove "existent knowledge from the public domain," that danger "is not lurking within the retroactive expansion of copyrights," for the latter "restrict the use of expressions but not of ideas themselves." *Id.* at 2328.

⁷ In the district court's view, McClurg expanded the protection of an existing patent, rather than issuing a patent in an invention entirely in the public domain. *Id.* at 2328.

The district court further supported its position by reference to history. It noted that before 1790, state common-law copyrights were "extinguished at first publication and thereafter must have been preserved by statute, if at all." Id. at 2337. In enacting the first copyright act, Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 ("1790 Act"), which extended protection to "any map, chart, book, or books already printed within these United States," Aplt. App. 2329 (emphasis added), the First Congress "anticipated the removal of some works from the public domain," and "evidently determined that such a practice was constitutionally permissible." Id. at 2339.⁸ In 1832 Congress had restored patents on inventions that had fallen into the public domain through technicalities, Id. at 2340 (citing the Act of July 3, 1832, 4 Stat. 559 ("1832 Patent Act")), and in 1919 and 1941 did the same with regard to works of foreign authors, whose copyrights were restored in proclamations by Presidents Wilson, Harding, Roosevelt, Truman, Eisenhower, and Johnson. Id. at 2341-43 (citing the Act of Dec. 7, 1919, Pub. L. No. 66-102, 41 Stat. 368-69 ("1919 Act") and the Emergency Copyright Act of Sept. 25, 1941, Pub. L. No. 77-258, 55 Stat. 732 ("1941 Act")). The district court concluded that "Congress has historically demonstrated little compunction about removing

⁸ The district court further noted that even "a slight expansion of then-existing copyright law in 1790 would be sufficient to support the Government's argument on this point." Aplt. App. 2330.

copyrightable materials from the public domain," and "[i]n light of this unbroken string of authority" found that the Copyright Clause had not been violated. Id. at 2344.

b. After finding that the URAA satisfied the rational basis test, id. at 2347, the district court turned to the question of First Amendment protection. The First Amendment has long been read as consistent with the copyright protection of authors' original expression, and the district court addressed this question briefly, noting that plaintiffs were "free to contract with copyright holders for permission to disseminate the works." Ibid. The district court therefore held that the URAA was consistent with the First Amendment, seeing "no need to expand upon the settled rule that private censorship via copyright enforcement does not implicate First Amendment concerns." Id. at 2348 (citing, inter alia, Eldred v. Reno, 239 F.3d at 375). Finally, the district court held that the URAA was consistent with Fifth Amendment due process requirements. Id. at 2348-51.⁹

c. The district court entered judgment for the Government on May 12, 2005. Plaintiffs filed a corrected notice of appeal on July 8, 2005.

⁹ This holding is not contested on appeal. See Aplt. Br. 2; see also Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co., 407 F.3d 1091, 1116 n. 21 (10th Cir. 2005) ("Failure to raise an issue in an opening appellate brief waives the issue.").

SUMMARY OF ARGUMENT

The district court correctly rejected all of plaintiffs' claims as a matter of law. As the court recognized, Eldred v. Ashcroft, 537 U.S. 186 (2003), is dispositive here.

Although the foreign works covered by Section 514 of the URAA were constitutionally eligible for copyright when first published, their authors were denied protection on the grounds of national origin, failure to comply with statutory formalities, or lack of subject-matter protection. Eldred itself establishes that Congress retains the power to amend, repeal or modify its copyright statutes in order to secure effective, reciprocal protection for American works abroad, and this is precisely what Congress did in Section 514. Plaintiffs' argument that Section 514 is invalid is unsupported by constitutional text and history, and flies in the face of principles articulated by the Supreme Court only two years ago in Eldred.

I. As Eldred unambiguously established, the scope of existing copyright protection is consistent with the First Amendment. In rejecting a First Amendment challenge similar to that brought by plaintiffs, Eldred described the "traditional First Amendment safeguards" of copyright law -- the idea/expression distinction and the doctrine of fair use -- as ensuring the consistency of copyright with free speech principles. 537 U.S. at 220. By granting copyrights otherwise

identical to those protecting domestic works, Section 514 of the URAA retains these "traditional First Amendment safeguards." The copyrights restored by the statute are no more speech-restrictive than ordinary copyrights; if anything, they are less so, for the restored works enjoy only the short remainders of the copyright terms that domestic works enjoyed in full. Plaintiffs' suggestion to impose heightened scrutiny on any sufficiently "novel" amendment to the copyright law is entirely alien to the reasoning of Eldred, incompatible with existing First Amendment doctrine, and unworkable.

II. As the D.C. Circuit ruled recently in rejecting a similar Copyright Clause challenge to Section 514 of the URAA, Luck's Music Library, Inc. v. Gonzales, 407 F.3d 1262 (D.C. Cir. 2005) -- inexplicably not even cited by plaintiffs despite its clear applicability and plaintiffs' counsel's participation in that case on the losing side in district court -- Eldred also reaffirmed the power of Congress under the Copyright Clause to determine the "limited Times" of a copyright's duration. Plaintiffs contend that the Clause forbids Congress to restore copyrights in works left unprotected by statutory restrictions, but this claim finds no foundation in the text of "limited Times." To be "limited," the Eldred Court held, the copyright term need not be "forever 'fixed' or 'inalterable'": rather, it must be "'confine[d] within certain bounds,' 'restrain[ed],' or

'circumscribe[d].'" 537 U.S. at 199 (citations omitted). The URAA clearly meets this test: the protection of a restored work expires on the very day it would have expired had the author initially satisfied the relevant statutory requirements. A restored copyright is by definition more "limited" than a domestic copyright that extends for a full term.

This understanding of the text has been shared by courts and Congresses since the Founding. The First Congress, whose understanding of the Copyright Clause carries virtually conclusive weight under Eldred, extended protection in the very first copyright act to all books, maps, and charts "already printed within these United States." 1790 Act, § 1. According to binding Supreme Court precedent and the 1790 Act itself, many of these works would otherwise have been without copyright protection at the time and thus in the public domain. Congress continued to restore both copyrights and patents on at least eleven separate occasions during the nineteenth century; these statutes were uniformly upheld by the courts in cases explicitly endorsed by Eldred, 537 U.S. at 201-02. Furthermore, in the twentieth century, Congress vested the President with authority to restore certain copyrights on three occasions, in 1909 and after both World Wars.

Although plaintiffs seek support for their novel principle from the patent case of Graham v. John Deere Co. of Kansas City,

383 U.S. 1 (1966), Eldred itself recognized that Graham concerned not the duration or restoration of patents, but the initial conditions for patentability. See Eldred, 537 U.S. at 202 n.7. The works restored by Section 514 of the URAA were constitutionally eligible for copyright at their creation; their restoration to the remainder of their terms is a legislative choice to which Graham poses no barrier. Moreover, as Eldred emphasized, 537 U.S. at 217 n.22, the constitutional restrictions on copyright statutes are more lenient than those governing patents. The district court thus correctly viewed plaintiffs' interpretation of Graham as inapplicable in the context of copyrights.

III. Finally, plaintiffs seek the outright overruling of Eldred on the constitutionality of existing copyright terms under the CTEA. The issue raised by plaintiffs (represented by the same counsel as petitioners in Eldred) was raised in dissent to Eldred by Justice Breyer, and as plaintiffs themselves concede, "[t]he Court rejected Justice Breyer's argument." Aplt. Br. 55. Plaintiffs, however, dismiss this rejection as resting upon an "uninformed attitude," and seek to correct it through a "factual showing" of the Framers' relevant intent. Id. at 57. Not only do plaintiffs thus condescend to the Supreme Court, but they also mistake questions of law for questions of fact and ignore the Court's power to set binding precedent on questions not briefed by the parties -- as the Court did, for example, when it decided

the seminal case of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The district court properly declined to overrule a recent decision of the Supreme Court, and its judgment should be affirmed.

STANDARD OF REVIEW

The challenged district court orders are subject to de novo review. See, e.g., Elliott Indus. Ltd. Partnership v. BP Am. Prod. Co., 407 F.3d 1091, 1106-07 (10th Cir. 2005).

ARGUMENT

I. SECTION 514 OF THE URAA DOES NOT VIOLATE THE FIRST AMENDMENT.

A. Section 514 Of The URAA Preserves The Existing Speech-Protective Safeguards Of Copyright Law.

Plaintiffs contend that the district court erred in refusing to apply "ordinary First Amendment review" to Section 514 of the URAA. Aplt. Br. 20. The district court, however, gave the statute appropriate First Amendment scrutiny under Eldred, and the provision passed muster. "[T]he Framers intended copyright itself to be the engine of free expression," by "suppl[ying] the economic incentive to create and disseminate ideas." Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985). Thus, as the Supreme Court held only two years ago, "copyright law contains built-in First Amendment accommodations." Eldred v. Ashcroft, 537 U.S. 186, 219 (2003). Given these accommodations, its "limited monopolies are compatible with free speech

principles." Ibid. The district court correctly followed this "settled rule," Golan II, Aplt. App. 2348, and like the Eldred Court, "reject[ed] [plaintiffs'] plea for imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards." 537 U.S. at 218-19.

As described in Eldred, copyright's First Amendment safeguards are twofold. First, the law "distinguishes between ideas and expression and makes only the latter eligible for copyright protection." Ibid. The copyrights in foreign works restored by the URAA, like domestic copyrights, do not extend to ideas per se, but serve only to "protect[] authors' original expression [of such ideas] from unrestricted exploitation." Id. at 221. As the Supreme Court stated in Harper & Row, the "idea/expression dichotomy 'strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.'" 471 U.S. at 556 (internal citation omitted).

Second, and relatedly, copyright law provides an exception for fair use, which "allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances." Id. at 219. Under 17 U.S.C. § 107, the exclusive rights guaranteed by copyright do not include "fair use . . . for purposes such as criticism, comment, news

reporting, teaching (including multiple copies for classroom use), scholarship, or research." The fair use exception "affords considerable 'latitude for scholarship and comment,' . . . and even for parody." Eldred, 537 U.S. at 219-20 (internal citations omitted). The fair use exception safeguards the public discussion and debate inspired by copyrighted works, while prohibiting the wholesale infringement of such works: it "'distinguishes between 'a true scholar and a chiseler who infringes a work for personal profit.'" Harper & Row, 471 U.S. at 563 (internal citations omitted).

The Eldred Court described the idea/expression dichotomy and the doctrine of fair use as the two "traditional First Amendment safeguards" at work in the copyright law. 537 U.S. at 220. It further noted that the protection of expression through copyright "does not raise the free speech concerns present when the government . . . burdens the communication of particular facts or ideas. The First Amendment securely protects the freedom to make . . . one's own speech; it bears less heavily when speakers assert the right to make other people's speeches." Id. at 221.¹⁰

¹⁰ Indeed, Eldred stressed that copyright protection also exists to serve First Amendment values; its purpose is "to promote the creation and publication of free expression," 537 U.S. at 219, by supplying "'the economic incentive to create and disseminate ideas.'" Ibid. (quoting Harper & Row, 471 U.S. at 558). The power to restrict others' exploitation of a work, including creating derivative works from the original, similarly protects a First Amendment interest not to speak. See Harper & Row, 471 U.S. at 559-60.

The Court therefore concluded that, to the extent that copyright protections "raise First Amendment concerns, copyright's built-in free speech safeguards are generally adequate to address them," ibid. -- unmistakably referring to the "traditional First Amendment safeguards" it had described two paragraphs earlier. Id. at 220. In this context, while the Court acknowledged that copyrights may not be "'categorically immune from challenges under the First Amendment,'" id. at 221 (citation omitted) -- i.e., the mere label of "copyright," applied without regard to fair use or the idea/expression distinction, would not immunize a statute from First Amendment review -- it held that "when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary." Ibid.

Section 514 of the URAA leaves these traditional safeguards of First Amendment interests intact. The idea/expression dichotomy and the doctrine of fair use are retained by the statute, for the copyrights restored to foreign authors are perfectly coextensive with those enjoyed by American authors. They last for precisely the same term, expire on precisely the same day, offer precisely the same protections against others' exploitation, and include precisely the same exceptions for pure ideas and fair use. The "built-in free speech safeguards" of copyright law, ibid., are thus preserved inviolate.

Plaintiffs do not claim to make use of pure ideas, nor do they claim to engage in fair use. Their proposed actions, which would constitute garden-variety copyright infringement, receive no First Amendment protection. Compare Harper & Row, 471 U.S. at 558 ("The public interest in the free flow of information is assured by the law's refusal to recognize a valid copyright in facts. The fair use doctrine is not a license for corporate theft").

The only difference between American works and foreign works restored under the URAA is that the latter have gone unprotected for much of their existence, at the expense of their foreign authors. URAA-restored works thus by definition enjoy a considerably shorter span of copyright protection than their American counterparts. Unless plaintiffs can establish that the copyright afforded to American works is similarly unconstitutional on First Amendment grounds -- an argument squarely foreclosed by Eldred -- the URAA's protection of foreign works must be upheld. The district court therefore appropriately treated the constitutional legitimacy of existing copyright law as a "settled rule," and declined to waste time and ink by "expand[ing] upon" it further. Golan II, Aplt. App. 2348.

B. Plaintiffs' Alternative Standard Rests On A Misreading Of Eldred And Should Be Rejected.

Plaintiffs reject this straightforward analysis of Eldred. They recognize, as did the Court, that "when . . . Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary." 537 U.S. at 221. On plaintiffs' alternative reading, however, the phrase "the traditional contours of copyright protection" does not refer to the "traditional First Amendment safeguards," id. at 220, discussed for the previous three pages of the Eldred opinion. Instead, plaintiffs maintain that the six-word phrase set out a new standard -- never before articulated in the Court's jurisprudence -- of applying First Amendment review to any copyright statute of sufficient novelty. To plaintiffs, "deviations from a tradition[] requir[e] ordinary First Amendment review," regardless of their particular relation to speech, and the URAA represents just such a "deviation." Aplt. Br. 28. Such a historical-novelty standard is entirely alien to the context and reasoning of Eldred, as well as to First Amendment doctrine, and should not be adopted in this case.

1. Eldred Does not Establish a "Historical-Novelty" Standard.

In context, it is unmistakably clear that the "traditional contours" referred to by the Court comprise the idea/expression dichotomy and the doctrine of fair use. These are the

"traditional First Amendment safeguards," Eldred, 537 U.S. at 220, and the "built-in First Amendment accommodations," id. at 219, which the Eldred Court took great care to describe -- and which plaintiffs' brief does not once mention. These are the exceptions that render the "limited monopolies" of copyright "compatible with free speech principles." Ibid. These are also the factors described in Harper & Row, which the Court specifically cited as authority with regard to the "traditional contours." See Eldred, 537 U.S. at 221; Harper & Row, 471 U.S. at 560.¹¹

The Court's reference in Eldred to "traditional contours" thus did not create a new standard, but merely repeated prior law, which holds that the idea/expression dichotomy and the doctrine of fair use ensure the consistency of private copyright enforcement with the First Amendment. This interpretation is also the only one consistent with the structure of the Eldred opinion. Although the Eldred Court certainly considered the CTEA's term extensions to be consistent with past practice, 537 U.S. at 200-204, it did not dispose of the First Amendment question on those grounds. Instead, the Supreme Court discussed at length the unique features of copyright law that secure First Amendment values. The Court simply did not suggest, let alone

¹¹ Neither Harper & Row nor San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987) -- the other case cited in this passage of Eldred -- sets forth any principle resembling plaintiffs' historical-novelty standard.

hold, that historical novelty is itself the relevant subject for inquiry.

Plaintiffs inexplicably treat the foregoing analysis as "effectively conceded[ing]" the propriety of their standard. Aplt. Br. 24; cf. Defendants' Notice of Motion & Motion to Dismiss Plaintiffs' Amended Complaint, Kahle v. Ashcroft, No. C-04-1127 MMC (N.D. Cal.), reprinted in Aplt. App. 532, 557-59. This fundamentally misconceives the Government's position, which has consistently described the idea/expression dichotomy and the doctrine of fair use -- both of which the URAA leaves untouched -- as the particular "traditional contours" relevant to First Amendment analysis.

Plaintiffs cannot identify a single court that has interpreted the First Amendment in the fashion they desire. They misread Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001), to endorse their standard, Aplt. Br. 25, but the "First Amendment protections interwoven into copyright law" mentioned by Suntrust Bank are explicitly described to be "the fair use factors" and the "idea/expression dichotomy." 268 F.3d at 1264-65. At least two courts since Eldred have agreed with this enumeration, and have squarely rejected plaintiffs' analysis. See Luck's Music Library, Inc. v. Ashcroft, 321 F. Supp. 2d 107, 119 (D.D.C. 2004) (holding that "Congress has not altered the traditional contours of copyright protection,"

because the URAA "does not alter First Amendment accommodations such as the idea/expression dichotomy or the fair-use doctrine."), aff'd on other grounds, 407 F.3d 1262 (D.C. Cir. 2005); Kahle v. Ashcroft, 2004 WL 2663157, *17 (N.D. Cal. Nov. 19, 2004), appeal pending.

2. A Historical-Novelty Standard Would be Incompatible with First Amendment Doctrine, as well as Unmanageable.

Plaintiffs' proposed historical-novelty standard would be inconsistent with established First Amendment doctrine and impossible to administer. Mere "novelty" in light of past copyright practice is entirely irrelevant to First Amendment values. The elimination in 1988 of the requirement to affix a copyright notice surely departed in some sense from traditional copyright protection (which had long required notice), but would not have required First Amendment scrutiny. What matters for First Amendment analysis is whether copyright's traditional First Amendment safeguards -- fair use and the idea/expression dichotomy -- have been altered, creating obstacles to others' use of copyrighted material in the course of speech. This is why the Court in Eldred referred to the "traditional contours of copyright protection," 537 U.S. at 221 (emphasis added); see also Kahle, 2004 WL 2663157, at *17 ("The concepts of copyright law that the Supreme Court suggests fall within those contours--the idea/expression dichotomy and the fair use exception--each relate

to the scope of copyright protection.").

Applied to cases beyond abandonment or alteration of the two traditional First Amendment safeguards recognized in copyright law, the historical-novelty standard would be incompatible with traditional modes of First Amendment review. Plaintiffs suggest applying the intermediate scrutiny of Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997), requiring that content-neutral restrictions of speech not "'burden[] substantially more speech than necessary to further [the Government's] interests.'" See Aplt. Br. 46. Such an approach would quickly embroil the courts in questions they were not meant to face.

The logic of plaintiffs' argument is that every time Congress amends the copyright statutes, the First Amendment is implicated and heightened scrutiny is appropriate. Compared to a 95-year restored copyright, for example, a term of 94 years would by definition be less speech-restrictive; so would a law that preserved copyright on books but not on newspapers or sound recordings. Rather than transform every change in copyright law into a separate First Amendment question, however, the Supreme Court has recognized the broad discretion of Congress, subject to the requirements of the Copyright Clause, the questions of which works will be copyrighted, who receives the right, and when copyright terms will expire. This is the only approach to First Amendment review consistent with the grant of power in the

Copyright Clause, and it entirely forecloses application of plaintiffs' historical-novelty standard.¹²

II. SECTION 514 OF THE URAA IS WITHIN THE POWER OF CONGRESS UNDER THE COPYRIGHT CLAUSE.

As the D.C. Circuit recently held in a virtually identical case not even cited by plaintiffs (despite the participation of their counsel in the D.C. district court proceedings), Section 514 of the URAA passes muster under the Copyright Clause of the Constitution. Luck's Music Library, Inc. v. Gonzales, 407 F.3d 1262 (D.C. Cir. 2005). Plaintiffs provide no basis for the Court to go into conflict with the D.C. Circuit on this issue.

A. The Text Of the Copyright Clause Supports Congress' Power To Enact Section 514 Of The URAA.

The power of Congress to enact Section 514 of the URAA is established by the plain text of the Constitution. The Constitution grants to Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their

¹² Even if this Court were to adopt plaintiffs' historical-novelty standard, and even were it to find the URAA sufficiently "novel," the statute should still be upheld under plaintiffs' proposed "undue burden" analysis. As we show below, the URAA is entirely consistent with congressional practice regarding copyrights for the past two centuries. Moreover, because Congress viewed the URAA as necessary to establish compliance with international treaties (and to secure protection abroad for American authors), the URAA -- even if viewed as a restriction on speech -- imposes exactly as great a burden as is "'necessary to further [the Government's] interests.'" Aplt. Br. 46. The statute should therefore be upheld without additional First Amendment inquiry, even under the plaintiffs' historical-novelty standard.

respective Writings and Discoveries." U.S. Const., art. I, § 8, cl. 8. The restoration of copyrights under the URAA falls squarely within that power. It secures to the authors of certain foreign works the remainder of the copyright terms to which they were originally entitled.

Plaintiffs dispute neither that the holders of restored copyrights are the authors or legitimate rightholders in the restored works, nor that the restored works themselves, at the time of their creation, were original and deserving of copyright protection.¹³ Nor, in their analysis of the Copyright Clause, Aplt. Br. 46-54, do plaintiffs contest the district court's finding that the URAA serves to "promote the Progress of Science and the useful Arts" by assuring current and future American authors that their copyrights will be respected abroad.¹⁴ See Golan II, Aplt. App. 2347 ("Congress was here attempting to promote protection of American authors by ensuring compliance with the Berne Convention within our own borders."). Instead, they rest their entire Copyright Clause challenge on the contention that the restoration of copyrights violates the

¹³ Restored works must already comply with the originality requirement; the URAA only restores copyrights in works that would have been eligible for protection but for failure to satisfy statutory formalities or lack of national eligibility or subject-matter protection. See Luck's Music, 407 F.3d at 1263; 17 U.S.C. § 104A(h)(6) (limiting the URAA's application to "original work[s] of authorship").

¹⁴ "Failure to raise an issue in an opening appellate brief waives the issue." Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co., 407 F.3d 1091, 1116 n. 21 (10th Cir. 2005).

requirement that copyrights be granted for "limited Times" (id. at 46) -- a claim not even mentioned in their First or Second Amended Complaint (which focused upon the now-abandoned "Progress of Science" and "originality" arguments, see n.6, supra).

The restored copyrights, however, indisputably are granted for "limited Times." The term for a restored copyright is of the same length as the term for domestic copyrights explicitly upheld in Eldred. If anything, the URAA's terms are shorter, because the term of a restored work ends on the same day as the term of a domestic work that was created or published on the same day, but the term of a restored work will have commenced later (in most cases many years later, upon restoration) than the term of its domestic counterpart.

For instance, the authors of a work such as Night Train to Munich, which was created in 1940, had by 1997 already been deprived of their first 57 years of copyright protection. The URAA merely restored to them the short remainder; it does not grant copyrights anew to works whose terms have simply expired, or extend the length of such copyrights beyond those available to domestic authors.¹⁵ The restored copyright is just as "limited" as an ordinary copyright.

¹⁵ Indeed, the URAA prohibits restoration of a work if the copyright term in its home country has already elapsed. 17 U.S.C. § 104A(h) (6) (B).

Even if a restored copyright were thought to merit stricter scrutiny than a domestic copyright of equal length, the terms of the URAA clearly meet the standard for "limited Times" enunciated in Eldred. To be "'limited,'" the Eldred Court held, the copyright term need not be "forever 'fixed' or 'inalterable'": rather, it must be "'confine[d] within certain bounds,' 'restrain[ed],' or 'circumscribe[d].'" 537 U.S. at 199 (citations omitted). The URAA is clearly thus confined. The protection of a restored work expires on the very day it would have expired had the author been nationally eligible for protection, or successful in complying with the relevant formalities. To paraphrase Eldred, "a timespan appropriately 'limited' as applied to [domestic] copyrights does not automatically cease to be 'limited' when applied to [restored] copyrights." Ibid.

Finally, as the D.C. Circuit observed in upholding Section 514 of the URAA, the URAA provides protections for "reliance parties" who have exploited the work without notice of its restoration. Luck's Music, 407 F.3d at 1265; see also 17 U.S.C. § 104A(d)(2). Plaintiffs do not challenge the adequacy of these provisions. Congress manifestly has the power to rectify the unfairness to those who lost all of the value of their works for decades because of their national origin or the technicalities of American law. Golan II, Aplt. App. 2350. Though plaintiffs such

as McDonough have enjoyed a windfall of many decades at foreign authors' expense, there is no constitutional requirement that this windfall be preserved in perpetuity.

B. History Confirms The Constitutionality Of Section 514 Of The URAA.

As the Supreme Court observed in Eldred, in determining Congress's power under the Copyright Clause, "'a page of history is worth a volume of logic.'" 537 U.S. at 200 (citation omitted). The history of copyright in the United States reveals an unbroken tradition, from the Founding to the present day, of attributing to Congress the power to restore copyrights on original works that lacked effective legal protection. Moreover, in reviewing a statute enacted by Congress, this Court "begins the analysis with a presumption of constitutionality," United States v. Monts, 311 F.3d 993 (10th Cir. 2002), cert. denied, 538 U.S. 938 (2003) -- a presumption that plaintiffs' inaccurate historical arguments cannot overcome.

1. The First Congress Began a Tradition of Restoring Copyright in 1790.

The restoration of copyright in unprotected works began with the very first federal copyright act in 1790. Section 1 of the 1790 Act provided copyright protection for "any map, chart, book or books already printed within these United States," as well as existing unpublished works. Aplt. App. 2105. Congress declined in the 1790 Act to follow the approach of some of the states,

such as New Jersey, whose initial copyright statutes applied prospectively only to works "not yet printed." See, e.g., 8 Melville B. Nimmer & David Nimmer, Nimmer on Copyright App. 7[C][4] at App. 7-19, Aplt. App. 2074. Rather, it enacted a new statutory protection for "existing works . . . and future works alike." Eldred, 537 U.S. at 194.

Prior to 1790, three states (Delaware, Maryland, and Pennsylvania) provided no statutory protection whatsoever to published works.¹⁶ The other ten states required authors to meet various formalities of registration, deposit, or notice. An author who had failed to comply with these formalities, like a non-compliant foreign author in this century, would have had no remedy against others' exploitation.¹⁷ Additionally, in ten of the thirteen states, no statutory protection was available for

¹⁶ Delaware never enacted copyright legislation. See Bruce W. Bugbee, Genesis of American Patent and Copyright Law 123-24 (1967), Aplt. App. 1908-09. The copyright statutes of Maryland and Pennsylvania would not become effective until "similar laws" were enacted "in all and every state of the United States," meaning that those statutes never took effect. 8 Nimmer App. 7[C][3] at App. 7-18, Aplt. App. 2075; id. App. 7[C][7] at App. 7-25, Aplt. App. 2083.

¹⁷ States with registration requirements included Connecticut, Aplt. App. 2069; New Jersey, Aplt. App. 2076; South Carolina, Aplt. App. 2085; Virginia, Aplt. App. 2088-89; Georgia, Aplt. App. 2092; and New York, Aplt. App. 2095. Deposit requirements were imposed by Massachusetts, Aplt. App. 2072-73, and North Carolina (which also specifically protected the right to publish previously-published works), Aplt. App. 2090-91. Two more states, New Hampshire, Aplt. App. 2078, and Rhode Island, Aplt. App. 2080, imposed a notice requirement of printing the author's name with the work (thereby prohibiting copyright on pseudonymous works).

published maps and charts.¹⁸ In all of these cases, however, authors could register for and receive federal copyright protection under the new law.

In extending copyright to all works already published in the United States, the First Congress "anticipated the removal of some works from the public domain," and "evidently determined that such a practice was constitutionally permissible." Golan II, Aplt. App. 2339. The D.C. Circuit reached the same conclusion in Luck's Music, 407 F.3d at 1265. Under Eldred, moreover, such a determination by the First Congress is entitled to "'almost conclusive'" weight. 537 U.S. at 213 (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884)).

Plaintiffs, however, deny that the 1790 Act extended protection to unprotected works, and advance two arguments to this end. First, plaintiffs claim that "no works could have been removed from the public domain of the United States by the 1790 Act, because before 1790, there was no copyright law for the jurisdiction of the United States." Aplt. Br. 29. In other words, plaintiffs consider the First Congress to have been logically incapable of removing works from the public domain, even if it had tried to grant George Washington a copyright on Hamlet.

¹⁸ The exceptions were Connecticut, Aplt. App. 2069-71; North Carolina, Aplt. App. 2090-91; and Georgia, Aplt. App. 2092, 2094. Each of these three refused to protect citizens of other states unless those states enacted reciprocal statutes.

This semantic argument fails on its own terms. Had Congress chosen never to exercise its copyright power, everything would be in the public domain "of the United States" -- there would be no federal law against copying another's work. Congress chose to make the very first exercise of its copyright power retrospective, placing a federal ban on what previously had been free exploitation. In plaintiffs' terminology, this surely represents a removal of works from the "public domain."

Moreover, plaintiffs misconceive the purpose of constitutional history: the goal is not to develop fanciful meanings of the term "public domain," which does not appear in the Constitution, but to understand the Copyright Clause, which does. The First Congress made an explicit choice to protect unprotected works "already printed," Aplt. App. 2074, not only those published after the date of enactment. There is no evidence whatsoever of contemporary concern that such copyrights exceeded "limited Times."

Plaintiffs' second argument asserts that the government must identify particular works registered under the 1790 Act that had not been protected in any state. Aplt. Br. 31-33. Again, plaintiffs mistake the question, which is not how many individual books fell into this category -- a virtually unanswerable question given that "not all of the records survived," id. at 32 -- but whether the First Congress would have considered such

protection to exceed the requirement of "limited Times." The 1790 Act, as shown above, explicitly extended protection to existing published works that had received no protection under state copyright statutes.

Plaintiffs claim, however, that even if the works protected by the 1790 Act were ineligible for statutory copyright, "no one can establish the status of state common law copyright at the time of the 1790 Act," for at the time "the status of common law copyright was uncertain." Aplt. Br. 34. Plaintiffs describe their confusion at some length. Id. at 34-37. The Supreme Court, however, has repeatedly clarified the status of common law copyright at the time of the 1790 Act.

In Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834), in denying a Pennsylvania plaintiff's claim of common law copyright, the Court distinguished between common law protection before and after publication. As the Court explained,

[t]hat an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavours to realise a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.

Id. at 657.

A common law post-publication copyright, the Court observed, had never been asserted in Pennsylvania, id. at 659, and "[n]o such right at the common law had been recognized in England, when

the colony of Penn was organized." Id. at 660. The question first became the subject of judicial inquiry in England in 1760, id., and the Court described the resulting uncertainty of the English common law -- which ultimately concluded against the existence of the copyright, see Donaldson v. Becket, 98 Eng. Rep. 257 (H.L. 1774) (holding that any common-law post-publication copyright had been extinguished by the Statute of 8 Anne, c. 19 (1710)), overruling Millar v. Taylor, 98 Eng. Rep. 201 (K.B. 1769) -- as evidence precluding the importation of any common law post-publication copyright into the newly independent states: "[c]an it be contended, that this common law right, so involved in doubt as to divide the most learned jurists of England . . . was brought into the wilds of Pennsylvania by its first adventurers[?]" Wheaton, 33 U.S. at 660. The Framers of the Constitution had assumed that it was not:

[T]he word "secure," as used in the [Copyright Clause], could not mean the protection of an acknowledged legal right. It refers to inventors, as well as authors, and it has never been pretended, by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented.

Id. at 661 (emphasis added).

The First Congress, the Court held, had operated under similar assumptions:

That congress, in passing the act of 1790, did not legislate in reference to existing rights, appears clear, from the provision that the author, &c. 'shall have the sole right and liberty of printing,' &c. Now if this exclusive right existed at common law, and

congress were about to adopt legislative provisions for its protection, would they have used this language? Could they have deemed it necessary to vest a right already vested. . . .

Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it. This seems to be the clear import of the law, connected with the circumstances under which it was enacted.

Ibid. (emphasis added); see also id. at 663 ("This right, as has been shown, does not exist at common law-it originated, if at all, under the acts of congress.").

Wheaton therefore concluded that at the time of the 1790 Act, no common law post-publication copyright existed in the United States; these protections were granted to unprotected works by the First Congress. Plaintiffs concede as much, reading Wheaton to hold that "whatever common law copyright there was, it did not survive publication." Aplt. Br. 35.¹⁹

Nor was Wheaton an anomaly. The Supreme Court concluded in Globe Newspaper Co. v. Walker, 210 U.S. 356 (1908), that "[i]n this country the right of an author to multiply copies of books, maps, etc., after publication, is the creation of the Federal statutes. These statutes did not provide for the continuation of

¹⁹ With regard to Wheaton, the district court described the government's contention as being that authors held no common law copyright whatsoever, even before publication. Golan II, Aplt. App. 2332. However, the position of the government, both here and below, is that any pre-1790 common law copyright did not survive the act of publication. See Golan II, Memorandum in Support of Defendants' Motion for Summary Judgment ("Mem. Def. MSJ"), 17, Aplt. App. 353 ("[T]he common law, as it existed prior to the 1790 Act, did not protect published works.").

the common-law right, but, under constitutional authority, created a new right." Id. at 362; see also Caliga v. Inter Ocean Newspaper Co., 215 U.S. 182, 188 (1909) ("[W]hen a book was published in print, the owner's common-law right was lost."). The holdings of the Supreme Court provide an unambiguous construction of the common law of copyright at the time of the 1790 Act.

These holdings are not to be compared with other historical sources, as if they were merely the work of a handful of historians who happened to wear black robes. Cf. Aplt. Br. 36 ("[W]hatever the Supreme Court's view of state common law copyright was in 1834 . . ."). Rather, they represent binding precedent. The status of the common law in 1790 is a legal question for courts to resolve, as construction of the law is a legal task. United States v. Turner, 52 U.S. (11 How.) 663, 668 (1850) (holding that the "laws which formerly prevailed" in a state "must be judicially noticed and expounded by the court," being "questions of law and not questions of fact"); Oklahoma ex rel. Dept. of Human Servs. v. Weinberger, 741 F.2d 290, 291 (10th Cir. 1983) ("[Q]uestions of statutory construction and legislative history . . . present legal questions properly resolved by summary judgment."), cert. denied, 466 U.S. 971 (1984). The Supreme Court in Wheaton, Globe Newspaper, Caliga and elsewhere has construed the laws of the several states circa

1790 as extending common-law protection to works before, but not after, publication. This construction is a conclusion of law necessary to the Court's resolution of Wheaton and its progeny, and has precedential effect unless and until these cases are overruled.

Plaintiffs incorrectly assert that the Eldred Court considered the pre-1790 common law obscure. Aplt. Br. 37. Eldred chose not to investigate the common law because it was irrelevant to the question presented in that case, which concerned Congress's power to extend additional copyright protection to works already in existence. The 1790 Act "clearly did" extend copyright to works "that had already been created," Eldred, 537 U.S. at 196 n.3, and no further investigation was required.

Finally, plaintiffs' alternative theory of the 1790 Act, that Congress merely wished to establish a "baseline" by eliminating perpetual copyright, Aplt. Br. 38, is historically untenable. Plaintiffs' own authorities, Messrs. Patterson and Walterscheid (see id. at 34), maintain that "[c]opyright was not secured by law in colonial America," Lyman Ray Patterson, Copyright in Historical Perspective 183 (1968), and that for "all intents and purposes, no colonial copyright practice existed," Edward C. Walterscheid, To Promote the Progress of Science and Useful Arts, 2 J. Intell. Prop. L. 1, 20 (1994). All the state

copyright statutes provided for limited terms, and in Pennsylvania, which had no copyright statute in effect, a common law right had never been asserted in court. Wheaton, 33 U.S. at 659; see also 1 William Crosskey, Politics and the Constitution in the History of the United States 485-86 (1953) (stressing the hostility of most of the states to the notion of common law copyright).

Plaintiffs' most detailed contemporary source is an editorial by Noah Webster, Aplt. Br. 35. Webster, however, had for years sought post-publication copyrights for his own work from state legislatures. See Bugbee 123, Aplt. App. 1908 (noting "the many errors in Webster's account," and adding that "Webster was interested primarily in securing private copyrights for his personal benefit"). Tellingly, Webster's own lobbying efforts belie the assertion that authors enjoyed effective, let alone perpetual, common law protection.

Thus, even disregarding Supreme Court precedent, plaintiffs present no evidence that the First Congress legislated against a background of common law post-publication copyright, let alone perpetual copyright. Rather, the First Congress extended protection to previously unprotected works. As the district court noted, even "a slight expansion of then-existing copyright law in 1790 would be sufficient to support the Government's argument on this point." Golan II, Aplt. App. 2330; see also

Luck's Music, 407 F.3d at 1265 ("If such works were unprotected by common law copyright, [the 1790 Act] would necessarily have granted protection to works previously unprotected -- that is, works in the public domain."). And even assuming arguendo that "the status of common law copyright was uncertain" (Aplt. Br. 34), this proposition merely proves that the First Congress was unconcerned about whether it was granting copyrights to works in the public domain -- thus indicating that the Framers saw no constitutional impediment to such action.

2. Restoration was Viewed as Constitutional Throughout the Nineteenth Century.

The First Congress's understanding of the Copyright Clause was shared by subsequent generations. In the nineteenth century, Congress repeatedly acted in private bills to restore copyrights after authors failed to comply with various statutory formalities. For instance, Levi Corson's work fell into the public domain "by mistake" when he registered for a copyright in the Southern District rather than the Northern District of New York. He was allowed to re-register by virtue of a private bill, which like the URAA included reliance provisions to protect those who had "printed, published, or vended the same work . . . in the absence of a copy-right duly obtained by the authors." An Act for the Relief of Levi H. Corson, ch. 57, 9 Stat. 763 (Feb. 19, 1849); see also An Act for the Relief of William Tod Helmuth, ch.

534, 18 Stat., pt. 3, at 618 (June 23, 1874); An Act for the Relief of Judson Jones, ch. 29, 30 Stat. 396 (Feb. 17, 1898).

Additionally, on at least two occasions, Congress restored to the widow of a public servant a 14-year copyright in her husband's work, which had been published "under order of Congress" and was therefore in the public domain. See An Act for the Relief of Mistress Henry R. Schoolcraft, ch. 16, 11 Stat. 557 (Jan. 25, 1859); An Act for the Relief of Mrs. William L. Herndon, ch. 99, 14 Stat. 587 (May 24, 1866).

At the same time, Congress applied a similar understanding to restorations of patents. Oliver Evans' patent for improvements in milling flour expired in 1805; three years later, Congress by private bill extended his patent term for another 14 years, while including reliance provisions to protect parties in the interim. See An Act for the Relief of Oliver Evans, ch. 13, 6 Stat. 70, 70-71 (Jan. 21, 1808); P. J. Federico, The Patent Trials of Oliver Evans (Part I), 27 J. Pat. Off. Soc'y 586, 597 (1945).

This statute was upheld against a constitutional challenge in Evans v. Jordan, 8 F. Cas. 872 (C.C.D. Va. 1813) (Marshall, Circuit Justice), aff'd, 13 U.S. (9 Cranch) 199 (1815). The restoration of patents was considered "one of those subjects which is, by the constitution of the United States, delegated entirely to the government of the Union," id. at 872; the private

bill was a legitimate "exercise of this constitutional power," ibid., because "[t]hat construction of the constitution which admits the renewal of a patent [after its expiration] is not controverted." Id. at 874; accord, Evans v. Robinson, 8 F. Cas. 886, 888 (C.C. Md. 1813) (holding that Congress has "the exclusive right by the constitution to limit the times for which a patent right shall be granted, and [is] not restrained from renewing a patent"); Evans v. Eaton, 8 F. Cas. 846 (C.C. Pa. 1816), rev'd on other grounds, 16 U.S. (3 Wheat.) 454 (1818).

A similar private bill, An Act to Renew the Patent of Thomas Blanchard, ch. 213, 6 Stat. 589 (June 30, 1834), explicitly restored patent rights "after the expiration of the patent heretofore granted." It was upheld in Blanchard v. Sprague, 3 F. Cas. 648 (C.C. Mass. 1839). Justice Story, sitting as Circuit Justice, declared that he had "never entertained any doubt of the constitutional authority of congress" to make a grant that "operates retrospectively to give a patent for an invention, which, though made by the patentee, was in public use and enjoyed by the community at the time of the passage of the act." Id. at 650 (emphasis added).

Congress continued to restore patent rights throughout the nineteenth century. See An Act for the Relief of William Gale, ch. 131, 6 Stat. 895 (Mar. 3, 1843); An Act for the Relief of John Goulding, ch. 88, 12 Stat. 904 (May 30, 1862) (upheld in

Jordan v. Dobson, 13 F. Cas. 1092 (C.C. Pa. 1870) (Strong, Circuit Justice)); An Act for the Relief of the Heirs of William Graham, ch. 187, 20 Stat. 542 (June 11, 1878) (upheld in The Fire-Extinguisher Case, 21 F. 40 (C.C. Md. 1884)). In 1832, a general law allowed patent owners to surrender and then restore patents which had become "invalid or inoperative" for failure to comply with legal formalities "by inadvertence, accident, or mistake." An Act Concerning Patents for Useful Inventions ("1832 Patent Act"), § 3, 4 Stat. 559 (July 3, 1832). This law was discussed by the Supreme Court in McClurg v. Kingsland, 42 U.S. (1 How.) 202, 207 (1843). See also Eldred, 537 U.S. at 202-03 (observing that the inventor in McClurg "was unprotected under the law in force when the patent issued," and that "[o]nly upon enactment, two years later, of an exemption . . . did the patent become valid, retroactive to the time it issued"); Luck's Music, 407 F.3d at 1266.

Plaintiffs argue that such failures did not always place the invention in the public domain. Aplt. Br. 53. This is true, but irrelevant, for some errors in patent applications undeniably would place inventions in the public domain as entirely "inoperative and invalid." See ibid. (recognizing that "such drafting errors could result in the patent being invalid"); Grant v. Raymond, 31 U.S. (6 Pet.) 218 (1832) ("[A] failure on the part of the patentee, in those pre-requisites of the act which

authorise a patent, is a bar to a recovery in an action for its infringement."). An invention freely exploitable by others is in the public domain, yet such fatal errors could still be corrected under the 1832 Patent Act.

Contemporary courts routinely upheld these statutes under the "limited Times" clause. As Justice Strong wrote in Jordan,

It is not said when those limited times shall commence, how long they shall continue, or when they shall end. All that is left to the discretion of congress. I see no reason why, under this commission, congress may not secure to an inventor an exclusive right to his invention for a limited period, beginning at any time after the invention is made I am not aware that it has ever been seriously thought congress has not power, after a patent has expired, to provide for its extension.

13 F. Cas. at 1095 (emphasis added). As Eldred observed approvingly, the courts "saw no 'limited Times' impediment to such extensions; renewed or extended terms were upheld in the early days." 537 U.S. at 202. Plaintiffs do not distinguish these cases, which were cited previously by the government. See generally Mem. Def. MSJ 20-23, Aplt. App. 356-59. Although the constitutional requirements for patents and copyrights may differ, see infra at p. 55, patent's limitations were considered by Eldred to be "more exacting than copyright's" -- meaning that repeated restoration of patents "without constitutional objection suggests even more strongly that similar legislation with respect to copyrights is constitutionally permissible." 537 U.S. at 217 n.22.

3. Twentieth-Century Statutes Continued the Practice of Restoring Copyrights.

In the twentieth century, both Congress and the Executive provided on multiple occasions for the restoration of foreign works. The 1909 Copyright Act authorized the President to determine whether a foreign nation granted sufficient protection to American works, in which case its citizens would receive reciprocal protection in the United States. An Act to Amend and Consolidate the Acts Respecting Copyright ("1909 Copyright Act"), Pub. L. No. 60-349, § 8, 35 Stat. 1075 (Mar. 4, 1909). On April 9, 1910, President Taft issued a proclamation that Germany had provided sufficient protection as of the previous July 1. Although a German work published before the proclamation would initially have been ineligible for copyright (and thus in the public domain), its eligibility would have subsequently been restored. See 29 Op. Att'y Gen. 64 (1911); 28 Op. Att'y Gen, 222 (1910); cf. 2 Nimmer on Copyright § 1.05[A][2] n.10 ("When a Presidential proclamation specifies a date earlier than its issuance on which copyright protection for a given country should commence, . . . [t]hat course of action may be conceptualized as a recapture of public domain materials, justified on the basis of harmonious foreign (copyright) relations.").

At the conclusion of World War I, Congress authorized the President to restore copyrights in foreign works published abroad without the necessary statutory formalities. Act of Dec. 8, 1919

("1919 Act"), Pub. L. No. 66-102, 41 Stat. 368-69; see also S. Rep. No. 66-326, 3 (1919) (endorsing concept of "retrospective protection of works").²⁰ Congress broadened that authority during World War II, authorizing the President to restore the copyright of foreign works when the author "may have been temporarily unable to comply with [copyright formalities] because of the disruption or suspension of facilities essential for such compliance." Emergency Copyright Act of 1941 ("1941 Act"), Pub. L. No. 77-258, 55 Stat. 732. The 1941 Act further provided the President with authority to grant "such extension of time as he may deem appropriate for the fulfillment of such conditions."

For instance, on July 12, 1967, President Johnson restored the possibility of copyright renewal for German works subject to renewal between Sept. 3, 1939, and May 5, 1956, which had been in the public domain and freely exploitable for at least 11 years.²¹ 32 Fed. Reg. 10,341. These proclamations "allowed foreign authors to restore copyright to their works, which had fallen

²⁰ Plaintiffs claim that notice was the sole copyright requirement at the time of the 1919 Act. Aplt. Br. 42. However, foreign works in English were also subject to "manufacturing clause" requirements easily disrupted by the war. See 1909 Copyright Act, § 15, 35 Stat. 1075, 1078-79.

²¹ See also 41 Stat. 1790 (1920) (Great Britain); 42 Stat. 2271-78 (1922) (Germany, Austria, New Zealand, Italy, Hungary); 58 Stat. 1129-31 (1944) (Great Britain); 61 Stat. 1057-58 (1947) (France); 61 Stat. 1065-66 (1947) (New Zealand); 64 Stat. A385 (1949) (Australia); 66 Stat. c5-6 (1951) (Finland); 74 Stat. c69-71 (1960) (Austria).

into the public domain of the United States." Luck's Music, 321 F. Supp.2d at 115.

Plaintiffs attempt to distinguish the wartime statutes by describing them as mere "extensions of time," Aplt. Br. 42, and by redefining the "public domain" to exclude works over which the authors hold any potential "reversionary interests." Aplt. Br. 43. Such semantic arguments fail for two reasons.

First, a law authorizing President Johnson to restore a work in 1967 that had become freely exploitable in 1939 is not an "extension of time," but a true restoration of copyright. See Luck's Music, 407 F.3d at 1265-66 (stating that "such works would necessarily have already entered the public domain"). In fact, like the URAA, the wartime statutes also incorporated reliance provisions (see 41 Stat. at 369; 55 Stat. at 732), designed to "protect the rights lawfully exercised by American users or publishers of copyrighted works[,] protection of which had lapsed." H.R. Rep. No. 77-619, at 2 (1941) (emphasis added).

Second, the task at hand is not to explore all the vagaries of the term "public domain," but to apply the constitutional text of "limited Times." As under the URAA, foreign works were restored under the wartime statutes only to the copyright terms they would have enjoyed had the various formalities been observed. Moreover, any "reversionary interest" theory was explicitly rejected in The Fire-Extinguisher Case, 21 F. at 43

("The right which the public has acquired to use the thing invented, by reason of the applicant for a patent failing to do something prescribed by congress, and the necessity for which congress might, by previous legislation, have dispensed with, has never been held to be a vested right."). The wartime statutes merely continue the tradition, begun in 1790, of congressional authority to restore unprotected works to their limited copyright terms.

Plaintiffs also argue, in self-contradictory fashion, that failure to comply with formalities never placed works into the public domain in the first place; thus, earlier acts allowing "copyright holders to 'cure' failures to comply" did not remove works from the public domain. See Aplt. Br. 40. If so, then the URAA's similar correction of prior failures does not remove works from the public domain either.

Finally, plaintiffs misinterpret the statement in section 7 of the 1909 Copyright Act that "[n]o copyright shall subsist in the original text of any work which is in the public domain." Aplt. Br. 41. This statutory provision does not establish a constitutional principle binding on future Congresses, and certainly could not have precluded Congress from enacting the 1919 and 1941 Acts, amending the 1909 Act and removing items from the public domain. The same is true of the various statutory interpretation cases such as Singer Mfg. Co. v. June Mfg. Co.,

163 U.S. 169 (1896), and Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003), which were "concerned . . . with the boundaries of authors' statutory rights, not of congressional authority." Golan II, Aplt. App. 2326-27.

C. Section 514 Of The URAA Is Consistent With The Supreme Court's Ruling In Graham.

1. Plaintiffs' Argument Rests on a Misreading of Graham.

Plaintiffs' argument concerning the alleged inviolability of the public domain hinges upon a misreading of a patent case, Graham v. John Deere Co., 383 U.S. 1 (1966). Plaintiffs contend that Graham interpreted the "limited Times" clause to forbid the restoration of patents in public-domain inventions. Aplt. Br. 47-49. Graham, however, was not even a "limited Times" case and in any event did no such thing, as Eldred itself recognized.

Graham concerned a patent for a "combination of old mechanical elements," 383 U.S. at 4, which failed to meet the requirement that patented inventions be original "Discoveries." Not every device is eligible for patent protection; the Constitution was written "against the backdrop of the practices . . . of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public." 383 U.S. at 5. The modern equivalent of such patronage, perhaps, would be to reward a campaign contributor with a patent on the steam engine, or a copyright on Hamlet. The

Constitution therefore required that the recipients of exclusive rights be "Authors" and "Inventors", and that the rights themselves be restricted to "their respective Writings and Discoveries" (emphasis added). See Eldred, 537 U.S. at 200 n.5 ("The Framers guarded against the future accumulation of monopoly power in booksellers and publishers by authorizing Congress to vest copyrights only in 'Authors.'"). These constitutional requirements -- of authorship and originality for copyrights, and of invention and novelty for patents -- ensure that Congress may not "enlarge the [intellectual] monopoly without regard to the innovation, advancement, or social benefit gained thereby." Graham, 383 U.S. at 6.

It was in this context that Graham rejected -- in broad dicta -- "patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available," for "[i]nnovation, advancement, and [addition] to the sum of useful knowledge are inherent requisites in [the] patent system." Ibid. Graham was thus concerned not with "limited Times" -- a phrase appearing only once, in Graham's recitation of the Copyright Clause, id. at 5 -- but rather with the "conditions for patentability," id. at 10 (emphasis added), in determining whether a combination of old mechanical elements represented true "innovation" or merely "existent knowledge" already in the public domain. Id. at 6. To paraphrase Eldred,

Graham "did not touch on the duration of [patent] protection," but rather "addressed the core question of [patent]ability, i.e., the 'creative spark' a work must have to be eligible for [patent] protection at all." 537 U.S. at 211; see also Luck's Music, 407 F.3d at 1266 (rejecting plaintiffs' reliance upon Graham dictum).

Works restored under the URAA undoubtedly meet the constitutional core conditions for copyright eligibility. The Copyright Clause prevents legislators from granting their campaign contributors a restored copyright on Hamlet, for such protection would be invalid ab initio; it does not forbid protection of works restored under the URAA, which were original at the time of their creation and whose authors would have received protection but for statutory formalities.²² These formalities are the creatures of Congress, which "may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim." Graham, 383 U.S. at 6.

According to plaintiffs, "Graham mandated 'that the threshold across which works pass into [the public domain] cannot be traversed in both directions.'" Aplt. Br. 50. This quotation, however, is taken from Golan II, not from Graham, and actually reads as follows: "However, that the public domain is indeed public does not mandate that the threshold across which

²² Plaintiffs do not contest the "originality" point on appeal. See p. __, supra.

works pass into it cannot be traversed in both directions." Aplt. App. 2325. The latter, the district court noted, "is a very different question," and "neither the Supreme Court nor any Circuit Court has adopted the rule that the plaintiffs suggest." Ibid.

The Supreme Court's own authoritative interpretation of Graham reinforces this view. Eldred expressly endorsed the nineteenth-century decisions upholding the restoration of patents. See 537 U.S. at 202 (citing Evans v. Jordan, 8 F. Cas. at 874; Blanchard, 3 F. Cas. at 650; and Evans v. Robinson, 8 F. Cas. at 888). The very same arguments made here by plaintiffs were raised in dissent by Justice Stevens, who believed that Graham "flatly contradicts" this substantial body of earlier precedent. 537 U.S. at 237 (Stevens, J., dissenting). According to the Court's opinion, however,

[n]othing but wishful thinking underpins that assertion. The controversy in Graham involved no patent extension. Graham addressed an invention's very eligibility for patent protection, and spent no words on Congress' power to enlarge a patent's duration.

Id. at 202 n.7 (emphasis added). Plaintiffs' reading of Graham thus was considered and rejected in Eldred by the majority of the Court, which provides the authoritative gloss on its own rulings. As Luck's Music, supra, held, it should not be adopted here.

2. The Constitution Provides More Lenient Standards for the Awarding of Copyrights than for the Awarding of Patents.

Even if the Supreme Court's own interpretation of Graham were somehow suspect, there would be no basis for extending limits on the patent power to the copyright realm, where history and case law weigh still more strongly against plaintiffs' position. In distinguishing patent from copyright cases, see 537 U.S. at 215-17, Eldred stressed that the Constitution provides more lenient standards for exercises of the copyright power, because "[a] copyright gives the holder no monopoly on any knowledge," for the reader "may make full use of any fact or idea she acquires from her reading"; a patent, "on the other hand, does prevent full use by others of the inventor's knowledge." Id. at 216-17. And the First Congress itself distinguished between patent and copyright on the precise issue of retroactive protection in the patent and copyright acts of 1790, the former offering protection only to works not yet known, the latter protecting books printed and not yet printed.

Thus, measures that generically fall within the patent power ordinarily are within the copyright power as well -- but because the copyright power is more extensive, a prohibition on restoring patents would not necessarily extend to copyrights. Graham, in fact, specifically limited its discussion to the patent context, omitting discussion of the copyright power "as not relevant

here." 383 U.S. at 6 n.1. Accordingly for the reasons set forth in section II. B, supra, Section 514 of the URAA should be upheld as a valid exercise of the copyright power, even assuming arguendo that a comparable patent statute might be invalid.²³

III. PLAINTIFFS' CLAIM THAT THE CTEA VIOLATES THE "LIMITED TIMES" REQUIREMENT IS FORECLOSED BY THE SUPREME COURT'S HOLDING IN ELDRED.

Plaintiffs contend that the copyright terms established by the CTEA, which apply to domestic works as well as restored works, are too long to be consistent with the "limited Times" requirement of the Copyright Clause. Aplt. Br. 22. This claim was dismissed by the district court as squarely controlled by the contrary holding in Eldred. Golan I, Aplt. App. 319-20.

Plaintiffs concede that the Supreme Court in Eldred considered and rejected their argument, raised in dissent by Justice Breyer, but contend that it was not advanced by the Eldred petitioners. Aplt. Br. 55. In essence, plaintiffs ask this Court to overrule the Supreme Court because the question was inadequately briefed.

This request directly contravenes the Supreme Court's own instructions. "[T]he mere fact that an issue was not argued or

²³ The Copyright Clause is merely one of Congress's enumerated powers, and the URAA can be also be justified as an exercise of the treaty power or the power to regulate foreign commerce. The district court, however, did not reach these arguments. Accordingly, assuming arguendo that the Court rejects the Copyright Clause as a basis for the statute -- contrary to Luck's Music -- the case should be remanded to the district court for initial consideration of these alternative grounds.

briefed does not undermine the precedential force of a considered holding." Monell v. Department of Soc. Servs., 436 U.S. 658, 709 n.6 (1978). Indeed, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), "is a case in point," for neither party in that case invoked the doctrine of judicial review. Monell, 436 U.S. at 709 n.6.

The constitutional validity of the CTEA's term was a considered holding of Eldred, which stated that the "CTEA's baseline term of life plus 70 years, petitioners concede, qualifies as a 'limited Tim[e]' as applied to future copyrights." Eldred, 537 U.S. at 199. The Court treated the issue as a concession, not as a doubtful proposition assumed arguendo. Justice Breyer, writing only for himself in dissent, "ma[de] no such concession," id. at 199 n.4, but instead characterized the CTEA's term as "virtually perpetual," id. at 243, alleging that on an economic analysis the extended terms were worth more than 99% of the value of a perpetual copyright. Id. at 255-256.

However, as plaintiffs tersely concede in their brief, "[t]he Court rejected Justice Breyer's argument." Aplt. Br. 55. It considered his economic approach to enjoy "precious little support from precedent," Eldred, 537 U.S. at 199 n.4, and considered it "doubtful" whether "those architects of our Nation, in framing the 'limited Times' prescription, thought in terms of the calculator rather than the calendar." Id. at 209 n.16. The

Court also pointed out that if Justice Breyer's "calculations were a basis for holding the CTEA unconstitutional, then the 1976 [Copyright] Act would surely fall as well," and even the 1909 and 1831 Acts "might be suspect." Ibid. Those acts, however, "did not create perpetual copyrights, and neither does the CTEA." Ibid.

In upholding the copyright term at issue in Eldred, the Supreme Court defined the word "limited" as "confine[d] within certain bounds, restrain[ed], or circumscribe[d]." Id. at 199 (internal quotations omitted). It did not decide what substantive limits might restrict the length of such a term, or whether those limits would be marked by principles such as the rule against perpetuities. Id. at 210 n.17 ("Whether such referents mark the outer boundary of 'limited Times' is not before us today."). The Court did, however, conclude that the CTEA's copyright term "qualifies as a 'limited Tim[e].'" Id. at 199; see also id. at 209 ("[A] regime of perpetual copyrights 'clearly is not the situation before us.'" (citation omitted). That should be the end of the matter.

This holding cannot be regarded as mere dicta, for it was necessary to the resolution of the case. Plaintiffs, however, would have this Court disregard Eldred's binding holding, because in their view the Supreme Court's conclusions represented an "uninformed attitude," Aplt. Br. 57, and "could have been based

upon nothing more than an intuition," Aplt. Br. 55. Plaintiffs' invitation should be declined. They may wish to present this argument in the appropriate forum -- the Supreme Court -- in a petition for writ of certiorari, and they should be afforded the opportunity to do so; but in the meantime, Eldred must be accorded the respect due to precedent, and the district court's judgment affirmed. See Tenet v. Doe, 125 S. Ct. 1230, 1237 (2005) ("[I]f the 'precedent of this Court has direct application in a case . . . the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" (citation omitted)).

Furthermore, even if the Eldred Court's considered language were dicta, "'this [C]ourt considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements.'" United States v. Nelson, 383 F.3d 1227, 1232 (10th Cir. 2004) (citation omitted). Eldred is only two years old, and has not been limited by the Court in any fashion.

Finally, plaintiffs claim to possess "evidence from the framing" relevant to their constitutional argument, Aplt. Br. 55, and demand the opportunity to make a "factual showing" before the district court. Aplt. Br. 57. They mistakenly describe the question of "how long . . . a term [must] be before it is considered effectively no longer limited" as "a factual one," and

claim a presumption (as against a motion to dismiss) in favor of all well-pleaded facts. Aplt. Br. 56; see also id. at 22.

Plaintiffs once again misconceive the use of constitutional history. Constitutional questions are preeminently questions of law (even if courts often consult historical facts to assist in resolving them), and construction of the law is a legal task. See, e.g., Oklahoma ex rel. Dept. of Human Servs., 741 F.2d at 291. Treating plaintiffs' legal assertions as allegations of fact, entitled to presumptive effect, would render Rule 12(b)(6) useless, inasmuch as any plaintiff could "allege" as a "factual matter" that the Constitution entitles him or her to relief. The district court thus properly applied the settled law in rejecting plaintiffs' challenge to the CTEA.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,²⁴

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²⁴ The Department of Justice gratefully acknowledges the assistance of Stephen Sachs, a student at Yale Law School, in the preparation of this brief.

STATEMENT REGARDING ORAL ARGUMENT

Although the district court's judgment is manifestly correct, oral argument nonetheless may aid the Court in its deliberations and is further warranted by the importance of the subject matter.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief was prepared on Corel WordPerfect 12.0 software, using Courier New monospaced font and 12 point type, and that according to the software's word count, the brief contains 13,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of September, 2005, I caused an original and seven copies the foregoing Brief for the Appellees to be sent to the Clerk electronically and by Federal Express overnight mail, and caused copies to be sent electronically and by Federal Express overnight mail to:

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CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to this Court's Emergency General Order filed October 20, 2004 and amended January 11, 2005, I hereby certify that:

1. all required privacy redactions have been made and, with the exception of those redactions (and with the exception of this certification and counsel's e-mail address, which appear only in the digital submission), every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk; and
2. the digital submissions have been scanned for viruses with the most recent version of the following commercial virus scanning program, which indicates that the submissions are free of viruses.

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 /s/
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