GOLAN V. HOLDER: CONGRESSIONAL POWER UNDER THE COPYRIGHT CLAUSE AND THE FIRST AMENDMENT

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I. INTRODUCTION

Golan v. Holder[1] presents the question of whether Congress was constitutionally permitted to pass Section 514 of the Uruguay Round Agreements Act,[2] a statute that "restored" copyright protection to foreign works that had been free for public use for decades.[3] The Copyright Clause gives Congress the authority to create limited monopolies in original works of authorship.[4] As with all congressional powers, however, the copyright power has its limits.[5] These limits are particularly important because copyright grants authors the exclusive right to copy, distribute, and adapt their works, potentially denying the public access to the "building blocks of future creativity."[6] Because the public domain is restricted with each additional protection that copyright provides, Congress must carefully balance the interests of the American public with those of copyright holders in determining the scope and duration of copyright protection.[7] Over time, Congress has shifted the balance increasingly in favor of copyright holders.[8]

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1. Golan v. Holder, No. 10-545 (U.S. argued Oct. 5, 2011).
2. Uruguay Round Agreements Act § 514, 17 U.S.C.A. § 104A (West 1994).
3. Brief for the Petitioners at 2, Golan v. Holder, No. 10-545 (U.S. June 14, 2011).
4. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991).
5. Graham v. John Deere Co., 383 U.S. 1, 5 (1966). Congress may only grant copyright to original works. *See Feist Publ'ns, Inc.*, 499 U.S. at 346 ("Originality is a constitutional requirement."). In addition, Congress may not grant perpetual copyrights. *See* Eldred v. Ashcroft, 537 U.S. 186, 209–10 (2003) (discussing the limited times constraint). Nor may it grant copyright to ideas or disallow fair use without violating the First Amendment. *See id.* at 219–21 (declaring that the idea/expression dichotomy and fair use defense make copyright compatible with the First Amendment).
6. Brief for the Petitioners, *supra* note 3, at 3–4.
7. *Id.* at 3.
8. *See Eldred*, 537 U.S. at 200–01 (discussing two prior copyright term extensions in the

Until now, courts have generally allowed it to do so.[9]

In *Golan v. Holder*, the Supreme Court will determine whether the Copyright Clause,[10] or alternatively, the First Amendment, prohibits Congress from restoring copyright to works in the public domain. *Golan v. Holder* thus presents the Court with the opportunity to place meaningful limits on the legislative expansion of copyright.

II. FACTUAL AND PROCEDURAL BACKGROUND

In April 1994, the United States signed the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) as part of the Uruguay Round of the General Agreement on Tariffs and Trade.[11] Among other things, the TRIPs agreement required that signatories comply with Article 18 of the Berne Convention.[12] Article 18 of the Berne Convention[13] requires the restoration of copyright to certain foreign works that were previously in the public domain, but allows each member nation to decide how to implement this requirement.[14] Pursuant to Article 18, foreign works that lost protection due to an author's failure to comply with registration, notice, or renewal formalities must be restored to copyright.[15] The TRIPs agreement also provides for compulsory dispute resolution before the World Trade Organization (WTO). A finding of noncompliance by the WTO could lead to trade sanctions against the noncompliant state party.[16]

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context of the Copyright Term Extension Act (CTEA), a third statute extending copyright protection); *see also* United States v. Moghadam, 175 F.3d 1269, 1273–74 (11th Cir. 1999) (discussing the constitutionality of the anti-bootlegging statute, which prohibited the recording of live performances despite the fact that live performances are not fixed in a tangible medium); United States v. Martignon, 492 F.3d 140, 141–42 (2d Cir. 2007) (finding the anti-bootlegging statute constitutional, despite lack of compliance with the fixation and limited times requirements).

9. *See Eldred*, 537 U.S. at 194 (finding the CTEA constitutional); *see also Moghadam*, 175 F.3d at 1282 (finding the anti-bootlegging statute constitutional); *Martignon*, 492 F.3d at 153 (finding the anti-bootlegging statute constitutional).

10. U.S. CONST. art. I, § 8, cl. 8.

11. TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

12. Golan v. Holder, 609 F.3d 1076, 1080 (10th Cir. 2010).

13. Berne Convention for the Protection of Literary and Artistic Works, Mar. 1, 1989, 331 U.N.T.S. 217 [hereinafter Berne Convention].

14. *Id.* at 251.

15. *Id.*

16. Brief for the Respondents at 4, Golan v. Holder, No. 10-545 (U.S. Aug. 3, 2011). It seems as though some countries take the threat of trade sanctions quite seriously. For example, the first TRIPs case the United States submitted to the WTO alleged that Japan's copyright

Pursuant to the TRIPs agreement, Congress enacted the Uruguay Round Agreements Act (URAA). Congress designed its implementing legislation with the hope that other member nations would reciprocate by providing the same protections to American authors in their countries that the United States provided to foreign authors through the URAA.[17] Section 514 of the URAA restores copyright protection to foreign works that have become part of the public domain for any of the following reasons: (i) failure to comply with U.S. registration formalities, (ii) lack of subject matter protection for sound recordings, or (iii) lack of national eligibility.[18] These foreign works receive copyright protection for the remainder of the copyright term they would have received in the United States had they never entered the public domain.[19] The URAA has no equivalent provisions for works created by American authors, to whom it provides no direct benefits.[20]

Section 514 has the potential to severely limit the American public's right to use millions of foreign works.[21] It provides some temporary protection, however, for reliance parties, persons who invested in the use of the works while they were in the public domain.[22] Foreign copyright holders who wish to enforce their restored copyrights must either (i) provide a general notice through the Copyright Office within two years of the date of restoration or (ii) send notice directly to the reliance party.[23] After the notice

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regime was noncompliant because the term of protection that applied to retroactively granted foreign sound recording copyrights was too short. Japan eventually agreed to amend its copyright law. Elizabeth T. Gard, *Copyright Law v. Trade Policy: Understanding the* Golan *Battle Within the Tenth Circuit*, 34 COLUM. J.L. & ARTS 131, 152–53 (2011). The United States, however, does not seem to take the trade sanctions as seriously. Although the WTO's dispute settlement body has found the United States in violation of the TRIPs agreement due to exceptions that allow restaurants and bars to play music and television under certain circumstances without paying royalty fees, the United States has not changed its copyright laws. Instead, it pays a yearly fine for the violation. Elizabeth T. Gard, *In the Trenches with § 104A: An Evaluation of the Parties' Arguments in* Golan v. Holder *as it Heads to the Supreme Court*, 64 VAND. L. REV. EN BANC 199, 205 (2011).

17. Brief for the Respondents, *supra* note 16, at 52.

18. Uruguay Round Agreements Act § 514, 17 U.S.C.A. § 104A (West 1994).

19. *Id.* In the United States, the copyright term is the life of the author plus seventy years. If the work is a work-for-hire, the copyright term lasts for ninety-five years after publication. 17 U.S.C.A. § 302 (1998).

20. *Id.*

21. Marybeth Peters, *The Year in Review: Accomplishments and Objectives of the U.S. Copyright Office*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 25, 31 (1996).

22. 17 U.S.C.A. § 104A (providing temporary protection for parties that relied on foreign works by making copies of them for distribution or by making derivative works).

23. *Id.*

requirement is satisfied, reliance parties have a one-year grace period during which they may continue selling copies of the work that were made prior to the notice of restoration.[24] In addition, reliance parties who created derivative works prior to restoration may continue to exploit those derivative works if they pay "reasonable compensation" to the owners of the restored copyrights.[25]

In *Golan v. Holder*, Petitioners sold, performed, distributed, and otherwise relied on foreign works in the public domain for their livelihoods.[26] They often chose works specifically because they were in the public domain and would not require payment of licensing fees, which Petitioners found to be cost-prohibitive.[27] Section 514 restored those works to copyright protection, requiring Petitioners to pay licensing fees if they chose to continue using them.[28]

Petitioners filed suit challenging the constitutionality of Section 514, arguing that its provisions exceeded the authority granted to Congress in the Copyright Clause and required First Amendment scrutiny.[29] The district court granted summary judgment for the Government on both issues.[30] The Court of Appeals for the Tenth Circuit affirmed the district court's holding on the Copyright Clause, but held that Section 514 was subject to First Amendment scrutiny and remanded the case to the district court to apply the appropriate analysis.[31] On remand, the district court applied intermediate scrutiny and concluded that Section 514 was unconstitutionally overbroad.[32] On appeal for the second time, the Tenth Circuit reversed and held that Section 514 was constitutional.[33]

III. LEGAL BACKGROUND

Petitioners in *Golan v. Holder* argue that Section 514 of the URAA runs afoul of two constitutional limitations on congressional power: the Copyright Clause and the First Amendment.

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24. *Id.*
25. *Id.*
26. Golan v. Holder, 609 F.3d 1076, 1081–82 (10th Cir. 2010) (stating that "[p]laintiffs are orchestra conductors, educators, performers, publishers, film archivists, and motion picture distributors" who "perform, distribute, and sell public domain works").
27. *Id.* at 1082.
28. *Id.*
29. *See id.* (discussing the procedural history of the case).
30. *Id.*
31. Golan v. Gonzales, 501 F.3d 1179, 1189, 1197 (10th Cir. 2007).
32. Golan v. Holder, 611 F. Supp. 2d 1165, 1177 (D. Colo. 2009).
33. *Golan v. Holder*, 609 F.3d at 1084, 1094.

A. The Copyright Clause

While the Copyright Clause grants Congress the authority to protect artistic works, this power comes with certain constraints.[34] The Copyright Clause states that "Congress shall have 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."[35] This language implies a number of limitations.[36] For example, the preamble of the Clause, requiring Congress to "promote the Progress of Science and useful Arts," is the textual root for the utilitarian theory of copyright law, which the Court has espoused for many years.[37] Based on this view of copyright, its immediate effect is to incentivize authors to create new works by guaranteeing them the exclusive right to reap the economic benefits of that work. Providing incentives to authors is not the ultimate goal, however, but a means to a more important end: the enrichment of the public domain.[38] The requirement that copyrights be granted for "limited Times" serves to achieve that goal. After copyright expires and the work enters the public domain, any member of the general public is free to use the work in any way he sees fit.[39]

Through several recent legislative enactments, Congress has considerably expanded copyright protections, and the courts have proved reluctant to defend the public domain against that expansion.[40] One such legislative enactment is the Copyright Term Extension Act (CTEA),[41] which lengthened the term of copyright protection for both

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34. Graham v. John Deere Co., 383 U.S. 1, 5 (1966).

35. U.S. CONST. art. I, § 8, cl. 8.

36. *See supra* note 5 and accompanying text.

37. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) (explaining that the "economic philosophy" behind copyright is that securing a "fair return" for authors' labor is the best way to achieve the ultimate aim of serving the public good); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (stating that the primary objective of copyright is to promote the progress of knowledge).

38. *Harper & Row*, 471 U.S. at 558.

39. Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 33–34 (2003).

40. *See* Eldred v. Ashcroft, 537 U.S. 186, 221–22 (2003) (characterizing the petitioners' claims as "assert[ing] the right to make other people's speeches" and stating that "the Copyright Clause empowers Congress to determine the intellectual property regimes that . . . will serve the ends of the Clause. . . . The wisdom of Congress' action . . . is not within our province to second-guess"); *see also* United States v. Moghadam, 175 F.3d 1269, 1274–75 (11th Cir. 1999) (finding the anti-bootlegging statute constitutional under the Commerce Clause, despite evidence that Congress believed it was acting under the Copyright authority and despite lack of compliance with the fixation and "limited Times" requirements); United States v. Martignon, 492 F.3d 140, 141–42 (2d Cir. 2007) (same).

41. Copyright Term Extension Act (CTEA), Pub. L. No. 105-298, §§ 102(b), (d), 112 Stat.

future and existing works by twenty years.[42] Its constitutionality was soon challenged in *Eldred v. Ashcroft*.[43]

The petitioners in *Eldred* argued that the CTEA violated the "limited Times" constraint[44] and that granting copyright to existing works could not possibly "promote the Progress of Science" because authors did not need further incentive to create works that already existed.[45] The Supreme Court disagreed.[46] The Court was unconvinced by the petitioners' argument that legitimizing this practice would allow Congress to circumvent the "limited Times" requirement by creating perpetual copyrights through repeated extensions.[47] Instead, the Court declared that "limited" did not mean "fixed" or "inalterable" and found that copyrights under the CTEA would still be limited by a specific expiration date.[48] Because Congress had extended the copyright term many times before and had applied each new term to both future and existing works—and because past courts had never objected—the Court found that Congress could continue that practice.[49] The Court believed that Congress deserved substantial deference in the realm of copyright because it was not the judiciary's role to alter the delicate balance Congress strove to achieve through its copyright policy.[50] As a result, the Court upheld the CTEA.

B. The First Amendment

The First Amendment forbids Congress from making any law that abridges the freedom of speech or expression.[51] The right to free speech, however, is not absolute. Although content-based regulations of expression are subject to strict scrutiny,[52] Congress has considerably more leeway in passing laws that are content-neutral, which are only subject to intermediate scrutiny.[53] In determining whether a regulation

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2827 (amending 17 U.S.C.A. §§ 302, 304).

42. CTEA §§ 102(b), (d).
43. *Eldred*, 537 U.S. at 193.
44. *Id.*
45. *Id.* at 211–12.
46. *Id.* at 199.
47. *Id.* at 208.
48. *Id.* at 199.
49. *Id.* at 202–04.
50. *Id.* at 204–05.
51. U.S. CONST. amend. I.
52. Under strict scrutiny, the government must prove that the speech-restricting law furthers a compelling government interest and is narrowly tailored to achieve that interest. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 898 (2010).
53. Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 642 (1994).

is content-based or content-neutral, the primary consideration is whether Congress enacted the regulation because of disagreement with the content of the speech.[54] If a statute is determined to be content-neutral, to withstand intermediate scrutiny under the First Amendment, it must "advance[] important governmental interests . . . and [must] not burden substantially more speech than necessary to further those interests."[55]

In *Eldred*, the petitioners argued that the CTEA was a content-neutral regulation of speech that failed intermediate scrutiny.[56] The Supreme Court disagreed, holding that because the Copyright Clause and the First Amendment were adopted close in time, copyright generally will be compatible with free speech principles.[57] In fact, the Court declared that copyright is an "engine of free expression" because its purpose is to promote the creation and publication of ideas.[58] In addition, copyright contains inherent First Amendment protections such as the idea/expression dichotomy and an exception for fair use.[59] Thus, the Court held that unless Congress "altered the traditional contours of copyright protection," First Amendment scrutiny of copyright laws was unnecessary.[60]

IV. HOLDING

In *Golan v. Gonzales*[61] and *Golan v. Holder*,[62] the cases giving rise to this litigation, the Tenth Circuit held that Section 514 did not exceed Congress's copyright authority[63] and did not violate the First Amendment.[64]

In *Golan v. Gonzalez*, the Tenth Circuit disposed of Petitioners' challenge under the Copyright Clause by following *Eldred*. It deferred

54. *Id.*
55. Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 189 (1997).
56. Eldred v. Ashcroft, 537 U.S. 186, 218 (2003).
57. *Id*. at 219.
58. *Id.*
59. *Id.* at 219–20 (explaining that the idea/expression dichotomy, which distinguishes between copyrightable expression and noncopyrightable ideas, and fair use, which affords the public certain privileged uses of copyrighted work, are "built-in First Amendment accommodations").
60. *Id.* at 221.
61. Golan v. Gonzales, 501 F.3d 1179 (10th Cir. 2007).
62. Golan v. Holder, 609 F.3d 1076 (10th Cir. 2010).
63. *Golan v. Gonzales*, 501 F.3d at 1197 (holding that Section 514 does not exceed Congress's copyright authority).
64. *Golan v. Holder*, 609 F.3d at 1094 (holding that Section 514 is consistent with the First Amendment).

to congressional judgment on the scope of copyright protection, holding that as long as Congress exercises its authority rationally and in a manner related to the goals of the Copyright Clause, courts cannot intervene.[65] Because Congress had passed Section 514 to protect the rights of American authors abroad, the court found that Congress had not exceeded its Copyright Clause authority.[66]

The Tenth Circuit seemed more conflicted, however, about Petitioners' First Amendment challenge. In *Golan v. Gonzales*, the court sought to determine what features of copyright represented its "traditional contours"[67] under *Eldred*. The court held that the term "traditional" made reference to the historical treatment of copyright.[68] Because every statutory scheme prior to Section 514 had preserved the same three-step sequence—from creation, to copyright, to the public domain—it found that one of the "traditional contours" of copyright was that works that entered the public domain remained there.[69] By removing works from the public domain, Section 514 violated this "time-honored tradition."[70] The idea/expression dichotomy and fair use defense could not alleviate the harm done to Petitioners because unlike the works' presence in the public domain, these measures do not allow for completely unrestricted use of the works.[71] As a result, the court held that in passing Section 514, Congress altered the traditional contours of copyright.[72] The Tenth Circuit remanded the case so the district court could apply a First Amendment analysis.[73] On remand, the parties stipulated that Section 514 was a content-neutral regulation of speech.[74] The district court applied intermediate scrutiny and found the statute unconstitutional.[75]

A year later, the Tenth Circuit reversed this ruling in *Golan v. Holder*, holding that Section 514 passed intermediate scrutiny.[76] The court found that a substantial government interest existed because

65. *Golan v. Gonzales*, 501 F.3d at 1187.
66. *Id.* at 1186–87.
67. The Supreme Court was never explicit about what it meant by the "traditional contours" of copyright, except that they included the idea/expression dichotomy and the fair use defense. Eldred v. Ashcroft, 537 U.S. 186, 219–21 (2003).
68. *Golan v. Gonzales*, 501 F.3d at 1188–89.
69. *Id.* at 1189.
70. *Id.* at 1192.
71. *Id.* at 1194–95.
72. *Id.* at 1192.
73. *Id.* at 1197.
74. Golan v. Holder, 609 F.3d 1076, 1082 (10th Cir. 2010).
75. *Id.*
76. *Id.* at 1080.

certain foreign countries' refusal to grant copyright to American works harmed the expressive and economic interests of American authors.[77] The court's analysis relied heavily on industry testimony heard during the URAA congressional hearings. The testimony stated that Section 514's retroactive grant of copyright protection to foreign works would encourage other countries to enact similar legislation, thereby resulting in preservation of the rights of American copyright holders.[78]

In determining whether Congress had sufficient evidence to conclude that Section 514 would alleviate a real harm, the court focused on the deference it owed Congress on this issue.[79] The court was obliged to show substantial deference to Congress's predictive judgments not only because of Congress's greater ability to "evaluate the vast amounts of data bearing upon . . . legislative questions" and "its authority to exercise the legislative power," but also because Section 514 relates to foreign affairs.[80]

The court then determined that Section 514 did not burden substantially more speech than necessary because the burdens imposed on Petitioners were congruent with the benefits given to American authors.[81] That other countries had chosen different structures for similar regulations was irrelevant because narrow tailoring does not require Congress to reach its end through the least-restrictive means.[82] As a result, the court held that Section 514 did not violate the First Amendment.[83]

The Supreme Court granted certiorari on two issues: (i) whether the Copyright Clause prohibits Congress from taking works out of the public domain, and (ii) whether Section 514 violates the First Amendment.[84]

77. *Id.* at 1084.

78. *Id.* at 1087–88. The Government argues that this prediction proved to be true and cites Russia's restoration of copyright for American authors as proof. Brief for the Respondents, *supra* note 16, at 51.

79. *Golan v. Holder*, 609 F.3d at 1084–85.

80. *Id.* (quoting Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 195–96 (1997)).

81. *Id.* at 1091.

82. *Id.* at 1092.

83. *Id.* at 1094.

84. Petition for Writ of Certiorari at 1, Golan v. Holder, No. 10-545 (U.S. Mar. 7, 2011).

V. ARGUMENTS

A. Congress's Power under the Copyright Clause

1. Petitioners' Arguments

Petitioners have three main arguments. First, that Section 514 violates the "limited Times" constraint. Second, that Section 514 is inconsistent with the language of the preamble. And finally, that the history of the Copyright Clause demonstrates that Congress cannot remove works from the public domain.

Petitioners first argue that Section 514 violates the Copyright Clause's requirement that copyright protection be granted for only "limited Times."[85] They assert that authorizing Congress to remove works from the public domain would render the limited times requirement meaningless by allowing copyright to be "resurrected at any time, even after it expires."[86] Petitioners distinguish this case from *Eldred* by stating that although an extended copyright term may still be limited by a definitive outer boundary, that is not the case here.[87] They argue that for the copyright term to be "limited," the entry of a work into the public domain must signal "the end of protection, not an intermission."[88]

Petitioners' second argument asserts that Section 514 contravenes the preamble of the Copyright Clause, which states that copyright must "promote the Progress of Science."[89] Petitioners argue that by allowing Congress to restore copyright to foreign works, the Court would not only destroy Petitioners' reliance interests, but would set precedent that would interfere with the public's ability to rely on public domain works in the future.[90] This uncertainty would undermine the progress the Copyright Clause seeks to promote.[91] In addition, by restricting the public's ability to use previously available works, Section 514 impoverishes the public domain of material that was being used to spur the creation of further artistic works.[92] Section 514 makes these sacrifices in order to grant protection to works that

85. Brief for the Petitioners, *supra* note 3, at 22.
86. *Id.* at 16.
87. *Id.* at 22.
88. *Id.* at 23.
89. *Id.* at 24.
90. *Id.*
91. *Id.*
92. *Id.*

have long been in existence and thus does not encourage the creation of new works.[93]

Finally, Petitioners argue that the history of copyright confirms that Congress cannot take works out of the public domain.[94] According to Petitioners, Congress has amended the Copyright Act nineteen times and each time has made sure to preserve the contents of the public domain.[95] Petitioners contend that any exceptions to this rule were the result of unusual circumstances, like war or the correction of legal errors.[96] Although the *Eldred* Court looked to historical practice in upholding the CTEA, Petitioners argue that in this case tradition compels the opposite result—a finding of unconstitutionality.[97]

2. The Government's Arguments

The Government asserts three arguments in response. First, that "limited Times" does not mean that the copyright term is inalterable. Second, that the preamble is not an independent limitation on Congress's copyright powers. And third, that history demonstrates that Congress has granted retroactive copyrights on numerous occasions in the past.

The Government emphasizes the *Eldred* Court's finding that "limited Times" does not require a "fixed" or "inalterable" expiration date.[98] Because the copyrights restored by Section 514 will still expire on the same date they would have expired had the works never entered the public domain, the Government argues that Section 514 is consistent with the limited times requirement.

In response to Petitioners' claim that the preamble is an independent limitation on Congress's powers, the Government

93. *Id.*

94. *Id.* at 20. *See* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 33–34 (2003) (stating that "[t]he rights of a . . . copyright holder are part of a 'carefully crafted bargain,' under which, once the . . . copyright monopoly has expired, the public may use the . . . work at will and without attribution" (internal citations omitted)).

95. Brief for the Petitioners, *supra* note 3, at 31.

96. Reply Brief for the Petitioners at 9–11, Golan v. Holder, No. 10-545 (U.S. Aug. 31, 2011). In their brief, Petitioners argue that the only instances in which Congress deviated from its traditional practice of preserving the public domain were (1) to allow foreign authors more time to register their works when World War I and World War II made it difficult for them to do so, and (2) to correct inadvertent errors on the part of the applicant or the Copyright Office. *Id.*

97. Brief for the Petitioners, *supra* note 3, at 31.

98. Brief for the Respondents, *supra* note 16, at 28.

stresses that no court has ever interpreted it in this way.[99] Instead, the Government argues that under *Eldred*, the Copyright Clause empowers Congress, not the judiciary, to determine what balance is appropriate to "promote the Progress of Science."[100]

Lastly, the Government refutes Petitioners' argument that historical practice suggests any limitation on Congress's power to remove works from the public domain. According to the Government, the Copyright Act of 1790 granted copyright to many existing works that did not qualify for protection under state laws or the common law.[101] Because state law and common law were the only forms of copyright protection prior to the Copyright Act of 1790, the Government contends that the First Congress believed that removing works from the public domain was constitutional.[102] The Government also points to various occasions on which Congress restored copyright and patent protection to individual works and inventions, as well as to copyright-restoring laws passed during World Wars I and II to allow authors more time to register their works given the exigencies of war.[103] The Government therefore argues that history demonstrates that removing works from the public domain is within the scope of Congress's powers.[104]

B. Whether Section 514 Violates the First Amendment

1. Petitioners' Arguments

Petitioners argue that Section 514 should be subject to First Amendment scrutiny because it alters the traditional contours of copyright. They then argue that Section 514 fails intermediate scrutiny either because none of Congress's interests reach the level of an important government interest or because Section 514 burdens more speech than necessary to achieve those interests.

Petitioners assert that under *Eldred*, Section 514 should be subject to First Amendment scrutiny because it alters the traditional contours of copyright by violating the time-honored principle that works in the

99. *Id.* at 16.
100. *Id.*
101. *Id.* at 20–21.
102. *Id.* at 21.
103. *Id.* at 24, 26 (citing the Act of Feb. 19, 1849 (Corson Act), ch. 57, 9 Stat. 763; Act of June 23, 1874 (Helmuth Act), ch. 534, 18 Stat. 618; Act of Feb. 17, 1898 (Jones Act), ch. 29, 30 Stat. 1396; Act of July 3, 1832, ch. 162, § 3, 4 Stat. 559; Act of Mar. 3, 1893, ch. 215, 27 Stat. 743).
104. *Id.* at 23.

public domain remain there.[105] They argue that the two built-in free speech safeguards that the Supreme Court identified in *Eldred*[106] are inadequate to protect their First Amendment rights in this case. While the public may use the entirety of public domain works and may harvest both the ideas and expression of those works, the idea/expression dichotomy and fair use defense only allow for limited use of copyrighted works.[107] As a result, Section 514 must be subject to First Amendment scrutiny.[108]

Petitioners then contend that Section 514 fails intermediate scrutiny under the First Amendment.[109] They deny that any of the Government's stated interests rise to the level of an important government interest.[110] Petitioners argue that granting foreign authors copyright in public domain works is, at best, an indirect means of protecting the rights of American authors, and that Congress based its predictions on insufficient evidence.[111]

In response to the Government's stated interest in complying with the Berne Convention, Petitioners assert that the United States could have done so without removing any works from the public domain.[112] Petitioners state that in 1988, when the United States joined the Berne Convention, Congress determined that the United States could comply with the Convention's requirements without restoring any copyrights.[113] Petitioners believe that the present Congress should abide by that determination. In the alternative, Petitioners argue that even if Berne does require the United States to restore copyright in foreign works, Section 514 burdens substantially more speech than necessary.[114] Petitioners maintain that Article 18 allows Congress significant discretion. They assert that under Article 18, the United States can negotiate agreements excepting it from the restoration requirement or, alternatively, can pass laws providing for the permanent protection of reliance parties.[115] Petitioners also assert that

105. Brief for the Petitioners, *supra* note 3, at 43.

106. Eldred v. Ashcroft, 537 U.S. 186, 219–20 (2003) (explaining that the idea/expression dichotomy and fair use are "built-in First Amendment accommodations").

107. Brief for the Petitioners, *supra* note 3, at 46–47.

108. *Id.* at 47.

109. *Id.*

110. *Id.* at 48.

111. *Id.* at 49–50.

112. *Id.* at 52.

113. *Id.*

114. *Id.* at 54.

115. *Id.* at 55–56.

Congress could have limited the copyright term for restored works to whichever copyright period is shorter: the period in the nation in which the work was created or the period in the United States.[116]

2. The Government's Arguments

The Government argues that Section 514 does not alter the traditional contours of copyright protection.[117] It maintains that the idea/expression dichotomy and fair use defense are the only features of copyright law that the *Eldred* Court referred to as "traditional contours."[118] Because both the idea/expression dichotomy and the fair use defense are preserved under Section 514, no First Amendment scrutiny is necessary.[119]

If, however, the Court finds that Section 514 is subject to intermediate scrutiny, the Government maintains that it would satisfy such review.[120] The Government asserts that important governmental interests motivated the passage of Section 514. Specifically, Congress's goal was not only to protect American authors' copyrights abroad, but to secure them the specific protections it gave to foreign authors in Section 514.[121] In addition to being in actual compliance with the Berne Convention, the Government contends that it is essential that other member nations perceive the United States as honoring the spirit of Berne's terms because of the World Trade Organization dispute resolution provided for in TRIPs.[122] Even if the Court disagrees with these assessments, the Government argues that because Congress is owed substantial deference in matters of predictive judgments and foreign affairs, the Court should not second-guess the legislature's decisions.[123]

The Government then argues that Section 514 does not burden substantially more speech than necessary to achieve Congress's interests.[124] It maintains that the methods of compliance Petitioners propose would undermine foreign nations' perception that the United States is in compliance with Berne and make the United States

116. *Id.* at 59–60.
117. Brief for the Respondents, *supra* note 16, at 37.
118. *Id.*
119. *Id.* at 37–38.
120. *Id.* at 42.
121. *Id.* at 52.
122. *Id.* at 44.
123. *Id.* at 42–43.
124. *Id.* at 49.

vulnerable to trade sanctions.[125] It also rejects these alternatives[126] because Section 514 was written under the assumption that other countries would reciprocate the specific scope and extent of restored copyright protections.[127]

VI. ANALYSIS AND LIKELY DISPOSITION

The Supreme Court is likely to affirm the Tenth Circuit's decision and uphold the constitutionality of Section 514. This result would be consistent with *Eldred* and other recent cases construing Congress's power to enact copyright statutes, all of which suggest that the judiciary is incredibly deferential to Congress's policy judgments in this area. Finding Section 514 unconstitutional, however, would be the better outcome, both in terms of ensuring that the boundaries of copyright law remain intact and in terms of adopting a policy that will promote the creation of new works.

Because Petitioners' arguments under the Copyright Clause are reminiscent of those made by the petitioners in *Eldred*, the Court is unlikely to find them convincing. The Court is likely, however, to reach a First Amendment analysis. Though the Government has managed to muster up some historical evidence of retroactive copyright grants, that historical evidence is exceptional enough for the Court to find that Section 514 alters copyright's traditional contours. Still, the Court is unlikely to find that Congress transgressed the bounds of the discretion it is entitled under intermediate scrutiny.

Though the arguments raised by Petitioners under the Copyright Clause seem more compelling in this case than in *Eldred*, their preambular argument probably is precluded by that Court's holding. In *Eldred*, the Court conceded that promoting the progress of knowledge is the "primary objective of copyright."[128] It rejected the argument, however, that the CTEA ran contrary to that objective because it is for Congress, not the courts, to determine what intellectual property regime will best achieve the "promote the

125. *Id.* at 47–48.

126. *See supra* Part V.B.1. (stating Petitioners' arguments that Congress could have (i) contracted around the Berne Convention's requirements by making agreements with other nations, (ii) provided for permanent protection of reliance parties, or (iii) limited copyright protection to the shorter copyright period, whether that be the term in the United States or the term in the country of origin).

127. Brief for the Respondents, *supra* note 16, at 52.

128. Eldred v. Ashcroft, 537 U.S. 186, 212 (2003) (quoting Feist Publ'ns, Inc. v. Rural Tel. Service Co., 499 U.S. 340, 349 (1991)).

Progress" aim.[129] In addition, the Court stated that "[t]he profit motive is the engine that ensures the progress" of knowledge.[130] In *Golan*, therefore, the Court is unlikely to perceive the additional rights Section 514 grants to foreign authors as being given at the expense of the American public.

If, however, the Court upholds Section 514, the preamble would be rendered inconsequential. It is inconceivable how Section 514's restoration of copyright could possibly "promote the Progress." The works protected by Section 514 were not only already created, but by removing them from the public domain, Congress stifled any further "Progress" they could have promoted. In addition, the statute threatens the future integrity of the public domain in a way that discourages others from using it to create new works in the future. If Congress is constitutionally permitted to remove works from the public domain, the public may be uncomfortable relying on these works.[131] This defeats the purpose of the public domain and the entire copyright regime. Section 514 not only fails to "promote the Progress of Science," but also eradicates progress that has already occurred. By threatening the integrity of the public domain, it severely impedes future progress. Though strengthening copyright holders' rights can arguably serve to "promote the Progress" by encouraging authors to put more effort into their works, that is not true in this case—the works at issue under Section 514 are works that already exist.

The limited times argument will be a more difficult issue for the Court because the *Eldred* Court assigned great weight to Congress's unbroken practice of retroactively extending the copyrights of existing works.[132] Here, the historical pattern is less clear and the parties offer conflicting accounts of the historical record.[133] However, the Government's historical arguments—that the First Congress restored copyrights with the Copyright Act of 1790 and that early Congresses restored copyright and patent protection to individual works and inventions that had entered the public domain—may be

129. *Id.* at 212–13.

130. *Id.* at 212 (quoting American Geophysical Union v. Texaco Inc., 802 F. Supp. 1, 27 (S.D.N.Y. 1992)).

131. Brief of Public Domain Interests as Amici Curiae in Support of Petitioners at 28–37, Golan v. Holder, No. 10-545 (U.S. June 20, 2011).

132. *Eldred*, 537 U.S. at 200–01, 209–10, 213.

133. *Compare* Brief for the Petitioners, *supra* note 3, at 31–41 (arguing that history demonstrates an unbroken congressional practice of preserving the public domain), *with* Brief for the Respondents, *supra* note 16, at 18–32 (arguing that history proves that Congress has removed works from the public domain in the past).

significant to the Court. The Court may be persuaded by the Government's argument because of its affinity for such historical evidence.[134] Still, relying too heavily on this evidence would be a mistake. If removing works from the public domain is not unprecedented, it is at least unusual.[135] And even if the Court accepts the Government's argument that Congress has established a historical practice of removing works from the public domain, "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence."[136]

To the extent the Court engages in a textual interpretation of the Copyright Clause, it is likely to rule in the Government's favor. In *Eldred*, the Court stated that "limited" did not mean "fixed" or "inalterable";[137] instead, it noted that an extended term still had a definite expiration date.[138] Similarly, the copyright term for restored works is still limited to the term that would have applied had the works not fallen out of copyright.[139] This is likely to satisfy the Court's definition of "limited." It seems clear, however, that Section 514 does in fact cross constitutional boundaries. If Congress can retroactively restore copyright to works in the public domain, it is difficult to imagine what it cannot do. Construing "limited Times" in this way would rob the phrase of any meaning.[140]

Though the Court is unlikely to find merit in Petitioners' Copyright Clause arguments, it is likely to reach the First Amendment analysis. If it does, this will be the first time the Court has done so in the copyright context.[141] Petitioners' First Amendment claims, however, are unlikely to prevail. Though they may succeed in

134. *See Eldred*, 537 U.S. at 201–03 (finding it "significant" that early Congresses extended the duration of numerous individual patents and copyrights).

135. Golan v. Gonzales, 501 F.3d 1179, 1192 (2007) ("[O]ur examination of the history of American copyright law reveals that removal [of works from the public domain] was the exception rather than the rule.").

136. *Eldred*, 537 U.S. at 236 (Stevens, J., dissenting) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970)).

137. *Id.* at 199.

138. *Id.*

139. Brief for the Respondents, *supra* note 16, at 10–11.

140. Tyler T. Ochoa, *Is the Copyright Public Domain Irrevocable? An Introduction to* Golan v. Holder, 64 VAND. L. REV. EN BANC 123, 144–45 (2011) (stating that the "limited Times" restriction in the Copyright Clause "will be rendered a dead letter" if Congress can restore copyrights).

141. *See Eldred*, 537 U.S. at 221 (discussing how "copyright's built-in free speech safeguards are generally adequate to address [First Amendment concerns]" in the copyright area).

convincing the Court that First Amendment review is warranted, they are unlikely to persuade it that Congress's actions should fail intermediate scrutiny.

Under *Eldred*, Petitioners must prove that Section 514 alters the "traditional contours of copyright protection" in order to obtain First Amendment scrutiny.[142] Unfortunately, the *Eldred* Court did not clarify exactly what it meant by copyright's "traditional contours." Because *Eldred* depended on the belief that the Copyright Clause and the First Amendment are inherently compatible,[143] whether the Supreme Court agrees with Petitioners' or the Government's interpretation will depend on what aspects of copyright it considers fundamental to copyright's free speech compatibility. The history of copyright is also likely to weigh heavily in its analysis.[144] Though it seems clear that the Court's definition of "traditional contours" will encompass more than the idea/expression dichotomy and fair use exception,[145] it is less obvious that the integrity of the entire contents of the public domain will make the Court's list. As mentioned previously, the historical record is not wholly supportive of the proposition that Congress has never removed works from the public domain.[146] However, because Petitioners were previously able to make unrestricted use of the entirety of the newly restored works and must now pay to do so, Section 514 burdens their speech in a way that cannot be rectified by the idea/expression dichotomy or fair use exception, neither of which allow for completely unrestricted use of those works.[147]

Even if the Court finds that Section 514 has altered the "traditional contours of copyright protection," the statute is unlikely to be struck down. Because the parties agree that Section 514 is content-neutral, it will be subject to intermediate scrutiny.[148] The Supreme Court is almost certain to find the avoidance of trade sanctions and the protection of American authors' rights abroad to be

142. *Id.*

143. *Id.*

144. *See* Golan v. Gonzales, 501 F.3d 1179, 1189 (10th Cir. 2007) ("[T]he *Eldred* Court's use of the word 'traditional' to modify 'contours' suggests that Congress's historical practice with respect to copyright and the public domain must inform our inquiry.").

145. For example, because it is constitutionally required, the originality requirement certainly qualifies as a traditional contour of copyright protection.

146. Brief for the Respondents, *supra* note 16, at 18–31.

147. *Golan v. Gonzales*, 501 F.3d at 1194–95.

148. *See* Golan v. Holder, 609 F.3d 1076, 1083 (10th Cir. 2010) (stating that content-neutral speech receives intermediate scrutiny).

important government interests.[149] The question of whether the statute burdens substantially more speech than necessary is more difficult. To satisfy this standard, a statute need not be the least-restrictive means of achieving the government's stated interest.[150] As a result, the existence of less burdensome alternatives is not dispositive.[151] Because this standard is somewhat flexible, the amount of legislative deference the Court believes is appropriate will be important in deciding the issue. As this is a complex matter concerning both the structure of the copyright regime and foreign relations, the Court is likely to defer substantially to Congress's decision-making authority.[152] Especially considering the concessions the statute makes to reliance parties,[153] the Court is unlikely to find that Congress went so far outside the scope of its discretion that it failed to tailor the statute narrowly enough to pass intermediate scrutiny.[154]

Nevertheless, as Petitioners argue in their brief, by virtue of the United States signing the Berne Convention, American copyright holders were already guaranteed protection for their new works in all member nations.[155] Though it may not have been ideal that they lacked protection for their previously created works, this problem would have solved itself with time because those works eventually would have fallen into the public domain. By contrast, setting a precedent that would allow Congress to remove works from the public domain and restore them to copyright at any time in the future would seriously undermine the integrity of the public domain in a way that could permanently stifle its use by the public.[156]

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149. *See* Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 195 (1997) (stating that in assessing the importance of the government's interest and whether the challenged statute addresses and alleviates a real harm, Congress is entitled to "substantial" deference).

150. *Golan v. Holder*, 609 F.3d at 1092.

151. *Id.*

152. *See* Eldred v. Ashcroft, 537 U.S. 186, 222 (2003) ("[T]he Copyright Clause empowers *Congress* to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause . . . . The wisdom of Congress' action [] is not within our province to second-guess." (emphasis added)); *see also* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 386 (2000) ("We have . . . consistently acknowledged that the 'nuances' of the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court." (internal citations omitted)).

153. Uruguay Round Agreements Act § 514, 17 U.S.C.A. § 104A (West 1994).

154. *See Turner Broad. Sys., Inc.*, 520 U.S. at 213 ("Content-neutral regulations do not pose the same inherent dangers to free expression that content-based regulations do, and thus are subject to a less rigorous analysis, *which affords the Government latitude in designing a regulatory solution*." (emphasis added) (citations omitted)).

155. Brief for the Petitioners, *supra* note 3, at 52.

156. Brief of Public Domain Interests as Amici Curiae in Support of Petitioners, *supra* note

While international harmonization and robust foreign trade are important, the effect of those goals on the United States's copyright framework must be limited.[157] The Tenth Circuit's opinion in *Golan v. Holder* is replete with concerns about trade, but lacking in copyright considerations.[158] The Copyright Clause and the First Amendment were fashioned to protect important interests. Those interests and the demands of the Constitution cannot be so easily brushed aside in the pursuit of trade.

131, at 39–40.

157. Gard, *Copyright Law v. Trade Policy: Understanding the* Golan *Battle Within the Tenth Circuit*, *supra* note 16, at 189.

158. *See* Golan v. Holder, 609 F.3d 1076, 1085–89 (10th Cir. 2010) (discussing testimony on the importance of Section 514 to American interests in foreign countries).