No. 01-618

IN THE

Supreme Court of the United States

ERIC ELDRED, *et al*.,
Petitioners,

v.

JOHN D. ASHCROFT, in his official capacity
as Attorney General,
Respondent.

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

BRIEF FOR *AMICUS CURIAE* THE INTELLECTUAL PROPERTY OWNERS ASSOCIATION IN SUPPORT OF THE RESPONDENT

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INTEREST OF AMICUS CURIAE [1]

Amicus Curiae Intellectual Property Owners Association ("IPO") is a nonprofit, national organization of nearly 100 large and midsize companies and more than 200 small businesses, universities, inventors, authors, executives, and attorneys who own or are interested in patents, trademarks, copyrights, and other intellectual property rights. Founded in 1972, IPO represents the interests of all owners of intellectual property. The members of IPO's Board of Directors, which approved the filing of this brief, are listed in the Appendix.

[1] The Parties have consented to the filing of this brief *amicus curiae*.

IPO's involvement in this case is prompted by two interrelated considerations. First, IPO's members rely heavily on the protections afforded by intellectual property laws both in the United States and abroad. As harmonization of intellectual property laws around the world becomes an international priority, IPO's members have a strong interest in ensuring that U.S. law keeps pace with emerging intellectual property laws in other countries. In particular, IPO members seek to ensure that their investment in intellectual property is not threatened by disparities between U.S. laws and those of other countries with whom the U.S. has a favorable balance of trade in intellectual property.

Second, IPO seeks to ensure that Congress has the power to adapt U.S. intellectual property laws to changing world conditions and to protect the interests of U.S. intellectual property owners abroad. In order for Congress to respond effectively to a rapidly changing international landscape of intellectual property laws, it must have a broad constitutional authority to legislate. This case challenges the foundation on which Congress may make changes to existing copyright rights. It thus presents an opportunity for this Court to define Congress' constitutional mandate in this area both clearly and broadly.

While IPO believes that the constitutionality of the CTEA can and should be upheld under the Copyright Clause alone, that issue will be fully briefed by the parties. If the Court concludes that the Copyright Clause cannot sustain the CTEA, IPO believes that due consideration should be given to whether an alternative constitutional foundation for the statute—specifically, the Commerce Clause—should be recognized.

INTRODUCTION

This case presents an important yet narrow question regarding the constitutional basis for Congress' retrospective

extension of the term of federal copyright protection for certain works from life-of-the-author-plus-50 years to life-of-the-author-plus-70 years, as embodied in the Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 ("CTEA"). Congress enacted the CTEA to keep pace with evolving international copyright standards and to protect U.S. copyright interests abroad and preserve our favorable balance of trade resulting from the export of copyrighted works. Given the foreign trade considerations that provided much of the impetus for passage of the CTEA, there can be little doubt that the statute bears a "substantial relation" to interstate and foreign commerce such that it passes constitutional muster under the Commerce Clause. *See United States v. Lopez*, 514 U.S. 549 (1995). Accordingly, irrespective of whether the CTEA can be sustained solely on the basis of the powers conferred by the Copyright Clause, the statute may be upheld as a valid exercise of Congress' concurrent powers under the Copyright and Commerce Clauses of the Constitution.

SUMMARY OF ARGUMENT

This Court has long recognized that the Copyright Clause is not the only enumerated power from which Congress might derive authority to grant intellectual property rights. *See Trade-Mark Cases*, 100 U.S. 82, 95 (1879). This Court in the *Trade-Mark Cases*, and two courts of appeals in more recent decisions,[2] have recognized that Congress can grant intellectual property rights under the Commerce Clause—even if those rights do not independently satisfy the prerequisites of the Copyright Clause—as long as the requirements of the Commerce Clause itself are met. In the case of the CTEA, those requirements are easily satisfied.

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[2] *See United States v. Moghadam*, 175 F.3d 1269, 1278-80 (11th Cir. 1999); *The Authors League of America, Inc. v. Oman*, 790 F.2d 220, 224 (2d Cir. 1986).

It is irrelevant that Congress did not explicitly invoke its Commerce Clause powers in passing the CTEA. Nor is it of any consequence that Congress did not make formal findings as to the substantial relationship between the extension of the federal copyright term and interstate or foreign commerce. *See Lopez*, 514 U.S. at 563-64. In fact, the legislative history of the CTEA amply demonstrates Congress' concern for protecting U.S. copyright interests abroad in the wake of changing international copyright standards, and for preserveing our surplus balance of trade in intellectual property in the process. *See* S. Rep. No. 104-315 at 3 (1996) ("S. Rep."). That legislative history makes abundantly clear that the extension of the copyright term "substantially affects" interstate and foreign commerce, and thus falls within Congress' regulatory power under the Commerce Clause. *Lopez*, 514 U.S. at 559.

Nothing in the language, history or structure of the Copyright Clause dictates that it be the sole basis for Congress' authority to legislate in the intellectual property arena, including copyright. Moreover, finding a concurrent basis for Congress' enactment of the CTEA under the Commerce Clause would not run afoul of the constitutional scheme.

In particular, upholding the constitutionality of the CTEA under both the Copyright and Commerce Clauses would not "eradicate" any "affirmative limitation" imposed by the Copyright Clause, including its "limited times" requirement. The Copyright Clause's "limited times" language is not a constitutional imperative applicable to all intellectual property legislation. Unlike the Bankruptcy Clause at issue in *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982), which this Court found imposed a uniformity requirement that precluded any "non-uniform" bankruptcy legislation, the Copyright Clause does not prescribe a "limited times" requirement for all intellectual property

legislation, and perhaps not even all federal copyright legislation. Particularly in an area intimately related to foreign commerce considerations, Congress should be accorded the latitude to extend the intellectual property protections currently available to U.S. citizens and companies pursuant to Congress' broad authority under the Commerce Clause.

ARGUMENT

I. THE COPYRIGHT CLAUSE IS NOT THE SOLE CONSTITUTIONAL BASIS FOR FEDERAL INTELLECTUAL PROPERTY LEGISLATION

The CTEA was enacted to harmonize the term provisions of the Copyright Act with their original legislative intent, U.S. interests in protecting its foreign commerce, and the subsequent trend of foreign law. Consequently, the CTEA extended the terms of both then-existing and future copyrights. Petitioners argue that the provisions of the CTEA that extended the term of *existing* copyrights are unconstitutional because they exceeded the scope of the legislative powers conferred by the Copyright Clause. *See* U.S. Const. art I, § 8, cl. 8.

Petitioners' arguments presume that if power to enact the CTEA was not conferred by the Copyright Clause of the Constitution, then the statute cannot be upheld as a constitutional exercise of federal legislative power. This premise may be understandable given that the lower courts sustained the constitutionality of the CTEA solely under the Copyright Clause.

But this premise is false. It can be reconciled with neither the independent nature of Article I's grants of legislative powers nor the history of the Copyright Clause. Consequently, even if some provisions of the CTEA were to

exceed the scope of the powers granted by the Copyright Clause, they would be well within the scope of the powers granted by the Commerce Clause.

Recognizing the substantial overlap between the subject matter of the Commerce and Copyright Clauses does not necessarily mean that Congress can use the Commerce Clause to grant any sort of "copyrights." Difficult legal questions might arise were the Commerce Clause used to grant copyrights utterly inconsistent with the fundamental principles of the Copyright Clause—such as eternal copyrights or copyrights for non-authors. But such questions do not arise in this case. Here, any arguable conflicts between the CTEA and the Copyright Clause derive from very technical limitations argued to affect the scope of Copyright Clause powers.

For example, the CTEA extends the terms of future and existing copyrights so that the longest would terminate after a period defined by the life of the author plus 70 years. Petitioners *concede* that such a term is constitutional, and that it would not be "meet" for this Court to dispute the propriety of such a term. Br. Pet'rs at 14. Nevertheless, it is argued that the term of *existing* copyrights cannot be extended by 20 years to equal this admittedly constitutional term of life-plus-70 years. *Id*. at 18. Such a 20-year term extension is allegedly not constitutionally "limited" only because more such extensions might be granted in the future. The "limited Times" language of the Copyright Clause is thus argued to draw some sort of constitutional "line" between a term of "life-plus-70 years" and a term of "life-plus-50-plus-20 years." *Id*. at 14. Any "line" drawn between "70" and "50+20" is a technicality at best.

Similarly, Petitioners also advance a very technical argument that extending the terms of existing copyrights to an admittedly constitutional term of "life-plus-70" years would not "promote the progress" of learning and human

knowledge as required by the Copyright Clause. *Id*. at 19-22. Petitioners assert that the requirement for "progress" can be met only if rights are granted in exchange for the production of a new work. Such an argument makes the 200-year-old practice of extending the term of existing copyrights unconstitutional since its origins in 1790.

This argument ignores the text of the Clause—Congress can surely *promote* the progress of learning indirectly, through means other than granting copyrights to newly created works. But even were this "progress" argument valid, it would be technical. Congress has compelling government interests in harmonizing the terms of domestic property rights, harmonizing the terms of domestic and foreign laws, and protecting U.S. exports in foreign commerce. None of these interests conflicts materially with promoting the progress of learning. They are merely argued to exceed the scope of a narrow reading of one word in the Copyright Clause. *See id*.

In summary, all of Petitioners' arguments about CTEA and the Copyright Clause assert that the CTEA technically exceeds some letter of the Clause without violating any of its fundamental principles. Such claims have a simple rebuttal: The Copyright Clause alone does not define the limits of federal legislative power.

Copyrighted content is one of this country's major domestic industries and one of its leading exports. Consequently, the Commerce Clause can sustain any provision of the CTEA that might exceed the scope of the legislative powers granted by the Copyright Clause.

Indeed, nothing in the history of the Copyright Clause itself suggests that it was intended to be the "stopping point" for legislative power advocated by petitioners. Br. Pet'rs at 11, 13. While the history of the Clause is indeed "extremely

limited," [3] nothing in it shows that the Clause was intended to be the only constitutional basis for Congress' protection of intellectual property rights. Nor did the Framers view the Copyright Clause as the sole means by which Congress may promote the progress of science and the useful arts. As a leading scholar of the Clause put it:

> There is simply nothing to indicate that there was any general intent by the Framers to limit the authority of Congress to promote the progress of science and useful arts to the issuance of limited-term monopolies to authors and inventors. Indeed, no rationale has ever been advanced [as to] why the Framers should have favored such a restriction on congressional authority.[4]

To the contrary, the history of the Clause reflects the Framers' desire "to assure that Congress would *in fact* have authority to issue patents and copyrights *in addition to* whatever other means it saw fit to use to promote the progress of science and useful arts." *Conforming*, *supra* note 4, at 95 (emphasis added). This history shows that far from being a "stopping point" for legislative power, the Copyright Clause was adopted to guard against narrow constructions of the scope of federal legislative powers.

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[3] *Goldstein v. California*, 412 U.S. 546, 555 (1973). In *Goldstein*, the Court sustained the constitutionality of a state statute that provided for copyright protection of recordings without regard to duration. After examining the wording, history and purposes of the Copyright Clause, the Court upheld the concurrent exercise of power by the states to protect copyright rights. *Id.* at 553. *Goldstein* held that the concurrent exercise of state and federal legislative powers relating to copyright comports with the constitutional scheme. Consequently, the concurrent exercise of federal legislative powers under the Copyright and Commerce Clauses should also do no violence to that scheme.

[4] *See Edward C. Walterscheid*, *Conforming the General Welfare Clause and the Intellectual Property Clause*, 13 Harv. J.L. & Tech. 87, 126 (1999) (hereafter "*Conforming*").

II. THE CTEA CAN BE SUSTAINED AS AN EXERCISE OF LEGISLATIVE POWERS GRANTED BY THE COMMERCE CLAUSE

Two showings are needed to prove that the CTEA can be sustained under the Commerce Clause. First, it must be shown that the Commerce Clause can sustain copyright legislation even though that subject is addressed more specifically in the Copyright Clause. Second, it must be shown that the CTEA exercises powers conferred by the Commerce Clause. Each of these issues will be addressed in turn.

The structure of Article I does not support the notion that the Framers intended to delineate legislative powers that were mutually exclusive and non-overlapping. As this Court observed in *The Legal Tender Cases*, 79 U.S. 457, 544-45 (1870), Congress' "power over a particular subject may be exercised as auxiliary to an express power, though there is another express power relating to the same subject, less comprehensive." [5] The structure of the Constitution

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[5] *See also Perpich v. Dep't of Defense*, 496 U.S. 334, 349 (1990) (holding that "the Militia Clauses do not constrain" other enumerated powers relating to national defense); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding under the Commerce Clause civil rights legislation similar to that held to exceed congressional enforcement power under the Fourteenth Amendment); *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 39 (1943) (holding that Congress could use its commerce power to enact Jones Act remedies unknown to admiralty law); *United States v. Flores*, 289 U.S. 137, 149 (1933) (holding that the Piracies and Felonies Clause "cannot be deemed to be a limitation" on more general legislative powers relating to admiralty); *Baender v. Barnett*, 255 U.S. 224, 226-27 (1921) (holding that the Counterfeiting Clause does not limit congressional power to punish closely related crimes pursuant to more general grants of power) (*citing United States v. Marigold*, 50 U.S. (9 How.) 560, 568 (1850)); *cf. Norman v. Baltimore & O.R. Co.*, 294 U.S. 240, 303 (1935) ("[t]he broad and comprehensive national authority over the subjects of revenue,

confirms this conclusion: The third of its three clauses dealing with "direct taxes" would be redundant unless the Framers intended that limitations on grants of legislative power relating to a particular subject would not ordinarily constrain broader grants of legislative powers that might encompass the same subject matter.[6]

The general principle that legislative powers are concurrent and overlapping also applies in the more specific context of intellectual property law. In *Trade-Mark Cases*, this Court first considered the possibility that intellectual property legislation enacted by Congress may be grounded *either* on the Copyright or Commerce Clauses. In that case, although the Court held that a trademark statute providing for criminal sanctions could not be sustained under either clause, it held open the possibility that trademark legislation might be sustained under the Commerce Clause. 100 U.S. 82, 95 (1879). The Court's willingness to consider the Commerce Clause as an alternative constitutional foundation for the statute set an important precedent in discerning whether the constitutional inquiry in this case starts and ends with the Copyright Clause.

More recently, two cases from the Eleventh and Second Circuits applied this principle of concurrent and overlapping legislative power in the particular context of copyright law. They expressly hold that the Copyright and Commerce Clauses provide Congress with coextensive authority to

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finance, and currency is derived from the aggregate of the powers granted to the *Congress*").

[6] *See, e.g.*, U.S. Const. art. I, § 8, cl. 1 (giving Congress broad authority to impose any sort of "taxes"); U.S. Const. art. I, § 2, cl. 3 ("direct taxes shall be apportioned among the several states . . . ."); U.S. Const. art. I, § 9, cl. 4 ("no capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.").

enact intellectual property legislation, including laws relating to copyright.

In *The Authors League of America, Inc. v. Oman*, 790 F.2d 220 (2d Cir. 1986), the Second Circuit upheld the constitutionality of the manufacturing clause of the 1976 Copyright Act, which had been part of U.S. copyright law for nearly a century. The manufacturing clause, which has since been eliminated from the federal copyright statute, prohibited the importation into the United States of works manufactured abroad. *Id.* at 221. Rejecting the argument that the constitutionality of the manufacturing clause could only be determined by reference to the Copyright Clause, the Second Circuit concluded that "denial of copyright protection to certain foreign-manufactured works [as a means of protecting the domestic publishing industry] is clearly justified as an exercise of the legislature's power to regulate commerce with foreign nations." *Id.* at 224.

In *United States v. Moghadam*, 175 F.3d 1269, 1275-76 (11th Cir. 1999), the Eleventh Circuit upheld the constitutionality of a federal criminal anti-bootlegging statute under the Commerce Clause. Noting that Congress believed that it had enacted this statute under the Copyright Clause, the court presumed, during its analysis, that the Copyright Clause could not sustain the statute. *Id.* at 1274.[7] The Eleventh Circuit went on to conclude that Congress' desire to protect the domestic recording industry from piracy both here and abroad brought the statute within the bounds of Congress' authority under the Commerce Clause, as defined by this Court in *Lopez*.[8]

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[7] This presumption was based on the supposition that the live performances recorded on disc without authorization did not satisfy the Copyright Clause's "fixation" requirement. *Id.* at 1277.

[8] The court's analysis of whether a Commerce Clause approach would bypass the limitations found in the Copyright Clause is addressed below.

These decisions reveal a judicial receptivity to a flexible constitutional approach that is appropriate here, especially given the foreign commerce interests at stake in the CTEA. They demonstrate that there is nothing inherent in the Copyright Clause that forecloses reliance on the Commerce Clause to sustain legislation that falls squarely within Congress' power to regulate interstate and especially foreign commerce—irrespective of whether the legislation independently survives scrutiny under the Copyright Clause. Whether the CTEA can be sustained under the Commerce Clause is the question to which we now turn.

"[T]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). Though Congress made no specific reference to the Commerce Clause during its consideration of the CTEA, the legislative history contains numerous findings concerning the effect of term extension on the copyright interests of American authors abroad. Furthermore, the legislative history leaves no doubt as to Congress' desire to preserve the favorable balance of trade resulting from the export of U.S. copyrighted products such as motion pictures, sound recordings and books. The legislative history of the CTEA thus firmly establishes the requisite link between term extension and interstate and foreign commerce required by the Commerce Clause. *See Lopez*, 514 U.S. at 559.

The CTEA responded, in part, to a 1993 European Union Directive requiring member countries to extend their copyright terms to life-plus-70 years. Council Directive 93/98, 1993 O.J. (L29019) ("*EU Directive*"), *cited in*, S. Rep. at 4-5. Utilizing a reciprocity-based principle derived from Article 7(8) of the Berne Convention known as the

"rule of the shorter term,"[9] the *EU Directive* permitted countries with longer copyright terms "to limit protection of foreign works to the shorter term of protection granted in the country of origin." S. Rep. at 9. As a result, unless the United States extended its copyright term to life-plus-70 years, U.S. authors and copyright owners faced the prospect of having their works enter the public domain in Europe 20 years before contemporaneous works authored in EU member countries. In Congress' view, this potential disparity put U.S. authors and copyright owners at a decided disadvantage with respect to our EU trading partners and threatened the enormous U.S. surplus balance of trade in copyrighted intellectual property:

> America exports more copyrighted intellectual property than any country in the world, a huge percentage of it to nations of the European Union. In fact, intellectual property is our second largest export, with U.S. copyright industries accounting for roughly $40 billion in foreign sales in 1994 . . . The United States stands to lose a significant part of its international trading advantage if our copyright laws do not keep pace with emerging international standards.

Id. The adverse consequences both to U.S. copyright owners and to our favorable balance of trade in intellectual property of not responding to emerging international copyright standards were starkly clear to Congress:

> Given the mandated application of the "rule of the shorter term" under the *EU Directive*, American works will fall into the public domain 20 years before those of our European trading partners, undercutting our

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[9] *See* Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 104th Cong., 1st Sess. 209 (1995) (Statement of Ambassador Charlene Barshefsky, Deputy U.S. Trade Rep., Office of the U.S. Trade Rep.).

> international trading position and depriving copyright owners of two decades of income they might otherwise have.

Id.; see also Hearing on the Copyright Term Extension Act of 1995, Before the Senate Comm. on the Judiciary, 104th Cong., 1st Sess. 2 (1995) (Opening Statement of Senator Orrin G. Hatch); H. R. Rep. No. 105-452, at 4 (1998) (hereafter "H. Rep.").

Together with Congress' findings that extension of the copyright term would strengthen incentives to creativity and maximize the return on creative investment,[10] these statements show that the CTEA was not only "substantially related" to foreign commerce concerns, it was driven by them. Under this Court's *Lopez* test, the CTEA easily passes muster under the Commerce Clause and should be upheld.

III. UPHOLDING THE CONSTITUTIONALITY OF THE CTEA UNDER THE COMMERCE CLAUSE WOULD NOT ERADICATE ANY AFFIRMATIVE LIMITATION ON GOVERNMENTAL POWER IMPOSED BY THE COPYRIGHT CLAUSE

As the Eleventh Circuit recognized in *Moghadam*, "[t]he more difficult question in this case is whether Congress can use its Commerce Clause power to avoid the limitations that might prevent it from passing the same legislation under the Copyright Clause." 175 F.3d at 1277. After careful analysis, the Eleventh Circuit concluded that sustaining an anti-bootlegging statute under the Commerce Clause would not undermine the Copyright Clause's fixation requirement,[11]

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[10] S. Rep. at 12; H. Rep. at 4.

[11] Because *Moghadam* had not raised the issue, the Eleventh Circuit did not decide whether the anti-bootlegging statute, which was perpetual

and was thus consistent with this Court's decision in *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982). A similar conclusion is warranted here.

In *Railway Labor*, this Court struck down bankruptcy legislation that affected only one particular bankrupt railroad. The Court held that this statute violated the "uniformity" requirement imposed by the Bankruptcy Clause. *Id*. at 468-69.[12] The Court also held that "non-uniform" bankruptcy laws could not be sustained under the Commerce Clause because this would "eradicate" what the Court deemed "an affirmative limitation" on legislative power imposed by the Bankruptcy Clause. *Id.*

But *Railway Labor* is distinguishable here for two related reasons: The principles underlying the Copyright Clause would not be impaired—much less "eradicated"—by the CTEA and the Clause itself was never intended to impose "affirmative limitations" on governmental power.

Most significantly, the CTEA does not "eradicate" the principles underlying the Copyright Clause. In *Railway Labor*, the Court held that a bankruptcy statute "eradicated" the uniformity requirement of the Bankruptcy Clause by effecting the most extreme violation of "uniformity" possible: It imposed huge and unique liabilities on one debtor identified by name. *Id*. at 471.

But ordinarily, invoking the Commerce Clause when foreign and interstate commerce are at issue effects the purposes of the Commerce Clause without "eradicating" any fundamental principles underlying narrower grants of

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in duration, was inconsistent with the "limited times" requirement of the Copyright Clause. 175 F.3d at 1281.

[12] The Bankruptcy Clause grants Congress the power to "establish . . . uniform laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4.

legislative power. For example, in *Moghadam*, the Eleventh Circuit held that the Commerce Clause could sustain an anti-bootlegging statute assumed not to satisfy the fixation requirement of the Copyright Clause: "Common sense does not indicate that extending copyright-like protection to a live performance is fundamentally inconsistent with the Copyright Clause." 175 F.3d at 1281.

The CTEA is even more consistent with the principles of the Copyright Clause than the statute sustained in *Moghadam.* Nothing in the CTEA "eradicates" any fundamental principle of the Copyright Clause. Both the text and legislative history of the CTEA confirm that it extends copyrights of authors for a limited and finite term of up to 20 years in order to promote the progress of learning by encouraging the creation of new works. *See, e.g.*, S. Rep. at 12; H. Rep. at 4. Even were the Copyright Clause construed so narrowly as to place the existing-term extension provisions of the CTEA beyond the scope of the Clause, the CTEA would still be consistent with its fundamental principles.

Moreover, this case is also distinguishable from *Railway Labor* because the Copyright Clause does not impose "affirmative limitations" on governmental power akin to those imposed by the "uniformity" requirement of the Bankruptcy Clause. For at least two reasons, the Copyright and Bankruptcy Clauses are fundamentally different in their effects and intent.

First, unlike the Bankruptcy Clause, the Copyright Clause does not impose "affirmative limitations" on government power because it does not bind the states. *E.g.,Goldstein v. California*, 412 U.S. 546, 559 (1973). By contrast, in *Railway Labor*, the Court recognized that the Framer's intent to make uniform bankruptcy laws a constitutional imperative was reflected not only in the Bankruptcy Clause, but also in the Contract Clause that effectively precludes states from

enacting retroactive debt-relief laws. 455 U.S. at 472 n.14. The uniformity requirement thus limited the exercise of the exclusively federal power to enact bankruptcy laws.

Here, in contrast to *Railway Labor*, where "[t]he Framers' intent to achieve uniformity among the Nation's bankruptcy laws" was readily apparent, *id.*, the constitutional structure of the Copyright Clause makes it implausible to assume that a modification of the copyright laws driven by foreign commerce concerns can derive only from powers granted by the Copyright Clause. The Constitution should not be construed to preclude copyright legislation needed to protect U.S. copyright owners abroad and to promote foreign commerce. Indeed, "[a] rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution." *Mathews v. Diaz*, 426 U.S. 67, 81 (1976).

Second, even as to Congress itself, a leading historian of the Copyright Clause has repeatedly concluded that it was adopted to confirm, rather than restrain, federal power to grant copyrights and patents and that such grants are only one of the means that Congress can use to exercise its power under the Clause. [13] A review of the history of the Clause confirms this analysis.

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[13] *See* Walterscheid, *Conforming*, *supra* note 4, at 125 (concluding that the Clause should be "interpreted to read: 'To promote the progress of science and useful arts [including] by securing for limited times . . .'"); Edward C. Walterscheid, *The Nature of the Intellectual Property Clause: A Study in Historical Perspective (Part I)*, 83 J. Pat. & Trademark Off. Soc'y 763, 767 (2001) (describing this interpretation as "a major thesis" of his research); *see also Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1565 (Fed. Cir. 1988) (holding that the Clause "does not state that the Government may promote the progress of the useful arts only through the patent and copyright system").

The drafting history of the Copyright Clause began when delegates to the Constitutional Convention proposed five legislative powers relating to copyrights or patents:

> To secure to literary authors their copy rights for a limited time; To encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries; . . . To grant patents for useful inventions; . . . To secure to authors exclusive rights for a certain time . . . [and] To establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures.[14]

These proposals were then submitted to the Convention's Committee on Detail and later referred as unfinished business to the so-called Committee of Eleven. That Committee reported an amalgam of these five proposals that the Convention then adopted without debate. *Conforming*, *supra* note 4, at 92.[15] It is striking that in so doing, the Committee departed from the narrow approach reflected in the Articles of Confederation, where the Continental Congress asked the states to grant copyrights in "any books not *hitherto printed* . . . for a certain time not less than 14 years" without the possibility of renewal.[16]

After the Copyright Clause was adopted by the Convention, it was not controversial. As *The Federalist* put it, "The utility of this power will scarcely be questioned." *The Federalist* No. 43 (James Madison). The powers

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[14] *2 Records of the Federal Convention of 1787*, 321-22 (Max Ferrand ed., 1937) (hereafter "*Records*").

[15] The Committee proposed what became known as the Copyright Clause: "To promote the progress of science and useful arts by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries." *Records*, *supra* note 14, at 509.

[16] Resolution of May 2, 1783, *Copyright Enactments of the United States 1783-1906*, 11 (2d ed. 1906) (emphasis added).

granted by the Clause were then broadly construed during the early years of the Republic. Numerous term extensions of patents and copyrights were subsequently enacted by Congresses populated by the Framers,[17] and several of those extensions were upheld by this Court or its justices.[18]

In conclusion, the Copyright Clause was adopted to confirm, rather than restrain, broad federal power to enact copyright legislation. Consequently, it should not be held to impose "affirmative limitations" like those at issue in *Railway Labor*.

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[17] For example, in 1808 Congress extended a patent by 14 years to remedy a governmental error. 6 Stat. 70 (1808). In 1790 and again in 1831, Congress adjusted the terms of then-existing copyrights. *See* 1 Stat. 124 (1790); 4 Stat. 436 (1831). Congress also extended the terms of individual copyrights. *See* 6 Stat. 389 (1828) (extending by 14 years the terms of copyright in a book); 6 Stat. 897 (1843) (extending the same author's copyright by 14 years).

[18] *See Evans v. Jordan*, 13 U.S. (9 Cranch) 199, 202-04 (1815); *Evans v. Eaton*, 16 U.S. (3 Wheat.) 454, 506-07 (1818); *Evans v. Hettich*, 20 U.S. (7 Wheat.) 453 (1822); *Evans v. Robinson*, 8 F. Cas. 886, 888 (C.C. Md. 1813) (No. 4571) (Duval, Circuit Justice); *Blanchard v. Sprague*, 3 F. Cas. 648, 650 (C.C. Mass. 1839) (No. 1518) (Story, Circuit Justice); *Blanchard's Gun-Stock Turning Factory v. Warner*, 3 F. Cas. 653, 657 (C.C. Conn. 1846) (No. 4571) (Nelson, Circuit Justice); *see also Bloomer v. McQuewan*, 55 U.S. (14 How.) 539, 543-44 (1852) (listing 15 patent term extensions between 1809 and 1847).

CONCLUSION

For the reasons set forth above, *amicus curiae* Intellectual Property Owners Association respectfully requests that the Court affirm the judgment of the Court of Appeals.

Respectfully submitted.

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