No. 10-545

IN THE

Supreme Court of the United States

LAWRENCE GOLAN, *ET AL.*,

Petitioners,

—v.—

ERIC H. HOLDER, JR., ATTORNEY GENERAL, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE*, INFORMATION SOCIETY PROJECT AT YALE LAW SCHOOL PROFESSORS AND FELLOWS, IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are Professors and Fellows affiliated with the Information Society Project at Yale Law School (ISP),[2] an intellectual center addressing the implications of new information technologies for law and society. Jack M. Balkin is Knight Professor of Constitutional Law and the First Amendment and the founder and director of the Information Society Project at Yale Law School. Marvin Ammori, a Visiting Scholar at Stanford Law School and a Legal Fellow at the New America Foundation, publishes in First Amendment and Internet policy. Nicholas Bramble, a Lecturer in Law at Yale Law School and a MacArthur Fellow in the Information Society Project at Yale Law School, has written articles on First Amendment law and information policy. Bryan Choi is a Postdoctoral Associate in Law and Kauffman Fellow in the Information Society Project

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made any monetary contribution toward the preparation or submission of this brief. Counsel for the respondents, on April 20, 2011, and counsel for the petitioners, on May 19, 2011, have filed in this Court consent to the filing of amicus curiae briefs in support of either party or of neither party in fulfillment of S. Ct. Rule 37.3. This brief was written by Nicholas Bramble, Lecturer in Law and MacArthur Fellow in the Information Society Project at Yale Law School, Bryan Choi, Postdoctoral Associate in Law and Kauffman Fellow in the Information Society Project at Yale Law School, and Bradley Wilson Moore, Visiting Fellow in the Information Society Project at Yale Law School, under the supervision of the undersigned Senior Fellow of the ISP, Priscilla Smith.

[2] The Professors and Fellows participate in this case in their personal capacity; titles are used only for purposes of identification.

at Yale Law School. Adam Cohen is a Lecturer in Law and Kauffman Fellow in the Information Society Project at Yale Law School.

SUMMARY OF ARGUMENT

By abrogating the rule that works pass permanently into the public domain, Section 514 of the Uruguay Round Agreements Act ("URAA") violates one of the traditional contours of copyright law that serve to balance copyright and freedom of speech. These traditional contours, including the idea/expression distinction, the fair use defense, and limited times, are constitutional privileges that keep copyright law consistent with the requirements of the First Amendment. Congress may not abridge them any more than it could require that defamation for public figure plaintiffs should be governed by a negligence standard instead of the actual malice rule of *New York Times v. Sullivan*. Therefore strict scrutiny should apply.

The permanence of public domain status is a constitutional privilege that is justified both by long tradition and by the logic of the copyright system as an engine of free expression.

Congress's revocation of works from the public domain is unprecedented. Legislative history since the time of the Framers reveals an unbroken congressional practice of preserving the finality of the public domain. Only wars and other exceptional disasters resulting in serious disruptions of communications systems that would unfairly prevent authors from claiming copyrights have warranted deviation from that basic agreement.

Congress has made policy judgments about which works should receive copyright protection, how copyrights are granted and expire, and when works will enter the public domain. But the public domain has never been subjected to this level of congressional manipulation. The contents of the public domain have always been free for all to use without fear that the privilege could be revoked at any time and works made in good faith would suddenly become illegal to publish or perform. The evidence in this case amply demonstrates the free speech harms imposed on creators, publishers, archivists, distributors, and other citizens who have come to rely on free and stable access to public domain works.

The URAA undermines central features of the constitutional arrangements that drive copyright's engine of free expression. That engine of free expression consists of a three-stage life cycle in which works are created, exclusive rights are granted to authors for limited times to incentivize production, and finally works are released permanently into the public domain. The last stage in the life cycle is crucial to copyright's free speech bargain because it allows future creators to make use of public domain material to produce new creations and new innovations. If Congress could take works out of the public domain at its pleasure, these future creative uses would be chilled because authors and artists would never know whether compositions using public domain material would later become contraband. Hence the finality of the public domain, like the idea/expression distinction and the fair use

defense, is a key constitutional privilege protected by the First Amendment.

The parties to this case were incorrect to stipulate that the URAA is content-neutral, and therefore that intermediate scrutiny is the appropriate standard of review. This Court's First Amendment doctrine often uses constitutional privileges, like the actual malice rule of *New York Times v. Sullivan* or the rule of *Brandenburg v. Ohio*, to demarcate zones of free speech protection in areas like defamation or conspiracy law; there, legislatures may justifiably regulate communications because of their content. These constitutional privileges balance important free speech values against interests in social order.

It is for this Court, and not for Congress, to strike this crucial balance. Thus, Congress may not change the actual malice rule because it wishes to balance speech and reputation differently from this Court. So too, Congress may not discard the traditional contours of copyright doctrine such as the idea/expression distinction, or, in this case, the permanent passage of works into the public domain. When Congress attempts to subvert a constitutional privilege that preserves the compatibility of the First Amendment with other areas of law—such as libel, obscenity, and incitement—it attempts to subvert a categorical balance already struck. Hence strict scrutiny should apply.

Section 514 cannot survive strict scrutiny. None of the interests articulated by the government—protecting the interests of American authors abroad, remedying past inequities suffered by foreign authors, and compliance with the Berne

Convention—are compelling. Even if they were, Section 514 is badly drafted to achieve these ends: it either fails to fulfill these goals or burdens far more speech than is necessary to fulfill them.