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IN THE SUPREME COURT OF THE UNITED STATES

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LAWRENCE GOLAN, ET AL., :

Petitioners :

v. : No. 10-545

ERIC H. HOLDER, JR., ATTORNEY :

GENERAL, ET AL. :

- - - - - x

Washington, D.C.

Wednesday, October 5, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

ANTHONY T. FALZONE, ESQ., Stanford, California; on behalf of Petitioners.

DONALD B. VERRILLI, JR., ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondents.

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1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 10-545, Golan v. Holder.

5 Mr. Falzone.

6 ORAL ARGUMENT OF ANTHONY T. FALZONE

7 ON BEHALF OF THE PETITIONERS

8 MR. FALZONE: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 Section 514 did something unprecedented in
11 American copyright law. It took millions of works out
12 of the public domain, where they had remained for
13 decades as the common property of all Americans. That
14 violated the Copyright Clause and the First Amendment.

15 Let me turn first to the Copyright Clause.
16 In Eldred, this Court held Congress gets to pick the
17 date on which a copyright expires, and it can extend
18 that date before we reach that date.

19 JUSTICE GINSBURG: You said that Congress
20 can set a time limit. In this case, we're dealing with,
21 let's say, Aaron Copeland, who gets the benefit of
22 copyright, and Congress says: No, we think Shostakovich
23 should be treated just like Copeland. Yes, we took care
24 of our own when we weren't part of the world community,
25 but now we are.

1 And so, all that Congress is doing is giving
2 Shostakovich works the same limited time as Aaron
3 Copeland. And why does that violate the limited-time
4 prescription?

5 MR. FALZONE: The problem is Congress is now
6 setting a second limit long after the first one has come
7 and gone.

8 JUSTICE GINSBURG: But the person -- the
9 person we're talking about, the work we're talking
10 about, never got the first limit. There was no -- there
11 was no time, there was no time when that work could have
12 been protected. So, why isn't it consistent with the
13 Copyright Clause to say, you are entitled to limited
14 time protection? We're not talking about a case where
15 you've had the protection, enjoyed it, and then it
16 expired, and then Congress says we'd like -- we like
17 your work so much we're going to give you another term.

18 What's affected here are people who were
19 unprotected. And Congress says we think that they
20 should have a limited time.

21 MR. FALZONE: So, let me just clarify one
22 thing. Many of the works that were restored here did
23 get some time, 28 years, and were not renewed.

24 But to get back to your question about the
25 works that got none --

1 JUSTICE GINSBURG: They didn't get the
2 equivalent of what a U.S. author -- but let's take the
3 large category, because it's the ones that you feature.
4 You're talking about Shostakovich, Stravinski, and I
5 say, well, what's wrong with giving them the same time
6 that Aaron Copeland got?

7 MR. FALZONE: Congress has been setting the
8 limited time at zero since 1790. In the 1790 Act,
9 Congress set the limit at zero for a wide array of
10 works, those that did not comply with formalities, those
11 that were written by foreign authors --

12 JUSTICE GINSBURG: That's not a limited
13 time. That's saying you have no time.

14 MR. FALZONE: Well, but saying you have no
15 time is itself picking the limit because the language of
16 the Copyright Clause forces Congress to pick a limit
17 that constrains copyright by marking its end. And when
18 -- if a limit does not mark the end once reached, then
19 there is no limit; there is no end.

20 JUSTICE GINSBURG: But it has to have a
21 beginning, too. And that's -- for these people who were
22 unprotected, because we didn't recognize their
23 copyright, there's no beginning.

24 MR. FALZONE: No, there does not need to be
25 a beginning. It is within Congress's discretion.

1 Remember, this is permissive. Congress may grant
2 exclusive rights, but it can also say your limit is
3 going to be zero; we decide that you're not going to get
4 any exclusive rights.

5 And every Congress since 1790, every time it
6 went to add subject matter, every time it went to extend
7 the duration of copyright, respected that choice to give
8 no time. And, in fact, the time -- the decision to make
9 foreign authors ineligible is a decision that Congress
10 has never gone back on. None of the exceptions the
11 Government points to remove anything from the public
12 domain that was placed there based upon a lack of
13 national eligibility. Two hundred years of history is
14 crystal clear about --

15 JUSTICE GINSBURG: I can understand your
16 argument that the public domain is untouchable. I'm not
17 sure I get that from the Constitution. That says to
18 secure to authors for a limited time the exclusive
19 right. That -- that's talking about what you can secure
20 to authors. So, I don't see why using the words of the
21 Constitution, to secure to authors for a limited time,
22 Congress can't say: We want every author to have a
23 limited time.

24 MR. FALZONE: Well --

25 JUSTICE GINSBURG: The foreign works that we

1 didn't give -- we're not treating them any better. They
2 don't get a different startup date, but they get the
3 same end date as our own authors.

4 MR. FALZONE: Right. The -- the operative
5 language is the limited times restriction, and the limit
6 it requires Congress to pick is the date at which all
7 protection ends for good. And Congress has picked zero
8 since 1790 and respected that decision, and that is no
9 accident.

10 Because the -- the -- if you want to know
11 what "limited times" means, if it means anything, it
12 means if -- for instance, if Congress is not required to
13 respect an expiration date long after it's passed or its
14 decision to deny a work any protection in the first
15 place --

16 JUSTICE GINSBURG: We're not talking about
17 expiration dates. So, I'd like you to concentrate --

18 MR. FALZONE: Sure.

19 JUSTICE GINSBURG: That's not -- that's not
20 -- none of these -- none of these copyrights have been
21 extended beyond their expiration date. They just
22 weren't protected.

23 MR. FALZONE: Well, taking works that got no
24 protection, if Congress is not required to respect its
25 decision to deny a work any protection in the first

1 place, we can never know whether we've reached the end
2 or not. And, in fact, that's the problem with the
3 Government's theory. Its theory says all Congress has
4 to do is attach a nominal expiration date to any given
5 copyright. Well, if that's true, there is -- if that's
6 all you need, there's nothing stopping us --

7 JUSTICE GINSBURG: But is it -- that is --
8 that is not --

9 MR. FALZONE: -- from reaching back and
10 giving De Tocqueville a hundred years.

11 JUSTICE GINSBURG: That is most distinctly
12 not before this case. So, please let's not talk about a
13 copyright that has been protected, has expired, and
14 Congress wants to revive it.

15 We are concentrating on what Congress did to
16 bring us into compliance with the worldwide system, and
17 it's saying: We're giving a limited time to these
18 authors.

19 MR. FALZONE: Well --

20 JUSTICE GINSBURG: They never had a limited
21 time before.

22 MR. FALZONE: Well, I -- I was talking -- De
23 Tocqueville never got any time, because he was a foreign
24 author. Ben Johnson never got any time, but on the
25 Government's theory, we could give him a hundred years

1 right now.

2 This statute did work differently. It
3 certainly restored copyrights into the existing period.
4 That's correct. That is an accurate description of this
5 statute. But that is not a limit that's contained
6 anywhere in the Government's interpretation of limited
7 times.

8 JUSTICE GINSBURG: Did anyone in the same --
9 the same -- published the same year as De Tocqueville, a
10 U.S. author, that would have a copyright protection
11 today?

12 MR. FALZONE: I'm sorry. I didn't hear you.

13 JUSTICE GINSBURG: I gave the example of
14 Aaron Copeland versus Shostakovich. Let's go back to De
15 Tocqueville. Who has a copyright who published in,
16 what, 18 -- what was it?

17 JUSTICE KENNEDY: Forties.

18 JUSTICE GINSBURG: Yes.

19 MR. FALZONE: The answer is nobody. But
20 here is the problem. If Congress wanted to reach that
21 work, here's all it has to do on the Government's theory
22 and even under the mechanism of section 514: All it
23 needs to do today is extend existing terms a hundred
24 years, and then reach back and restore into that
25 existing term. So, on the Government's theory and even

1 by the mechanism on which this statute operates, the
2 government could reach back and protect De Tocqueville.

3 CHIEF JUSTICE ROBERTS: Under your -- under
4 your theory, let's say you have a copyright that expires
5 on October 5th, okay? On October 4th, Congress could
6 extend that for 25 years.

7 MR. FALZONE: Yes.

8 CHIEF JUSTICE ROBERTS: Right? But on
9 October 6th, they couldn't go back and extend it 1 day.

10 MR. FALZONE: That's exactly right because
11 the limit the Copyright Clause requires us to pick is an
12 end date with permanent consequence. End dates are
13 about finality. If that end date doesn't have permanent
14 consequence, if it doesn't have finality, we can never
15 know if we've reached the end or not. The limit the
16 Framers knew was the limit of the Statute of Anne.

17 JUSTICE KENNEDY: But it seems -- but it
18 seems to me that that was rejected in our most recent --
19 an earlier case on copyright.

20 MR. FALZONE: In Eldred?

21 JUSTICE KENNEDY: Yes.

22 MR. FALZONE: No, no. Eldred said Congress
23 can move the limit back before we reach it. But Eldred
24 most certainly did not say that Congress is free to
25 ignore the limit once we hit it, because if you can do

1 that, then you never know if you've reached the limit or
2 not. The limit the Framers knew was the one in the --

3 JUSTICE SOTOMAYOR: Counselor, there was no
4 limit here, meaning these foreign works were never given
5 the opportunity to be copyrighted. Isn't that a
6 substantial difference from the hypothetical that you're
7 trying to proffer? You're -- the hypothetical -- and I
8 think that's what Justice Ginsburg was responding to --
9 is you had a copyright, it expired, and now Congress
10 wants to revive it. Isn't that different from not
11 having had the opportunity at all and being given a term
12 to exploit your work and protect it?

13 MR. FALZONE: The answer is no, it's not
14 different; and Congress treated those situations exactly
15 the same in all 19 amendments over the span of 200
16 years.

17 JUSTICE SOTOMAYOR: The problem --

18 MR. FALZONE: It gave equal respect.

19 JUSTICE SOTOMAYOR: I -- I know, but it
20 didn't do it when it set up the copyright system.

21 MR. FALZONE: Oh, it did.

22 JUSTICE SOTOMAYOR: In 1790, counsel, there
23 were three States that didn't give copyrights. There
24 were other States, and you make a big deal in your brief
25 about common law protection, but common law protection,

1 particularly in New York, which you relied on, only
2 extended to unpublished works. Once a work was
3 published, it was no longer protected under the common
4 law. That was true of most States. And some States
5 gave copyright protection to residents of their own
6 State but not to residents from other States.

7 So, it took a whole body of public works and
8 gave them copyright protection the day they decided to
9 pass the copyright law. So, what are you doing telling
10 us that there has never been a historical experience
11 with Congress taking public works out of the public
12 domain?

13 MR. FALZONE: Well, let me be clear about
14 what happened in 1790. The 1790 Act did not remove
15 anything from the public domain. The text is clear,
16 because insofar as it applied to works already printed,
17 it presupposes existing copyrights explicitly in the
18 text of the Act.

19 JUSTICE SOTOMAYOR: Read those words to me.

20 MR. FALZONE: So, I'm looking at section 1
21 of the 1790 Act, and at the beginning it talks about
22 "after the passing of this act, the author and authors
23 of any map, chart, book or books already printed within
24 these United States, being a citizen ... thereof, or
25 resident within ... or his or hers executors,

1 administrators or assigns, who hath or have not
2 transferred to any other person the copyright of such
3 map, chart, book or books" --

4 JUSTICE SCALIA: Wait a minute. Who have or
5 have not transferred to any other person. So, you don't
6 have to have a copyright.

7 JUSTICE SOTOMAYOR: You just --

8 JUSTICE SCALIA: Right?

9 JUSTICE SOTOMAYOR: -- well, you have to
10 have a --

11 MR. FALZONE: You do have to have a
12 copyright. So, it says "author or authors" and "hath"
13 is the singular, and "have" -- "have not" is the plural
14 for that.

15 JUSTICE SCALIA: Read it again. Who have --

16 MR. FALZONE: Sure.

17 JUSTICE SCALIA: -- or have not transferred
18 to any other person.

19 MR. FALZONE: Right. The copyright of such
20 map. It presupposes the existence of a copyright.

21 JUSTICE SCALIA: Oh. Oh, the copyright. I
22 got you.

23 MR. FALZONE: Yes. "The copyright" is the
24 key language. So, the text makes it clear they
25 presupposed existing copyrights.

1 And let me speak to --

2 JUSTICE SOTOMAYOR: I -- your reading of
3 that passage is different than mine. I think it's a --
4 it's saying if -- whether you have or you haven't.

5 MR. FALZONE: But let me speak to the point
6 you raised about common law protection for published
7 works. You said New York provided no common law
8 protection for published works. With respect, that's
9 not correct. The Naxos v. Capitol Records case, highest
10 court of New York, says New York common law provided
11 protection for published works right up to the point
12 where the Federal Act cut it off.

13 And if you look -- and if -- if the question
14 is whether the first Congress intended to take anything
15 out of the public domain in 1790, the answer is you
16 simply cannot reach that conclusion, because everything
17 contemporaneous with the first Congress, the history of
18 the common law in Britain, decided by Millar v. Taylor
19 and Donaldson v. Beckett, recognized common law rights
20 in published works. The Federalist Papers spoke about
21 Millar, and everything contemporaneous --

22 JUSTICE SOTOMAYOR: If we disagree with your
23 proposition, does your argument fail? If the historical
24 work does not point to what you claim?

25 MR. FALZONE: You mean the 1790 Act or the

1 19 after it?

2 JUSTICE SOTOMAYOR: In 1790. If Congress
3 did what I believe it did --

4 MR. FALZONE: No, I --

5 JUSTICE SOTOMAYOR: -- would your argument
6 fail.

7 MR. FALZONE: No, not necessarily, because,
8 of course, that was the first Copyright Act, and
9 Congress established a baseline. It had to start
10 somewhere. What we see 19 --

11 JUSTICE SOTOMAYOR: It could have started in
12 the place you want Congress to have started now?

13 MR. FALZONE: Well, no, but then --

14 JUSTICE SOTOMAYOR: It said, moving forward,
15 there's a Federal copyright. It didn't have to take
16 things out of the public domain. We're arguing about
17 whether they did or didn't. But assuming they did.

18 MR. FALZONE: Oh, I will assume they did.
19 They had to start somewhere. They wanted uniformity.
20 They created a statute that provided it.

21 When you look at every amendment, 19 times
22 in 200 years after that, Congress respected the
23 permanent consequence of the limits it chose, even when
24 those limits were a work gets no time whatsoever, based
25 on formality and noncompliance, based upon national

1 eligibility, based upon expiration of 28 years. It was
2 consistent each time it added subject matter or extended
3 terms.

4 JUSTICE KENNEDY: Can you tell me a little
5 bit about the phrase and the argument about the public
6 domain? Is, in your view, that just a synonym for when
7 the time has ended? Or is there something more
8 substantive to it that -- is it your position that the
9 public somehow owns what's in the public domain? I'm --

10 MR. FALZONE: Well -- so, to be precise, our
11 position is once Congress calls the limit, that is, once
12 it says this work is unprotected, whether it's the
13 expiration of 28 years or a decision to give it no
14 protection, it's creating affirmative rights in every
15 member of the public. Yes, they own it. And this Court
16 has recognized --

17 JUSTICE KENNEDY: But -- but how does the
18 phrase -- so, the public domain is simply a conclusion
19 to express that, the operation of that principle? The
20 public domain doesn't have any more substantive meaning
21 other than to just express the conclusion that there's a
22 limited time?

23 MR. FALZONE: Well, it -- in this case, when
24 I refer to the public domain, it's the collection of
25 things for which Congress had said protection is done,

1 it's over, we've hit the limit, it's done. So things
2 that went --

3 JUSTICE KENNEDY: Once again, it's just a
4 conclusion for the argument.

5 MR. FALZONE: I think that's the operative
6 concept here. That's right.

7 JUSTICE GINSBURG: I think you gave an
8 analogy to the statute of limitations, and I thought you
9 were quite right about that. You can extend the statute
10 of limitations before it's expired, but once it's
11 expired, it's over.

12 The problem with you using that as an
13 analogy is that there was a beginning. Time ran out,
14 and you're trying to deal with a situation here where
15 you say, you know, the time was limited for the U.S.
16 work, but it's unlimited, that you -- you cannot treat
17 the foreign work -- you cannot give it a limited time,
18 the same limited time that you would give a U.S. work.
19 You're saying these people had no time, and they may
20 never get time.

21 MR. FALZONE: They had no time because
22 Congress decided that their works were going to be
23 ineligible, and a limit of zero is one Congress has been
24 setting since 1790 and respected consistently.

25 If the Chief Justice gives me a limited time

1 for oral argument, I might say no, thanks, I have
2 nothing to say.

3 JUSTICE GINSBURG: But it isn't -- it isn't
4 quite --

5 MR. FALZONE: And we all know I can't come
6 back tomorrow.

7 JUSTICE GINSBURG: -- quite so because there
8 are these examples of the people who couldn't get
9 copyright because of wartime both after -- after both
10 World War I and World War II, and -- so, those people
11 were allowed to get the protection that they couldn't
12 get because of the war.

13 MR. FALZONE: That's correct. That's what
14 those statutes did. They were never challenged. And
15 make no mistake, our position is, insofar as they
16 removed anything from the public domain, they are
17 unconstitutional.

18 But even if the Court doesn't want to go
19 that far, I think the wartime statutes and the other
20 small handful of exceptions the Government points to fit
21 quite well into a very limited exception for eligible
22 authors who show nothing more than the familiar concept
23 of excusable neglect, which has operated -- and, again,
24 in very narrow situations -- to relieve people of the
25 consequences of deadlines.

1 CHIEF JUSTICE ROBERTS: What about new
2 categories? You know, architecture. Congress decides
3 we're going to extend copyright protection to
4 architectural design, and they say: And we're going to
5 go back 5 years. So, any new architectural design
6 conceived or constructed, whatever, within the last 5
7 years gets protection, and it goes on for another 15.

8 MR. FALZONE: Right. So -- so -- of course,
9 to be clear, that's not what Congress actually did when
10 it protected architectural works.

11 CHIEF JUSTICE ROBERTS: No, no, I know.

12 MR. FALZONE: It looked forward. Right.

13 But that -- so, in that case, the -- the
14 Federal scheme, if it had not previously regulated
15 architectural works, it had not -- there had been no
16 decision as to what the limit was going to be. And so,
17 you may pose a different question.

18 Here, we're talking about works that were
19 affirmatively within the Federal scheme --

20 CHIEF JUSTICE ROBERTS: No, no, I'm just
21 trying to -- I'm trying to test the limit of your public
22 domain --

23 MR. FALZONE: Sure.

24 CHIEF JUSTICE ROBERTS: -- argument. Does
25 it extend to new categories of copyrightable works?

1 MR. FALZONE: I think the answer is the
2 retrospective portion of that statute flunks progress of
3 science but -- but passes limited times.

4 JUSTICE SCALIA: Would you -- would you
5 spend a little bit of time on your other argument? I
6 take it to be a separate argument apart from the, you
7 know, time limit argument, the argument that the problem
8 here is that this law does not promote the progress of
9 science and useful arts and, therefore, does not comply
10 with the Copyright Clause. Why doesn't it --

11 MR. FALZONE: That's right.

12 JUSTICE SCALIA: Why doesn't it promote the
13 progress of science and the useful arts?

14 MR. FALZONE: So, the -- the progress of
15 science corresponds roughly to the creation and spread
16 of knowledge and learning. A statute that does nothing,
17 like this one, does nothing but take old works out of
18 the public domain without any impact on prospective
19 incentives, cannot stimulate the creation of anything.
20 And as for things that already exist, it cannot
21 stimulate the spread of them. All it can do is restrict
22 the spread of things that could once circulate freely.

23 JUSTICE SOTOMAYOR: You don't think that
24 there are some foreign authors who didn't or wouldn't
25 come into the U.S. market because they couldn't protect

1 their works here and kept their works in other markets
2 that -- in which it was protected?

3 MR. FALZONE: Well, I don't -- I don't --

4 JUSTICE SOTOMAYOR: And it doesn't encourage
5 them to sort of make investments?

6 MR. FALZONE: No. Not -- this statute does
7 not and cannot do that, because it --

8 JUSTICE SOTOMAYOR: Why not?

9 MR. FALZONE: Because it --

10 JUSTICE SOTOMAYOR: Foreign authors who
11 decided not to exploit their works here wouldn't be
12 induced to think about coming into this market because
13 now they can protect their works?

14 MR. FALZONE: Well, whether they came into
15 this market or not has no effect on whether they can
16 protect their works or not. They were unprotected
17 whether they came into this market or not. They would
18 be protected --

19 JUSTICE SOTOMAYOR: You're not answering my
20 question. You don't think that this law induces those
21 foreign authors to come here and promote their work?

22 MR. FALZONE: I -- I don't see how it could.

23 CHIEF JUSTICE ROBERTS: Well, one way it
24 could, I suppose, is that it shows that Congress is
25 interested in making sure that American authors overseas

1 have reciprocal protection, an issue that could come out
2 in a variety of contexts. And if I'm sitting there
3 writing a great novel, I will have the confidence that
4 my government will ensure that I get protection when it
5 becomes a bestseller in China.

6 MR. FALZONE: Yes.

7 CHIEF JUSTICE ROBERTS: Right? Well, that's
8 -- that's an incentive.

9 MR. FALZONE: Yes. And you were assured of
10 that incentive in 1988, when we joined the Berne
11 Convention without removing anything from the public
12 domain, because when you sit down to write that book
13 today, that work will absolutely be protected in all of
14 the Berne and WTO countries. So, the incentive effect
15 was achieved and achieved in full in 1988.

16 CHIEF JUSTICE ROBERTS: No, I'm talking
17 about -- but the same issue can come up again, you know,
18 whether it's in the area of formalities or whatever.
19 There may be another problem where there's a dispute
20 between other countries and our country. And I will
21 know that, in the past, the United States has taken
22 action looking out for -- for the interests of American
23 authors.

24 MR. FALZONE: That's -- that's --

25 CHIEF JUSTICE ROBERTS: That's an incentive.

1 Now, it may be, as I think it was described in a court
2 of appeals decision, a "meager" incentive. You may be
3 more interested in other protection. But it's -- we
4 haven't really required much more than that.

5 MR. FALZONE: Perhaps. I mean, there's
6 nothing in -- in the record before Congress here to
7 reflect the fact they made any such conclusion.

8 JUSTICE SCALIA: Let me put it -- I think
9 it's the same point -- another way. Let's assume I'm a
10 multibillionaire, and I receive an award as a great
11 patron of the arts because I have furthered the arts by
12 giving several million dollars to someone who has
13 already composed an opera or who has already written a
14 book. Wouldn't -- wouldn't I be furthering, be viewed
15 as furthering, the arts?

16 MR. FALZONE: Potentially, but the problem
17 here, if I can move a little bit to the First Amendment,
18 is the mechanism Congress chose to use here. They chose
19 to create that reward by taking away core public speech
20 rights from the American public and transforming them
21 into somebody's private property.

22 JUSTICE SCALIA: But that's what the
23 copyright law permits, the -- excluding things from the
24 public domain so long as, in the process of doing it,
25 you're furthering the arts.

1 MR. FALZONE: Well -- but let me focus on
2 the First Amendment problem. An ordinary copyright
3 statute does not revoke the public's Federal right to
4 copy and use works in the public domain. That is
5 exactly the thing Congress refused to do 19 times over
6 200 years. And that's the huge departure from
7 traditional contours of copyright protection that
8 triggers First Amendment scrutiny here. And when you go
9 to ask the First Amendment question, you can't ignore
10 the mechanism Congress chose to use here, which is to
11 take away public speech rights and turn them into
12 somebody else's private property.

13 That was the explicit motivation of the
14 people who came before Congress and asked them to pass
15 this statute. That is the justification the
16 Government --

17 JUSTICE KENNEDY: But now you're saying that
18 there is a substantive component to this public domain
19 argument, that the public does own something. And
20 that's different from what I thought you answered
21 earlier when you said it's just conclusory for a limited
22 time.

23 MR. FALZONE: In that case, I misspoke. The
24 public -- the public domain is owned collectively by the
25 public. And, in fact, decisions of this Court going

1 back to the 19th century refer to it as public property.
2 And I think that --

3 JUSTICE BREYER: I'm curious to go back a
4 second. I thought Justice Sotomayor's question was:
5 Imagine Smith in Germany. He has written a book. It's
6 there, already exists, but it has no copyright
7 protection in the United States. So, after this, would
8 he be more willing to send it to the United States? And
9 I take it your answer is no. The reason is because I
10 can go and buy a copy and sell it in the United States
11 even without this law. Is that right or wrong?

12 MR. FALZONE: I think -- I think that it
13 could possibly incentivize him to bring a work to the
14 United States, depending on how the statute worked --

15 JUSTICE BREYER: Well, see, that's what --
16 -- isn't that the question? The question is, now that
17 Smith has the same protection in the United States that
18 Germany gave him, doesn't that give him an incentive to
19 send his book to the U.S.? I'm thinking about that one.
20 I thought: Not much, because I can go buy it today
21 without this law and bring it to the United States and
22 sell as many as I want. But nonetheless --

23 MR. FALZONE: I think that's right.

24 JUSTICE BREYER: What is -- that's not
25 right?

1 MR. FALZONE: No, I think -- I think you're
2 correct. I think you're correct. I think that's --

3 JUSTICE BREYER: Well, don't just jump on my
4 answer as being correct if it's not.

5 (Laughter.)

6 JUSTICE SOTOMAYOR: Counsel --

7 JUSTICE BREYER: All right. Then the
8 answer --

9 JUSTICE SOTOMAYOR: It might be his
10 incentive to buy it or not, but the question is the
11 author's incentive to sell it here. Those are two
12 different incentives. Whether -- you know, he could go
13 anywhere and buy a cheaper book if he chose to take the
14 trip or get on the Internet and find it. He could do
15 that now. Copyrighted materials here go at a different
16 price than they do elsewhere. That's not the issue.
17 The issue is the author's incentive.

18 MR. FALZONE: The -- the problem here is
19 these authors are long gone. You can't incentivize
20 them. These works are so old they're long gone. You
21 can't incentivize anything that's -- that's happened so
22 long ago. So -- and if you could --

23 JUSTICE SOTOMAYOR: Well, if you can't
24 incentivize them, they're not going to claim their
25 rights.

1 MR. FALZONE: I'm sorry.

2 JUSTICE SOTOMAYOR: They're not going to
3 come and claim their rights. Part of this law is that
4 they have to declare that they're interested in
5 protecting their copyright here.

6 MR. FALZONE: No. Actually, that's
7 optional. It's optional for them to file a notice of
8 intent to enforce. It's optional for them to declare.
9 But the real problem is --

10 JUSTICE SOTOMAYOR: Optional for them, but
11 once they do, that's when they can sue a prior user.

12 MR. FALZONE: That's right. If -- well, it
13 depends who they want to sue, but yes. That -- they
14 certainly have broader rights once they file the notice
15 of intent to enforce. But the --

16 JUSTICE SCALIA: Of course, the assumption
17 of this -- of this line of questioning, I suppose, is
18 that the mere marketing in the United States of stuff
19 that has already been created promotes the progress of
20 the useful arts. I'm not sure it promotes the progress
21 of the useful arts. It makes more money for the guy who
22 wrote it, but it doesn't incentivize anybody --

23 MR. FALZONE: That's right.

24 JUSTICE SCALIA: -- to create art.

25 MR. FALZONE: It's not going to incentivize

1 anybody to create anything, and it only restricts the
2 circulation of things that once circulated freely.

3 If I can reserve my time for rebuttal, I'd
4 like to do that.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 MR. FALZONE: Thank you.

7 CHIEF JUSTICE ROBERTS: General Verrilli.

8 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,

9 ON BEHALF OF THE RESPONDENTS

10 GENERAL VERRILLI: Mr. Chief Justice, and
11 may it please the Court:

12 I'd like to begin by picking up on a point
13 that my friend made in response to Justice Ginsburg
14 suggesting that with respect to foreign works what
15 Congress has done is set the copyright term at zero. I
16 don't really think that's a fair description of the
17 situation, and it obscures what Section 514 actually
18 does and what Congress is all about here.

19 Since 1891, Congress has concluded as a
20 matter of copyright law that foreign works are entitled
21 to the same protection as domestic works. The problem
22 with respect to the authors that section 514 covers is
23 not that Congress set the copyright limit at zero; is
24 that as a matter of foreign relations, we did not have
25 treaties with these individual countries. And what 514

1 does is remedy that problem. What 514 says is, with
2 respect to a defined set of foreign authors, they get
3 the remainder of the copyright term that they would
4 otherwise have gotten, and nothing more, had they lived
5 in countries where we had -- with which we had copyright
6 relations at the time they published, or had they
7 complied with the formalities that we used to enforce
8 but no longer do to perfect and renew copyrights.
9 That's what it does.

10 It doesn't grant anybody a perpetual term.
11 It does not renew a copyright term that has run its full
12 course and create a new one. It rectifies that problem
13 which doesn't -- doesn't reflect anything about a
14 congressional judgment setting the copyright term at
15 zero for foreign works.

16 JUSTICE ALITO: Could Congress grant
17 copyright protection to works that had lost that
18 protection due to the expiration of the period that was
19 provided for under then -- under previous law?

20 GENERAL VERRILLI: We think that the --
21 there isn't an ironclad limit that can be derived from
22 the text of the Copyright Clause or from history that
23 would say that Congress is forbidden in any circumstance
24 from doing that. We do think that there are significant
25 limits in the text of the Copyright Clause that would

1 restrict any ability Congress might have to do that.
2 But one thing I think is important here is that section
3 514 is not a statute in which Congress did that, and
4 we'd respectfully suggest that any assessment by this
5 Court of whether Congress had that power should await a
6 concrete context in which Congress exercises it, if it
7 ever does.

8 JUSTICE SOTOMAYOR: What is it that you're
9 -- that you're referring to?

10 GENERAL VERRILLI: Excuse me, Justice
11 Sotomayor.

12 JUSTICE SOTOMAYOR: You said there are
13 limits.

14 GENERAL VERRILLI: Yes.

15 JUSTICE SOTOMAYOR: What --

16 GENERAL VERRILLI: Well, one limit I think
17 is a quite important one is that the Copyright Clause
18 says that you can only grant copyright in authors, to
19 authors. And as a work gets older and older when you're
20 talking about Shakespeare and Ben Johnson, there really
21 at that point isn't an author in which you could vest
22 the copyright. And creating any copyright for a
23 long-expired work like that would really, I think, raise
24 the problem that the Framers were addressing by
25 restricting copyright to authors, which -- which was to

1 avoid the creation of patronage monopolies in which
2 publishers who weren't the authors could claim the
3 exclusive rights of copyright.

4 JUSTICE ALITO: But doesn't this -- doesn't
5 section 514 provide copyright protection for works that
6 were created by people who are long since dead?

7 GENERAL VERRILLI: Yes, it does.

8 JUSTICE ALITO: So, I don't understand the
9 limit that you were just suggesting.

10 GENERAL VERRILLI: Well, because they --

11 JUSTICE ALITO: Do they have to be dead for
12 some period of time before --

13 GENERAL VERRILLI: No, but --

14 JUSTICE ALITO: -- Congress is unable to
15 give them back their copyright?

16 GENERAL VERRILLI: What 514 does, Justice
17 Alito, is provide copyright protection to works of
18 foreign authors whose works still have copyright
19 protection in their own country, whether they're dead or
20 alive. So long as the work has protection in the
21 country, then 514 provides copyright protection.

22 And the reason it does so is to ensure our
23 compliance with the Berne Convention. And so, the why
24 here is very important and, I think, provides the answer
25 to Justice Scalia's question about how 514 contributes

1 to the progress of arts and sciences. What 514 does --
2 514 is, in essence, the price of admission to the
3 international system. We decided, the policymaking
4 branches of our government, the executive and the
5 Congress, decided that we needed to be -- and it was in
6 the national interest -- to be part of the international
7 copyright system and to join the Berne Convention to
8 accomplish that. The reason we did so was because our
9 intellectual property is subject to very serious levels
10 of piracy in many foreign countries because of
11 under-enforcement.

12 By joining Berne, what we did was commit
13 ourselves to the international standards. And by
14 enacting Section 514 to implement the Uruguay Round
15 Agreements in 1994, what we did was say to the world
16 that we are going to ensure compliance in this country.

17 JUSTICE SCALIA: General Verrilli, I do not
18 find that an appealing argument. It seems to me
19 Congress either had the power to do this under the
20 Copyright Clause or it didn't. I don't think that
21 powers that Congress does not have under the
22 Constitution can be acquired by simply obtaining the
23 agreement of the Senate, the President, and Zimbabwe.

24 (Laughter.)

25 JUSTICE SCALIA: I do not think a treaty can

1 expand the powers of the Federal Government. I mean,
2 this is either okay under the copyright clause or it
3 isn't. Now --

4 GENERAL VERRILLI: We completely --

5 JUSTICE SCALIA: -- it would be nice to know
6 the reason for it, but you would still have to establish
7 that it's within the power of the Federal Government --

8 GENERAL VERRILLI: We completely agreement
9 with that, Justice Scalia.

10 JUSTICE SCALIA: Okay.

11 GENERAL VERRILLI: There's no textual limit
12 in the Copyright Clause that would preclude Congress
13 from enacting this statute.

14 The Petitioners have also raised the First
15 Amendment argument. We don't think First Amendment
16 scrutiny applies here. To the extent it did, the why
17 would matter there, and there's definitely a substantial
18 interest on the part of Congress in -- in ensuring
19 compliance with Berne and getting protection for our
20 works in Berne.

21 Now, in Eldred, the Court did say, I think
22 quite clearly, that there is no requirement under the
23 Copyright Clause that a new financial benefit granted to
24 an existing -- that a new financial benefit cannot be
25 granted to an existing work --

1 JUSTICE BREYER: No, but it was -- in Eldred
2 the main difference is that in Eldred, there was a law
3 that might, at least in principle, have elicited a new
4 book. And in this case, by definition, there is no
5 benefit given to anything at all that is not already
6 created.

7 GENERAL VERRILLI: I disagree.

8 JUSTICE BREYER: By -- how? How does it
9 give any benefit to anything that isn't already created?

10 GENERAL VERRILLI: Because it creates
11 additional incentives for authors today and going
12 forward, because they know that there's a much greater
13 likelihood that whatever intellectual property they
14 create will be better protected in foreign countries as
15 a result of our joining the Berne Convention.

16 JUSTICE BREYER: How does this provision do
17 that? I think maybe there are other provisions, but I
18 thought this provision is talking solely about books,
19 for example, that are already created.

20 GENERAL VERRILLI: Well, but --

21 JUSTICE BREYER: Is it not? I may have been
22 misreading, it but I certainly got that out of, like, 42
23 briefs and --

24 (Laughter.)

25 GENERAL VERRILLI: But we can't -- we can't

1 get the protections of Berne -- Berne is not a menu --

2 JUSTICE BREYER: Oh, oh. You say --

3 GENERAL VERRILLI: -- in which we get to
4 choose options.

5 JUSTICE BREYER: Well then, you know, as you
6 also know from the 42 briefs, that there's a lot of
7 argument that you could comply in other ways that are
8 less restrictive. And whether that's true or not, is
9 that -- there what you're saying is -- if I parody it,
10 it's not a fair reading I'm going to give -- but what
11 you're saying is we are -- here have a law which says
12 that libraries, music lovers, book buyers will either
13 pay more money for things already in existence or will
14 simply be unable to get them if they're orphans, on the
15 one hand, so that other countries will impose similar
16 kinds of restrictions upon their music lovers, music
17 goers, libraries and -- so that they pay more for our
18 works that are already in -- that are already produced,
19 or simply can't use them because they can't find who
20 owns them.

21 Now, that's in parody form, for
22 succinctness, what I think the argument is on the other
23 side --

24 GENERAL VERRILLI: Right, but --

25 JUSTICE BREYER: -- and they'll say no

1 copyright law -- with your exception of when the country
2 was founded -- no copyright law has served that kind of
3 purpose. That's served often by tariffs --

4 GENERAL VERRILLI: But --

5 JUSTICE BREYER: -- but not by copyright
6 law.

7 GENERAL VERRILLI: But there's another way
8 of looking at that, Justice Breyer, of course, which is
9 that the -- but for the fact that these individual
10 authors lived in countries that didn't have copyright
11 relations with the United States, they would have the
12 protection of our copyright law, and they would have the
13 term of copyright --

14 JUSTICE BREYER: Not necessarily. There are
15 three categories. One is the category of the people who
16 you couldn't, because of the country; that's Egypt, I
17 think, and Russia. The second is the category of the
18 people -- of sound recordings, and their third is the
19 category, which is not the null set, of people who did
20 not comply with certain registration requirements. For
21 example, I believe that the widow of Samuel Brittan
22 failed to renew her copyright. And there are probably
23 many that failed to renew the copyright after 28 years,
24 and the reason that they didn't is because they didn't
25 think there was much money in it. And those are the

1 very works that the libraries want to get ahold of and
2 put in their databases.

3 GENERAL VERRILLI: And there is no textual
4 limit in the Copyright Clause that says that Congress
5 cannot provide the same limited term to those categories
6 of works that it provides to other works. There just is
7 no textual limit.

8 JUSTICE BREYER: That's true but for one
9 text. They say that text has to do with progress. And
10 when they read it historically in light of Macaulay, in
11 light of the Statute of Anne, in light of going back to
12 Venice and the copyrights, in light of going back to
13 letters between Madison and Jefferson -- that term has
14 always meant produce at least one new thing. And here
15 there is not one new thing.

16 GENERAL VERRILLI: And -- yes.

17 JUSTICE BREYER: All right.

18 GENERAL VERRILLI: Yes, there is. First,
19 with respect to section 514, it's part and parcel of
20 joining Berne, and Berne gives protection not only to
21 the previously created works but to newly created works,
22 and it creates additional economic incentives in
23 foreign -- by assuring better protection in foreign
24 countries for newly created works. So, it creates many,
25 many more than one new work.

1 And I think it's also quite reasonable,
2 Justice Breyer, to read the incentive structure here in
3 a way parallel to the way the Court did in Eldred, which
4 is to say that, just as in Eldred the Court assumed that
5 there was an implicit guarantee to an author making a
6 creation that that author would get the benefit not only
7 of the existing term of copyright but any extension, I
8 think here, with respect to American authors, it's an
9 implicit guarantee that they get the benefit not only of
10 the foreign protection in existence at the time but any
11 expansion of foreign protection through adjoining
12 treaties, and article 8 -- and section 514 implementing
13 article 18 of Berne is the price of admission to that
14 treaty --

15 CHIEF JUSTICE ROBERTS: General, there is
16 something at least at an intuitive level appealing about
17 Mr. Falzone's First Amendment argument. One day I can
18 perform Shostakovich; Congress does something, the next
19 day I can't. Doesn't that present a serious First
20 Amendment problem?

21 GENERAL VERRILLI: I don't think so, Mr.
22 Chief Justice, and I do think -- for a host of reasons.
23 One is I think that it's -- it's just not so simple, and
24 I think the question that I think Your Honor asked my
25 friend was what about when Congress expands the scope of

1 exclusive rights for existing works? Well, Congress has
2 done that many, many times, and musical composition is a
3 really good example of that. In 1831, Congress created
4 exclusive right in the publishing and vending of musical
5 compositions, but not in their public performance. So,
6 from 1831 on, once I bought the sheet music, the public
7 performance was, to borrow the Petitioners' way of
8 thinking, in the public domain. You could do it any
9 time you wanted without having to get --

10 CHIEF JUSTICE ROBERTS: All right. Well,
11 that's --

12 GENERAL VERRILLI: -- a license to pay any
13 money. But --

14 CHIEF JUSTICE ROBERTS: That's -- one answer
15 is that Congress has done this before.

16 GENERAL VERRILLI: But then, in 1897,
17 Congress granted an exclusive right in the public
18 performance of musical compositions --

19 CHIEF JUSTICE ROBERTS: Right.

20 GENERAL VERRILLI: -- and made it applicable
21 to all existing copyrights. And so --

22 CHIEF JUSTICE ROBERTS: Okay. Well, do you
23 have an argument other than that they've -- they've done
24 this before?

25 GENERAL VERRILLI: Well, that they've done

1 it many times before, and it's a process -- I think it
2 reflects -- and -- and the point is that no one has
3 thought with respect to any of those significant
4 adjustments of the boundaries, that it was an occasion
5 for First Amendment scrutiny. And I think that's
6 because of the wisdom of the Court's opinion in Eldred,
7 that these are --

8 CHIEF JUSTICE ROBERTS: But we have -- but
9 it's pertinent under the First Amendment in other areas,
10 right? It's a different analysis if your claim is the
11 government should open up a park as a public forum, than
12 if it's been a public forum for 200 years and the
13 government decides to close it down. Maybe they can do
14 it, but it's a different question.

15 So, why isn't this a different question,
16 from whether they can extend copyright protection that's
17 already there?

18 GENERAL VERRILLI: I think -- because I
19 think there is -- once the Court gets into the business
20 of First Amendment analysis, there's no stopping point,
21 because all of the adjustments of the boundaries could
22 have the same kind of effect, I think, as the musical
23 composition example shows.

24 CHIEF JUSTICE ROBERTS: Well, what about --
25 what about Jimi Hendrix, right? He has a distinctive

1 rendition of the national anthem, and all of a --
2 assuming the national anthem is suddenly entitled to
3 copyright protection that it wasn't before, he can't do
4 that, right?

5 GENERAL VERRILLI: What copyright does, by
6 definition, is provide exclusive rights in expression;
7 and so, if the First Amendment is triggered whenever
8 copyright provides exclusive rights in expression that
9 it didn't used to provide, then heightened scrutiny will
10 apply any time Congress exercises its copyright power.
11 And what the Court said in Eldred --

12 CHIEF JUSTICE ROBERTS: So, he's just out of
13 luck? And that's just one example of many, where you
14 take existing works and you have a derivative work or
15 something that is distinctive to you. So, those people
16 are just out of luck?

17 GENERAL VERRILLI: Well, of course, under
18 section 514, they're not out of luck because it has
19 significant protections and accommodations for
20 derivative works. The question of whether there should
21 be heightened First Amendment scrutiny, we think, Eldred
22 answers, that -- that the First -- the Copyright Clause
23 already contains very significant accommodations of
24 First Amendment interests, the idea/expression
25 dichotomy, fair use. And -- and that is going to

1 provide -- maybe -- maybe Jimi Hendrix could claim fair
2 use in that situation.

3 And those are at the core of the traditional
4 contours of copyright. So, if Congress were to try to
5 extinguish fair use, I'd say yes, we'd have a First
6 Amendment issue there. If Congress were to try to
7 provide exclusive right in the ideas that are expressed,
8 as opposed to the expression itself, yes, we'd have a
9 First Amendment issue there. If Congress were to, say,
10 use the copyright power to engage in viewpoint
11 discrimination --

12 JUSTICE KENNEDY: Well, it seems to me what
13 you're saying, and I'm glad you gave this answer because
14 originally I thought I was going to put in my notes the
15 First Amendment doesn't apply to the copyright area --
16 and that just can't be.

17 What you're saying is, is that this law will
18 pass intermediate scrutiny. It's an important
19 governmental interest, and it's substantially related to
20 that.

21 GENERAL VERRILLI: We don't think it would
22 have any problem passing intermediate scrutiny, but we
23 don't think --

24 JUSTICE KENNEDY: But -- but --

25 GENERAL VERRILLI: -- intermediate scrutiny

1 ought to apply, Justice Kennedy.

2 JUSTICE KENNEDY: But can you -- can you
3 cite me to some -- some authority which says the First
4 Amendment doesn't apply to a copyright --

5 GENERAL VERRILLI: No. We don't say it
6 doesn't apply, but Eldred --

7 JUSTICE KENNEDY: The First Amendment test
8 doesn't apply. There has -- there has to be a -- a
9 test. Now, maybe -- say it isn't immediate scrutiny but
10 something else. But -- but certainly the First
11 Amendment is implicated.

12 GENERAL VERRILLI: Yes. And what Eldred
13 said, as I read it, Justice Kennedy, is that unless
14 Congress alters their traditional contours of copyright,
15 then rational basis scrutiny, rather than any heightened
16 form of First Amendment scrutiny, applies.

17 CHIEF JUSTICE ROBERTS: Even under -- even
18 under rational basis scrutiny, it seems to me that you
19 run into Justice Breyer's concern that the government
20 interest is vanishingly small when it comes to promoting
21 progress under the Copyright Clause, so that the
22 interest weighed on the other side of the -- the
23 restriction of free speech rights -- it's hard to say
24 that that's necessarily going to tip the balance in
25 every case.

1 GENERAL VERRILLI: I think it is going to
2 tip the balance, Mr. Chief Justice, because the -- I --
3 the reason Congress enacted section 514, at the urging
4 of executive branch officials who were charged with
5 trying to ensure that we could integrate ourselves into
6 the international system of copyright protection, was
7 that if we didn't have this provision, then we were not
8 going to be taken seriously; our works were not going to
9 be protected in these foreign countries; and that it
10 would defeat the purpose of joining Berne in the first
11 place.

12 JUSTICE BREYER: It couldn't have been.
13 That must be somewhat overstated, mustn't it? Because
14 the only concern is not about protecting new works in
15 the foreign countries. The concern, as I understand it,
16 was that we've had things in copyright for many years,
17 and we want retroactive protection there. The countries
18 that didn't give it, like Japan, were not kicked out of
19 the Berne Convention.

20 Rather, we pursued them in the WTO for many
21 years, and I guess somebody might pursue us. And then
22 you get into an argument about whether there are other
23 ways. Now, is that strong enough to overcome what these
24 briefs are full of?

25 I'll give you an example. Save The Music is

1 charged with looking for Jewish music in the periods
2 '30s, '40s, and '50s. Other organizations might find a
3 treasure trove of literature that was -- that was
4 copyrighted in Czechoslovakia or in Warsaw, and they
5 want to put it on the Web, and they want people to
6 listen to it. But they have no more idea of how to
7 track down the person on that, and they aren't protected
8 by any notice requirements because they aren't reliance
9 parties.

10 We're told by Barbara Ringer, former
11 registrar, that there are millions of such instances
12 where people would like to go back and would like to put
13 music, literature, film, et cetera, in a form that
14 people can use it today, and there's no way to do it
15 without their becoming scofflaws or without their having
16 millions of dollars to hire infinite numbers of trackers
17 and lawyers. Now, that's the argument that's made on
18 the other side, as the interest in communication that's
19 important.

20 What do you say?

21 GENERAL VERRILLI: So, two points: First,
22 with respect to the interest in what foreign countries
23 will do, I think it's incorrect to assume that this will
24 be tit-for-tat, that if we don't enforce article 18, the
25 only thing other countries won't do is enforce article

1 18 with respect to our works, as opposed to believing
2 that we're not an -- an effective partner and not
3 enforcing their copyright laws for the whole corpus of
4 our works.

5 Second, Justice Breyer, that problem that
6 you identified just exists as a feature of copyright
7 law. Copyright law exists for a certain time. With
8 respect to those works, it's going to create that issue.
9 The problem here is just the result of a fortuity that
10 those works might have been published in a country that
11 at the time they were published didn't have copyright
12 relations with the United States. And what section 514
13 does is address that fortuity by putting those authors
14 in the same position they would have been in had their
15 country had copyright relations with the United States.
16 And so, I don't think that's a principled objection on a
17 constitutional basis to section 514 --

18 JUSTICE BREYER: Well, here we have ASCAP.
19 We have ASCAP. I agree with you that it is a general
20 problem. It may be diminished in the United States, but
21 it still exists. And I guess the argument here is,
22 well, don't make it millions of times worse.

23 GENERAL VERRILLI: Well, it doesn't make it
24 millions of times worse. It applies to a small number
25 of -- but a significant number of countries --

1 JUSTICE BREYER: Well, what do you --
2 Barbara Ringer said a million. She numbers it in the
3 millions. Do you want to say, too?

4 GENERAL VERRILLI: No, we don't -- we don't
5 have any reason to doubt the -- the aggregate number.

6 JUSTICE GINSBURG: That's presupposing that
7 they're all going to give notice.

8 GENERAL VERRILLI: Well, with respect to
9 reliance parties, that's certainly true. They would
10 have to give notice. It is the case, Justice Ginsburg,
11 that if you're not a reliance party, then there would be
12 an infringement even without notice. So, I do think
13 there's something to that point. But, again, I just
14 think that's a result of the fortuity of the countries
15 not having copyright relations with the United States.
16 It's not about the -- it's not anything integral as a
17 matter of constitutional principle of the statute,
18 and --

19 JUSTICE SOTOMAYOR: -- library, the day this
20 law was passed, had to go and pick out all the books it
21 had that were subject to copyright and throw them out,
22 or do what with them?

23 GENERAL VERRILLI: I -- I don't think it had
24 to --

25 JUSTICE SOTOMAYOR: Stop them from

1 circulation?

2 GENERAL VERRILLI: I don't think it had to
3 take --

4 JUSTICE SOTOMAYOR: I'm not sure. How did
5 they protect themselves from infringement?

6 GENERAL VERRILLI: Yes. I don't think that
7 they had -- I don't think there is an act of
8 infringement by having a library book on the shelf, and,
9 of course, there are protections for libraries built
10 into the Copyright Act in all events.

11 And I do -- if I could in my remaining time,
12 I want to go back to the history that we started with,
13 because I do think it is important that there is no --
14 as a matter of text, I think it's clear -- there is no
15 unyielding requirement that you cannot restore copyright
16 to works in the public domain. I think the history
17 really does bear that out.

18 I think Justice Sotomayor had the history
19 exactly right, that in 1790, you had three States with
20 no copyright statutes. Of the 10 States with copyright
21 statutes, you had 7 that did not provide copyright to
22 maps and charts, which the Federal statute did. And I
23 think this is the key point: Of the States that did
24 enact copyright statutes to -- in the 1780s, in advance
25 of the 1790 Federal Act, at least four, and depending on

1 how you counted, as many as eight provided copyright
2 protection only to works printed after the date of the
3 State statute. They did that at the urging of the
4 Continental Congress in 1783.

5 So, I don't think there's any doubt that
6 when Congress enacted the Copyright Act in 1790, it made
7 a conscious choice to take a different approach, to
8 grant copyright protection to existing works, including
9 many, many, many works that were freely available for
10 exploitation in those States --

11 JUSTICE ALITO: Doesn't that show at most
12 that retroactive protection can be granted when there is
13 an enormous interest in doing so, namely, the
14 establishment of a uniform copyright system at the
15 beginning of the country? Because if Congress had not
16 done that and had said -- the alternative would be to
17 say things can be copyrighted going forward, then you
18 would have different copyright laws in all of the
19 States.

20 GENERAL VERRILLI: I think -- I don't think
21 so, Justice Alito. I think they could have followed the
22 model nationally of prospective copyright only and
23 extinguishing the prior copyright --

24 JUSTICE ALITO: Right.

25 GENERAL VERRILLI: -- and -- but they didn't

1 make that choice. They made a different choice. Now,
2 my friend suggests that the 1790 Act was just a
3 transition. But, of course, the same thing is really
4 true in an important sense of section 514. It's part of
5 a tradition -- of a transition of the United States into
6 the international system, which has required an
7 adjustment of our rules in order to bring us into
8 conformity with the international system.

9 And beyond the example, of course, of the
10 1790 -- and by the way, with respect to that language in
11 the 1790 copyright -- who hath or hath not have
12 copyright -- that's just a rerun of an argument that the
13 Court rejected in *Wheaton v. Peters*. In *Wheaton*, the
14 Court said that that language in the 1790 Act was
15 referring to pre-publication common law copyright, not
16 post-publication common law copyright.

17 Beyond that, it seems to me pretty clear
18 that what that language was referring to -- of course,
19 Congress presupposed the existence of copyrights. There
20 were all these State statutes that created some
21 copyrights. But what Congress did was act far more
22 broadly.

23 And -- so, I do think -- and then when one
24 looks at the examples of patents -- and I think the
25 Oliver Evans example and that case is an important

1 example. Early in our history, Congress creates a new
2 patent term to an expired patent. President Jefferson
3 signs it. Secretary of State Madison issues it. Chief
4 Justice Marshall upholds it as a circuit justice, and
5 the Court upholds it against a charge that it's
6 impermissibly burdening people who act in reliance on
7 the expiration of the prior patent.

8 There wasn't a word in this Court's decision
9 in that case about any potential constitutional
10 infirmity with doing that. And one would think if this
11 was such a significant and viable principle of
12 constitutional law, that someone would have brought it
13 up in those cases. In fact, the striking thing about
14 reading the Evans decision is that the Court clearly
15 looks at this all as a matter of legislative policy
16 judgment. It says, you know, yes, you're right, it
17 might have been an argument, a good argument in favor of
18 creating some reliance interest here, but that's a
19 judgment Congress should have made if anybody was going
20 to make it. It didn't -- and there is no reading of the
21 -- there's no required reading of that statute that has
22 to protect the reliance party.

23 So, I don't -- I just think when you look at
24 the patent protection, when you look at the 1790 Act,
25 when you consider the fact that when Congress expands

1 exclusive rights, as it did for example with respect to
2 musical compositions but did in the 1976 Act with
3 respect to lots of exclusive rights, it does so with
4 existing copyrights.

5 And all of that points up the wisdom of what
6 this court said in Eldred, that within very wide
7 margins, these are matters for legislative choice.
8 These are policy calls that require the balancing of a
9 complex set of interests, the drawing of a complex set
10 of lines made even more complex by virtue of the fact
11 that we are now trying to make a transition into full
12 participation in an international system, which is of
13 vital importance to protecting one of our most valuable
14 economic exports, intellectual property.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you, General.

17 Mr. Falzone, you have 4 minutes remaining.

18 REBUTTAL ARGUMENT OF ANTHONY T. FALZONE

19 ON BEHALF OF THE PETITIONERS

20 MR. FALZONE: Thank you. I have -- I have
21 four points to make: First one, refusing to provide any
22 protection for a work is setting the term at zero. The
23 point of the limited times restriction is it -- excuse
24 me -- it forces Congress to tell us when the end has
25 come. And if Congress is forever free to change its

1 mind, then we can never know if the end has come.

2 Point number two, this statute does not and
3 cannot promote progress, that is, the creation and
4 spread of knowledge and learning. When we joined Berne
5 in 1988, we got all of its prospective benefits or, as
6 the Government put it, secured the highest available
7 level of multilateral copyright protection for U.S.
8 artists, authors, and their creators. This statute is
9 not about that. It's simply about rewarding people who
10 made things long ago. It's --

11 JUSTICE GINSBURG: At the time we joined
12 Berne, there was an appreciation that we deferred the
13 article 18 issue. There wasn't any -- anyone who said
14 that we satisfied it.

15 MR. FALZONE: No. There was an express
16 finding -- explicit finding written into the statute,
17 that -- and Congress found explicitly that we could
18 comply with all Berne obligations without removing
19 anything from the public domain.

20 Now, third point --

21 JUSTICE GINSBURG: Well, there were many
22 people who read article 18 in a different way, and
23 Congress was later persuaded that that was right.

24 MR. FALZONE: Congress never revisited that
25 finding. So, no, they found what they found in 1988,

1 and they never revisited it.

2 JUSTICE GINSBURG: They -- they found that
3 compliance with article 18 was appropriate for us to
4 become a full member of the international copyright
5 community.

6 MR. FALZONE: Congress did not make that
7 finding, and I don't think you can even glean that from
8 the testimony that was presented to Congress. The
9 problem here is the -- the right to use works in the
10 public domain has defined the freedom of speech that the
11 public has known since 1790. The 1790 Act made these
12 freedoms clear by placing works unambiguously and
13 clearly in the public domain, including all foreign
14 works. So, even since before we had a First Amendment,
15 that has defined the freedom of speech that the public
16 knew.

17 And that right has also made sure that the
18 copyright sequence provides ever-increasing protection
19 for public speech rights. It gives partial protection
20 for some public speech interests during any initial
21 period of protection, but that blossoms into complete
22 protection for all public speech interests, once we
23 reach the limit Congress picks, once they place the work
24 in the public domain.

25 The burden on speech that this statute

1 imposes is remarkable. Let's start with the performance
2 right, which is central to my clients. There can't be
3 any doubt, as I think Chief Justice Roberts got at, that
4 the performance has a huge amount of original expression
5 bound up in it. It's the reason it's different to see
6 King Lear at the Royal Shakespeare Company; it's the
7 reason it's different when John Coltrane plays a jazz
8 standard. Huge amount of expression.

9 But even if you put performances aside, this
10 Court has recognized in case after case that there is a
11 critical speech interest in publishing the work of
12 another author, in showing a film created by another, or
13 for that matter, performing the work of another. So,
14 the -- the burden here is it took speech rights of 250
15 million Americans and turned them into the private
16 property of foreign authors, all on the bare possibility
17 that might put more money in the pocket of some U.S.
18 authors.

19 JUSTICE GINSBURG: All this rides on
20 accepting your argument that zero is a limited time.

21 MR. FALZONE: No. Not on the First
22 Amendment side. Not at all. No, no, no.

23 No. That is -- the First Amendment argument
24 is completely independent of that. Even if you find
25 Congress could do this on the Copyright Clause, we still

1 have that First Amendment problem, and the -- there is
2 no way the Government can pass intermediate scrutiny
3 here.

4 This was not required by Berne. The
5 Government does not even contend Section 514 was
6 required by Berne, nor could it, because that would
7 violate Congress's explicit findings they made in 1988.

8 JUSTICE GINSBURG: Would you say it was
9 would required by TRIPS?

10 MR. FALZONE: No. Because TRIPS just
11 implements Berne. So that the problem here is this
12 statute was not passed --

13 JUSTICE GINSBURG: Is it not so that if we
14 don't comply with Berne 18, then we are subject to being
15 sanctioned by some World Trade Organization --

16 MR. FALZONE: There was very vague testimony
17 about the unsupported possibility that could happen, and
18 that's why the Government falls back on this interest of
19 avoiding a dispute.

20 Here is the problem: If the government can
21 get around First Amendment limits by signing a treaty,
22 and then the flexibility to take away public speech
23 rights is defined by some complaint proffered by some
24 treaty partner, then the First Amendment is defined only
25 by the perceptions, the complaints, and, frankly, the

1 imagination of foreign countries. That can't be the way
2 it works.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Counsel.

5 The case is submitted.

6 (Whereupon, at 12:05 p.m., the case in the
7 above-entitled matter was submitted.)

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