No. 07-189

In The
Supreme Court of the United States

BREWSTER KAHLE; INTERNET ARCHIVE;
RICHARD PRELINGER; and
PRELINGER ASSOCIATES, INC.,

Petitioners,

v.

ALBERTO R. GONZALES, Attorney General,
in his official capacity as Attorney
General of the United States,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, Petitioners file this supplemental brief to bring to the Court's attention a recent decision by the United States Court of Appeals for the Tenth Circuit, which creates a more dramatic split of authority regarding the proper interpretation and application of *Eldred, et al.* v. *Ashcroft*, 537 U.S. 186 (2003).

On September 4, 2007, the Tenth Circuit Court issued its opinion in *Golan* v. *Gonzales* (Supp. App. 1a), which reversed a lower court decision relied upon by the Ninth Circuit in the present case. *Golan* held that *Eldred* required First Amendment review of the statute at issue because the statute represented a change in the "traditional contours of copyright protection." (Supp. App. 34a-35a). This holding is precisely the position Petitioners have advanced in this case, and the position rejected expressly in the D.C. Circuit and by the Ninth Circuit below. *See Luck's Music Library, Inc.* v. *Gonzales*, 407 F.3d 1262 (D.C. Cir. 2005); *Kahle* v. *Gonzales*, 487 F.3d 697 (9th Cir. 2007) (App. 1a).

The statute at issue in *Golan* was section 514 of the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809, 4976-80 (1994), codified at 17 U.S.C. § 104A, which purported to "restore" copyrights to works that had passed into the public domain. (Supp. App. 2a). Plaintiffs in that case alleged that restoration of copyright to works that had entered the public domain was unprecedented, constituting a change in "traditional contours of copyright protection." Such a change, Plaintiffs maintained, required the Court to apply First Amendment review to section 514. (Supp. App. 12a). In response, the

government argued that First Amendment review was limited to changes in the two "traditional First Amendment safeguards" identified in *Eldred* – "fair use" and the idea/expression dichotomy. (Supp. App. 29a). *See Eldred*, 537 U.S. at 219-20.

The Court of Appeals for the Tenth Circuit has now squarely rejected the government's view. It has held that *Eldred* (1) requires First Amendment review whenever Congress changes the "traditional contours of copyright protection" and (2) that "fair use" and the idea/expression dichotomy are not the only "traditional contours of copyright protection" that might trigger First Amendment review. (Supp. App. 15a-16a). The Court thus remanded the case to the District Court to evaluate section 514 under the First Amendment.

Petitioners in this case have made precisely the same argument about a different fundamental change in the "traditional contours of copyright protection" – indeed, a change far more profound than the change challenged in *Golan*. In this case, Petitioners have challenged the change from an opt-in to an opt-out system of copyright. The opt-in system was the most distinctive feature of American copyright law for 186 years of the Republic's history. *See* R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J. L. & ARTS 133, 135-46, 148-54 (2005); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 491-93 (2004). It profoundly affected the range of material in the public domain. As Petitioners have alleged, because of this regime, more than 50% of published material entered the public domain immediately. More than 85% of that part copyrighted entered the public domain after an initial (and relatively short) term.

See Sprigman, *supra*, at 502-14, 519; WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 236 (Harvard Univ. Press 2003). By contrast, the current regime extends a federal copyright to all creative work reduced to a tangible form, for a term lasting almost a century.

There has been no change in copyright law more significant to the scope and reach of the public domain than the change challenged by Petitioners in this case. There has been no change that better fits the description of a change in a "traditional contour of copyright protection." Under the reasoning of the Court of Appeals for the Tenth Circuit, the change Petitioners challenge would entitle Petitioners to First Amendment review in the Tenth Circuit. But the Ninth Circuit denied Petitioners any such review.

There is now, therefore, an even clearer split in authority about whether *Eldred* requires First Amendment review of changes in the "traditional contours of copyright protection," beyond changes in "fair use" or the idea/expression distinction. The Ninth Circuit below denied Petitioners such review. A district court in the D.C. Circuit expressly held no such review was possible. *See Luck's Music Library, Inc.* v. *Ashcroft*, 321 F. Supp. 2d 107, 119 (D.D.C. 2004). Now, the Tenth Circuit has directly affirmed the argument Petitioners advance here: that changes in the "traditional contours of copyright protection" beyond "fair use" and the idea/expression dichotomy also merit First Amendment review.

This Court should therefore grant review to resolve this clear split.

Respectfully submitted,

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