

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 Tenth Circuit**

---

**BRIEF OF AMICUS CURIAE EAGLE FORUM  
EDUCATION & LEGAL DEFENSE FUND  
IN SUPPORT OF PETITIONERS**

---

ANDREW L. SCHLAFLY  
939 Old Chester Road  
Far Hills, NJ 07931  
(908) 719-8608  
aschlaflly@aol.com

*Counsel for Amicus*

June 17, 2011

---

WILSON-EPES PRINTING CO., INC. — (202) 789-0096 — WASHINGTON, D. C. 20002

## QUESTIONS PRESENTED

Section 514 of the Uruguay Round Agreements Act of 1994 (Section 514) did something unique in the history of American intellectual property law: It “restored” copyright protection in thousands of works that the Copyright Act had placed in the Public Domain, where they remained for years as the common property of all Americans. The Petitioners in this case are orchestra conductors, educators, performers, film archivists and motion picture distributors, who relied for years on the free availability of these works in the Public Domain, which they performed, adapted, restored and distributed without restriction. The enactment of Section 514 therefore had a dramatic effect on Petitioners’ free speech and expression rights, as well as their economic interests. Section 514 eliminated Petitioners’ right to perform, share and build upon works they had once been able to use freely.

The questions presented are:

1. Does the Progress Clause of the United States Constitution prohibit Congress from taking works out of the Public Domain?
2. Does Section 514 violate the First Amendment of the United States Constitution?

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	iv
INTEREST OF <i>AMICUS CURIAE</i> .....	1
STATEMENT OF THE CASE .....	2
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	5
I. THE FIRST AMENDMENT PROHIBITS TAKING WORKS OUT OF THE PUBLIC DOMAIN .....	5
II. THE PROGRESS CLAUSE DOES NOT AUTHORIZE CONGRESS TO REMOVE WORKS FROM THE PUBLIC DOMAIN, AND <i>ELDRED</i> SHOULD BE OVERRULED TO THE EXTENT ITS HOLDING IMPLIES OTHERWISE .....	10
III. THE TENTH CIRCUIT ERRED IN DEFERRING TO FOREIGN INTERESTS AT THE EXPENSE OF THE U.S. CONSTITUTION .....	16
CONCLUSION .....	18

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>Banks v. Manchester</i> , 128 U.S. 244 (1888).....	9
<i>Boos v. Barry</i> , 485 U.S. 312 (1988).....	17
<i>Burrow-Giles Lithographic Co. v. Sarony</i> , 111 U.S. 53 (1884).....	15
<i>Cox Broadcasting Corp. v. Cohn</i> , 420 U.S. 469 (1975).....	7
<i>Eldred v. Ashcroft</i> , 537 U.S. 186 (2003).....	<i>passim</i>
<i>Eldred v. Reno</i> , 239 F.3d 372 (D.C. Cir. 2001), <i>aff'd</i> , 537 U.S. 186 (2003) .....	14
<i>Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.</i> , 499 U.S. 340 (1991).....	12, 14, 15
<i>Fox Film Corp. v. Doyal</i> , 286 U.S. 123 (1932).....	14
<i>Geofroy v. Riggs</i> , 133 U.S. 258 (1890).....	16, 17
<i>Golan v. Gonzales</i> , 501 F.3d 1179 (10th Cir. 2007) (“ <i>Golan I</i> ”) .....	3, 4, 11
<i>Golan v. Holder</i> , 609 F.3d 1076 (10th Cir. 2010) (“ <i>Golan II</i> ”).....	3, 4, 16
<i>Goldstein v. California</i> , 412 U.S. 546 (1973).....	2

<i>Graham v. John Deere Co.</i> , 383 U.S. 1 (1966).....	10, 11, 12
<i>MGM Studios Inc. v. Grokster, Ltd.</i> , 545 U.S. 913 (2005).....	2
<i>Near v. Minnesota</i> , 283 U.S. 697 (1931).....	8
<i>Nebraska Press Ass'n v. Stuart</i> , 427 U.S. 539 (1976).....	8
<i>Nevada Comm'n on Ethics v. Carrigan</i> , 2011 U.S. LEXIS 4379 (June 13, 2011) .....	10
<i>Organization for a Better Austin v. Keefe</i> , 402 U.S. 415 (1971).....	8
<i>Reid v. Covert</i> , 354 U.S. 1 (1957).....	16, 17
<i>Roth v. United States</i> , 354 U.S. 476 (1957).....	8
<i>Smith v. Daily Mail Pub. Co.</i> , 443 U.S. 97 (1979).....	5, 7
<i>United States v. Lopez</i> , 514 U.S. 549 (1995).....	14
<i>Veeck v. SBCCI</i> , 293 F.3d 791 (5th Cir. 2002) ( <i>en banc</i> ), <i>cert.</i> <i>denied</i> , 539 U.S. 969 (2003).....	9

#### CONSTITUTION AND STATUTES

17 U.S.C. § 104A .....	3, 4
17 U.S.C. § 109 .....	2
Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).....	2, 3



# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.