

No. 21-711

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**In the Supreme Court of the United States**

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MARKHAM CONCEPTS, INC., ET AL., PETITIONERS,

*v.*

HASBRO, INC., ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT*

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**BRIEF FOR RESPONDENT REUBEN KLAMER  
IN OPPOSITION**

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## QUESTION PRESENTED

The Copyright Act of 1909 provided that “the word ‘author’ shall include an employer in the case of works made for hire.” Pub. L. No. 60-349, § 62, 35 Stat. 1075, 1088. It did not further define “employer” or “works made for hire.” That provision still governs works created before 1978.

This case addresses how to apply the provision where one party commissioned an independent contractor to create a work. Here the First Circuit held that a work for hire includes a commissioned work if the work was created at the commissioning party’s “instance and expense,” in which case the commissioning party is the “author.” That interpretation of the 1909 Act followed holdings of courts around the country, including every circuit to apply the 1909 Act over the last five decades.

Petitioners contend that all those courts erred. They say that by using the word “employer” in 1909, Congress meant to cover only works created within the scope of an employer-employee relationship.

The question presented is:

Whether the First, Second, Fifth, Seventh, and Ninth Circuits have all erroneously held, consistently over the past 50-plus years, that the term “author” in the Copyright Act of 1909 is not limited to a party whose employee created the work within the scope of his or her employment.

II

**TABLE OF CONTENTS**

Question presented ..... I

Introduction ..... 1

Statement.....5

    A. Statutory background .....5

    B. Facts and procedural history .....10

Reasons for denying the petition.....14

    I. Like every other circuit, the decision below held that the instance-and-expense test governs whether a commissioned work is a work for hire under the 1909 Act .....14

    II. That settled interpretation of the 1909 Act is correct and does not conflict with *Reid* .....16

    III. The question presented is of limited and diminishing importance.....27

    IV. Significant reliance interests militate against disturbing settled law.....30

Conclusion .....31

III

TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Aldon Accessories Ltd. v. Spiegel, Inc.</i> , 738 F.2d 548 (2d Cir. 1984).....	15
<i>Altman v. New Haven Union Co.</i> , 254 F. 113 (D. Conn. 1918).....	7
<i>Brattleboro Publ’g Co. v. Winmill Publ’g Corp.</i> , 369 F.2d 565 (2d Cir. 1966).....	8, 21
<i>Brevet Press, Inc. v. Fenn</i> , No. CIV. 06-4056-KES, 2007 WL 9773251 (D.S.D. Sept. 17, 2007) .....	15
<i>Brumley v. Albert E. Brumley &amp; Sons, Inc.</i> , 822 F.3d 926 (6th Cir. 2016) .....	29
<i>Brumley v. Albert E. Brumley &amp; Sons, Inc.</i> , No. 3:08-CV-1193, 2010 WL 1439972 (M.D. Tenn. Apr. 9, 2010) .....	14
<i>Clingman v. Beaver</i> , 544 U.S. 581 (2005) .....	25
<i>Community for Creative Non-Violence v. Reid</i> , 490 U.S. 730 (1989) .....	<i>passim</i>

IV

<i>Dastar Corp. v. Random House, Inc.</i> , 548 U.S. 919 (2006) .....	3
<i>Dielman v. White</i> , 102 F. 892 (D. Mass. 1900).....	5, 8, 20, 21
<i>Estate of Hogarth v. Edgar Rice Burroughs, Inc.</i> , No. 00-Civ.- 9569 (DLC), 2002 WL 398696 (S.D.N.Y. Mar. 15, 2002).....	22
<i>Estate of Hogarth v. Edgar Rice Burroughs, Inc.</i> , 342 F.3d 149 (2d Cir. 2003).....	7, 10, 14
<i>Estate of Hogarth v. Edgar Rice Burroughs, Inc.</i> , 541 U.S. 937 (2004) .....	3
<i>Forward v. Thorogood</i> , 985 F.2d 604 (1st Cir. 1993).....	8, 13, 14, 29
<i>Grant v. Kellogg Co.</i> , 58 F. Supp. 48 (S.D.N.Y. 1944) .....	8, 21
<i>The Indrani</i> , 101 F. 596 (4th Cir. 1900).....	18
<i>Larsen v. Home Tel. Co. of Detroit</i> , 129 N.W. 894 (Mich. 1911).....	19
<i>Lawrence v. Dana</i> , 15 F. Cas. 26 (D. Mass. 1869) .....	5, 20
<i>Lin-Brook Builders Hardware v. Gertler</i> , 352 F.2d 298 (9th Cir. 1965) .....	8, 21

<i>Lumiere v. Robertson-Cole Distributing Corp.</i> , 280 F. 550 (2d Cir. 1922) .....	21
<i>M.G.B. Homes, Inc. v. Ameron Homes, Inc.</i> , 903 F.2d 1486 (11th Cir. 1990) .....	2, 15, 16
<i>Martha Graham School &amp; Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.</i> , 380 F.3d 624 (2d Cir. 2004) .....	6
<i>Martha Graham School &amp; Dance Found., Inc. v. Spitzer</i> , 544 U.S. 1060 (2005) .....	3
<i>Marvel Characters, Inc. v. Kirby</i> , 726 F.3d 119 (2d Cir. 2013) .....	8, 29
<i>McHarge v. M.M. Newcomer &amp; Co.</i> , 100 S.W. 700 (Tenn. 1907) .....	19
<i>Middleton v. P. Sanford Ross, Inc.</i> , 213 F. 6 (5th Cir. 1914) .....	18
<i>Murray v. Gelderman</i> , 566 F.2d 1307 (5th Cir. 1978) .....	8
<i>N.Y. Times Co. v. Tasini</i> , 533 U.S. 483 (2001) .....	22
<i>New Prime, Inc. v. Oliveira</i> , 139 S. Ct. 532 (2019) .....	<i>passim</i>
<i>Peregrine v. Lauren Corp.</i> , 601 F. Supp. 828 (D. Colo. 1985) .....	15

VI

<i>Philadelphia Orchestra Ass'n v. Walt Disney Co.</i> , 821 F. Supp. 341 (E.D. Pa. 1993) .....	15
<i>Piche v. Warner Bros., Inc.</i> , No. CV-06-963 FMC (Ex), 2006 WL 8449116 (C.D. Cal. May 16, 2006) .....	29
<i>Picture Music, Inc. v. Bourne, Inc.</i> , 457 F.2d 1213 (2d Cir. 1972) .....	8
<i>Picture Music, Inc. v. Bourne, Inc.</i> , 409 U.S. 997 (1972) .....	3
<i>Pierson v. Chicago, R.I. &amp; P. Ry. Co.</i> , 170 F. 271 (8th Cir. 1909).....	18
<i>Robbins v. City of Chicago</i> , 71 U.S. 657 (1866) .....	18
<i>Schmidlin v. Alta Planning Mill Co.</i> , 150 P. 983 (Cal. 1915) .....	19
<i>Shapiro, Bernstein &amp; Co. v. Jerry Vogel Music Co.</i> , 115 F. Supp. 754 (S.D.N.Y. 1953) .....	6
<i>Sid Bernstein Presents, LLC v. Apple Corps Ltd.</i> , No. 16-Civ.-7084(GBD), 2017 WL 4640149 (S.D.N.Y. July 26, 2017).....	29
<i>Siegel v. Time Warner Inc.</i> , 496 F. Supp. 2d 1111 (C.D. Cal. 2007) .....	29

VII

*Sony Corp. of Am. v. Universal City Studios, Inc.*,  
464 U.S. 417 (1984) ..... 22

*St. Paul Water Co. v. Ware*,  
83 U.S. 566 (1872) ..... 18

*Stern v. Lavender*,  
319 F. Supp. 3d 650 (S.D.N.Y. 2018) ..... 29

*Tex. Dep’t of Housing & Community Affairs v. Inclusive Communities Project, Inc.*,  
576 U.S. 519 (2015) ..... 22

*TufAmerica, Inc. v.Codigo Music LLC*,  
162 F. Supp. 3d 295 (S.D.N.Y. 2016) ..... 29

*Twentieth Century Fox Film Corp. v. Entm’t Distrib.*,  
429 F.3d 869 (9th Cir. 2005) ..... 8, 10, 14

*United States v. Paramount Pictures*,  
334 U.S. 131 (1948) ..... 22

*Yardley v. Houghton Mifflin Co.*,  
108 F.2d 28 (2d Cir. 1939) ..... 7, 8

**Statutes and Rules**

17 U.S.C. 101 ..... 9

17 U.S.C. 101(1) ..... 23

17 U.S.C. 304 ..... 27

17 U.S.C. 304(c) ..... 12, 13, 27, 28



VIII

17 U.S.C. 304(c)(1)..... 13

17 U.S.C. 304(c)(2)..... 13

17 U.S.C. 304(c)(3)..... 4, 13, 27

17 U.S.C. 304(c)(4)..... 4

17 U.S.C. 304(c)(4)(A) ..... 28

17 U.S.C. 304(d)..... 28

17 U.S.C. 601..... 4, 27

17 U.S.C. 601(b)(1) ..... 27

Copyright Amendments Act of 1992, Pub.  
L. No. 102-307, 106 Stat. 264..... 22

Pub. L. No. 60-349, 35 Stat. 1075 (1909) ..... 6, 16

Pub. L. No. 111-295, 124 Stat. 3180 (2010) ..... 4, 27

S. Ct. Rule 10 ..... 30

S. Ct. Rule 35 ..... 1

Sonny Bono Copyright Term Extension  
Act of 1998, Pub. L. No. 105-298, 112  
Stat. 2827..... 22

Work Made for Hire and Copyright  
Corrections Act of 2000, Pub. L. No.  
106-379, 114 Stat. 1444..... 22

**Other Authorities**

Barbara A. Ringer, 86th Cong., <i>Copyright Law Revision Study No. 31: Renewal Of Copyright</i> (Comm. Print 1961) (1960) .....	7, 20, 21, 25
<i>Black's Law Dictionary</i> (2d ed. 1910) .....	20
Borge Varmer, 86th Cong., <i>Copyright Law Revision Study No. 13: Works Made for Hire and on Commission</i> (Comm. Print 1960) (1958) .....	<i>passim</i>
13 <i>Cal. Jurisprudence: A Complete Statement of the Law and Practice of the State of California</i> (William M. McKinney ed., 1923).....	19
Catherine L. Fisk, <i>Authors at Work: The Origins of the Work-for-Hire Doctrine</i> , 15 <i>Yale J.L. &amp; Human.</i> 1 (2003).....	5, 6, 26
<i>General Discussion of the Nature of the Relationship of Employer and Independent Contractor</i> , 19 <i>A.L.R.</i> 226 (1922) .....	19
3 James A.H. Murray, <i>A New English Dictionary of Historical Principles</i> (1897) .....	20
Pet., No. 05-1259, <i>Dastar Corp. v. Random House, Inc.</i> (U.S. filed Mar. 28, 2006) .....	16
Restatement (First) of Agency (1933) .....	19

X

Restatement (First) of Torts (1934).....	19
Richard R. Carlson, <i>Why the Law Still Can't Tell an Employee When It Sees One And How It Ought to Stop Trying</i> , 22 Berkeley J. Emp. & Lab. L. 295 (2001) .....	5
1 Seymour D. Thompson, <i>Commentaries on the Law of Negligence</i> (1901).....	19
U.S. Copyright Office, <i>Notices of Termination</i> , <a href="https://www.copyright.gov/recordation/termination.html">https://www.copyright.gov/recordation/ termination.html</a> .....	28
U.S. Copyright Office, <i>Section 304(c)</i> , <a href="https://www.copyright.gov/comp3/docs/termination-table-section304c.pdf">https://www.copyright.gov/comp3/docs/ termination-table-section304c.pdf</a> .....	28
<i>Webster's New International Dictionary</i> (1911) .....	19

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**BRIEF FOR RESPONDENT REUBEN KLAMER  
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**INTRODUCTION**

For over 50 years, courts have uniformly determined copyright authorship of commissioned works under the 1909 Copyright Act using the instance-and-expense test. For over 50 years, those works have been bought and sold, licensed and assigned, with the understanding that the instance-and-expense test governed copyright rights in those works.

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<sup>1</sup> Reuben Klamer was a defendant-appellee below but passed away after the First Circuit issued its opinion. The authorized representatives of Mr. Klamer's estate have a pending motion under Supreme Court Rule 35.1 to substitute the Reuben B. Klamer Living Trust as a party.

Petitioners want this Court to overturn decades of precedent and hold that authorship is actually determined only by examining whether the work was created by an employee within the scope of employment. In other words, petitioners want to wreak havoc on 50 years of settled expectations in business transactions.

The Court should deny that request. Petitioners offer no persuasive reason to upset those reliance interests. They serve up a non-existent circuit split, an illusory conflict with a 30-year-old decision of this Court, and exaggerations about the ongoing relevance of a statute that hasn't controlled a new work since 1977.

As to the circuit split, there simply isn't one. Petitioners attempt to undermine the uniform, national rule with what they call an alternative holding by the Eleventh Circuit that *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), overruled the instance-and-expense test under the 1909 Act. See Pet. 23-24 (discussing *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1490-1491 (11th Cir. 1990)). But *M.G.B. Homes* was a case under the 1976 Copyright Act, so any comments on the 1909 Act were dicta. And petitioners omit the key part of this supposed holding, which makes clear the Eleventh Circuit wasn't talking about the 1909 Act at all. See 903 F.2d at 1490-1491 (stating that *Reid* "defined the 'work for hire' doctrine *under the 1976 Act*") (emphasis added). In the thirty years since *M.G.B. Homes* was decided, it does not appear that any court has ever adopted petitioners' unique view of its dicta. Put simply, there is already nationwide uniformity under the 1909 Act.

Petitioners' asserted conflict with *Reid* has also been rejected by multiple courts. For good reason. *Reid* interpreted the 1976 Act, not the 1909 Act. Petitioners claim that "[t]he textual question" under the two acts is "materially identical." Pet. 19. This is a remarkable declaration.

The key word in the 1909 Act for petitioners’ argument—“employer”—does not even appear in the 1976 Act’s definition. *Reid* expressly rested its decision on the 1976 Act’s usage of the terms “employee” and “scope of employment,” as well as that act’s explicit distinction between commissioned works and employee-created works.

Petitioners contend there is no difference between the meanings of “employer” in 1909 and “employee” and “scope of employment” in 1976, but this Court rejected an actually materially identical argument in *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532 (2019): Even if “today[] the term ‘contracts of employment’ might call to mind only agreements between employers and employees, . . . this modern intuition isn’t easily squared with evidence of the term’s meaning at the time of the [Federal Arbitration] Act’s adoption in 1925.” *Id.* at 539; see *id.* at 542.

Petitioners ignore the textual difference between the 1909 and 1976 Acts and the decades separating their enactment. Those differences also eviscerate petitioners’ view of *Reid*. Had *Reid* interpreted the 1909 Act, it would have examined the type of evidence *New Prime* did. *Reid* did not do so, however, for the simple reason that the 1909 Act’s interpretation was not at issue. What Congress thought in 1909 would not answer what Congress thought in 1976.

Three times this Court has been asked to use *Reid* to overrule the instance-and-expense test under the 1909 Act, and three times this Court has declined. See *Dastar Corp. v. Random House, Inc.*, 548 U.S. 919 (2006); *Martha Graham School & Dance Found., Inc. v. Spitzer*, 544 U.S. 1060 (2005); *Estate of Hogarth v. Edgar Rice Burroughs, Inc.*, 541 U.S. 937 (2004); see also *Picture Music, Inc. v. Bourne, Inc.*, 409 U.S. 997 (1972) (denying petition from Professor Nimmer). This should be the fourth.

Indeed, petitioners vastly overstate the importance of the question presented. This issue rarely arises, and its significance fades every year. Petitioners try to bolster its importance by worrying about “incentivizing artistic expression” and the effects on “owners’ renewal rights, termination rights, and right to import certain goods bearing the copyright.” Pet. 27-28. Each of those factors is overblown.

Nobody has created a work under the 1909 Act since 1977; this case is simply irrelevant to artists’ incentives. Likewise, the statutory provision on importation expired in 1986 and has since been repealed. See 17 U.S.C. 601; Pub. L. No. 111-295, § 4(a), 124 Stat. 3180 (2010).

Petitioners focus their pitch on termination rights, but here, too, they hope the Court does not look too closely at the statutory scheme. The termination window has already closed for works created before 1963, and that window shrinks with each passing year. See 17 U.S.C. 304(c)(3)-(4). The last day to serve notice of termination is the end of 2036. Of those works that are still eligible for termination, most were created after the instance-and-expense test took hold. To date, only a handful of cases have addressed work-for-hire disputes in the context of termination rights. And the issue will become only less important as time passes. It does not warrant space on the Court’s docket.

That leaves petitioners with the extended renewal term for works under the 1909 Act. But that is just another way to say that the Court should send parties scrambling to reevaluate decades of transactions made with the understanding that authorship is governed by the instance-and-expense test. If any branch of government should impose those costs, it is Congress. The petition should be denied.

## STATEMENT

### A. Statutory Background

1. In the 1800s, courts struggled to determine who owned the copyright of a work created by a worker for someone else. Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 Yale J.L. & Human. 1, 47 (2003) (“By the last two decades of the nineteenth century, the law of employee copyrights was highly uncertain and the results of cases were quite unpredictable.”). Generally, courts “examine[d] the ‘contract express or implied’ between the parties” regarding ownership. *Ibid.* Around 1900, the default rule tended to vest ownership in the employer. *Id.* at 55, 59-60. That included in some circumstances commissioned works by artists who today would be independent contractors. See *id.* at 59-61; *Dielman v. White*, 102 F. 892, 894 (D. Mass. 1900); *Lawrence v. Dana*, 15 F. Cas. 26, 50-51 (D. Mass. 1869).

Whatever the outcome of the cases, these early decisions “never mentioned” any “distinction between employees and independent contractors.” Fisk, *supra*, at 46. That is likely because back then this distinction mattered primarily in addressing tort liability. See Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When It Sees One And How It Ought to Stop Trying*, 22 Berkeley J. Emp. & Lab. L. 295, 301-307 (2001); cf. *New Prime*, 139 S. Ct. at 539-540.

It is therefore demonstrably incorrect that the employer-default rule arose only for works created “by an employee within the course of employment.” Pet. 5.

2. Congress enacted the Copyright Act of 1909 against that backdrop. To define “author,” the conferees tried out various formulations that reflected the caselaw’s uncertainty. Fisk, *supra*, at 63-67; Borge Varmer, 86th Cong., *Copyright Law Revision Study No. 13: Works Made for*



*Hire and on Commission 128* (Comm. Print 1960) (1958). Among the possibilities:

- Identifying specific persons who could claim a copyright, including a “publisher of a composite or collective work . . . which has been produced at his instance and expense,” and the “employer” of a person “for valuable consideration to make a portrait,” Fisk, *supra*, at 64;
- Making an exception for “the person at whose expense such works were made,” *id.* at 65; and
- Including “[a]n employer, in the case of a work produced by an employee during the hours for which his salary is paid, subject to any agreement to the contrary,” and “[a]ny person who employs a photographer to make a photographic portrait,” Varmer, *supra*, at 128.

Congress ultimately enacted broader, open-ended language: “the word ‘author’ shall include an employer in the case of works made for hire.” 35 Stat. at 1088. Because it did not elaborate on that definition, “the task of shaping these terms fell to the courts.” *Reid*, 490 U.S. at 744.

The early cases that explicitly invoked the work-for-hire doctrine happened to involve salaried employees who created works within the scope of employment. Varmer, *supra*, at 130. One case “held that a work made by an employee as an extra assignment for extra pay was not a work made for hire.” *Ibid.* (citing *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 115 F. Supp. 754 (S.D.N.Y. 1953)). That case did not resolve whether the employer of an independent contractor could sometimes be an author. Cf. *Martha Graham School & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 635 (2d Cir. 2004).

Other early cases under the 1909 Act considered works commissioned from artists who were not employees. These cases generally placed the “property” or “right to copyright” in the commissioning party. Varmer,

*supra*, at 130 (quoting *Altman v. New Haven Union Co.*, 254 F. 113, 118 (D. Conn. 1918), and *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28, 31 (2d Cir. 1939)).<sup>2</sup>

Two studies prepared during the 1976 copyright law revision appear to view these cases as applying “the employer-for-hire rule in the case of commissioned works.” Varmer, *supra*, at 142; see Barbara A. Ringer, 86th Cong., Copyright Law Revision Study No. 31: Renewal of Copyright 142 (Comm. Print 1961) (1960) (“work made for hire’ probably applies to some commissioned works”) (citing Varmer). In any event, by 1958 there was a “paucity of reported litigation over the ownership of commissioned works.” Varmer, *supra*, at 142.

Between 1924 and 1940, several bills were proposed to revise the definition of “author.” *Id.* at 131-135; see, e.g., *id.* at 134 (“‘Author’ includes an employer in the case of any work created by an employee within the scope of his employment, and such employer shall be the owner of the copyright in such work in the absence of agreement to the contrary; but this provision shall not apply to works created under special commission where there is no relation of employer and employee, unless the parties agree otherwise.”). Some proposals “might arguably have been intended to reverse the employer-for-hire rule in the case of commissioned works.” *Id.* at 142. None was enacted.

3. In 1965, the Ninth Circuit became the first circuit to expressly state the “instance and expense” test: “[W]hen one person engages another, whether as employee or as

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<sup>2</sup> Although the Second Circuit later interpreted *Yardley* as finding an implied assignment from the artist to the commissioning party, it also noted that *Yardley* was ambiguous on the point. See *Estate of Hogarth v. Edgar Rice Burroughs, Inc.*, 342 F.3d 149, 158-159 (2d Cir. 2003).

an independent contractor, to produce a work of an artistic nature, that in the absence of an express contractual reservation of the copyright in the artist, the presumption arises that the mutual intent of the parties is that the title to the copyright shall be in the person at whose instance and expense the work is done.” *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965) (citing *Yardley*, 108 F.2d 28; *Grant v. Kellogg Co.*, 58 F. Supp. 48 (S.D.N.Y. 1944); *Dielman*, 102 F. 892).

Other circuits soon followed suit. See *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216 (2d Cir. 1972), cert. denied, 409 U.S. 997 (1972); *Brattleboro Publ’g Co. v. Winmill Publ’g Corp.*, 369 F.2d 565, 567-568 (2d Cir. 1966); *Murray v. Gelderman*, 566 F.2d 1307, 1310 (5th Cir. 1978); *Forward v. Thorogood*, 985 F.2d 604, 606 (1st Cir. 1993).

The “instance” prong asks “whether ‘the motivating factor in producing the work was the employer who induced the creation.’” *Twentieth Century Fox Film Corp. v. Entm’t Distrib.*, 429 F.3d 869, 879 (9th Cir. 2005) (citation omitted), abrogated on other grounds by *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873 (2019). The key is “the extent to which the hiring party provided the impetus for, participated in, or had the power to supervise the creation of the work.” *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 139 (2d Cir. 2013). Merely incidental control does not suffice. *Ibid.*

The “expense” prong examines “the parties’ relative investment of resources in the work and the related financial risk.” Pet. App. 16a. The purpose of this “requirement is to ‘reward[] with ownership the party that bears the risk with respect to the work’s success.’” *Ibid.* (quoting *Marvel*, 726 F.3d at 140) (alteration in original).

Petitioners have not cited any case controlled by the 1909 Act that has rejected the instance-and-expense test.

4. In 1976, Congress “almost completely revised existing copyright law,” including the provision on works for hire. *Reid*, 490 U.S. at 743. It deleted the definition of “author” as broadly “includ[ing] an employer in the case of works made for hire.” It added instead a two-pronged definition of a “work made for hire”:

A “work made for hire” is—

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

17 U.S.C. 101. Whereas the 1909 Act used the word “employer” alone, the 1976 Act uses the terms “employee” and “scope of employment.” And whereas the 1909 Act did not separately mention commissioned works, the 1976 Act distinguishes works created by an employee from works created on commission. Section 101’s formulation resulted from “a historic compromise” between the interested parties. *Reid*, 490 U.S. at 746.

In *Reid*, this Court resolved a four-way split about how to interpret the first prong of the new work-for-hire definition. Seizing on the terms of art “employee” and “scope of employment” and the legislative history, the Court held that courts should use “principles of general common law of agency” to determine “whether the work was prepared by an employee or an independent contractor.” 490 U.S. at 750-751. While the Court gave “a brief historical account” of early decisions under the 1909 Act,

it did not address the meaning of “author” or “employer” in that statute. *Hogarth*, 342 F.3d at 162.

Courts have repeatedly rejected arguments that *Reid* overruled the instance-and-expense test under the 1909 Act. See Pet. App. 14a-15a (citing *Twentieth Century Fox*, 429 F.3d at 878; *Hogarth*, 342 F.3d at 162-163). Petitioners do not even purport to cite any decision that held otherwise in a case governed by the 1909 Act.

It is thus undisputed that for decades parties have dealt with works created under the 1909 Act with the expectation that the instance-and-expense test governs authorship.

#### **B. Facts And Procedural History**

1. In 1959, Milton Bradley Company’s president asked Reuben Klamer, a toy developer with extensive industry contacts, to develop a product idea to commemorate the company’s 1960 centennial. Pet. App. 2a-3a, 25a. Klamer agreed, and searched for inspiration in Milton Bradley’s archive. He found a copy of the “Checkered Game of Life,” created by Milton Bradley himself in 1860. Klamer developed the concept to update the Checkered Game of Life to reflect contemporary American society and values. *Id.* at 3a, 26a.

Klamer needed help refining his concept and “translating it into a prototype he could actually sell to Milton Bradley.” *Id.* at 26a. He engaged one of his contacts, Bill Markham, who headed a firm named California Product Development (“CPD”). CPD employed two artists at the time, Grace Chambers and Leonard Israel, whose presence at CPD convinced Klamer to hire Markham’s firm. *Ibid.*

Chambers and Israel testified that labor was divided. Klamer and Markham contributed “the big ideas,” and

Klamer visited CPD “once or twice a week during development to give real-time edits to Chambers and Israel.” *Id.* at 27a-28a.

Chambers and Israel both testified that they, not Markham or Klamer, built the prototype. Chambers constructed most of the prototype’s game board, while “[t]he art for the prototype’s box cover was Israel’s handiwork.” *Id.* at 28a-29a. “As with the board, Markham had ‘nothing to do’ with the physical creation of the box cover.” *Id.* at 29a. He was often handling other matters while “the prototype was taking physical form.” *Ibid.* The prototype’s rules “were a collective, iterative effort.” *Ibid.* Chambers and Israel considered Klamer “the final arbiter of the prototype’s look and feel.” *Id.* at 39a.

In August 1959, Klamer presented the prototype to Milton Bradley executives. *Id.* at 29a. Also present was radio and television personality Art Linkletter, who had co-founded with Klamer a company called Link Research Corporation (“Link”) to develop consumer products and market them using Linkletter’s fame. Part of Klamer’s pitch was that Linkletter could help market the game. The pitch worked, and Klamer mailed the prototype to Milton Bradley. *Id.* at 4a, 29a-30a.

Two agreements regarding rights to the game followed. The first was a license agreement between Link and Milton Bradley. It gave Milton Bradley the exclusive right to make and sell the game, which Link had “designed and constructed.” *Id.* at 30a. It also allowed Milton Bradley to use Linkletter’s name and image in promotions. In exchange, Link received a 6% royalty on game sales and a non-refundable \$5,000 advance. “Absent termination or breach, the agreement was to last as long as Milton Bradley marketed the [g]ame.” *Ibid.*

The second was an assignment agreement between Link and Markham. It stated that, at the request of Link,

Markham had “invented, designed[,] and developed” the game, and assigned to Link “all of [Markham’s] right, title, and interest in and to” the game. *Id.* at 30a-31a. In exchange, Markham received 30% of Link’s 6% royalty, including a \$773.05 non-refundable advance. *Id.* at 31a. Link also agreed to pay Markham the \$2,423.16 he spent producing the prototype, for which he had billed Link, and which included Chambers’ and Israel’s salaries. *Ibid.* Klamer paid Markham’s bill, which he had promised would be his responsibility at the outset of the project, out of the \$5,000 Milton Bradley advance. *Ibid.* The assignment agreement required Link to notify Markham of any contemplated changes to the game so Markham could share his thoughts. “[T]he final decision regarding such changes,” however, “rest[ed] with either LINK or [Milton Bradley].” *Ibid.*

Milton Bradley first published the game in early 1960. In December 1960, Milton Bradley applied to register copyrights in the game’s board and rules, identifying itself as author. *Id.* at 32a. The same day, Link submitted a copyright application for the game’s box, also identifying Milton Bradley as the author. The game “sold like crazy” and became an “instant classic.” *Ibid.*

In the 1980s, Hasbro acquired Milton Bradley and the rights to the game. *Id.* at 5a. The game remains a money-maker for Hasbro today. *Ibid.*

For decades following publication, however, Markham and Klamer repeatedly disputed who deserved credit for the game. Markham passed away in 1993. *Id.* at 5a-6a, 33a-35a. Klamer passed away in 2021.

2. Petitioners, Markham’s successors-in-interest, filed the present action in 2015. Petitioners sought, among other relief, a declaration that they possess termination rights under Section 304(c) of the 1976 Copyright Act. Section 304(c) generally allows “author[s]” or, if deceased

(as will usually be the case for works created under the 1909 Act), their heirs to terminate the transfer of a copyright after a certain amount of time. 17 U.S.C. 304(c)(1)-(3). A “work made for hire,” however, is not eligible for termination rights. 17 U.S.C. 304(c). Petitioners hoped to cancel the assignment agreement and negotiate a new deal. Pet. App. 6a-7a. Because the game was created before the effective date of the 1976 Act, all parties agree that the 1909 Act’s definition of “author” controls whether petitioners are entitled to termination rights under Section 304.

a. The district court conducted a bench trial focusing on whether the game was a work for hire. See Pet. App. 6a-7a. The court heard live testimony from Klamer, Chambers, and Israel. The court held that the game was a work for hire under the instance-and-expense test, and the presumption thus was that Klamer “was the prototype’s author and entitled to its copyright ab initio.” *Id.* at 7a, 25a, 42a-44a. The game was made at Klamer’s instance because he “provided the impetus for, participated in, [and] had the power to supervise the creation of [the prototype].” *Id.* at 40a (alterations in original) (citation omitted). It was produced at his expense because he was responsible for the financial risk and cost. *Id.* at 40a-42a. The court also found that the prototype’s physical creation “was done by Markham’s erstwhile employees”—Chambers and Israel—along with Markham’s wife and “unnamed parties hired by Markham to furnish finishing touches.” *Id.* at 25a. The court thus entered judgment against petitioners on their claim for termination rights.

b. The First Circuit affirmed. The court first rejected petitioners’ “claim that the instance and expense test . . . is no longer applicable” after *Reid*. *Id.* at 10a. It explained that it was bound by *Forward v. Thorogood*, 985 F.2d 604 (1st Cir. 1993), which held that the instance-and-expense



test applies to works governed by the 1909 Act. Pet. App. 11a-14a. Even if the panel had authority to abrogate *Forward*, however, it would not do so because “we are skeptical that the Supreme Court [in *Reid*], in construing the 1976 Act, casually and implicitly did away with a well-established test under a different Act.” *Id.* at 14a. The panel noted that the Second and Ninth Circuits had held likewise. *Id.* at 14a-15a (citing *Twentieth Century Fox*, 429 F.3d at 878; *Hogarth*, 342 F.3d at 162-163).

Applying the instance-and-expense test, the First Circuit held that “the evidence amply supports the district court’s finding that the game was created at Klamer’s expense.” Pet. App. 16a. And petitioners did not challenge the district court’s finding that the game was created at Klamer’s instance. See *id.* at 15a-16a.

Therefore, “Markham ‘never owned the copyrights to assign,’ and ‘there are no rights the assignment of which his . . . heirs may now terminate.’” *Id.* at 21a (alterations in original) (citation omitted).

## **REASONS FOR DENYING THE PETITION**

### **I. LIKE EVERY OTHER CIRCUIT, THE DECISION BELOW HELD THAT THE INSTANCE-AND-EXPENSE TEST GOVERNS WHETHER A COMMISSIONED WORK IS A WORK FOR HIRE UNDER THE 1909 ACT**

The First Circuit held that the term “author” in the 1909 Act includes a commissioning party that contracted to have a work created at its instance and expense. That interpretation is consistent with an unbroken line of authority dating back decades. Petitioners admit that the Second, Fifth, Seventh, and Ninth Circuits all agree. *E.g.*, Pet. 8-9. And district courts from other circuits have held likewise. See, *e.g.*, *Brumley v. Albert E. Brumley & Sons, Inc.*, No. 3:08-CV-1193, 2010 WL 1439972, at \*5 (M.D.

Tenn. Apr. 9, 2010); *Brevet Press, Inc. v. Fenn*, No. CIV. 06-4056-KES, 2007 WL 9773251, at \*5-6 (D.S.D. Sept. 17, 2007); *Philadelphia Orchestra Ass'n v. Walt Disney Co.*, 821 F. Supp. 341, 348 (E.D. Pa. 1993).

In the face of that overwhelming, uniform caselaw, petitioners claim a conflict with a 30-year-old decision from the Eleventh Circuit. They say that *M.G.B. Homes* reached an “alternative holding” that the instance-and-expense test no longer governs the 1909 Act after *Reid*. Pet. 23-24. They are wrong twice over: the Eleventh Circuit’s statement was plainly dicta, and it did not interpret the 1909 Act anyway.

First, the 1976 Act controlled the dispute. *M.G.B. Homes*, 903 F.2d at 1490 n.10. Any comments relating to the 1909 Act were thus dicta. See Pet. App. 15a.

Second, *M.G.B. Homes* did not even include dicta rejecting the longstanding interpretation of the 1909 Act. The district court there had applied the instance-and-expense test to the 1976 Act, exactly as some other courts had before *Reid*. See 903 F.2d at 1490; see, e.g., *Reid*, 490 U.S. at 738-739; *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 552 (2d Cir. 1984); *Peregrine v. Lauren Corp.*, 601 F. Supp. 828, 829 (D. Colo. 1985). The Eleventh Circuit ruled that that was error “because (i) [its instance-and-expense precedent] was overruled by the amendments to the Copyright Act in 1976 and (ii) its rationale was rejected by [*Reid*], which defined the ‘work for hire’ doctrine *under the 1976 Act*.” *M.G.B. Homes*, 903 F.2d at 1490-1491 (footnotes omitted) (emphasis added).

Petitioners say that point “(ii)” was “an independent reason why the circuit’s 1909 Act precedent was abrogated.” Pet. 24. But they mischaracterize that point in omitting the final clause from their quotation. Pet. 23-24. The court wrote that *Reid* defined works for hire “*under the 1976 Act*,” not the 1909 Act. And, again, the Eleventh

Circuit had no reason to address the 1909 Act's definition. The reason the court mentioned *both* the 1976 amendments *and Reid* is because some courts, like the district court there, had viewed the 1976 amendments as incorporating the instance-and-expense test. That was the precise conflict that *Reid* resolved; the Eleventh Circuit thus needed *Reid* to establish the 1976 Act's meaning. Petitioners' view of *M.G.B. Homes* is baseless.

Indeed, petitioners' counsel's firm previously told this Court that *M.G.B. Homes agrees* with the other circuits. See Pet. 19, No. 05-1259, *Dastar Corp. v. Random House, Inc.* (U.S. filed Mar. 28, 2006). And in the 30 years that *M.G.B. Homes* has been on the books, there does not appear to be a single case citing it for the proposition petitioners claim.

Even if petitioners were right about *M.G.B. Homes*, petitioners themselves make clear that the conflict would have no practical significance. They explain that most copyright cases arise in the Second and Ninth Circuits, which agree on this issue. Pet. 26. And to the extent other courts might weigh in, they will "routinely adopt the Second and Ninth Circuits' copyright precedents as their own." Pet. 26-27. It is revealing that petitioners have cited zero cases that apply their interpretation of the 1909 Act to a dispute governed by that act.

There is no inconsistency that warrants this Court's intervention. Uniform interpretation of a federal statute is already here.

**II. THAT SETTLED INTERPRETATION OF THE 1909 ACT IS CORRECT AND DOES NOT CONFLICT WITH *REID***

The 1909 Act provides that "the word 'author' shall include an employer in the case of works made for hire." 35 Stat. at 1088. Petitioners contend that by using the word

“employer,” Congress limited this definition to works created within the scope of a common-law employer/employee relationship. *E.g.*, Pet. 16, 19. Petitioners make little effort to defend that interpretation with the usual statutory-construction tools. Instead they say that *Reid*’s analysis of starkly distinct statutory text controls the issue. Petitioners are wrong about the 1909 Act and wrong about *Reid*.

A. 1. Petitioners’ argument falters on the text. They overlook the “fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute.” *New Prime*, 139 S. Ct. at 539 (cleaned up). Whatever the meaning of “employer” today or “employee” in 1976, in 1909 “employer” was widely understood to include those who hired independent contractors as well as employees.

In *New Prime*, this Court rejected an argument nearly identical to petitioners’ here. The question in that case was whether the term “contracts of employment” in the Federal Arbitration Act of 1925 included only employer-employee relationships or also extended to independent contractors. *Id.* at 536, 538-539. Although today the term “might call to mind only agreements between employers and employees,” that “modern intuition isn’t easily squared with evidence of the term’s meaning at the time of the Act’s adoption in 1925.” *Id.* at 539. “At that time,” the term “meant nothing more than an agreement to perform work.” *Ibid.* The supporting evidence includes dictionaries and legal authorities, both of which showed that “employment” covered independent contractors. *Id.* at 539-540.

Like petitioners, the losing party in *New Prime* elided the difference between the terms “employee” and “em-

employment.” *Id.* at 541-542. “[W]hatever the word ‘employee’ may have meant [in 1925], and however it may have later influenced the meaning of ‘employment,’ the evidence before us remains that, as dominantly understood in 1925, a contract of *employment* did not necessarily imply the existence of an employer-employee or master-servant relationship.” *Id.* at 542 (emphasis in original).

*New Prime* all but forecloses petitioners’ position. Even if “employee” would have fit petitioners’ interpretation, Congress used a different term in the 1909 Act. Whereas “employee” is a specific type of worker, the term “employer,” like “employment,” refers to a person who hires either employees or independent contractors.

Authorities around the time of the 1909 Act’s passage regularly used “employer” in that broader sense. See, *e.g.*, *St. Paul Water Co. v. Ware*, 83 U.S. 566, 576 (1872) (“if the contractor does the thing which he is employed to do the employer is as responsible for the thing as if he had done it himself”); *Robbins v. City of Chicago*, 71 U.S. 657, 666-667 (1866) (“[I]f a person in the exercise of his rights as a private individual . . . employs a contractor to do work, and the latter is guilty of negligence in doing it, the contractor and not the employer is liable. . . . [T]he more completely the execution of [the work], and the manner of doing it, are placed by the employer in the hands of skilful and independent contractors, the more fully has he performed his duty to the public.”); *Middleton v. P. Sanford Ross, Inc.*, 213 F. 6, 10 (5th Cir. 1914) (“the employer of the independent contractor”); *Pierson v. Chicago, R.I. & P. Ry. Co.*, 170 F. 271, 274 (8th Cir. 1909) (“An independent contractor is one who renders service in the course of an occupation representing the will of his employer only as to the result of his work . . . .”); *The Indrani*, 101 F. 596,

598 (4th Cir. 1900) (“If an independent contractor is employed to do a lawful act, and in the course of the work does some casual act of negligence, the common employer is not answerable.”); *Schmidlin v. Alta Planning Mill Co.*, 150 P. 983, 984 (Cal. 1915) (“the general rule that exonerates the employer of an independent contractor”); *Larsen v. Home Tel. Co. of Detroit*, 129 N.W. 894, 897 (Mich. 1911) (distinguishing “the relation of master and servant” from “that of independent contractor and employer”); *McHarge v. M.M. Newcomer & Co.*, 100 S.W. 700, 701 (Tenn. 1907) (discussing “the relation of employer and independent contractor”); Restatement (First) of Torts § 409 (1934) (chapter titled “Liability of an Employer of an Independent Contractor”: “Except as stated in §§ 410 to 429, the employer of an independent contractor is not subject to liability for bodily harm caused to another by a tortious act or omission of the contractor or his servants.”); Restatement (First) of Agency § 2 cmt. b (1933) (“[T]he term ‘independent contractor’ is used to indicate all persons for whose conduct, aside from their use of words, the employer is not responsible.”); *General Discussion of the Nature of the Relationship of Employer and Independent Contractor*, 19 A.L.R. 226 (1922); *Independent Contractors*, 13 *Cal. Jurisprudence: A Complete Statement of the Law and Practice of the State of California* 1011, 1018 (William M. McKinney ed., 1923) (distinguishing between relation “of master and servant or that of employer and contractor”); 1 Seymour D. Thompson, *Commentaries on the Law of Negligence* § 622 (1901); cf. Varmer, *supra*, at 141 (“If the employment-for-hire rule is not to extend to works created on commission at a fixed fee, the definition might further specify ‘employment on a salary basis.’”).

Dictionaries from the early 1900s reflect that broad usage. See, e.g., *Webster’s New International Dictionary*

718 (1911) (defining “employer” as “one who employs another,” and defining “employ” to include “To make use of the services of; to have or keep at work; to give employment to, to intrust with some duty or behest”);<sup>3</sup> *Black’s Law Dictionary* 422, 616 (2d ed. 1910) (defining employer to include “[o]ne who employs the services of others”; and “independent contractor” as “one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer”); 3 James A.H. Murray, *A New English Dictionary of Historical Principles* 129-130 (1897).<sup>4</sup>

2. It makes sense that Congress used the broader term “employer” because pre-1909 cases sometimes placed copyright ownership in the employer of an independent contractor. See, e.g., *Dielman*, 102 F. at 894; *Lawrence*, 15 F. Cas. at 50-51; cf. Varmer, *supra*, at 130 (“The cases which have settled problems of copyright ownership in works made on commission have generally involved portrait or group photographs. Certain principles were developed for this type of work long before the 1909 act.”); Ringer, *supra*, at 142 (“‘work made for hire’ probably applies to some commissioned works”) (citing Varmer).

Congress would have understood, for instance, that an “author” would include “[a]ny person who employs a photographer to make a photographic portrait,” even though

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<sup>3</sup> *Webster’s* gives as an example of “employ”: “to employ an expert accountant”—i.e., a type of worker who would often be an independent contractor, cf. *New Prime*, 139 S. Ct. at 540 n.5.

<sup>4</sup> It is no matter that *Black’s* second definition of “employer” is “one for whom employees work and who pays their wages or salaries.” No one disputes that a person who employs a salaried worker is an “employer.” See *New Prime*, 139 S. Ct. at 542.

that person would be an independent contractor in petitioners' view. Varmer, *supra*, at 128; see Ringer, *supra*, at 138 (explaining that drafters of the 1909 Act "criticized as too limitative" confining "author" to salaried employees because it would not cover portraitists). And there is no basis in the 1909 Act for distinguishing between different types of works. Cf. Varmer, *supra*, at 142 ("the policy considerations regarding the ownership of copyright in commissioned works are in many ways similar to those with respect to works made in the course of employment"), 151.

The instance-and-expense test derives from the early cases. The Ninth Circuit in *Lin-Brook* cited, among other decisions, *Dielman and Grant v. Kellogg Co.*, 58 F. Supp. 48 (S.D.N.Y. 1944). See 352 F.2d at 300. Although *Grant* did not use the phrase "instance and expense," it invoked that reasoning: The work's "idea and theme were" from the commissioning party, which also "spent large sums of money" on the contractor's effort. 58 F. Supp. at 53. Similarly, *Brattleboro* cited *Lumiere v. Robertson-Cole Distributing Corp.*, 280 F. 550 (2d Cir. 1922), which explained that, "[w]here a photographer takes photographs of a person, who goes or is sent to the photographer in the usual course, the photographer is paid for the photographs and his services in taking the photographs, the right of copyright is in the sitter, or in the person sending the sitter to be photographed, and it is not in the photographer." 280 F. at 552-553; see Varmer, *supra*, at 130. There the photographs "were taken at the instance of the [commissioning party], and for pay received." *Lumiere*, 280 F. at 553.

Viewing the commissioning party as the employer in these circumstances represents a sensible interpretation of the interplay between the broad terms "author," "employer," and "works made for hire." By contrast, restricting "employer" to master-servant relationships would



necessarily exclude arrangements that were understood to vest copyright ownership in the hiring party.

The instance-and-expense test also advances the copyright statute’s “primary” purpose in encouraging creation for the public’s benefit. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (quoting *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948)); see *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 495 n.3 (2001) (noting that the 1976 Act broke a “two-hundred-year-old tradition” that favored patrons). “In the work for hire context, the law directs its incentives towards the person who initiates, funds and guides the creative activity, namely, the employer, but for whose patronage the creative work would never have been made.” *Estate of Hogarth v. Edgar Rice Burroughs, Inc.*, No. 00-Civ.-9569(DLC), 2002 WL 398696, at \*19 (S.D.N.Y. Mar. 15, 2002), *aff’d*, 342 F.3d 149 (2d Cir. 2003).

3. While the courts of appeals have consistently employed the instance-and-expense test for the past fifty-plus years, Congress has repeatedly amended the copyright statutes without altering that interpretation. See, *e.g.*, Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, 114 Stat. 1444; Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298 § 102, 112 Stat. 2827; Copyright Amendments Act of 1992, Pub. L. No. 102-307 § 102, 106 Stat. 264. That further supports the First Circuit’s decision here. See, *e.g.*, *Tex. Dep’t of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 536-537 (2015).

B. To support their interpretation of “employer,” petitioners say that *Reid* did all the work for them, limiting the interpretation of the 1909 Act to the same as the 1976 Act, *i.e.*, works created within the scope of an employer/employee relationship. They misconstrue *Reid* at every level.

*Reid* resolved a circuit split on the meaning of the 1976 Act, so its analysis focused on illuminating what Congress intended in 1976. The Court’s interpretation turned on factors that have no bearing on the 1909 Act’s meaning: the 1976 Act’s unique “language, structure, and legislative history.” 490 U.S. at 750.

As to language, Congress did not use the word “employer” at all. It instead paired the distinct terms “employee” and “scope of employment”: “a work prepared by an employee within the scope of his or her employment.” 17 U.S.C. 101(1). By 1976 those terms had “accumulated settled meaning . . . under the common law.” 490 U.S. at 739 (alteration in original). As the Court explained, “scope of employment” is “a widely used term of art in agency law.” *Id.* at 740. But the same cannot be said for the word “employer,” especially not in 1909. See *supra* pp. 18-20. The fact that *Reid* did not examine any evidence of how authorities used “employer” in 1909 speaks volumes.

As to structure, the 1976 Act explicitly distinguished employee-created works from commissioned works: “Section 101 plainly creates two distinct ways in which a work can be deemed for hire: one for works prepared by employees, the other for those specially ordered or commissioned works which fall within one of the nine enumerated categories and are the subject of a written agreement.” *Reid*, 490 U.S. at 741. Accordingly, construing the first category to include some commissioned works “would mean that many works that could satisfy § 101(2) would already have been deemed works for hire under § 101(1).” *Ibid.* The 1909 Act, by contrast, lacks that statutory “dichotomy” (*ibid.*) and does not enumerate any categories of works.

As to legislative history, the 1976 Act “was the product of two decades of negotiation” and “compromise.” *Id.* at

743. Needless to say, discussions in the mid-20th-century cannot inform statutory drafting from fifty years earlier.

It is therefore flatly untrue that “[t]he textual question under the 1909 Act is materially identical to the one” in *Reid*. Pet. 19. Petitioners’ effort to justify that assertion mischaracterizes *Reid*. They contend that “*Reid* held that both terms—employer and employee—must be understood to refer to a traditional, common law employment relationship.” Pet. 19 (citing *Reid*, 490 U.S. at 739-743, 751). *Reid* said nothing of the sort. The 1976 Act’s definition does not even use the word “employer.” Tellingly, the cited pages of *Reid* offer a gloss on the term “employer” only once: “[W]hen we have concluded that Congress intended terms such as ‘employee,’ ‘employer,’ and ‘scope of employment’ to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms.” 490 U.S. at 740 (emphasis added). But that statement assumes a hypothetical case where “employer” has already been interpreted to incorporate agency law; it does not say that “employer” “must be understood” (Pet. 19) to incorporate agency law.

And *Reid* did not examine any of the textual evidence discussed above about the meaning of the distinct term “employer” in 1909. *Supra* pp. 18-22. The fact that the Court did not examine that evidence should be unsurprising, for the meaning of “employer” in 1909 was not at issue.

Petitioners are thus also wrong to declare that *Reid* “directly addressed the meaning of the 1909 Act” in describing early cases interpreting the 1909 Act. Pet. 19 (citing 490 U.S. at 743-744, 748-749). The Court reviewed those cases to determine what Congress would have understood when crafting the 1976 Act’s work-for-hire definition. See 490 U.S. at 749 (“Congress certainly could not

have ‘jettisoned’ a line of cases that had not yet been decided.”). But that historical description did not assess what Congress in 1909 thought, which is the question posed by this case.<sup>5</sup>

Nor did the Court evaluate or criticize the instance-and-expense line of cases. It merely found them irrelevant because “the [1976 Act’s] text was agreed upon in essentially final form by 1966,” before the test took root. 490 U.S. at 749. That “a federal court for the first time applied the work for hire doctrine to commissioned works” only “after the 1965 compromise was forged and adopted” (*ibid.*) does not suggest these decisions are incorrect. As discussed above, there was widespread agreement in the 1900s that the hiring party for a commissioned work could be an “author.” Even if some “courts generally presumed that the commissioned party had impliedly agreed to convey the copyright, along with the work itself, to the hiring party” (*id.* at 744), “‘work made for hire’ probably applie[d] to some commissioned works” as well. Ringer, *supra*, at 142 (citing Varmer). There was simply a “paucity of reported litigation over the ownership of commissioned works” to illuminate the precise contours of the rule. Varmer, *supra*, at 142.

It is thus no surprise that every circuit to apply the 1909 Act after *Reid* has continued to use the instance-and-expense test, and that this Court has repeatedly denied petitions raising this same issue.

C. Petitioners deride the instance-and-expense test as the result of “freewheeling policy analysis” that “had no

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<sup>5</sup> If petitioners are trying to argue (Pet. 22) that the 1976 Act’s definition of works for hire controls works created under the 1909 Act, that is plainly wrong. Petitioners also waived the argument by not raising it before the First Circuit. See *Clingman v. Beaver*, 544 U.S. 581, 598 (2005) (“We ordinarily do not consider claims neither raised nor decided below.”).

basis in the actual statute [courts] were purporting to enforce.” Pet. 25. Yet aside from uncritically relying on *Reid*, petitioners engage in hardly any “reasoned legal analysis” themselves. Pet. 24. They do not examine how authorities used the term “employer” in 1909. They do not acknowledge *New Prime* or the difference between “employer” in the 1909 Act and “employee” and “scope of employment” in the 1976 Act.

Petitioners eschew textual analysis to focus on legislative history and what they think was the statute’s purpose. They assert that Section 26 of the 1909 Act was designed for publishers of collected works. Pet. 20. That limit plainly has no basis in the statutory text, even though such language was proposed. *Supra* pp. 5-6.

Petitioners also quote legislative history for the proposition that “the ‘right belonging to that artist who is employed for the purpose of making a work of art so many hours a day . . . should be very different from the right that is held by the independent artist.” Pet. 20-21 (quoting Fisk, *supra*, at 65). Petitioners misleadingly truncate that quotation. The “very different” right rested in “the independent artist or man who makes a painting *for art’s sake*.” Fisk, *supra*, at 65 (emphasis added). Making art “for art’s sake” is a far cry from making art at someone else’s instance and expense. Cf., *e.g.*, Varmer, *supra*, at 154 (comment of Edward Abbe Niles: “I think it utterly unrealistic to distinguish between writings made on regular salary and on special, compensated order, for the purpose of classifying a work as for hire or not for hire. The writing in either case is for hire in the ordinary sense of the term, since in either case the work is being done on order, for compensation, and to the employer’s specifications whether broad or detailed, and the work is intended to become his property.”).

Petitioners’ “scope of employment” requirement is atextual and ahistorical. It has been properly rejected by the lower courts for decades.

### III. THE QUESTION PRESENTED IS OF LIMITED AND DIMINISHING IMPORTANCE

Even apart from the absence of a conflict, the question presented does not warrant review. The ongoing relevance of the work-for-hire doctrine under the 1909 Act is minimal and weakening every year. Each factor petitioners cite to support certiorari is either outdated or exaggerated.

First, the 1909 Act no longer has anything to do with “the development of arts and culture” or “incentivizing artistic expression.” Pet. 27. Nobody has created a work under the 1909 Act in 45 years, and nobody ever will again. This issue has zero effect on artistic creation.

Second, petitioners cite the “right to import certain goods bearing the copyright.” Pet. 28 (quoting *Reid*, 490 U.S. at 737 (citing 17 U.S.C. 601(b)(1)). Yet petitioners fail to note that 17 U.S.C. 601 lapsed and has been repealed. Pub. L. No. 111-295, § 4(a), 124 Stat. 3180 (2010). Again, review is pointless.

Third, the primary right petitioners invoke is the right of an author or his heirs to terminate an assignment under 17 U.S.C. 304. See Pet. 12, 22, 28. Petitioners again gloss over the statutory text. They wrongly imply that termination rights are relevant to any work created under the 1909 Act. Far from it, Section 304 provides a limited window to exercise termination rights, and that window has passed for the majority of works—and is shrinking for the rest.

Under Section 304(c), an author or his heirs may terminate a transfer or license only during a five-year window “beginning at the end of fifty-six years from the date copyright was originally secured.” 17 U.S.C. 304(c)(3).

And “advance notice” of termination must be “served not less than two or more than ten years before” that termination date. 17 U.S.C. 304(c)(4)(A). The upshot is that the opportunity to terminate has expired for every work created before 1963 unless notice already has been served. See U.S. Copyright Office, *Section 304(c)*, <https://www.copyright.gov/comp3/docs/termination-table-section304c.pdf> (*e.g.*, December 31, 1962 + 56 years + 5 years – 2 years = December 31, 2021). And every year that passes means that this right expires for another year’s worth of works. What’s more, the last day to serve a termination notice for any work governed by the 1909 Act is December 31, 2036. So in 15 years, this issue will become entirely irrelevant.

Section 304(d) would provide a second chance at termination for certain works for which the copyright was secured between January 1, 1923, and October 26, 1939, whose authors or owners failed to exercise their termination rights under Section 304(c). But that provision no longer has effect: The last day to serve notice was in 2017, and the Copyright Office has stopped accepting such notices. U.S. Copyright Office, *Notices of Termination*, <https://www.copyright.gov/recordation/termination.html>.

In sum, termination rights no longer have any relevance whatsoever for most works created under the 1909 Act. And for the remaining 15 years’ worth of works that are still termination-eligible, most of those works were created after the instance-and-expense test took hold. It is telling that, in the 44 years since the 1976 Act implemented termination rights, there have been fewer than ten reported cases, including this one, in which termination rights under Section 304(c) depended on the 1909 Act’s work-for-hire standard. This question is far from “commonplace.” Pet. 28.

Finally, petitioners repeatedly note that the extended renewal terms mean that many works will continue to have protection under the 1909 Act, so the question presented affects their ownership. Petitioners hyperventilate that this issue affects “thousands upon thousands of works.” Pet. 4, 12. They cite no authority for that exorbitant estimate, and a simple caselaw search refutes it.<sup>6</sup>

Not only does the question presented arise infrequently, it won’t always matter. Both the instance prong and *Reid*’s test focus on the hiring party’s right to oversee the work. Compare *Reid*, 490 U.S. at 751 (“the hiring party’s right to control the manner and means by which the product is accomplished”), with, e.g., *Marvel*, 726 F.3d at 139 (“[t]he ‘right to direct and supervise the manner in which the work is carried out’”) (citation omitted).

To that end, courts regularly find the instance-and-expense test unsatisfied. *E.g.*, *Forward*, 985 F.2d at 606; *Stern v. Lavender*, 319 F. Supp. 3d 650, 673-676 (S.D.N.Y. 2018); *Sid Bernstein Presents, LLC v. Apple Corps Ltd.*, No. 16-Civ.-7084(GBD), 2017 WL 4640149, at \*7-\*8 (S.D.N.Y. July 26, 2017); *TufAmerica, Inc. v. Codice Music LLC*, 162 F. Supp. 3d 295, 318 n.29 (S.D.N.Y. 2016); *Brumley v. Albert E. Brumley & Sons, Inc.*, 822 F.3d 926, 930 (6th Cir. 2016) (noting jury’s finding); *Siegel v. Time Warner Inc.*, 496 F. Supp. 2d 1111, 1138-1142 (C.D. Cal. 2007); *Piche v. Warner Bros., Inc.*, No. CV-06-963 FMC (Ex), 2006 WL 8449116, at \*3 (C.D. Cal. May 16, 2006); cf. *Marvel*, 726 F.3d at 140 n.9 (denying that the test creates an “almost irrebuttable presumption”) (citation omitted).

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<sup>6</sup> For instance, in Westlaw’s database for federal district court opinions, there are just 56 results for: “(copyright /p 1909) & (work-for-hire or work-made-for-hire) & ((instance or insistence) /s expense).” And that search catches cases in which the doctrine will not actually be at issue.



So adopting petitioners' narrower test would not change those decisions.

The issue has therefore become only less important since the last time the Court denied review. It does not warrant review now either.

#### **IV. SIGNIFICANT RELIANCE INTERESTS MILITATE AGAINST DISTURBING SETTLED LAW**

Even if petitioners had successfully mustered some reason to take the case—an actual conflict, some recurring question of legal or practical significance (see S. Ct. Rule 10)—denial would still be the right result. Petitioners ask this Court to upset decades of settled precedent. It is undisputed that courts around the country—including the two most important circuits (the Second and Ninth Circuits), in petitioners' own telling—have applied the instance-and-expense test since the 1960s. And this Court has several times denied other petitioners' attempts to overrule that test.

So for all this time, parties have bargained with “the expansive bundle of rights granted through copyright ownership” (Pet. 28) under the expectation that the instance-and-expense test would determine such ownership. Petitioners offer no persuasive reason why the Court should impose a new test and suddenly throw ownership into doubt, potentially depriving parties of the deals they have struck. Those reliance interests should be respected. Notably, those interests are even stronger for works with the longest remaining copyright durations. The parties involved with those works—created after the instance-and-expense test took hold in the 1960s—had even less reason to think an employer/employee relationship was required. Weighing these kinds of concerns is a task for Congress. The Court should deny yet another request for it to throw so many transactions into disarray.

**CONCLUSION**

The petition should be denied.

Respectfully submitted.

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FEBRUARY 2022