

No. 21-711

In The
Supreme Court of the United States

—◆—
MARKHAM CONCEPTS, INC., *et al.*,

Petitioners,

v.

HASBRO, INC., *et al.*,

Respondents.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

—◆—
**BRIEF IN OPPOSITION OF
RESPONDENT HASBRO, INC.**

—◆—
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QUESTION PRESENTED

Whether this Court should grant review to consider a claim that the term “author,” as defined in the Copyright Act of 1909 (the “1909 Act”), implicitly and categorically *excluded* employers of independent contractors in the case of works made for hire, even though the relevant statutory definition expressly and unqualifiedly “*include[d]* an *employer* in the case of works made for hire,” the case upon which Petitioners rely (*Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 743-44 (1989) (“*Reid*”) (emphasis added)) did not hold or state that the 1909 Act excludes employers of independent contractors, common law at the relevant time defined “employer” to include employers of independent contractors, every federal circuit to have considered the question has held that the word “employer” as used in the 1909 Act encompasses within it employers of independent contractors, Congress has acquiesced in that interpretation for over sixty years, and parties relied upon that interpretation for decades when negotiating contracts.

**LIST OF PARTIES AND
RULE 29.1 STATEMENT**

Pursuant to Rule 29.1 of the Rules of this Court, respondent Hasbro, Inc. states that it is a publicly held corporation, has no parent company, and has no non-wholly owned subsidiaries or affiliates.

All parties to the appeal in the First Circuit are listed on page ii of the Petition.

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INTRODUCTION

For almost six decades, the law of the land has been clear. When called upon to interpret the term “employer” in the 1909 Act, every circuit court to consider the issue has concluded that that term included employers of independent contractors. Over the years, countless contracting parties have relied upon that settled law when setting the economic terms of their deals. And Congress, aware of that law over those many decades, has not seen fit to change it, despite changing other aspects of copyright law—including work-for-hire provisions—over that time.

Petitioners Markham Concepts, Inc., *et al.* (“Petitioners”) now ask this Court to revisit that settled law based on a claimed conflict with a case decided by this Court almost 33 years ago, and based on a claimed circuit split resulting from a case decided by the Eleventh Circuit almost 32 years ago. In deciding *Reid*, however, this Court interpreted the 1976 Act, not the 1909 Act, and in recounting the judicial history of the 1909 Act, neither criticized it nor implied that it was in error. Further, the common-law history, statutory terms, statutory structure and legislative history of the Copyright Act of 1976 (“1976 Act”) are markedly different than the common law, terms, structure and history of the 1909 Act, making it wholly inappropriate to extrapolate from *Reid* to the 1909 Act. Accordingly, all three circuit courts that have addressed the question of whether *Reid* overturned decades of settled law have concluded that it did not.

Further, no circuit split exists. The only supposedly contrary case that Petitioners identify—among thousands of cases that have cited to *Reid*—is an Eleventh Circuit case that addressed the 1976 Act. That case, however, merely held that precedent governing the 1909 Act could not be applied to the 1976 Act, just as this Court ruled in *Reid*.

Finally, the question presented by Petitioners has minimal implications. It would apply only retroactively, to works created prior to 1978, and thus would not implicate the core goal of copyright law—to encourage the creation of *new* works. The potential retroactive effect also is limited, since a ruling would impact only a small subset of pre-1978 works. And in those instances, a retroactive change in the law would run the risk of creating unforeseen inequitable consequences for contracting parties that relied upon well-settled law in formulating economic terms. If such a change is to be made, it is Congress, and not this Court, that should make it.

◆

STATEMENT

This case involves the creation of the iconic board game, The Game of Life (the “Game”), which is owned by Respondent Hasbro, Inc. (“Hasbro”) and has been a family classic since it was introduced by Hasbro’s predecessor-in-interest, the Milton Bradley Co. (“MB”), in 1960. The key players include Respondent Reuben Klamer (“Klamer”) and Petitioners’

predecessor-in-interest, Bill Markham (“Markham”), both of whom were involved in the development of a prototype of the Game (the “Prototype”). The dispute arises from Petitioners’ desire to exercise a statutory termination, pursuant to 17 U.S.C. § 304(c) (“Section 304(c)”), so as to revoke an alleged grant of copyrights in the Prototype that, they claim, Markham made in 1959.

Under Section 304(c), where an existing federal copyright was transferred or licensed prior to January 1, 1978, the author or author’s heirs may rescind that transfer or license decades later, under certain conditions. 17 U.S.C. § 304(c). No such right of termination exists, however, for grants of copyright in works made for hire. *Id.* That limitation is critical here because, as found by both courts below, Markham was hired to work on the Game at Klamer’s instance and expense—and thus as a work for hire, per the standard applicable under the 1909 Act. Petition (“Pet.”) Appendix (“App.”) at 16a, 21a, 37-44a.

Specifically, Klamer, a toy developer, conceived of the Game in 1959, when tasked with developing a game to commemorate MB’s upcoming centennial. *Id.* at 2-3a, 25-26a. Searching for inspiration in MB’s archives, Klamer discovered a copy of the company’s first board game, “The Checkered Game of Life,” created by Milton Bradley himself in 1860. *Id.* at 3a, 26a. Thus inspired, Klamer came up with the concepts for the Game, but needed help building a prototype to pitch to MB. *Id.* Klamer hired Markham and his company, California Product Development (“CPD”), for

that purpose. *Id.* Klamer chose CPD largely because he had been impressed by two artists employed there—Grace Chambers (“Chambers”) and Leonard Israel (“Israel”). *Id.*

In engaging CPD to help with the Prototype, Klamer agreed to cover all of the costs incurred by CPD in connection with the project, whether the pitch was successful or not. *Id.* at 5a, 31a. That included Chambers’ and Israel’s salaries throughout their time working on the Prototype. *Id.* As such, Markham took no economic risk in the project.

Over the next six weeks, CPD created the Prototype, with Klamer overseeing the project through frequent visits to CPD’s offices. *Id.* at 3-4a, 27-29a. Chambers built the Prototype’s game board, while Israel created the art for its box cover. *Id.* at 3-4a, 28-29a. Markham, Klamer, Chambers and Israel collectively refined the rules through test play sessions, with Markham’s wife memorializing those rules in writing. *Id.* at 4a, 29a.

MB saw potential in the Prototype, and entered into a license agreement with Klamer’s company, Link Research Corporation (“Link”). *Id.* at 4-5a, 29-30a. In pertinent part, MB agreed to pay a 6% royalty to Link in return for the exclusive right to produce and market the Game. *Id.* at 4-5a, 30a. Separately, Link entered into an assignment agreement (the “Assignment”) with Markham, whereby Markham agreed to assign any interests that he may have had in the Game to Link, in exchange for, *inter alia*, 30% of Link’s

royalties. *Id.* at 5a, 30-31a. In addition, as previously agreed, Klamer paid for CPD's costs, including Chambers' and Israel's salaries. *Id.* at 5a, 31a.¹

In 1960, after making substantial revisions, MB released a commercial version of the Game to great success. *Id.* at 5a, 31-32a. Hasbro acquired all rights to the Game thereafter. *Id.* at 5a. Hasbro has continued to leverage and expand upon that success ever since, developing a global brand around the classic game. *Id.* at 5a, 32a. Markham died in 1993, but his heirs (Petitioners) continue to collect substantial royalties on the Game, as well as the many extensions that Hasbro has created over the decades. *Id.* at 5-6a, 32a, 35a. Notwithstanding such remarkable financial success, in 2015—presumably in hopes of obtaining even greater royalties—Petitioners sought a declaratory judgment that they were entitled to exercise a termination, pursuant to Section 304(c), of the copyrights that they claim Markham owned and transferred in 1959. *Id.* at 6a, 23-25a.

The district court held that Petitioners had no termination rights because the Prototype was created at Klamer's instance and expense, and thus as a work for hire. Pet. App. 37-44a (applying the test articulated in *Forward v. Thorogood*, 985 F.2d 604, 606 & n.2 (1st Cir. 1993)). Affirming that decision, *id.* at 16a, 22a, the First Circuit rejected, *inter alia*, Petitioners' argument

¹ Chambers and Israel, meanwhile, never received a cent from Markham in royalties on the Game. *Id.* at 27a.

that *Reid* abrogated the instance and expense test as to works for hire under the 1909 Act. *Id.* at 10-15a.

In light of that conclusion, the First Circuit found no need to address Respondents’ “alternative theory for affirmance”: that the same result would inure even under Petitioners’ interpretation of the word “employer” because, regardless of Klamer’s role, Chambers and Israel created the Prototype as a work for hire *for Markham* in a traditional employment relationship. *Id.* at 21a (noting that Petitioners also would have no termination rights on that basis); 17 U.S.C. § 304(c) (excluding copyrights in works for hire). Petitioners did not seek rehearing en banc.



REASONS FOR DENYING THE PETITION

I. The Decision Below Does Not Conflict With This Court’s Decision in *Reid*

In *Reid*, this Court analyzed the meaning of the term “employee” in Section 101(1) of the Copyright Act of 1976 (the “1976 Act”). In so doing, the *Reid* Court offered no opinion on the meaning of the term “employer” under the 1909 Act. And because the Court dealt with substantially different common-law definitions, statutory language, statutory structure and legislative history in analyzing the 1976 Act, *Reid* does not control a proper analysis of language at issue here. As such, the decision below in no way conflicts with this Court’s holding in *Reid*.

A. *Reid* Addressed the Copyright Act of 1976 Without Criticizing the Judicial History of the 1909 Act

Asserting that the decision below “conflicts with . . . this Court’s interpretation of the 1909 Act in *Reid*,” Pet. 4, Petitioners contend that, in *Reid*, this Court “‘concluded that the work for hire doctrine codified in [the 1909 Act] referred only to works made by employees in the regular course of their employment,’ and not to commissioned works from independent contractors.” *Id.* at 3 (quoting *Reid*, 490 U.S. at 744). Petitioners also claim that “this Court rejected the instance-and-expense test as a judicial intervention untethered to the text or history of the Act, specifically relying on the fact that the 1909 version of the statute limited works for hire to works produced in the course of a traditional employment relationship.” *Id.* at 16. Those statements are materially wrong.

As an initial matter, this Court’s task in *Reid* was to “construe the ‘work made for hire’ provisions of the Copyright Act of 1976,” not the 1909 Act. *Reid*, 490 U.S. at 732; *see also* Pet. i (“But because [*Reid*] arose under the 1976 Act. . . .”). Specifically, “[t]he dispositive inquiry” in *Reid* was whether the sculpture at issue was “‘a work prepared by an employee within the scope of his or her employment’ under § 101(1)” of the 1976 Act—statutory language for which the circuit courts had offered four different interpretations. *Reid*, 490 U.S. at 738-39 (emphasis added).

In addressing that particular issue, the Court observed that the “starting point for our interpretation of a statute is always its language.” *Id.* at 739. In that context, the Court noted that the 1976 Act did not define “employee” or “scope of employment,” and further observed that “[i]t is . . . well established that where Congress uses terms that have an accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress meant to incorporate the established meaning of those terms.” *Id.* at 739-40 (citation omitted).

The Court’s analysis, however, did not end there. Rather, in ultimately concluding that courts should “us[e] principles of general common law of agency” in determining whether a work was performed by an employee under Section 101(1) of the 1976 Act, *id.* at 751, the Court focused on several factors specific to that act.

First, it observed that an agency-based definition was the prevailing common-law definition of “employee” at the time Congress passed the 1976 Act. *Id.* at 740. Second, the Court concluded that nothing in the 1976 Act showed an intent by Congress to use any other definition. *Id.* To the contrary, the Court observed, Congress’s use of the phrase “scope of employment”—which, the Court noted, is “a widely used term of art in agency law”—in Section 101(1) was consistent with an intention to use the common law definition of “employee.” *Id.*

Third, the structure of Section 101 supported a limited definition of “employee” based upon agency principles. Specifically, Congress had divided Section 101 into works made by employees (Section 101(1)), and works made by independent contractors (Section 101(2)). *Id.* at 741-42. The petitioners’ efforts in that case to import independent contractor principles into the term “employee” in Section 101(1) simply made no sense in the context of that overall structure. *Id.*

Fourth, the legislative history of the 1976 Act supported the Court’s construction. *Id.* at 743. Namely, based upon the protracted negotiations that led to two distinct sections within Section 101, Congress clearly intended to keep employees and independent contractors as two distinct concepts. *Id.* As such, before concluding that the “general common law of agency” should apply to the definition of “employee,” the *Reid* Court performed a detailed analysis of the language, structure and legislative history of Section 101 of the 1976 Act. *Id.* at 739-48.

Meanwhile, to the extent that this Court discussed the 1909 Act in *Reid*, it did so in two ways. First, the Court briefly described the 1909 Act and the early case law construing it, to contextualize the negotiations that led to the initial draft of the 1976 Act. *Id.* at 743-44. Second, the Court addressed the petitioners’ claim that “Congress, in enacting the [1976] Act, meant to incorporate a line of cases decided under the 1909 Act holding that an employment relationship exists sufficient to give the hiring party copyright ownership whenever that party has the right to control or

supervise the artist's work." *Id.* at 748. In support of that argument, the petitioners argued that Congress's silence on the subject was evidence of that intent. *Id.* at 748-49.

In rejecting that argument, the Court merely observed, *inter alia*, that Congress already had agreed upon the structure and text of Section 101 of the 1976 Act in 1965 and 1966, before the line of cases referenced by the petitioners had been fully developed. *Id.* at 749. Since Congress was unlikely to have even been aware of those cases, its silence was particularly meaningless. *Id.*

Significantly, when describing the legislative and judicial history of the 1909 Act, the Court did so without criticism. Certainly, if the *Reid* Court thought that the line of cases described therein were wrongly decided, it could have stated as much. But the Court never even hinted at such criticism. And under no circumstances can it credibly be argued, as Petitioners do, that the *Reid* Court "directly addressed the meaning of the 1909 Act, twice confirming that [employer] was limited to traditional employment relationships." Pet. 19. The *Reid* Court plainly did no such thing.

B. The Question Before the *Reid* Court Was Materially Different Than the Question Presented

Faced with the fact that *Reid* did not itself address the 1909 Act, Petitioners argue that the "textual

question under the 1909 Act is materially identical to the one this Court answered in *Reid*,” and that “employer” under the 1909 Act, like “employee” under the 1976 Act, “must be understood to refer to a traditional, common law employment relationship[.]” Pet. 19.

That argument, however, ignores the significant differences between the 1976 Act and the 1909 Act, as well as the common-law definitions relevant to a proper analysis of the two statutes. In fact, if the reasoning of *Reid* is to apply to the 1909 Act, that reasoning only supports the First Circuit’s conclusion that, in using “employer” in that act, Congress intended to include employers of independent contractors.

1. The Common-Law Definition of “Employer” Includes Employers of Independent Contractors

As this Court observed in *Reid*, “[i]t is . . . well established that [w]here Congress uses terms that have an accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress meant to incorporate the established meaning of those terms.” *Reid*, 490 U.S. at 739-40 (citation omitted). In an effort to extend that reasoning to the 1909 Act, Petitioners assert that the terms “employee,” as used in the 1976 Act, and “employer,” as used in the 1909 Act, mean the same thing. *See* Pet. 17-19. Petitioners purport to rely on

Reid in conflating those terms. *Id.* at 18 (citing *Reid* for the proposition that, “since well before the 1909 Act, the words ‘employer’ and ‘employee’ had been understood to ‘describe the conventional master-servant relationship as understood by common-law agency doctrine.’”). *Reid* made no such connection, however, and Petitioners’ effort to do so is demonstrably wrong.

In reality, in 1909, and indeed thereafter, the established meaning of “employer” included those who employed independent contractors. That is because, at the time that Congress passed the 1909 Act, leading common-law authorities understood the term “employer” to include one who engages—*i.e.*, employs—the services of an independent contractor. Non-exclusive examples include the following:

- In legal discourse in the early twentieth century, the party that hired an independent contractor was routinely referred to as an “employer.” *See, e.g., Symons v. Road Directors for Allegany Cty.*, 65 A. 1067, 1071 (Md. 1907) (“the **employer** of an independent contractor is not liable, although the work to be done is intrinsically dangerous, so long as no negligence can be imputed to him in employing such contractor. . . .”) (emphasis added) (quotation omitted); *Flori v. Dolph*, 192 S.W. 949, 950-51 (Mo. 1917) (an “‘independent contractor’ is one, who . . . contracts to do a piece of work . . . without being subject to the control of his **employer** except as to the result of his work” (quoting treatise) (emphasis

added)); *Embler v. Gloucester Lumber Co.*, 83 S.E. 740, 742 (N.C. 1914) (same) (citing, *inter alia*, *Bouvier's Law Dictionary*); see also *N. Bend Lumber Co. v. Chicago, M & P.S. Ry. Co.*, 135 P. 1017, 1021 (Wash. 1913); *Alexander v. R. A. Sherman's Sons Co.*, 85 A. 514, 515 (Conn. 1912) (quoting treatise); *Messmer v. Bell & Coggeshall Co.*, 117 S.W. 346, 348 (Ky. 1909) (citing treatise); *Keys v. Second Baptist Church*, 59 A. 446, 447 (Me. 1904); *City of Richmond v. Sitterding*, 43 S.E. 562, 563 (Va. 1903); *Ridgeway v. Downing Co.*, 34 S.E. 1028, 1030 (Ga. 1900); *State v. Swayze*, 18 A. 697, 697-98 (N.J. 1889); *Rogers v. Florence R. Co.*, 9 S.E. 1059, 1061 (S.C. 1889); *Hexamer v. Webb*, 4 N.E. 755, 758 (N.Y. 1886); *City of Tiffin v. McCormick*, 34 Ohio St. 638, 642 (1878); *De Forrest v. Wright*, 2 Mich. 368, 369-70 (1852); *Hedge v. Williams*, 64 P. 106, 106 (Cal. 1901) (Beatty, C.J., dissenting from denial of rehearing).

- Likewise, many contemporaneous state and federal courts, relying on other cases and treatises, defined an independent contractor as being “employed” or having “independent employment.” See, e.g., *Prest-O-Lite Co. v. Skeel*, 106 N.E. 365, 367 (Ind. 1914) (“When the person **employing** may prescribe what shall be done, but not how it is to be done, or who is to do it, the person so **employed** is a contractor, and not a servant.”) (emphasis added); *Du Bois Elec. Co. v. Fid. Title & Trust Co.*, 238 F. 129, 131 (3d Cir. 1916) (“For present purposes we shall treat the contract as an **independent employment. . .**”)

(emphasis added); *see also Pierson v. Chicago, R.I. & P. Ry. Co.*, 170 F. 271, 274 (8th Cir. 1909); *Thomassen v. West St. Louis Water & Light Co.*, 278 S.W. 979, 979 (Mo. 1925); *Lindsay v. McCaslin*, 122 A. 412, 414 (Me. 1923); *Root v. Shadbolt & Middleton*, 193 N.W. 634, 636 (Iowa 1923).

- *Thompson on Negligence*, a respected 19th century common-law treatise, defined an “independent contractor” as “one who renders service in the course of an occupation representing the will of his **employer** only as to the result of his work, and not as to the means by which it is accomplished.” *Gayle v. Missouri Car & Foundry Co.*, 76 S.W. 987, 992 (1903) (quoting Judge Thompson’s treatise with approval) (emphasis added); *Jahn’s Adm’r v. Wm. H. McKnight & Co.*, 78 S.W. 862, 863 (Ky. 1904) (same).

Consistent with those common-law authorities, this Court’s pre-1909 Act cases also referred to a party who hires an independent contractor as the contractor’s “employer.” *See, e.g., Water Co. v. Ware*, 83 U.S. 566, 576-77 (1872); *Robbins v. Chicago City*, 71 U.S. (4 Wall.) 657, 679 (1866). The *Robbins* Court explained, for example, that, in certain kinds of cases, the principal for whom certain work was done could not defeat a just claim brought by an injured party “by proving that the work which constituted the obstruction or defect was done by an independent contractor.” *Robbins*, 71 U.S. (4 Wall.) at 678-79. In applying that principle, the Court used the term “employer” to refer to “the person

who employs” the independent contractor. *Id.* at 679. *See also id.* at 666 (quoting another case for the proposition that “the contractor and not the **employer** is liable” in certain circumstances, and addressing the law that applies when a work is “placed by the **employer** in the hands of skilful [sic] and independent contractors”) (emphasis added).

Law dictionaries from the time also support a definition of “employer” that includes employers of independent contractors. *See Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (to identify the ordinary meaning of a term in a statute, courts should consult “[d]ictionaries from the era of [the statute’s] enactment.”). Non-exclusive examples include the following:

- The 1910 edition of *Black’s Law Dictionary* contains multiple relevant definitions:
 - It offered two different definitions of “employer”: “[o]ne who **employs the services of others**,” and “one for whom employees work and who pays their wages or salaries.” *Black’s Law Dictionary* 422 (2nd ed. 1910) (emphasis added).
 - It defined an “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** except as to the result of the work.” *Id.* at 616 (emphasis added).

- And it defined “employment” as “an engagement or rendering services for another.” *Id.* at 422.
- The 1914 edition of *Bouvier’s Law Dictionary* defined “employed” as “[t]he act of doing a thing, and the being under contract or orders to do it.” 1 *Bouvier’s Law Dictionary* 1035 (1914 ed.). See also 2 *Bouvier’s Law Dictionary* 1035 (1914 ed.) 1533-36 (providing a lengthy definition of “independent contractor” beginning with “[o]ne 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**, except as to the result of his work” (emphasis added)).
- The 1912 edition of *Cyclopedic Law Dictionary* defines “employment” as a “business or vocation” and “the service of another.” *The Cyclopedic Law Dictionary* 314 (1st ed. 1912).

Similarly, common-law authorities post-dating the 1909 Act recognize that the term “employer” includes employers of independent contractors. Non-exclusive examples include the following:

- A leading common-law treatise dedicated a full chapter to addressing the “Liability of an *Employer of an Independent Contractor*.” Restatement (Second) of Torts ch. 15, §§ 409-429 (1965) (emphasis added); accord Restatement (First) of Torts §§ 409-429 (1934).

- The common-law cyclopedia *American Jurisprudence* in 2021 used the word “employer” to refer to the party who hires an independent contractor. *See, e.g.*, “Retention of Control, by Employer of Independent Contractor, Over Contracted Work or Part Thereof,” 182 Am. Jur. Proof of Facts 3d 119 (updated Dec. 2021).
- A chapter of *American Jurisprudence* regarding “Independent Contractors” consistently refers to the hiring party as the “employer” of the independent contractor. *See, e.g.*, 41 Am. Jur. 2d *Independent Contractors* §§ 8-12, 18, 19, 22 (Feb. 2022 update).
- An annotation of the *American Law Reports* “collects and analyzes those state and federal cases in which the courts have considered and determined the liability of an **employer** of an independent contractor to employees of the contractor who sustained injuries while engaged in inherently or intrinsically dangerous work.” *Liability of Employer With Regard to Inherently Dangerous Work for Injuries to Employees of Independent Contractor*, 34 A.L.R.4th 914 (originally published in 1984; updated 1986) (emphasis added).
- Another authority explained in 1922 that, “[i]n cases involving independent contractors, the cases use various pairs of correlative expressions, such as ‘employer’ and ‘person employed,’ ‘employer’ and ‘independent contractor,’ [and] ‘employer’ and ‘contractor[.]’”

General Discussions of the Nature of the Relationship of the Employer and the Independent Contractor, § 4, 19 A.L.R. 226 (1922).

Indeed, as of the date of this filing, a Westlaw search for cases using the phrase “employer of an independent contractor” turns up 462 federal cases (including 116 cases from the federal courts of appeals) and 987 state cases.

The foregoing also is consistent with this Court’s more recent holding in *New Prime Inc. v. Oliveira*, 139 S.Ct. 532 (2019). In that case, this Court had to determine whether “contracts of employment,” as used in the 1925 Federal Arbitration Act, encompassed contracts for independent contractors. *Id.* at 539. In rejecting the petitioners’ modern definition of “employee,” this Court observed that terms should be given their ordinary meaning “at the time Congress enacted the statute,” and “[a]t that time, a ‘contract of employment’ usually meant nothing more than an agreement to perform work.” *Id.* (quotations omitted). Notably, in so holding, this Court pointed to numerous common-law references “us[ing] the phrase ‘contract of employment’ to describe work agreements involving independent contractors.” *Id.* at 540; *see also id.* at 542 (“a contract of *employment* did not necessarily imply the existence of an employer-employee or master-servant relationship.”) (emphasis in original).

In short, looking to common-law authorities to fill the gaps on an undefined statutory term—as the Court

did in *Reid*—reveals abundant support for the view that “employer,” as used in the 1909 Act, includes an employer of an independent contractor.

2. The Language, Structure and Legislative History of the 1909 Act Are Markedly Different Than the 1976 Act

In defining “employee” under the 1976 Act, the Court in *Reid* did not just consider the common-law definition of “employee.” *Reid*, 490 U.S. at 739-40. The Court also considered all of the language in Section 101(1), the structure of Section 101 as a whole, and the legislative history of that section. *Id.* 739-48. Significant to the Court, for example, was the inclusion of the term “scope of employment” in Section 101(1), which the Court explained was a common term used in agency law. *Id.* 739-40. The Court also considered the dichotomy in the statute between employee-created works and independent contractor-created works, and the protracted legislative negotiations that led to that dichotomy. *Id.* 741-48. Only after that fulsome analysis did the Court conclude that Congress intended to use the agency definition of “employee” in the statute. *Reid*, 490 U.S. at 750-51.

The 1909 Act contains none of the compelling factors that led to this Court’s conclusion in *Reid*. Starting with the language in the two statutes, at least three fundamental differences exist. First, Section 101(1) of the 1976 Act uses the term “employee,”

whereas the 1909 Act uses the term “employer.” As noted above, the common-law definition of the word “employer” includes an employer of an independent contractor, whether or not an independent contractor is considered an “employee.” *See* Section B(1), *supra*.

Second, Section 101(1) of the 1976 Act “defines as a ‘work made for hire’ a ‘work prepared by an employee *within the scope of his or her employment.*’” 490 U.S. at 732 (emphasis added). As the *Reid* Court noted, that “widely used term of art” suggests that Congress intended to impute basic agency principles into that section. *Id.* at 740. Congress did not use that phrase in the 1909 Act, nor did it use anything comparable.

Third, the plain text of the 1976 Act’s work-for-hire definition is exclusive, whereas the plain text of the 1909 Act is inclusive. The definition in the 1976 Act provides that “[a] ‘work made for hire’ *is*” a work that falls into either one “or” another of two carefully circumscribed categories. 17 U.S.C. § 101 (emphasis added); *see* 490 U.S. at 738. The 1909 Act, on the other hand, not only omits any precise and exclusive definition of the phrase “works made for hire”; it broadly provides that a different term—“the word ‘author’”—“shall *include* an employer in the case of works made for hire.” 17 U.S.C. § 26 (repealed) (emphasis added); 490 U.S. at 743-44.

With regard to this language, Petitioners claim that the term “employer,” as used in the 1909 law, “must be understood to . . . exclud[e] cases involving a commission to an independent contractor.” Pet. 19. In

other words, Petitioners would have this Court conclude that a law that expressly and unqualifiedly “include[d] an employer in the case of works made for hire” impliedly and categorically *excluded* an employer of an independent contractor. Such an approach is inconsistent with the language of the statute. Congress’s use of words like “includes” or “including” ordinarily enlarges or illustrates, rather than restricts, the scope of the provision at issue. *See, e.g., Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001). In any event, *Reid* made no effort to analyze the significance of this difference in language choice.

The structures of the work-for-hire provisions in the 1909 and 1976 Acts, meanwhile, are fundamentally different. *Reid*’s interpretation of the term “employee” was based in part on how the pertinent language fit into the two-pronged definition of “works made for hire” in the 1976 Act. *Reid*, 490 U.S. at 741. Construing the word “employee,” as used in Section 101(1), to include independent contractors would have made a mess of the statutory scheme by effectively eviscerating limits on commissioned works that Congress expressly incorporated into Section 101(2). *Id.* 741-42. As such, the petitioners’ control test in *Reid* “was particularly hard to square with § 101(2)’s enumeration of the nine specific categories of specially ordered or commissioned works eligible to be works for hire.” *Id.* at 741.

The 1909 Act, in contrast, did not delineate between employee-created works and independent contractor-related works. Rather, it used only the

words “employer” and “works made for hire,” with “the task of shaping these terms [falling] to the courts.” *Reid*, 490 U.S. at 744. Thus, construing the term “employer,” as used in the 1909 Act, to include an employer of an independent contractor does not raise the kind of structural concerns that informed this Court’s analysis in *Reid*.

Further, the legislative history of the two acts also contains meaningful differences. The 1976 Act was the result of decades of negotiation. *Id.* 743-48. Those negotiations resulted in a carefully constructed work-for-hire provision that sought to balance competing interests, including the interests of commissioning and commissioned parties. *Id.* 746-47. As the Court observed in *Reid*, were “employee” in Section 101(1) to include independent contractors, that interpretation would effectively unwind the limitations on commissioned works that Congress had so scrupulously negotiated. *Id.* 748.

No such history exists in connection with the 1909 Act. In fact, the legislative history of the 1909 Act tells a different story. As Petitioners acknowledge, “a previous draft of the 1909 Act” would have framed the law’s work-for-hire provision “in terms of salaried employment.” Pet. 21; see 3 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT (B. Fulton Brylawski & Abe Goldman eds., 1976) (proposing to define the word “author” to include, *inter alia*, “[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”). Notably, however,

Congress chose *not* to adopt that limiting language. That choice, on its face, supports the inference that the drafters of the 1909 Act considered and rejected a proposal that would have restricted the work-for-hire provision to works prepared by an employee in the scope of their employment.

Of course, “it might be argued conversely, that employment for hire implies salaried employment and that the omitted definition was presumably thought to be superfluous.” Borge Varmer, 86th Cong., Copyright Law Revision Study No. 13: Works Made for Hire and on Commission 128 (Comm. Print 1960) (1958) (acknowledging competing inferences and concluding that “[t]he legislative proceedings do not cast any light on this question”). But Congress did not omit the proposed provision. Rather, Congress essentially adopted the work-for-hire provision of the draft proposal—*minus* the specific limiting language that Petitioners now ask the Court to write back into the law. At a minimum, the legislative history assuredly does not compel the conclusion, as Petitioners claim, that Congress intended the term “employer” to categorically exclude an employer of an independent contractor.

Finally, straining to find support in the 1909 Act’s legislative history, Petitioners point to the comments of a single attendee during the Librarian’s Conference on Copyright prior to the passage of the 1909 Act. Pet. 20-21 (quoting Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 *Yale J.L. & Humans*. 1, 65 (2003)). That singular comment,

however, *preceded* the draft discussed above, which proposed to define “author” to include “[a]n employer, in the case of a work produced by an employee during the hours for which his salary is paid . . . ,” *see* Fisk at 65, and which was never adopted. *Id.* at 66. As such, the isolated comment by a representative of the Lithographer’s Association in 1905 sheds no additional light on how this Court should interpret the 1909 Act’s actual work-for-hire provision.

* * *

In sum, this Court in *Reid* was tasked with interpreting a different statutory term with a different common-law history, found in a statute with different language, different structure and a different legislative history. Those differences, at a minimum, make the “textual question under the 1909 Act” (Pet. 19) materially different from the question this Court answered in *Reid*.

II. Petitioners Have Not Identified a Split Between Circuits

Prior to *Reid*, the Second, Fifth, Seventh and Ninth Circuits all concluded that the 1909 Act’s work-for-hire provision applied to employers of independent contractors.² The First Circuit joined those circuits

² *See Real Estate Data v. Sidwell Co.*, 809 F.2d 366, 371 (7th Cir. 1987); *Murray v. Gelderman*, 566 F.2d 1307, 1311 n.7 (5th Cir. 1978); *Brattleboro Pub. Co. v. Winmill Pub. Co.*, 369 F.2d 565, 568 (2d Cir. 1966); *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965).

shortly after *Reid* was decided.³ Thereafter, litigants pressed the same argument made here—that *Reid* upended that line of cases—to both the Second and Ninth Circuits. Those circuits, like the First Circuit’s decision below, unambiguously rejected that argument, reaffirming their pre-*Reid* precedents.⁴

Reid was decided in 1989, and it has been cited in well over one thousand cases since that time. Out of all of those cases, Petitioners point to only one—*M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486 (11th Cir. 1990)—that, in their view, “recognized that *Reid* abrogated prior decisions extending the work-for-hire doctrine to independent contractors under the 1909 Act.” Pet. 23. Specifically, Petitioners argue that the panel in *M.G.B. Homes* “held that its 1909 Act instance-and-expense authority ‘is no longer valid precedent because . . . its rationale was rejected by [*Reid*].’” Pet. 24 (citing 903 F.2d at 1490-91).

That assertion overstates the holding in that case. As a starting point, and as Petitioners acknowledge, in *M.G.B. Homes*, the Eleventh Circuit addressed a complaint “alleg[ing] copyright infringement in violation

³ See *Forward*, 985 F.2d at 606.

⁴ See, e.g., *Twentieth Century Fox Films Corp. v. Entertainment Distributing*, 429 F.3d 869, 878 (9th Cir. 2005); *Martha Graham School and Dance Foundation v. Martha Graham Center of Contemporary Dance*, 380 F.3d 624, 635-36 (2d Cir. 2004); *Estate of Burne Hogarth v. Edgar Rice Burroughs, Inc.*, 342 F.3d 149, 161-63 (2d Cir. 2003); *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 206 F.3d 1322 (9th Cir. 2000); *Playboy Enterprises v. Dumas*, 53 F.3d 549, 554 (2d Cir. 1995).

of the Copyright Act of 1976.” 903 F.2d at 1487, 1490 n. 10 (emphasis added); Pet. 24. Accordingly, the Eleventh Circuit did not opine on the 1909 Act at all. It did not say, for example, that an employer of an independent contractor could never be an “employer” for purposes of the work-for-hire provision of the 1909 Act. *See* 903 F.2d at 1489-92. In fact, throughout its opinion, the Eleventh Circuit did not use the word “employer” at all.

Similarly, the Eleventh Circuit did not opine that only a traditional “employee” may create a work-for-hire under the 1909 Act, and did not try to explain how or why the teaching of *Reid* might apply to the very different text and context of the 1909 Act. *See id.* Indeed, the *M.G.B. Homes* court did not quote, paraphrase, or analyze the text of the 1909 Act at all. Rather, that panel did just what it should have done: it looked to the text of the 1976 Act and the case law construing that Act—including this Court’s decision in *Reid*—in assessing the work-for-hire claim *under the 1976 Act. Id.*

And in interpreting the 1976 Act, the Eleventh Circuit performed the unremarkable act of following this Court’s ruling in *Reid*. As the panel explained, despite the fact that the trial court was analyzing the work-for-hire provision in the 1976 Act, it appeared to do so by applying case law governing the 1909 Act. *Id.* at 1490. In particular, “[t]he trial court apparently relied” on *Murray v. Gelderman*, 566 F.2d 1307, 1309 (5th Cir. 1978), which held that the 1909 Act’s “‘work-for-hire’ doctrine created a rebuttable presumption of

authorship in the employer,” and applied the instance-and-expense test as “[t]he crucial factor in applying this presumption.” 903 F.2d at 1490.

In addressing the trial court’s approach, the panel stated that “*Murray* is no longer valid precedent because (i) it 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.**” *Id.* at 1490-91 (footnotes omitted) (emphasis added). In so stating, the *M.G.B. Homes* court merely was observing—correctly—that *Murray* could no longer be deemed “valid precedent” *in construing the 1976 Act.* *See id.* at 1490-91; *Easter Seal Soc. for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises*, 815 F.2d 323, 327 (5th Cir. 1987) (citing *Murray*, 566 F.2d at 1310, in discussion of the “conservative interpretation” of the 1976 Act). At no time, however, did the panel conclude that *Murray* incorrectly construed *the 1909 Act*—just as it did not conclude that the 1976 Act “overruled” *Murray’s* interpretation of the 1909 Act. *See M.G.B. Homes*, 903 F.2d at 1490. To the extent that *M.G.B. Homes* “overruled” *Murray*, it was solely to the extent that *M.G.B. Homes* concluded, correctly, that the instance-and-expense test in *Murray* should not be applied to the 1976 Act.

Indeed, it would make no sense to say that *Murray’s* interpretation of the 1909 Act was “overruled by the amendments to the Copyright Act of 1976,” since—as the panel recognized—the 1976 Act “became effective January 1, 1978” and was not made

retroactive to cases arising under the 1909 Act. *See id.* at 1490 n.10. In addition, construing the panel’s formulation to apply only to the 1976 Act is the only way to make sense of the rest of the Court’s analysis—which focuses exclusively on how *Reid* applied the 1976 Act. *See, e.g., id.* at 1491. As such, it is demonstrably wrong to claim that, in *M.G.B. Homes*, the Eleventh Circuit intended to abandon the instance-and-expense test under the 1909 Act, or that it held that employers of independent contractors were not “employers” under that act.

In any event, because *M.G.B. Homes* was “governed by the 1976 Act,” 903 F.3d at 1490 n.10; Pet. 24, any view the panel expressed on the 1909 Act was, at most, dictum. Further, more than 30 years have passed since *M.G.B. Homes* was decided. Assuming *arguendo* that certain language in the court’s opinion could be construed to speak to the 1909 Act, Petitioners have not identified any subsequent case—in the Eleventh Circuit or elsewhere—that has applied the holding in *M.G.B. Homes* to the 1909 Act at all, let alone a case that reached a result that conflicts with the First, Second or Ninth Circuits. Hence, there is no conflict for this Court to resolve.

III. The Question Presented Is Not Important Enough to Warrant This Court’s Review

Petitioners request that this Court grant certiorari to decide whether certain 1960s-era lower court decisions correctly construed a 1909 law that was

completely overhauled in 1976. For three reasons, that request does not merit this Court’s review.

First, as quintessentially retrospective, the question presented does not implicate any important public interest. As Petitioners and their *amici* recognize, copyright law is important to the public because it impacts real-world incentives for creating works of art. *See, e.g.*, Pet. 27 (arguing that copyright law is of “immense importance to both the development of the arts and culture in our country, and to the role of intellectual property law in incentivizing artistic expression”); Amicus Br. of Larry Lieber *et al.* at 3 (“[t]he economic philosophy behind the [Copyright] clause . . . is the conviction that the encouragement of individual effort by personal gain is the best way to advance the public welfare through the talents of authors [] in ‘[] useful Arts.’”) (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

The answer to the question presented, however, would not affect “the development of the arts and culture” or “the role of intellectual property law in incentivizing” creative endeavors. Pet. 27. Nor would it encourage or discourage “individual effort by personal gain.” Amicus Br. of Larry Lieber *et al.* at 3 (quotation omitted). That is because the question presented applies only to already completed works, specifically works that were created more than forty years ago. As such, the absence of a prospective impact makes Petitioners’ question of limited import.

Second, to the extent that the question presented has retrospective effect, a ruling would apply to only a discrete and progressively dwindling subset of private interests. That is because the time limits and various restrictions contained in Section 304(c) result in termination rights that are extremely limited in duration and scope.

As a starting point, the question presented only impacts (un-exercised) Section 304(c) rights in copyrights that were originally secured between 1963 and 1977. This is because any termination must be effected within a five-year window that begins “at the end of fifty-six years from the date copyright was originally secured . . . ,” and must be preceded by two to ten years’ “advance notice in writing upon the grantee or the grantee’s successor in title.” 17 U.S.C. §§ 304(c)(3), (4). Thus, as of the date of this filing, the chance to notice a Section 304(c) termination for any copyright secured before 1963 has expired, unless notice already has been served. Meanwhile, 1977 will always be the last year of relevance because the 1976 Act took effect in 1978.

Further, the question presented would, at best, impact only a small subset of those 1963 to 1977 copyrights. For example, all works created by employees would not be affected by the requested change in the law; those works remain works-for-hire no matter the result. At the other end of the spectrum, works that were not created by either an independent contractor or an employee similarly would not be affected, because those works could never be

considered works-for-hire. Further, works created by independent contractors, but that do not satisfy the instance-and-expense test, also would not be affected by a change in the rule.

In addition, grants made by will are not eligible for termination, 17 U.S.C. § 304(c), and grants made by other means are terminable only if originally executed by a living author or certain, enumerated heirs of a deceased author. *Id.* § 304(a)(1)(c). In addition, where a right of termination exists, the statute specifies exactly who may exercise it (and, often, who must act in concert to do so), depending upon who executed the grant and how the author's interest has been distributed in the intervening five or six decades. *See* 17 U.S.C. §§ 304(c)(1), (4). Based on these restrictions, among others, the class of stakeholders who potentially are impacted by a change in the work-for-hire rule under the 1909 Act is necessarily and manifestly small.

Further, even where Section 304(c) rights exist, they are not necessarily meaningful. As a practical matter, terminations are subject to various limitations set forth in the statute. *See, e.g.,* 17 U.S.C. § 304(c)(6)(A) (termination does not cut off rights to derivative works already prepared under the authority of the original grant). Moreover, termination rights matter only if there is a legitimate, unresolved dispute between grantor and grantee, and only as to copyrights that, against all odds, prove valuable enough to warrant rescinding a grant more than 56 years later.

In sum, with regard to rights of termination under Section 304(c), the question presented affects only those rare copyrighted works that were created on a commissioned basis and would satisfy the instance-and-expense test; were first secured between 1963 and 1977; were transferred or licensed by certain enumerated individuals before 1978; are the subject of a dispute between grantor and grantee; and are inherently valuable enough to motivate (potentially disparate) rights-holders to muster their resources and exercise a right of termination more than *half a century* after the fact. Moreover, any such rights will be irrelevant in less than fifteen years—mathematically, the last possible day to serve a termination notice under Section 304(c) is December 31, 2036. As such, any retroactive effect of the requested ruling is extremely limited.

Third, the change in the law requested by Petitioners could have unintended inequitable consequences. As Petitioners recognize, copyrights still covered by the 1909 Act are apt to involve works made late in the lifetime of that law—*i.e.*, “in the 1960s and 1970s.” Pet. 30. By that time, the courts of appeals already had made clear that the 1909 Act meant what it said—that a provision expressly and unqualifiedly “includ[ing] an employer in the case of works made for hire” included employers of independent contractors. *See, e.g., Brattleboro Pub. Co.*, 369 F.2d at 568; *Lin-Brook Builders Hardware*, 352 F.2d at 300. Commissioning and commissioned parties who entered into agreements during that time presumably knew of the

unanimous 1960s-era precedents when entering into those agreements. *See, e.g., May v. Morganelli-Heumann & Assocs.*, 618 F.2d 1363, 1368 (9th Cir. 1980) (“Under the ‘works for hire’ doctrine, when an employer hires an employee or an independent contractor to produce work of an artistic nature, the courts will presume in the absence of contrary proof that the parties expected the employer to own the copyright *and that the artist set his price accordingly.*”) (emphasis added). Presumably, those parties also would have set economic terms based on the settled law of that time. *Id.* To fundamentally change the law now would, in effect, change the economic terms to which the parties knowingly agreed. That is not something that this Court should entertain. *See New Prime Inc.*, 139 S.Ct. at 539 (“[I]f judges could freely invest old statutory terms with new meanings,” the Court would run the risk of “upsetting reliance interests in the settled meaning of the statute.”).

Based on the foregoing, this Court understandably has determined in the past that the question is not important enough to warrant review. Petition for a Writ of Certiorari, *Dastar Corp. v. Random House, Inc.*, 2006 WL 849912, at *i (U.S. Mar. 28, 2006); *Twentieth Century Fox Films Corp.*, 429 F.3d 869, *cert. denied, sub nom. Dastar Corp. v. Random House, Inc.*, 548 U.S. 919 (2006); *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). Given the passage of time since those decisions, the practical import of the question

presented has only diminished, making it exceedingly less worthy of certification today than when previously presented to this Court.

IV. The Decision Below Is Correct and Does Not Reflect Judicial Drift

As noted throughout, Section 62 of the 1909 Act states that “the word ‘author’ shall include an employer in the case of works made for hire.” 17 U.S.C. § 26 (repealed). “Because the 1909 Act did not define ‘employer’ or ‘works for hire,’ the task of shaping these terms fell to the courts.” *Reid*, 490 U.S. at 744.

Consistent with that responsibility, five circuit courts have interpreted that language over the course of sixty years, and each has come out the same way. Each, including the First Circuit in the decision below, has concluded that the above statutory language does not exclude from “employer” those employers that hire independent contractors. *See supra* Part II at 24-25 (citing cases).

Those decisions were demonstrably correct. At the time Congress passed the 1909 Act, common-law sources routinely referred to parties that contracted with independent contractors as “employers.” *See supra* Part I.B.1 at 12-16. The language in the 1909 Act, meanwhile, is inclusive, rather than exclusive. *See* 17 U.S.C. § 26 (repealed). And the legislative history suggests that, in choosing that language, Congress considered but rejected more specific language limiting

the work-for-hire provision to salaried employees. *See supra* Part I.B.2 at 21-23.

Nor is it true, as Petitioners claim, that those decisions reflect “judicial drift.” Pet. 25. The decisions were in fact entirely consistent with the statutory text. Contrary to Petitioners’ assertions, the five circuit courts that have addressed the issue did not just ignore the text of the 1909 Act and blindly allow their precedents to “drift” down a path that Congress did not chart. Pet. 25. Rather, those courts properly concluded—in line with the broad and inclusive text of the 1909 Act’s work-for-hire provision and innumerable common-law authorities—that an employer of an independent contractor is an “employer” under the act. *See, e.g., Brattleboro Pub. Co.*, 369 F.2d at 568 (“We see no sound reason why these same principles are not applicable *when the parties bear the relationship of employer and independent contractor*”) (emphasis added); *accord Twentieth Century Fox Film Corp.*, 429 F.3d at 877 (“Nor are we alone in applying the work-for-hire doctrine to a case in which an employer commissioned a work by an independent contractor.”); *Murray*, 566 F.2d at 1311 n.7 (“the works for hire doctrine is applicable when the parties are employer and independent contractor”); *Lin-Brook Builders Hardware*, 352 F.2d at 299 (“Many of the illustrations were drawn by a commercial artist, H. L. Baxter, whom appellant employed as an independent contractor.”).

Finally, Petitioners are wrong in arguing that “nothing in the 1976 Act itself justifies applying the

instance-and-expense test to works copyrighted under the 1909 Act.” Pet. 21. First, Congress’s intent in passing a law in 1976 is not meaningful in determining its intent in 1909. Second, even if it were, by including Section 101(2), Congress evidenced an intent to include works made by independent contractors as works-for-hire, albeit on a more limited basis due to intense negotiations between various stakeholders. *Reid*, 490 U.S. at 744-47. Indeed, as the *Reid* Court observed, the categories of commissioned works that are included in Section 101(2), “although not prepared by employees and thus not covered by the first subsection, nevertheless should be treated as works for hire because they were ordinarily prepared ***at the instance, direction, and risk of a publisher or producer.***” *Id.* at 746 (citation omitted) (emphasis added). As such, if anything is to be gleaned from Congress’s intent in 1976, it is that Congress *endorsed* the principles behind the instance-and-expense test, as applied to employers of independent contractors.

V. Petitioners’ Request to Disrupt Well-Settled Precedent Should Be Directed to Congress, Not This Court

As a prior petition properly conceded, and as the lower courts have uniformly recognized, the law that Petitioners seek to upend has been firmly settled in the courts of appeals for almost sixty years. *See* Pet. for Writ of Certiorari, *Dastar Corp. v. Random House*, No. 05-1259, 2006 WL 849912, at 3 (Mar. 28, 2006) (acknowledging the “received wisdom” among federal

courts of appeals); *see also Twentieth Century Fox Film Corp.*, 429 F.3d at 877 (observing, 17 years ago, that the “argument that independent contractors cannot create works-for-hire as a matter of law essentially seeks to overturn forty years of established case law within this circuit”). During that almost six-decade period, Congress could have, at any time, amended the 1909 Act if it disagreed with the courts’ interpretation of the statute. It could have done so, for example, when it passed the 1976 Act. *See, e.g., Estate of Burne Hogarth*, 342 F.3d at 163 (explaining that “any distinction in the case law under the 1909 Act between employees and independent contractors ‘was erased long before the 1976 Act’s arrival’”) (quoting *Easter Seal Society*, 815 F.2d at 330 n.13); *see also* Pet. 9 (“Throughout the 1960s, Congress engaged in an extensive study of the Nation’s copyright laws.”). And it could have done so during the four decades that followed. It never did; as such, this Court should not overturn the unanimous and firmly established position of the lower courts in light of Congress’s protracted acquiescence in that case law. *See, e.g., Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988) (“we have recognized that Congress’s failure to disturb a consistent judicial interpretation of a statute may provide some indication that Congress at least acquiesces in, and apparently affirms, that interpretation”) (alterations and quotation marks omitted).

In reality, Congress arguably has gone beyond mere acquiescence. Specifically, Congress has repeatedly amended federal copyright law in general and the work-for-hire doctrine in particular, but has opted

not to apply those amendments to copyrights governed by the 1909 Act. *See, e.g.*, Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, 114 Stat. 1444; 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 consistent congressional policy judgment strongly suggests that Congress either agrees with the lower courts' view of the 1909 Act, has determined that the costs of disturbing those cases would outweigh the benefits, or both. As such, Petitioners' plea to radically revise the longstanding work-for-hire doctrine under the 1909 Act should be directed to Congress, not this Court.

◆

CONCLUSION

The petition for a writ of certiorari should be denied.

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