No. 99-879

In the Supreme Court of the United States

ALI MOGHADAM, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's conviction under 18 U.S.C. 2319A, for knowingly distributing, selling, and trafficking in unauthorized recordings of live musical performances, could be sustained pursuant to the Commerce Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 175 F.3d 1269. The decisions of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1999. A petition for rehearing was denied on August 27, 1999 (Pet. App. 29). The petition for a writ of certiorari was filed on November 23, 1999. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Middle District of Florida, petitioner was convicted of knowingly distributing,

selling, and trafficking in unauthorized recordings of live musical performances, in violation of 18 U.S.C. 2319A. Petitioner was sentenced to 24 months' probation and a fine of $8,000. Petitioner appealed, and the court of appeals affirmed. Pet. App. 1-28.

1. This case involves the constitutionality of 18 U.S.C. 2319A, which makes the unauthorized recording of live musical performances, and the distribution, sale or rental of such unauthorized recordings, unlawful. Congress enacted Section 2319A, among other things, to bring United States law into conformity with various international agreements and treaties to which the United States is a party. Section 2319A is drawn from the Agreement on Trade Related Aspects of Intellectual Property (TRIPs), which was enacted as part of the Uruguay Round Agreements Act (URAA), and resulted from negotiations of the General Agreement on Tariffs and Trade (GATT). See Pub. L. No. 103-465, § 1101, 108 Stat. 4809, 4974; Pet. App. 5, 14-15.

In relevant part, Section 2319A provides:

> (a) OFFENSE—Whoever, without the consent of the performer or performers involved, knowingly and for purposes of commercial advantage or private financial gain—
>
> (1) fixes the sound or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation;
>
> (2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance; or

> (3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States;
>
> shall be imprisoned * * * or fined * * * or both * * * .

18 U.S.C. 2319A. Section 2319A thus prohibits the unauthorized recording, and the distribution of unauthorized recordings, of the sounds and images of live musical performances.

2. In 1997, a grand jury in the United States District Court for the Middle District of Florida returned an indictment charging petitioner with, among other things, trafficking in unauthorized recordings of the live musical performances of artists such as Tori Amos and the Beastie Boys, in violation of Section 2319A. Pet. App. 1-2; Pet. 3. Petitioner moved to dismiss the indictment on the ground that Section 2319A is unconstitutional, but the district court denied the motion without opinion. Pet. App. 2. While preserving his right to challenge the constitutionality of Section 2319A on appeal, petitioner pleaded guilty to knowingly distributing, selling and trafficking in unauthorized recordings of live musical performances in violation of Section 2319A. Pet. App. 1-2 & n.1.

3. Petitioner appealed, and the United States Court of Appeals for the Eleventh Circuit affirmed. Pet. App. 1-28.

Petitioner's primary argument on appeal was that Congress lacked constitutional power to enact Section 2319A under either the Copyright Clause, U.S. Const. Art. I, § 8, Cl. 8, or the Commerce Clause, U.S. Const. Art. 1, § 8, Cl. 3. The court of appeals first turned to

Congress's authority under the Copyright Clause, which affords Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. Art. I, § 8, Cl. 8. Petitioner contended that, under the Copyright Clause, Congress may extend copyright protection only to "[w]ritings," which must be "fixed" works—*i.e.*, works that have been recorded or otherwise memorialized in a physical or tangible medium. See Pet. App. 8-9. A live musical performance, petitioner argued, does not meet that "fixation" requirement. *Id.* at 9-10.

The court of appeals found it unnecessary to address petitioner's Copyright Clause argument, because it concluded that Congress had the power to enact Section 2319A under the Commerce Clause. Pet. App. 10. With respect to the Commerce Clause, the court held that because Section 2319A "clearly prohibits conduct that has a substantial effect on both commerce between the several states and commerce with foreign nations," it could be sustained as an exercise of Congress's commerce power under this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995). Pet. App. 14, 11-16.[1]

That did not end the court's analysis, however. In its view, "[t]he more difficult question in this case is whether Congress can use its Commerce Clause power to avoid the limitations that might prevent it from passing the same legislation under the Copyright Clause." Pet. App. 16. The court noted that "each of the powers of Congress is alternative to all of the other powers,

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[1] Petitioner does not challenge the court's holding that Section 2319A satisfies the requirements set forth in *Lopez*. Pet. 9-10.

and what cannot be done under one of them may very well be doable under another." *Ibid.* The court also acknowledged, however, that in "some circumstances * * * the Commerce Clause cannot be used by Congress to eradicate a limitation placed upon Congress in another grant of power." *Id.* at 23. Without deciding the question, the court of appeals assumed *arguendo* that Congress could not use the Commerce Clause to enact a statute that was "fundamentally inconsistent" with a limitation in the Copyright Clause. Pet. App. 23 n.12.

The court of appeals therefore examined whether Section 2319A is incompatible with the fixation requirement of the Copyright Clause and concluded that it is not. Pet. App. 25-26. In fact, the court noted, prohibiting unauthorized recordings (and the distribution of such recordings) of live musical performances "actually complements and is in harmony with the existing scheme that Congress has set up under the Copyright Clause." *Id.* at 24. Preventing the creation of and trafficking in such unauthorized recordings "promote[s] the progress of the useful arts by securing some exclusive rights to the creative author," the court explained, a result that is wholly consistent with the purpose of the Copyright Clause. *Ibid.* In addition, although the subject matter here (a live performance) might not have been "fixed" or reduced to a writing at the time the bootleg recording was originally made, the court observed, "it certainly was subject to having been thus fixed." *Ibid.*

The court noted that "there is another limitation in the Copyright Clause that may be implicated by the anti-bootlegging statute: the 'Limited Times' requirement that forbids Congress from conferring intellectual property rights of perpetual duration." Pet. App. 26.

Petitioner, however, had failed to challenge Section 2319A on that basis. *Id.* at 27. Accordingly, the court stated that it would not decide "whether extending copyright-like protection under the anti-bootlegging statute might be fundamentally inconsistent with the 'Limited Times' requirement of the Copyright Clause." *Ibid.*[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The decision below, moreover, is the first to address the constitutionality of 18 U.S.C. 2319A, and addresses only one narrow, limited issue related to that question. Further review therefore is not warranted.

1. Petitioner contends that the court of appeals erred by holding that Congress could enact Section 2319A under the Commerce Clause. Pet. 5-20.[3] Before

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[2] Petitioner also raised other contentions on appeal, but the court of appeals rejected them without discussion, Pet. App. 28 n.18, and petitioner does not seek review of those contentions in this Court.

[3] Petitioner asserts (Pet. 5) that "[a]ll parties concede that section 2319A creates copyright protections and that those protections cannot pass constitutional muster under the Copyright Clause." See also Pet. 8 ("In the Court of Appeals, the government agreed that section 2319A could not be sustained pursuant to Congress's authority under the Copyright Clause."). That is not correct. Although the government did not rely on Congress's powers under the Copyright Clause in the court of appeals, it never conceded that Section 2319A could not be sustained under those powers. See Gov't C.A. Br. 20 n.3, 23-24. Nor did the government concede that Section 2319A creates "copyright protections." Instead, the government has described the protections extended by Section 2319A as "sui generis intellectual property rights," which are distinguishable from copyrights. *Id.* at 14 & n.2;

this Court, petitioner does not dispute that the conduct regulated by Section 2319A bears a sufficient relationship to interstate and foreign commerce to fall within Congress's commerce powers. See Pet. 9-10. Instead, petitioner argues that, under the Copyright Clause, Congress can protect only "the [w]ritings" of authors. By permitting Congress to enact Section 2319A under the Commerce Clause to protect live performances that are not previously recorded or otherwise reduced to a "writing," he contends, the decision below "opens the door for Congress to legislate all copyright protections by way of the Commerce Clause and thus render the Copyright Clause, and potentially every other limited grant of authority contained in Article I, Section 8, superfluous." Pet. 6.

a. Petitioner misconstrues the scope and meaning of the court of appeals' decision. As an initial matter, the court of appeals assumed—without deciding—that the Copyright Clause may impose limits on Congress's commerce power. Pet. App. 23 & n.12. "[W]e take as a given that there are some circumstances," the court of appeals stated, "in which the Commerce Clause cannot be used by Congress to eradicate a limitation placed upon Congress in another grant of power." *Id.* at 23. For that reason, the court "assume[d] arguendo, without deciding, that the Commerce Clause could not be used to avoid a limitation in the Copyright Clause if the particular use of the Commerce Clause (*e.g.*, [Section 2319A]) were fundamentally inconsistent with the particular limitation in the Copyright Clause (*e.g.*, the fixation requirement)." *Id.* at 23 n.12. In this case, petitioner identifies only one limit on Congress's power

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see Pet. App. 7 (describing rights at issue as "quasi-copyright" or "sui generis" protections).

under the Copyright Clause with which Section 2319A is allegedly inconsistent, namely the "writing" or "fixation" requirement. After thorough analysis of the Copyright Clause and Section 2319A, however, the court of appeals concluded that Section 2319A is not fundamentally inconsistent with that requirement. See p. 5, *supra*.

Petitioner thus is incorrect to characterize the court of appeals' decision as holding that the Copyright Clause imposes *no* limits on Congress's commerce power. Pet. 6, 19-20. The actual decision was exceedingly narrow. See Pet. App. 23 ("in reaching our conclusion in this case, we undertake a circumscribed analysis, deciding only what is necessary to decide this case, and we reach a narrow conclusion"). The court of appeals merely concluded that, under the circumstances of the present case, Congress's decision to extend protection against unauthorized or bootleg recording and distribution of live musical performances was not "fundamentally inconsistent" with the "writing" requirement of the Copyright Clause, which limits its protections to matters that are fixed or recorded in a tangible medium of expression. *Id.* at 24-28.

2. The narrowness of the court of appeals' decision and the absence of other appellate authority on point also counsel against review by this Court. For example, the court of appeals here did not address myriad other issues, many of which might have to be decided in petitioner's favor before Section 2319A could be held unconstitutional. First, the court of appeals did not answer whether Section 2319A could be sustained under the Copyright Clause, because that issue was not necessary to its decision. See Pet. App. 10 ("Because we affirm the conviction in the instant case on the basis of an alternative source of Congressional power, we

decline to decide in this case whether the fixation concept of Copyright Clause can" be extended to cover live musical performances capable of fixation.). Second, the court of appeals did not decide the extent to which the Copyright Clause in fact imposes limits on Congress's power to enact legislation under the Commerce Clause; instead, the court merely assumed, *arguendo*, that the Copyright Clause does impose particular limits. See Pet. App. 23 & n.12. Third, the court of appeals did not address whether Section 2319A's prohibition on the unauthorized recording of live musical performances (and the distribution of such recordings) is consistent with the Copyright Clause's "limited Times" requirement, because petitioner failed to raise that issue in a timely fashion. Pet. App. 26-27, 28 n.17. Indeed, petitioner failed to show that, as applied in this case, the Act afforded protection that exceeded the temporal limitations that are provided by statute for the protection of copyrights, *i.e.*, the life of the author plus 70 years, see 17 U.S.C. 302(a) (Supp. IV 1998).

The decision of the court of appeals not only is exceedingly narrow, but also is the first to have addressed Congress's power to enact Section 2319A. Thus, no other court of appeals has addressed the one issue the court below actually decided (that Section 2319A is not fundamentally inconsistent with the Copyright Clause's "writing" requirement). And no court of appeals has addressed any of the related legal questions described above. See pp. 8-9, *supra*. Under these circumstances, there is no compelling reason for the Court to consider the matter immediately and without the benefit of the reasoning or views of other courts of appeals.

3. Petitioner's claim that Section 2319A lies outside Congress's Commerce Clause powers rests primarily on this Court's decisions in *Bonito Boats, Inc.* v. *Thunder*

Craft Boats, Inc., 489 U.S. 141 (1989), and *Feist Publications, Inc.* v. *Rural Telephone Serv. Co.*, 499 U.S. 340 (1991). See Pet. 16-18. Neither decision supports petitioner's contention that the Copyright Clause renders Section 2319A *ultra vires*.

a. In *Bonito Boats*, this Court concluded that the Florida intellectual property law at issue there conflicted with the federal patent *statute*. Through federal patent law, the Court explained, Congress had established a "balance" between the goal of promoting innovation and the desire to promote the use of innovations to maximum public advantage. See 489 U.S. at 151-152. The Florida law, the court noted, sought to protect a product design after, for purposes of federal patent law, it had passed into the public domain. See *id.* at 159. Because the Florida law sought to withdraw otherwise unpatentable innovations from public use, the Court explained, it impermissibly undermined the balance Congress had established. *Id.* at 157. The Court did not hold that *Congress* itself lacks the power to alter the balance the Constitution permits it to establish.

In discussing the Copyright Clause in *Bonito Boats*, the Court did state that it "contains both a grant of power and certain limitations upon the exercise of that power." 489 U.S. at 146. That statement, however, refers to Congress's power under the Copyright Clause alone; it does not purport to address Congress's power under the Commerce Clause, which was not at issue in *Bonito Boats*. Besides, in this case, the court of appeals assumed for the sake of argument that limits in the Copyright Clause, such as the "writing" or "fixation" requirement, do limit Congress's powers under the Commerce Clause. Pet. App. 10, 23 & n.12. It found, however, that there was no fundamental conflict between those limits and Section 2319A.

b. Petitioner's reliance on this Court's decision in *Feist* is similarly misplaced. In *Feist*, the Court addressed whether telephone directory white pages are entitled to copyright protection under the Constitution or the Copyright Act. 499 U.S. at 363-364. It held that, because the white pages directory did not qualify as an "original" work, it was not eligible for copyright protection under the Copyright Clause of the Constitution or the Copyright Act. Nowhere did the Court specifically address any possible or further limitations on the scope of Congress's power under the Commerce Clause.

Recognizing as much, petitioner relies (Pet. 16) not on *Feist*'s holding, but on its assertion that the "primary objective of copyright is not to reward the labor of authors, but [t]o promote the Progress of Science and useful Arts." See 499 U.S. at 349 (internal quotation marks omitted). The Court made that statement, however, in discussing the basis for the originality requirement: "To this end, copyright assures authors the right to their *original* expression, but encourages others to build freely upon the ideas and information conveyed by a work." *Id.* at 349-350 (emphasis added). In this case, the court of appeals expressly concluded that a "live musical performance clearly satisfies the originality requirement." Pet. App. 24. Petitioner, moreover, does not raise the originality requirement in his petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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