

NO. 21-5195

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

MATTHEW D. GREEN, ET AL.,

PLAINTIFFS- APPELLANTS,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,

DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the District of Columbia
No. 1:16-cv-01492-EGS
Hon. Emmet G. Sullivan

APPELLANTS' OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Appellants hereby certify as follows:

A. Parties and Amici

The following were parties in the district court proceeding from which this appeal was taken and are the parties before this Court:

- a) Matthew D. Green
- b) Andrew Bunnie Huang
- c) Alphamax, LLC
- d) United States Department of Justice
- e) Library of Congress
- f) United States Copyright Office
- g) Carla Hayden
- h) Maria A. Pallante
- i) Loretta E. Lynch
- j) Digital Content Protection, LLC (amicus)
- k) Intel Corporation (amicus)
- l) Advanced Access Content System Licensing
- m) Administrator, LLC (amicus)
- n) DVD Copy Control Association (amicus)
- o) Association of American Publishers, Inc. (amicus)
- p) Entertainment Software Association (amicus)

- q) Motion Picture Association, Inc. (amicus)
- r) Recording Industry Association of America, Inc. (amicus)

B. Rulings Under Review

The rulings under review are the district court's:

- a) Order Granting in Part and Denying in Part Defendants' Motion to Dismiss (Dkt. Nos. 24, 25); and
- b) Memorandum Opinion Order Denying Plaintiffs' Motion for Preliminary Injunction (Dkt. Nos. 51, 52).

Both rulings were entered by Emmet G. Sullivan, United States District Judge for the District of Columbia, on June 27, 2019 and July 15, 2021 in Case No. 1:16-cv-01492-EGS.

C. Related Cases

There are no related cases before this court, or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellant Alphamax LLC states that it does not have a parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

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GLOSSARY OF ABBREVIATIONS

DMCA	Digital Millennium Copyright Act
HDCP	High-Bandwidth Digital Content Protection
HDMI	High-Definition Multimedia Interface
TPMs	Technological Protection Measures

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a). Because the district court denied Plaintiffs' motion for preliminary injunction on July 15, 2021 (JA1730-62), this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1292(a), based on the timely notice of appeal filed by Appellants on September 10, 2021 (JA1763-64). *See* Fed. R. App. P. 4(a)(1)(B)(i). This Court also has jurisdiction over any issues "*inextricably bound*" with the decision being appealed, including claims dismissed prior to appeal of a preliminary injunction order. *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 911 (D.C. Cir. 1993).

STATEMENT OF ISSUES FOR REVIEW

1. Whether 17 U.S.C. § 1201(a) is likely unconstitutional on its face, as a speech restriction that cannot survive strict or intermediate scrutiny, or as an unconstitutional speech-licensing regime.
2. Whether 17 U.S.C. § 1201(a) is likely unconstitutional as applied to Appellants and their desired speech activities.
3. Whether Appellants are entitled to a preliminary injunction barring enforcement of 17 U.S.C. § 1201(a) against them for engaging in their desired speech activities.

STATUTES AND REGULATIONS

All pertinent statutes and regulations cited in this Brief are included in the addendum.

INTRODUCTION

Plaintiffs-Appellants are respected technologists whose desire to create and share information is being thwarted by a draconian federal statute that directly restricts their ability to speak. Appellants sought a preliminary injunction freeing themselves and others from these restrictions, but the district court turned their challenge aside for reasons that do not meet the standards required by the First Amendment. This Court should reverse.

Appellant Matthew Green is a security researcher and professor of Computer Science at Johns Hopkins who discovers security vulnerabilities so they may be fixed and teaches others how to identify and prevent such vulnerabilities. Appellant Andrew “bunnie” Huang is a respected engineering researcher who, along with his company Appellant Alphamax LLC, seeks to create software to record and modify video data to facilitate new expression, education, and research—and to publish instructions that would enable others to do the same.

Appellants’ research and expression would be highly valuable to society. Their work would also be perfectly lawful but for one thing—it requires circumventing digital locks and teaching others how to do the same. In the name of protecting

copyrights, a federal statute, Section 1201(a) of the Digital Millennium Copyright Act (DMCA), makes it a crime to engage in or even distribute information about such circumvention, even if the circumvention serves an otherwise lawful purpose. This statute subverts the traditional contours of copyright law to criminalize speech and bar people from using information they possess for education, journalism, and expression. That, in turn, puts Section 1201(a) on a collision course with the First Amendment—one it cannot and should not survive.

Appellants are entitled to an injunction barring enforcement of this unconstitutional censorship regime.

STATEMENT OF THE CASE

A. The Challenged Regime of Section 1201(a)

1. The Anti-Circumvention and Anti-Trafficking Provisions

Appellants challenge two provisions of Section 1201(a): the anti-circumvention provision in Section 1201(a)(1), and the anti-trafficking provision in Section 1201(a)(2). The former prohibits “circumvent[ing] a technological measure that effectively controls access to a work protected [by copyright].” 17 U.S.C. § 1201(a)(1). Such measures, often referred to as “technological protection measures” (TPMs), include encryption, username/password combinations, and physical memory restrictions that prevent a user from accessing stored information. JA16-17 ¶ 18.

The anti-trafficking provision prohibits “manufactur[ing], import[ing], offer[ing] to the public, provid[ing], or otherwise traffic[king] in any technology, product, service, device, component, or part thereof, that ... is primarily designed or produced for the purpose of” circumventing an access control TPM. 17 U.S.C. § 1201(a)(2). This language has been interpreted to bar not only the distribution of a physical device, but also knowledge in the form of specific numbers used as encryption keys, instructions describing the mathematical steps that can be used to read encrypted information, and even publishing links telling a reader where this information can be found. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 308-310, 317-18 (S.D.N.Y.), *aff'd sub nom., Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

Both provisions include a private right of action. If the circumvention or trafficking is done for a commercial purpose, it is a federal crime punishable by up to \$500,000 in fines and imprisonment for up to 5 years. 17 U.S.C. § 1204(a). Prosecutors are taught that they may pursue individuals under Section 1201(a) even where the circumvention or trafficking has no nexus with actual infringement. JA18-19 ¶ 27.

In a widely criticized opinion, the Second Circuit interpreted Section 1201(a) to bar access even to materials a person owns (such as a lawfully purchased DVD) if they try to access it in a way not authorized by the copyright owner. *Corley*, 273

F.3d 429. In enforcing Section 1201(a), the Department of Justice adopted the holding of *Corley*, despite a circuit split with the Federal Circuit and dicta from the Sixth Circuit.

Under this regime, people across the United States are barred from reading works encumbered by access controls, such as software in their devices or an e-book they need technological assistance to read. They are barred from making educational, critical, and expressive uses of copyrighted works or even *looking* at a copy of computer code that they own to understand and improve it.

2. Section 1201's Triennial Rulemaking Process

Congress recognized that the statute's breadth could adversely impact a range of legitimate and beneficial speech. H.R. Rep. No. 105-551 (Part 2), at 36 (1998). Rather than narrowing the law, Congress directed the U.S. Copyright Office and the Librarian of Congress ("the Rulemaking Defendants") to conduct a rulemaking process once every three years in order to determine "whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition [on circumvention] in their ability to make non-infringing uses under this title of a particular class of copyrighted works." 17 U.S.C. § 1201(a)(1)(C); 144 Cong. Rec. H10615, H10621 (daily ed. Oct. 12, 1998) (statement of Rep. Klug). If so, the statute instructs the Librarian to grant an exemption for such uses, for a three-year period. 17 U.S.C. § 1201(a)(1)(D). The

exemption process applies only to the circumvention ban and provides no shield to trafficking liability.

The statute instructs the Librarian to consider several specific factors: (i) the availability for use of copyrighted works; (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes; (iii) the impact of the anti-circumvention rule on criticism, comment, news reporting, teaching, scholarship, or research; and (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works. 17 U.S.C. § 1201(a)(1)(C).

In addition, the Librarian may consider “such other factors as the Librarian considers appropriate.” 17 U.S.C. § 1201(a)(1)(C)(v). The Librarian has used this catch-all provision to deny exemptions based on issues that have nothing to do with copyright, such as potential impacts on automobile pollution and energy policy. JA21 ¶ 33(e); *see also* JA969.

In implementing the provision, the Rulemaking Defendants have imposed a variety of other requirements. JA20-21 ¶ 33. Those include: (1) putting the burden of proof on the party seeking an exemption; (2) requiring a demonstration of widespread impact on non-infringing uses; (3) requiring evidence that people are already engaging in circumvention, which invites criminal and civil jeopardy; and

(4) requiring applicants to show that there is *no* viable alternative means of engaging in the prohibited use. *See id.*

Granted exemptions expire every three years unless they are renewed, which has happened several times. JA21 ¶ 35; *see also* JA942-44.

B. Section 1201(a)'s Chilling Effects on Appellants

1. Appellant Matthew Green

Dr. Matthew Green is an assistant professor of computer science and applied cryptography at the Johns Hopkins Information Security Institute. JA15 ¶5, JA29 ¶ 75. He studies the security of computer systems and teaches others how to do the same. JA29 ¶ 75. This is crucial work, because computer systems often have serious vulnerabilities that can be exploited by wrongdoers. JA907-8 ¶ 3. Security researchers like Dr. Green identify those vulnerabilities so they may be fixed. *Id.*; JA29 ¶ 75.

To analyze the security of a given technology, Dr. Green or a member of his team will first lawfully purchase a copy of the system they wish to test. JA908 ¶ 6. Dr. Green then seeks to understand how the system works, and where it might be vulnerable, including flaws in TPMs intended to control access to the systems. JA909 ¶ 9; JA16-17 ¶ 18, JA29 ¶ 75-77. Malicious actors try to bypass these security measures in order to locate and exploit vulnerabilities. JA909 ¶ 9. To identify security flaws, Dr. Green must do the same. *Id.* When Dr. Green locates security

vulnerabilities, he discusses them with his research team and, where possible, with the company responsible for fixing them and/or people affected by the vulnerability. JA910-12 ¶¶ 13-18.

Dr. Green's research often requires circumventing TPMs. Circumventing a TPM ordinarily means converting unreadable code into a readable format. JA909 ¶ 9. Dr. Green and other security researchers can then evaluate both the TPM itself and the code that the TPM ordinarily renders unreadable. JA909 ¶ 9; JA16-17 ¶ 18, JA29 ¶ 75-77. Dr. Green has used these methods to identify flaws and suggest fixes for widely used software such as Apple iMessage and the software that protects secure online communication and transactions. JA912-13 ¶¶ 20-22. Without circumventing, researchers like Dr. Green cannot read the code they possess and therefore cannot analyze it, improve upon it, or inform the public. JA909-10 ¶ 10. Dr. Green's research is currently protected from Section 1201(a)(1) by a temporary exemption, but security researchers must invest time and resources seeking a renewed permission every three years, with no guarantee of success.

Dr. Green is writing a book about his research. JA29 ¶ 75. To inform readers about the methods of security research, including how to identify vulnerabilities in computer systems, Dr. Green would like to include examples of code capable of bypassing security measures that restrict access to copyrighted software. JA29 ¶ 75; JA912-14 ¶¶ 20-23. Like any scientific research, Dr. Green's findings are credible

only to the extent that other scientists can replicate them, so his book must show fellow computer scientists how to do so. JA913 ¶ 21. Moreover, Dr. Green hopes that others will build upon his research and locate additional security flaws. *Id.* ¶ 22. Finally, Dr. Green hopes that the people who design computer systems will use his book to improve those systems. JA914 ¶ 23. However, he fears that sharing this information will put him at risk of liability under Section 1201(a). *Id.* ¶¶ 37-44.

In addition, Dr. Green would like to offer his book for sale via typical distribution channels, such as bookstores and online retailers. JA29 ¶ 75; JA914 ¶ 24. His marketing materials would highlight detailed information about bypassing security measures since that is part of the book's value as a tool for understanding cutting-edge security research. JA29 ¶ 75; *Id.* ¶ 25. He fears that these activities could invite criminal prosecution under Section 1201(a). JA31 ¶ 87.

2. Appellants Andrew “bunnie” Huang and Alphamax

Dr. Huang is an engineer with a Ph.D. from the Massachusetts Institute of Technology. JA31 ¶ 88. He owns and runs several small businesses, including Appellant Alphamax, and he is a Research Affiliate of the MIT Media Lab. *Id.* Among his inventions are the “NeTV” and “NeTV2” devices, which allow people to edit high-definition digital video streams. JA32 ¶ 89; JA923 ¶ 3 (collectively, “NeTV”).

Dr. Huang, through Alphamax, wishes to create an improved version of the NeTV device, called “NetTVCR.” JA32 ¶ 90. This upgrade would allow people to edit their high-definition digital videos—via “High-Definition Multimedia Interface” or “HDMI” signals¹—and store that edited material in a way that can be used later. *Id.* ¶ 92. That capability, in turn, would facilitate a wide range of non-infringing speech. For example, it would enable users to display a live presidential debate along with text from a commentator’s live blog, or display coverage from multiple sources at once. JA34 ¶ 100. It would enable the creation of remix videos combining snippets of different works, materials for media literacy education, and versions of videos that are more accessible to persons with visual impairment. *Id.* Developers could create a visual overlay that notifies homeowners when a door has opened or alerts elderly people when they need to take their medicine. *Id.* Teachers could create side-by-side comparisons of rescaled videos. *Id.* NeTVCR would also allow people to recapture the functionality of a VCR: a person could save content for later viewing, move content to a different device, or convert it to a more useful format. JA32 ¶ 91. In 2018 Dr. Huang and Alphamax started a crowdfunding

¹ HDMI is a digital video standard used to send video signals from devices like computers, DVD players, and video game consoles to televisions and computer monitors. JA32 ¶ 92.

campaign to seek support for their work, and raised over \$87,000 from more than 200 interested customers. JA925-26 ¶ 8.

Dr. Huang also would like to use NeTVCR himself to learn a new language, by including automatic transliterations alongside videos he owns. Developing and implementing this function will require circumventing High-Bandwidth Digital Content Protection (“HDCP”). JA930 ¶ 20. The prohibition also prevents Dr. Huang and others from developing other computer-aided analysis, altering the image to help people with colorblindness, using audiovisual media to train artificial intelligence systems, and otherwise advancing the state of knowledge and expression when it comes to audiovisual works. JA924-25 ¶ 6, JA930-31 ¶ 23.

In addition, Dr. Huang has an elevated risk for early onset Alzheimer’s disease and understands that watching familiar media is soothing to those with the condition. He would like to develop format-shifting and archiving programs now, so that he will have them in a familiar device rather than risk trying to navigate new technology while suffering dementia. Electronic Frontier Foundation, Reply Comment of Andrew “bunnie” Huang Regarding Proposed Class 4 (Mar. 13, 2018), https://cdn.loc.gov/copyright/1201/2018/comments-031418/class4/Class_04_Reply_Huang.pdf.

Finally, Dr. Huang and Alphamax would also like to publish software instructions so others can reprogram the computer in their NeTVs. JA926 ¶ 12,

JA928-29 ¶ 16. This software will be published in a format that will allow others to read and understand it, and propose new ideas to edit the code. *Id.* That information would facilitate the development of entirely different categories of creative expression, such as media criticism, documentary and narrative filmmaking, remix videos, educational uses, and more. JA19-20 ¶ 32, JA21-22 ¶ 37; JA1382-86.

To develop, sell, and use the NeTVCR upgrade, however, Dr. Huang and Alphamax must circumvent the TPM that restricts the viewing of HDMI signals: HDCP. JA33 ¶ 93. The “secret” keys needed to decode HDCP have been public since 2010, so less scrupulous technologists can already break this measure. JA924 ¶ 5.c. Dr. Huang needs to be able to circumvent HDCP to improve his understanding of how the signals are transmitted and encoded, in order to write the software that communicates how to achieve the desired transformations. JA928-29 ¶¶ 16-18, JA930-31 ¶ 23.

But, like Dr. Green, Dr. Huang and Alphamax fear the possibility of prosecution under Section 1201(a). Accordingly, Section 1201(a) has deterred Dr. Huang from pursuing any of the above activities.² JA926 ¶ 11.

² The “master key,” a collection of numbers that can be used to decrypt HDCP restrictions, was anonymously calculated and uploaded to the Internet in 2010. JA33 ¶¶ 95-96. Intel has made it clear that it would bring a Section 1201(a) claim against anyone who uses the numbers to create an unauthorized device for HDCP playback. *Id.* ¶ 97.

C. Section 1201(a) Harms the Speech of Numerous Third Parties

Appellants are far from the only people suffering from Section 1201(a)'s restrictions on speech. As described in the Complaint (JA22-23 ¶¶ 39-41 and JA24-28 ¶¶ 49-72) and in the subsequent 2018 rulemaking cited in Appellants' motion for preliminary injunction, JA1003-1345, the statute also impairs:

- Creating documentary and narrative films. *See* JA1044, 1061-67.
- Creating audio and visual commentary over digital gameplay recordings. JA1134, 1146-47.
- Creating videos that “remix” content from other videos into a new work. JA1069, 1072.
- Reading and analyzing software in motorized land vehicles and farm equipment. JA1031-32, 1190-1236.
- Creating multimedia ebooks discussing movies and including clips from those movies. JA1035, 1068-72.
- Teaching media criticism and analysis. JA1033-34, 1037-95.
- Reading and analyzing software in all sorts of electronic devices to conduct security research. JA1032, 1289-1320.
- Altering media into accessible formats for the visually impaired. JA1028-29, 1095-1117.
- Restoring the ability to perceive and play lawfully acquired online video games where such games are no longer supported by the maker. JA1033, 1261-89.
- Educational uses of copyrighted works by museums, libraries, and nonprofits. JA1035, 1037-94.
- “Format shifting” (converting lawfully acquired media from one format to another). JA1013-14, 1117-33.
- “Space shifting” (moving lawfully acquired media from one device to another). JA1013-14, 1117-33.
- Reading and analyzing data on medical devices. JA22-23 ¶ 41.

These are only some of the harms of Section 1201(a), and they are not speculative. Advocates for filmmakers, researchers, people with disabilities, archivists, educators, and others have documented the harms in an effort to persuade the Librarian of Congress to ease the restrictions they suffer, with only partial success. For example, filmmakers have explained how the ban on circumventing access controls interferes with their work;³ the Association of Transcribers and Speech-to-Text Providers showed TPMs inhibit access to educational materials for over 77,000 hearing-impaired students and 60,000 visually impaired students;⁴ and computer security researchers described how the anti-circumvention rule interferes with their efforts to identify vulnerabilities in a variety of devices, including traffic control systems and drones.⁵

The ban on trafficking also harms these third parties as they seek to read, learn, and create. Many individuals do not know how to create circumvention technology without assistance, but Section 1201(a) deters law-abiding people who do have that knowledge from providing that help.

³ JA1361-67, 1373.

⁴ JA1507.

⁵ JA1534-36.

D. Procedural History

On July 21, 2016, Appellants filed this lawsuit—a challenge to both the constitutionality of Section 1201(a) and the resolution of the 2015 triennial rulemaking. JA13-44. On September 29, 2016, Dr. Green moved to preliminarily enjoin enforcement of Section 1201(a). *See* ECF No. 16, JA6. The district court stayed briefing and resolution of that motion pending briefing and resolution of the Government’s concurrently filed motion to dismiss the underlying lawsuit. *See* Minute Order (September 30, 2016), JA6.

Nearly three years later, on June 27, 2019, the district court issued an order granting in part and denying in part the Government’s motion. *See* JA801-2. The court correctly determined that Appellants had standing to bring their claims. The court dismissed Appellants’ facial challenges to Section 1201(a) and Administrative Procedure Act claims, but held that in light of Appellants’ intended course of conduct, Appellants had stated a claim that the application of Section 1201(a) against them violated the First Amendment. In addition, the court affirmed that “code is speech,” and that using code to circumvent TPMs, and sharing that code with others, are forms of expression protected by the First Amendment. JA829-30.

On September 19, 2019, Dr. Green again moved for injunctive relief, now joined by Dr. Huang and Alphamax. On July 15, 2021, the district court denied the motion. JA1730. Relying on its prior ruling on the motion to dismiss, the court found

that Appellants were unlikely to succeed on the merits of their claims. JA1744. Despite the allegations and statements provided in his declaration, the district court held that the sale of Dr. Green's books would not implicate the anti-trafficking prohibition. JA1747. The court did not further consider Dr. Green's as-applied claim. The court did consider the as-applied claims brought by Dr. Huang and Alphamax. JA1748. Applying intermediate scrutiny, the court held that the anti-circumvention and anti-trafficking provisions do not burden substantially more speech than is necessary. JA1758-59. Appellants timely appealed the denial of their preliminary injunction motion.

STANDARD OF REVIEW

This Court reviews the legal conclusions underlying the denial of a preliminary injunction *de novo*; the decision as to whether to issue the injunction is reviewed for abuse of discretion. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). The Court also reviews *de novo* an order on a motion to dismiss based on the pleadings. *Carter v. Washington Metro. Area Transit Auth.*, 503 F.3d 143, 145 (D.C. Cir. 2007).

SUMMARY OF ARGUMENT

Appellants seek to read and analyze information, to engage in valuable academic research, to author software that enables further speech, and to publish specific instructions for replicating their work. All of these steps are protected links

in a chain of expression that would ultimately reach a public audience that has a corresponding right to hear Appellants' speech and use their work to engage in new acts of speech and expression. Each step falls squarely within the First Amendment's protection.

Yet Section 1201(a) makes it a federal crime for Appellants to take these steps—and criminalizes the similar activity of countless others. This overly broad law forbids enormous swaths of research and expression that are otherwise lawful, without regard to ordinary First Amendment considerations such as fair use and other traditional contours of copyright law. The Supreme Court has made clear that these traditional contours are what allow copyright law to coexist with the First Amendment. But Section 1201(a) ignores them, harming lawful speech and speakers who have no connection to copyright infringement.

The consequences of this blunderbuss speech restriction have been felt by everyone from people with disabilities who need technological assistance to read, to media critics, filmmakers, educators, and investigators seeking to inform the public of flaws or undesirable features of the software in electronic devices like cars and phones. This regime cannot be squared with the First Amendment, and Appellants are entitled to a preliminary injunction blocking the Government from prosecuting protected speech activities.

First, because the statute’s sweeping prohibitions are substantially overbroad, and nearly two decades of experience with the law has made clear that it causes extraordinary collateral damage to speech and innovation, Section 1201(a) is facially invalid. Section 1201(a)’s content-based bans are subject to strict scrutiny, and the Government cannot meet its burden of showing that the law is narrowly tailored to advance a compelling interest. The result is the same even if the statute faces only intermediate scrutiny.

Second, the triennial rulemaking “safety valve” does not save the statute. Instead, it creates a speech-licensing regime that has no binding standards, does not provide speedy determinations, places the burden of proof on the would-be speaker, and, according to the district court, is not subject to judicial review. Any one of those characteristics would render the regime unconstitutional.

Third, the statute is unconstitutional as applied to Appellants. Appellants’ speech advances the purposes of copyright law: the progress of science and the arts. A regime that prohibits this speech is not tailored to legitimate objectives of preventing copyright infringement.

To be compatible with the First Amendment, laws targeting infringement must respect the traditional boundaries that reconcile copyright’s restrictions with the First Amendment. Section 1201(a) does not do so; instead, it runs roughshod over established speech rights. The district court’s denial of Appellants’ motion for

preliminary injunction is contrary to precedent, the Constitution, and the public interest. This Court should reverse it and enjoin this unconstitutional law while this case proceeds.

ARGUMENT

II. APPELLANTS ARE LIKELY TO SUCCEED IN THEIR FACIAL CHALLENGE TO SECTION 1201(A)

The district court erred in rejecting Appellants' facial challenge to Section 1201(a). Appellants are likely to succeed on these claims because the statute cannot survive strict or intermediate scrutiny, and because Section 1201 established an unconstitutional speech-licensing regime.

A. Section 1201(a) Burdens Myriad Forms of Speech

The district court found that strict scrutiny did not apply because, in the court's view, the statute only regulates "non-speech" elements of computer code. JA841. That was error: Section 1201(a) directly regulates—and burdens—a wide array of protected speech.

1. Section 1201(a) Burdens the Right to Publish Speech

Appellants seek to publish instructions that teach how to circumvent access controls on certain copyrighted works, in both English and in computer languages. JA39 ¶¶ 132, 139. It is well settled, and the Government itself conceded below, that "computer code, and computer programs constructed from code," are forms of speech. *Corley*, 273 F.3d at 446-50 ("Computer programs are not exempted from the

category of First Amendment speech simply because their instructions require use of a computer.”); accord *Bernstein v. U.S. Dep’t of State*, 922 F. Supp. 1426, 1436 (N.D. Cal. 1996). Thus, the creation and sharing of a computer program is protected by the First Amendment, just as is the creation and performance of a musical work, a film, or a scientific experiment. *Corley*, 273 F.3d at 447 (comparing computer code to musical scores); *Bd. of Trustees of Leland Stanford Jr. Univ. v. Sullivan*, 773 F. Supp. 472, 474 (D.D.C. 1991) (the “First Amendment protects scientific expression and debate just as it protects political and artistic expression”).

Accordingly, because Section 1201(a) bars Appellants from sharing information they have authored, it squarely implicates their First Amendment rights. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (protecting “the acts of ‘disclosing’ and ‘publishing’ information”). Software conveys information, and is protected by the First Amendment even when it can also be used to instruct a computer. *Corley*, 273 F.3d at 447 (“A recipe is no less ‘speech’ because it calls for the use of an oven, and a musical score is no less ‘speech’ because it specifies performance on an electric guitar.”).

And, of course, Appellants are not the only ones whose speech is restricted by this law. Section 1201(a) blocks the publication of a wide variety of protected speech, harming filmmakers, media critics, educators, people with visual disabilities, and more. JA20-21 ¶ 33.

2. Section 1201(a) Burdens the Right to Gather Information

“[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). Section 1201(a) is just such a prohibition. Dr. Green seeks to circumvent TPMs to identify and understand security flaws in them and in the computer programs they restrict, so that he can share that information to help make computer systems more secure. Dr. Huang seeks to circumvent TPMs in order to gather information about how to write the NeTVCR program and to share his methods with his customers and the public. JA30 ¶¶ 78-82, JA33-35 ¶¶ 93, 98-106.

The Supreme Court has recognized that the ability to gather information is a “necessary predicate” to the exercise of “rights of speech, press, and political freedom.” *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality). “Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011); *see also, e.g., ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (First Amendment right to record police officers because “[t]he right to publish ... would be insecure, or largely ineffective” if the necessary antecedent acts of gathering information were “wholly unprotected.”). It follows that the portions of

1201(a) that target a necessary predicate to speech are subject to the same degree of First Amendment scrutiny as those targeting the speech itself.

Indeed, Section 1201(a) is uniquely restrictive in this regard, as it bars a person from reading a copyrighted work that they own, such as a lawfully acquired ebook or the software in a device they purchased. *Cf. Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 160 (1989) (explaining the importance of reverse engineering to spurring knowledge and innovation). In this way, Section 1201(a) improperly transforms copyright law from a regime designed to promote access to knowledge into one that can be used to enforce ignorance. That is directly contrary to the underlying purpose of copyright law. *See, e.g., Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021).

3. Section 1201(a) Burdens the Right to Create, Share, and Receive Information

Appellants and others also seek to create and share new information. But this, too, is directly restricted by Section 1201(a)'s prohibition on the sharing of “technology” or “service[s]” or “a part thereof” that are primarily designed for circumvention or marketed for circumvention—regardless of whether that circumvention would actually infringe copyright. 17 U.S.C. § 1201(a)(2).

“[T]he creation and dissemination of information are speech within the meaning of the First Amendment” and “[a]n individual’s right to speak is implicated when information he or she possesses is subjected to ‘restraints on the way in which

the information might be used' or disseminated." *Sorrell*, 564 U.S. at 568, 570 (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984)). The "process of creating" is just as protected as "the product of these processes." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010) ("[W]e have not drawn a hard line between the essays that John Peter Zenger published and the act of setting the type."). Indeed, it is well settled that the First Amendment protection for speech includes protection for the tools that enable speech. *See, e.g., Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983) (striking down a tax on ink used to publish newspapers). Likewise, it is "well established that the Constitution protects the right to receive information and ideas." *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972).

All of these protections are implicated here. Software like Dr. Green's security testing code and Dr. Huang's NeTVCR program is speech in and of itself (as discussed above) *and* it can facilitate the reading, gathering, and creation of information and new expressive works. It enables Appellants to engage in protected First Amendment activities and to allow others to do so as well. By restricting the use of that technology, Section 1201(a) burdens speech as surely as a restriction on the use of a printing press.

Likewise, many people want to receive the information that Appellants would offer. Security researchers, computer vendors, and consumers want to learn from and

be able to replicate Dr. Green’s research. Consumers who lawfully possess videos want to learn from Dr. Huang how to use circumvention to enable lawful fair use. JA32 ¶¶ 90-91, JA34 ¶¶ 100-01, JA35 ¶ 107. The rights of these audiences to receive information buttress Appellants’ First Amendment rights to gather and publish it.

B. Section 1201(a) Is Subject to Strict Scrutiny

The restrictions here are plainly content-based and therefore trigger strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64, 171 (2015) (content-based speech restrictions are presumptively unconstitutional and subject to strict scrutiny). The district court’s decision to apply intermediate scrutiny instead was error. JA841.

1. Section 1201(a) Is a Content-Based Restriction on Speech

In *Reed*, the Supreme Court explained that “[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter,” whereas “others are more subtle, defining regulated speech by its function or purpose.” *Reed*, 576 U.S. at 163. Regardless of how obvious, “[b]oth are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.” *Id.* at 163-64. Those distinctions need not be based on viewpoints—it is well established that “[t]he First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.” *Id.* at 169.

Here, the anti-trafficking and circumvention provisions ban speech based on “particular subject matter” and “function or purpose.” *Id.* at 163. Specifically, the anti-trafficking provision bans speech, in the form of software or words, about a particular subject matter—methods of circumventing TPMs—if the speech constitutes a “technology” or a “service” or a “part thereof.” 17 U.S.C. § 1201(a)(2). Likewise, the anti-circumvention provision bans a particular function of speech: that which depends upon circumvention, including journalism, critique, education, research, parody, and other transformative expression, as well as simply reading, while allowing other speech (and *insulating* copyrightable works from such criticism, parody, and transformation). *Id.*; *Reed*, 576 U.S. at 169.

The district court relied heavily on the non-binding *Corley* opinion to support its finding that Section 1201(a) nevertheless only restricts the “non-speech component of plaintiffs’ use and dissemination of code and only incidentally burdens the ability of the code to express a message to a human (*i.e.*, the ‘speech’ component).” JA844. This conclusion is both incorrect as to computer code and ignores the many forms of speech other than code that the law restricts.

When a technologist writes instructions to share their knowledge, they often do so in the language of computer software, because of the precision it offers. *Junger v. Daley*, 209 F.3d 481, 484 (6th Cir. 2000). Like a cookbook or a musical score, it is possible for another person to follow those instructions to achieve a result, using

tools like an oven or a player piano. But the use of those tools plainly does not mean that the original publication can be suppressed for having a supposed “non-speech component.” *See Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1021 (5th Cir. 1987) (First Amendment protected magazine’s publication of potentially harmful instructions). A vegetarian Congress could not ban cookbooks that teach how to grill and then evade First Amendment scrutiny by claiming the law was directed at the “non-speech component” of cooking meat. *See id.*; *see also Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (explaining the exacting scrutiny applied to government restrictions on speech based on anticipated consequences).

This is doubly true here because the result of a person following the instructions in circumvention code is simply translating information from an unintelligible format into a readable one, which the statute forbids as “circumvention.” By following the mathematical steps described in the code, the scrambled version of the work can be translated back into a format that a person can understand and build upon. These machine-aided reading steps are part of the chain of First Amendment-protected activity, not a separate “non-speech” element. *See supra* Section I(C),(D). Such instructions are equally protected whether or not a computer can process and implement them. To hold otherwise would mean that previously protected publications lose First Amendment protection as computers become better at understanding natural languages like English. Indeed, musical

compositions are protected even though player pianos (and computers) can render them automatically. *See Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp.*, 515 U.S. 557, 569 (1995). In short, authoring and publishing circumvention code is pure speech.

Even if circumvention technology did not itself constitute speech, Section 1201(a)'s ban would be akin to banning eyeglasses that are not authorized by a copyright owner. Making blurry information intelligible and making encrypted information intelligible are both parts of the enjoyment of rights guaranteed by the First Amendment, not “non-speech” to be regulated without constitutional scrutiny. *See Anderson*, 621 F.3d at 1061-62; *Minneapolis Star & Tribune Co.*, 460 U.S. at 581-83.

Section 1201's exemptions render its content-based nature even more obvious. As the Supreme Court has explained, a restriction is content-based if it requires enforcement authorities to “examine the content of the message that is conveyed to determine whether a violation has occurred.” *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (citation omitted). That is exactly the case here. The statute on its face draws various content-based distinctions by exempting certain kinds of “reverse engineering,” “encryption research,” and “security testing” (17 U.S.C. § 1201(f), (g), (j)), but not others. The statute also directs the Rulemaking

Defendants to favor a particular list of subject matter, such as criticism, comment, news reporting, teaching, scholarship, or research. 17 U.S.C. § 1201 (a)(1)(C)(ii-iii).

Further, the anti-trafficking provision requires courts “to ‘examine the content of the message that is conveyed to determine whether’ a violation has occurred.” *McCullen*, 573 U.S. at 479. For instance, Section 1201(a)(2) liability can attach to the dissemination of information as a technology or service if circumvention is the “primary purpose” or if the dissemination “has only limited commercially significant purpose or use other than” circumvention, or if a technology or service is “marketed” for use in circumvention.

The district court incorrectly found that these categorical distinctions are irrelevant because they are “overlaid on a regulation of the non-speech component of expressive activity.” JA847. This reasoning is based entirely on its application of the Second Circuit’s flawed conclusion in *Corley* that the restricted element is a separable form of non-speech. JA845. But that is at odds with the district court’s prior (correct) finding that multiple speech interests are at “at least arguably” at play: publication, preparing expressive works, close predicates to speech, and third parties’ rights to receive information. JA823-24, 830.

2. Section 1201(a) Has a Disparate Impact on Certain Speakers

The Supreme Court has held that “laws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content

preference.” *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2347 (2020) (quoting *Reed*, 576 U.S. at 170). Section 1201’s triennial rulemaking process does exactly that—preferences some speakers over others. For example, through their exemption decisions, the Rulemaking Defendants have preferred “documentary” film to “narrative” film, remixes of film over remixes of video games, multimedia ebooks and classroom courses doing “close analysis” of film clips over other fair uses, and research on consumer devices over research on infrastructure. JA21-23 ¶¶ 36-42, JA30-31 ¶¶ 78-85.

C. Section 1201(a) Fails Strict Scrutiny

Under strict scrutiny, restrictions on speech can survive only upon a showing that they are “the least restrictive means of achieving a compelling state interest.” *McCullen*, 573 U.S. at 478; *see also Reed*, 576 U.S. at 171 (strict scrutiny requires “the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest” (quotations and citations omitted)).

The Government cannot meet this standard here. The Government has asserted that the purpose of Section 1201(a) is to ensure adequate legal protections for copyrighted content and discourage digital piracy. But there are far less restrictive means to achieve these goals and the goals of copyright law.

Indeed, there is an obvious and powerful tool already in place—copyright law itself. Copyright law punishes infringers with both civil liability (with statutory

damages) and criminal penalties. 17 U.S.C. §§ 501, 504, 506. Unlike Section 1201(a), however, copyright law recognizes limits, such as fair use, that keep it in balance with the First Amendment. *See Golan v. Holder*, 565 U.S. 302, 328 (2012). And it “leaves breathing room for innovation and a vigorous commerce” by “absolv[ing] the equivocal conduct of selling an item with substantial lawful as well as unlawful uses.” *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 932-33 (2005); *see also Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442, 456 (1984).

Would-be infringers are already violating copyright or other laws, and are unlikely to be deterred by the additional penalty for circumvention. A fair user, on the other hand, trying to stay on the right side of the law, bears the brunt of Section 1201(a)’s onerous restrictions. Section 1201(a) is not narrowly tailored to achieve a compelling government interest. To the contrary, it primarily impedes lawful speech.

D. Section 1201(a) Also Fails Intermediate Scrutiny

Although strict scrutiny should be applied here, Section 1201(a) also fails intermediate scrutiny because the government interest at issue is closely related to the suppression of free expression and burdens far more speech than necessary to further that interest. *See Turner Broad. Sys., Inc.* 512 U.S. at 662 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1968); *United States v. O’Brien*, 391 U.S. 367, 377 (1968)). The Government cannot show that Section 1201(a)’s restrictions are no

greater than necessary to further the Government's interest, on their face or as applied to Appellants.⁶

1. Section 1201(a) Targets Speech

Contrary to the district court's assertion, the anti-trafficking and anti-circumvention provisions directly target otherwise lawful speech. As discussed above, Section 1201(a) is directly aimed at multiple forms of speech that require being able to read, analyze, and alter copyrighted works subject to TPMs; the instructive speech in both English and in code that enables others to do so; and the speech used to market a technology or service for use in circumvention.

2. Section 1201(a) Is Both Over- and Under-Inclusive

Narrow tailoring requires the Government to show "that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Turner*, 512 U.S. at 662. The prohibitions must "target[] and eliminate[] no more than the exact source of the 'evil' [they] seek to remedy." *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 522-23 (D.C. Cir. 2010) (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)).

⁶ In its Order on Appellants' Motion to Dismiss, the district court considered whether Section 1201(a) passed intermediate scrutiny as applied to Appellants. JA848-53. The Court, however, did not consider whether Section 1201(a) is facially invalid under intermediate scrutiny.

Section 1201(a) is a textbook example of an overbroad law. It burdens far more speech than necessary to “promote the Progress of Science and useful Arts,” the purpose of copyright law. *Google*, 141 S. Ct. at 1195. First, as discussed above, Section 1201(a) is over-inclusive in that it bans broad swaths of speech unrelated to the infringement of copyright. As a result, it unnecessarily suppresses both Appellants’ own expression and the expression of numerous third parties. *See Initiative & Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299, 1313 (D.C. Cir. 2005) (statute considered invalid “because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally ‘overbroad.’” (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984)); *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166 n.14 (2002) (restrictions on third parties’ First Amendment rights are relevant when overbreadth claim is made). It prevents Dr. Green or anyone else from learning the content of encrypted software, prevents Dr. Huang and Alphamax and others from adapting audiovisual works for their own education or accessibility, prevents media critics and educators from using clips of the media they are discussing, prevents innovators from making non-infringing improvements to the software in a device, and so on. Section 1201(a)(2) likewise bans people communicating information about how to achieve these and other lawful ends by circumventing technological protection measures. And even when the Librarian grants an exemption allowing circumvention

for legitimate speech, the ban on *trafficking* to achieve that purpose remains in place. 17 U.S.C. §1201(a)(1)(C).

In short, Section 1201(a)'s provisions necessarily target far more than the “source of the ‘evil’ [they] seek to remedy.” *Boardley*, 615 F.3d at 522-23. Moreover, since it is already a violation of law to infringe copyright or to commit secondary copyright infringement, most of the impact of Section 1201(a) lands on people trying to engage in lawful non-infringing speech.

Second, Section 1201(a) is also fatally under-inclusive. As this Court explained, “an arbitrary exemption from or ‘under-inclusiveness of the scheme chosen by the government’” can show “the asserted interests either are not pressing or are not the real objects animating the restriction on speech.” *Edwards v. Dist. of D.C.*, 755 F.3d 996, 1007 (D.D.C. 2014); *see also, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994) (exceptions from speech limits “may diminish the credibility of the government’s rationale for restricting speech in the first place”); *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 638 (1980) (limit on door-to-door solicitation was not narrowly drawn where it exempted similarly situated solicitors).

That is precisely the case here. Section 1201’s statutory exemptions permit certain limited forms of reverse engineering, encryption research, and security testing, while forbidding a wide range of lawful and valuable research—something

the Librarian itself has recognized. JA960, 80 Fed. Reg. 65,944 (Oct. 28, 2015) (“2015 Final Rule”) at 65,945 (recognizing that the law impedes legitimate and valuable research and analysis). The reverse engineering provision even provides an exemption for the researcher to communicate their findings while continuing to prohibit anyone else from replicating them, as it “permits information acquired through reverse engineering to be made available to others only by the person who acquired the information.” *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 320 (S.D.N.Y. 2000), *aff’d sub nom., Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

Finally, the Government’s effort to satisfy intermediate scrutiny rests on generalized claims of harm. In place of evidence, the Government offered speculation and conjecture—private parties’ supposed fears that TPMs and traditional copyright and other laws will be insufficient to deter unidentified third parties (not Appellants themselves) from engaging in piracy. Such fears are not sufficient to establish either the substantial interest needed to meet intermediate scrutiny or that the restriction imposed by Section 1201(a) alleviates those harms in a direct and material way. *Turner*, 512 U.S. at 644, 667-68 (statute failed to pass intermediate scrutiny where government did not proffer adequate evidence to support its claimed interest).

In contrast, Appellants have offered concrete evidence that the supposed harm of not enforcing 1201(a) is imagined rather than real, with concrete evidence: many online vendors of digital media have abandoned TPMs as unnecessary, JA1688, the Government admitted that TPMs are readily broken, JA1589 n. 18, and it is illogical to conclude that those willing to break copyright law to engage in infringement will be unwilling to break Section 1201(a). General statements that Congress wished to do something about perceived infringement do not support the notion that *this* solution is effective or narrowly tailored. After all, “the deference afforded to legislative findings does not ‘foreclose [a court’s] independent judgment of the facts bearing on an issue of constitutional law.’” *Action for Children’s Television v. F.C.C.*, 58 F.3d 654, 680 (D.C. Cir. 1995).

Appellants do not claim that copyright infringement does not occur, nor that breaking digital locks cannot be a part of infringement.⁷ But vague assertions do not

⁷ In the district court, the Government claimed that the WIPO Copyright Treaty’s commitment to provide legal protection and effective legal remedies against the circumvention of effective technological measures requires Section 1201(a). WIPO Copyright Treaty (1996). But the Treaty itself contemplates the preservation of fair use and does not support criminalizing the otherwise lawful use and publication of computer code. In fact, the Treaty explicitly contemplates that signatories need not forbid activities authorized under local copyright law. *Id.*, art. 11 (1996). U.S. law already met this standard prior to enacting Section 1201(a) by providing penalties for infringement. Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 Berkeley Tech. L.J. 519, 530 (1999).

establish a “record that convincingly shows a problem to exist and that relates the proffered solution to the statutory mandate.” *Home Box Office v. FCC*, 567 F.2d 9, 50 (D.D.C. 1977). Existing copyright laws⁸—unchallenged here—already prohibit and deter copyright infringement in the digital space, through civil and criminal penalties. Anyone using circumvention tools to distribute unauthorized non-transformative copies of copyrighted works is likely already liable as a direct infringer, *see* 17 U.S.C. § 501, and substantial secondary liability exists for bad actors who knowingly or intentionally provide such tools to facilitate infringing uses, *see A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019-24 (9th Cir. 2001).

If anything, the Government’s inability to present anything more than generalized and unsubstantiated predictions underscores that Section 1201(a) does little to deter copyright infringement. *See, e.g., IMS Health Inc. v. Sorrell*, 630 F.3d 263, 276 (2d Cir. 2010) (rejecting a proposed government interest in medical privacy given the absence of studies or data to substantiate that commercial use of data would actually undermine the prescribing process or the doctor-patient relationship).

Further, even assuming that the speech activity in which Appellants and others seek to engage might *theoretically* help unnamed others infringe (something the

⁸ As discussed *infra*, Section I(F), another less-restrictive alternative to the challenged regime is one that requires a nexus to copyright infringement as an element of Section 1201(a) liability.

Government has not shown here), it would not change the result. As the Supreme Court has explained, the “prospect of crime ... by itself does not justify laws suppressing protected speech.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002); *see also Bartnicki v. Vopper*, 532 U.S. 514, 529-30 (2001) (“[I]t would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.”). The Government simply “may not suppress lawful speech as the means to suppress unlawful speech.” *Packingham v. N. Carolina*, 137 S. Ct. 1730, 1738 (2017) (citation omitted).

Lastly, this Court should not ignore Section 1201(a)’s harm to filmmakers, educators, people with disabilities, media critics, and countless other speakers. A law is overbroad when “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citation omitted). The district court believed that it could dismiss Appellants’ facial overbreadth challenge as redundant because Appellants also argued that the law was invalid as applied to them. JA833. But that approach would render any number of constitutional challenges moot. The better approach is to analyze each claim separately, on its merits. *Watchtower*, 536 U.S. at 166 n.14.

E. Section 1201 Is an Unconstitutional Speech-Licensing Regime

Congress recognized Section 1201(a) could prohibit a range of legitimate and beneficial speech. H.R. Rep. No. 105-551 (Part 2), at 36 (1998). Rather than narrowing the law to eliminate that impact, Congress created the triennial rulemaking: a limited mechanism for some speakers to obtain temporary relief from Section 1201(a)(1). But that “fail-safe” does not save the statute. The triennial rulemaking process regularly privileges certain speakers, topics, and mediums of speech over others. What is worse, it creates an independent problem: an unconstitutional speech-licensing regime.

1. Speech-Licensing Schemes Must Satisfy Strict Standards

When a law broadly prohibits speech, but provides a mechanism for would-be speakers to seek government permission to speak, it is a presumptively unconstitutional speech-licensing regime. *See Freedman v. Maryland*, 380 U.S. 51 (1965); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990) (plurality opinion) (ordinance requiring a permit to operate a business selling sexually explicit books and movies); *Bernstein v. U.S. Dep’t of State*, 974 F. Supp. 1288 (N.D. Cal. 1997) (regulation requiring a license to export encryption technology). Such schemes create an unacceptably high risk that officials will abuse their excessive discretion. *Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 758 (1988), *see also Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969) (A scheme making the “freedoms which the

Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.”)

Accordingly, a regulation “subjecting the exercise of First Amendment freedoms to the prior restraint of a license” must include “narrow, objective, and definite standards to guide the licensing authority.” *Shuttlesworth*, 394 U.S. at 150-51; *accord Lakewood*, 486 U.S. at 770-73 (explaining that a law requiring government permission for an activity with a “nexus to expression, or to conduct commonly associated with expression” is a speech-licensing regime subject to facial challenge as such). Any viable speech-licensing regime must also employ specific procedural safeguards: (1) the licensing decision must be prompt; (2) there must be prompt judicial review; and (3) the censor must prove the gag is justified rather than placing the onus on the would-be speaker. *See Freedman*, 380 U.S. at 58-60.

2. Section 1201 Creates a Speech-Licensing Regime

Section 1201(a) begins with a blanket ban on a broad array of activities protected by the First Amendment. Indeed, the Rulemaking Defendants themselves have acknowledged that the circumvention ban blocks many kinds of non-infringing speech and is unduly restrictive of legitimate activity. JA22-23 ¶ 41, JA30 ¶ 79. But the only way that citizens can overcome that ban is to obtain the Government’s

permission in advance. *See Freedman*, 380 U.S. 51; *FW/PBS*, 493 U.S. 215 (plurality opinion); *Bernstein*, 974 F. Supp. 1288. This is a textbook example of a speech-licensing regime that must, therefore, include the *Freedman* safeguards.

Moreover, contrary to the district court's approach, JA838-39, those safeguards are required even if the licensing scheme is content-neutral. *See Lakewood*, 486 U.S. at 763-64; *FW/PBS*, 493 U.S. at 227 (plurality opinion) (city did not pass judgment on content of protected speech, but impermissibly had indefinite amount of time to issue license).

In *Lakewood*, for example, the Supreme Court struck down a facially-neutral permitting scheme that governed conduct closely related to expression. The Court based its decision on the fact that licensing schemes create a heightened risk of discriminatory application even when facially neutral. *Lakewood*, 486 U.S. at 757-59. That is because the *Freedman* safeguards exist to *avoid* the scenario where a member of the public must establish a censor's specific intent to discriminate as to content, speaker, or viewpoint. *Id.*

In any event, while not required, Appellants did explain that the Rulemaking Defendants made improper, content-based distinctions and abused their discretion at the expense of protected speech, as discussed above.

3. Section 1201 Lacks Constitutionally Required Safeguards

Section 1201's licensing system lacks *every single one* of the safeguards that the First Amendment requires. JA19-23 ¶¶ 29-42, JA37-38 ¶¶ 122-128. Missing any one of these safeguards is sufficient to invalidate the regime; missing all of them exposes the regulation as an unconstitutional exercise in unbridled discretion. *Freedman*, 380 U.S. at 58-60.

First, the rulemaking lacks definite standards. The statute instructs that a class of copyrighted work is to be exempted from the ban on circumvention if “non-infringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected.” 17 U.S.C. § 1201(a)(1)(D). But it also provides that the Librarian of Congress “shall examine” several factors that speak to whether a use is infringing or is adversely affected by the ban, including “*such other factors as the Librarian considers appropriate.*” *Id.* § 1201(a)(1)(C)(i)-(v) (emphasis added). Based on this amorphous clause, the Rulemaking Defendants have denied and narrowed requested exemptions based on a variety of considerations that are wholly unrelated to copyright, such as environmental protection, personal injury, and energy policy.⁹

⁹ For example, in the 2015 Rulemaking, the Librarian delayed implementation of exemptions for certain security research and automobile repair because they were uncertain of the impact on, among other things, automobile pollution and energy policy. JA21 ¶ 33(e).

The Rulemaking Defendants also routinely use their discretion to favor some lawful speech over others. JA19-21 ¶¶ 32-33. For example, in the most recent rulemaking prior to filing the Complaint, the Rulemaking Defendants opted to prefer “documentary” film to “narrative” film, remixes of film over remixes of video games, multimedia ebooks and classroom courses doing “close analysis” of film clips over other fair uses, and research on consumer devices over research on infrastructure. JA21-23 ¶¶ 36-42, JA30-31 ¶¶ 78-85. They later denied Dr. Huang an exemption, making it clear that he could not obtain a license for his speech based on his own rights and needs because the agency viewed them as unimportant, opining that the restrictions’ impact on him as an individual was “*de minimis*.” JA998, 83 Fed. Reg. 54,010 (Oct. 26, 2018) (“2018 Final Rule”) at 54,027. A similar fate befell those seeking to create noncommercial films, when the Librarian concluded without explanation that such an exemption was not “necessary.” JA964, 2015 Final Rule at 65,949. The Librarian depended on the recommendation of the Copyright Office, which indicated its view that “limiting the scope to uses of motion pictures for purposes of criticism or commentary is integral” (to the detriment of other forms of fair use videos petitioners sought to make) and whose recommendations hinged on whether regulators were “able to perceive” why a would-be speaker’s message depended on use of high quality source material. JA186, 189.

Second, the triennial rulemaking regime lacks essential procedural protections. *See Freedman*, 380 U.S. at 58-60. It places the burden on would-be speakers to vindicate their rights. JA20 ¶ 33(a), JA21 ¶ 35; *see* JA1018-19. It requires speakers to wait up to three years to even ask for permission to speak, with no corresponding deadline for the Librarian, who generally takes between one and two years to issue a decision. JA19 ¶ 29, JA21 ¶ 35, JA37 ¶ 123; Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43,825 (July 27, 2010) at 43,826 (rulemaking commenced October 8, 2008; final rule published July 27, 2010). This is even more egregious than the delay of four months that was unacceptable in *Freedman*. 380 U.S. at 55.

Finally, the regime does not include a mechanism for swift judicial review, or indeed *any* judicial review. JA38 ¶ 124; JA835.

Any one of these many failings would render the regime unconstitutional, and even speech that is ultimately exempted through the rulemaking process is impermissibly burdened by the need to engage with it. *Freedman*, 380 U.S. at 58-59.

The rulemaking provision is not severable from the statute, because (a) the remaining portion of 1201(a) would continue to be unconstitutional; (b) without the intended “fail-safe” mechanism for non-infringing speech, the ban would not

function as Congress intended; and (c) Congress would not have enacted an absolute ban on circumvention without it. *See, e.g., Am. Fed'n of Gov't Employees, AFL-CIO v. Pierce*, 697 F.2d 303, 307 (D.C. Cir. 1982) (general prohibition not severable from its fail-safe mechanism).

In short, Section 1201(a)(1) creates a blanket ban on expressive activity, including on the ways that people may access information they lawfully possess, which is alleviated only by a fundamentally unfair governmental licensing process. This unconstitutional speech-licensing regime cannot stand.

F. Section 1201(a) is Uniquely Problematic Because It Overrides Copyright's Traditional Contours

The Government cannot rescue Section 1201(a) by invoking copyright's unusual relationship to First Amendment jurisprudence, because the statute overrides the definitional balance upon which that relationship stands.

1. A Ban on Non-infringing Speech Invites First Amendment Scrutiny

There is a fundamental tension between copyrights—which confer limited but powerful rights to control expression—and the First Amendment's prohibition on laws restricting freedom of speech. The Supreme Court has attempted to resolve this tension by identifying a “definitional balance” between the First Amendment and the Copyright Act. *See, e.g., Harper & Row, Publs., Inc. v. Nation Enterprises*, 471 U.S. 539, 556 (1985) (explaining that copyright's idea/expression dichotomy

“strike[s] a definitional balance between the First Amendment and the Copyright Act”).

Thus, in *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003), the Court rejected a First Amendment challenge to the 1998 extension of the copyright term, but made clear that copyrights are not “categorically immune from challenges under the First Amendment.” *Id.* at 221. The Court observed that “copyright law contains built-in First Amendment accommodations”—such the idea/expression dichotomy. *Id.* at 219. Where “Congress has not altered the traditional contours of copyright protection,” the Court explained, “further First Amendment scrutiny is unnecessary.” *Id.* at 221. The Court reaffirmed that principle in *Golan v. Holder*, 565 U.S. at 328-29, and expressly identified fair use as another part of those “traditional contours,” rejecting a First Amendment challenge to copyright law that left “undisturbed the ‘idea/expression’ distinction and the ‘fair use’ defense.”

Unlike the laws at issue in *Eldred* and *Golan*, however, Section 1201(a) *actively disturbs* the traditional “‘speech-protective purposes and safeguards’ embraced by copyright law” (*Golan*, 565 U.S. at 329)—by eliminating the right of fair use, the idea/expression distinction, and limits on secondary liability. That not only raises serious First Amendment concerns but runs contrary to the traditional purposes of copyright. *Id.* at 324-26. In short, the content-based nature of the restriction, the inherent speaker preferences built into the statute, and the

Government's decision to unnecessarily target lawful speech without regard for traditional copyright limitations all make clear that Section 1201(a) demands full and strict scrutiny under the First Amendment, which it fails.

2. Constitutional Avoidance and the Rule of Lenity Support Adopting a Narrowing Construction

But another interpretation is possible. Relying on *Corley*, a pre-*Eldred* decision that wrongly concluded the elimination of fair use protections raises no First Amendment issue, the district court rejected Appellants' suggestion that it construe the definition of "circumvent" in Section 1201(a) to provide for a fair use defense by affirming that a person may be considered to have the requisite "authority of the copyright owner" when their use of the copyrighted work at issue is non-infringing and therefore authorized by copyright law. JA1567-68. But *Corley* is an outlier among appellate decisions, and was decided before the Supreme Court clarified the essential role of fair use in reconciling the Copyright Act and the First Amendment.

This Court should not repeat the Second Circuit's mistake. Instead, it can relieve the tension between the First Amendment and Section 1201(a) if it joins the Federal Circuit and interprets Section 1201(a) to be bounded by the traditional contours of copyright doctrine, allowing for fair use, the use of noncopyrightable facts, and sharing of technology with substantial non-infringing uses by requiring a nexus to copyright infringement for 1201 liability to attach. *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1202-03 (Fed. Cir. 2004).

The rule of lenity likewise demands that the ambiguity in Section 1201(a) be resolved in favor of Appellants. *Whitman v. United States*, 574 U.S. 1003 (2014). This rule serves both to ensure that defendants are on fair notice of what is forbidden and to ensure that “only the *legislature* may define crimes and fix punishments. Congress cannot, through ambiguity, effectively leave that function to the courts—much less to the administrative bureaucracy.” *Id.* at 1005.

Text. The language of Section 1201(a) is far from precise. This has led appellate courts interpreting the statute into divergent readings, from the infringement nexus of the Federal Circuit (*Chamberlain*, 381 F.3d at 1202-03) to the restrictive view of the Second Circuit that Appellees have adopted in enforcing the law. *Corley*, 273 F.3d at 443-44. In the Sixth Circuit, a concurring judge agreed in essence with the Federal Circuit that “Congress . . . sought to reach those who circumvented protective measures ‘for the purpose’ of pirating works protected by the copyright statute.” *Lexmark Int’l v. Static Control Components, Inc.*, 387 F.3d 522, 552 (6th Cir. 2004) (Merritt, J., concurring).¹⁰ Another judge in that case would

¹⁰ Judge Merritt reasoned that because Section 1201(a) is only meant to prohibit piracy, the court should consider the purpose of the circumvention technology before enforcing Section 1201(a)’s anti-circumvention ban: “Unless a plaintiff can show that a defendant circumvented protective measures for such a purpose, its claim should not be allowed to go forward.” *See id.* at 552 (Merritt, J., concurring). Judge Merritt further observed that construing the law to prohibit otherwise lawful circumvention, intended to make fair or non-infringing uses of a protected work,

have held that any finding of fair use would prevent a successful Section 1201(a) claim. *See id.* at 562 (Feikins, J., dissenting). Meanwhile the Ninth Circuit held that a *prima facie* showing of a 1201(a) violation did not require showing a nexus to infringement, but left open the possibility of a fair use defense. *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 950 n.12 (9th Cir. 2010).

Legislative History. The legislative history indicates that in enacting Section 1201, Congress intended to create a regime that would permit those who had lawful access to a work to circumvent access controls for the limited purpose of making non-infringing uses of the work. The House Report issued in connection with Section 1201 explains that “an individual would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which he or she has acquired lawfully.” H.R. Rep. No. 105-551, pt. 1, at 18 (1998); *see also* 144 Cong. Rec. H10615-01 (1998) at H10616 (“It is very clear to us that we need to have the protection of the fair use provisions which had previously been in the law. This we have done.”); *id.* at H10617 (bill “respect[s] the right of people to fair use in accessing information”).

The Senate agreed, stating that the ban on circumvention was not to apply once a person “has obtained authorized access . . . even if such actions involve

would thwart Congress’s purpose under the Copyright Act of promoting science and useful arts. *Id.* at 553.

circumvention of other types of technological protection measures.” S. Rep. No. 105-190, at 28 (1998); *see* 144 Cong. Rec. S11887-01 (1998) at S11887 (Sen. Kohl states, “In my opinion, this bill achieves a fair balance by taking steps to effectively deter piracy, while still allowing fair use of protected materials.”).

Congress also intended to preserve the traditional limit on secondary liability that protects the dissemination of technology with substantial non-infringing uses. 144 Cong. Rec. S4884-01 (1998) at S4890 (Sen. Ashcroft states “neither section 1201(a)(2) nor section 1201(b) should be read as outlawing any device with substantial non-infringing uses”). It anticipated and *rejected* the idea of a “‘pay-per-use’ society” where lawful possession would not enable subsequent fair uses. 144 Cong. Rec. E2136-02 (1998) at E2137.

Congress codified the limited reach of the anti-circumvention provision in 17 U.S.C. § 1201(c), which specified that “[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title” and preserving the limitations on secondary copyright infringement and “[the] rights of free speech or the press.” This likely reflects the fact that even Congress did not imagine that its ban on circumventing access controls would be construed so broadly as to sweep in essentially every fair use that depends upon TPM-encumbered media.

It contravenes both Congress's intent and the purpose of copyright law to prosecute a lawful possessor of a work for circumventing in order to make a non-infringing use or disseminating technology for such circumvention when the technology has substantial non-infringing uses. As discussed above, this expansive interpretation of the statute also brings Section 1201(a) directly into conflict with the First Amendment. Accordingly, this Court should adopt the construction of Section 1201(a) that preserves the freedom to engage in non-infringing uses and avoids creating constitutional infirmities. *See, e.g., Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”).¹¹

¹¹ This construction also partially cures the infirmities of the triennial rulemaking, since it would no longer be strictly necessary to seek a rulemaking exemption in order to avoid legal jeopardy for non-infringing circumvention. Instead, the rulemaking would enable would-be fair users to establish their rights as to categories of copyrighted works without the full expense of litigation and the risk of massive statutory damages for copyright infringement if they were mistaken about the fair use status of their activities.

III. APPELLANTS ARE LIKELY TO SUCCEED ON THEIR AS-APPLIED CLAIMS

While Section 1201(a) should be enjoined on its face, the district court further erred in denying Appellants' narrower request for a preliminary injunction barring the Government from applying the statute to their specific speech.

A. The First Amendment Protects Appellants' Speech and Activities

Appellants are likely to prevail on the merits of their as-applied challenge to Section 1201(a), for the same reasons that they have stated a viable facial challenge (*see supra* Section I)—and for the additional reasons below.

1. Section 1201(a) Stifles Dr. Green's Protected Expressive Activities

Dr. Green seeks to teach others how to engage in security research, which requires him to teach others how to read software that is obscured by technological protection measures and to include samples of computer-readable instructions that can bypass TPMs. He wants to publish and sell this information in a book.

This kind of security and safety research falls well within the First Amendment's protections for creating and disseminating information. *See, e.g., Sorrell*, 564 U.S. at 570. Dr. Green's activities are also protected by the traditional contours of copyright law: the idea/expression distinction protects his right to republish information in a work—such as security flaws that he finds—and fair use protects his right to copy and share computer code to perform his analysis and

comment on the software. Prohibiting these non-infringing uses is neither necessary to advance a legitimate government interest nor desirable in light of the purposes of copyright law.

The Ninth Circuit has explained that research into the functional aspects of video game software is a legitimate reason to access and copy software, even for a competitor seeking to develop competing games. *See Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1522-23 (9th Cir. 1992). The court later reaffirmed this reasoning in *Sony Computer Entertainment, Inc. v. Connectix Corp.*, explaining that it was legitimate for Connectix to copy Sony's PlayStation BIOS in order to understand its functional parameters and allow it to create a competing means of playing games designed for the PlayStation console. 203 F.3d 596, 608 (9th Cir. 2000). Even copying the entire work is generally fair when done for analysis, as with security research. *Id.* at 603, 605; *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 98 (2d Cir. 2014); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820-21 (9th Cir. 2003) (same); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163-64 (9th Cir. 2007).

Curiously, the district court denied Dr. Green's motion for a preliminary injunction partially based on the belief that his book would *not* be marketed for circumvention—a belief that is contrary to Dr. Green's sworn declaration. JA1746-47. The court recognized that Green said the book would be marketed “to highlight the detailed information it contains about bypassing security measures,” but seemed

not to understand that this is circumvention. *Id.* That is why he, too, has a credible fear of prosecution that requires injunctive relief, particularly given the Government's own argument below that Dr. Green should not include circumvention code at all to avoid running afoul of Section 1201(a)(2), JA1603. That assertion directly suggests that the Government would otherwise construe the book to fall *within* Section 1201(a)'s trafficking provisions. JA1747. And it confirms beyond any doubt that Dr. Green's liability is entirely dependent on what content he includes in his book, further underscoring the content-based nature of Section 1201(a) and the need for strict scrutiny.

2. Section 1201(a) Stifles Dr. Huang and Alphamax's Protected Expressive Activities

Dr. Huang's work similarly implicates the First Amendment. Part of his current research focuses on analyzing and transforming video streams. That work enables socially valuable expression in areas such as education, news, and creativity by allowing people to analyze, blend, rescale, and alter videos. As described above, adhering to Section 1201(a)'s limits has forced Dr. Huang to dramatically restrict his work with video signals and the capabilities of the code he writes by refraining from reading the pixels in high-definition digital videos. JA926. Without the ability to access those videos, users cannot save transformative works, run software to interpret and modify the videos in question, or even rescale images or create professional-quality overlays. JA927 ¶ 13. If he were free to circumvent HDCP, he

and his customers could access the videos they possess and use them for all of those purposes. JA926 ¶¶ 11-12.

Dr. Huang's marketing activities are also protected. Contrary to the Government's contention below, this marketing is not "commercial speech proposing illegal activity." JA1578-79 n.8. First, numerous categories of circumvention are protected by statutory and rulemaking exemptions, so the idea that circumvention tools categorically propose illegal activity is simply false. Second, "commercial speech" is "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980). That definition does not apply where, as here, publications are also marketed for use in exercising freedoms of expression. *Id.* Further, nothing in the statute's prohibition against marketing technology limits it to speech that does nothing more than propose a transaction, meaning it will cover noncommercial speech. *Id.* Nor is the statute directed at preventing "commercial harms" such as fraudulent advertising, the kind of harm that justifies lesser scrutiny of regulations on commercial speech. *Sorrell*, 564 U.S. at 579. To the contrary, the statute is directed at blocking the dissemination of technology if it contains the knowledge that enables circumvention.

The district court erred in crediting generalized assertions of harm as justifying the restrictions on Dr. Huang and Alphamax. As applied to Dr. Huang's

NeTVCR, it is especially necessary to view such assertions with a grain of salt: rightsholders made the same outlandish claim that VCRs would devastate commercial entertainment, an assertion that is especially laughable in hindsight and the Supreme Court rightly did not credit in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

Finally, the Government's assertions, even if credited, speak only to the Section 1201(a)(2) ban on Dr. Huang and Alphamax *sharing* their circumvention knowledge with others. It is entirely unclear how Section 1201(a)(1)'s ban on their *circumvention* for their own non-infringing use would lead to the falling-sky scenarios the Government alleges and the district court credited.

IV. THE REMAINING PRELIMINARY INJUNCTION FACTORS FAVOR INJUNCTIVE RELIEF

A. Irreparable Injury

Interference with an individual's First Amendment right to expression constitutes *per se* irreparable injury. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016).

Here, Appellants have been gagged for *over five years* since filing this case. Dr. Green has been forced to withhold his book from the world and Huang and Alphamax have been unable to develop their understanding of HDCP or create new works themselves, let alone share their knowledge with the world to enable others

to do so. *See* JA925-26 ¶¶ 8-9. Dr. Green also routinely must refrain from publishing important information about security vulnerabilities; two examples arising during the pendency of this litigation include a potentially dangerous vulnerability in medical devices and a serious flaw in encrypted communication technology. *See* JA916-17 ¶¶ 32-33.

B. Public Interest and Balance of Equities

Appellants' desired activities are paradigmatic fair use exercises of their speech rights, which would contribute substantially to the development of the arts and sciences. The Government proclaims to champion copyright protections but does so in this case by undermining the very purpose behind such protections: to promote innovation, discovery, and progress. That is not in the public interest. *Pursuing America's Greatness*, 831 F.3d at 511 (the public interest is the government's interest) (*citing Nken v. Holder*, 556 U.S. 418, 435 (2009) (holding that assessing the harm to the opposing party and weighing the public interest "merge when the Government is the opposing party"))).

Whatever the Government's cited interest, "there is always a strong public interest in the exercise of free speech rights otherwise abridged by an unconstitutional regulation and, without a preliminary injunction, [Appellants are] unable to exercise those rights." *Pursuing America's Greatness*, 831 F.3d at 511 (*citing Gordon*, 721 F.3d at 653). It is not in the public interest to unconstitutionally

restrict the speech of Appellants and a broad range of third-party speakers or to deprive the public the opportunity to receive their speech. *See Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 15 (1st Cir. 2012) (citing *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010)).

Because Appellants are likely to succeed on the merits of their constitutional claims under the proper legal standards, all preliminary injunction factors weigh heavily in favor of an injunction and the district court should have granted Appellants' motion.

CONCLUSION

Appellants respectfully requests that the lower court's decision to deny Appellants' motion for preliminary injunction be reversed and that the matter be remanded for further proceedings. Appellants respectfully request that this Court enjoin this unconstitutional law while this case proceeds.

Dated: January 12, 2022

Respectfully submitted,

By: /s/ Corynne McSherry

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CERTIFICATE OF COMPLIANCE

I, Corynne McSherry, in reliance on the word count of the word processing system used to prepare this brief, certify that the foregoing brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B).

The brief contains 12,782 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in Times New Roman 14-point font, a proportionately spaced typeface, using Microsoft Word 2016.

Dated: January 12, 2022

/s/ Corynne McSherry

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 12, 2022

/s/ Corynne McSherry