SUPREME COURT OF THE UNITED STATES

No. 96–1768

C. ELVIN FELTNER, JR., PETITIONER *v.* COLUMBIA PICTURES TELEVISION, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March 31, 1998]

JUSTICE SCALIA, concurring in the judgment.

It is often enough that we must hold an enactment of Congress to be unconstitutional. I see no reason to do so here– not because I believe that jury trial is not constitutionally required (I do not reach that issue), but because the statute can and therefore should be read to provide jury trial.

"[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909). The Copyright Act of 1976 authorizes statutory damages for copyright infringement "in a sum of not less than $500 or more than $20,000 as the court considers just." 17 U. S. C. §504(c). The Court concludes that it is not "fairly possible," *ante*, at 4 (internal quotation marks omitted), to read §504(c) as authorizing jury determination of the amount of those damages. I disagree.

In common legal parlance, the word "court" can mean "[t]he judge or judges, as distinguished from the counsel or jury." Webster's New International Dictionary 611 (2d ed. 1949) (def. 10d). But it also has a broader meaning, which includes both judge and jury. See, *e.g., id.,* (def. 10b: "The

persons duly assembled under authority of law for the administration of justice"); Black's Law Dictionary 318 (5th ed. 1979) (". . . A body organized to administer justice, and including both judge and jury"). We held in *Lorillard* v. *Pons*, 434 U. S. 575 (1978), that a statute authorizing "the court . . . to grant such legal or equitable relief as may be appropriate," 29 U. S. C. §626(b), could fairly be read to afford a right to jury trial on claims for backpay under the Age Discrimination in Employment Act of 1967.

As the Court correctly observes, *ante*, at 6, there was more evidence in *Lorillard* than there is in the present case that "court" was being used to include the jury. The remedial provision at issue explicitly referred to the "'powers, remedies, and *procedures*'" of the Fair Labor Standards Act, under which "it was well established that there was a right to a jury trial," *Lorillard*, 434 U. S., at 580. The provision's reference to "legal . . . relief" also strongly suggested a statutory right to jury trial. *Id.*, at 583. The text of §504(c) lacks such clear indications that "court" is being used in its broader sense. But their absence hardly demonstrates that the broader reading is not "fairly possible," *e.g.*, *Tull* v. *United States*, 481 U. S. 412, 417, n. 3 (1987). The only significant evidence cited by the Court for *that* proposition is that the "Copyright Act use[s] the term 'court' in contexts generally thought to confer authority on a judge, rather than a jury," *ante*, at 5, but "does not use the term 'court' in the subsection addressing awards of actual damages and profits, see §504(b), which generally are thought to constitute legal relief," *ante*, at 5–6. That is a fair observation, but it is not, in my view, probative enough to compel an interpretation that is constitutionally doubtful.

That is at least so in light of contradictory evidence from the statutory history, which the Court chooses to ignore. Section 504(c) is the direct descendant of a remedy created for unauthorized performance of dramatic compositions in

an 1856 copyright statute. That statute provided for damages "not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the court having cognizance thereof shall appear to be just," enforced through an "action on the case or other equivalent remedy." Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 139. Because actions on the case were historically tried at law, it seems clear that this original statute permitted juries to assess such damages. See *Lorillard, supra*, at 583. Although subsequent revisions omitted the reference to "action[s] on the case," they carried forward the language specifying damages "as to the court shall appear to be just." See Act of July 8, 1870, ch. 230, §101, 16 Stat., 214; Act of January 6, 1897, ch. 4, 29 Stat., 482. In 1909, Congress extended those provisions to permit all copyright owners to recover "in lieu of actual damages and profits such damages as to the court shall appear just . . . ." Act of March 4, 1909, ch. 320, §25(b), 35 Stat. 1081. We have recognized that, although the prior statutory damages provisions

> "were broadened [in 1909] so as to include other copyrights and the limitations were changed in amount, . . . the principle on which they proceeded– that of committing the amount of damages to be recovered to the court's discretion and sense of justice, subject to prescribed limitations– was retained. The new provision, like one of the old, says the damages shall be such 'as to the court shall appear to be just.'" *L. A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100, 107 (1919).

If a right to jury trial was consistent with the meaning of the phrase "as to the court . . . shall appear to be just" in the 1856 statutory damages provision, I see no reason to insist that the phrase "as the court considers just" has a different meaning in that provision's latest reenactment.

"[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard*, 434 U. S., at 581.

I do not contend that reading "court" to include "jury" is necessarily the *best* interpretation of this statutory text. The Court is perhaps correct that the indications pointing to a change in meaning from the 1856 statute predominate. As I have written elsewhere, however:

> "The doctrine of constitutional doubt does not require that the problem-avoiding construction be the *preferable* one– the one the Court would adopt in any event. Such a standard would deprive the doctrine of all function. 'Adopt the interpretation that avoids the constitutional doubt if that is the right one' produces precisely the same result as 'adopt the right interpretation.' Rather, the doctrine of constitutional doubt comes into play when the statute is 'susceptible of' the problem-avoiding interpretation, *Delaware & Hudson Co.*, 213 U. S., at 408– when that interpretation is *reasonable*, though not necessarily the best." *Almendarez-Torres* v. *United States*, 523 U. S. ___, ___ (SCALIA, J., dissenting).

As the majority's discussion amply demonstrates, there would be considerable doubt about the constitutionality of §504(c) if it did not permit jury determination of the amount of statutory damages. Because an interpretation of §540(c) that avoids the Seventh Amendment question is at least "fairly possible," I would adopt that interpretation, prevent the invalidation of this statute, and reserve the constitutional issue for another day.