No. 18-877

IN THE
Supreme Court of the United States

FREDERICK L. ALLEN and
NAUTILUS PRODUCTIONS, LLC,

Petitioners,

v.

ROY A. COOPER, III,
as Governor of North Carolina, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

CORY L. ANDREWS
Counsel of Record
CORBIN K. BARTHOLD
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

August 13, 2019

QUESTION PRESENTED

Whether Congress validly abrogated state sovereign immunity by enacting the Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990), which provides remedies to copyright owners when States infringe their federal copyrights.

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes and defends free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus curiae* in important copyright cases. *See, e.g., Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019); *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 573 U.S. 431 (2014).

"By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Harper & Row Publishers, Inc. v. Nation Enters.*, 461 U.S. 539, 558 (1985). The Framers explicitly provided, therefore, for a federal regime of robust copyright protection, to foster and reward the creative genius that sustains a flourishing free market.

As with all forms of private property, the right to one's own creative works is only as strong as the ability to enforce that right against the world. The decision below thus highlights a growing problem in copyright enforcement. States increasingly claim the right to infringe copyrights with impunity, relying on this Court's erratic sovereign immunity jurisprudence to avoid all accountability. Such flouting of copyrights does violence to the Framer's design.

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[*] No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, helped pay for the preparation or submission of this brief. All parties have granted blanket consents to *amicus* briefs under Rule 37.2(a).

STATEMENT OF THE CASE

A "tall, spare man with a very black beard which he wore very long," Edward Teach is better known to history as Blackbeard. Angus Konstam, *Blackbeard: America's Most Notorious Pirate* 91 (2006). Though "his career as an independent pirate captain lasted less than a year and a half," Teach's actions "shook the very foundations of British rule in colonial America." *Id.* at viii. In 1717, he captured a 26-gun French merchant vessel, boosted its armament to 40 guns, and renamed it the *Queen Anne's Revenge*. *Id.* at 87. It would serve as the flagship of a pirate fleet comprising four vessels and over 200 men until May 1718, when it foundered at Beaufort Inlet near North Carolina's Outer Banks.

The *Revenge* lay undisturbed on the mid-Atlantic seabed for nearly three centuries. In November 1996, the private salvage-recovery firm Intersal discovered the shipwreck. Pet. App. 6a-7a. Intersal hired petitioners Frederick Allen and his company, Nautilus Productions, LLC, to film and photograph the ship's salvage. *Id.* at 7a-8a. Over the next two decades, petitioners created "a substantial archive of video and still images" documenting both "the underwater shipwreck and the efforts of teams of divers and archaeologists to recover various artifacts" from it. *Id.* at 9a.

Allen registered his works with the U.S. Copyright Office and licensed them to Nautilus for commercial use. Pet. App. 9a. In 2013, petitioners discovered that the State of North Carolina and its officials had infringed petitioners' copyrights by uploading the works and posting them online without per-

mission. *Id.* at 9a, 43a. In October 2013, North Carolina and its officials entered into a settlement agreement with Nautilus. *Id.* at 43a. Besides paying Nautilus $15,000 for specific instances of prior infringement, respondents promised not to infringe Nautilus's works in the future. *Ibid.*

While at first they stopped all infringement of Nautilus's works, respondents soon resumed infringing—both in print and online. Pet. App. 12a, 44a. North Carolina then tried to insulate itself from copyright liability by enacting "Blackbeard's Law," N.C. Gen. Stat. § 121-25(b), a law designating all "photographs, video recordings, and other documentary materials" of shipwrecks in the State's custody as "public records." *Id.* at 44a.

Petitioners sued respondents for copyright infringement in the U.S. District Court for the Eastern District of North Carolina. Pet. App. 13a, 45a. Moving to dismiss the complaint, respondents claimed immunity from suit under the Eleventh Amendment. *Ibid.* The district court refused to dismiss petitioners' copyright infringement claim. *Id.* at 64a-65a. The court found that Congress—when it enacted the Copyright Remedy Clarification Act of 1990 (CRCA), Pub. L. No. 101-553, 104 Stat. 2749 (1990)—validly abrogated state sovereign immunity in such cases. The CRCA strips "any State," its "officers," or its "employees" of Eleventh Amendment immunity for copyright infringement. *Ibid.*

The Fourth Circuit reversed. Pet. App. 30a-31a. The panel held that even if the CRCA were otherwise clear in purpose, Congress's reliance on Article I's Copyright Clause was an inadequate basis for

abrogating Eleventh Amendment immunity under *Seminole Tribe of Florida. v. Florida*, 517 U.S. 44 (1996). *Id.* at 18a. Nor, the appeals court held, had Congress validly enacted the CRCA under its § 5 authority in the Fourteenth Amendment. *Id.* at 20a-21a. Congress, the court determined, had not made it clear enough that it was relying on § 5 of the Fourteenth Amendment as the source of its authority. And Congress failed to ensure that its abrogation of immunity was "congruent and proportional" to any Fourteenth Amendment injury. *Ibid.* (quoting *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639-42 (1999)).

SUMMARY OF ARGUMENT

Richard M. Weaver famously called private property "the last metaphysical right." Richard Weaver, *Ideas Have Consequences* 131 (1948). By this he meant that private property has intrinsic value apart from its social utility; it is bound up with notions of responsibility, hard work, and identity. *Ibid.* In short, one's private property is an extension of oneself. Perhaps nowhere is Weaver's observation truer than in the area of copyright, which secures exclusive ownership of one's original works of art and expression.

No uniform copyright law existed before the nation's founding. The Articles of Confederation made no provision for copyrights. And while twelve of the original thirteen States had their own copyright laws at the time of the Constitutional Convention in 1787, state-by-state copyright enforcement was both cumbersome and inconsistent. On the eve of the Convention, the States widely recognized the

dire need for a uniform federal regime to encourage and protect the authors of creative works. "The utility of this power will scarcely be questioned," James Madison predicted. *The Federalist* No. 43. He was right.

The Framers inserted a copyright clause into the Constitution itself. *See* U.S. Const., Art. I, § 8, cl. 8. The Copyright Clause was one of the few enumerated powers of Congress included in the Constitution. It explicitly gives Congress the power to "secur[e] for limited Times to Authors * * * the exclusive Right to their respective Writings." *Ibid.* While this language accomplished a marked shift in authority over copyrights from the States to the federal government, the Constitutional Convention adopted it by unanimous vote, with no recorded debate.

The First Congress soon implemented the Copyright Clause's grant of authority. The Copyright Act of 1790, which granted American authors the exclusive right to their works for fourteen years, authorized an award of statutory damages for copyright infringement. *See* Act of May 31, 1790, ch. 15, §§ 2, 6, 1 Stat. 124, 125 (1790). The law provided no carve-out for State infringers or their agents. *Id.* Later, under 28 U.S.C. § 1338(a), Congress gave federal courts exclusive jurisdiction over copyright-infringement suits. And Congress has since occupied the field, preempting all state laws—common law or statutory—affecting copyright. 17 U.S. § 301.

Congress once again used its plenary authority over copyrights—authority ceded by the States at the Convention—when it enacted the CRCA in 1990. *See* Pub. L. No. 101-553, 104 Stat. 2749 (1990). The

CRCA strips "any State," its "officers," or its "employees" of Eleventh Amendment immunity for copyright infringement. *Ibid.* Duly enacted, the CRCA is fully binding, under the Supremacy Clause, on North Carolina and its agents. The Fourth Circuit erred in refusing to enforce it.

While petitioners make a compelling case that Congress, by enacting the CRCA, lawfully abrogated the States' sovereign immunity under § 5 of the Fourteenth Amendment, this brief argues that the CRCA was unnecessary to authorize federal court jurisdiction over copyright infringement suits against the States. That is because the States consented to such suits in the "plan of the Convention." *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 377 (2006). Indeed, the history of the Copyright Clause, the reasons the Framers inserted it into the Constitution, and the laws enacted under its auspices just after ratification confirm that it was not only an Article I grant of authority to Congress but also a way to subordinate state sovereign immunity in copyright enforcement suits.

ARGUMENT

THE STATES WAIVED IMMUNITY FOR COPYRIGHT INFRINGEMENT IN THE PLAN OF THE CONVENTION.

State sovereign immunity "derives not from the Eleventh Amendment but from the structure of the original Constitution itself." *Alden v. Maine*, 527 U.S. 706, 728 (1999). This Court has recognized that the States enjoy no sovereign immunity where there was "a surrender of this immunity in the plan of the convention." *Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934). Because the Copyright Clause transferred the power to "secure" copyrights from the States to Congress, and because that power would be impotent without the ability to hold State actors liable for copyright infringement, the States relinquished their immunity from copyright infringement suits when they ratified the Copyright Clause in the plan of the Convention.

A. *Katz* Recognizes That the States Waived Sovereign Immunity by Ratifying Certain Unique Grants of Power to Congress under Article I of the Constitution.

This Court's modern sovereign-immunity jurisprudence has followed a circuitous path. In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), a plurality of the Court held that Congress may, by statute, authorize suits against the States under Article I—so long as it does so explicitly. And five justices agreed that Congress, when it enacted the Comprehensive Environmental Response, Compensation,

and Liability Act of 1980, authorized cleanup suits against the States in federal court. 491 U.S. at 19.

Seven years later, in *Seminole Tribe*, the Court explicitly overturned *Union Gas* for allowing "no principled distinction" between laws enacted under "the Indian Commerce Clause and the Interstate Commerce Clause." 517 U.S. at 63. *Seminole Tribe* involved an action under the Indian Gaming Regulatory Act, which authorized suits against States that refused to negotiate compacts with Indian tribes to allow gaming on Native American lands. 517 U.S. at 47.

Explaining that "the Eleventh Amendment restricts the judicial power under Article III," the Court invalidated the statute. *Id.* at 72-73. The Court went even further to say that Article I "cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 73. At bottom, *Seminole Tribe* strongly implied that only § 5 of the Fourteenth Amendment permits Congress to abrogate the States' sovereign immunity from suit under the Eleventh Amendment. *Id.* at 59.

In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court considered whether the Patent Remedy Act abrogated, under § 5 of the Fourteenth Amendment, state sovereign immunity for patent-infringement claims in federal court. 527 U.S. at 627. Because the statute's "basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime," it was not a legitimate "effort to remedy or to pre-

vent unconstitutional state action" under § 5 of the Fourteenth Amendment. *Id.* at 647-48.

The Court did not decide—and no party briefed or argued—whether the States relinquished immunity from patent-infringement suits when they ratified the Patent Clause in the plan of the Convention. Even so, because the parties did not "contend otherwise," the Court volunteered that "after *Seminole Tribe*," Article I "does not give Congress the power to enact such legislation." *Id.* at 636, 648.

But in *Central Virginia Community College v. Katz*, the Court held that neither the Eleventh Amendment nor sovereign immunity insulates States from certain bankruptcy proceedings authorized under Article I. *Katz* involved a suit by a bankruptcy trustee to set aside preferential transfers to state agencies. 546 U.S. at 356. Though acknowledging that *Seminole Tribe* "reflected an assumption" that Article I provides no basis for overcoming state sovereign immunity, the Court dismissed that "dicta" as "erroneous." *Id.* at 363.

To be sure, *Katz* did not decide whether Congress had validly "abrogated" the States' immunity in bankruptcy proceedings under Section 5 of the Fourteenth Amendment. *Id.* at 379. Rather, *Katz* held that "Congress's determination that States should be amenable to such proceedings is within the scope of its power to enact 'Laws on the subject of Bankruptcies'" under Article I of the Constitution. *Id.* at 379 (quoting U.S. Const. art. I, § 8, cl. 4).

Katz reasoned that the Framers, by ratifying the Bankruptcy Clause in Article I, § 8, meant to

override considerations of sovereign immunity. The "States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought" under bankruptcy. *Id.* at 377. Under this analysis, the only "relevant 'abrogation' is the one effected in the plan of the Convention, not by statute." *Id.* at 379.

Katz emphasized three attributes of the Bankruptcy Clause signaling that the States waived immunity from bankruptcy proceedings in the plan of the Convention. *First,* the Framers recognized a strong need for uniformity, as the States' disparate bankruptcy laws had yielded inconsistent enforcement of discharge rights. *Id.* at 366-69. *Second*, Congress soon implemented the Bankruptcy Clause's grant of authority both by creating substantive federal bankruptcy rights and by empowering federal courts to enforce those rights. *Id.* at 373-77. *Third*, the federal courts' exercise of bankruptcy jurisdiction "does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction." *Id.* at 362. As we will see, each of these attributes inheres equally in the Copyright Clause.

* * *

Even before *Katz*, this Court insisted that state sovereign immunity "does not confer upon the State a concomitant right to disregard the Constitution or valid federal law." *Alden*, 527 U.S. at 754-55. Above all, the "States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design." *Id.* at 755. Despite this Court's assurance that no sovereign State would "refuse to honor the Constitution or obey the binding laws of the United

States," that is precisely what North Carolina and other States have done with federal copyright law. *Ibid.* Yet if U.S. copyrights are to have any vitality going forward, this Court can no longer avoid the troubling implications of some of its harsher sovereign-immunity precedents.

B. The Unique Text, History, and Importance of the Copyright Clause Confirm That the States Waived Sovereign Immunity for Copyright Infringement.

Like the Bankruptcy Clause, the Copyright Clause has its own unique history worthy of "[c]areful study and reflection." *Cf. Katz*, 546 U.S. at 363. While the Framers considered other ways to protect intellectual property, they ultimately decided on patents and copyrights. *See* Edward C. Walterscheid, *To Promote the Progress of Useful Arts: American Patent Law & Administration, 1787-1836* 35 n.32 (1998). As James Madison predicted in *The Federalist*, "The utility of this power will scarcely be questioned." *The Federalist* No. 43. It wasn't.

The Constitutional Convention adopted the Copyright Clause—introduced late in the proceedings—by unanimous vote, with no recorded debate. Walterscheid, *supra*, at 31. The "absence of extensive debate over the text * * * or its insertion indicates that there was a general agreement on the importance of authorizing a uniform federal response." *Cf. Katz*, 546 U.S. at 369. Indeed, the need for uniform copyright enforcement was widely recognized.

The Articles of Confederation had failed to provide for copyrights. *See* Irah Donner, *The Copyright Clause of the U.S. Constitution: Why Did the Framers Include It With Unanimous Approval?*, 36 Am. J. Legal Hist. 361, 361 (1992). Although "twelve of the thirteen states" had their own copyright laws, *id.* at 362, none exempted state actors from infringement liability. *See* 8 *Nimmer on Copyright*, App. 7(c). Yet "requiring an author to travel to each state was considered cumbersome and unacceptable." Donner, *supra*, at 362. Even worse, "the state statutes varied in procedural detail," with some providing that copyright protection "would not become in force until all states had such laws, which never occurred." *Id.* at 374. This cumbersome, patchwork approach to copyright protection left much to be desired.

As Madison recognized, "The States cannot separately make effectual provision for either [copyrights or patents], and most of them have anticipated the decision of this point, by laws passed at the instance of Congress." *The Federalist* No. 43. Without a federal copyright regime, Joseph Story noted, authors "would be subjected to the varying laws and systems of the different states," which would "impair and might even destroy the value of their rights." Joseph Story, *Commentaries on the Constitution of the United States* § 558, at 402-03 (Boston, Hilliard, Gray & Co. 1833).

Thus, "on the eve of the Constitutional Convention, the states were strongly in favor of securing authors' copyright in their works," but "there was dissatisfaction with the system of state copyright laws and the need for a national law was apparent."

Donner, *supra*, at 374. So it was to Congress, and not to the States, that the Framers turned to accomplish this vital aim. In short, the Framers "envisioned a uniform national system in which state regulatory powers would be subservient." Beryl R. Jones, *Copyrights and State Liability*, 76 Iowa L. Rev. 701, 723 (1991).

The Constitution vests Congress with plenary authority over securing copyrights. U.S. Const., Art. I, § 8, cl. 8. The Copyright Clause explicitly gives Congress the power to "secur[e] for limited Times to Authors * * * the exclusive Right to their respective Writings." *Ibid.* This is the only original Article I power in the Constitution that includes a purpose behind it: "To promote the Progress of Science and useful Arts." *Ibid.* Under this grant of authority, "Congress manifestly has the power either to grant complete exclusivity or no protection at all." 1 *Nimmer on Copyright* § 1.07. But, as this case shows, if States remain free to infringe copyrights, the Constitution's mandate that Congress "secure" those rights would be meaningless.

The First Congress wasted no time implementing the Copyright Clause's grant of authority. The Copyright Act of 1790 granted American authors the exclusive right to their works for a period of fourteen years (renewable for another fourteen years). *See* Act of May 31, 1790, ch. 15, §§ 2, 6, 1 Stat. 124, 125 (1790). It set statutory damages for infringement at "the sum of fifty cents for every sheet which shall be found in [the infringer's] possession," recoverable "by action of debt in *any* court of record in the United States." *Id.* at § 2 (emphasis added); *see also Feltner v. Columbia Pictures Televi-*

sion, Inc., 523 U.S. 340, 349-51 (1998) (discussing history of statutory damages for copyright infringement).

This law, "enacted under [the Copyright Clause's] auspices immediately following ratification," shows that the "power granted to Congress by [that] Clause is a unitary concept rather than an amalgam of discrete segments." *Cf. Katz*, 546 U.S. at 370. The Copyright Clause "was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the [Copyright] arena." *Id.* at 362-63. The Framers recognized that state immunity from copyright would both undermine the goal of national uniformity for copyright protection and deter artists and writers from creating original works.

This "construction placed upon the Constitution by [the drafters of] the first copyright act of 1790"—"men who were contemporary with [the Constitution's] formation, many of whom were members of the convention which framed it"—is "entitled to very great weight." *Golan v. Holder*, 565 U.S. 302, 321 (2012) (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884)).

Nor is that all. "Congress recognized a need for federal courts to decide matters of patent and copyright law long before it supported federal court interpretation of federal laws in general." Amy B. Cohen, *"Arising under" Jurisdiction and the Copyright Laws*, 44 Hastings L. J. 337, 351 (1993). In fact, Congress clarified that federal jurisdiction over the Copyright Act is both original and exclusive, ensuring the nationwide uniformity and consistency for

copyright litigation. *See* Act of Feb. 15, 1819, ch. 19, 3 Stat. 481, 481 (1819); 28 U.S.C. § 1338(a).

And Congress has since occupied the field, preempting all state laws (common law or statutory) affecting copyright. *See* 17 U.S. § 301 (preempting "all legal or equitable rights" that even "come within the subject matter of copyright as specified by sections 102 and 103" of the Copyright Act). What's more, the United States has specifically waived sovereign immunity for copyright infringement claims, so holding the States to account for copyright infringement would not put them on unequal footing with the federal government. *See* 28 U.S.C. § 1498.

When, as here, "Congress evenhandedly regulates an activity in which both States and private actors engage," it does not encroach upon "the States' sovereign authority to regulate their own citizens." *Murphy v. NCAA*, 138 S. Ct. 1461, 1478-79 (2018). So too would copyright enforcement against the States "not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction." *Cf. Katz*, 546 U.S. at 362.

"When Congress grants an exclusive right or monopoly, its effects are pervasive; no citizen *or State* may escape its reach." *Goldstein v. California*, 412 U.S. 546, 560 (1973) (emphasis added). Yet federal copyright protection is *not* exclusive to the author if States are free to infringe copyrighted works without consequence. That toothless approach to securing copyright bears no resemblance to the federal copyright power the Framers ratified at the Convention.

Allowing States to flout federal copyright law would erode the incentive for authors to put their blood, sweat and tears into creating original works. It would not "promote the progress of science and the useful arts" if a State, or one of its countless agents, could infringe an author's creative works free from any fear of liability. As with all private property, any meaningful protection of intellectual property must allow the owner to exclude the world, including the States and state actors. No less than in bankruptcy proceedings under the Bankruptcy Clause, the States gave up any immunity from copyright infringement when they ratified the Copyright Clause. *See Katz*, 546 U.S. at 362-63.

* * *

The Constitution, it has been said, is not a "suicide pact." *Terminiello v. City of Chicago*, 337 U.S. 1, 36 (1949) (Jackson, J., dissenting). The Framers did not insist that Congress "secure" copyrights with the tacit understanding that the States are perfectly free to trample them without consequence. On the contrary, the unique text, history, and importance of the Copyright Clause confirm that the States did not retain sovereign immunity against copyright-infringement claims.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

CORY L. ANDREWS
Counsel of Record
CORBIN K. BARTHOLD
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

August 13, 2019