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 RALPH OMAN AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Ralph Oman served as the Register of Copyrights from 1985 to 1993, and is currently the Pravel, Hewitt, Kimball, and Kreiger Professorial Lecturer in Intellectual Property and Patent Law at The George Washington University Law School. Before Congress passed the Copyright Remedy Clarification Act ("CRCA"), Pub. L. No. 101-553, 104 Stat. 2749 (1990), it asked Mr. Oman for "assistance with respect to the interplay between copyright infringement and the Eleventh Amendment," and to investigate the "practical problems relative to the enforcement of copyright against state governments." Letter from Reps. Robert W. Kastenmeier & Carlos Moorhead, H. Subcomm. on Courts, Civil Liberties & the Admin. of Justice, to Ralph Oman, Register of Copyrights, at 1 (Aug. 3, 1987) ("1987 Letter to Oman"), *in* U.S. Copyright Office, *Copyright Liability of States and the Eleventh Amendment: A Report of the Register of Copyrights* (June 1988) ("Register's Report").[2]

In response to that request, Mr. Oman and his staff at the Copyright Office solicited and reviewed dozens of public comments in late 1987 and early 1988. After completing that review, Mr. Oman

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[1] The parties have consented to the filing of this brief. Letters evidencing such consent have been provided to the Clerk of the Court. No counsel for a party authored this brief in whole or in part; and no such counsel, any party, or any other person or entity—other than amicus curiae and his counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Available at http://files.eric.ed.gov/fulltext/ED306963.pdf.

reported to Congress the "dire financial and other repercussions that would flow from state Eleventh Amendment immunity for damages in copyright infringement suits," and documented the recent surge of cases finding states immune from copyright damages. Register's Report, at ii–iii. Congress's decision to enact the CRCA was based, in large part, on that report and Mr. Oman's subsequent testimony about the need for such legislation.

The record that Mr. Oman created is at the heart of this dispute. The Fourth Circuit below—like the Fifth Circuit in a prior case—evaluated that record and found it insufficient to support abrogation of Eleventh Amendment immunity. *See* Pet. App. 27a–32a; *Chavez v. Arte Publico Press*, 204 F.3d 601, 605–08 (5th Cir. 2000). Mr. Oman respectfully submits this amicus brief to provide the Court with his first-hand perspective of the evidence he collected and reviewed, and to explain why that evidence amply supports Congress's decision to abrogate.

INTRODUCTION AND SUMMARY OF ARGUMENT

Before Congress enacted the CRCA, it coordinated with Mr. Oman and the Copyright Office to determine whether abrogation of states' Eleventh Amendment immunity from copyright infringement claims was, in fact, necessary. That process began in 1987 and ended with the CRCA's enactment in 1990. Over the course of the next decade, this Court held that Congress's constitutional authority to abrogate Eleventh Amendment immunity is limited. Among other things, the Court began requiring Congress to compile a robust record of unconstitutional state

conduct before abrogating immunity under § 5 of the Fourteenth Amendment.

Applying that standard, the district court in this case reviewed the CRCA's legislative record—with particular emphasis on Mr. Oman's report and congressional testimony—and found it sufficient. *See* Pet. App. 52a–53a. The Fourth Circuit disagreed, aligning itself with the Fifth Circuit. *See* Pet. App. 27a–32a; *Chavez*, 204 F.3d at 605–08.

That view gives short shrift to the CRCA's record. Mr. Oman solicited and reviewed dozens of comments, produced a comprehensive report, and testified before both Houses of Congress. Although the record compiled is limited in some respects, it documented an emerging and troubling problem of copyright infringement by states and a total absence of effective remedies to stem such abuse. And it substantiated prevailing concerns that, without abrogation, states would engage in copyright infringement with impunity. Nearly two decades after the Fifth Circuit's decision in *Chavez*, it is now clear that those concerns were more than warranted and that Congress's predictive judgment was accurate.

The courts of appeals also wrongly treated the CRCA's record as functionally equivalent to the record of the Patent and Plant Variety Protection Remedy Clarification Act, Pub. L. No. 102-560, 106 Stat. 4230 (1992) ("Patent Remedy Act"), which this Court considered—and found wanting—in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* ("*Florida Prepaid*"), 527 U.S. 627, 639–46 (1999). But the Patent Remedy Act's record pales in comparison. That Act was enacted nearly two years after, and largely on the back of, the successful passage of the CRCA. A full and fair

evaluation of the CRCA's record justifies Congress's decision to abrogate states' Eleventh Amendment immunity from copyright infringement claims.

ARGUMENT

I. THE CRCA IS SUPPORTED BY A SUBSTANTIAL RECORD DOCUMENTING THE NEED TO ABROGATE ELEVENTH AMENDMENT IMMUNITY FROM COPYRIGHT INFRINGEMENT CLAIMS

A. The Copyright Office Serves A Unique Role In Formulating Copyright Policy For The United States

Copyright law is a specialized subject matter. As countless courts have recognized, the federal copyright regime creates a complex system of property protections, limits, and exceptions "to promote not simply individual interests, but—in the words of the Constitution—'the [P]rogress of [S]cience and useful [A]rts' for the benefit of society as a whole." *TCA Television Corp. v. McCollum*, 839 F.3d 168, 177 (2d Cir. 2016) (quoting U.S. Const. art. I, § 8, cl. 8), *cert. denied*, 137 S. Ct. 2175 (2017); *see also, e.g.*, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994). As such, it presents "notoriously difficult" questions for courts and policymakers. *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 290–91 (3d Cir. 2004) (Roth, J., dissenting), *cert. denied*, 546 U.S. 813 (2005). At times, the contours of the law have been described as "hard to fathom," David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. Copyright Soc'y U.S.A. 401, 405 (1999), with certain applications "like assembling a jigsaw puzzle whose pieces do not quite fit," *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49

F.3d 807, 820 (1st Cir. 1995) (Boudin, J., concurring), *aff'd by an equally divided Court*, 516 U.S. 233 (1996).

The Copyright Office is the expert agency charged with administering that complex system. Established as "an arm of Congress," *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 182 n.6 (1985) (White, J., dissenting), one of the agency's principal statutory mandates is to "[a]dvise Congress on national and international issues relating to copyright," 17 U.S.C. § 701(b)(1). With its "100 year experience in copyright issues," *Nat'l Ass'n of Broadcasters v. Librarian of Congress*, 146 F.3d 907, 913 (D.C. Cir. 1998) (quoting H.R. Rep. No. 103-286, at 11 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 2954, 2958), it plays a central role in completing the "massive work necessary" for Congress to revise federal copyright law, *Mills Music*, 469 U.S. at 159–60. Congress itself has acknowledged that it "relies extensively on the Copyright Office to provide its technical expertise in the legislative process." S. Rep. No. 101-268, at 6 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 237, 241; *accord* 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 7.26 (online ed. 2019).

Numerous federal copyright policies have originated from the Copyright Office. *See, e.g.*, *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 354–55, 360 (1991) (clarification of the "originality" requirement for copyrighted works); *Brumley v. Albert E. Brumley & Sons, Inc.*, 822 F.3d 926, 928–29 (6th Cir. 2016) (the 1976 Copyright Act's revamping of the copyright renewal provision). Indeed, the currently prevailing copyright law—the 1976 Copyright Act (as amended)—"was the product of two decades of negotiation by representatives of creators and copyright-using industries, *supervised by the*

Copyright Office and, to a lesser extent, by Congress." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 743 (1989) (emphasis added). And that process itself was the continuation of a tradition started at the turn of the 20th century, when the Copyright Office called for and guided Congress on the prior overhaul of U.S. copyright law, culminating in the adoption of the 1909 Copyright Act. *See* William F. Patry, *Copyright Law and Practice* 56–58 (2000) (describing the leading role played by the Register of Copyrights in the statutory revision process from 1901 to 1909).

B. The Copyright Office Carefully Studied The Need To Abrogate Eleventh Amendment Immunity From Copyright Infringement Claims

In 1985, this Court decided *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). In *Atascadero*, the Court held that a "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Id.* at 246. This holding was seen as a marked departure from the Court's prior decisions, which had sanctioned a more flexible analysis of Congress's intent to abrogate Eleventh Amendment immunity.[3]

Congress immediately recognized the implications for copyright policy. Before *Atascadero*, the Ninth Circuit, for example, had little trouble concluding that the 1909 Copyright Act authorized individuals to seek damages for copyright infringement by states. *See*

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[3] *See, e.g.*, Vicki C. Jackson, *The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 112 & n.443 (1988).

Mills Music, Inc. v. Arizona, 591 F.2d 1278, 1284–85 (9th Cir. 1979). And the last time Congress engaged in a major revision of the Copyright Act in 1976, it intended to maintain that status quo. *See* H.R. Rep. No. 101-282, at 1–2 (1989). But because the law as written contained no statutory provision expressly abrogating immunity, *Atascadero* raised the danger that, going forward, courts would be compelled to conclude that states were immune from monetary liability for copyright infringement.

And that is precisely what happened, as courts across the country quickly concluded that the Copyright Act lacked the unequivocal, unmistakable, and specific language to abrogate Eleventh Amendment immunity that *Atascadero* required. *See, e.g.*, *Woelffer v. Happy States of Am., Inc.*, 626 F. Supp. 499, 503–05 (N.D. Ill. 1985); *Richard Anderson Photography v. Radford Univ.*, 633 F. Supp. 1154, 1159–60 (W.D. Va. 1986), *aff'd in relevant part sub nom. Richard Anderson Photography v. Brown*, 852 F.2d 114, 117–20 (4th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989); *BV Eng'g v. Univ. of Cal., L.A.*, 657 F. Supp. 1246, 1248–50 (C.D. Cal. 1987), *aff'd*, 858 F.2d 1394, 1397–98 & n.1 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989); *Lane v. First Nat'l Bank of Bos.*, 687 F. Supp. 11, 14–15 (D. Mass. 1988), *aff'd*, 871 F.2d 166, 168–69 (1st Cir. 1989). The implications were clear: After *Atascadero*, states could engage in copyright infringement "with virtual impunity." *BV Eng'g*, 858 F.2d at 1400.

In the wake of *Atascadero*, Congress turned to Mr. Oman, then the Register of Copyrights, to help assess whether it should amend the Copyright Act to clearly abrogate states' Eleventh Amendment immunity. On August 3, 1987, Representatives Robert Kastenmeier

and Carlos Moorhead—the leaders of the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, which had jurisdiction over intellectual property issues—wrote Mr. Oman a letter requesting his "assistance with respect to the interplay between copyright infringement and the Eleventh Amendment." 1987 Letter to Oman, at 1. The correspondence noted that "there [had] been a number of court cases in recent years which [had] addressed this question." *Id.* (citing John C. Beiter, *Copyright Infringement and the Eleventh Amendment: A Doctrine of Unfair Use?*, 40 Vand. L. Rev. 225 (1987)). And it charged Mr. Oman and the Copyright Office with three tasks.

First, it asked Mr. Oman "to conduct an inquiry concerning the practical problems relative to the enforcement of copyright against state governments." *Id.* *Second*, it asked him "to conduct an inquiry concerning the presence, if any, of unfair copyright or business practices vis a vis state government with respect to copyright issues." *Id.* *Third*, it asked him "to produce a 'green paper' on the current state of the law in this area," including a 50-state survey of the statutes and regulations concerning waiver of sovereign immunity, "and an assessment of what constitutional limitations there are, if any, with respect to Congressional action in this area." *Id.*

C. The Copyright Office Compiled Substantial Evidence Of The Need To Abrogate Eleventh Amendment Immunity From Copyright Infringement Claims

Mr. Oman promptly began working to fulfill Congress's request. On November 2, 1987, the Copyright Office published a Request for Information

in the Federal Register seeking public comments on the important issues Congress had asked Mr. Oman to investigate. 52 Fed. Reg. 42,045, 42,045 (Nov. 2, 1987). The Request for Information stressed that the shifting precedential landscape "might influence states to change their practices of recognizing the rights of copyright owners." *Id.* at 42,046. It solicited public comments on "(1) any practical problems faced by copyright proprietors who attempt to enforce their claims of copyright infringement against state government infringers, and (2) any problems state governments are having with copyright proprietors who may engage in unfair copyright or business practices with respect to state governments' use of copyrighted materials." *Id.* at 42,045.

For the next several months, responses flowed into the Copyright Office on these issues. In total, more than 40 comments were submitted from textbook publishers, motion picture producers, composers, software companies, financial advisors, trade groups, state agencies, and others. *See* Register's Report, at Appendix A. Mr. Oman carefully reviewed and analyzed each submission.

1. The Register's Report Documented A Pattern Of Copyright Infringement By The States And A Lack Of Effective State Remedies

After nearly a year's work, on June 27, 1988, Mr. Oman submitted a report of his findings, titled *Copyright Liability of States and the Eleventh Amendment: A Report of the Register of Copyrights*. In his transmittal letter, he explained the Report's contents, which included "a factual inquiry about enforcement of copyright against state governments

and about unfair copyright licensing practices, if any, with respect to state government use of copyrighted works"; "an in-depth analysis of the current state of Eleventh Amendment law and the decisions relating to copyright liability of states"; and a "50 state survey of the statutes and case law concerning waiver of state sovereign immunity" prepared by the Congressional Research Service. Letter from Ralph Oman, Register of Copyrights, to Reps. Robert W. Kastenmeier & Carlos Moorhead, H. Subcomm. on Courts, Civil Liberties & the Admin. of Justice (June 27, 1988), *in* Register's Report. All told, the Register's Report spanned over 150 pages. And it clearly established both (i) an emerging pattern of copyright infringement by states and state agencies, and (ii) a total lack of effective remedies to stem such abuse.

Copyright Infringement by States: With respect to copyright infringement by states, Mr. Oman explained that "the comments almost uniformly chronicled dire financial and other repercussions that would flow from state Eleventh Amendment immunity for damages in copyright infringement suits." Register's Report, at iii, 5–6. As one comment starkly framed the issue: Eleventh Amendment immunity represents nothing less than "the grant to states of a compulsory license to exercise all of a copyright owner's rights, gratis." *Id.* at 6; *see* U.S. Copyright Office, RM 87-5 Comment Letter No. 27, at 19 (Jan. 29, 1988) (comment letter of the Information Industry Association) ("[A]bsent a detected infringement, states would have what

amounts to a compulsory license . . . [with] no payment to the copyright owner.").[4]

Nearly half of the comments expressed the fear that, if Congress did not act, states would engage in "widespread, uncontrollable copying of their works without remuneration." Register's Report, at 6. The comments explained that, "with immunity from damages, states would acquire copies of their works and ceaselessly duplicate them." *Id.*; *see, e.g.*, Comment Letter No. 5, at 1–2 (Jan. 20, 1988) (comment letter of The Foundation Press, Inc.) ("If such decisions are upheld, it would enable a State, with practical impunity, to purchase one copy of one of our books and then produce its own copies thereof for all State funded law libraries and for distribution to students at State funded law schools . . . .").[5]

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[4] All comments are hereinafter referred to as "Comment Letter No. __." The comments submitted to the Copyright Office are available at https://archive.org/details/Copyright11thAmendmentStudyComments.

[5] By contrast, not a single comment suggested that copyright owners took advantage of states or imposed unfair business practices on them. *See* Register's Report, at 5–6. On the contrary, the comments showed that states leveraged their significant bargaining power and exacted concessions beyond those ordinarily granted. *Id.* at 6. As one comment explained, "state agencies are able to extract from or even impose on publishers substantial concessions of basic rights under the Copyright Act that . . . go far beyond the borders of fair use, educational exemptions, or the educational guidelines incorporated in the legislative history." *Id.* at 11 (alteration in original) (citation omitted); *see also* Comment Letter No. 17, at 3 (Feb. 1, 1988) (comment letter of Harcourt Brace Jovanovich, Inc.) ("Schools expect permission to create literally thousands of copies of translations or thousands of audio cassettes or

Critically, the Register's Report documented numerous examples of blatant copyright infringement that had already occurred. *See* Register's Report, at 7–10. Complaints about infringement by state actors came from individuals, small businesses, and large, seemingly powerful organizations; and from companies and organizations in a diverse range of industries including healthcare, education, music, motion picture, and financial data. *See id.*

The Motion Picture Association of America, for example, explained that it frequently encountered state correctional institutions publicly performing motion pictures without authorization from the copyright owners. *See id.* at 7–8. When caught and confronted, some states agreed to obtain a license; but others brashly persisted in nakedly infringing conduct, and at least two states—North Carolina and Wisconsin—did so expressly based on their assertion of Eleventh Amendment immunity. *Id.* at 8. In fact, in North Carolina, the Special Deputy Attorney General categorically concluded in 1987 that "[t]he showing of video tapes to prison inmates will not subject the State to liability under the federal copyright laws." Comment Letter No. 16, at 6 (Feb. 1, 1988) (comment letter of Motion Picture Association of America, Inc.).

Similarly, the American Journal of Nursing Company recounted the story of a Minnesota state-run nursing home that was operating an "information center," where it copied the company's (and its competitors') educational materials and offered them

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derivative works and they expect publishers to grant these permissions at no charge.").

for sale without permission. *See* Register's Report, at 8. The Journal's comment confirmed that similar infringements were being committed by state agencies in California and, the Company suspected, across the country. *See* Comment Letter No. 26, at 1–2 (Jan. 28, 1988) (comment letter of the American Journal of Nursing Company) ("Clearly the pattern is repeating itself.").

Mr. Oman believes that these episodes and the others described in the Report were just the tip of the iceberg, for several reasons.

First, the Copyright Office did not have (and therefore could not exploit) subpoena power, or anything like it, to gather a truly comprehensive catalogue of state copyright infringements. Instead, Mr. Oman and his team relied on a modest request for information directed to the relatively small group of individuals and organizations savvy enough to be aware of the notice and to prepare and submit responsive comments.

Second, the Request for Information did not seek public comments about all known instances of copyright infringement by states. At the time, Congress was focused on "the practical problems" posed by Eleventh Amendment immunity for copyright infringement, 1987 Letter to Oman, at 1, and whether to enact "unmistakably clear" statutory language abrogating it, *see Atascadero*, 473 U.S. at 242.[6] Consistent with that focus, Mr. Oman sought

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[6] As noted above, in the late 1980s, many of the planks of modern abrogation doctrine—including, for example, that prophylactic legislation under § 5 of the Fourteenth Amendment must be "congruent and proportional" to a pattern of unconstitutional state conduct, and that Congress must usually

and received a set of responses that was illustrative rather than exhaustive. 52 Fed. Reg. at 42,046.

Third, even apart from those limitations, the historical data set was necessarily limited because, before *Atascadero*, states generally assumed they were *not* immune from copyright infringement claims. With the real threat of damages looming, one would expect to see considerably fewer instances of states engaging in infringing conduct. *See, e.g.*, U.S. Gen. Accounting Office, GAO-01-811, *Intellectual Property: State Immunity in Infringement Actions* 4, 24, 32 (Sept. 2001); *cf., e.g.*, *Mills Music*, 591 F.2d at 1282, 1285–86 (state did not raise Eleventh Amendment immunity as a defense until after trial and, pre-*Atascadero*, lacked such a defense). Yet, even then, it was clear that acts of copyright infringement by states were on the rise. Indeed, the prevalence of post-*Atascadero* cases charging states with copyright infringement (*see supra* at 7) was the very impetus prompting Congress's request to Mr. Oman to document the severity of the trend. The resulting comments thus substantiated Congress's fear that states and state agencies already were, and would continue, taking advantage of their newfound ability "to violate the federal copyright laws with *virtual impunity*." *BV Eng'g*, 858 F.2d at 1400 (emphasis added).

Absence of Other Remedies: With respect to possible remedies for this pattern of infringement, the Register's Report made clear that, in the absence of

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develop a record to support exercise of its § 5 power—were yet to come. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 516–29 (1997); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639–48 (1999).

congressional action, *there were none*. The Report's comprehensive, 50-state survey revealed that without abrogation of Eleventh Amendment immunity, damages for copyright infringement were not available. *See* Register's Report, at Appendix C. "[N]one of the fifty states in their state constitution, state laws, or state court decisions, expressly waive[d] Eleventh Amendment immunity from suit for damages in federal court in copyright infringement cases." *Id.* at xi.

The survey did note a few state attorney general opinions indicating a willingness to comply with federal copyright law. But, as the Report noted, attorneys general usually lacked authority to waive a state's immunity. *Id.*, Appendix C at CRS-9. And, in any event, almost all of these opinions pre-dated *Atascadero* and thus provided "small comfort." Comment Letter No. 12, at 3–4 (Feb. 1, 1988) (comment letter of the Association of American Publishers, Inc. and the Association of American University Presses, Inc.). Following *Atascadero*, the Report noted, the Texas Attorney General concluded unequivocally "that the [E]leventh [A]mendment would bar any damage action in federal court against the state, and to sue the State of Texas in state court would require permission to sue to be granted by the legislature." Register's Report, Appendix C at CRS-21.

The comments overwhelmingly rejected the idea that injunctive relief alone could serve as an adequate remedy or effective deterrent against state infringements. *See id.* at 13–15. Some comments noted that small companies might lack the resources to bring suits for equitable relief alone. *See* Comment Letter No. 26, at 2 (explaining that the American

Journal of Nursing Company had dropped a claim for injunctive relief for this reason); Comment Letter No. 10, at 1 (Jan. 28, 1988) (comment letter of the Data Retrieval Corporation) ("The availability of injunctive relief is simply not enough of a remedy to provide practical protection for a small company such as ours from States with relatively unlimited legal resources who may wish to use our software products without paying license fees."). Other comments, by companies that sell to state agencies, stressed the business impracticality of suing their customers for prospective injunctive relief. *See* Comment Letter No. 11, at 2 (Jan. 27, 1988) (comment letter of McGraw-Hill, Inc.) ("[I]t is . . . doubtful whether any vendor can bring a systematic series of lawsuits against its customer base and expect to retain a significant portion of that business."). Still other comments reported that injunctive relief would often come too late. *See* Comment Letter No. 27, at 19 ("The difficulty [in seeking an injunction] is compounded by the fact that computer software and databases are particularly susceptible to copying and other infringing uses which are difficult to detect."); Comment Letter No. 23, at 7 (Feb. 1, 1988) (comment letter of the American Society of Composers, Authors, and Publishers) ("The only meaningful remedy available to the copyright owner of the pe[r]forming right [in musical compositions] is the *after-the-fact* infringement action for monetary damages.").

Recommendation: For all the reasons set forth above, the Register's Report declared that the Copyright Office was "convinced that . . . copyright proprietors ha[d] demonstrated they w[ould] suffer immediate harm if they [we]re unable to sue infringing states in federal court." Register's Report,

at 103. The Report thus urged Congress to use the available constitutional authority to "act quickly to amend the [Copyright] Act" to provide copyright owners "an effective remedy against infringing states" and "to ensure that states comply with the requirements of the copyright law." *Id.* at 103–04.

2. Mr. Oman's Congressional Testimony Further Showed The Need For The CRCA

Following the submission of the Register's Report, Mr. Oman was the first witness called at both the House and the Senate hearings on the CRCA. *See Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liability of States: Hearing on H.R. 1131 Before the Subcomm. on Courts, Intellectual Property & the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. III, 5 (1989) ("House Hearing"); *The Copyright Clarification Act: Hearing on S. 497 Before the Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary*, 101st Cong. III, 7 (1989). Like the Register's Report, both hearings focused on the pressing need for the CRCA after *Atascadero*. *See, e.g.*, House Hearing, at 4.

Mr. Oman emphasized the "great dilemma" Congress faced. *Id.* at 5. Because copyright suits must be litigated in federal court, Eleventh Amendment immunity left copyright owners without any monetary remedy for copyright infringement by states. *Id.* In his testimony, Mr. Oman made clear that the "major concern" among copyright owners "is the widespread, uncontrollable copying of their works without payment," which would cause "dire financial consequences" for copyright owners and others. *Id.* at

6. Mr. Oman acknowledged that based on the evidence he had collected via the Federal Register announcement alone, he could not conclude that such abuses were yet "widespread," *id.* at 53, or that states were on the verge of "launch[ing] a massive conspiracy to rip off the publishers across-the-board," *id.* at 8. But he explained that the comments demonstrated that the dangers of congressional inaction were very real, with significant attendant problems under the status quo in which states were not "held accountable in damages for the[ir] infringement of copyrighted works." *Id.* at 7.

Mr. Oman reported his finding that states were asserting their Eleventh Amendment immunity in pending litigation. *Id.* at 51. And he told Congress that he did not believe that states would take responsibility for their actions in copyright disputes "unless there is the larger possibility of liability" for monetary damages. *Id.* at 48. Accordingly, Mr. Oman testified that the CRCA was "of such immediate and direct importance" that Congress should expeditiously take legislative action. *Id.* at 50.

Mr. Oman's view was shared by his predecessor as Register of Copyrights, the late Barbara Ringer, who had been instrumental in Congress's adoption of the 1976 Copyright Act. Ms. Ringer testified that the Register's Report showed that copyright infringement by states was a problem that was "likely to get worse." *Id.* at 81–83, 92. Ms. Ringer further noted that she knew of "plenty of instances . . . where there is a crunch between budgetary considerations and copyright, and in these cases copyright gives way." *Id.* at 83. And Ms. Ringer thought there was "no question" the problem would only get worse because "[a]ll the good faith in the world is not going to

override the reality that people will not pay for something they can get free." *Id.* at 94. Accordingly, Ms. Ringer agreed with Mr. Oman, advising Congress to enact the CRCA "as soon as possible." *Id.* at 82.

D. Congress Made A Predictive Judgment, Which Has Proven Correct

Congress heeded that advice. In October 1990, the CRCA was enacted by voice vote. *See* 136 Cong. Rec. 31,384 (1990) (Senate); 136 Cong. Rec. 35,120–21 (1990) (House). Congress rejected any "suggest[ion] that no actual harm had yet occurred as a result of the application of State sovereign immunity in copyright cases." H.R. Rep. No. 101-282, at 8. But it also went further, finding Mr. Oman's report and testimony "persuasive" in showing that "actual harm . . . will continue to occur if this legislation [the CRCA] is not enacted." *Id.*

Congress was entitled to make such a predictive judgment. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997). And, as Petitioners and other amici curiae recognize, that judgment has proven correct. *See, e.g.*, Pet'rs Br. 52–53 (collecting sources). Since the Fifth Circuit's decision in *Chavez v. Arte Publico Press*, 204 F.3d 601, 605–08 (5th Cir. 2000), holding that the CRCA did not validly abrogate states' Eleventh Amendment immunity from copyright infringement claims, state actors have taken advantage of their ability "to violate the federal copyright laws with virtual impunity," *BV Eng'g*, 858 F.2d at 1400.

Indeed, in the ensuing two decades since *Chavez*, there have been over 150 cases filed or decided that involve alleged copyright infringement, often

intentional, by state actors. *See* Addendum.[7] And that number presumably understates—significantly—the actual incidents of state copyright infringement. *Chavez* and similar cases surely have discouraged copyright holders from filing infringement suits against state actors who, per those decisions, could successfully claim immunity. Whatever the precise number, the post-enactment history further validates Congress's judgment that "copyright owners . . . will suffer immediate harm if they are unable to sue infringing States for damages." S. Rep. No. 101-305, at 10 (1990).

II. THE CRCA'S RECORD IS NOT FUNCTIONALLY EQUIVALENT TO THE RECORD THIS COURT CONSIDERED IN *FLORIDA PREPAID*

In *Florida Prepaid*, this Court held that the Patent Remedy Act's record did not support abrogation of Eleventh Amendment immunity under § 5 of the Fourteenth Amendment. 527 U.S. 627, 640–47 (1999). That record, however, was far less robust than the CRCA's.

For one thing, Congress considered the issue of state patent infringement as a follow-on to the successful passage of the CRCA. *See, e.g.*, H.R. Rep. No. 101-960, pt. 1, at 7–8 (1990). Congress did not, however, ask the Patent and Trademark Office to study that issue. Nor did it undertake such an effort

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[7] This list was originally filed as part of a motion to reconsider the dismissal of claims against a state university. *See* Exhibit A to Plaintiffs' Motion for Reconsideration, *Bynum v. Tex. A&M Univ. Athletic Dep't*, No. 4:17-cv-181 (S.D. Tex. filed July 26, 2019), ECF No. 102-1. It is reproduced here—with modifications by counsel for amicus curiae—with the plaintiffs' permission.

itself. Instead, Congress heard from three witnesses at a single, hour-long hearing and issued two brief committee reports, all of which generally described the speculative, unsubstantiated problem of Eleventh Amendment immunity from patent infringement claims and the then-pending legislation to abrogate it. *See Patent Remedy Clarification Act: Hearing on H.R. 3886 Before the Subcomm. on Courts, Intellectual Property & the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 1 (1990); H.R. Rep. No. 101-960, at 33–40; S. Rep. No. 102-280, at 2–11 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 3087, 3088–97.

In *Florida Prepaid*, this Court found three main problems with the Patent Remedy Act's record. As described above—and as recognized by the four Justices who joined the *Florida Prepaid* dissent—the CRCA's record shares none of those flaws.

First, in enacting the Patent Remedy Act, "Congress came up with little evidence of infringing conduct on the part of the States." *Fla. Prepaid*, 527 U.S. at 640. In contrast, "[t]he legislative history of [the CRCA] includes many examples of copyright infringements by States." *Id.* at 658 n.9 (Stevens, J., dissenting) (citing, *inter alia*, House Hearing, at 93, 148); *see* Register's Report, at 7–10; *supra* at 12–14. The CRCA's record also substantiated the concern that such infringement would increase if Congress did not act—a concern that has since materialized. *See supra* at 19–20.

Second, with respect to the Patent Remedy Act, "the evidence before Congress suggested that most state [patent] infringement was innocent or at worst negligent." *Fla. Prepaid*, 527 U.S. at 645. Here, in contrast, the evidence—including the cases that

prompted congressional action—showed that state copyright infringement often was not innocent. *See supra* at 12–14; S. Rep. No. 101-305, at 11 (a "senior State employee" told a company that, in light of then-recent Eleventh Amendment caselaw, "the State no longer intended to license three copies [of a computer program] but instead only planned to buy one"); *Richard Anderson Photography*, 633 F. Supp. at 1156 (university licensed photographs for one publication but used them without permission in others).[8]

Third, with respect to the Patent Remedy Act, Congress said almost "nothing about the existence or adequacy of state remedies." *Fla. Prepaid*, 527 U.S. at 644. The Register's Report here, again in contrast, included a detailed 50-state survey showing that state remedies for copyright infringement were unavailable or inadequate. *See id.* at 658 n.9 (Stevens, J., dissenting); Register's Report, at xi, Appendix C; *supra* at 14–16.[9]

In sum, the CRCA's record is far more substantial than the record this Court considered in *Florida Prepaid*. The Fourth Circuit below—like the Fifth Circuit previously—wrongly treated them as though

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[8] *See also* John T. Cross, *Suing the States for Copyright Infringement*, 39 Brandeis L.J. 337, 402 (2000–2001) ("Although accidental or negligent infringements are possible, they are the exception, not the rule.").

[9] Contrary to what the *Florida Prepaid* Court believed, *see* 527 U.S. at 644 n.9, some courts have held that one remedy—a Takings claim in state court—might not, in fact, be available for either copyright or patent infringement, *see Univ. of Hous. Sys. v. Jim Olive Photography*, __ S.W.3d __, 2019 WL 2426301, at *11–*12 (Tex. App. June 11, 2019) (copyright infringement is not a compensable Taking).

they were the same. *See* Pet. App. 27a–32a; *Chavez*, 204 F.3d at 605–08. And when the CRCA's record is viewed on its own merits, it clearly justifies Congress's decision to abrogate states' Eleventh Amendment immunity from copyright infringement claims, as the district court below held, and as the *Florida Prepaid* dissent suggested.

CONCLUSION

The judgment of the court of appeals should be reversed.

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ADDENDUM

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2. *Berry v. Ala. A&M Univ.*, No. 5:99-cv-1053 (N.D. Ala. filed Apr. 27, 1999)

3. *Planet Earth Found. v. Univ. of Wash.*, No. 2:99-cv-861 (W.D. Wash. filed May 28, 1999)

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149. *Yerkel v. Derby*, No. 0:18-cv-2618 (D. Minn. filed Sept. 7, 2018) (Univ. of Minn.)

150. *MMAS Research, LLC v. Regents of the Univ. of Cal.*, No. 2:18-cv-9767 (C.D. Cal. filed Nov. 20, 2018)

151. *Bell v. Pflugerville Indep. Sch. Dist.*, No. 6:19-cv-24 (W.D. Tex. filed Jan. 25, 2019)

152. *Bell v. Granite Sch. Dist.*, No. 2:19-cv-209 (D. Utah filed Mar. 28, 2019)

153. *Bell v. Crawford Indep. Sch. Dist.*, No. 6:19-cv-268 (W.D. Tex. filed Apr. 16, 2019)

154. *Bell v. Glen Rose Indep. Sch. Dist.*, No. 6:19-cv-269 (W.D. Tex. filed Apr. 16, 2019)

155. *Bell v. Jarrell Indep. Sch. Dist.*, No. 6:19-cv-267 (W.D. Tex. filed Apr. 16, 2019)

156. *Bell v. Llano Indep. Sch. Dist.*, No. 6:19-cv-265 (W.D. Tex. filed Apr. 16, 2019)

157. *Bell v. Northside Indep. Sch. Dist.*, No. 6:19-cv-297 (W.D. Tex. filed May 10, 2019)

158. *Embarcadero Techs., Inc. v. Miss. Office of State Aid Road Constr.*, No. 4:19-cv-2091 (S.D. Tex. filed June 10, 2019)