No. 18-877

IN THE

Supreme Court of the United States

FREDERICK L. ALLEN, et al.,
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 ASSOCIATION OF PUBLIC AND LAND-GRANT UNIVERSITIES AND ASSOCIATION OF AMERICAN UNIVERSITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Amicus curiae the Association of Public and Land-grant Universities ("APLU") is a research, policy, and advocacy organization dedicated to strengthening and advancing the work of public universities in the United States, Canada, and Mexico. With a membership of 242 public research universities, land-grant institutions, state university systems, and affiliated organizations, APLU's agenda is built on the three pillars of increasing degree completion and academic success, advancing scientific research, and expanding engagement. Annually, its 199 U.S. member campuses enroll 4.2 million undergraduates and 1.2 million graduate students, award 1.1 million degrees, employ 1.1 million faculty and staff, and conduct $42.4 billion in university-based research. APLU's member university systems and universities are listed in Appendix A to this brief.

Amicus curiae the Association of American Universities ("AAU") is a non-profit organization that was founded in 1900 to advance the international standing of United States research universities. AAU's mission is to shape policy for higher education, science, and innovation; promote best practices in undergraduate and graduate education; and strengthen the contributions of research universities to society. Its members include 62 public and private research universities. AAU's member universities are listed in Appendix B to this brief.

Amici curiae have a substantial interest in the impact this case will have on the research and educational

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[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici,* their members, or their counsel made a monetary contribution to the brief's preparation or submission. All parties have filed letters granting blanket consent to the filing of *amicus* briefs.

endeavors of the nation's academic institutions. *Amici* monitor federal legislation, judicial decisions, and trends of concern to public universities. *Amici* and their member institutions are strongly committed to respecting copyright law. *Amici* and their member institutions are concerned, however, that unlawfully abrogating state sovereign immunity will result in numerous meritless copyright-infringement lawsuits that will substantially burden state universities and divert crucial resources from research and education.

SUMMARY OF ARGUMENT

State sovereign immunity ensures that state universities can continue to serve the vital public goals of education, research, and community engagement. Meritless copyright-infringement suits aimed at accessing state coffers will severely hinder these goals. With the increased cost of warding off litigation, state universities will be forced to divert scarce resources currently spent purchasing intellectual-property licenses, buying hundreds of thousands of library books, and educating millions of students.

None of this is necessary. Economic, institutional, and practical considerations already strongly disincentivize States and state universities from infringing copyrights. State universities are accountable to state governments, and they do not want to infringe copyrights given their non-profit status, their role as creators of copyrightable content, and their desire to maintain goodwill in their State and marketplace. All these practical considerations confirm that this Court should be "unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States." *Alden* v. *Maine*, 527 U.S. 706, 755 (1999).

States and state universities also face multiple

remedial disincentives to copyright infringement. An injunction blocking any possible infringement is likely the most important of the already available remedies. But Congress also has a variety of alternative mechanisms for addressing copyright infringement that are less drastic than wholesale abrogation of state sovereign immunity.

Beyond these practical considerations, doctrinal considerations likewise foreclose petitioners' arguments. As in *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings*, Congress here identified no "widespread and persisting deprivation of constitutional rights" or a "pattern of constitutional violations" sufficient to abrogate state sovereign immunity under its Fourteenth Amendment, § 5 power. 527 U.S. 627, 640, 645 (1999) (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 526 (1997)). Even the primary sponsor of the Copyright Remedy Clarification Act in the House stated that "thus far there have not been any significant number of wholesale takings of copyright rights by States or State entities." *Hearings on H.R. 1131, Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liability of States, Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong., at 48 (1989) ("House Hearings") (statement of Rep. Kastenmeier). And Ralph Oman, who was then the United States Register of Copyrights, acknowledged that the States "are all respectful of the copyright law." *Id.* at 8.

Ultimately, protecting States and state universities from copyright-infringement suits has important roots in constitutional history. States did not give up their sovereign immunity from copyright-infringement suits for damages as part of the plan of the Convention. The lack of debate surrounding the Copyright Clause "is best explained by the simple fact that no one, not even the Constitution's

most ardent opponents, suggested the document might strip the States of the immunity." *Alden*, 527 U.S. at 741 (discussing States' immunity from suit in their own courts). The Court should therefore preserve state sovereign immunity in this context and protect public universities from costly litigation that diverts crucial resources from research and education.

ARGUMENT

I. PRESERVING STATE SOVEREIGN IMMUNITY FROM COPYRIGHT-INFRINGEMENT SUITS FOR DAMAGES PROTECTS STATE UNIVERSITIES' KEY PUBLIC ROLES OF RESEARCH AND EDUCATION

Abrogating state sovereign immunity will significantly harm state universities and divert crucial public resources away from research and education. State universities are frequently "an arm of the State" and thus may invoke state sovereign immunity against suits for monetary damages under the Eleventh Amendment. *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429-431 (1997).

Public research universities educate approximately 20 percent of all students in the United States, enrolling millions of undergraduate and graduate students annually.[2] "Universities are seemingly timeless institutions, serving as sanctuaries for those who want to engage in ideas, learning, and cultural milestones for personal development." Shubha Ghosh, *Are Universities Special?*, 49 Akron L. Rev. 671, 674 (2016).

In addition to leading education, state universities advance critical research and development across almost all

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[2] American Academy of Arts & Sciences, *Public Research Universities: Serving the Public Good*, at 2 (2016), https://www.amacad.org/sites/default/files/academy/multimedia/pdfs/publications/researchpapersmonographs/PublicResearchUniv_PublicGood.pdf.

fields and industries. Between 2012 and 2013 alone, research at state universities resulted in more than 13,322 patent applications, 522 start-up companies, and 3,094 intellectual-property licenses.[3] Annually, state universities conduct over $44 billion of research (66 percent of all university-based research).[4] Through their purchase of journal subscriptions and individual works, universities provide critical funding for the academic publishing industry, which generates billions of dollars in revenue.[5] And public universities invest an estimated $24.2 million annually in their university presses.[6] As one commentator notes: "Universities are in the business of education and research. Faculty-created works—research, teaching, and service—are essential parts of universities' education and research activities." Alissa Centivany, *Paper Tigers: Rethinking the Relationship Between Copyright and*

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[3] *Ibid.*

[4] APLU, *How Does Public University Research and Community Engagement Benefit Society at Large?*, https://www.aplu.org/projects-and-initiatives/college-costs-tuition-and-financial-aid/publicuvalues/research-engagement.html (last visited Sept. 26, 2019) (citing National Science Foundation, National Center for Science and Engineering Statistics, Higher Education Research and Development Survey (2014)).

[5] Glenn S. McGuigan & Robert D. Russell, *The Business of Academic Publishing: A Strategic Analysis of the Academic Journal Publishing Industry and Its Impact on the Future of Scholarly Publishing*, 9 Electronic J. Acad. & Special Librarianship, no. 3 (2008), http://southernlibrarianship.icaap.org/content/v09n03/mcguigan_g01.html.

[6] See Association of University Presses, *AUPresses Snapshot*, http://www.aupresses.org/about-aaup/about-university-presses/snapshot (last updated Sept. 2019) (showing 2018 institutional allocation provided by U.S. public universities).

Scholarly Publishing, 17 Mich. Telecomm. & Tech. L. Rev. 385, 397 (2011) (footnote omitted).

In particular, "America's land-grant universities continue to fulfill their democratic mandate for openness, accessibility, and service * * * . Through the land-grant university heritage, millions of students are able to study every academic discipline and explore fields of inquiry far beyond the scope envisioned in the original land-grant mission." Gary Pulsinelli, *Freedom to Explore: Using the Eleventh Amendment to Liberate Researchers at State Universities from Liability for Intellectual Property Infringements*, 82 Wash. L. Rev. 275, 365 (2007) (citation omitted).

Preserving state sovereign immunity helps protect this strong public purpose of state universities. See *id.* at 364-365. The unlawful abrogation of state sovereign immunity will cause state universities to face numerous meritless copyright-infringement suits for damages. The financial drain of warding off meritless lawsuits will decrease the resources state universities can use for education, research, and development. State universities either will be unable to provide some public goods they now provide or will at least be unable to provide them to the same extent.[7]

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[7] HathiTrust Digital Library is just one example of the kind of innovative public goods that universities provide. HathiTrust "currently has 80 member institutions and [its digital library] contains digital copies of more than ten million works, published over many centuries, written in a multitude of languages, covering almost every subject imaginable." *Authors Guild, Inc.* v. *HathiTrust*, 755 F.3d 87, 90 (2d Cir. 2014). As the Second Circuit stated: "By storing digital copies of the books, the [HathiTrust Digital Library] preserves them for generations to come, and ensures that they will still exist when their copyright terms lapse." *Id.* at 103.

State universities collectively spend billions of dollars each year purchasing and contributing to intellectual property and thus are excellent consumers—not violators—of intellectual-property rights.[8] Colleges and universities that purchase journal articles through their library systems are key participants in the scholarly publishing industry, which generates billions of dollars in revenue.[9] Moreover, "[a]s technology has become more fully integrated into the university environment, the variety of copyrightable faculty-created works has increased. * * * [O]riginal works of authorship might include software, websites, data compilations, technical manuals, textbooks, articles, visual artworks, fiction and non-fiction writings, musical works, video games, and online courses * * * ." Glenda A. Gertz, *Copyrights in Faculty-Created Works: How Licensing Can Solve the Academic Work-for-Hire Dilemma*, 88 Wash. L. Rev. 1465, 1465 (2013) (footnote omitted). Public universities themselves—and their students and faculty—license and purchase vast quantities of copyrighted material every year.

But university resources are far from unlimited. In fact, rising subscription costs for journals are already causing even higher-resourced universities to "cut library budgets and reduce subsidies to university-affiliated publishers." Centivany, 17 Mich. Telecomm. & Tech. L. Rev.

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[8] See Association of University Technology Managers, *Highlights of AUTM's U.S. Licensing Activity Survey FY2015*, at 3-4, https://www.autm.net/AUTMMain/media/SurveyReportsPDF/AUTM_FY2015_Highlights_US_no_appendix_FINAL.pdf (last visited Sept. 26, 2019); APLU, *How Does Public University Research and Community Engagement Benefit Society at Large?*, https://www.aplu.org/projects-and-initiatives/college-costs-tuition-and-financial-aid/publicuvalues/research-engagement.html.

[9] McGuigan & Russell, 9 Electronic J. Acad. & Special Librarianship, no. 3.

at 413. Meritless infringement suits for damages would only compound the problem of scarce resources, forcing state universities to provide fewer public goods as litigation costs rise.

Consequently, both policy and economic considerations show that "[a]t the very least, broad congressional legislation, such as * * * blanket waivers of sovereign immunity, most likely will cause a great deal of financial harm to the states, while perhaps providing only a small or negligible increase in social benefit and protection to intellectual property owners and creators." Christopher L. Beals, Comment, *A Review of the State Sovereignty Loophole in Intellectual Property Rights Following* Florida Prepaid *and* College Savings, 9 U. Pa. J. Const. L. 1233, 1276 (2007). Incentivizing individuals to seek unnecessary windfalls from a State only burdens the citizens of the State. Therefore, "[r]ather than looking for ways to increase liability on the states and state actors, we should seek to decrease liability for researchers at state universities." Pulsinelli, 82 Wash. L. Rev. at 354.

II. EXISTING PRACTICAL, INSTITUTIONAL, AND REMEDIAL CONSTRAINTS ALREADY PREVENT STATES AND STATE UNIVERSITIES FROM ENGAGING IN WIDESPREAD COPYRIGHT INFRINGEMENT

Key institutional and practical reasons already make widespread copyright infringement by States and state universities highly unlikely. And alternative remedies—like injunctive relief—further disincentivize state copyright infringement.

A. State universities face numerous practical constraints preventing them from engaging in widespread copyright infringement: accountability to state governments, institutional ethical cultures, status as creators of copyrightable material, and the desire to preserve crucial

reputational capital. This explains petitioners' inability to point to anything close to a widespread pattern of state copyright infringement. As one analysis notes, "[i]n addition to the relatively small number of infringement cases involving states, there are political, social, and economic considerations that limit the prospects of widespread intellectual property infringement becoming a normal practice for states." Beals, 9 U. Pa. J. Const. L. at 1268.

First, public university leaders are accountable to state governments. "Universities receive significant public resources for research[,] and policymakers wish to hold them accountable for those investments."[10] Government is "able to demand more from universities than from industry * * * because academic research is far more dependent on federal funds than industrial research * * * ."[11] Moreover, it seems likely that "few state-elected officials would want to be connected with the widespread infringement of intellectual property without a justification." Beals, 9 U. Pa. J. Const. L. at 1271 (emphasis omitted).

Second, state universities are built on an ethical culture that cuts against infringement activity. See Ghosh, 49 Akron L. Rev. at 675 (describing "a rich picture of universities as institutions: establishments that were vital and critical for the functioning of the country with a range of options for those who sought civic engagement or introspection"); see also Ernest A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 Tex.

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[10] Walter D. Valdivia, *University Start-Ups: Critical for Improving Technology Transfer*, Brookings Ctr. for Tech. Innovations, at 1 (Nov. 2013), https://www.brookings.edu/wp-content/uploads/2016/06/Valdivia_Tech-Transfer_v29_No-Embargo.pdf.

[11] *Id.* at 4.

L. Rev. 1551, 1564 (2003) (describing the "public-service-oriented culture of state governmental entities"). Not only is intentional infringement outside the ethical norms of academic practice, but state universities also actively cultivate environments where this sort of behavior is discouraged. "Indeed, it is a core part of public universities' mission to serve their communities * * * ."[12]

Third, state universities are creators of copyrightable material and are also communities of independent creators. See Centivany, 17 Mich. Telecomm. & Tech. L. Rev. at 397; Gertz, 88 Wash. L. Rev. at 1465-1466. Infringing copyrights is ultimately against state universities' interests as co-creators, and universities are also concerned about the proper enforcement of copyright law. This, too, undermines any incentive to infringe.

Fourth, States and state universities are keenly aware that they must maintain their reputational capital. "[M]any state entities, especially universities, are entering into the commercial domain, where goodwill translates into business relationships and sales. As this process occurs, goodwill becomes even more crucial for those state entities seeking any measure of commercial success." Beals, 9 U. Pa. J. Const. L. at 1270. For example, public universities that engage in repeated infringement "would likely encounter a great deal of difficulty in a number of key activities. It would be difficult for them to partner with private industry groups to fund research, to attract new research faculty, or to form partnerships with private universities." *Id.* at 1270-1271.

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[12] APLU, *How Does Public University Research and Community Engagement Benefit Society at Large?*, https://www.aplu.org/projects-and-initiatives/college-costs-tuition-and-financial-aid/publicuvalues/research-engagement.html.

States and state universities therefore rarely intentionally infringe copyrights (or patents). See Peter S. Menell, *Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights*, 33 Loy. L.A. L. Rev. 1399, 1433 (2000) ("[T]he nature of public entities and the employees attracted to them suggest that state infringement, to the extent it occurs, is likely to be unintentional and episodic in most areas of state activity."). This fact arises from state universities' institutional ethical cultures, reinforced by "the bureaucratic and public-service-oriented culture of state governmental entities, as well as the absence of a significant profit motive." Young, 81 Tex. L. Rev. at 1564. As evidence of this, States and state universities did not respond to *Florida Prepaid* by abusing patents. See Tejas N. Narechania, Note, *An Offensive Weapon?: An Empirical Analysis of the "Sword" of State Sovereign Immunity in State-Owned Patents*, 110 Colum. L. Rev. 1574, 1605 (2010) ("[S]tates do not wield their immunity as a patent sword.").

In fact, state universities in the Fifth Circuit strengthened their commitment to comply with federal intellectual property laws after the Fifth Circuit ruled that the Act at issue here did not validly abrogate state sovereign immunity. See *Chavez* v. *Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000). In the wake of that decision, the University of Houston's General Counsel's office reviewed the impact of the Fifth Circuit's decision on institutional operations, and the University determined to strengthen—not slacken—its compliance with federal intellectual-property law. Young, 81 Tex. L. Rev. at 1564-1565. The University's review determined that:

> [T]he University remained *bound*—both legally and ethically—by the federal intellectual property laws. As a result, the General

> Counsel's office concluded, "we are not running to the copy machine or logging onto every bootleg music and software site we can get to. There are far too many other reasons besides fear of lawsuits for money damages in federal court for us to respect the intellectual property of creative people."

Id. at 1565 (footnote omitted).

As the Court has stated, "We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States." *Alden*, 527 U.S. at 755. There is practical and empirical evidence here confirming that States and state universities face numerous constraints preventing any possible widespread copyright infringement.

B. In addition to practical constraints on copyright infringement, copyright holders have various remedial mechanisms for obtaining relief against States or state universities that infringe copyrights. Copyright infringement only violates the Constitution when States provide no adequate remedy for the infringement. The fact that there are adequate remedial measures in the current copyright-infringement context renders wholesale abrogation of state sovereign immunity unconstitutional and inappropriate.

In passing the Act, Congress failed to meaningfully address alternative remedies besides wholesale abrogation of state sovereign immunity for copyright-infringement claims. See, *e.g.*, *Chavez*, 204 F.3d at 606 ("Congress barely considered the availability of state remedies for infringement."). Congress therefore failed to consider a necessary predicate to showing constitutional violations. See *Fla. Prepaid*, 527 U.S. at 643 ("[U]nder the plain terms of the [Patent and Copyright Clause] and the clear import of

our precedent, a State's infringement of a patent * * * does not by itself violate the Constitution"; "only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result.").

Most importantly, Congress failed to consider whether injunctions could rectify any existing problems. Yet "the availability of injunctions against state officers to compel compliance with federal law" is "[f]irst and foremost" among the remedies for combating copyright infringement. Young, 81 Tex. L. Rev. at 1561. Individuals can "invoke a variety of prospective remedies provided by the federal intellectual property laws, including not only an injunction against further publication but perhaps also impoundment and disposition of the unlawful copies." *Id.* at 1561-1562 (footnote omitted).

Petitioners cannot sustain their assertion that Congress "specified why nothing short of abrogation and monetary liability would suffice to rectify and deter States' violations." Pet. Br. 55. Other than conclusory assertions, the most petitioners can point to (Pet. Br. 48-49) is a few sentences in the Register of Copyright's Report showing that, out of forty-four comments received, eleven parties "maintained that [injunctive relief] is neither an adequate remedy nor a deterrent."[13] But eleven parties' comments on the inadequacy of injunctive relief is a far cry from Congress actually considering and assessing the availability of injunctions for remedying state copyright infringement.

Besides injunctive relief, various other mechanisms

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[13] See U.S. Copyright Office, A Report of the Register of Copyrights, *Copyright Liability of States and the Eleventh Amendment*, at 5-6 (1988), http://files.eric.ed.gov/fulltext/ED306963.pdf ("Register's Report").

can protect copyrights. See Young, 81 Tex. L. Rev. at 1561. For example, "private parties may be able to sue the state in a local court under common law causes of action, such as unjust enrichment." Narechania, 110 Colum. L. Rev. at 1604. Most States have already consented to such suits in state court. *Ibid.* And "shifting to state courts the relatively few copyright cases filed against states that don't waive immunity" will likely not undermine the uniformity of copyright law. Eugene Volokh, *Sovereign Immunity and Intellectual Property*, 73 S. Cal. L. Rev. 1161, 1166 (2000).

Congress also could amend the Act to explicitly provide for direct federal government enforcement, analogous to that provided in Title III of the Americans with Disabilities Act, 42 U.S.C. § 12188(b)(B). See Young, 81 Tex. L. Rev. at 1563. The federal government could then sue States or state entities on behalf of aggrieved parties to remedy serious violations of the Act. After all, "States are not immune from suit when the United States is the plaintiff, even when the United States is suing on a private individual's behalf." *Id.* at 1562; see *Seminole Tribe of Fla.* v. *Fla.*, 517 U.S. 44, 71 n.14 (1996) ("The Federal Government can bring suit in federal court against a State * * * ." (citing *United States* v. *Texas*, 143 U.S. 621, 644-645 (1892))).

Thus, a variety of alternative mechanisms exist for addressing any copyright infringement by States or state universities. This shows that the Act's wholesale abrogation of state sovereign immunity is unconstitutional and inappropriate. See *Fla. Prepaid*, 527 U.S. at 643.

III. CONGRESS DID NOT IDENTIFY A WIDESPREAD PATTERN OF STATE COPYRIGHT INFRINGEMENT WHEN PASSING THE ACT OR TAILOR THE ACT TO REMEDYING SUCH A PATTERN

In light of the existing practical and remedial constraints just discussed, it is no surprise that Congress could not identify a "widespread and persisting deprivation of constitutional rights" or "pattern of constitutional violations" from state copyright infringement when it passed the Act. *Fla. Prepaid*, 527 U.S. at 640, 645. In all events, Congress did not properly tailor its remedy.

A. As an initial matter, Congress did not even rely on its Fourteenth Amendment powers when passing the Act. Yet "for Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions * * * ." *Fla. Prepaid*, 527 U.S. at 639. Congress must intend to remedy a specific "Fourteenth Amendment 'evil' or 'wrong.'" *Ibid.*

Rather than basing the Act on its Fourteenth Amendment powers, Congress instead relied exclusively on Article I's Copyright Clause. See Pet. App. 21-22a ("Congress relied on the Copyright Clause in Article I of the Constitution, rather than § 5 of the Fourteenth Amendment. This invocation of Article I authority was expressly and repeatedly stated in the Act's legislative history.").

The fact that Congress did not discuss its Fourteenth Amendment power "precludes consideration of" the Fourteenth Amendment as a basis for the Act. *Fla. Prepaid*, 527 U.S. at 642 n.7. As the court below correctly recognized, "no case since *Florida Prepaid* has disavowed the Supreme Court's instruction that an abrogation of sovereign immunity cannot be sustained by a source of constitutional authority that Congress never invoked." Pet. App. 24a.

B. Petitioners' Fourteenth Amendment argument fails for a second, independent reason: the legislative record does not show a pattern of state copyright infringement sufficient to justify abrogating state sovereign immunity.

To rely on the Fourteenth Amendment, Congress must at least identify a "pattern of * * * infringement by the States" before it abrogates state sovereign immunity. *Fla. Prepaid*, 527 U.S. at 640; see *id.* at 645 ("The legislative record thus suggests that the Patent Remedy Act does not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic § 5 legislation." (quoting *City of Boerne*, 521 U.S. at 526)); see also *Coleman* v. *Court of Appeals of Md.*, 566 U.S. 30, 42 (2012) (plurality opinion) ("States may not be subject to suits * * * unless *Congress has identified* a specific pattern of constitutional violations" (emphasis added)).

So petitioners' Fourteenth Amendment argument must turn on the Act's legislative record, not post hoc rationalization.[14] See *Fla. Prepaid*, 527 U.S. at 640. Yet

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[14] Petitioners appear to recognize that there was little evidence of a pattern of copyright infringement when Congress passed the Act. Petitioners therefore attempt to supplement the fixed legislative record, arguing that "the instances of actual infringement have ballooned" since *Florida Prepaid*. Pet. Br. 52. But petitioners cannot show this either. Petitioners cite a U.S. General Accounting Office report—from 2001—that identified 58 lawsuits alleging state patent, trademark, and copyright infringement between 1985 and 2001. *Ibid.* Of course, data for this pre-2001 period hardly substantiates the claim that state copyright infringements have ballooned from 1999 to the present. Moreover, "the fifty-eight lawsuits included those at both the state and federal level and included many cases that were dismissed, settled, or decided in the states' favor." Beals, 9 U. Pa. J. Const. L. at 1267. In other words, 58 lawsuits filed does not equate to 58 findings of infringement: "the cause could simply be that intellectual property

Congress did not identify a "pattern" of copyright infringement by the States, "let alone a pattern of constitutional violations." *Ibid.*

In fact, the Act's legislative record shows "little evidence of infringing conduct." *Ibid.* Even the bill's primary sponsor in the House stated that "thus far there have not been any significant number of wholesale takings of copyright rights by States or State entities." House Hearings at 48 (statement of Rep. Kastenmeier). And even Mr. Oman, testifying in favor of the Act, conceded that "the States are not going to get involved in wholesale violation of the copyright laws." *Id.* at 53.

The court below thus correctly held that the record of any copyright infringement by States "was materially similar to that in *Florida Prepaid*." Pet. App. 28a; see *Fla. Prepaid*, 527 U.S. at 640 (noting that the House Report provided only two examples of patent-infringement suits against States, and the Federal Circuit had identified only eight between 1880 and 1990).

Most of the evidence of alleged copyright infringement by States or state universities came in a 1988 report by Ralph Oman, who was then the United States Register of Copyrights. See Register's Report at ii-xi. But even the Register's Report discussed "at most seven incidents" of potential copyright infringement by States. Pet. App. 28a. And only two of these incidents clearly showed willfulness. *Ibid.* "In total, even assuming that all of the incidents of unremedied infringement were intentional, the record before Congress contained at most a dozen incidents of copyright infringement by States that could be said to have violated the Fourteenth Amendment." *Id.* at 29a; see

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owners are more willing to bring infringement lawsuits of questionable merit." *Id.* at 1255.

Chavez, 204 F.3d at 606 ("Rather than expose a current epidemic of unconstitutional deprivations, the testimony before Congress worried principally about the *potential* for future abuse * * * .").

Petitioners attempt to amplify the scant evidence of state copyright infringement by cherry-picking legislative history. For example, petitioners quote the House Report as asserting that States "are injuring the property rights of citizens." Pet. Br. 46-47 (quoting H.R. Rep. No. 101-887, at 5 (1989)). However, the full quotation states that "the Register concluded that '*[i]f* the states violate the copyright law, they are injuring the property rights of citizens * * * .'" H.R. Rep. No. 101-887, at 5 (emphasis added). This is far more tentative and does not establish a pattern of actual state copyright violations. Another example is petitioners' assertion that "[t]he Senate discerned a 'clearly widespread' and 'clearly increasing' pattern of copyright infringement by the States." Pet. Br. 47 (quoting *Hearing on S. 497, the Copyright Clarification Act, Before the Subcomm. on Patents, Copyrights, and Trademarks of the S. Comm. on the Judiciary*, 101st Cong., at 109 (1989) ("Senate Hearing") (David Eskra, representing the Software Publishers Association and ADAPSO)). But the full Senate did not discern anything of the kind. Rather, immediately before Mr. Eskra (one of the witnesses testifying at the hearing) alleged that copyright violations were widespread and increasing, Senator DeConcini noted that "subsequent witnesses will testify that S. 497 is premature because there is *no data available regarding infringing by States on copyright material*." Senate Hearing at 109 (Sen. DeConcini) (emphasis added).

Petitioners rely on various portions of the legislative record discussing potential or hypothetical harms. In discussing congressional hearings, petitioners can only state that "'copyright owners whose businesses rely, in whole or

in part, on public universities or other state agencies' *would be* 'substantial[ly] impact[ed].'" Pet. Br. 49 (emphasis added) (quoting Senate Hearing at 70 (Statement of J. Healy, Copyright Remedies Coalition)). And petitioners state that "Congress also heard testimony that textbook publishers and other individual creators '*could* be put out of business *if* the states [are permitted to] engage in'" copyright infringement. *Ibid.* (quoting Senate Hearing at 70) (emphasis added). Petitioners' reliance on portions of the record that discuss copyright infringement as a potential—rather than an actual—problem reveals that the record falls far short of showing the necessary "pattern of . . . infringement by the States." *Fla. Prepaid*, 527 U.S. at 640.

Likewise, the Register's Report discussed concerns from solicited public comments showing anxiety about merely hypothetical harms: "The major concern of copyright owners appears to be widespread, uncontrollable copying of their works without remuneration: 19 parties worried that with immunity from damages, states would acquire copies of their works and ceaselessly duplicate them." Register's Report at 6. The Register's Report thus reveals hypothesizing about what the "consequences of state immunity would be"—while, as petitioners admit, only five comments mentioned "actual problems faced in attempting to enforce their claims against state government." *Id.* at 7; see Pet. Br. at 48.

Even Mr. Oman, the author of the Register's Report on which petitioners extensively rely, concluded the discussion of his year-long investigation by expressing his doubt that States would perpetuate significant infringing activity:

> [A]uthors and copyright proprietors have demonstrated *at least the potential for harm* from the uncompensated use by

> States and State entities of works protected under the Federal Copyright Act. * * * As a practical matter, States continue to buy books * * * and other copyrighted works. * * * I doubt very much, Mr. Chairman, if you fail to enact this bill, that the States would all launch a massive conspiracy to rip off the publishers across-the-board. *They are all respectful of the copyright law*, and what State or State official wants to get a reputation as a copyright pirate?

House Hearings at 7-8 (emphases added).

While Mr. Oman urged passage of the Act, he did so not based on a pattern of past copyright infringement by States or state universities—but rather to "guard against sloppiness" given the "potential for harm." *Id.* at 7-9. This is hardly a "widespread and persisting deprivation of constitutional rights." *Fla. Prepaid*, 527 U.S. at 645 (quoting *City of Boerne*, 521 U.S. at 526).

C. Even if a sufficient legislative record had existed (and it did not), the Act's wholesale abrogation of state sovereign immunity is not tailored to preventing constitutional violations. To legislate under § 5 of the Fourteenth Amendment, Congress must not only "identify conduct transgressing the Fourteenth Amendment's substantive provisions" but must also "tailor its legislative scheme to remedying or preventing such conduct." *Fla. Prepaid*, 527 U.S. at 639. As for this tailoring requirement, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Ibid.* (quoting *City of Boerne*, 521 U.S. at 520).

Congress failed to tailor abrogation appropriately. Just like the Patent Remedy Act, the Act in question fails

to tailor the abrogation of state sovereign immunity to cases of "nonnegligent infringement"—or to instances in which "a State refuses to offer any state-court remedy" or has "questionable remedies or a high incidence of infringement." *Fla. Prepaid*, 527 U.S. at 646-647. Rather, Congress designed the Act such that "in general, defendants in copyright infringement suits would be treated equally, no matter what their status. * * * The Congress specifically contemplated that State governments might be sued for copyright infringement and that the same rules that applied to private defendants should also apply to the States." H.R. Rep. No. 101-282, at 1-2 (1989) (footnote omitted).

Further exemplifying the complete absence of tailoring, Mr. Oman "acknowledged that most copyright infringement by states is unintentional, stating that '[the States] would want [immunity] only as a shield for the State treasury from the occasional error or misunderstanding or innocent infringement.'" *Chavez*, 204 F.3d at 607 (quoting House Hearings at 8). Congress therefore lacked authority to abrogate state sovereign immunity over copyright-infringement claims.

IV. STATES DID NOT GIVE UP SOVEREIGN IMMUNITY FROM COPYRIGHT-INFRINGEMENT SUITS FOR DAMAGES AS PART OF THE PLAN OF THE CONVENTION

Petitioners' Article I arguments also fail. First, *Central Virginia Community College* v. *Katz*, 546 U.S. 356 (2006), did not hold that Congress validly used Article I's Bankruptcy Clause to abrogate state sovereign immunity. Rather, *Katz* holds that the States surrendered their sovereign immunity for in rem bankruptcy proceedings as part of the plan of the Convention. See *Katz*, 546 U.S. at 379 ("[T]he relevant 'abrogation' is the one effected in the plan of the Convention, not by statute."). This distinction is subtle but crucial because it shows that the *Katz*

rationale is not applicable to intellectual property. In rem bankruptcy proceedings, where assets are gathered and then distributed to creditors, are fundamentally different from the government granting a property interest in an invention or a published work.

Second, the Copyright Clause says nothing about individuals suing States for damages, and its ratification said nothing either. See U.S. Const. art. I, § 8, cl. 8 ("Congress shall have Power * * * [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries * * * ."). Petitioners argue that because the Copyright Clause was passed without significant debate, it means the States conceded to waiving their sovereign immunity from copyright suits for damages. Pet. Br. 29. Without explaining the logical leap, petitioners assert that "[t]he conception embraced by the Framers leaves no place for States to retain sovereign immunity * * * ." *Id.* at 26.

Petitioners' argument draws the wrong conclusion. The status quo at ratification was extensive sovereign immunity, and thus the unanimous passage of the Copyright Clause without recorded debate shows that the Clause did *not* enact a sweeping overhaul of that status quo. See Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 Colum. L. Rev. 272, 338 (2004); see also *Alden*, 527 U.S. at 722 ("The text and history of the Eleventh Amendment also suggest that Congress acted not to change but to restore the original constitutional design.").

"When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts." *Alden*, 527 U.S. at 715. "Although the American people had rejected other aspects of English political theory, the doctrine that a sovereign

could not be sued without its consent *was universal in the States when the Constitution was drafted and ratified*." *Id.* at 715-716 (emphasis added). Thus "the Founders' silence is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity." *Id.* at 741 (discussing States' immunity from suit in their own courts). And there is no evidence in the records of the Constitutional Convention, the Federalist Papers, or the ratification debates showing that the Framers believed that individuals could sue States for damages in federal court for copyright infringement.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX A

Association of Public and Land-grant Universities ("APLU") Members

APLU Member University Systems

American Indian Higher Education Consortium (AIHEC)
Colorado State University System
Southern Illinois University System
Southern University System
Texas A&M University System
Texas Tech University System
The California State University System
The City University of New York System
The State University of New York System
The University of Texas System
University of Alabama System
University of Alaska System
University of California
University of Colorado System
University of Hawaii System
University of Illinois System
University of Massachusetts System
University of Missouri System
University of Nebraska System
University of North Carolina System
University of Tennessee System
University of Wisconsin System
University System of Georgia
University System of Maryland

APLU Member Universities by Jurisdiction

ALABAMA

Alabama A&M University
Auburn University
Tuskegee University
The University of Alabama
The University of Alabama at Birmingham
The University of Alabama in Huntsville
University of South Alabama

ALASKA

University of Alaska Fairbanks

AMERICAN SAMOA

American Samoa Community College

ARIZONA

Arizona State University
Northern Arizona University
University of Arizona

ARKANSAS

University of Arkansas
University of Arkansas at Pine Bluff

CALIFORNIA

California Polytechnic State University, San Luis Obispo
California State University, Fresno
California State University, Fullerton
California State University, Northridge
California State University, Sacramento
San Diego State University
San Francisco State University
San Jose State University
University of California, Berkeley
University of California, Davis
University of California, Irvine
University of California, Los Angeles
University of California, Merced
University of California, Riverside
University of California, San Diego
University of California, Santa Barbara
University of California, Santa Cruz

COLORADO

Colorado School of Mines
Colorado State University
University of Colorado at Boulder
University of Colorado Denver/Anschutz Medical Campus

CONNECTICUT

University of Connecticut

DELAWARE

Delaware State University
University of Delaware

DISTRICT OF COLUMBIA

University of the District of Columbia

FLORIDA

Florida A&M University
Florida Atlantic University
Florida International University
Florida State University
University of Central Florida
University of Florida
University of South Florida

GEORGIA

Augusta University
Fort Valley State University
Georgia Institute of Technology
Georgia Southern University
Georgia State University
Kennesaw State University
The University of Georgia

GUAM

University of Guam

HAWAII

University of Hawaii

IDAHO

Boise State University
University of Idaho

ILLINOIS

Illinois State University
Northern Illinois University
Southern Illinois University at Carbondale
University of Illinois at Chicago
University of Illinois at Urbana-Champaign

INDIANA

Ball State University
Indiana University
Indiana University-Purdue University Indianapolis
Purdue University

IOWA

Iowa State University
University of Iowa

KANSAS

Kansas State University

University of Kansas
Wichita State University

KENTUCKY

Kentucky State University
University of Kentucky
University of Louisville

LOUISIANA

Louisiana State University and Agricultural & Mechanical College
Louisiana Tech University
Southern University and A&M College, Baton Rouge
University of Louisiana at Lafayette
University of New Orleans

MAINE

The University of Maine

MARYLAND

Morgan State University
United States Naval Academy
University of Maryland, Baltimore County
University of Maryland, College Park
University of Maryland Eastern Shore
University of Maryland University College

MASSACHUSETTS

Massachusetts Institute of Technology
University of Massachusetts Amherst
University of Massachusetts Boston
University of Massachusetts Lowell

MICHIGAN

Central Michigan University
Michigan State University
Michigan Technological University
Oakland University
University of Michigan
Wayne State University
Western Michigan University

MINNESOTA

University of Minnesota
University of Minnesota Duluth

MISSISSIPPI

Alcorn State University
Jackson State University
Mississippi State University
The University of Mississippi
The University of Southern Mississippi

MISSOURI

Lincoln University

Missouri University of Science and Technology
University of Missouri-Columbia
University of Missouri-Kansas City

MONTANA

Montana State University
The University of Montana

NEBRASKA

University of Nebraska-Lincoln

NEVADA

University of Nevada, Las Vegas
University of Nevada, Reno

NEW HAMPSHIRE

University of New Hampshire

NEW JERSEY

Montclair State University
New Jersey Institute of Technology
Rowan University
Rutgers, The State University of New Jersey
Rutgers University-Newark

NEW MEXICO

New Mexico State University
The University of New Mexico

NEW YORK

Binghamton University, SUNY
Cornell University
Stony Brook University, SUNY
SUNY Polytechnic Institute
The City College of New York, CUNY
University at Albany, SUNY
University at Buffalo, SUNY

NORTH CAROLINA

East Carolina University
North Carolina A&T State University
North Carolina State University
The University of North Carolina at Chapel Hill
University of North Carolina at Charlotte
University of North Carolina at Greensboro
University of North Carolina at Wilmington

NORTH DAKOTA

North Dakota State University
The University of North Dakota

NORTHERN MARIANA ISLANDS

Northern Marianas College

OHIO

Bowling Green State University
Central State University
Cleveland State University
Kent State University
Miami University
Ohio University
The Ohio State University
The University of Toledo
University of Cincinnati
Wright State University

OKLAHOMA

Langston University
Oklahoma State University
University of Oklahoma

OREGON

Oregon State University
Portland State University
University of Oregon

PENNSYLVANIA

The Pennsylvania State University
Temple University
University of Pittsburgh

PUERTO RICO

University of Puerto Rico Mayaguez

RHODE ISLAND

The University of Rhode Island

SOUTH CAROLINA

Clemson University
South Carolina State University
University of South Carolina

SOUTH DAKOTA

South Dakota School of Mines & Technology
South Dakota State University
University of South Dakota

TENNESSEE

Middle Tennessee State University
Tennessee State University
The University of Memphis
The University of Tennessee, Knoxville

TEXAS

Prairie View A&M University
Texas A&M University
Texas State University
Texas Tech University

University of Houston
University of North Texas
University of Texas at Arlington
University of Texas at Austin
University of Texas at Dallas
University of Texas at El Paso
The University of Texas at San Antonio

UTAH

The University of Utah
Utah State University

VERMONT

The University of Vermont

VIRGIN ISLANDS

University of the Virgin Islands

VIRGINIA

The College of William & Mary
George Mason University
Old Dominion University
University of Virginia
Virginia Commonwealth University
Virginia Polytechnic Institute & State University (Virginia Tech)
Virginia State University

WASHINGTON

University of Washington
Washington State University

WEST VIRGINIA

Marshall University
West Virginia State University
West Virginia University

WISCONSIN

University of Wisconsin-Madison
University of Wisconsin-Milwaukee

WYOMING

University of Wyoming

CANADA

Dalhousie University
University of Alberta
The University of British Columbia
University of Calgary
University of Guelph
University of Saskatchewan
Western University
Queen's University

MEXICO

Instituto Politécnico Nacional
Universidad Autónoma de Nuevo León
Universidad de Guadalajara
Universidad Nacional Autónoma de México
Universidad Veracruzana

APPENDIX B

Association of American Universities ("AAU") Members

AAU Public University Members

Georgia Institute of Technology
Indiana University
Iowa State University
Michigan State University
The Ohio State University
The Pennsylvania State University
Purdue University
Rutgers University-New Brunswick
Stony Brook University-The State University of New York
Texas A&M University
University at Buffalo-The State University of New York
The University of Arizona
University of California, Davis
University of California, Berkeley
University of California, Irvine
University of California, Los Angeles
University of California, San Diego
University of California, Santa Barbara
University of Colorado, Boulder
University of Florida
University of Illinois at Urbana-Champaign
The University of Iowa
The University of Kansas

University of Maryland at College Park
University of Michigan
University of Minnesota, Twin Cities
University of Missouri, Columbia
The University of North Carolina at Chapel Hill
University of Oregon
University of Pittsburgh
The University of Texas at Austin
University of Virginia
University of Washington
The University of Wisconsin-Madison

AAU Private University Members

Boston University
Brandeis University
Brown University
California Institute of Technology
Carnegie Mellon University
Case Western Reserve University
Columbia University
Cornell University
Duke University
Emory University
Harvard University
The Johns Hopkins University
Massachusetts Institute of Technology
New York University
Northwestern University
Princeton University
Rice University

Stanford University
Tulane University
The University of Chicago
University of Pennsylvania
University of Rochester
University of Southern California
Vanderbilt University
Washington University in St. Louis
Yale University

AAU Canadian University Members

McGill University
University of Toronto