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

PETITIONERS' REPLY BRIEF

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INTRODUCTION

The State's brief in opposition ("BIO") confirms that this Court should grant review, as it typically does when a lower court invalidates an Act of Congress.

After suggesting it should be a foregone conclusion that no Article I power can justify Congress's abrogation of state sovereign immunity, the State grudgingly concedes this Court's precedent is now to the contrary. In a belated footnote (BIO 16-17 n.6), the State posits what should happen "if this Court takes a clause-by-clause approach to evaluating Congress's abrogation powers," as this Court did in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), where it recognized such power under the Bankruptcy Clause. But neither the Fourth Circuit nor any other court—including this Court in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999)—has *ever* accorded such analysis to Article I, Section 8, Clause 8 (the "Intellectual Property Clause"). If Congress is to be foreclosed from using its Intellectual Property power to abrogate sovereign immunity, then clause-specific explanation should emerge from this Court's rigorous examination upon plenary review, as in *Katz*—not from a respondent's footnote opposing certiorari.

Nor should it be assumed the CRCA fails scrutiny relative to Congress's power under Section 5 of the Fourteenth Amendment. Lower courts have given short shrift to this inquiry, too, by equating the legislative record underlying the CRCA with the one this Court analyzed in *Florida Prepaid*. In actuality, the relevant legislative records differ substantially

and so do the legal backdrops for copyrights versus patents, as Register of Copyright Ralph Oman—who spent a year compiling the 150-page report Congress commissioned for the CRCA—emphasizes here as *amicus*. See Br. of Ralph Oman as *Amicus Curiae* Supporting Petitioners ("Oman Br.") 6-19. Far from providing comfort, lower courts' "striking consensus" (BIO 12) on this issue is concerning: Unless this Court intercedes, Congress's hard work in enacting the CRCA will have been casually discarded.

The decision below sanctions continued trampling of federal copyrights by States without any meaningful check. See Br. of David Nimmer et al. as *Amici Curiae* Supporting Petitioners ("Scholars Br.") 2 ("[c]opyright infringement by state actors has become a serious problem" with "few (if any) remedies"). *Amicus* Recording Industry Association of America ("RIAA") warns that the "serious and accelerating problem" of state copyright infringement will persist absent review. Br. of RIAA as *Amicus Curiae* in Support of Petitioners ("RIAA Br.") 3-10.

Beyond the policy concerns at stake, this case affords opportunity for this Court to apply *Katz* to the Intellectual Property Clause as an Article I power, and to evaluate the unique legislative record surrounding the CRCA. Only this Court can adequately address these issues and show due dignity to its coordinate branch. There is no reason to wait and no better vehicle coming.

ARGUMENT

I. THE STATE DOES NOT DENY THAT INVALIDATION OF A FEDERAL STATUTE CUSTOMARILY TRIGGERS THIS COURT'S REVIEW

It is undisputed that the Fourth Circuit "exercise[d] … the grave power of annulling an Act of Congress" on constitutional grounds. *United States v. Gainey*, 380 U.S. 63, 65 (1965). The "obvious importance" of that decision itself warrants this Court's immediate review, *Gonzales v. Raich*, 545 U.S. 1, 9 (2005), irrespective of any circuit split. See Pet. 12 (citing cases). As the Solicitor General noted in obtaining a grant earlier this Term—without a circuit split—"any decision invalidating an Act of Congress on constitutional grounds is significant." Pet. for Cert. 11, *Iancu v. Brunetti*, 139 S. Ct. 782 (2019) (No. 18-302), available at https://www.justice.gov/sites/default/files/briefs/2018/09/10/18-302_brunetti_pet.pdf (Sept. 7, 2018) (citing cases); see also, *e.g.*, *United States v. Kebodeaux*, 570 U.S. 387, 391 (2013) (granting review because "a Federal Court of Appeals has held a federal statute unconstitutional" notwithstanding absence of circuit split); *United States v. Bajakajian*, 524 U.S. 321, 327 (1998) (similar); Stephen M. Shapiro et al., SUPREME COURT PRACTICE 264 (10th ed. 2013) ("Where the decision below holds a federal statute unconstitutional … certiorari is usually granted because of the obvious importance of the case."); *cf. Maricopa Cnty., Ariz. v. Lopez-Valenzuela*, 135 S. Ct. 428, 428 (2014) (Thomas, J., respecting denial of stay) ("We have recognized a strong presumption in favor of granting writs of certiorari to review

decisions of lower courts holding federal statutes unconstitutional.").

Moreover, there is no prospect here of further percolation among courts of appeals. As the State observes (BIO 11-12), lower courts have "uniformly" refused to enforce the CRCA, and the Solicitor General has "stopped defending the law." Thus, as *amicus* RIAA aptly puts it, the question presented "is stagnating" rather than percolating. RIAA Br. 16. Nor does the State deny the pressing practical problems posed by the decision below. See Pet. 17-19; RIAA Br. 8-10; Scholars Br. 2.

Without denying the importance of the Question Presented, the State cites (BIO 13-15 & n.5) isolated, inapposite cases where this Court denied certiorari; in *only two* of those cases (both distinguishable) was this Court asked to review a lower court's invalidation of a federal statute. See *Am. Civil Liberties Union v. Mukasey*, 534 F.3d 181, 184 (3d Cir. 2008), *cert. denied* 555 U.S. 1137 (2009) ("*ACLU*"); *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1240 (11th Cir. 2003), *cert. denied* 541 U.S. 1030 (2004).[1] For the past decade, no less than previously, this Court has continued to grant certiorari in cases like this without awaiting any circuit split. See, *e.g.*, *Dep't of Transp. v. Ass'n of*

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[1] In *ACLU*, the Court had already granted certiorari and, on the merits, enumerated the applicable test to resolve that dispute. See *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564 (2002). In *Tennessee Valley Authority*, the EPA did not seek reversal of a final judgment but of a non-final agency order. See Pet. for Cert., *Leavitt v. Tenn. Valley Auth.*, 541 U.S. 1030 (2004) (No. 03-1162) (Feb. 13, 2004).

Am. R.R.s, 573 U.S. 930 (2014) (granting review of decision holding federal statute unconstitutional, notwithstanding absence of circuit split and respondent's similar invocation of *ACLU*).[2]

The State further misplaces reliance (BIO 5) on this Court's decision to grant review, vacate and remand ("GVR") in *University of Houston v. Chavez*, 517 U.S. 1184 (1996). A GVR "does 'not amount to a final determination of the merits.'" Shapiro, *supra*, at 349 (quoting *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964)); see also *Tyler v. Cain,* 533 U.S. 656, 666 n.6 (2001) (GVR "was not a 'final determination on the merits'"). Nor are this Court's passing comments about the CRCA (BIO 5) a substitute for plenary review.

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[2] Tellingly, other cases the State cites (BIO 13-15 & n.5) did not urge review of a lower court's invalidation of a federal law. Pet. for Cert., *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 569 U.S. 1004 (2013) (No. 12-928) (Jan. 25, 2013) (seeking review of decision *upholding* Copyright Act by revising statutory language to cure potential constitutional error); Pet. for Cert., *Am. Snuff Co. v. United States*, 569 U.S. 946 (2013) (No. 12-521) (Oct. 26, 2012) (seeking review of part of decision *upholding* statute on constitutional grounds); *Barajas-Alvarado v. United States*, 566 U.S. 968 (2012) (denying petition of criminal defendant to review decision *affirming* sentence based on lack of prejudice, 655 F.3d 1077, 1079 (9th Cir. 2011)); *Yazzie v. United States*, 546 U.S. 921 (2005) (denying petition of criminal defendant to review decision *affirming* sentence based on harmless error, 407 F.3d 1139, 1142 (10th Cir. 2005)).

II. THE STATE DOES NOT DISPUTE THAT THIS CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS THE QUESTION PRESENTED

This case affords a pristine vehicle for deciding the Question Presented, and the State does not contend otherwise.

Indeed, the facts of this case highlight why the Court should grant review. Contrary to the State's suggestion (BIO 6) that its alleged violations were discrete and fleeting, they vividly demonstrate how a recalcitrant State can repeatedly infringe, without accountability or check, while copyright holders play a futile, unending game of whack-a-mole. After Nautilus spent nearly two decades creating works by photographing and filming (at considerable risk) underwater excavation of Blackbeard's famed *Queen Anne's Revenge*, the State brazenly pirated them. Pet. App. 9a. Then, after briefly agreeing to cease its infringement, the State not only resumed but passed a statute purporting to haul Nautilus's works into the public domain. Pet. App. 43a-45a. According to the decision below, however, Petitioners have no recourse once the State purports to have ceased the latest round of violations Nautilus managed to identify. Pet. App. 19a-21a.

If the decision below stands, aggrieved copyright holders like Nautilus effectively have no recourse for recurring infringement by States. As explained by *amicus* RIAA, there is no meaningful remedy short of that provided by the CRCA. See RIAA Br. 10-16; see also Pet. 19-20. The "value" of a copyright resides in the ability to enforce it, RIAA Br. 10, and the practical upshot of the decision below renders

copyrights virtually unenforceable against States, *id.* at 11-14.

III. THE DECISION BELOW IS WRONG

A. The State Fails To Refute That *Katz* Calls For Reexamination Of Congress's Authority Under The Intellectual Property Clause

The State erroneously relies (BIO 1, 3-4) on the sweeping, unexamined assumption from *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) that no Article I power authorizes Congress to abrogate sovereign immunity. That is precisely the overbroad assumption the Court repeated in *Florida Prepaid* (without the issue being briefed) and *Katz* held "was erroneous." 546 U.S. at 363; Pet. 24-25. In *Katz*, this Court corrected itself by holding that the States "agreed in the plan of the Convention *not* to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'" 546 U.S. at 377 (emphasis added).

Only in a footnote (BIO 16 n.6) does the State purport to come to grips with *Katz* and its "clause-by-clause approach" to assessing whether a particular Article I power authorizes abrogation of state sovereign immunity. In then arguing why this Court should still disallow abrogation upon specifically examining the Intellectual Property Clause (*id.*), the State tacitly concedes this Court has yet to answer the Question Presented using the *Katz* methodology. This alone is ample basis to grant review. See Pet. 23-24.

On the merits, the Intellectual Property Clause has its own unique constitutional history that deserves "[c]areful study and reflection." *Katz*, 546 U.S. at 363; see RIAA Br. 18-19; Pet. 23. Tellingly, the State offers no explanation (BIO 17 n.6) why the history of the Intellectual Property Clause is any less "unique" than that of the Bankruptcy Clause or any less indicative of a plan of the Convention waiver. It is readily apparent how leaving individual States free (without prospect of liability) to violate copyrights and to disseminate copyrighted works as they please would thwart the very notion of Congress securing uniform federal protections. See Pet. 26-27; Scholars Br. 8-9, 11-13.[3]

The State also does not address the text of the Intellectual Property Clause, which empowers Congress to bestow federal copyrights and "secur[e]" protection for them nationwide. See Pet. 25. Nor does the State address the Framers' consensus that "the utility of this power will scarcely be questioned." THE FEDERALIST NO. 43 at 268 (Clinton Rossiter ed. 2003); see *Katz*, 546 U.S. at 369. Notably, the distinctive nature of the Intellectual Property Clause ensures any abrogation will be discrete and confined to the singular purpose of securing uniform

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[3] Without substantively addressing the history of the Intellectual Property Clause or States' susceptibility to suits for copyright infringement, the State begins its historical account (BIO 2) with *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). The State thereby skips past earlier decades of precedent and practice supporting Congress's power to subject the States to suit for infringement. See Pet. 33 n.10; Scholars Br. 9-10 (citing 8 NIMMER ON COPYRIGHT, App. 7(C)).

protection for intellectual property as federally registered and bestowed. See Pet. 26-27. It is unsatisfying, to say the least, that these defining aspects of the Intellectual Property Clause would go unconsidered by this Court, especially following *Katz*.

Also contrary to the State's gloss (BIO 17 n.6), *Katz*'s allusion to "*in rem* jurisdiction" enhances the case for abrogation under this Clause. Just as *Katz* emphasized the *in rem* nature of bankruptcy, see 546 U.S. at 369-71, copyright involves *in rem* interests in personal property, see Scholars Br. 11 & n.9; 17 U.S.C. 201(d)(1) (recognizing copyright as "personal property"); Gideon Parchomovsky & Alex Stein, *Intellectual Property Defenses*, 113 COLUM. L. REV. 1483, 1487 (2013) ("[I]ntellectual property rights are rights in rem that avail against the rest of the world."). Indeed, unlike the sundry relations that may occasion disputes between States and debtors in bankruptcy, the property at issue in copyright disputes has an inherently *federal* dimension from its inception.

B. The State Fails To Engage How The CRCA's Legislative Record Implicates Congress's Enforcement Power Under The Fourteenth Amendment

The State is similarly unpersuasive in contending Congress did not validly abrogate state sovereign immunity pursuant to Section 5. As a threshold matter, the State errs by treating (BIO 15, 17) the absence of express reliance by Congress on "Section 5" as preclusive. This Court has made clear that "Congress need [not] anywhere recite the words 'section 5' or 'Fourteenth Amendment.'" *EEOC v.*

Wyoming, 460 U.S. 226, 243 n.18 (1983); see also *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 78-80 (2000) (considering Section 5 as possible basis for abrogation, even though Congress did not reference it by name). And in enacting the CRCA, Congress expressly stated its concern that States "are injuring the property rights of citizens." H.R. Rep. No. 101-887, at 5 (1989).

Moreover, although the State summarily argues (BIO 18-19) the congressional record underlying the CRCA is "analogous" to the record in *Florida Prepaid*, the State does not grapple with key distinctions between the different legislative records. Principal among them is the comprehensive, 50-state, 150-page report Mr. Oman compiled at Congress's request, documenting mounting copyright infringement by States and recommending the CRCA as the appropriate, tailored remedy. See Oman Br. 6-19; *Fla. Prepaid,* 527 U.S. at 658 n.9 (Stevens, J., dissenting).

Not only does the legislative record pinpoint at least twelve examples of reported infringement by ten different States in the decade preceding the CRCA, but it explains why this number was "just the tip of the iceberg." Oman Br. 9, 13; Register's Report, at ii, 8-9, 92-93. The legislative record further explains why the same problem did not manifest in earlier years, when States were generally understood to face liability for copyright infringement. See Pet. 33 n.10. The PRA, by contrast, "provide[d] only two examples of patent infringement suits against States" and "only eight patent infringement suits prosecuted against the States" in the previous 110 years. *Fla. Prepaid,* 527

U.S. at 640, 643. Thus, whereas the PRA provided, "at best … scant support for Congress' conclusion that States were depriving patent owners of property without due process of law," *id.* at 646, the legislative history of the CRCA is considerably stronger, see *id.* at 658 n.9 (Stevens, J., dissenting) (contrasting legislative history and expressing "hope that the [CRCA] may be considered 'appropriate' § 5 legislation" even under majority's analysis).

The State is wrong to assert (BIO 19) that Congress "barely" considered the adequacy of state remedies for copyright infringement. To the contrary, the absence of alternative remedies drove Congress to enact the CRCA, see Pet. 30-31; Oman Br. 3, 14-16, after the lack of adequate remedies was specifically spotlighted and substantiated, see S. Rep. No. 101-305, at 8, 12 (1990).

Like lower courts, the State also overlooks crucial distinctions between copyrights and patents. Thus, the State fails to appreciate that copyright infringement, unlike patent infringement, typically involves an element of intentionality insomuch as it requires outright *copying*. See Pet. 34-35. Atop that, the CRCA incorporates other limitations peculiar to copyright law, including the doctrine of fair use. See 17 U.S.C. 107 (fair use "is not an infringement of copyright"); William F. Patry, 4 PATRY ON COPYRIGHT § 10:73 (2019) ("[F]air use is occasionally asserted [by States] as a defense for unauthorized government copying."); J. Daniel Yu, *Trapped! Avoiding a Potential Pitfall of Nevada's Open Meeting Law*, 24 NEV. LAW. 17, 18 (Mar. 2015) (noting that fair use applies to use of copyrighted works by governmental entities); see also *Ass'n of Am. Med. Coll. v. Cuomo*,

928 F.2d 519, 526 (2d Cir. 1991) (State protected by fair use). Simply stated, States' copyright infringement entails constitutional deprivation to an extent that their patent infringement does not.

Most fundamentally, the State deviates (BIO 18) from a sound conception of congruence and proportionality. Contrary to the State's premise, no particular "magnitude" (BIO 19) of violations should be prerequisite to Congress exercising its legislative prerogative. This Court has never imposed such shackles on its coordinate branch. See *City of Boerne v. Flores*, 521 U.S. 507, 530-32 (1997). Judicial inquiry properly focuses on *congruence* and *proportionality*, not on absolute numbers, viewed in a vacuum. Instead of demanding that Congress satisfy some arbitrary numerical threshold, courts should simply compare the nature and scope of the statutory remedy against the constitutional problem identified. Especially considering that Congress here documented mounting, unchecked copyright infringement by States, its record-based findings and predictions (since vindicated) deserve due credit.

Nevertheless, the State here second guesses (BIO 19-20) whether Congress should have better "tailor[ed] the scope of the abrogation," positing novel legislative alternatives. Such criticism is not only strained but incompatible with Congress's legislative competence, and with Congress's judgment that States should be deterred from compounding their worsening infringement. See RIAA Br. 20-21.

The problem at issue is one of States infringing federal copyrights without limitation or remedy. After diligent fact-finding, Congress responded by making States liable for copyright infringement, just

as private infringers are. Such abrogation flows naturally from Congress's power under Section 5 and should not be invalidated without this Court's searching review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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