

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 THE INTELLECTUAL PROPERTY LAW
ASSOCIATION OF CHICAGO AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONERS**

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I. QUESTION PRESENTED

Whether Congress validly abrogated state sovereign immunity via the Copyright Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990), in providing remedies for authors of original expression whose federal copyrights are infringed by States.

II. INTEREST OF *AMICUS CURIAE*¹

The Intellectual Property Law Association of Chicago (“IPLAC”) respectfully submits this brief as *amicus curiae* in support of Petitioners Frederick L. Allen and Nautilus Productions, LLC.

IPLAC requests that this Court reverse the Fourth Circuit’s decision in *Allen et al. v. Cooper, et al.*, 895 F.3d 337 (4th Cir. 2018), and hold that Congress properly abrogated state sovereign immunity when enacting the Copyright Remedy Clarification Act of 1990, Pub. L. No. 101-553, 104 Stat. 2749 (1990).

Founded in 1884 in Chicago, Illinois, a principal forum for U.S. technological innovation and intellectual property litigation, IPLAC is the country’s oldest bar association devoted exclusively to intellectual property matters. IPLAC’s over 1,000

¹ Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in any part or made a monetary contribution intended to fund preparation or submission of the brief, and no person other than the *amicus curiae*, its members, or its counsel, made such a monetary contribution. On June 24, 2019, each party filed a blanket consent in this Court to the filing of amicus briefs.

voluntary members include attorneys in private and corporate practices in the areas of copyrights, patents, trademarks, trade secrets, and the legal issues they present before federal bars throughout the United States, as well as before the U.S. Patent and Trademark Office and the U.S. Copyright Office.² IPLAC's members represent innovators and accused infringers in roughly equal measure and are split roughly equally between plaintiffs and defendants in litigation.

As part of its central objectives, IPLAC is dedicated to aiding in developing intellectual property law, especially in the federal courts.³

III. SUMMARY OF ARGUMENT

IPLAC takes no position as to whether the actions of the State of North Carolina equate to copyright infringement. On the question presented,

² In addition to the required statement of footnote 1, IPLAC adds that after reasonable investigation, IPLAC believes that (a) no member of its Board or Amicus Committee who voted to prepare this brief, or any attorney in the law firm or corporation of such a member, represents a party to this litigation in this matter, (b) no representative of any party to this litigation participated in the authorship of this brief, and (c) no one other than IPLAC, or its members who authored this brief and their law firms or employers, made a monetary contribution to the preparation or submission of this brief.

³ Although over 30 federal judges are honorary members of IPLAC, none of them was consulted or participated in any way regarding this brief.

the Fourth Circuit's decision should be reversed for separate, but related, reasons.

First, when Congress amended the Copyright Act in 1990 by enacting the Copyright Remedy Clarification Act ("CRCA"), it used clear and unambiguous language stating that the statute abrogates state sovereign immunity. This Court should accept Congress's unequivocal expression of the intent to abrogate sovereign immunity and reverse the Fourth Circuit.

Second, this Court should hold that Congress may validly legislate the abrogation of sovereign immunity under its Article I, Section 8 powers. The record supports a conclusion that the Framers foresaw limited abrogation under Article I, Section 8, Clause 8, to achieve the nationwide harmonized copyright and patent system in place today. This Court has rarely departed from that rule and IPLAC respectfully urges the Court to reverse the Fourth Circuit's decision for this additional reason.

Third, because the Congressional power to establish copyright protection is a Constitutional power, Congress may exercise that power without expressly referring to the Fourteenth Amendment so long as there is a legislative record supporting the Congressional action. Here that record is significant and substantial. There is no question that Congress reacted to rampant state infringement of copyright without due process and just compensation being available to authors. This confirms Congress's intent to abrogate state sovereign immunity under the Fourteenth Amendment, including the Due Process

and/or the Privileges or Immunities Clauses of that Amendment.

Fourth, this case presents an unprecedented opportunity for the Court to solidify the method by which Congress may validly abrogate state sovereign immunity. Specifically, the Court should hold that sovereign immunity may be abrogated under the Fourteenth Amendment as well as through the Intellectual Property Clause of Article I, Section 8 of the Constitution. When sovereign immunity is available as a defense in copyright matters, copyright authors risk substantial harm with no recourse. As a result, authors and creators have less incentive and in instances, perhaps, no incentive, to create art, if the states may infringe at will.

Finally, IPLAC respectfully requests that this Court conclude that N.C. Gen. Stat. § 121-25(b) is preempted by the Copyright Act. North Carolina's attempt to define what falls into the public domain conflicts with the Copyright Act. If the North Carolina statute remains and other states follow North Carolina's lead, the country will end up with a poor hodge-podge of state laws affecting the exclusive powers available to the creators of copyrighted works under the Constitution.

For these reasons, IPLAC respectfully requests that this Court reverse the Fourth Circuit and hold the CRCA is a valid abrogation of state sovereign immunity.

IV. SUMMARY OF FACTS⁴

In 1718, the Queen Anne's Revenge, the flagship of pirate Blackbeard, ran aground off the coast of North Carolina and was abandoned. Over 250 years later, Intersal, Inc., a research and salvage company, entered into an agreement with the North Carolina Department of Natural and Cultural Resources to salvage the shipwreck and recover relics. The North Carolina state government considers the shipwreck to be a historic artifact and a source of public and tourist interest.

Petitioner Allen is a videographer and owner of Petitioner Nautilus Productions, LLC. Over the course of more than twenty years and under contract with the research and salvage firm, Intersal, they recorded and documented the salvage of the shipwreck.

From 1996 to 2013, Petitioner Allen and his company Nautilus took many original photographs and videos of the wreck, and the salvaging operations. Allen received 13 copyright registrations in these materials (collectively the "works") from the U.S. Copyright Office and subsequently used the works for commercial purposes.

In October 2013, North Carolina, through its Department of Natural Resources and Cultural Resources (the "North Carolina Department"), copied

⁴ See generally, *Allen v. Cooper*, 895 F.3d 337, 343-46 (4th Cir. 2018)

and displayed Petitioners' works by uploading and posting images online and in print media. This was done without the authorization of Allen and Nautilus. Nautilus brought suit for copyright infringement and the parties settled on October 15, 2013, with the agreement that North Carolina would not infringe the works anymore. This was the only agreement directly between the North Carolina Department and Nautilus and Allen.⁵

Despite the settlement, Petitioners allege that North Carolina resumed its infringing activities, after originally taking down the offending images. Further, on August 18, 2015, North Carolina passed H.B. 184, N.C. Gen. Stat. § 121-25(b), dubbed "Blackbeard's Law."⁶ The face of that law suggests an attempt to avoid liability for infringing actions by converting any "photographs, video recording, or other documentary materials," into public records, when they pertain to a shipwreck or its contents, artifacts, or historical materials, in custody of any

⁵ The North Carolina Department was given authorization for the limited use of some of the works, in museums, exhibits for educational purposes, and research.

⁶ N.C. Gen. Stat. § 121-25(b) states:

All photographs, video recordings, or other documentary materials of a derelict vessel or shipwreck or its contents, relics, artifacts, or historic materials in the custody of any agency of North Carolina government or its subdivisions shall be a public record pursuant to Chapter 132 of the General Statutes.

agency of the North Carolina government. The statute provides no remedy available to copyright holders if the state uses such “public” records.

On December 1, 2015, Petitioners filed suit in the U.S. District Court for the Eastern District of North Carolina, claiming infringement of their works under the Copyright Act. North Carolina moved to dismiss the claim based on the doctrine of state sovereign immunity, as defined in *Florida Prepaid*, which in turn relied on *Seminole Tribe*. See *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636-38 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 74-76 (1996). The District Court denied the motion, holding that in passing the 1990 CRCA Congress clearly and unambiguously stated the intent to abrogate state sovereign immunity in copyright infringement matters. In addition, the District Court held that while Congress may not rely on Article I, Section 8, clause 8 of the Constitution to abrogate state sovereign immunity, the record, in this case, showed that Congress was acting under Section 5 of the Fourteenth Amendment, in responding to state infringement and abuse of copyrights. *Allen v. Cooper*, 244 F. Supp. 3d 525, 535-37 (E.D.N.C. 2017).

North Carolina appealed that decision and the Fourth Circuit reversed the District Court. The Fourth Circuit panel held that any reliance, on Article I of the Constitution, even if coupled with the Due Process and Privileges or Immunities Clauses of the Fourteenth Amendment, was an invalid basis for abrogation of state sovereign immunity. The Circuit also held that Congress did not make it clear that it

was relying on Section 5 of the Fourteenth Amendment as the source of authority, and therefore there was no valid basis supporting abrogation of state immunity. *Allen v. Cooper*, 895 F.3d at 349-50.

Allen and Nautilus appeal the Fourth Circuit's decision.

V. ARGUMENT

A. SECTION 511 OF THE COPYRIGHT ACT IS A CLEAR AND UNAMBIGUOUS ABROGATION OF STATE SOVEREIGN IMMUNITY AND THIS COURT SHOULD HONOR CONGRESSIONAL INTENT AND REVERSE THE FOURTH CIRCUIT.

The focus of this case is the application of amendments to the copyright statutes made by the CRCA of 1990. For purposes of this case, the important amendment was to add Section 511 and amend Section 501 of chapter 5, title 17 of the United States Code. The added Section 511(a) is expressly an elimination of sovereign immunity to states, their agencies, and officers, *in toto*:

Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, *shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by*

any person, including any governmental or nongovernmental entity, for a violation of any of the exclusive rights of a copyright owner provided by sections 106 through 119, for importing copies of phonorecords in violation of section 602, or for any other violation under this title.

17 U.S.C. § 511(a) (emphasis added).

Congress did not stop there. The CRCA also amended Section 501(a) of title 17 to add a definition making the states subject to the reach of the copyright laws. That section, with the amendment emphasized, is:

Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). *As used in this subsection, the term “anyone” includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any*

*State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.*⁷

17 U.S.C. § 501(a) (emphasis added).

This Court has instructed that when the legislature is clear as to its intention, courts are bound to honor that intention. *United States v. Palmer*, 16 U.S. (3 Wheat. 281) 281, 290 (1818) (“when the legislature manifests this clear understanding of its own intention, which intention consists with its words, courts are bound by it.”). Both parties and the Fourth Circuit agree to the meaning of Section 511, and there is no question as to its intent. The plain, unabiguous words in Section 511(a) have only one meaning: the abrogation of state sovereign immunity for copyright infringement.

Every term and phrase used in Section 511(a) leads to this singlar result. As noted, the CRCA also explicitly amended Section 501(a) of the copyright statute relating to “infringement of copyright” to include “any state, any instrumentality of a state, and any officer or employee of a state or instrumentality of a state, acting in his or her official capacity,” as being in the defined group of “anyone”

⁷ Congress also amended Sections 910(a) and 911 of the Copyright Act, with the CRCA. These sections pertain only to mask works and add the same above language subjecting state actors to liability. *See* 17 U.S.C. §§ 910(a) and 911(g)(1).

used in the Copyright Act. That language therefore subjected North Carolina to the Act. CRCA, 1990 Enacted H.R. 3045, 101 Enacted H.R. 3045, 104 Stat. 2749, 101 P.L. 553, 1990 Enacted H.R. 3045, 101 Enacted H.R. 3045. Moreover, Section 501(a) provides that all of those state actors are subject to the entirety of Title 5 “in the same manner and to the same extent as any nongovernmental entity.” 17 U.S.C. § 501(a). This, of course, includes violations of the copyright owner’s exclusive rights and subject to the remedies described in 17 U.S.C. § 501(b). Such remedies include impoundment of infringing materials, actual damages, statutory damages, profit damages, costs, and attorney’s fees under the Copyright Act. *Id.* A crystal glass could not be clearer than this statute. This case presents an unambiguous Congressional intent to subject states and state actors to Section 511 of the Copyright Act.

Here, the expression of Congress also stated that “[a]ny State ... shall not be immune *under the Eleventh Amendment ... or any other doctrine of sovereign immunity* from any suit in Federal court” for copyright infringement. 17 U.S.C. § 511(a) (emphasis added). And, “any state” means just that; the definition provided by Congress in Section 501(a) gives states no way to escape the coverage of the Copyright Act.

Looking at “the particular statutory language at issue, as well as the language and design of the statute as a whole,” Congress plainly intended to hold states and state actors responsible for copyright infringement. *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991); *see also Crandon v. United States*, 494

U.S. 152, 158 (1990) (“In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy”). The language in Section 511(a) and the design of the Copyright Act do not give rise to any other possible interpretation. The inquiry must end there.

The inquiry into applicability of a statute ends “[if the statute] clear[ly] and unambiguous[ly] and plainly expresses the legislative intent” and “the court will enforce the plain meaning without resort to interpretation” *Ashworth v. Albers Med., Inc.*, 395 F. Supp. 2d 395, 405 (S.D. W. Va. 2005); *see also Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992) (*quoting Rubin v. United States*, 449 U.S. 424, 430 (1981)) (“We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: the ‘judicial inquiry is complete.’”). Because Section 511(a) is unambiguous, this Court should reverse the Fourth Circuit, and hold Section 511 is an unambiguous statute applicable to and enforceable against states.

Here, the Fourth Circuit recognized the unambiguous feature of Section 511(a), stating: “It is well established that any abrogation of a State’s Eleventh Amendment immunity requires both a clear statement of congressional intent—which, to be sure, § 511 provides—and a valid exercise of congressional power.” *Allen v. Cooper*, 895 F.3d at 347. Given the Fourth Circuit’s agreement that Section 511 is a

“clear statement” of Congressional intent to abrogate state sovereign immunity, the question turns to whether Congress validly exercised its powers.

B. THIS COURT’S PRECEDENT SUPPORTS A FINDING THAT 17 USC § 511 VALIDLY ABROGATED SOVEREIGN IMMUNITY UNDER CONGRESSIONAL ARTICLE I POWERS.

The Court should reverse the Fourth Circuit’s erroneous holding and find that Congress validly abrogated state sovereign immunity under Section 511 of the CRCA. The law has evolved, and sovereign immunity abrogation must also be considered under Article I, Section 8 of the Constitution.

Many courts, including the Fourth Circuit in this case, have incorrectly relied on *Seminole Tribe* for the assertion that Congress cannot abrogate sovereign immunity under its Article I powers. *Seminole Tribe*, 517 U.S. at 76. In that case, and again in *Florida Prepaid*, this Court refrained from discussing broad applicability of the Intellectual Property Clause. *Id.*; *Florida Prepaid*, 527 U.S. at 636-38. This Court, relying on *Seminole Tribe*, invalidated abrogation under the Patent Remedy Clarification Act in *Florida Prepaid*, but for the reasons below, those cases should no longer be considered applicable. *Florida Prepaid*, 527 U.S. at 636.

Indeed, continued reliance on those two cases should be revisited because seven years after *Florida Prepaid*, this Court explicitly deemed the assumption

underlying the holding in *Seminole Tribe* was “erroneous” and the Court is “not bound to follow our dicta in a prior case.” *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006). Recognition of the erroneous nature of *Seminole Tribe* means other cases relying on it should not survive either. *Florida Prepaid* is one of those cases.

The Court in *Seminole Tribe* assumed that the Bankruptcy Clause under Article I and derivatives therein did not validly abrogate sovereign immunity. *Seminole Tribe* 517 U.S. at 65. This assumption was dicta and erroneous as noted in *Katz* and not followed there. *Katz*, 546 U.S. at 363.⁸

Referring to the Bankruptcy Clause in Article I at issue in *Katz*, this Court concluded that the Framers would have foreseen limited abrogation when including that clause, and enacting subsequent legislation:

It is appropriate to presume that the Framers of the Constitution were familiar with the contemporary legal

⁸ The Fourth Circuit refused any argument using *Katz*, because that case discussed the Bankruptcy Clause rather than the Intellectual Property Clause. *See Allen, v. Cooper*, 895 F.3d at 348. However, the court failed to mention that *Seminole Tribe* is entirely focused on the bankruptcy clause, and *Florida Prepaid* is based on *Seminole Tribe*. *Seminole Tribe*, 517 U.S. at 73-73; *Florida Prepaid*, 527 U.S. at 636. The conclusion that *Katz*'s Bankruptcy Clause focus makes it irrelevant is therefore erroneous. Both clauses are part of the enumerated powers given to Congress by the Constitution.

context when they adopted the Bankruptcy Clause -- a provision which . . . reflects the States' acquiescence in a grant of congressional power to subordinate to the pressing goal of harmonizing bankruptcy law sovereign immunity defenses that might have been asserted in bankruptcy proceedings. The history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution demonstrates that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena. Foremost on the minds of those who adopted the Clause were intractable problems, not to mention the injustice, created by one State's imprisoning of debtors who had been discharged (from prison and of their debts) in and by another State. As discussed below, to remedy this problem, the first Congresses considered, and the Sixth Congress enacted, bankruptcy laws authorizing federal courts to, among other things, issue writs of habeas corpus directed at state officials ordering the release of debtors from state prisons.

Katz, 546 U.S. at 372.

The Court then concluded that the creation of the Bankruptcy Clause and its subsequent legislation was an indication of the Framers' intention to abrogate sovereign immunity in a limited fashion. *Id.* Indeed, this Court recognized significant problems were posed by allowing sovereign immunity to continue under the Bankruptcy Clause. *Id.* Those problems are no less significant when considering intellectual property.

In Article I, the Intellectual Property Clause is found just four short clauses after the Bankruptcy Clause, and is included in the same set of specific powers granted to Congress by the Constitution. U.S. Const., Art. I, § 8, cl. 8; U.S. Const., Art. I, § 8, cl. 4. The legislative history of the statutes enacted under the Intellectual Property Clause after adoption of the Constitution mirrors that of the Bankruptcy Clause, and for similar reasons implicates limited abrogation of state sovereign immunity. *See Katz*, 546 U.S. at 372.

Using its Constitutional power under Article I, § 8, cl. 8 Congress passed The Patent Act of 1790 and the Copyright Act of 1790 which provided how the federal government would grant and deny protected status to inventions and works of art. Patent Act of 1790, Ch. 7, 1 Stat. 109-112 (April 10, 1790); Copyright Act of 1790, 1 Stat. 124 (May 21, 1790);

see also 85 J. Pat. & Trademark Off. Soc'y 33 (2003)⁹. Indeed, under that Copyright Act, and subsequent interpretation and legislation, there was no protection without federal registration. 1 Stat. 124.

The Framers and the First United States Congress made a conscious choice to harmonize copyright and patent law across the new republic, by limiting state sovereignty. Even though some states may have statutes that address copyright matters and provide for a common law copyright, states do not have registration procedures and their copyright laws are not recognized outside their respective borders, a result the Framers likely foresaw. Trimble, Marketa, U.S. State Copyright Laws: Challenge and Potential, 21 Stan. Tech. L. Rev. 66, 112-25 (2017); *Katz*, 546 U.S. at 372. By creating a federal system to regulate these property rights, the Framers and subsequent Congresses established a system that could be in nationwide harmony only if the states' rights and claims were limited.

In 1896, the Court held that “the exemption of the United States from the judicial process does not protect their officers and agents . . . from being personally liable . . . by a private person whose rights of property they have wrongfully invaded or injured.” *Belknap v. Schild*, 161 U.S. 10, 18 (1896); *see also Ex parte Young*, 209 U.S. 123, 152 (1908) citing *Osborn v. United States Bank* (1824), 9 Wheat. 738,

⁹ The Journal of the Patent and Trademark Office Society as cited reproduced the 1790 Copyright Act and contains commentary concerning it.

846, 857 (“But the general doctrine of *Osborn v. Bank of the United States*, that the Circuit Courts of the United States will restrain a state officer from executing an unconstitutional statute of the State, when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution, and would work irreparable damage and injury to him, has never been departed from.”). There is no question that copyright is a property right that states and others regularly infringe. If the officers and agents of the federal government can be personally liable, the officers and agents of states should bear the same consequences.

The Court did limit the ability to sue in *Hans v. Louisiana*, which established when sovereign immunity applies and the extent of the immunity defense. *Hans v. Louisiana*, 134 U.S. 1, 11-14 (1890). However, despite holding in favor of sovereign immunity, two rules from that case are important here: (i) a state may be sued if it consents, or (ii) a state may be sued if its immunity is specifically abrogated by Congress. *Id.* at 19.

From the beginning, by granting Congress the power to create laws regulating copyright, stripping recognition of registrations outside of the federal government, and preempting state law, the Framers and early Congresses enunciated their intent to hold copyright above and out of reach of state control. A constitutional law scholar recently addressed this point as to patents, stating: “Failure to recognize that the Privileges or Immunities Clause established congressional authority to abrogate state Eleventh

Amendment immunity . . . stems from a combination of false assumptions and historical neglect.” William J. Rich, *Patent Rights and State Immunity*, 28 Fed. Cir. Bar J. No. 15-39, at 17 (2018). Unfortunately, this historical record has not been fully analyzed with the importance and dedication it deserves.

The public policy incentives provided in *Katz* also have merit in this case. *Katz*, 546 U.S. at 372. For example, in *Katz*, debtors could be imprisoned in multiple states, multiple times for the same debts. Under the Fourth’s Circuit’s decision, a single author may be subject to rampant and continuous infringement by state actors in multiple states and is left with no recourse. *See id.* Where bankruptcy laws could be vastly different from state to state, and abrogation harmonizes that, abrogation does the same for copyrights. *Id.* At bottom, North Carolina’s alleged improper actions, in addition to comparable actions of many other states, are subject to remedies under the copyright statute.

As a country, we have continuously affirmed that “the right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel is, in truth, a personal right.” *Lynch v. Household Fin. Corp.*, 405 U.S. 538,552 (1972). Beginning with the Framers and to the most recent Congresses, there has been no pull-back from the Constitutional policy that authors and inventors must be able to enforce their intellectual property rights against anyone who infringes. But, now the Fourth Circuit has decided that North Carolina and other states have the ability to pick and choose when they wish to take responsibility for their actions.

Members of our society are encouraged to be lawful and take responsibility if their actions violate the law; states should have no exemption.

Allowing such exemptions is contrary to the federal domain of copyrights and patents, because the fundamental basis of the Intellectual Property Clause is that “the states cannot separately make effectuation for copyright and patents.” The Federalist No. 43 (James Madison) at 1. The Framers fully recognized that “the public good fully coincides ... with the causes of individuals.” *Id.* The progress of the sciences and useful arts can only happen if creators are guaranteed limited protection, which would be completely negated by state sovereign immunity, where state actors can take as much as they wish. U.S. Const., Art. I, § 8, cl. 8. The steps of the history of this clause—from the Framers, the Constitution, the early statutes, to this Court’s law—require that the Fourth Circuit’s decision be reversed and Congress’s intent to abrogate sovereign immunity be respected.

**C. CONGRESS'S INTENT TO ABROGATE
SOVEREIGN IMMUNITY IS NOT
NEGATED BY FAILURE TO EXPLICITLY
REFER TO SECTION 5 OF THE
FOURTEENTH AMENDMENT.**

1. Copyright is protected under Section 5 of the Fourteenth Amendment and the CRCA is enforceable under that Amendment.

Copyrights, like patents, are a distinct species of intellectual property. Though there has been considerable debate in recent years regarding whether intellectual property is a public or private right, it is undisputed that such property is subject to being unlawfully taken from the creator. And, such deprivation of the rights can deprive the author of due process, just as with any other type of property deprivation by the state. A person is deprived of due process for their property rights when forced to cede the property or have property rights taken without compensation. If a state cannot be sued for taking the exclusive rights held by the copyright owner, then that owner has been deprived of those rights without due process and just compensation. This is traditionally actionable under the Fourteenth Amendment. Pursuant to Section 5 of the Amendment when considered in conjunction with Section 1 (“nor shall any state deprive any person of life, liberty, or property, without due process of law, ...”), Congress creates legislation to ensure due process is followed if property is to be taken from its lawful owner. This Court has noted that Due Process under Section 1 of the Fourteenth Amendment

requires just compensation to be made to the owner of the private property taken for public use under the authority of the State. *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 116 U.S. 226, 235, 238-39 (1897).

The CRCA is Congress's attempt to corral the states and create an incentive not to infringe by abrogating state sovereign immunity for copyright suits. The late Justice Stevens correctly noted that the CRCA may be considered an example of valid sovereign immunity abrogation, where infringement by states was an ongoing and pervasive problem:

To the extent that a majority of this Court finds this factor dispositive, there is hope that the Copyright Remedy Clarification Act of 1990 may be considered "appropriate" § 5 legislation. The legislative history of that Act includes many examples of copyright infringement by States—especially state universities . . . Perhaps most importantly, the House requested that the Register of Copyrights prepare a study... This report contains comments from industry groups, statistics, and legal analysis relating to copyright violations, actual and potential, by States.

Florida. Prepaid, 527 U.S. at n. 9 (Stevens, J., *dissenting*) (internal citations omitted).

The court in *Florida Prepaid* was unable to find infringement significant enough to support the Patent Remedy Clarification Act under a Section 5 theory of property deprivation. *Id.* at 647. But, as Justice Stevens noted, there was ample evidence of systematic copyright infringement by states and state actors, without any compensation, which was presented as evidence while the CRCA was being considered. *Id.* at n. 9 (Stevens, J., *dissenting*).

The legislative record supports the view that this evidence heavily influenced the passage of the CRCA, citing many instances of copyright infringement by states. *See* Hearings on H. R. 1131 before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary 101st Cong., 1st Sess., 93, 148 (1989); Hearing on S. 497 before the Subcommittee on Patents, Copyrights, and Trademarks of the Senate Committee on the Judiciary on 101st Cong., 1st Sess. 148 (1989), found at:

https://ipmall.law.unh.edu/sites/default/files/hosted_resources/lipa/copyrights/Copyright%20Remedy%20Clarification%20Act%20and%20Copyright%20Office%20Report%20%28April%2012%20and%20July%2011,%201989%29.pdf (hereinafter “Compiled Hearing Notes,” last visited August 1, 2019).¹⁰ The Congressional Subcommittees commissioned a report of state copyright infringement by the Register of

¹⁰ The site maintaining the Compiled Hearing Notes is hosted by the University of New Hampshire Franklin Pierce School of Law.

Copyrights, which found that most IP proprietors stood to lose significant amounts if states were allowed to engage in “widespread uncontrollable copying of [author’s] works without payment [or] restitution.” Compiled Hearing Notes at 4.

Mr. Ralph Oman, the Register of Copyrights during debates for the CRCA (and who submitted amicus briefs in this case supporting Petitioner at both the Fourth Circuit and in support of the Petition for Writ of Certiorari), concluded in his report that “copyright proprietors demonstrated the potential for harm ... the public might lose out. ... Congress [in the Copyright Act of 1976] intended to hold states, like other users, liable for copyright infringement ... [and] [the Copyright Register] see[s] no policy justification for full state immunity to copyright damage suits.” *Id.* at 7-8. The impetus surrounding the CRCA is that states only refrain from infringement activities by the threat of a “fat fine.” *Id.* at 8. Mr. Oman described that if the CRCA did not pass, there would be little prerogative for states to continue education and policies preventing infringing activities by their officers. *Id.* But, the instant case indicates that where a state believes it is subject to sovereign immunity it will systematically improperly use the copyrighted materials of its citizens or others. The copyright owners are then left without recourse and receive neither due process nor just compensation.

Mr. Oman’s report and testimony foresaw what could happen if the Fourth Circuit’s decision stands. Under that decision, states could infringe copyrights with impunity; play copyrighted music as

a draw for public events and even charge entry fees to hear the music; show music videos at such events as a further draw; reproduce and sell books, scripts, lyrics; and even set up their own pay television networks to provide copyrighted movies to their residents, again with a fee paid into the coffers of the state by its residents. All of this could be done without paying royalties and without being subject to any suit by the copyright owners.

The House and Senate committees recognized that systematic infringement by states was an ongoing problem and would be a problem in the future. Compiled Hearing Notes at 4; 7-8. “Contrary to historic warnings, when sovereign immunity is in the equation, enforcement of federal [intellectual property] law now varies from one state to another.” Rich, *Patent Rights and State Immunity*, 28 Fed. Cir. Bar J. at 15. Though, as Justice Stevens noted, “this Court has never mandated that Congress must find widespread and persisting deprivation of constitutional rights,” the enactment history of the CRCA does show a “widespread and persistent deprivation” of intellectual property, without due process. *Florida. Prepaid*, 527 U.S. at 660. (Stevens, J., *dissenting*).

Furthermore, the CRCA meets the requirements for a preventative measure legislation under Section 5. The language used by Congress and the design of the statute as a whole puts state actor infringers in the same position as non-state actor infringers. Holding every infringer to the same standards and to the same consequences is more than appropriate. *Id.* at 662.

The case law and this legislative record show that Congress intended to take a valid preventative measure, in abrogating the state sovereign immunity defense, with a sound basis in Section 5 of the Fourteenth Amendment. “The Fourteenth Amendment overrides the Eleventh Amendment, and patent rights [much like copyrights] fit squarely within the scope of protected ‘privileges enjoyed by United States Citizens . . . Furthermore, Congress’ power . . . should not be blocked by state claims of immunity’ . . . Historical evidence, congressional action, and Supreme Court precedent all support such conclusions.” Rich, *Patent Rights and State Immunity*, at 16-17.

The Privileges or Immunities Clause of the Fourteenth Amendment protects those privileges or immunities granted by the federal government to its citizens. That Amendment gives Congress the power to ensure that states do not encroach upon the privileges or immunities granted by it. In this case, such privileges are the copyright registrations granted to Petitioners giving them the exclusive rights to their materials. Another similar privilege granted by Congress involves patents. For this additional reason, the Court should reverse the Fourth Circuit, and hold that the CRCA validly abrogates state sovereign immunity for copyright infringement.

2. This Court should defer to Congressional intent to validly abrogate sovereign immunity.

As found in the legislative record, during discussions leading to the CRCA, the Senate and House Committees were concerned about whether they should enact the statute under their Article I, Section 8 powers, or pursuant to the Fourteenth Amendment, Section 5. Congress clearly foresaw the potential for challenge under the Eleventh Amendment, and sought the best method to abrogate sovereign immunity as intended in the Copyright Act of 1976. As committee members stated:

Mr. BERMAN . . . As I understand, the Atascadero State Hospital case said that, to overcome the immunity given to the States by the eleventh amendment, Congress has to clearly state its intent to abrogate the eleventh amendment, and that if it does, then there is no immunity. It would then follow that if we made it clear that the 1976 Act applied to the States, and that the liability was our intent and it is our intent that it apply to the States, that they can be held liable. That would be what would be necessary to overcome the effect of that decision.

. . .

Mr. OMAN. There is a fourteenth amendment consideration involved in the case. . . .

Compiled Hearing Notes at 53-54

. . .

Mr. BERMAN. And in the course of that it said that if in its exercise of its constitutional authority to implement fourteenth amendment rights Congress clearly indicated an intent to allow

Ms. SCHRADER. Yes.

Mr. BERMAN [continuing]. The individual to recover from the State, then that would supersede the eleventh amendment. . . .

Id. at 57-58

. . .

Mr. MOORHEAD. You seem to be pretty clear that you feel the Court has taken the position—I would agree with you—that Congress can abrogate the fourteenth amendment [sic]. I think it comes down to—weighing the social needs of the State against property rights, and I wonder how you come down on that issue?

Ms. LEE. I think that the basic place for the weighing of the social needs of the State against property rights in the copyright area is probably in the substantive definition of what constitutes a copyright violation, what constitutes fair use, what are the defenses. As I understand it, in the 1976 Act, there are a number of exemptions that were included because of the view that States acting in nonprofit capacities ought not to be liable for copyright violations. Once you come to the remedy, Congress has already made a deliberate policy choice that States should not be engaging in this sort of behavior and that when States do engage in this form of copying, then it is a violation of someone's intellectual property right. At that point I think it is appropriate to allow an effective remedy to be provided by suits for money damages against States by private parties.

Mr. MOORHEAD. It gets people upset if they think the State is taking money or property or property rights from individuals without compensation.

Id. at 80.

(Compiled Hearing Notes at 53-54; 57-58; 80).

During the committee discussions prior to submitting the proposed CRCA for vote, case law then, as now, did not provide much guidance as to whether Congress could validly abrogate sovereign immunity under Article I, Section 8. This Court should resolve that continued confusion. The legislative record here makes it explicitly clear that Congress intended to prevent states from taking intellectual property without granting authors due process and just compensation. This approach was fully supported by the express words in Sections 1 and 5 of the Fourteenth Amendment.

At that time, it was understood under *Hans*, *Atascadero*, and *Pennsylvania v. Union Gas* that if Congress made explicitly clear and absolutely unambiguous that it was abrogating state sovereign immunity, that action would withstand scrutiny. Compiled Hearing Notes at 53-54, 57-58, 80; *Louisiana*, 134 U.S. at 21; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 25-27 (1989). The *Pennsylvania* case held that “we have twice assumed that Congress has the authority to abrogate States’ immunity when acting pursuant to the Commerce Clause . . . It is no accident, therefore, that every Court of Appeals to have reached this issue has concluded that Congress has the authority to abrogate States’ immunity from suit when legislating pursuant to the plenary powers granted it by the Constitution”: Article I, Section 8. *Pennsylvania*, 491 U.S. at 15, citations omitted; *see also Pennsylvania*, 491 U.S. at 24. (Stevens, J., *concurring*) (“A statute cannot amend the Constitution. With respect to the

latter — the judicially created doctrine of state immunity even from suits alleging violation of federally protected rights — I agree that Congress has plenary power to subject the States to suit in federal court”).

The historical record, though neglected, solidly supports finding Congress, through its expressed intent, has the power to abrogate state sovereign immunity. As Professor Rich emphasizes in his article *Patent Rights and State Immunity*, “[i]n 1866, John Bingham . . . a primary Fourteenth Amendment architect, repeatedly emphasized the importance of elevating federally guaranteed rights in the face of state attempts at derogation.” Rich, *Patent Rights and State Immunity*, at 24. Rich correctly points out that “[Justice] Bradley . . . noted that the national government has jurisdiction and sovereignty ‘over all those general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike, and which require uniformity of regulations and laws, such as . . . *patent and copyright laws* . . . all which subjects are expressly or impliedly prohibited to the State governments.” *Id.* (quoting Justice Bradley (concurring) in *Knox v. Lee*, 79 U. S. 457, 555 (1870)) (emphasis in article). His analysis, primarily relying on the well-recognized *Slaughterhouse Cases*, shows that the current and previous understanding recognized this national supremacy, when rights are derived from the Constitution. Then “[s]ubsequent judicial opinions . . . supported by an academic consensus . . . cemented the conclusion that the Privileges or Immunities Clause enshrined the

authority to enforce federal statutes against state actors who seek to cut back on statutorily conferred rights.” Rich, *Patent Rights and State Immunity*, at 25, citations omitted.

Some courts in recent years clearly sought to expand the power of sovereign immunity. This is in contradiction to the historic jurisprudence. Each time such action was addressed, up to and including during debates for the Fourteenth Amendment, the rights granted by the Constitution, including Congressional power to regulate patents, copyright and bankruptcy, remained above and out of reach of states. *Id.* at 24-27. That historical record should be given the respect it is due. This Court should affirmatively hold that Congress has the power to and did validly abrogate state sovereign immunity for copyright matters.

In the CRCA, Congress clearly intended to follow the most valid method to abrogate sovereign immunity. Deference should be given to the plain words Congress used. “Granting deference to Congressional intent serves two policy goals. First, statutory law is made by Congress, not the courts. The determination of social policies to be carried out by the [relevant act, here the Copyright Act] is solely the domain of Congress. Second, statutes should be construed to give effect to every word Congress used.” *In re Pattison*, 132 B.R. 449, 452 (Bankr. D.N.M. 1991). As with other matters, Congressional intent is a cornerstone of statutory construction. Where the case law was unclear, Congress attempted to follow the law of the time, and this Court should defer to the clearly expressed Congressional intent,

and hold the CRCA is a valid abrogation of state sovereign immunity.

**D. N.C. GEN. STAT. 121-25(B) IS
PREEMPTED BY FEDERAL LAW.**

There is no question that N.C. Gen. Stat. § 121-25(b) was enacted for the sole purpose of avoiding the consequences of copyright infringement. However, this statute is preempted by federal copyright law. The North Carolina statute degrades the protected status of federally registered copyrighted works, in clear contradiction to federal law.

A fundamental principle of the United States Constitution is that Congress has the power to preempt state law. U.S. Const. Art. VI, cl. 2. Even without an express provision for preemption, state law must yield to a congressional act in at least two circumstances. When Congress intends federal law to ‘occupy the field,’ state law in that area is preempted. And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute.

Crosby v. National Foreign Trade Council, 530 U.S. 363, 366 (2000).

The North Carolina statute directly conflicts with federal law, and the Constitution and Congress have made it clear that the federal government is to

be the primary actor “occupying the field” of copyright. *Id.*; see also *Felix the Cat Prods. v. New Line Cinema*, No. CV 99-9339 FMC (RCx), 2000 U.S. Dist. LEXIS 21763, at *13 (C.D. Cal. Apr. 28, 2000) (“A state law is preempted by the Copyright Act if (1) the work at issue comes within the subject matter of copyright; and (2) the state law rights are equivalent to rights within the general scope of copyright. . . . To survive preemption, the state cause of action must protect rights which are qualitatively different from those protected by copyright law.”) (internal quotations and citations omitted). Allowing each state to dictate how copyright protection and status is determined and which actor gets a free pass would undermine and disharmonize the entire copyright system. Therefore, this Court should conclude that the North Carolina statute is fully preempted.

VI. CONCLUSION

This case presents the opportunity for the Court to ensure that the exclusive rights of copyright owners are protected against infringements by states and state agencies. To do so, the Court should hold that Congress abrogated state sovereign immunity when the CRCA was enacted. Holding otherwise would permit states to trample on copyrights with impunity, under the rubric of sovereign immunity, thereby putting the entire foundation of copyright at risk. By reversing the Fourth Circuit, this Court will be promoting sciences and useful arts as provided in the Constitution and will be recognizing the intent of Congress when the CRCA was enacted.

This case also presents the opportunity for the Court to clarify what Congress may rely on to abrogate sovereign immunity. Here, Congress took every reasonable step to ensure the CRCA unambiguously delivered the intent to abrogate state sovereign immunity. *Sans* the CRCA, states may infringe unabashedly.

IPLAC respectfully urges the Court to reverse the Fourth Circuit's decision and hold that 17 USC § 511 validly abrogates state sovereign immunity under the Copyright Act.

Respectfully submitted,

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