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 Recording Industry Association of America, American Association of Independent Music, and National Music Publishers' Association as *Amici Curiae* in Support of Petitioners

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae the Recording Industry Association of America (RIAA) is a nonprofit trade organization representing the American recording industry. The RIAA supports and promotes the creative and financial vitality of the major recorded music companies. In support of its members, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels.

Amicus curiae American Association of Independent Music (A2IM) is a trade organization representing a broad coalition of over 600 independently owned U.S. music labels that range in size from large to small and are located across the United States. A2IM works to promote growth, awareness, and opportunities for independent music through advocacy and other activities.

RIAA's and A2IM's members collectively comprise the most vibrant record industry in the world and create, manufacture, and/or distribute most of the sound recordings legitimately produced and sold in the United States. RIAA's and A2IM's members depend on copyrights to protect the valuable performances embodied in sound recordings in which they have invested and created in collaboration with musicians, songwriters, and other artists.

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[1] Counsel for all parties have filed blanket consents to the filing of *amicus* briefs. In accordance with Rule 37.6, *amici* confirm that no party or counsel for any party authored this brief in whole or in part, and that no person other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Amicus curiae the National Music Publishers' Association (NMPA) is the principal trade association representing the U.S. music publishing and songwriting industry. Over the last 100 years, NMPA has served as a leading voice representing American music publishers before Congress; in the courts; within the music, entertainment, and technology industries; and to the listening public. NMPA's membership includes major music publishers affiliated with record labels and large entertainment companies as well as independently owned and operated music publishers of all catalog and revenue sizes. Compositions owned or controlled by NMPA's hundreds of members account for the vast majority of musical works licensed for commercial use in the United States.

In the Copyright Remedy Clarification Act of 1990 (CRCA), Pub. L. No. 101-553, 104 Stat. 2749, Congress abrogated the States' sovereign immunity from suit for copyright infringement. Resolution of the question presented in this case regarding the validity of the CRCA is highly significant to *amici* because of their strong interest in ensuring that copyright holders can earn a living by exploiting the fruits of their creative labor and can effectively enforce their rights and obtain monetary relief for infringement, regardless of whether an infringer is affiliated with state government or is part of the private sector.

SUMMARY OF ARGUMENT

Congress enacted the CRCA to permit monetary remedies against States that infringe copyrights. But the lower courts, including the court of appeals in this case, have ruled that Congress lacked the power to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment or under the Copyright

Clause in Article I of the Constitution. In reaching that conclusion, those courts have minimized the extensive record of state infringement of copyrights Congress assembled prior to passage of the CRCA and have dismissed additional evidence confirming Congress's prediction that state infringement would run rampant without a deterrent monetary remedy. Indeed, during the years in which the CRCA has been deemed invalid, state infringement of copyrights—including obviously willful infringement—has reached unprecedented levels.

Without the CRCA, copyright holders, including recording artists, songwriters, and other music owners whose livelihoods depend on licensing their works, face dramatic and irremediable infringement of their rights. States are currently free to infringe copyrights with impunity, and that serious and accelerating problem is not ameliorated by the existence of an injunctive remedy against state officers or by the possibility that an aggrieved party might bring some state-law claim for relief. That state of affairs visits significant harms on creators whose music is used routinely by States and their institutions without fair compensation. In light of the seriousness of the real-world injury created by lower courts' invalidation of the CRCA, a great deal turns on this Court's decision in this case. Permitting state infringement to continue unchecked harms creators and the industries that distribute, promote, and finance the development of creative works; meaningfully decreases incentives for creation of new works; and damages the economy as a whole.

The legislative record of the CRCA and the evidence of what has occurred since Congress enacted that statute strongly support the conclusion that the

CRCA is a valid exercise of Congress's powers. The legislative record demonstrates that the CRCA's abrogation of state sovereign immunity was a congruent and proportional remedy under Section 5 of the Fourteenth Amendment—a legislative response to a serious existing problem that was reasonably projected to become significantly worse in the absence of any congressional action. Congress was permitted to draw such a conclusion from the facts before it. See *City of Boerne* v. *Flores*, 521 U.S. 507, 532 (1997) ("[I]t is for Congress to determine the method by which it will reach a decision").

In addition, the CRCA is valid as an exercise of Congress's powers under the Copyright Clause of Article I, which calls for Congress "[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." U.S. Const. art. I, § 8, cl. 8 (emphasis added). As is true of the Bankruptcy Clause, which gives Congress the power to deem States amenable to certain bankruptcy claims, see *Cent. Virginia Cmty. Coll.* v. *Katz*, 546 U.S. 356 (2006), the Copyright Clause calls for uniformity—something that Congress can provide only through a federal-law remedy for copyright infringement. And a copyright holder's "exclusive" right to a "secure[]" copyright is meaningless if States are effectively immune from monetary liability. In short, affording States sovereign immunity against copyright damages suits fundamentally undermines the operation of the Copyright Clause, and the States should be understood to have agreed in the plan of the Constitutional Convention not to assert immunity to such suits.

ARGUMENT

I. The CRCA Addresses A Serious And Continuing Problem Of State Copyright Infringement

1. Under federal copyright law, "[a]nyone who violates any of the exclusive rights of [a] copyright owner * * * or who" illicitly "imports copies or phonorecords into the United States" is "an infringer" and is subject to "an action for any infringement." 17 U.S.C. 501(a)-(b). In such an action, a copyright holder can obtain injunctive relief as well as actual or statutory damages and, in some cases, costs and attorneys' fees. See 17 U.S.C. 502-505.

For much of the twentieth century, it was understood that copyright holders could seek monetary relief against the States for copyright infringement.[2] For instance, in *Mills Music*, *Inc.* v. *Arizona*, 591 F.2d 1278 (9th Cir. 1979), decided shortly after enactment of the Copyright Act of 1976 (Copyright Act), the Ninth Circuit declared that "a state may not, consistent with the Constitution, infringe the federally protected rights of the copyright holder, and thereafter avoid the federal system of statutory protections." *Id.* at 1286; see, *e.g.*, *Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liability of States: Hearing on H.R. 1131 Before the Subcomm. on Courts, Intellectual Property and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong. 97 (1989) (CRCA Hearing) (former Register of Copyrights agrees there

[2] References in this brief to infringement by "States" also encompass infringement by state actors—including universities, school systems, hospitals, and prisons—that are cloaked with state sovereign immunity.

is "no doubt * * * that the 1976 [copyright] law not only covered States and State entities, but that" they "understood that they were covered by that law at that time"); S. Rep. No. 305, 101st Cong., 2d Sess. 7 (1990) (Senate Report).

Of course, under that regime States sometimes infringed the copyrights of musicians or other creators. See, *e.g.*, *Mills Music*, 591 F.2d at 1281 (noting the finding that a State infringed a musician's copyright "willful[ly]" and "with full notice and knowledge of plaintiff's copyrights") (citation omitted); *Johnson* v. *Univ. of Virginia*, 606 F. Supp. 321, 322 (W.D. Va. 1985) (addressing state entity's unauthorized copying of photographs taken at sporting events). But the existence of a monetary remedy helped to deter States from engaging in such infringement and gave them strong incentives "to negotiate settlements or to enter into licensing arrangements." *Hearing on Sovereign Immunity and the Protection of Intellectual Property Before the Senate Judiciary Comm.*, 107th Cong. 7 (2002) (Sovereign Immunity Hearing) (statement of James Rogan).

This Court's 1985 decision in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), which stated that a waiver of state sovereign immunity must be "unequivocal," changed the legal landscape. *Id.* at 241. Applying *Atascadero*, federal courts of appeals held that the Copyright Act did not clearly abrogate state sovereign immunity and that monetary relief therefore was not available against state infringers. See *Lane* v. *First Nat'l Bank of Boston*, 871 F.2d 166, 166-167 (1st Cir. 1989) (addressing misuse of compilations of financial data); *BV Eng'g* v. *Univ. of California, Los Angeles*,

858 F.2d 1394, 1395 (9th Cir. 1988) (addressing unauthorized copying of a computer program and manual); *Richard Anderson Photography* v. *Brown*, 852 F.2d 114, 116, 122 (4th Cir. 1988) (addressing unauthorized use of photographs created for a student prospectus). Courts expressed concern that the absence of such a monetary remedy would "allow states to violate the federal copyright laws with virtual impunity," but concluded that it was up to "Congress * * * to remedy this problem." *BV Eng'g*, 858 F.2d at 1400.

Congress quickly responded. It first commissioned a report from the Register of Copyrights to assess the scope of the problem. That report, issued in 1988, identified numerous instances of copyright infringement by the States, including many that had never come to court. See U.S. Copyright Office, *A Report of the Register of Copyrights: Copyright Liability of States and the Eleventh Amendment* 5-17, 91-97 (June 1988) (Register's Report), *available at* http://files.eric.ed.gov/fulltext/ED306963.pdf. The Report also discussed the deterrent effect of monetary relief for state infringement and the difficulties associated with the post-*Atascadero* change in the law. See *id.* at 8. Congress thereafter held extensive hearings, soliciting testimony from numerous copyright experts on the likely effect of *Atascadero* on States' willingness to infringe. See CRCA Hearing; *Copyright Remedy Clarification Act: Hearing on S. 497 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary*, 101st Cong. (1989). And committees of both the House and Senate issued reports summarizing their findings and conclusions based on those materials. See H.R. Rep. No. 282, 101st Cong., 1st Sess. 2 (1989) (House Report); Senate Report 4.

In 1990, against the backdrop of that legislative record, Congress enacted the CRCA to "abrogate State sovereign immunity to permit the recovery of money damages against States." House Report 2. The CRCA provides that "[a]ny 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 * * * for a violation of any of the exclusive rights of a copyright owner," for "importing copies of phonorecords in violation of" statute, or for "any other violation under" federal copyright law. 17 U.S.C. 511(a); see 17 U.S.C. 501(a). It also provides that in such a suit against a State "remedies * * * are available for the violation to the same extent as such remedies are available for such a violation in a suit against any public or private entity other than a State," including actual damages, statutory damages, costs, and attorneys' fees. 17 U.S.C. 511(b).

2. The legislative record of the CRCA—including the Register's Report, the hearings, and the committee reports—clearly demonstrates that willful state infringement of copyrights was a serious problem in 1990. The record likewise establishes that, based on the evidence before Congress, there was every reason to believe that the problem would worsen over time in the absence of a statute abrogating States' immunity and ensuring that they were subject to federal copyright claims for money damages. Finally, the record demonstrates that Congress considered the possibility of alternative remedies and enacted the CRCA in light of powerful evidence that such remedies were wholly insufficient to address state infringement.

a. When enacting the CRCA, Congress had before it numerous recent examples of copyright infringement, as detailed in judicial cases, expert testimony, and personal accounts. The number of examples was particularly notable given that this Court's decision in *Atascadero*, which changed the legal landscape and emboldened States to infringe copyrights with impunity, was fewer than five years old at the time that the CRCA's legislative record was being assembled. See CRCA Hearing 92.

One striking example involved a case in which a state entity had not only reproduced but also subsequently itself offered for sale educational materials for nurses that had been created and copyrighted by private companies, thus depriving those companies of both licensing fees and future sales to others. As the Register's Report explained, the copyright owner decided not to file suit upon learning that state sovereign immunity barred any monetary recovery (including costs or attorneys' fees) from the infringer. Register's Report 8. The Register concluded that the publisher's experience was emblematic of the position "in which many other publishers of educational materials f[oun]d themselves." *Ibid.*; see, *e.g.*, *id.* at 7-8 (discussing Texas prison's copying and distribution of other copyrighted materials).

Other examples involved performance of or other infringement of creative works, including musical compositions. The Report noted that a state college had infringed the copyright in musical compositions and that the company that held the copyright "dismissed an infringement action * * * rather than incur the burden and expense of contesting the defendant's claim of" sovereign immunity. Register's Report 7-8.

The Report also recounted instances in which state institutions showed copyrighted movies to an audience—and therefore publicly performed those movies, see 17 U.S.C. 106(4)—despite having been notified by the copyright holders of the violation of their federal rights. *Ibid.* Testimony at the hearings and reports from congressional committees provided yet further examples along the same lines. See, *e.g.*, CRCA Hearing 148-149; House Report 8.

All told, Congress heard about at least nine existing judicial cases and at least ten other instances of copyright infringement by individual States that had never come to court as a result of the copyright holder's inability to recover money damages after *Atascadero*. On the basis of that evidence, both the House Report and the Senate Report concluded that copyright infringement by States was a truly pressing problem in need of an immediate solution. See House Report 8 ("actual harm has occurred"); Senate Report 10 ("The Copyright Office concludes and the committee agrees that copyright owners have demonstrated that they will suffer immediate harm if they are unable to sue infringing States for damages.").

b. The legislative record of the CRCA also set forth many expert predictions that, in the absence of a monetary remedy against the States, copyright infringement by the States would only increase over time and the harm caused by that infringement would only worsen. As the former Register of Copyrights testified, States are "major users of copyrighted material" and will not "pay for something they can get free." CRCA Hearing 93-97. Accordingly, "[i]t does not take an oracle to predict what will happen unless you accept the

Supreme Court[']s invitation to abrogate State sovereign immunity for copyright infringement." *Id.* at 96; see *ibid.* ("[T]he longer the situation continues the worse it gets and the harder it is to change."); House Report 8. The House Report found on the basis of that evidence that harm would "continue to occur" in the future until such time as States were subject to some monetary penalty for their bad acts. See House Report 8.

c. Congress also heard testimony and saw other evidence that only a money damages remedy under the Copyright Act could address state infringement, as other remedies were categorically inadequate. In enacting the CRCA, Congress necessarily concluded that a gap in the law existed that alternative remedies could not fill.

i. First, as both the House Report and the Senate Report explained based on other portions of the legislative record, the possibility of an injunction against a state officer under *Ex parte Young*, 209 U.S. 123 (1908), cannot "provide adequate compensation or effective deterrence for copyright infringement." Senate Report 12; see *ibid.* (noting that injunctive remedies were particularly ineffective for "small companies" whose copyrights had been infringed by States); House Report 8 ("The Committee believes * * * that injunctive relief is not alone an adequate remedy."). After all, an injunction against a state officer barring copyright infringement is, by its nature, prospective only. See generally *Los Angeles Cty., California* v. *Humphries*, 562 U.S. 29, 31 (2010). Accordingly, a State that faces nothing more burdensome than an injunction can infringe with impunity until the infringement is detected, a lawsuit against a state official is brought,

and a court issues injunctive relief. States are thus highly unlikely to be deterred from infringement by the threat of an injunction. See Senate Report 12; CRCA Hearing at 99; Register's Report 6.

States also may be able to avoid or circumvent injunctions. A State that can freeload on the copyrights of another until a court prospectively bars that wrongdoing has a strong incentive to conceal its infringement for as long as possible. And because any injunction will issue only against particular state officers in their official capacities, and will of necessity cover only specifically defined infringing activity, even in the face of an injunction a State may be able to continue with infringement very similar to the activity that the injunction addresses—especially given that enforcement of an injunction against a state officer through a contempt sanction may be an onerous undertaking. See Register's Report 15.

Moreover, a copyright holder who brings suit for an injunction does not receive any compensation for infringing activity by the State that has already taken place, even if that activity has drained substantial value from the copyright. See Senate Report 6 n.7, 8, 12; cf. *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110, 128 (1948) (ruling in antitrust case that "injunction against future violations is not adequate to protect the public interest" because "[i]f all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact"), *overruled on other grounds*, *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984). As the Register's Report observes, such a remedy is thus particularly unsatisfying with respect to music, which typically is at its peak value

immediately upon release and loses value over time, such that the material damage to the copyright holder already has been done when an injunction finally issues. See Register's Report at 14 ("The lifespan of much of today's music is limited; by the time unauthorized use is discovered and an injunction obtained, the music has lost value and enjoining future use is of little worth.").

Finally, Congress plainly understood, and both the House and Senate Report expressly found, that for some copyright holders an injunction may not justify the cost of suit against a state infringer. The Copyright Act's provisions for money damages, costs, and attorneys' fees reflect a "delicate[] balance[]." House Report 11. The ability to recover attorneys' fees and costs, in particular, is often a deciding factor in whether a copyright holder can sue to enforce a copyright. See *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1986-1987 (2016) (discussing litigation incentives created by possibility of attorneys' fee award in copyright cases). Without any prospect of such recovery, a copyright holder may not be able to secure counsel willing to take on an infringement case in the first place, see CRCA Hearing 99, or may lack the resources to pursue the case to its conclusion, see Senate Report 10 ("A company that licenses performance rights for musical compositions withdrew an infringement suit against a community college because it was too expensive to contest."); *id.* at 12; CRCA Hearing 99. The evidence before Congress thus established that to relegate such parties to an injunctive remedy is to afford them no remedy at all.

ii. Second, the legislative record demonstrated that if monetary remedies for copyright infringement by

States are unavailable under federal law because of state sovereign immunity, state law is unlikely to provide a viable alternative remedy to which copyright holders can turn to recoup their losses or attempt to deter States from future infringement. See, *e.g.*, House Report 1; Senate Report 5-8.

First, with certain exceptions, Congress generally has provided for exclusive jurisdiction in federal courts over copyright claims, 28 U.S.C. 1338, and for preemption of state-law causes of action that protect copyright or an "equivalent right," 17 U.S.C. 301.[3] As Congress knew when considering whether to enact the CRCA, those statutory provisions can make it difficult for plaintiffs to seek relief for copyright infringement in state courts or under state law. Senate Report 5; *id.* at 8 (unavailability of state remedies means copyright holders are effectively "only able to seek relief in Federal court"); Register's Report 2; CRCA Hearing 98, 114-115.

Second, even assuming that a state-law claim can survive application of those federal provisions, there are numerous other reasons why such a claim may not provide effective relief. A state-law claim that is not preempted may require plaintiffs to conceive of new legal theories to attempt to protect their copyright rights under state law. In the case of widespread infringement, plaintiffs must undertake that task with respect to a number of different jurisdictions. Such untested theories may well fail. Moreover, as plaintiffs develop theories, States may amend their laws to subvert those

[3] Those limitations help ensure the national uniformity of copyright law, which is part of Congress's mandate under Article I's Copyright Clause. See, *e.g.*, *Richard Anderson Photography* v. *Brown*, 852 F.2d 114, 118 (4th Cir. 1988).

theories—and, more generally, they may assert broad-based sovereign immunity in their own courts. See generally *Alden* v. *Maine*, 527 U.S. 706, 712 (1999).[4] Notably, the legislative record of the CRCA does not include any examples of successful state-law claims remedying copyright infringement.

3. Congress's prediction at the time of the CRCA's enactment that infringement by States would only increase in the absence of a monetary remedy against States under federal copyright law—a prediction that was firmly grounded in evidence about how States had acted in the past— has proven to be correct.

a. After passage of the CRCA, Congress revisited the question of state infringement of copyrights in 2001 and 2002, when it commissioned a study by the General Accounting Office and held an additional hearing on the matter. See General Accounting Office, *Intellectual Property: State Immunity in Infringement Actions: Report to the Hon. Orrin G. Hatch, Ranking Minority Member, Senate Judiciary Comm.* (Sept. 2001) (GAO Report); Sovereign Immunity Hearing 7.

Those congressional proceedings were prompted by court of appeals decisions concluding that the CRCA was invalid, which in turn created a situation in which incidents of copyright infringement by States began to multiply. See, *e.g.*, *Chavez* v. *Arte Publico Press*, 204 F.3d 601, 607-608 (5th Cir. 2000). That conclusion of

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[4] In this very case, North Carolina amended its laws in 2015 to declare that "photographs, video recordings, or other documentary materials of a derelict vessel or shipwreck or its contents" are "public record[s]," regardless of whether those materials are copyrighted or whether the owners of the copyrights might otherwise have some state-law claim for relief based on the State's unauthorized use of the materials. Pet. App. 44a-45a.

invalidity relied on decisions of this Court finding that Congress lacked authority to abrogate state sovereign immunity under particular circumstances—although the holdings of those decisions did not address the CRCA itself or, more generally, Congress's power under Article I of the Constitution "[t]o promote the Progress of Science and useful Arts[] by securing for limited Times to Authors * * * the exclusive Right to their respective Writings." U.S. Const. art. I, § 8, cl. 8; see *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 63-64, 72 (1996) (holding that Congress lacked authority under Article I's Indian Commerce Clause to abrogate state sovereign immunity); *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627, 635-636 (1999) (holding that the Patent and Plant Variety Protection Remedy Clarification Act had not validly abrogated state sovereign immunity under Section 5 of the Fourteenth Amendment).

What Congress found in the course of the new proceedings confirmed the necessity of the CRCA. The GAO Report and the testimony at the hearing identified dozens of new incidents of state infringement in the wake of *Seminole Tribe* and subsequent decisions. For instance, Senator Leahy told the Committee about photographers who had been subjected to willful state infringement of copyrights in photographic works. Sovereign Immunity Hearing 90-91. His examples included a photographer who had licensed his copyrighted photographs to a State for many years, but who learned in 1998 that the State was abruptly repudiating an existing licensing contract and refusing to pay anything for use of the copyrighted materials. See *ibid.* Similarly, the software industry reported 77 recent incidents of "obvious and flagrant * * * piracy"

by States, including one in which a state hospital "all but admitted wrong doing" with respect to copyrighted software and "appeared potentially willing to settle * * * for hundreds of thousands of dollars in damages" before suddenly reversing its position and asserting that the CRCA's abrogation of sovereign immunity was invalid. *Id.* at 91-92.

As was true of the evidence Congress gathered in the process leading up to the CRCA's enactment, the evidence gathered by Congress in 2001 and 2002 emphasized that the specific examples presented were merely the tip of the iceberg. Those examples, experts said, "represent[ed] only a small number of the total accusations against States" and therefore were likely "evidence of a much larger problem." Sovereign Immunity Hearing 7.

Finally, Congress collected further evidence that remedies other than monetary damages under federal law were ineffective. The GAO Report identified only four copyright cases that had been filed in state court from 1985 to 2001, none of which had proceeded to judgment. GAO Report 22. That paucity of authority, and the various underlying difficulties with pursuing copyright infringement through state-law claims, led the Director of the U.S. Patent and Trademark Office to declare unequivocally to the Senate Judiciary Committee that "it is difficult to imagine any sufficient and practical alternative State remedy for State infringement of a copyright" and that "[r]equiring an intellectual property owner to resort to" novel legal theories "in State courts in order to remedy an infringement damages the integrity of the U.S. intellectual property system." Sovereign Immunity Hearing 8 (statement of

James Rogan); see *ibid.* (noting problem of States asserting immunity from suit in their own courts); GAO Report 23 (same).

b. In the period since Congress last focused attention on the empirical difficulties caused by the lower courts' invalidation of the CRCA's abrogation of State sovereign immunity, the problem of state copyright infringement has—as the Congress that enacted the CRCA understood would be the case—only accelerated.

Copyright suits against States do not "accurately reflect the amount of intellectual property infringement engaged in by state entities because," in the absence of any possibility of monetary recovery, "many—if not most—instances of intellectual property infringement never find their way into the courts." Sovereign Immunity Hearing 92 (letter from software industry association). Still, using the existence of such suits as a very rough marker for the relative amount of copyright infringement in which States have engaged over time, such infringement is now picking up speed at an alarming rate. Compare GAO Report 9-10 (identifying approximately 24 copyright suits against States between 1985 and 2001, a period of time during which the CRCA was mainly being enforced by courts), with Exhibit to Motion for Reconsideration, *Canada Hockey* v. *Texas A&M University Athletic Dep't*, No. 17-00181 (S.D. Tex. July 26, 2019), Docket No. 102-1 (collecting over 170 copyright cases filed against States between 2000 and 2019); see also, *e.g.*, Amicus Br. of Copyright Alliance at 6-7, *Allen* v. *Cooper*, No. 17-1522 (4th Cir. Oct. 20, 2017), Docket No. 44 (noting that of more than fifty instances of copyright infringement by States documented in the records of Getty Images, an

agency that distributes photographs and film footage, sixteen instances arose in the prior three years alone).

Many of the suits in question include allegations of egregious, willful infringement by state actors that consciously use immunity as a shield in profiting from copyright holders' original work. For instance, in *Nettleman* v. *FAU Board of Trustees*, 228 F. Supp. 3d 1303 (S.D. Fla. 2017), the plaintiff alleged that the chair of a state university department asked for permission to use copyrighted educational materials for free and, when the plaintiff denied that permission, simply used the materials anyway without paying anything for them. See *id.* at 1306; see, *e.g.*, *Jacobs* v. *Memphis Convention & Visitors Bureau*, 710 F. Supp. 2d 663, 665-666 (W.D. Tenn. 2010) (plaintiff granted limited license to state tourism department to use copyrighted photograph; after license expired, the tourism department made photograph available on the internet and permitted the public to download it for use in virtual postcards); see also, *e.g.*, *Rodriguez* v. *Texas Comm'n on the Arts*, 199 F.3d 279, 280 (5th Cir. 2000) (plaintiff alleged Texas sold license plates incorporating copyrighted design); *Bell* v. *Hess*, 2018 WL 1241991, at *1 (S.D. Ind. Mar. 9, 2018) (plaintiff alleged university medical school downloaded copyrighted photograph and used it in advertisements); *Coyle* v. *Univ. of Kentucky*, 2 F. Supp. 3d 1014, 1016 (E.D. Ky. 2014) (plaintiff alleged university unlawfully used his photographs of athletes for "various commercial activities"); *Hairston* v. *N. Carolina Agric. & Tech. State Univ.*, 2005 WL 2136923, at *2 (M.D.N.C. Aug. 5, 2005) (plaintiff alleged university included copyrighted photograph in football programs "offered and sold at the university's football games").

The suits also demonstrate how seeking injunctive relief alone, rather than monetary damages, can often be a futile exercise. Small business owners almost always discover infringement well after the fact. See, *e.g.*, *Bell*, 2018 WL 1241991, at *4; *Hairston*, 2005 WL 2136923, at *8. In addition, plaintiffs are often unable to identify the precise individual responsible for the infringement, or are unaware of the specific facts that would tie that particular defendant to what is otherwise clear institutional wrongdoing, resulting in dismissal of the request for injunctive relief. See, *e.g.*, *Coyle*, 2 F. Supp. 3d at 1020-1021 (finding no injunction permissible where plaintiff failed to allege enough specific involvement by the particular individual defendants he chose to sue).

Finally, in the instances in which wronged copyright holders have sought relief under state-law causes of actions, they have been notably unsuccessful. Courts generally have held those claims to be preempted by federal copyright law, see, *e.g.*, *Issaenko* v. *Univ. of Minnesota*, 57 F. Supp. 3d 985, 1022 (D. Minn. 2014); *Mktg. Info. Masters, Inc.* v. *Board of Trustees of California State Univ. Sys.*, 552 F. Supp. 2d 1088, 1098 (S.D. Cal. 2008), or have otherwise dismissed them as noncognizable, see, *e.g.*, *Univ. of Houston Sys.* v. *Jim Olive Photography*, 2019 WL 2426301, at *1, *12 (Tex. App. June 11, 2019) (dismissing inverse condemnation claim under Texas law; claim was based on state university's downloading of copyrighted photograph (which the photographer took while suspended from a helicopter over Houston) from the website of a professional photographer without permission, removal of copyright notice from the photograph, and subsequent use and reuse of the copyrighted work).

Those decisions cement the conclusion that the CRCA is a necessary solution to a pressing problem. Without the prospect of facing monetary damages for copyright infringement, States have little or no incentive to respect copyrights and increasingly simply refuse to do so.

II. This Court's Decision On The Validity Of The CRCA Will Have Critically Important Implications For The Music Industry And For Other Copyright Holders

As this Court observed in *Washingtonian Publishing Co.* v. *Pearson*, 306 U.S. 30 (1939), a copyright is of no "value" to its owner if it cannot be effectively enforced in the courts. *Id.* at 39-40. The legislative record assembled by Congress in enacting the CRCA, and the subsequent experience of state infringement in the absence of enforcement of the CRCA by the lower courts, strongly indicate that the CRCA is a valid abrogation of state immunity both under Article I and under Section 5 of the Fourteenth Amendment. See pp. 26-33, *infra*. More practically, those facts also indicate that a tremendous amount turns on this Court's decision in this case—for all copyright holders in general, and for the music industry in particular.

The rise in state infringement engendered by decisions invalidating the CRCA is particularly problematic for music creators and owners. Such creators have suffered from state infringement in the past and, if the decision of the court below is affirmed, they are likely to do so again in the future and thus to continue to have their rights devalued. See, *e.g.*, *Mills Music*, 591 F.2d at 1280; Sovereign Immunity Hearing 46 (statement of Prof. Paul Bender) ("Copyrighted software, music, motion pictures, sound recordings and other

works are used by many State departments and agencies."); Senate Report 12 (for "[s]ome copyrighted materials, such as music," the "only meaningful remedy for infringement is damages"); *id.* at 9 ("creators and producers" of "music" are "hurt" without federal damages remedy against state infringement).

As an initial matter, the absence of an adequate monetary remedy is particularly pernicious in the context of music because of the nature of the copyrighted works. Digital piracy of sound recordings and musical works, including by States, can be quick and easy to accomplish and is especially prevalent at the time of initial release. See, *e.g.*, Sovereign Immunity Hearing 46 (statement of Prof. Paul Bender) (advances in internet technology "now make it possible for a university to distribute copies or performances of copyrighted works to unlimited numbers of faculty, students, and even members of the general public"). That is precisely the period during which music is typically at its highest earning potential. Thus, "by the time unauthorized use is discovered and an injunction obtained," it may well be that "the music has lost value and enjoining future use is of little worth." Register's Report 14; see Sovereign Immunity Hearing 14 (statement of Register of Copyrights); Senate Report 12.

More generally, for many music creators and owners, including *amici*'s members, the value of the enterprise in which they are engaged lies in large part in their copyrights. When those copyrights cannot be meaningfully enforced against the States, the resulting harm is serious indeed. Cf. *Washingtonian Publishing Co.*, 306 U.S. at 39-40. The financial viability of the music industry is threatened by unauthorized exploitation of copyrighted works, see, *e.g.*, Michael D.

Smith & Rahul Telang, *Assessing the Academic Literature Regarding the Impact of Media Piracy on Sales* 1 (Aug. 2012), *available at* https://www.riaa.com/reports/assessing-the-academic-literature-regarding-the-impact-of-media-piracy-on-sales/, which amounts to stealing the creative output of recording artists and songwriters and giving nothing in return. If state entities are allowed to trample music copyrights without any monetary consequence, and to do so at what is a disturbingly mounting pace, then significant value will be drained from those copyrights and from the works they are meant to protect.

State universities, in particular, are well positioned to provide young adults—who are heavy consumers of music, especially new music, see IFPI, *Music Consumer Insight Report* 7 (2018), *available at* https://www.ifpi.org/downloads/music-consumer-insight-report-2018.pdf—with free copyrighted music for which the industry would otherwise receive compensation, see Senate Report 11. Music plays an integral role in numerous state university activities. University athletic departments commonly play copyrighted music at sports arenas during games to increase the crowd's excitement. Radio stations operated by state universities may broadcast copyrighted recordings to the community. University theaters, music groups, and music departments often need copies of sheet music and lyrics. Such activities are difficult to halt by injunction, particularly if they are ephemeral public performances. Cf. *Broadcast Music, Inc.* v. *Columbia Broadcasting Sys.*, 441 U.S. 1, 4-5 (1979) (observing that the American Society of Composers, Authors, and Publishers was formed "because those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a

practical matter it was impossible for the many individual copyright owners to * * * detect unauthorized uses"). And those activities derive substantial value from music in a manner that is no different from similar activities conducted by private universities, which might be exposed to damages in a copyright lawsuit. Copyright owners should be entitled to fair compensation for the use of their music by state universities as well as by private ones. See House Report 10 ("anomalous and unjustified" for state universities to be able to infringe with impunity while private educational institutions may not).

Moreover, by refusing to respect copyrights in music (or other creative works), state universities send clear messages to their students that copyrights are not to be taken seriously. That encourages yet additional infringement. See, *e.g.*, Alisa Roberts, *Congress' Latest Attempt to Abrogate States' Sovereign Immunity Defense Against Copyright Infringement Actions: Will IPPRA Help the Music Industry Combat Online Piracy on College Campuses?*, 12 DePaul J. Art, Tech. & Intell. Prop. L. 39, 46 (2002); *Reiner* v. *Canale*, 301 F. Supp. 3d 727, 730-731 (E.D. Mich. 2018).

Indeed, the harm arising from uncompensated copyright infringement by the States extends even further outward, to circumstances in which States have no involvement whatever. As a former Register of Copyrights explained in connection with the enactment of the CRCA, "[w]hen one group, whether rightly or wrongly, thinks it has found a loophole that gives its members a free copyright ride, * * * the result inevitably is a miasmic atmosphere of disorder and lawlessness that tears the fabric not only of the copyright law but of the disciplines and enterprises involved." CRCA

Hearing 96; cf. *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913, 929 (2005) (suggesting that "ease of copying songs or movies" that are copyrighted "foster[s] disdain for copyright protection").

That tearing of the fabric of copyright law ultimately undermines the incentive to make music (and other creative works) in the first place. See *Kirtsaeng*, 136 S. Ct. at 1982 (objective of copyright law is to "enrich[ ] the general public through access to creative works") (citation omitted); Joseph Story, III *Commentaries on the Constitution of the United States* 49 (1833) ("right of depredation and piracy of * * * copyright" means there is "little inducement to prepare elaborate works for the public"); see also Senate Report 9-10 (discussing "critical[] impair[ment]" of incentives for "creators and producers of * * * music" and other creative works); Sovereign Immunity Hearing 14 (statement of Register of Copyrights) (stating that when there is "diminution of incentives to create" the "American economy and culture will be poorer for it").[5] And by harming various industries, including the music industry, that center around creating, distributing, or producing creative materials, the undermining of copyright protections damages the economy as a whole, on which those industries have an outsized impact. See Stephen E. Siwek, *Copyright Industries in the U.S. Economy* 2-4 (2014), *available at* https://

[5] Moreover, such disorder can affect copyright holders' rights not only in the United States but also throughout the world, as failure to protect copyrights sufficiently in this country may be a violation of U.S. treaty obligations and may "encourage disregard for copyright abroad." Senate Report 12; see, *e.g.*, CRCA Hearing 56; GAO Report 29.

www.riaa.com/wp-content/uploads/2015/09/2014_CopyrightIndustries_USReport.pdf.

III. The CRCA Is A Valid Exercise Of Congress's Power

A. Congress Validly Abrogated State Sovereign Immunity Under the Fourteenth Amendment

The extensive record of state copyright infringement (including willful infringement) set forth above and the dire negative consequences of allowing that infringement to continue without a monetary remedy make clear that the CRCA is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment.

Congress has the power, under Section 5 of the Fourteenth Amendment, to pass legislation to "remedy and to deter violation of rights guaranteed thereunder," *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 727-728 (2003), which include the right to be free from deprivations of property without due process of law, *Florida Prepaid*, 527 U.S. at 642, and from unconstitutional takings of "private property * * * for public use, without just compensation," *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 481 n.10 (1987). To constitute a valid exercise of Congress's power under Section 5, a statute must exhibit a "congruence and proportionality" between the injury to be "prevented or remedied" and the "means adopted to that end." *Tennessee* v. *Lane*, 541 U.S. 509, 520 (2004) (quoting *Boerne*, 521 U.S. at 520).

In *Florida Prepaid*, this Court concluded that the Patent and Plant Variety Protection Remedy Clarifi-

cation Act (PRCA) could not be "sustained as legislation enacted to enforce the guarantees of the Fourteenth Amendment's Due Process Clause." 527 U.S. at 630. That was because, in this Court's estimation, the legislative record supporting Congress's enactment identified almost no examples of patent infringement by States, *id.* at 640, almost no examples of intentional infringement, *id.* at 643, and "barely considered the availability of state remedies," *ibid.*; see *Lane*, 541 U.S. at 520 (referring to that record as containing a "virtually complete absence" of relevant evidence). Moreover, testimony that was part of the legislative record of the PRCA's enactment "acknowledged that 'states are willing and able to respect patent rights'" and affirmed that "'[t]he fact that there are so few reported cases involving patent infringement claims against states underlies the point.'" 527 U.S. at 640 (citation omitted).

As detailed above, the legislative record of the CRCA is very different indeed. Congress amassed a record of existing violations of copyright law by the States, including both violations reflected in reported suits and violations that had never been the subject of a lawsuit. That record amply established that, far from being willing and able to respect copyrights, States were consciously flouting them. See pp. 8-11, *supra*. On that basis, both the House and Senate Reports expressly concluded—having discussed and weighed all of the evidence before the relevant committees—that "actual" and "immediate" harm was occurring that cried out for a remedy. House Report 3-4; Senate Report 10.

Although the existing record of violations was sufficient to support the CRCA, Congress also had a

strong basis for believing that the CRCA was necessary to deal with an even more serious *anticipated* problem. As this Court has explained, Congress can exercise its power under the Fourteenth Amendment to "deter[] *or* remed[y] constitutional violations." *Boerne*, 521 U.S. at 518; see, *e.g.*, *Florida Prepaid*, 527 U.S. at 639 (asking whether the PRCA was "remedial or preventive legislation"); *Hibbs*, 538 U.S. at 727-728 ("Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.").

In *Florida Prepaid*, this Court stated in passing that the notion that "patent infringement by States might increase in the future" was insufficient because it was "speculative." 527 U.S. at 641. But while a prediction based on a lack of current evidence may under some circumstances be "speculative," because there is no factual basis for making the prediction, that cannot possibly be said about the prediction reflected in the CRCA's legislative record: that the problem of state copyright infringement would continue to increase. That prediction did indeed have a basis in the evidence. Although the change in law that empowered the States to assert sovereign immunity against copyright claims was only a recent one, there was already a strong record of the States willfully and lawlessly disregarding copyrights in order to use and profit from others' creative output. And the States' incentives for continuing to do so, and to do so more frequently, were abundantly clear.

Moreover, subsequent experience has proven that the prediction was *correct*, turning it from an evidence-based projection about the future into an indisputable fact. This Court has looked to evidence that Congress

did not itself review, including evidence that post-dated Congress's enactments, in determining whether a congressional act can be considered remedial, preventative legislation. See *Lane*, 541 U.S. at 524-525 (noting that judicial "decisions also demonstrate a pattern of unconstitutional treatment in the administration of justice," and citing numerous such decisions that post-dated the 1990 enactment of the Americans with Disabilities Act); cf. *Shelby Cty., Alabama* v. *Holder*, 570 U.S. 529, 550-551 (2013) ("[A] statute's 'current burdens' must be justified by 'current needs.'"). After all, "[j]udicial deference" is based not merely "on the state of the legislative record Congress compiles." *Boerne*, 521 U.S. at 531 (quoting *Oregon* v. *Mitchell*, 400 U.S. 112, 207 (1970) (opinion of Harlan, J.)). Here, given the strength of the legislative record, the evidence post-dating the enactment of the CRCA plays only a confirmatory role.

Finally, unlike the legislative record that this Court considered in *Florida Prepaid*, see 527 U.S. 643-644, the legislative record of the CRCA shows that Congress paid attention both to the question whether State infringement was willful (it was) and to the question whether alternative remedies were adequate (they were not).[6] See pp. 9-10, 11-15, *supra*. Thus, the

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[6] That conclusion about the inadequacy of state remedies is not surprising given States' historical lack of participation in the protection of copyrights, see generally U.S. Const. art. I § 8, cl. 8, which obviates any concern about encroaching into the sphere protected for States by the Tenth Amendment, see *Boerne*, 521 U.S. at 523. In any event, under this Court's recent decision in *Knick* v. *Township of Scott*, 139 S. Ct. 2162 (2019), the adequacy of state remedies is not relevant to Congress's authority to exercise its Section 5 powers with respect to the unconstitutional taking of copyrights. Under *Knick*, an unconstitutional taking occurs

branch of government constitutionally tasked with securing copyrights properly concluded under Section 5 that only the congressional action reflected in the CRCA could preserve the "delicate balance," *Eldred* v. *Ashcroft*, 537 U.S. 186, 205 n.10, 212 (2003) (citation omitted), necessary to ensure protection of copyright holders and the public.

B. Congress's Determination That States Should Be Subject To Federal Copyright Suits For Money Damages Is Within The Scope Of The Article I Copyright Power

Section 5 of the Fourteenth Amendment is an independently sufficient basis for upholding the validity of the CRCA. But that statute can also be upheld on an additional ground: Congress's determination that States lack immunity from federal copyright claims for damages is within the scope of that body's Article I power.

In *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996), this Court held that Congress could not abrogate state sovereign immunity pursuant to Article I's Indian Commerce Clause. See *id.* at 47. The Court stated in dicta that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 72-73. And the Court suggested, again in dicta, that its analysis might sweep in the Copyright and Bankruptcy

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when "the government takes * * * property without paying for it," regardless of whether a state remedy is available. *Id.* at 2167.

Clauses of Article I, neither of which was at issue in the case. See *id.* at 72 n.16.

In *Central Virginia Community College* v. *Katz*, 546 U.S. 356 (2006), this Court tackled a question never addressed in this Court's previous decisions: whether Congress can abrogate state sovereign immunity under Article I's Bankruptcy Clause. See *id.* at 363. The Court acknowledged that its previous decisions "reflected an *assumption* that the holding in [*Seminole Tribe*] would apply to the Bankruptcy Clause." *Ibid.* (emphasis added). Nevertheless, the Court made clear that the relevant discussion in *Seminole Tribe* constituted "dicta" because it was based on an "erroneous" assumption that "was not fully debated." *Ibid.* The Court then analyzed the history of the Bankruptcy Clause and concluded that, given the importance placed on uniformity in bankruptcy law at the time of the Founding, the Clause was intended "to authorize limited subordination of state sovereign immunity in the bankruptcy area." *Id.* at 362-378.

There is little question that the Bankruptcy Clause and the Copyright Clause are analogous to each other in that regard. This Court has treated the clauses together in the context of sovereign immunity analyses. See*, e.g.*, *Seminole Tribe*, 517 U.S. at 72 n.16 (addressing in dicta whether "the bankruptcy, copyright, and antitrust laws" can be enforced against the States, and noting that "the copyright and bankruptcy laws have existed practically since our Nation's inception"). And the dissenters in *Katz* noted that the Copyright Clause would be a valid source of abrogation power under the majority's analysis because—"no less than the Bankruptcy Clause"—it was "motivated by the Framers' desire for nationally uniform legislation." 546 U.S. at

384-385 (Thomas, J., dissenting); see, *e.g.*, *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989); Story, *supra*, at 48-49 (lack of uniformity in copyright law could "impair" or "even destroy the value of" copyrights). The CRCA's legislative record acknowledges the importance of that uniformity to the effective operation of the copyright laws. See, *e.g.*, House Report 9-11; Senate Report 12 (CRCA must be enacted "if the uniformity of the original Copyright Act is to be restored").

The Copyright Clause is also analogous to the Bankruptcy Clause in another respect: "critical features" of the Copyright Clause, *Katz*, 546 U.S. at 363-364, necessitate that copyright holders be able to bring suits for damages against infringing States. That Clause grants Congress the power to "[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." U.S. Const. art. I, § 8, cl. 8 (emphases added); see *Wheaton* v. *Peters*, 33 U.S. 591, 660 (1834). But Congress could not carry out that power effectively if States were immune from suit. There is no secure, exclusive right when, in fact, a whole category of powerful infringers—States and their various arms—can impinge on the right at will without fear of any meaningful consequence. Indeed, real-world experience with just such a copyright regime makes that amply clear. See pp. 15-21, *supra*. And in the absence of a secure, exclusive right, the "Progress of Science and useful Arts" will be impeded rather than "promot[ed]," U.S. Const. art. I, § 8, cl. 8, as creators lose the incentive to expend the time, money, and energy required to create new works.

In short, both uniformity of copyright law and exclusivity and security of copyrights are critical to Congress's Article I copyright power, and have been so since the adoption of that constitutional provision. The only way to ensure that copyright remains uniform is to provide for suits under federal law, and the only way to ensure that copyright is exclusive and secure is to make every infringer subject to suit for damages. Just as in *Katz*, then, the only possible conclusion is that "States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings," 546 U.S. at 377, pursuant to the Copyright Clause. See Pet'r Br. 20-31.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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