

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 *AMICUS CURIAE*
THE SOFTWARE & INFORMATION INDUSTRY
ASSOCIATION IN SUPPORT OF PETITIONERS**

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INTERESTS OF AMICUS CURIAE

The Software & Information Industry Association (“SIIA”) is the principal trade association for the software and digital content industry.¹ SIIA’s members routinely distribute and license software, databases, and educational technology to state entities. We supported enactment of the Copyright Remedy Clarification Act (“CRCA”), Pub. L. No. 101-553, 104 Stat. 2749 (1990), and filed a brief in *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999), to support congressional power to abrogate sovereign immunity in cases of copyright infringement. We also frequently confront willful copyright infringement committed by states. *E.g.*, *Oracle Am., Inc. v. Or. Health Ins. Exch. Corp.*, 145 F. Supp. 3d 1018 (D. Or. 2015), *appeal voluntarily dismissed*, No. 15-35950 (9th Cir. filed Sept. 20, 2016). *Amicus* thus brings an informed and experienced perspective to the issue presented to the Court.

SUMMARY OF ARGUMENT

SIIA’s members comprise over 800 technology and content companies that license and sell a variety of copyrighted works including software, business to business publications, scientific and medical journals, financial market information, and educational technology products. They frequently license access

¹ No party or counsel for any party authored any part of this brief or made a monetary contribution intended to fund the preparation and submission of this brief. All parties filed blanket consent for submission of *amici* briefs. *Amicus* informed the parties on July 29, 2019 it intended to file this brief on August 13, 2019. A list of SIIA’s members is available at <https://www.siiia.net/About/SIIA-Member-Companies>.

to their products and works to state entities. In the years since the constitutionality of the CRCA was drawn into question, these members witnessed an increase in infringement and experienced considerable difficulty in enforcing their property rights against state entities.

In this case, the Fourth Circuit took the extraordinary step of declaring the CRCA, and thus 17 U.S.C. § 511, unconstitutional *in all cases*, including those – like this one – that present egregious constitutional violations by state defendants. With respect to its analysis of the Fourteenth Amendment, the Fourth Circuit made multiple legal errors.

By holding that Congress must expressly invoke section 5 of the Fourteenth Amendment to exercise power thereunder, the appellate court acted contrary to prior opinions of this Court. These include *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948), which held that the extent of Congress' power does not depend on whether Congress recited a specific provision of the constitution in legislative reports. Federalism mandates that courts will not infer legislative intent to subject a state to federal jurisdiction in the absence of express language in a statute. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-46 (1985). It does *not* require congressional intonation of a specific enumerated power. This Court has never invalidated Congress' actions solely for formalism's sake.

Here, Congress also properly used its power under section 5 of the Fourteenth Amendment to pass

the CRCA.² Congress recorded and responded to a pattern of existing and predictable abuses of copyright owners by the states. Congress acted pursuant to documentation of rapidly increasing state infringements and swift technological change: its findings are due deference. In addition, Congress' drafting of the statute did not need to be as surgically precise as the Fourth Circuit believed. Truly negligent copyright infringement is rarely litigated due to (i) the comparatively narrow scope of copyright's reach and (ii) numerous statutory and common law defenses, limiting doctrines, remedies curbs, and notice requirements that do not exist in the patent context.

Finally, and perhaps most important, the CRCA is constitutional *as applied* to state actors – like the State of North Carolina here – that intentionally deprive copyright owners of their property without due process of law. As this Court held in *United States v. Raines*, 362 U.S. 17, 21 (1960), “one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.” Indeed, Congress does not even need a written legislative record of historical abuses to pass a statute that enforces the provisions of the Fourteenth Amendment against only intentional deprivations of property. See *United States v. Georgia*, 546 U.S. 151, 158 (2006);

² Section 1 of the Fourteenth Amendment provides that no State shall “deprive any person of . . . property . . . without due process of law.” Section 5 provides that “[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga., 633 F.3d 1297, 1315 (11th Cir. 2011). Here, there is little doubt about the alleged intentionality of the state's infringement, which was supported by detailed factual allegations. The CRCA is constitutional as applied to the state's actions.

Accordingly, this Court should reverse the Fourth Circuit's decision and remand for further proceedings.

ARGUMENT

I. In SIIA's Experience, Due Process Violations By States Are Widespread.

The Fourth Circuit should not have declared the CRCA unconstitutional in all of its applications. *Amicus* agrees with Petitioners that Congress had the power to pass the CRCA under Article I section 8, clause 8 of the Constitution (*i.e.*, the Copyrights and Patents Clause). *See* Pet'rs Br. at 20-38 (citing *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 377 (2006)). *Amicus* also agrees with Petitioners that the Fourteenth Amendment supported the passage of the statute, *e.g.*, Pet'rs Br. at 38-62, and they write to emphasize the effect of the lower court's decision on their constitutionally protected property rights.

The Fourth Circuit's holding is of particular importance to SIIA because its members' property has been the subject of frequent state deprivation. For the last three decades, SIIA's members have been at the forefront of the digital revolution. *Amicus* actively pursues a campaign to protect and enforce the intellectual property rights of participating software and content companies: one that combines

enforcement of intellectual property rights with public and government education in order to be effective. Over the years, SIIA has uncovered tens of thousands of instances of copyright infringement in the private and public sectors.

The program generally works as follows. When *Amicus* learns of infringing activity and confirms its credibility, it, or the relevant member company, may send a cease-and-desist letter and take other actions to put the putative defendant on notice that its conduct is infringing. These matters often settle, quickly and quietly – the defendant pays for the software that it has infringed and legalizes its use going forward. When a defendant refuses to do so, any infringements taking place after receiving such notice are more than likely based on a motive to benefit commercially without paying the requisite price. *See, e.g., Wall Data, Inc. v. L.A. Cty. Sheriff's Dep't*, 447 F.3d 769, 779 (9th Cir. 2006). Private parties who do so, eventually, pay a litigation price for their misconduct. *See* 17 U.S.C. § 504. States do not.

After the U.S. Department of Justice (“DOJ”) declined to defend the CRCA as a valid exercise of congressional power beginning in 1999,³ the amount of reported state infringements increased substantially. In the wake of this Court’s decision in *Florida Prepaid*, SIIA identified for Congress seventy-seven instances of infringement by state

³ *See* Letter from Attorney General Janet Reno to Speaker of the House of Representatives Dennis Hastert, Re: *Chavez v. Arte Publico Press* (Oct. 13, 1999), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/10-13-1999.pdf> (last visited Aug. 9, 2019).

entities.⁴ Although some cases did resolve, SIIA reported multiple incidents in which states refused to pay compensation for their past unauthorized use of copyrighted works based on the states' assertion of Eleventh Amendment immunity from damages suits.⁵ SIIA and its members simply stopped pursuing actions against state entities. Nonetheless, given the ease and scale at which copyright infringement was and is committed in the digital environment, *Amicus* is quite sure that the reported infringements represented just a fraction of existing intentional infringement.

As technology changed and networked technology emerged, many of SIIA's members transitioned to internet technology, cloud computing, and software as a service. Today, *Amicus*' members create software, databases, and information solutions for nearly every field of commercial and academic endeavor. Their products and services spark the economy, improve modern life, and set the pace for the digital age. These companies create numerous products that help state entities to perform their functions. They license those products to state

⁴ See General Accounting Office, *Intellectual Property: State Immunity in Infringement Actions: Report to the Hon. Orrin G. Hatch, Ranking Minority Member, Senate Judiciary Comm.* 1-2 (Sept. 2001); see also *Hearing on Sovereign Immunity and the Protection of Intellectual Property Before the Senate Judiciary Comm.*, 107th Cong., 2d Sess., 91-93 (2002) ("2002 Hearing").

⁵ Even worse, states warned SIIA members of potential retribution for trying to protect their rights. See 2002 Hearing at 54 n.89 (statement of Paul Bender: "SIIA reports that on more than one occasion, a State threatened legal sanctions against SIIA for attempting to either: (1) enjoin further infringing acts; or (2) obtain damages for unauthorized use of software.").

entities ranging from educational institutions to administrative and law enforcement agencies.

In many cases, those products are well-known versions of off-the-shelf operating systems, word processors, and spreadsheet programs. Others, however, involve expensive and complex implementations of bespoke software and database solutions: SIIA's educational members often license both software and electronic textbooks to state educational institutions all over the country. Still other agreements involve detailed licenses of huge databases of scientific, technical and medical journals, permitting state university consortia to access centuries' worth of knowledge from individual student and faculty computer terminals. Non-compliance with these kinds of license agreements frequently results in huge losses from infringement.

As a result of the appellate court's decision, states may compete in the intellectual property marketplace under two different sets of rules. They may take full advantage of their own intellectual property rights, earning millions in revenue from those protections,⁶ while refusing any consequences when they deprive other authors and innovators of their constitutionally protected property. See H.R. Rep. No. 101-282, pt. 1, 101st Cong., 1st Sess., at 11 (1989) ("Unless state institutions may be held liable, "the University of California at Los Angeles could sue

⁶ See, e.g., Tim Peeler, *NC State Makes Top 25 for Technology Transfer*, NC State University (Apr. 20, 2017), <https://news.ncsu.edu/2017/04/nc-state-makes-top-25-for-technology-transfer/>; Tim Peeler, *NC State Jumps to No. 80 Worldwide for U.S. Patents*, NC State University (June 6, 2017), <https://news.ncsu.edu/2017/06/nc-state-jumps-to-no-80-worldwide-for-u-s-patents/>.

its cross-town counterpart, the University of Southern California, for the full array of copyright remedies, but USC could sue UCLA only for injunctive relief.”). And, if affirmed by this Court, the result will be even more frequent abuses by states, including willful deprivations of authors’ property rights. See *Allen v. Cooper*, 244 F. Supp. 3d 525, 535 (E.D.N.C. 2017), *rev’d*, 895 F.3d 337, 343 (4th Cir. 2018) (noting significant number of lawsuits against states even with the backdrop of immunity defenses). Congress passed the CRCA against a backdrop of intentional infringement and looming technological change to prevent exactly this result.

II. There Is No Requirement That Congress Expressly Invoke Its Fourteenth Amendment Power.

Congress may abrogate state sovereign immunity by following two well-established rules: (1) it must make “its intention to abrogate unmistakably clear in the language of the statute” and (2) it must act “pursuant to a valid exercise of its power under [section] 5 of the Fourteenth Amendment.” *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003) (citing *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001)); *Allen*, 244 F. Supp. 3d at 533. The CRCA, 17 U.S.C. § 511(a), easily satisfies the first prong of the test by way of phrases like “shall not be immune.” *Fla. Prepaid*, 527 U.S. at 635. There is no dispute about the clarity of Congress’ intent. *Allen*, 895 F.3d at 347.

Nevertheless, the Fourth Circuit facially invalidated the statute using a new, additional requirement, purportedly drawn from *Florida Prepaid*, 527 U.S. 627, that requires Congress to

additionally “make clear that it is relying on § 5” by including some *express* “invocation of authority” in either the text of the statute or its legislative history. *Allen*, 895 F.3d at 349. This requirement was invented from whole cloth. Although respect for principles of federalism requires Congress to make clear its intent to allow private litigants to sue states for damages in federal courts, *Atascadero*, 473 U.S. at 242-46, this Court has repeatedly declined to require a similar clear and express recital of the constitutional powers Congress seeks to exercise. *See, e.g., Woods*, 333 U.S. at 144; *EEOC v. Wyoming*, 460 U.S. 226, 244 n.18 (1983); *Nat’l. Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012).⁷

The *Atascadero* rule is no monument to abstract formalism, but rather a necessary consequence of the dual sovereignty system: courts should not infer a congressional desire to abridge sovereign dignity in the absence of express legislative direction. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). But once Congress’ intent is clear, federalism-based concerns decrease. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 (1976) (“As ratified by the States after the Civil War, [the Fourteenth] Amendment quite clearly contemplates limitations on their authority.”). It is thus sensible for a court to say that it will not infer intent to apply a statute against a state in the absence

⁷ Regardless, Congress did refer to its power under the Fourteenth Amendment while working on the CRCA. *E.g.*, H.R. Rep. No. 101-282, pt. 1, at 7 (1989) (“Congress’ power under the Fourteenth Amendment has been repeatedly upheld”). Congress simply focused more on its Article I power, given this Court had not yet established the rule articulated in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

of express statutory guidance, but it is a far different matter for a court to say that *even where that intent is clearly stated*, the statute is invalid unless a legislative report states which power Congress intended to exercise. *Cf. Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (“A ruling of unconstitutionality frustrates the intent of the elected representatives of the people.”).

Florida Prepaid does not support the Fourth Circuit’s rule. *See* 527 U.S. at 642 n.7. And it certainly did not overrule the holdings of *EEOC* and *Woods*: where Congress passes legislation under the Fourteenth Amendment, a court need only “be able to discern” some purpose or factual predicate in support. *EEOC*, 460 U.S. at 244 n.18 (Congress need not “recite the words ‘section 5’ or ‘Fourteenth Amendment’” in order to address due process concerns.). This Court analyzed implicit indicia to sustain sources of congressional authority in both *Florida Prepaid* and *EEOC*, and no Supreme Court precedent holds or even suggests that a separate express invocation is required. Of particular import here, *EEOC* held that the lower court had “erred [when it read prior Supreme Court precedent] as holding that Congressional action could not be upheld on the basis of § 5 unless Congress ‘expressly articulated its intent to legislate under § 5[.]’” *Id.* The Fourth Circuit below made the same error, and should be reversed.

In short, when it enacted the CRCA, Congress made its intent unequivocal. Thus, the relevant inquiry remains simply if the Fourteenth Amendment will support the statute or not. As discussed in detail below, Congress more than fulfilled this requirement

because the relevant committees articulated a clear legislative purpose and generated a robust factual record to support the exercise of its section 5 power.

III. Congress Properly Exercised Its Fourteenth Amendment Power By Passing The CRCA.

The CRCA represents a valid exercise of Congress' Fourteenth Amendment power to remedy property deprivations that occur without due process. *Allen*, 244 F. Supp. 3d at 534-35. In this sphere, Congress has "wide latitude" in exercising its discretion. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). However, there must be a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* In other words, "for Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." *Fla. Prepaid*, 527 U.S. at 639.

This Court's section 5 jurisprudence requires legislative tailoring, but not perfection. "Congress must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions," *Tennessee v. Lane*, 541 U.S. 509, 520 (2004), including property deprivations. Moreover, "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *Id.* at 518. And its findings and predictions, particularly with regard to the effects of technological change, are uniquely ill-suited to second-guessing by the courts and are due

deference. See *Eldred v. Ashcroft*, 537 U.S. 186, 206-08 (2003) (“[W]e are not at liberty to second-guess congressional determinations and policy judgments” concerning “demographic, economic, and technological changes[.]”); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 665 (1994) (“[C]ourts must accord substantial deference to the predictive judgments of Congress,” especially those that address “technical, rapidly changing” industries and are based on “deductions and inferences for which complete empirical support may be unavailable” given, *inter alia*, the subject’s complexity); *Carpenter v. United States*, 138 S.Ct. 2206, 2233 (2018) (Kennedy, J., dissenting) (“[H]ow property norms and expectations of privacy form around new technology, often will be difficult to determine during periods of rapid technological change. In those instances ... it is wise to defer to legislative judgments[.]”). The CRCA represents an appropriate, remedial attempt to protect long-recognized property rights.

A. Exclusive Rights Established By The Copyright Act Are Constitutionally Protected Property.

From the earliest years of federal copyright protection, courts have routinely characterized the interest of a copyright owner as a species of property.⁸

⁸ See, e.g., *Davoll v. Brown*, No. 3662, F. Cas. 197, 199 (C.C.D. Mass. 1845); *Holmes v. Hurst*, 174 U.S. 82, 84-86 (1899); *Paige v. Banks*, 80 U.S. 608, 614-15 (1871); *Int’l News Serv. v. AP*, 248 U.S. 215, 256 (1918) (Brandeis, J., dissenting); *Mitchell Bros. Film Grp. v. Cinema Adult Theater*, 604 F.2d 852 n.8 (5th Cir. 1979); *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983); see also Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. Cal. L. Rev.

Thus, “[a] copyright is a property interest protected under the Due Process Clause,” *Nat’l. Ass’n of Bds. of Pharmacy*, 633 F.3d at 1317, and in the CRCA Congress recognized it as such. See H.R. Rep. No. 101-282, pt. 1, at 7 (noting Congress’ power to abrogate states’ immunity under the Fourteenth Amendment had been “repeatedly upheld”); see also S. Rep. No. 101-305, 101st Cong., 2d Sess., at 7-8 n.16 (1989) (“[T]he fourteenth amendment gives Congress the power to subject States to private suits for money damages[.]”).

B. Congress Compiled A Sufficient Record Of States Committing Due Process Violations.

Due process violations require “deliberate decisions” by state officials. *Daniels v. Williams*, 474 U.S. 327, 328 (1986). And the legislative record of the CRCA identifies multiple deliberate acts of infringement by states. *Allen*, 244 F. Supp. 3d at 535. In contrast to the afterthought legislative record of patent infringement at issue in *Florida Prepaid*,⁹ the CRCA’s legislative record was replete with evidence of the prevalence and impact of intentional copyright infringement by states. *E.g.*, H.R. Rep. No. 101-282, pt. 1, at 4 (Hearing witnesses “testified that the

993, 1006 (2006) (“[T]he courts and legislatures had regularly discussed copyrighted works as ‘property’ throughout the seventeenth, eighteenth, and early nineteenth centuries, with the adjectival concepts of ‘artistic,’ ‘literary,’ and ‘intellectual’ orbiting around the property notion.”).

⁹ The *Florida Prepaid* Court premised its holding in part on the conclusion that “the evidence before Congress suggested that most state [patent] infringement was innocent or at worst negligent.” 527 U.S. at 645.

inability of copyright owners to recover money damages [from states] had already had a direct and negative impact on their businesses, and would continue to do so.”); *id.* at 8 (Hearing witnesses “cited the extensive use of copyrighted materials by the States, described current problems with the inability to obtain monetary relief, and predicted that, as awareness of the judicial findings of immunity spread, States would increasingly avail themselves of this protection.”).

1. Congress Amassed An Ample Record Of Infringing State Activity In A Very Short Period Of Time.

The intentional acts of infringement identified by Congress were of relatively recent vintage during consideration of the CRCA, because prior to 1985, states believed, and courts had held, that they were legally subject to the copyright laws. When Congress passed the Copyright Act of 1976, it intended to abrogate state sovereign immunity. H.R. Rep. No. 101-282, pt. 1, at 5. However, this Court’s decision in *Atascadero*, 473 U.S. at 246, holding that federal laws seeking to abrogate sovereign immunity must do so in “unequivocal statutory language,” cast doubt on the Act’s efficacy against state infringers. *Id.* In the wake of *Atascadero*, an onslaught of litigation ensued as state agencies became emboldened to infringe and wielded the Eleventh Amendment against claims of copyright infringement.

In response to the post-*Atascadero* cases, in 1987 the House Judiciary Committee requested an extensive report from the U.S. Copyright Office about copyright infringement by state actors, which was

finished in mid-1988.¹⁰ Congressional committees then held hearings on the subject in 1989.¹¹

The record of state agency infringement and its impact thus covered a period of fewer than five years after the Court decided *Atascadero*. The House Judiciary Subcommittee report discussed at least six published court decisions, issued in infringement lawsuits against six different states in the three years following *Atascadero*. H.R. Rep. No. 101-282, at 2 n.6. All of them upheld the states' newfound immunity. *Id.* The testimony also included references to at least seven instances of infringement by states that were never brought to court as a result of *Atascadero*. USCO Report at 7-9.

2. Congress Examined State Remedies As An Option.

The House and the Senate Judiciary Committees approved substantially identical legislation, *see generally* H.R. Rep. No. 101-887, 101st

¹⁰ See Letter from the Hon. Robert W. Kastenmeier, Chairman, House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice, and the Hon. Carlos Moorhead, to Ralph Oman, Register of Copyrights (Aug. 3, 1987) (“Kastenmeier Letter”); *see also* Ralph Oman, Register of Copyrights, *Copyright Liability of States and the Eleventh Amendment* 7-9 (1988) (“USCO Report”).

¹¹ See *The Copyright Clarification Act: Hearing on S. 497 Before the Subcomm. on Patents, Copyrights and Trademarks of the Comm. on the Judiciary*, 101st Cong. (1989) (“Senate Hearing”); *Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liability of States: Hearing on H.R. 1131 Before the Subcomm. on Courts, Intellectual Prop., and the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. (1989) (“House Hearing”); *see also* H.R. Rep. No. 101-282, pt. 1, at 4.

Cong., 2d Sess. (1990), after reviewing the USCO Report, as well as a survey of state laws compiled by the Congressional Research Service and appended to the Copyright Office report.¹² In contrast to the record at issue in *Florida Prepaid*, 527 U.S. at 643, congressional consideration of the CRCA reflected a conscientious evaluation of potential alternative remedies under state law.

At the time Congress considered the CRCA, and today, federal district courts had/have exclusive jurisdiction over copyright infringement cases, 28 U.S.C. § 1338(a), and Congress preempted all equivalent state causes of action. 17 U.S.C. § 301. Once *Atascadero* and its progeny divested federal courts of jurisdiction, one path for restoring infringement remedies was for states to voluntarily waive their immunity and to consent to be sued for infringement in federal court. But the legislative record “reveal[ed] that none of the fifty states in their state constitutions, state laws, or state court decisions, expressly waive[ed] Eleventh Amendment immunity from suit for damages in federal court in copyright infringement cases.” USCO Report at xi. Thus, Congress was entirely correct when it concluded that, without abrogation of Eleventh Amendment immunity, states would likely, and purposefully, avoid all monetary liability for infringement. *Cf. Hibbs*, 538 U.S. at 734 (chronicling

¹² The House Judiciary Committee asked the Copyright Office to commission a “50 state survey of the statutes and case law concerning waiver of sovereign immunity” by the American Law Division of the Library of Congress’s Congressional Research Service. See Kastenmeier Letter, in USCO Report, foreword materials.

deficient state responses to family medical leave needs as justification for use of section 5 power).

3. Congress Heard Compelling Evidence Of Both Imminent Harm And Oncoming Technological Change.

Taking all this information into consideration, the Senate Committee concluded “that copyright owners have demonstrated that they will suffer immediate harm if they are unable to sue infringing states for damages.” S. Rep. No. 101-305, at 10. The House Subcommittee concurred that “actual harm has occurred and will continue to occur if this legislation is not enacted.” H.R. Rep. No. 101-282, pt. 1, at 8.

The district court below correctly concluded these explicit determinations by the congressional committees of jurisdiction were well-supported by an extensive legislative record. *Allen*, 244 F. Supp. 3d at 534. In those circumstances, the number of specific cases identified for Congress – litigated and not litigated – was more than enough to document what the *Florida Prepaid* Court found lacking in the patent context: “a pattern of . . . infringement by the States,” 527 U.S. at 640, during the only relevant time period (*i.e.*, the post-*Atascadero* environment of judicially recognized sovereign immunity for copyright infringement).

With respect to the CRCA, the record before Congress contained evidence of significant intentional, un-remedied infringement. This conduct was unconstitutional, as was the gender discrimination that carried with it a “presumption of

unconstitutionality” in *Hibbs v. Nev. Dep’t of Human Res.*, 273 F.3d 844, 855 (9th Cir. 2001), *aff’d sub nom.*, 538 U.S. 721 (2003), and, as there, here Congress’ exercise of power was proper.

For example, Congress was presented with evidence regarding two public universities that “withdr[ew] from discussions about photocopy licenses as a result of judicial decisions upholding assertions of sovereign immunity.” H.R. Rep. No. 101-282, at 8. Other examples presented to Congress involved prison officials who created unauthorized copies of a training video and who continued to publicly show copyrighted motion pictures without remuneration after being notified by the copyright owners that this constituted infringement. S. Rep. No. 101-305, at 10. Moreover, the Senate Report recounted the testimony of “the chief executive officer of one of the Nation’s largest independent software companies” about a state agency that reduced the number of copies of high-end software products (licensed at \$100,000 per copy) it intended to license, immediately after reading front-page coverage of the Ninth Circuit’s decision to uphold state immunity in *BV Eng’g v. UCLA*, 858 F.2d 1394 (9th Cir. 1988). *Id.* at 11; Senate Hearing at 95 (statement of David Eskra). These scenarios reek of intent to infringe, not negligence.¹³

¹³ All of the above clearly separates the record compiled by Congress in support of the CRCA from the record compiled in support of the PRCA. *See Fla. Prepaid*, 527 U.S. at 645 (“Congress did not focus on instances of intentional or reckless infringement on the part of the States.”). Comparing the two cases should result in a conclusion by the Court that here the outcome should differ.

In addition, Congress heard from witnesses that the pace and scope of potential infringements were being impacted by technological change. *E.g.*, House Hearing at 148 (statement of Mr. Van Den Berg: “[A]ll I know is you take a computer disk, a 50-cent computer disc, and you can take a \$100 program and make a perfect copy of it in less than 60 seconds on any personal computer. [I]n the textbook market at least you have to use a photocopier and stand there for half an hour.”). It was clear that, in the emerging digital environment, piracy could have sweeping, rapid, and extremely harmful impacts. *Cf.* H.R. Rep. No. 105-551, pt. 1, 105th Cong., 2d Sess., at 9 (1998) (Because “the digital environment ... allows users of electronic media to send and retrieve perfect reproductions of copyrighted material easily and nearly instantaneously, to or from locations around the world,” the internet presents both amazing opportunities and significant risks.). Given the difficulty of detecting infringement, Congress would have been fully justified in believing both that the instances reported to it were a fraction of broader unlawful state activity, and that the digital revolution would make that activity materially worse. These threats made Congress’ determination to abrogate state immunity all the more reasonable.

The Fourth Circuit’s rationale would require Congress to wait until state violations of the constitution reach market-destructive levels before acting—even in areas, like developing technology, where the courts have acknowledged the legislature’s greater access to expertise. *Amicus’* real-world experience, especially in the digital age, confirms the accuracy of Congress’ prediction that state actors will become significantly emboldened to intentionally

exploit authors' works, without paying due compensation, in the absence of remedial abrogation of immunity. See, e.g., *Oracle Am.*, 145 F. Supp. 3d at 1020-24; see also *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000) (*en banc*) ("*Chavez II*") (state university printed 5,000 copies of author's book in breach of contract, held immune);¹⁴ *Nat'l. Ass'n of Bds. of Pharmacy*, 633 F.3d at 1301-02, 1317-19 (state university system entered settlement agreement promising not to copy plaintiff's exam questions, then did so anyway, held immune). Congress enacted a proportional response to the problems it both actually saw and reasonably predicted.

C. Congress Properly Tailored The CRCA.

Although negligent acts of infringement by states do not constitute due process violations, *Fla. Prepaid*, 527 U.S. at 645 (citing *Parratt v. Taylor*, 451 U.S. 527 (1981)), the structure of the Copyright Act makes these kinds of actions relatively rare. Just as the legislative records of the CRCA and the patent legislation considered in *Florida Prepaid* differ, copyrights are materially distinct from patents in their scope and enforceability.

Unlike a case involving a patent for a "data processing system for administering a program to provide a future return,"¹⁵ which can be infringed

¹⁴ The underlying facts at issue in *Chavez II* are recited in more detail in *Chavez v. Arte Publico Press*, 59 F.3d 539, 540-41 (5th Cir. 1995) ("*Chavez I*").

¹⁵ The specific patent at issue in *Florida Prepaid* was discussed in the Respondents' Brief to this Court. See Br. for Respondent College Savings Bank in Case No. 98-531, 1999 WL 164439, at *1 (Mar. 24, 1999); Methods and Apparatus For Funding

without access to the patented invention, a copyright case requires both access to the underlying work and copying of it. Pet’rs Br. at 58. Moreover, title 17 contains numerous provisions that make negligent infringement suits unlikely and avoidable. *See, e.g.*, 17 U.S.C. § 411(a) (preventing plaintiff from filing infringement lawsuit without first registering the work at issue); 17 U.S.C. § 412 (limiting remedies available to plaintiff if work was not registered before infringement began); 17 U.S.C. § 504(c)(2) (authorizing reduction of statutory damages against defendants who were “not aware and had no reason to believe” they were infringing); 17 U.S.C. § 512 (limiting remedies for online infringement in the absence of knowledge); 17 U.S.C. § 108 (exceptions for library and archival uses); 17 U.S.C. § 110(1), (2) (limitation for face-to-face education); 17 U.S.C. § 107 (fair use for purposes of “criticism, comment, news reporting, teaching ..., scholarship or research”). In many cases (especially, for example, where a valid copyright notice is placed on copies), often people look before leaping into the use of a protected work.

Courts have also developed doctrines that render unintentional acts of infringement less prone to suit. *See, e.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (explaining that secondary liability for copyright infringement requires either “intentionally inducing or encouraging direct infringement ... [or] profiting from direct infringement while declining to exercise a right to stop or limit it”); *Newton v. Diamond*, 388 F.3d 1189, 192-93 (9th Cir. 2004) (applying “de minimis use” defense to “trivial” copying); *CoStar Grp., Inc. v.*

Future Liability Of Uncertain Cost, U.S. Patent No. 4722055, claim 1 (granted Jan. 26, 1988).

LoopNet, Inc., 373 F.3d 544, 549 (4th Cir. 2004) (no direct liability for conduct that is not “volitional”).

Some of these provisions and doctrines are specifically targeted to nonprofit educational institutions, many of which are state agencies for Eleventh Amendment purposes. *See, e.g.*, 17 U.S.C. § 504(c)(2) (complete remission of statutory damages for employees or agents of such institutions who had “reasonable grounds to believe” that fair use excused any infringement); *Wall Data*, 447 F.3d at 777 (fair use analysis includes assessment of “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”). Finally, if a copyright owner files a baseless suit, and loses, a state may seek its attorneys’ fees and costs when it prevails. 17 U.S.C. § 505.

While abrogation could expose some state agencies to damages liability for negligent infringements that may not amount to property deprivations cognizable under the Due Process Clause, in practice this theoretical exposure is relatively minimal, and fits comfortably within the “somewhat broader swath of conduct” that this Court’s precedents permit prophylactic legislation to reach. *See Hibbs*, 538 U.S. at 727. In most cases, a state actor will have an opportunity to seek a license rather than infringe a particular work. Even if the CRCA “proscribe[s] [some] facially constitutional conduct” – *i.e.*, negligent infringements – this Court’s precedents allow for this statutory breadth “in order to prevent and deter unconstitutional conduct.” *Id.* at 728. In other words, the intentional or willful infringement is likely, as a practical matter, to make

up the great majority of claims. *See Allen*, 244 F. Supp. 3d at 540 (“Congress has clearly abrogated state immunity in cases arising under the CRCA, and such an abrogation is congruent and proportional to a clear pattern of abuse by the states.”).

IV. As Applied To Respondents, The CRCA Is Constitutional Under The Fourteenth Amendment.

In throwing out the entire CRCA, the Fourth Circuit ignored one of the primary canons of resolving constitutional cases. “Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.” *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). Thus, “the fact that [a legislative act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.” *United States v. Salerno*, 481 U.S. 739, 745, (1987). As a result, where “the record make[s] clear that the statute at issue would be constitutional as applied in a large fraction of cases,” a defendant’s constitutional challenge should fail. *Roulette v. City of Seattle*, 97 F.3d 300, 306 (9th Cir. 1996), *amended on denial of reh’g and reh’g en banc* (Sept. 17, 1996) (confronting a substantive due process challenge).

“[N]o one doubts that § 5 grants Congress the power to ‘enforce . . . the provisions’ of the Amendment by creating private remedies against the States for *actual* violations of those provisions.” *Georgia*, 546 U.S. at 158 (emphasis in original). Accordingly, the

CRCA may constitutionally be applied against states that, through their intentional conduct, violate the Fourteenth Amendment's guarantees. As discussed above, most copyright infringement falls into that category, which is enough to sustain the statute on its face. But even if it were not, North Carolina cannot use that alleged incongruence to wash away its unconstitutional conduct. *See Salerno*, 481 U.S. at 745 (“[W]e have not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.”).

This Court's decision in *Lane*, 541 U.S. at 530-31, is illustrative. There, Tennessee argued that the Eleventh Amendment prohibited application of Title II of the Americans with Disabilities Act to state agencies – specifically, the courts. Because the ADA required all public entities to make accommodations, the state argued, Title II was improperly tailored. *Id.* at 530.

This Court firmly rejected this argument:

Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even voting booths, but whether Congress had the power under [section] 5 to enforce the constitutional right of access to the courts. Because we find that Title II unquestionably is valid [section] 5 legislation as it applies to the class of cases implicating the

accessibility of judicial services, we need go no further.

Id. at 530-31.

Lane thus instructs that it should not matter, in a case where the defendant is an alleged willful infringer, if some copyright infringements by states might not amount to due process violations. See *Ass'n for Disabled Ams., Inc. v. Fla. Int'l Univ.*, 405 F.3d 954, 958 (11th Cir. 2005) (taking as applied approach to Fourteenth Amendment question regarding ADA); *Toledo v. Sánchez*, 454 F.3d 24, 31, 39 (1st Cir. 2006) (same). To be sure, that allegation must be supported by facts entitled to the “assumption of truth” and not mere legal conclusions. See *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief [at the merits stage].”). But a motion to dismiss a complaint alleging willful infringement, based on an immunity defense, should be denied.¹⁶

No pleading defects existed below, and of the adjectives that could be used to describe the state’s conduct in this case, “negligent” is not among them. Petitioners have alleged that the State of North Carolina promised, in a settlement agreement, not to infringe their copyrights, and then did so anyway. When called on this failure to adhere to the

¹⁶ “[T]o prove willfulness under the Copyright Act, the plaintiff must show (1) that the defendant was actually aware of the infringing activity, or (2) that the defendant’s actions were the result of reckless disregard for, or willful blindness to, the copyright holder’s rights.” *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 991 (9th Cir. 2017).

contractual conditions, the state did not apologize and disable public access to the works, but instead attempted to immunize itself from liability by illegally labeling the works as public domain materials. That state legislation even expressly stated that the prior settlement agreement was supposedly “void and unenforceable.” Pet’rs Br. at 11-13. Respondents should therefore not be heard to argue that the CRCA sweeps too broadly by allowing lawsuits for money damages against states involved in innocent or negligent infringement. Like the Petitioners in *Lane*, all the Petitioners in this specific case seek to preserve is access to the courts for those cases in which copyright owners are attempting to protect their property rights from unconstitutional state action. As applied to cases of alleged willful infringement, like this one, 17 U.S.C. § 511 is constitutional. That alone should result in a remand of this case.

CONCLUSION

For the reasons stated above and in the Petitioners' Brief, this Court should reverse the Fourth Circuit's opinion below and remand for further proceedings.

Respectfully submitted,

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