

No. 18-877

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IN THE

**Supreme Court of the United States**

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FREDERICK L. ALLEN and  
NAUTILUS PRODUCTIONS, LLC,  
*Petitioners,*  
v.

ROY A. COOPER, III,  
as Governor of North Carolina, *et al.*,  
*Respondents.*

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

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**REPLY BRIEF FOR PETITIONERS**

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## INTRODUCTION

In its brief (“Br.”), the State of North Carolina does not address key indicia of Congress’s authority to abrogate States’ sovereign immunity specifically for copyright infringement.

To contest Congress’s Article I authority, the State invokes “stare decisis” (Br. 19-22, 57-63) without accounting for prevailing precedent as set forth in *Central Virginia Community College v. Katz*, where the Court held that: (1) a particular Article I power *can* authorize abrogation; and (2) this Court’s contrary “assumption was erroneous” “dicta.” 546 U.S. 356, 363 (2006). Because this Court in *Florida Prepaid* had done nothing more than repeat the same “erroneous” assumption—there unchallenged—of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), this Court’s precedent today calls for what the State itself aptly termed a “clause-by-clause approach” to the Intellectual Property Clause (BIO 16 n.6), which this Court has yet to undertake. Such clause-specific analysis reveals a compelling basis for upholding the CRCA. Indeed, the State neither denies that the text and design of the Intellectual Property Clause evince a singular basis for abrogation, nor explains how the Framers could have envisioned Congress *securing exclusive* copyrights, promoting continuing creative incentives, if States retained free license to infringe without paying.

Alternatively, Congress’s enforcement power under Section 5 of the Fourteenth Amendment sustains the CRCA. Only by overlooking fundamental distinctions between copyright and patent infringement—distinctions that make the former both more culpable and more in need of



recompense—and the superior legislative record underlying the CRCA does the State argue that *Florida Prepaid* controls. But the CRCA’s legislative record “documented an emerging and troubling problem of copyright infringement by states and a total absence of effective remedies to stem such abuse,” such that “the Patent Remedy Act’s record pales in comparison.” Oman Br. 3. Congress had obvious reason to prescribe the remedy it did for systemic copyright infringement by States, which remedy simply matches that available against private infringers. By the State’s account, Congress would need to await maximal state violations before laboring to fashion minimalist, patchwork federal remedies that *might* withstand judicial review. But that self-defeating roadmap is neither constructive nor respectful of Congress’s remedial role.

This case reverses the institutional concerns that have traditionally animated judicial skepticism towards Section 5 invocation. Congress has unique, express constitutional charter to secure these federally-bestowed property rights. And the CRCA reflects the straightforward legislative judgment that States should pay their due when infringing federal copyrights. Given the demonstrated problem posed by state copyright infringement, the on-point legislative record (backed by intervening experience), and the textual command for Congress to secure exclusive federal rights for copyright holders, this should be a textbook case for upholding Congress’s exercise of its remedial power.

**ARGUMENT****I. THE STATE FAILS TO REFUTE  
CONGRESS'S ARTICLE I BASIS FOR  
THE CRCA****A. The State Errs In Characterizing  
Precedent As Foreclosing Abrogation  
Under The Intellectual Property Clause**

The State (Br. 19-22) and state *amici* (States Br. 15-18) err in maintaining that the Court's precedent forecloses Congress from abrogating state sovereign immunity pursuant to the Intellectual Property Clause.

To start, *Seminole Tribe* does not control the issue. As the State earlier recognized (BIO 16 n.6), *Katz* requires a "clause-by-clause approach" to analyzing Congress's authority to abrogate state sovereign immunity. The Court has yet to undertake that analysis for the Intellectual Property Clause. *Seminole Tribe* considered only the Indian Commerce Clause, and the Court has since confirmed that any suggestion in *Seminole Tribe* that Congress cannot abrogate under any Article I power was an "assumption [that] was erroneous" and "dicta." *Katz*, 546 U.S. at 363.

Neither does *Florida Prepaid* control. There, the Court granted review specifically on the question whether "Congress ha[d] power *under § 5 of the Fourteenth Amendment* to abrogate the states' Eleventh Amendment immunity" in enacting the PRA. Br. for Pet'r, *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999), 1999 WL 86486, at \*i (emphasis added). By no means, therefore, was the Court "decid[ing] a

question that was squarely before” it (Br. 21) when it summarily dismissed the Article I basis for abrogation. That question was *never* at issue on appeal. *Fla. Prepaid*, 527 U.S. at 630, 636.

Nor is the State correct to posit (Br. 21) that the Court must have decided the Article I question because sovereign immunity presents a “jurisdictional bar” the Court was “duty-bound to address.” State-immunity defenses do not implicate the Court’s jurisdiction. See *Nevada v. Hicks*, 533 U.S. 353, 373 (2001) (citing *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997)). Unlike issues that go to original jurisdiction, issues of Eleventh Amendment immunity need not be raised *sua sponte*; “[u]nless the State raises the matter, a court can ignore it.” *Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381, 389 (1998). The same follows *a fortiori* for an argument never presented for *overcoming* state immunity.

Even assuming *arguendo* that jurisdiction were at stake, the State is wrong to claim (Br. 21) the Court was “duty-bound” to address it. Because this Court “is one of final review, not of first view,” it would have afforded lower courts “the first opportunity to consider [any] ... new contention with respect to jurisdiction in [that] case.” *Ford Motor Co. v. United States*, 571 U.S. 28, 30 (2013).

Tellingly, this Court in *Florida Prepaid* did not even purport to seek “‘compelling evidence’ that the States were required to surrender [sovereign immunity] ... pursuant to the constitutional design.” *Alden v. Maine*, 527 U.S. 706, 713 (1999). Instead, it offered only the following two sentences: “*Seminole Tribe* makes clear that Congress may not abrogate

state sovereign immunity pursuant to its Article I powers; hence the Patent Remedy Act cannot be sustained under ... the Patent Clause. The Federal Circuit recognized this, and College Savings and the United States do not contend otherwise.” *Fla. Prepaid*, 527 U.S. at 636 (citation omitted).

Last, the Court’s passing, uncontroverted statement in *Florida Prepaid* could not possibly deserve stare decisis (Br. 57-63).<sup>1</sup> Because the snippet the State relies upon from *Florida Prepaid* simply repeated the *Seminole Tribe* “dicta” that this Court has held “erroneous,” *Katz*, 546 U.S. at 363, any precedential foundation has crumbled. Stare decisis affords no justification for continuing to block Congress’s exercise of a core Article I power after the sole premise of the blockage has been held erroneous.<sup>2</sup>

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<sup>1</sup> Contrary to the State’s suggestion (Br. 2, 60), *Florida Prepaid* did not alter reliance on “property rights.” No court has questioned intellectual-property holders’ *rights* to their creations; the only question surrounds their *remedies* for deprivations. If the State misapprehends sovereign immunity as *negating* federally-bestowed property rights and giving States a “reliance” interest in *infringing* (Br. 60), that only confirms the wisdom behind the CRCA.

<sup>2</sup> Nor does stare decisis derive from Congress’s decision to continue *standing behind* the CRCA (Br. 62), rather than revising or repealing it. As for prior positional statements by Solicitors General (Br. 61), they have never been briefed or tested before this Court. Nor do they purport to account for *Katz* or for the fundamental differences between copyright and patent law as relevant to *Florida Prepaid*. See *infra*, at 13-15. Given the Solicitor General’s silence here, it is imprudent to speculate about, let alone rely upon, his current views.

### **B. The State Ignores Indicia Of A Plan-Of-The-Convention Waiver**

At the threshold, the State agrees (Br. 13-14) sovereign immunity was potentially subject to a Plan-of-the-Convention waiver. That agreed principle belies the State's notion (Br. 12, 15) that this Court's entire sovereign-immunity jurisprudence depends on slamming the door shut to analyzing whether any particular Article I clause reflects such a waiver.

Far from "unsettl[ing] a virtually unbroken line of judicial precedent" (Br. 15), analysis of the Intellectual Property Clause, *qua* clause, is faithful to this Court's precedent along with the Framers' design. Pet'rs Br. 21-37. And the particulars of this Clause find no answer by the State: The State does not deny that the constitutional text—by commanding Congress to "secur[e]" creators' "exclusive Right[s]" in order to "promote" creative incentives nationwide—signals that States were surrendering immunity within this unique, discrete realm, especially considering the Framers' overarching concerns with protecting individuals' rights against government intrusion and ensuring fair recompense. Pet'rs Br. 21-31. Notably, no other provision of Article I directs Congress to secure exclusive federal rights against all comers, as this one does.

***The Framers Intended To Provide Authors With Monopolies Over Their Works.*** Although the State mischaracterizes (Br. 14) Petitioners as arguing that any grant of exclusive federal power trumps sovereign immunity, the State's quarrel ostensibly is with Alexander Hamilton and the

quoted portion of *The Federalist*. THE FEDERALIST No. 32 (Alexander Hamilton) (quoted at Pet’rs Br. 22). As Petitioners’ brief emphasized, this case spotlights an instance where the Constitution “granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant.” *Id.*

Because the Framers bequeathed creators a monopoly over their works, yielding corresponding financial rewards, Pet’rs Br. 25-26, state encroachment is “contradictory and repugnant” to the goal of “promot[ing] the Progress of Science and useful Arts.” Indeed, this Court has already so recognized. See *Goldstein v. California*, 412 U.S. 546, 560 (1973) (“When Congress grants an exclusive right or monopoly, its effects are pervasive; no citizen or State may escape its reach.”).<sup>3</sup> As such, the Intellectual Property Clause furnishes the compelling evidence of waiver that this Court has always contemplated, just as the Framers did.

***The First Congress Recognized The Plan-Of-The-Convention Waiver.*** The First Congress followed the Framers’ intent by granting authors the “sole” right to their works and a damages remedy against infringers. Act of May 31, 1790, 1 Stat. 124, § 1. These “exclusive Right[s]” would be illusory were States exempted from that damages remedy.

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<sup>3</sup> Contrary to the State’s argument (Br. 23), *Wheaton v. Peters*, 33 U.S. 591 (1834), did not suggest Congress can “secur[e]” copyrights without protecting them from “any and all” intrusion. *Wheaton* instructs merely that federal copyright law does not displace *common law* copyrights, power over which is not “vest[ed]” in Congress. *Id.* at 661.

The State erroneously argues (Br. 29) that Congress’s early copyright legislation did not reflect an “understanding” that States surrendered immunity for copyright claims because the first Copyright Act protected “against infringement by ‘persons,’” which the State contends “does not include the sovereign.” Br. 29 (citing 1 Stat. 124 §§ 1, 6) (emphasis added). But that argument overlooks shared recognition that States *were* included as “persons” under that Act.

The interpretive “presumption” that the statutory term “person” excludes the sovereign is not absolute; it merely aids interpretation absent evidence that Congress “intended to include the [State]” in defining “person.” *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1863 (2019). Such evidence exists here. See Pet’r Br. 25-31.

Tellingly, States understood themselves to be “persons” who could hold and enforce copyrights. Section 3 of the Copyright Act of 1790 provides that “no person shall be entitled to the benefit of this act” unless “he” satisfies certain requirements; the same term “person” is used in sections 2 and 6 to describe who may be liable for infringement. 1 Stat. 124, §§ 2, 3, 6. States have long considered themselves “persons” able to obtain the Act’s “benefit[s]” by registering and holding copyrights in their works—unlike the United States, which cannot register copyrights. See U.S. COPYRIGHT OFFICE, COPYRIGHT LAW REVISION: STUDY NO. 33, COPYRIGHT IN GOVERNMENT PUBLICATIONS, PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE S. COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS. 31 (1961) (States objected to

proposals for the Copyright Act of 1909 prohibiting copyrights in government publications because they “might be construed as prohibiting copyright in State publications *which the courts had held copyrightable*” (emphasis added); *Little v. Gould*, 15 F. Cas. 612, 612-13 (Cir. Ct. N.D.N.Y. 1852) (secretary of state held copyright in reporter’s volume, “securing to the state the exclusive right of proprietorship in the work”).

Congress and the States concluded that the Copyright Acts of 1790 and 1909 “permitt[ed] copyright in ... State publications” other than official texts like State laws and court decisions, “while prohibiting copyright in all publications of the United States.” COPYRIGHT LAW REVISION, STUDY NO. 33, *supra*, at 32; see also U.S. COPYRIGHT OFFICE, COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 129-30 (1961) (“ban against copyright in Government publications” did “not extend to [certain] publications of State and local governments,” which “may be copyrighted”); Br. for Pet’rs 26-29, Br. of States 7-8, *Georgia v. Public.Resource.Org, Inc.*, No. 18-1150.

To the extent States were “persons” entitled to benefit from the earliest Copyright Acts, it follows that they were “persons” for *all* purposes, including paying damages if they infringed. See *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) (the same term used in related provisions



enacted simultaneously should be interpreted the same).<sup>4</sup>

***The Waiver Is Even Clearer Here Than It Is As To The Bankruptcy Clause.*** The State also errs (Br. 27-29) in characterizing the Bankruptcy Clause as the lone Article I power evincing waiver. If anything, the case for waiver under the Intellectual Property Clause is even more compelling. Pet’rs Br. 22-31.

Whereas “uniform Laws” is the sole purpose of the Bankruptcy Clause, U.S. CONST., art. I, § 8, cl. 4, the Framers *specifically* intended to provide authors and inventors a *financial monopoly* over their works through uniform, surefire protection, which cannot happen unless such works are protected against governmental intrusion, along with all other intrusion. See *supra*, at 6-7; Pet’rs Br. 22-31. As for statutory pedigree, the Copyright Act of 1790 subjected States to liability for copyright infringement no less than it entitled States to their copyright registrations ever since. In contrast, the Bankruptcy Act was not enacted until a decade later and granted federal courts only limited habeas authority to release debtors from state prisons—

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<sup>4</sup> That the State located no reported decision pre-dating *Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (9th Cir. 1979), awarding damages for a State’s copyright infringement does not supply contrary evidence. There likewise is “no judicial decision in the ensuing 172 years [post-dating the Copyright Act of 1790] that [sustained a State’s defense] ... on the grounds of sovereign immunity.” *Sovereign Immunity and the Protection of Intellectual Property: Hearing Before the S. Judiciary Comm., 107th Cong. 2d Sess., 12 (2002)* (statement of Marybeth Peters, Register of Copyrights).

quite different from subjecting States to monetary damages under federal law. *Katz*, 546 U.S. at 363.

Nor should the fact that bankruptcy proceedings are *in rem* make a difference, contrary to the State’s argument (Br. 16-17). *Katz* recognized that, “while the principal focus of the bankruptcy proceedings is and was always the res, some exercises of bankruptcy courts’ powers—issuance of writs of habeas corpus included—unquestionably involved more than mere adjudication of rights in a res.” *Id.* at 378. At the same time, copyright law shares *in rem* features. Pet’rs Br. 36.

Finally, the State cannot credibly discount (Br. 26-27) the importance of damages actions in securing authors’ exclusive rights and forestalling infringement. Economic incentives are the Framers’ engine to “promote the Progress of Science and useful Arts.” See *infra*, at 23-25; see also Oracle Am. Br. 8-10; Dow Jones Br. 10-13; Br. for Pet’rs 55-58, *Public.Resource.Org*, No. 18-1150. They are also the essential deterrent that so disquiet the State and its state *amici*.

## II. THE STATE FAILS TO UNDERMINE CONGRESS’S SECTION 5 BASIS FOR THE CRCA

Independently, Congress validly enacted the CRCA under Section 5 of the Fourteenth Amendment. The enforcement power is at its apex here, where Congress has an express constitutional charge to secure copyrights. See *supra*, at 6-7; *Fullilove v. Klutznick*, 448 U.S. 448, 489 (1980) (“[D]oubts must be resolved in support of the congressional judgment that this limited program is

a necessary step to effectuate the constitutional mandate ....”). Far from presenting a new or intrusive cause of action to vindicate a dubious or expansive right,<sup>5</sup> the CRCA simply “clarif[ied]” that States can be held monetarily accountable no less than private actors if they infringe federal copyrights, which have been a core, express feature of the constitutional design for two centuries preceding the CRCA.

The State does not seriously dispute that Section 5 deserves consideration here. Pet’rs Br. 40-46; *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 564 (2012) (constitutionality of Congress’s exercise of power “not controlled by Congress’s choice of label”).<sup>6</sup> Nor should the State’s repeated invocation of “stare decisis” (Br. 57-63) forestall this Court’s consideration of Section 5. This Court has never

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<sup>5</sup> Compare *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30, 33-34 (2012) (subjecting States as employers to self-care provision of FMLA); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 372-74 (2001) (subjecting States to across-the-board, affirmative duties of reasonable accommodation under ADA); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67-68 (2000) (subjecting States as employers to ADEA); *City of Boerne v. Flores*, 521 U.S. 507, 514-16 (1997) (requiring States to accommodate and exempt religious exercise relative to generally applicable laws).

<sup>6</sup> Although the State passingly suggests Congress “did not consider” its Section 5 authority (Br. 51 n.22), Congress explicitly sought to protect “the property rights of citizens” against “injur[y],” H.R. Rep. No. 101-887, at 5, and referenced “the enforcement provisions of section 5 of the fourteenth amendment,” S. Rep. No. 101-305, at 7 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)); see also *Fla. Prepaid*, 527 U.S. at 642 n.7.

studied the CRCA and its legislative record. Upon doing so, it is apparent that “Congress could reasonably conclude” such “remedial legislation” was necessary, and that Congress fashioned a remedy congruent and proportional to the identified pattern of Fourteenth Amendment violations by States. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 734 (2003).<sup>7</sup>

### **A. State Copyright Infringement Poses A Constitutional Violation Warranting Remedy**

While relying upon *Florida Prepaid* to negate resort to Section 5, the State does not address fundamental, dispositive differences between the distinctive legal regimes. Whereas patents grant monopoly over *ideas*, no matter the embodiment or use, and regardless whether infringers arrive at independent discoveries, copyrights protect only against *copying* of particular, original *expression*, without ensnaring fair use, independent creation, and various accepted uses that find safe harbors.<sup>8</sup>

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<sup>7</sup> Contrary to the State’s suggestions (Br. 60-61), lower-court decisions and the Solicitor General’s earlier declination to defend the CRCA are no basis for “stare decisis” and no substitute for this Court’s plenary review. See *supra*, at 5 & n.2.

<sup>8</sup> In offering a parade of supposed horrors (Am. Library Ass’n Br. 14-22; Ass’n of Public & Land-Grant Univs. Br. 4-8), the State’s library and academic *amici* omit to note the array of statutory protections the CRCA preserves for them. See, e.g., 17 U.S.C. 108 (circumstances where “it is not an infringement of copyright for a library or archives” to reproduce works), 109 (similar for sales of individual copies), 110 (performances and displays in educational environments), 111 (secondary

Pet'rs Br. 57-61; *Mazer v. Stein*, 347 U.S. 201, 217-18 (1954) (“Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself.”). Accordingly, courts have long recognized that “[t]he protection afforded by patent law is broader ... than in that of copyright.” *Bobbs-Merrill Co. v. Straus*, 147 F. 15, 23-24 (2d Cir. 1906), *aff'd* 210 U.S. 339 (1908); see also *Robert R. Jones Assocs., Inc. v. Nino Homes*, 858 F.2d 274, 277-78 (6th Cir. 1988); *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 103-04 (2d Cir. 1951).

The upshot is that copyright enforcement against States is inherently tailored to a constitutional deprivation in a way that patent enforcement is not. Take the State’s favorite example of “innocent” infringement (Br. 34-36, 46 n.19). Under patent law, when two inventors independently (*i.e.*, innocently) arrive at the same invention, the second comer is abjectly liable for infringement; under copyright law, in contrast, independent creation altogether precludes liability. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 478 (1974). Again, there can be no copyright infringement absent *actual copying*. *Mazer*, 347 U.S. at 218.

The State thus misses the boat by critiquing Congress (Br. 33-37) for failing to isolate “intentional” copyright infringement. Copyright infringement is, by definition, “intentional” in a way that patent infringement is not. What is more,

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transmissions), 117 (computer programs), 121 (reproductions for visually impaired).

copyright law builds in safety valves for atypical cases of “innocent” infringement. See 17 U.S.C. 504(c)(2) (reduced statutory damages of \$200 where “infringer was not aware and had no reason to believe that his or her acts constituted an infringement”).<sup>9</sup> When a State copies a copyright holder’s original expression, it goes far beyond letting a prisoner slip on a mislaid pillow. See *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (noting the absence of a “deliberate” deprivation in rejecting prisoner’s section 1983 claim); Dow Jones Br. 11 (“[C]opyright infringement normally does not happen by accident.”).

To the extent the State posits that the government might illegally copy a copyrighted work for its own use without offending due process (itself a strained and worrisome proposition), it suffices to note that any such instance would be the exception rather than the rule. Not only has this Court generally acknowledged that Congress may employ reasonable prophylaxis in fashioning its Section 5 remedies (Br. 49), but it has specifically upheld statutory remedies extending into *unintentional* state conduct: In *Hibbs*, for example—a decision post-dating *Daniels*—the Court upheld provisions of the Family and Medical Leave Act as validly abrogating state sovereign immunity even though statutory violations

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<sup>9</sup> While the State cries catastrophe (Br. 54-55) at the prospect of facing “the full panoply of statutory copyright remedies,” these remedies are already tailored to the degree of the violation. See, e.g., 17 U.S.C. 504(c)(1)-(2) (range of statutory damages is \$750-\$30,000 per work infringed, with damages of up to \$150,000 reserved for “willful” infringement).

need *not* be “intentional.” See 538 U.S. at 735; 29 U.S.C. 2617(a)(1)(A)(iii) (permitting award of damages even where employer acted “in good faith” and “had reasonable grounds for believing” it was not violating statute); *id.* § 2617(c)(2) (longer statute of limitations for “willful violation”).

Notably, the State altogether ignores that Congress via the CRCA was also protecting against unconstitutional, uncompensated takings. Pet’rs Br. 45.<sup>10</sup> A taking can occur irrespective of intentionality, provided “the asserted invasion is the direct, natural, or probable result of authorized government action.” *St. Bernard Par. Gov’t v. United States*, 887 F.3d 1354, 1360 (Fed. Cir. 2018) (citing *Sanguinetti v. United States*, 264 U.S. 146, 149-50 (1924)). Considering that an owner “has an actionable Fifth Amendment takings claim when the government takes his property without paying for it,” irrespective of any potential recourse or compensation, *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167 (2019), Congress had every reason to treat uncompensated, unauthorized copyright infringement as a takings problem warranting remedy.

In any event, the State errs (Br. 33-34) in claiming that “Congress ... did not even consider whether any state infringement was intentional” or that it focused

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<sup>10</sup> Nor does the State address the argument of *amici* law professors, who correctly observe that the Privileges or Immunities Clause of the Fourteenth Amendment is violated when States infringe federally-derived copyrights. See Law Professors Br. 18-22.

on “merely negligent” conduct. The record is replete with knowing, systematic infringement by States. See, *e.g.*, Register’s Report 7 (State copied work and “returned the original without payment”); *id.* at 7-8 (States “continue[d] unauthorized performances” of films after notice); S. Rep. No. 101-305, at 11 (State ceased licensing multiple copies of program, but “instead only planned to buy one”); H.R. Hearings 95-96;<sup>11</sup> Oman Br. 10-12, 21-22 (“the evidence” before Congress “showed that state copyright infringement was often not innocent”).

Last, as to the specifics of *this* case, contrary to the State’s claim (Br. 55-57), Petitioners expressly alleged due process was violated, including because the State’s actions “were willful,” after the State “previously infringed the copyrights.” 4th Cir. J.A. 25-33, 35 (Compl.); Pet’rs Br. 11-13. The State nonetheless spins a self-serving, sanitized account of its repeated infringement as involving innocent mistakes implicating “a handful of images” (Br. 3) or “snippets” of footage (Br. 6). That account does not square with the State’s: (1) repeated, unauthorized publication of Nautilus’s copyrighted material, Pet. App. 43a-44a; (2) payment of \$15,000 as settlement for its unauthorized publication, *id.*; (3) *near-immediate resumption* in infringing Nautilus’s *non-watermarked* materials as *expressly forbidden* by the settlement, Pet. App. 10a; and (4) *contemporaneous* passage of “Blackbeard’s Law,” N.C. Gen. Stat. § 121-25(b), effectively converting Nautilus’s copyrighted

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<sup>11</sup> Herein, Petitioners continue from their Opening Brief the same abbreviated citations to the CRCA’s legislative record.



material into unprotected works so that the State could continue infringing, Pet. App. 44a. If the State sincerely sees merit in its defenses (Br. 56-57), it should take them to the factfinder.

**B. The CRCA Is A Congruent And Proportional Response To Unremedied Copyright Infringement By States**

Even the State recognizes (Br. 32) that Congress devoted “lengthy deliberations” to the CRCA. Those deliberations are reflected in a 158-page report Congress commissioned, dozens of public comments urging abrogation, multiple-day hearings with 10 witnesses, and numerous examples of States’ blatant copyright infringement. Pet’rs Br. 7-11, 46-53. Congress thereby constructed a record and basis well eclipsing what the Court reviewed in *Florida Prepaid*, which involved only two examples of patent infringement, had no study, was marked by Congressional equivocation about whether unremedied patent infringement “might” increase, and, if anything, confirmed the absence of any need for monetary remedy. 527 U.S. at 640-41.

Yet the State seeks to subject this robust legislative record to death by a thousand cuts. Such hostility to the instant legislative judgment and record is misplaced. When this Court in *Florida Prepaid* catalogued a litany of deficiencies that defined the “truly awful legislative record” there, Pet’rs Br. 53 (quoting Mitchell N. Berman et al.), the Court did not hold or suggest that Congress must perfectly steel a legislative record against all such criticisms before withstanding judicial review under Section 5. Especially considering that the *post hoc*

criticisms the State now levels were not raised before Congress, which confronted an overwhelming case for abrogation, Register's Report iii-iv, it is improper to fault Congress for not more pointedly addressing each. *Cf. Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015) (agencies "must consider and respond [only] to significant comments received during the period for public comment"); *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1059 (D.C. Cir. 2001).

### **1. The Record Demonstrates States' Pattern Of Infringement**

As to the underlying violations, Congress found a "clearly widespread" and "clearly increasing" pattern of copyright infringement by the States. S. Hearing 109 (D. Eskra). In asserting (Br. 53) that Congress did not "concretely" identify "any constitutional problems," the State fails to credit Congress's familiarity with copyright and constitutional law, according to which such uncompensated infringements are, at least in the main, unconstitutional. See *supra*, at 13-17.

The State nonetheless discounts supportive public comments as "anecdotes" (Br. 45), "unreliable" (*id.*), and "hearsay" (Br. 44), and revisits reported instances of infringement to argue certain ones were not sufficiently "intentional" (Br. 45-46 & n.18).<sup>12</sup>

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<sup>12</sup> The State urges the Court to disregard materials outside the legislative record (Br. 50-51), yet cites materials outside and post-dating the record in an effort to impeach Congress's findings (Br. 36-37 & n.15, 45-46). Read fairly, the CRCA's record is ample on its face, Pet's Br. 46-53, and fortified by the reality that systemic state copyright infringement has

But such after-the-fact evidentiary objections have no place in scrutinizing legislative deliberations. Nor can such nitpicking overcome the Register's Report, the dozens of public comments, the witnesses' testimony, and the resulting Congressional finding and judgment that States were systematically infringing copyrights without paying for them and that this pattern warranted remedy. S. Rep. No. 101-305, at 9; H.R. Rep. No. 101-282, at 8; Oman Br. 8-20.

It is similarly inappropriate to fault Congress (Br. 2, 31-33, 43-46) for not identifying a larger number of state violations. Because this Court eschews any such quantitative threshold, see *City of Boerne*, 521 U.S. at 530-32, Congressional remedies neatly contoured around the violations occasioning concern should pass muster before States do their worst by racking up an outsized number.

What is more, Congress here specified why reported state violations were "clearly increasing," with "just the tip of the iceberg" emerging after *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). S. Hearing 109 (D. Eskra); Oman Br. 13-14. This express legislative rationale is backed by logic and experience alike, as an industry chorus confirms. Given the State's admission that "Congress can use Section 5 to deter future constitutional violations" (Br. 49), this is the prototypical case where Congress was justified to be addressing an emerging pattern of

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continued unchecked absent judicial enforcement of the CRCA, see Dow Jones Br. 2-5, 9-13; Oracle Am. Br. 12-17; RIAA Br. 22-25; SIIA Br. 5-6.

state infringement that needed deterring. See Oman Br. 19-20 & Add. (over 150 cases against States for copyright infringement since 2000); SIIA Br. 5-6 (detailing 77 instances); Copyright Alliance & U.S. Chamber of Comm. Br. 12-18 (describing escalating infringement).

## **2. The Record Demonstrates The Inadequacy Of Alternative Remedies**

As for alternative remedies, far from “overlook[ing]” the issue (Br. 39), Congress studied it and made clear why the main alternative, injunctive relief, is insufficient. See Register’s Report 13-15; S. Rep. No. 101-305, at 8-9; H.R. Rep. No. 101-282, at 8-9. In addition, Mr. Oman conducted a “detailed 50-state survey showing that state remedies for copyright infringement were unavailable or inadequate.” Oman Br. 22. Ultimately, the Copyright Office found such alternatives wanting and submitted its conviction “that copyright proprietors have demonstrated they will suffer immediate harm if they are unable to sue infringing states in *federal* court.” Register’s Report 103 (emphasis added). Because the State’s proposed remedies “would not have achieved Congress’ remedial object,” *Hibbs*, 538 U.S. at 738, Congress’s choice of the CRCA should stand.

Nor are specific alternatives the State posits adequate. See Pet’rs Br. 56-57.

*First*, state-law claims, in contract or tort (Br. 39-40), are no substitute for a federal copyright claim, as such claims are preempted by the Copyright Act. 17 U.S.C. 301(a) (preempting claims based on

“equivalent” rights); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.15[A][2] (“contract causes of action .... [that] allege essentially nothing other than the derogation of rights under copyright .... are to be deemed preempted”).<sup>13</sup> While the State asserts (Br. 41-42) that “most” claims survive preemption, its own citation says the opposite, noting “the vast bulk of copyright entitlements arise under federal law, with only a small remnant still covered by state law.” NIMMER § 2.02[D][1]. Even setting aside the preemption problem, however, state-law claims remain unsatisfying for this purpose because they are variable, inapposite, and subject to sovereign immunity (including egregious gamesmanship surrounding same), as *amici* have chronicled. See, e.g., Dow Jones Br. 13-15; Oracle Am. Br. 18-22; Pet’rs Br. 56-57.

*Second*, takings claims (Br. 40) are no substitute. Congress specifically noted that, particularly “for individual authors and small entrepreneurs, statutory damages and attorney’s fees are the difference between protection and loss of rights.” H.R. Hearings 95. Such concerns are compounded in the takings context, where claims are notoriously difficult to litigate and quantify. See, e.g., *Univ. of Hous. Sys. v. Jim Olive Photography*, 580 S.W.3d 360, 376-77 (Tex. App. 2019) (State’s copyright infringement not a compensable taking).

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<sup>13</sup> What Nimmer describes as “trivially obvious” (Br. 42) is that “a single work *can* give rise to both federal and state entanglements,” although “[i]n almost every instance, protection is either/or.” NIMMER § 2.02[D][1] (emphasis added).

*Third*, section 1983 suits (Br. 40-41) are inadequate, with qualified-immunity defenses interposing a daunting hurdle. See Pet. App. 39a (dismissing claim brought against individual State officials because qualified immunity protects unless question is “beyond debate”); see also Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 34-38 (2015). Indeed, resort to suing individual officers is no more satisfying here than it would be for any pattern of Fourteenth Amendment violations Congress might remedy.<sup>14</sup>

### **3. The CRCA Represents A Congruent And Proportional Remedy**

The congruence and proportionality of Congress’s chosen remedy are manifest. Pet’rs Br. 54-62. As noted, see *supra*, at 13-17, the CRCA incorporates the many established protections of copyright law, while simply matching the monetary remedies available against private infringers, as proven to vindicate federal copyrights and deter unauthorized use. Pet’rs Br. 58-59; see also Copyright Alliance & U.S. Chamber of Comm. Br. 18-21 (detailing “State-friendly safe harbors” that make “copyright standards ... less onerous for States”). Beyond that, Congress pinpointed the need for the established

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<sup>14</sup> The State misreports (Br. 41 n.15) Mr. Oman’s relevant testimony. He said that “*States might also argue* that suits for monetary damages against individual State officials” would “act as a brake,” before himself *disagreeing*: “Without the threat of a fat fine, the States might become lax in their copyright education programs,” thereby breeding rampant infringement. S. Hearing 9 (emphasis added).

statutory remedies, including attorney’s fees and statutory damages, specifically for copyrights (different from patents) after assessing alternatives and finding them inadequate. Pet’rs Br. 54-61.

Nevertheless, the State redlines how Congress “could have” narrowed liability—such as by making the Copyright Act non-preemptive (Br. 53), or by limiting abrogation only to certain States or regions (Br. 53-54), to “intentional” infringement (Br. 53), or to a specified temporal window (Br. 53-54). But such proposed limitations are impractical to the point of self-defeating. They could never secure the uniform, dependable, nationwide protection and deterrent Congress enacted the CRCA to achieve.<sup>15</sup> See *Hibbs*, 538 U.S. at 727 (Congress may use its Section 5 power to “deter violations of rights ... by prohibiting a somewhat broader swath of conduct”).

Finally, the State overlooks (Br. 54-55) Congress’s rationale for not limiting the CRCA to the remedies available against the United States. Congress expressed particular concern about avoiding unfair disparity between *state* educational institutions and private ones. H.R. Rep. No. 101-282, at 10-11. Relatedly, unlike the United States, which cannot register copyrights, 17 U.S.C. 105, States are on the same footing as private institutions in securing and

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<sup>15</sup> For example, a fact-based, threshold inquiry into whether a State’s act was “intentional” would subsume and encumber all copyright complaints against States. Nor would Congress have bettered its relations with States by branding certain ones scofflaws before subjecting those alone to the same monetary remedies generally available against infringers. And disabling preemption in this context could wreak havoc.

enforcing their own copyrights. If States want to match the insulation the United States has against copyright remedy, then Congress “would have to consider ... whether to withhold protection for State works.” H.R. Hearings 98-99 (B. Ringer); H.R. Rep. No. 101-282, at 10 (Congress found “persuasiv[e]” the view that “fairness dictated that if States were to be granted immunity, they should be denied the ability to copyright their own works, as is the Federal government”); see also Br. for Pet’rs, *Public.Resource.Org*, No. 18-1150 (Georgia asserting copyrights). Nor do States fund and maintain a special tribunal to handle copyright claims against them, as the United States does with the Court of Federal Claims. 28 U.S.C. 1346(a)(2), 1498(b).

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In sum, the CRCA neither “substantively redefine[s]” (Br. 36) States’ obligations nor exposes them to intrusive remedial schemes (Br. 30-32). It simply holds States to the same monetary remedy for the same infringement as private infringers. Such legislation is “congruent and proportional” by any fair measure. In contrast, the State’s obstructionist critique would foreclose any Congressional remedy that is truly fit to vindicate federal copyrights as against infringing States.



**CONCLUSION**

The Fourth Circuit's judgment should be reversed.

Respectfully submitted,

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