No. 18-877

In the Supreme Court of the United States

FREDERICK L. ALLEN, *et al.*,
Petitioners,

v.

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

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Copyright Remedy Clarification Act purports to abrogate the states' sovereign immunity for alleged violations of federal copyright law.

Did the Court of Appeals correctly hold that the Copyright Remedy Act's abrogation of state sovereign immunity was invalid?

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INTRODUCTION

This Court has made clear that "Congress may not abrogate state sovereign immunity pursuant to its Article I powers." *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636 (1999). Although Congress may authorize lawsuits against states by using its Section 5 power to enforce the substantive provisions of the Fourteenth Amendment, that enforcement power may be used only in limited circumstances. For example, as a precursor to abrogation under Section 5, Congress must find that states have engaged in a "widespread and persisting deprivation of constitutional rights." *Id.* at 645.

The federal courts have uniformly held that Congress identified no such pattern of constitutional violations when it enacted the statute at issue here, the Copyright Remedy Clarification Act. That uniformity should come as no surprise. Two decades ago, in *Florida Prepaid*, this Court struck down the Act's sister statute, the Patent Remedy Act, for exactly this reason. As the Fourth Circuit correctly observed below, the legislative record at issue here is virtually identical to the record that this Court found wanting in *Florida Prepaid*. Pet. App. 23a-27a. Thus, the Fourth Circuit joined the chorus of federal courts to reach the same conclusion: a ruling that the Copyright Remedy Act is invalid is "required by *Florida Prepaid*." Pet. App. 25a.

Because the decision below involves nothing more than a straightforward application of this Court's precedents, review should be denied.

STATEMENT

A. The Copyright Remedy Clarification Act

The Copyright Remedy Clarification Act authorizes private lawsuits against states for violations of federal copyright law. Pub. L. No. 101-533, 104 Stat. 2749 (1990) (codified at 17 U.S.C. § 511(a)). This statute was one of a trio of laws that Congress enacted in the early 1990s to abrogate state sovereign immunity for intellectual-property claims. *See also* Patent Remedy Clarification Act, Pub. L. No. 102-560, 106 Stat. 4230 (1992) (codified at 35 U.S.C. § 271(h)); Trademark Remedy Clarification Act, Pub. L. No. 102-542, 106 Stat. 3567 (1992) (codified at 15 U.S.C. § 1121).

These abrogation laws came on the heels of this Court's 1989 decision in *Pennsylvania v. Union Gas Company*, 491 U.S. 1 (1989) (plurality opinion). In *Union Gas*, a four-Justice plurality held for the first time that Congress has the authority to abrogate state sovereign immunity by using its Article I powers—in that case, the Commerce Clause. *Id.* at 19-20. Justice White supplied the fifth vote to rule against Pennsylvania in that case, but stated that he "did not agree with much of the [plurality's] reasoning." *Id.* at 57 (White, J., concurring in part and dissenting in part).

Congress explicitly invoked *Union Gas* to enact the trio of intellectual-property abrogation laws. For example, the Senate Report for the Copyright Remedy Act observed that, until *Union Gas*, it was unclear "whether Congress has the power under article I of the Constitution to abrogate the immunity of states."

S. Rep. No. 101-305, at 8 (1990). In Congress's view, *Union Gas* "affirmatively answered the question" in favor of Congress's "plenary power to enact Federal legislation." *Id.* Thus, Congress chose to rely on its powers under the Patent and Copyright Clause of Article I to enact the Act. *Id.*; *see also, e.g.*, H.R. Rep. No. 101-282, pt. 1, at 7 (1989).

B. *Seminole Tribe* and its Aftermath

Shortly after Congress passed these abrogation laws, however, this Court explicitly overruled *Union Gas*. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996) ("*Union Gas* was wrongly decided and . . . should be, and now is, overruled."). As the Court explained, "[i]n the five years since it was decided"—a period when Congress passed all three abrogation laws—"*Union Gas* has proved to be a solitary departure from established laws." *Id.*

Thus, in *Seminole Tribe*, the Court held that Congress's Article I powers do not include the power to abrogate state sovereign immunity. *Id.* The Court explained that state sovereign immunity "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.

Three years later, the Court specifically applied this ban on Article-I based abrogation to Congress's power to regulate intellectual property. *See Florida Prepaid*, 527 U.S. at 636. In a pair of cases decided the same day, the Court struck down both the Patent Remedy Act and the Trademark Remedy Act as unconstitutional. *Id.* (Patent Remedy Act); *College Sav. Bank v. Fla. Prepaid*

Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999) (Trademark Remedy Act).

As the Court explained in *Florida Prepaid*, "*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers." 527 U.S. at 636. Thus, Article I's Patent and Copyright Clause does not empower Congress to authorize private lawsuits against states. *Id.*

The Court went on to consider whether the patent and trademark statutes could be justified under any other constitutional theory. The Court held that they could not. In particular, the Court held that neither statute was a valid exercise of Congress's Section 5 power to enforce the substantive provisions of the Fourteenth Amendment. *Id.* at 641-47; *College Savings Bank*, 527 U.S. at 672-75.

Although this Court has not explicitly addressed the constitutionality of the Copyright Remedy Act, the statute has featured prominently in the Court's previous decisions.

For example, in *Seminole Tribe*, the Court criticized the *Union Gas* plurality's Commerce Clause rationale by observing that it would necessarily extend to "all the other Article I powers." 517 U.S. at 62. To illustrate this criticism, the Court cited a Fifth Circuit decision that had upheld the Copyright Remedy Act as a valid exercise of Congress's Article I power to regulate copyrights. *Id.* (citing *Chavez v. Arte Publico Press*, 59 F.3d 539, 546 (5th Cir. 1995), *rev'd after remand*, 204 F.3d 601, 607 (5th Cir. 2000)). In his *Seminole Tribe*

dissent, moreover, Justice Stevens agreed that the majority opinion "prevents Congress from providing a federal forum for a broad range of actions against States," including "those sounding in copyright and patent laws." *Id.* at 77 (Stevens, J., dissenting).[1]

After the Court decided *Seminole Tribe*, it granted a pending petition that sought to reverse the Fifth Circuit decision that had upheld the Copyright Remedy Act. *Univ. of Houston v. Chavez*, 116 S. Ct. 1667, 1667 (1996). It then vacated the Fifth Circuit's decision to uphold the Act and remanded the case "for further consideration in light of *Seminole Tribe*." *Id.*

On remand, the Fifth Circuit reversed its previous holding and held that the Act was unconstitutional. *Chavez v. Arte Publico Press*, 204 F.3d 601, 607 (5th Cir. 2000). Applying *Seminole Tribe* and *Florida Prepaid*, the court concluded that the Act could not be justified as a valid exercise of Congress's powers under either the Copyright Clause of Article I or Section 5 of the Fourteenth Amendment. *Id.*

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[1] *See also, e.g.*, *Florida Prepaid*, 527 U.S. at 650 (Stevens, J., dissenting) (acknowledging that Congress's authority to regulate patents and its authority to regulate copyrights derive from "the same Clause" of the Constitution); *College Savings Bank*, 527 U.S. at 695 (Breyer, J., dissenting) (citing the Copyright Remedy Act as an example of a statute whose constitutionality was doubtful under the Court's decision).

C. This Lawsuit

This case concerns the display of a handful of copyrighted images online by a state agency—an agency whose purpose is to preserve and promote state history.

In 1996, a shipwreck was discovered off the coast of North Carolina. The wreck is the remains of the Queen Anne's Revenge, the flagship of the pirate known as Blackbeard. Because of the wreck's historical and archaeological value, the North Carolina Department of Natural and Cultural Resources began a twenty-year process to recover, preserve, and archive the wreckage. *See* Pet. App. 7a.

Petitioner Rick Allen is a documentary filmmaker. Allen agreed to document the Department's recovery of the Queen Anne's Revenge. He has registered copyrights for his photographs and video footage of the recovery. Pet. App. 8a.

In 2013, Allen accused the Department of copyright infringement because it had posted a few images of the shipwreck's anchor on the Department's website. The parties settled the dispute. *See* Pet. App. 9a. In the settlement agreement, Allen expressly allowed the Department to "retain, for research purposes, archival footage, still photographs and other media" of the shipwreck. Pet. App. 10a. He further allowed the Department to display Allen's "noncommercial digital media" on its website. Pet. App. 10a.

In this lawsuit, Allen has alleged that, after the settlement agreement, the Department posted online

five short videos and one photograph that depicted the State's recovery of artifacts from the Queen Anne's Revenge. Shortly after Allen filed his complaint, the Department removed the videos and photographs from that online location. Pet. App. 12a.

Based on these allegations, Allen sued the Department and several state officials, including Governor Roy A. Cooper, for copyright infringement in the Eastern District of North Carolina. Pet. App. 12a.

The Department moved to dismiss. Among other reasons, the motion argued that the Department enjoys state sovereign immunity from copyright claims. Pet. App. 13a. On this issue, the district court denied the motion to dismiss. Pet. App. 14a.

The district court observed that, for over a century, this Court has held that states are usually immune from lawsuits in federal court. Pet. App. 54a (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)). The court opined, however, that the Court's reasoning in these cases is "flawed" and "harm[ful] to the fundamental rule of law in this nation." Pet. App. 54a. Despite this view, the district court acknowledged that, under this Court's precedents, Congress cannot abrogate state sovereign immunity using its Article I power to regulate copyrights. Pet. App. 50a (citing *Seminole Tribe*, 517 U.S. at 66, 72).

The court went on, however, to consider whether Congress had the power to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment. Pet. App. 50a-53a. To abrogate immunity under that provision, Congress must decide that

abrogation is necessary to remedy a widespread pattern of constitutional violations by states. *See Florida Prepaid*, 527 U.S. at 645.

According to the district court, the Copyright Remedy Act was a valid exercise of Congress's Section 5 powers. In the district court's view, the Act's legislative record contains "sufficient evidence of infringement of copyrights by the states" to justify abrogation of state sovereign immunity for copyright claims. Pet. App. 52a.

The Fourth Circuit reversed. As an initial matter, the court agreed with the district court that, under *Seminole Tribe*, Congress cannot abrogate state sovereign immunity under Article I's Patent and Copyright Clause. Pet. App. 18a.

The Fourth Circuit went on to hold that the Copyright Remedy Act was not valid under Section 5 of the Fourteenth Amendment.

First, the court observed that "it is readily apparent" that Congress relied only on its Article I powers to enact the Act. Pet. App. 21a. Because Congress never invoked its separate power under Section 5 of the Fourteenth Amendment, the court held that the Act cannot be justified based on that provision of the Constitution. Pet. App. 22a-23a (citing *Florida Prepaid*, 527 U.S. at 642 n.7).

Next, the court of appeals held that, even if Congress had properly invoked Section 5, the Copyright Remedy Act was not valid Section 5 legislation. Pet. App. 24a-31a. The court stated that

this "conclusion is required by *Florida Prepaid*," where this Court struck down the Patent Remedy Act on an "analogous" legislative record. Pet. App. 25a. The record in that case showed a mere "10 patent infringement suits against States"—a far cry from the "widespread and persisting deprivation of constitutional rights" that valid Section 5 legislation would require. Pet. App. 26a (quoting *Florida Prepaid*, 527 U.S. at 645). As this Court held, that meager record of violations could not justify the Patent Remedy Act's "sweeping abrogation provisions, which made States liable for patent infringement to the same extent as private parties." Pet. App. 26a.

The Fourth Circuit then held that, in this case, "a similar legislative record and an equally broad enactment likewise" doom the Copyright Remedy Act under Section 5. The court observed that "the record before Congress contained at most a dozen incidents of [alleged] copyright infringement by States." Pet. App. 27a. This meager record of state infringement matches "the historical evidence underlying the Patent Remedy Act, which was found insufficient in *Florida Prepaid*." Pet. App. 29a.

Moreover, the Fourth Circuit observed that Congress chose the same remedy that this Court found overbroad in *Florida Prepaid*: "imposing sweeping liability for *all violations* of federal copyright law, whether the violation implicates the Fourteenth Amendment or not." Pet. App. 30a. Because this expansive remedy "was wholly incongruous with the sparse record" of copyright infringement by states, the Fourth Circuit held that the Copyright Remedy Act

was not a proper exercise of Congress's Section 5 power to enforce the Fourteenth Amendment. Pet. App. 30a.

Allen filed a petition for rehearing en banc. The Fourth Circuit denied the petition without calling for a vote. Pet. App. 82a.

REASONS FOR DENYING THE PETITION

I. Federal Courts Have Uniformly Held That the Copyright Remedy Act Is Unconstitutional.

Two decades ago, this Court struck down the Copyright Remedy Act's sister statutes in the patent and trademark spheres. Since that time, the federal courts have uniformly concluded that the Copyright Remedy Act is likewise unconstitutional.[2]

Indeed, Allen can identify no court decision that has upheld the Remedy Act against a constitutional

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[2] *See, e.g.*, Pet. App. 24a-30a; *Chavez*, 204 F.3d at 607; *Flack v. Citizens Mem. Hosp.*, No. 6:18-cv-3236, 2019 WL 1089128, at *3 (W.D. Mo. Mar. 7, 2019); *Reiner v. Canale*, 301 F. Supp. 3d 727, 749 (E.D. Mich. 2018); *Issaenko v. Univ. of Minn.*, 57 F. Supp. 3d 985, 1007-08 (D. Minn. 2014); *Coyle v. Univ. of Ky.*, 2 F. Supp. 3d 1014, 1017-19 (E.D. Ky. 2014); *Whipple v. Utah*, No. 10-811, 2011 WL 4368568, at *20 (D. Utah Aug. 25, 2011); *Jacobs v. Memphis Convention & Visitors Bureau*, 710 F. Supp. 2d 663, 669 (W.D. Tenn. 2010); *Romero v. Cal. Dep't of Transp.*, No. 08-8047, 2009 WL 650629, at *3-5 (C.D. Cal. Mar. 12, 2009); *Mktg. Info. Masters, Inc. v. Bd. of Trustees of the Cal. State Univ. Sys.*, 552 F. Supp. 2d 1088, 1092 (S.D. Cal. 2008); *InfoMath v. Univ. of Ark.*, 633 F. Supp. 2d 674, 680-81 (E.D. Ark. 2007); *De Romero v. Inst. of P.R. Culture*, 466 F. Supp. 2d 410, 414 (D.P.R. 2006); *Hairston v. N.C. Agric. & Tech. State Univ.*, No. 04-1203, 2005 WL 2136923, at *8 (M.D.N.C. Aug. 5, 2005); *Salerno v. City Univ. of N.Y.*, 191 F. Supp. 2d 352, 355-56 (S.D.N.Y. 2001).

challenge and that was *not* reversed on appeal. *See* Pet. 15. Allen thus concedes that there is "no circuit split" on this issue, nor is one likely to arise in the future. Pet. App. 2.

This consensus on the Act's unconstitutionality extends to the federal government. Since *Florida Prepaid* and *College Savings Bank* were decided by this Court, the United States has consistently agreed that the Copyright Remedy Act cannot be justified as a valid exercise of any congressional power. Pet. 15-16. For example, in 1999 then-Attorney General Janet Reno wrote to Congress that "[i]n light of the Supreme Court's decisions in *Florida Prepaid* . . . and *College Savings Bank* . . . I have determined that the current legislative record will no longer support the constitutionality" of the Act.[3] Thus, the United States stopped defending the law.

Later administrations have taken the same uniform position: the Act's "legislative record does not support a defense of the constitutionality of that statute in its current breadth."[4]

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[3] Letter from Janet Reno, Att'y Gen., to Hon. J. Dennis Hastert, Speaker U.S. House Reps. (Oct. 13, 1999), available at https://www.justice.gov/oip/foia-library/osg_530d_letters_5_5_2017/download

[4] Letter from Jeffrey B. Wall, Acting Solicitor Gen., to Hon. Paul D. Ryan, Speaker, U.S. House of Reps. (May 5, 2017), available at https://www.justice.gov/oip/foia-library/osg_530d_letters_5_5_2017/download (citing Letter from Loretta Lynch, Att'y Gen., to Hon. Paul Ryan, Speaker, U.S. House of Reps. (Nov. 21, 2016)).

In this case, too, the United States has declined to intervene to defend the Copyright Remedy Act, despite being notified of the case shortly after the appeal was docketed in the Fourth Circuit. *See* Notice re: challenge to constitutionality of federal statute at 2, *Allen v. Cooper*, No. 17-1522 (4th Cir. May 5, 2017); *see also* Fed. R. App. P. 44.

In sum, the federal courts and the United States all agree that, under this Court's precedents, the Copyright Remedy Act is unconstitutional. This striking consensus—one that spans numerous courts and multiple administrations—shows that this Court's review is not needed to ensure uniformity of federal law. *See* S. Ct. R. 10(a).

II. The Fourth Circuit's Decision to Recognize the Act's Unconstitutionality Does Not Independently Warrant This Court's Review.

Although Allen concedes that he cannot identify any circuit split here, he contends that review is warranted merely because the court of appeals recognized that the Copyright Remedy Act is unconstitutional. That argument fails.

First, Allen is wrong that this Court "generally grants review" whenever "a federal court refuses to enforce a federal statute on constitutional grounds." Pet. 3. Although this factor is relevant to deciding whether a petition raises an important question of federal law, S. Ct. R. 10(c), it is far from dispositive. Indeed, the Court has frequently denied review in

similar cases in which a court of appeals has recognized that a federal statute is unconstitutional.[5]

In particular, this Court has routinely denied review where, as here, a statute's unconstitutionality flows directly from a previous decision of this Court.

For example, in *American Civil Liberties Union v. Mukasey*, the Court denied review of a decision by the Third Circuit that facially invalidated the Child Online Protection Act, 47 U.S.C. § 231. *See* 534 F.3d 181, 184 (3d Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009). That statute made it a crime to post "material that is harmful to minors" on the internet "for commercial purposes." 47 U.S.C. § 231(a).

In an earlier decision, however, this Court had affirmed a preliminary injunction that enjoined the law from going into effect. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 665 (2004). The Court then

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[5] *See, e.g.*, *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 517 (6th Cir. 2012) (striking down several parts of the Family Smoking Prevention and Tobacco Control Act), *cert. denied*, 569 U.S. 946 (2013); *Intercoll. Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1334 (D.C. Cir. 2012) (striking down part of the Copyright Act, 18 U.S.C. § 802), *cert. denied*, 569 U.S. 1004 (2013); *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1079 (9th Cir. 2011) (striking down part of the Immigration and Nationality Act, 8 U.S.C. § 1225(b)(1)(d)), *cert. denied*, 566 U.S. 968 (2012); *Am. Civil Liberties Union v. Mukasey*, 534 F.3d 181, 184 (3d Cir. 2008) (striking down the Child Online Protection Act, 47 U.S.C. § 231), *cert. denied*, 555 U.S. 1137 (2009); *United States v. Yazzie*, 407 F.3d 1139, 1145 (10th Cir.) (striking down part of the Sentencing Reform Act of 1984, 18 U.S.C. § 3553(b)(2)), *cert. denied*, 546 U.S. 921 (2005); *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1240 (11th Cir. 2003) (striking down parts of the Clean Air Act), *cert. denied*, 541 U.S. 1030 (2004).

remanded for further factual development, but emphasized that its decision "d[id] not foreclose" the government from meeting its burden of proof at a later stage in the litigation. *Id.* at 673.

On remand, after a bench trial, the court of appeals held that the statute facially violated the First Amendment, because it unduly restricted protected speech. *Mukasey*, 534 F.3d at 197-98. The court also held that the statue was unconstitutionally vague, in violation of the Fifth Amendment's Due Process Clause. *Id.* at 205.

The United States again filed a petition for a writ of certiorari to this Court. *See* Pet. for Cert., *Mukasey v. Am. Civil Liberties Union*, No. 08-565, available at https://stg.justice.gov/sites/default/files/osg/briefs/2008/01/01/2008-0565.pet.aa.pdf. In its petition, the United States argued that the Third Circuit's "invalidation of an Act of Congress warrants this Court's review." *Id.* The petition emphasized that the decision "would permanently prevent the government from enforcing" a statute that was designed to "protect . . . millions of children" from "harmful online pornography." *Id.* at 17. This Court was not swayed by these arguments: it denied the petition. *See* 555 U.S. 1137.

In another example, in *United States v. Yazzie*, this Court declined to review a decision by the Tenth Circuit that invalidated a provision of the Sentencing Reform Act of 1984. 407 F.3d 1139 (10th Cir.), *cert. denied*, 546 U.S. 921 (2005). The Tenth Circuit had held that the provision "must be excised" from the statute "to remedy the [Sentencing] Guidelines' underlying Sixth Amendment violations." *Id.* at 1145.

That decision followed directly from this Court's reasoning in *United States v. Booker*, 543 U.S. 220 (2005). Under *Booker*, district courts may not treat the Sentencing Guidelines as mandatory. *Id.* at 227. Thus, *Booker* struck down 18 U.S.C. § 3553(b)(1), which stated that a sentencing court "shall impose" a sentence within the guidelines range. *Id.* at 234.

As the Tenth Circuit recognized, *Booker*'s logic necessarily rendered invalid any statute that required courts to impose a mandatory sentence. *Yazzie*, 407 F.3d at 1146. Given this reality, it is no surprise that this Court saw no need to grant full review of the Tenth Circuit's ruling. *See* 546 U.S. 921.

The same logic applies to this case. As shown below, the Fourth Circuit's ruling here followed directly and inescapably from this Court's controlling precedents.

III. The Fourth Circuit Correctly Held That the Copyright Remedy Act Is Unconstitutional.

Congress may abrogate state sovereign immunity only through a valid exercise of constitutional power. The Fourth Circuit was right to hold that the Copyright Remedy Act was not a valid abrogation under any part of the Constitution.

As an initial matter, Congress enacted the Act by using its Article I power to regulate copyrights. Specifically, in deliberations over the Act, Congress invoked only its powers under Article I's Patent and Copyright Clause. For example:

- The House Report states that Congress was passing the Remedy Act under "the Copyright Clause of Article I." H.R. Rep. No. 101-282, pt. 1, at 7 (1989).

- The Senate Report states that "Congress has the power under Article I of the Constitution to abrogate [Eleventh Amendment immunity] when it legislates under . . . the Copyright Clause." S. Rep. No. 101-305, at 6 (1990).

This Court has squarely decided, however, that Article I's Patent and Copyright Clause does not empower Congress to abrogate state sovereign immunity. *Florida Prepaid*, 527 U.S. at 636. Although *Florida Prepaid* invalidated the Copyright Remedy Act's sister statute in the patent sphere, its logic applies inescapably here. The Patent and Copyright Clause gives Congress coextensive powers over patent and copyrights. U.S. Const. art. I, § 8, cl. 8. This common source of congressional power creates a "kinship between patent law and copyright law" that applies fully to the abrogation context. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439 (1984). Indeed, Allen states no reason why Congress's abrogation powers should be greater for copyrights than for patents.[6] *See* Pet. 24.

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[6] For this reason, review should be denied even if this Court takes a clause-by-clause approach to evaluating Congress's abrogation powers. *See* Pet. 23-27.

In any case, Allen is wrong that, under this Court's decision in *Katz*, such an approach would yield a different outcome here. *See* Pet. 24 (citing *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006)). That decision relied on two considerations that are unique to the

As the Fourth Circuit correctly held, the Act's invalidity under Article I ends the abrogation analysis. Pet. App. 21a-23a. When courts assess congressional authority to abrogate state sovereign immunity, they are limited to the sources of authority that Congress itself invoked. *Id.* For example, in *Florida Prepaid*, this Court held that it was "preclude[d]" from upholding an abrogation based on a clause of the Constitution that Congress did not "ha[ve] in mind" when it passed the statute. 527 U.S. at 642 n.7.

Here, the legislative record of the Copyright Remedy Act shows that Congress relied only on the Copyright Clause of Article I to enact the statute. *See* Pet. App. 22a (summarizing the Act's legislative record). Thus, the Fourth Circuit was right to hold that the Act must stand or fall based on Congress's Article I powers alone. Pet. App. 21a-23a.

But even if Congress had invoked its Section 5 power to enforce the Fourteenth Amendment's Due Process Clause, the abrogation would still be invalid.

Bankruptcy Clause. First, "[b]ankruptcy jurisdiction, at its core, is *in rem*," so "it does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction." *Katz*, 546 U.S. at 362. Second, the Bankruptcy Clause has a unique constitutional history that shows that the "States agreed in the plan of the Convention" to forgo "any sovereign immunity defense" to bankruptcy jurisdiction. *Id.* at 377.

Neither of these considerations applies here. There is no dispute that a copyright lawsuit involves in personam jurisdiction. And nothing in the history of the Copyright Clause suggests that the framers intended for the Clause to directly abrogate state immunity for copyright claims.

Under Section 5, Congress may abrogate state sovereign immunity only when doing so is "congruen[t] and proportional[ ]" to the scale of the constitutional problem that Congress seeks to remedy. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). To satisfy this standard, Congress must first identify a "widespread pattern" of constitutional violations by states. *Id.* at 531. Only a record of pervasive unconstitutional conduct by states can justify the "indiscriminate" remedy of wholesale abrogation of state sovereign immunity. *Florida Prepaid*, 527 U.S. at 447.

The Fourth Circuit correctly held that the legislative record of the Copyright Remedy Act does not meet this high bar. Indeed, when Congress enacted the Remedy Act, it did not identify any constitutional violations at all.

Copyright infringement is not categorically unconstitutional. Instead, infringement violates the Constitution only when it rises to the level of a property deprivation without due process of law. To commit such a due-process violation, a state must infringe a copyright *intentionally*. A mere "negligent act that causes unintended injury to a person's property does not 'deprive' that person of property within the meaning of the Due Process Clause." *Florida Prepaid*, 527 U.S. at 645.

Here, in its deliberations over the Remedy Act, Congress did not explicitly identify even one case in which a state had infringed a copyright intentionally. *See Chavez*, 204 F.3d at 607. As the Fourth Circuit observed, moreover, the legislative record described "only two incidents" of alleged state infringement in

enough detail to suggest that the infringement might have been intentional. Pet. App. 28a.

Likewise, Congress barely even considered whether state remedies for copyright infringement were adequate to address any constitutional problem. *Chavez*, 204 F.3d at 606. This lack of consideration independently shows that Congress did not identify a record of widespread constitutional violations. *See id.* After all, a state does not violate the Due Process Clause unless it fails to afford an adequate state remedy to enforce property rights. *See Florida Prepaid*, 527 U.S. at 643.

Even if all copyright infringement were unconstitutional, moreover, Congress did not identify a magnitude of infringement that could justify abrogation. *See City of Boerne*, 521 U.S. at 526. Instead, as the Fourth Circuit found, "the record before Congress contained at most a dozen incidents of copyright infringement by States." Pet. App. 29a.

This meager record of alleged infringement falls far short of the "widespread and persisting deprivation of constitutional rights" that abrogation of state sovereign immunity would require. When this Court faced a similar record in *Florida Prepaid*, it ruled that the "handful" of allegations of state patent infringement before Congress came nowhere close to justifying complete abrogation of state sovereign immunity for all patent claims. 527 U.S. at 645.

The Copyright Remedy Act has this same defect. Based on a few, anecdotal allegations of state copyright infringement, Congress chose an expansive remedy:

complete abrogation of state sovereign immunity for all copyright claims. Just as in the patent context, this "indiscriminate" remedy is "so out of proportion" to the constitutional problem that it "cannot be understood as . . . designed to prevent unconstitutional behavior." *Id.* at 646-67.

Importantly, Congress chose not to tailor the scope of abrogation to focus on infringement that violates the Constitution. For example, Congress could have limited the Act's coverage to intentional infringement. Likewise, it could have applied the Act only to states that do not provide an adequate state-law remedy to recover for infringement. As this Court held in *Florida Prepaid* when it faced a similar lack of tailoring, Congress's decision not to take these steps "offends" Section 5's "proportionality principle." *Id.* at 647.

In sum, the Copyright Remedy Act's wholesale abrogation of state sovereign immunity for copyright claims was not a constitutionally valid response to the modest scope of the problem the Act was designed to address. Thus, the Fourth Circuit was right to conclude that the Act is unconstitutional. Pet. App. 30a-31a. Because this decision was "required by *Florida Prepaid*" and other precedents from this Court, further review is not warranted here.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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