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IN THE SUPREME COURT OF THE UNITED STATES

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FREDERICK L. ALLEN, ET AL., )

Petitioners, )

v. ) No. 18-877

ROY A. COOPER, III, GOVERNOR OF )

NORTH CAROLINA, ET AL., )

Respondents. )

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Washington, D.C.

Tuesday, November 5, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

DEREK L. SHAFFER, ESQ., Washington, D.C.;

on behalf of the Petitioners.

RYAN PARK, Deputy Solicitor General, Raleigh, North

Carolina; on behalf of the Respondents.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 18-877, Allen versus Cooper.

Mr. Shaffer.

ORAL ARGUMENT OF DEREK L. SHAFFER

ON BEHALF OF THE PETITIONERS

MR. SHAFFER: Mr. Chief Justice, and may it please the Court:

When states infringe the exclusive federal rights that Congress is charged with securing, Congress can make states pay for doing so. That's our respectful submission today, one that follows from the Constitution's text and affords ample basis for this Court to uphold the work Congress did in enacting the CRCA.

Article I, Section 8, clause 8, what we're calling the intellectual property clause, is unique within Article I in laying down an express constitutional mandate for Congress to protect specified private property rights against any and all intrusion.

Consider just how pointed and clear the constitutional text is. Congress is not

1 only to be granting copyrights but securing  
2 them, and the resulting rights by definition are  
3 meant to be exclusive rights. Exclusive against  
4 whom, Your Honors? Exclusive against all  
5 comers, exclusive against the world, including  
6 the government and including states.

7           And this exercise of congressional  
8 power serves the express constitutional purpose  
9 to promote progress. How? By affording  
10 monetary recompense to copyright holders. The  
11 framers thus made very clear that all those  
12 wanting to use an author's copyright are meant  
13 to be paying money for doing so.

14           This clause's text signals a plan of  
15 the convention waiver like no other in Article  
16 I. For states to retain immunity to avoid  
17 paying for infringing the very same exclusive  
18 rights that Congress is meant to secure would be  
19 incompatible with the text as fixed and  
20 understood by the framers.

21           And this Court has already so  
22 recognized in substance. Going back to 1888, in  
23 *United States v. Palmer*, the Court said in  
24 holding the federal government monetarily liable  
25 for infringing patents that Congress's power,

1 the same power we were just talking about, could  
2 not be affected if the government had a reserve  
3 right to infringe. Same reasoning holds for  
4 states, Your Honors.

5 And in Goldstein v. California in  
6 1973, the Court said -- and, again, in -- here  
7 discussing copyrights -- when Congress grants an  
8 exclusive right or monopoly, its effects are  
9 pervasive. No citizen or state may escape its  
10 reach.

11 JUSTICE GINSBURG: All -- all that is  
12 -- would be highly persuasive if we didn't have  
13 the patent decision, the Florida Prepaid  
14 decision. It is the very same clause. It's the  
15 very same secure. It's the very same  
16 exclusivity.

17 MR. SHAFFER: Correct, Justice  
18 Ginsburg. But -- but the Court was not  
19 examining the text. The Court was not examining  
20 the clause. In fact, it didn't even grant  
21 review on the question whether the Article I  
22 basis for the Patent Remedy Act would be a valid  
23 basis. That wasn't before the Court. It wasn't  
24 even raised before the Court.

25 And so all the Court did, Justice

1 Ginsburg, was refer back to Seminole Tribe, that  
2 the sweeping assumption of Seminole Tribe that  
3 no Article I clause could ever supply a basis  
4 for abrogation. That's the same assumption that  
5 the Court in Katz more recently called dicta and  
6 held to be erroneous dicta, an erroneous  
7 assumption, which is the only way that the Court  
8 was able to analyze the specifics of the  
9 Bankruptcy Clause and find that it did reflect a  
10 plan of the convention waiver --

11 JUSTICE GINSBURG: In -- in --

12 MR. SHAFFER: -- and a basis for  
13 abrogation.

14 JUSTICE GINSBURG: -- in Katz, the --  
15 the Court concentrated on the bankruptcy  
16 authority as a unique authority. We have  
17 Seminole, which is across the board, and then we  
18 have the exception for the Bankruptcy Clause.

19 Now are you asking us to go through  
20 all of the Article III authority and take them  
21 one by one? Isn't Katz more properly read as a  
22 bankruptcy exception to the Seminole Tribe rule?

23 MR. SHAFFER: Your Honor, we rely upon  
24 the methodology of Katz and we rely upon the  
25 upfront holding of Katz. We take it to be a

1 holding that, in fact, what Seminole Tribe had  
2 said about no Article I power supplying a basis  
3 for abrogation, that that was dicta, and that  
4 was an erroneous assumption.

5 In fact, the relevant portion of  
6 Seminole Tribe, as both the majority and the  
7 dissent in that case recognized, it dealt with  
8 the Copyright Clause and the Bankruptcy Clause  
9 and the commerce power all in the same breath.  
10 It was the same --

11 JUSTICE KAGAN: And do you -- because  
12 I read the erroneous dicta language -- maybe I'm  
13 misreading it, so you can tell me how -- as just  
14 a reference to the statements in Seminole Tribe  
15 about the Bankruptcy Clause.

16 MR. SHAFFER: It's the same sentences,  
17 Justice Kagan. It's the same exact portion of  
18 Seminole Tribe that dealt with all Article I  
19 clauses in the same breath.

20 And, in fact, in Justice Stevens'  
21 dissent in -- I think it was the first footnote  
22 of it -- he noted that the Seminole Tribe  
23 decision by its terms would apply to the  
24 commerce -- would apply to the Copyright Clause  
25 and to the Bankruptcy Clause, and Justice

1 Rehnquist, I think -- and Chief Justice  
2 Rehnquist, in Footnote 16, I think, engaged that  
3 assumption and said, yes, essentially, no big  
4 deal, but that is the necessary upshot of the  
5 Seminole Tribe holding as it was articulated by  
6 the Court.

7 And that's why I think, in Katz, this  
8 Court had to deal right upfront with whether  
9 that assumption held or not, and it rejected it  
10 as erroneous.

11 But, Justice Ginsburg, Justice Kagan,  
12 let me assure the Court there is no other clause  
13 in Article I like this one. There is no other  
14 clause that is as pointed. There is no other  
15 clause that contemplates that there will be  
16 private property rights --

17 JUSTICE KAGAN: But if you're --

18 JUSTICE KAVANAUGH: What about --

19 JUSTICE KAGAN: -- if you're right --  
20 if you are right, we would then have to go back  
21 to Florida Prepaid, right, and topple that rule?

22 MR. SHAFFER: It would be certainly  
23 open to folks in patent cases to make that  
24 argument, Justice Kagan.

25 JUSTICE KAGAN: But how -- how could

1 -- how could we have the two rules going  
2 simultaneously?

3 MR. SHAFFER: That would be my  
4 prediction. My prediction is that, ultimately,  
5 the Patent Remedy Act would be revisited and  
6 properly upheld as a valid exercise -- exercise  
7 of Congress's Article I power.

8 JUSTICE ALITO: So, basically, you're  
9 asking us to overrule Florida Prepaid?

10 MR. SHAFFER: I'm asking this Court to  
11 follow Katz, Justice Alito, where I think  
12 Florida Prepaid was overruled in relevant part  
13 and certainly --

14 JUSTICE ALITO: You think Katz  
15 overruled Florida Prepaid?

16 MR. SHAFFER: I think it -- it  
17 overruled -- it overruled the basis for Florida  
18 Prepaid. The -- the precedential foundation for  
19 Florida Prepaid was solely the relevant portion  
20 of Seminole Tribe. That's exactly what the  
21 Court was -- was, I think, calling erroneous --  
22 erroneous dicta and rejected.

23 So I take the holding of Katz to have  
24 totally undermined the foundation --

25 JUSTICE ALITO: So you --

1 MR. SHAFFER: -- of Florida Prepaid.

2 JUSTICE ALITO: -- you think the state  
3 of the law is that every Article I, Section 8  
4 power would have to be considered independently  
5 and Florida Prepaid may hold on for a while as a  
6 poorly reasoned exception to that rule but  
7 ultimately would have to be overruled to bring  
8 it in line with the position you're asking us to  
9 adopt today?

10 MR. SHAFFER: I have only one friendly  
11 amendment to Your Honor's assumption, which is I  
12 don't think that there is any other Article I  
13 clause that reflects a plan of the convention  
14 waiver in the sense that we're discussing, in  
15 terms of the constitutional text and the  
16 necessary implications of it, because, for the  
17 reasons that this Court has already recognized,  
18 we think it is totally incompatible with the  
19 framers' text and the framers' contemplation to  
20 say that there's any such thing as an exclusive  
21 private property right secured by the United  
22 States Congress that states are free to infringe  
23 without pay. I think that would have been  
24 antithetical to the framers' conception.

25 That's our respectful submission on

1 Article I. And if the Court doesn't have other  
2 questions about that, I'll move on to --

3 JUSTICE KAVANAUGH: Well, do you think  
4 Florida Prepaid is subject to our usual stare  
5 decisis rules or not?

6 MR. SHAFFER: Well, Justice Kavanaugh,  
7 obviously, the Court will decide what is its  
8 precedent. We read Florida Prepaid as not  
9 having really squarely addressed this question.  
10 I don't think Florida Prepaid reached a holding  
11 on the Article I point because the question was  
12 not before the Court there.

13 JUSTICE KAVANAUGH: Well, the Court  
14 said the Patent Remedy Act cannot be sustained  
15 under either the Commerce Clause or the Patent  
16 Clause. Before that, it said Seminole Tribe  
17 makes clear that Congress may not abrogate state  
18 sovereign immunity pursuant to its Article I  
19 powers.

20 MR. SHAFFER: It said that without the  
21 question having been presented and without any  
22 party arguing the question, which is why I -- I  
23 would respectfully question whether it's truly a  
24 holding, Justice Kavanaugh.

25 But, if it was a holding, it was, just

1 as Your Honor articulated it, based solely on  
2 Seminole Tribe, the very same aspect of Seminole  
3 Tribe that we read the Court as revisiting and  
4 overruling in Katz. But the Court will decide  
5 the status of its precedent. If it has any  
6 qualms about the Article I basis for the CRCA, I  
7 would ask the Court to sustain the CRCA on the  
8 strength of the --

9 JUSTICE SOTOMAYOR: Could you tell me  
10 --

11 MR. SHAFFER: -- Section 5 of the  
12 Fourteenth Amendment basis.

13 JUSTICE SOTOMAYOR: -- can you  
14 articulate what "plan of the convention" means  
15 to you? I know what it means in Katz. And --  
16 and they look to a textual foothold, the ability  
17 of -- ability of habeas courts to grant relief  
18 to state prisoners. So that's a clear intrusion  
19 on states.

20 I don't see the same thing in the  
21 intellectual property provision. In fact, for  
22 200 years, there was concurrent state and  
23 federal jurisdiction. That seems to cut against  
24 your argument that somehow the founders thought  
25 that this was an exclusive federal right.

1 MR. SHAFFER: Take those in turn,  
2 Justice Sotomayor.

3 JUSTICE SOTOMAYOR: Or exclusively, an  
4 exclusive right to the federal government.

5 MR. SHAFFER: A plan of the convention  
6 waiver refers to some reflection that states  
7 were surrendering their back-dropped default  
8 sovereign immunity in a discrete respect as part  
9 of the constitutional convention --

10 JUSTICE KAGAN: You don't think --

11 MR. SHAFFER: -- and what came out of  
12 it.

13 JUSTICE SOTOMAYOR: -- that exclusive  
14 jurisdiction would have signaled that more  
15 clearly --

16 MR. SHAFFER: I --

17 JUSTICE SOTOMAYOR: -- than concurrent  
18 jurisdiction for over 200 years?

19 MR. SHAFFER: I think that our textual  
20 basis for the abrogation is stronger than it was  
21 in Katz. In Katz, as you say, Your Honor, I --  
22 I don't think it was in the Bankruptcy Clause,  
23 the plan of the convention waiver.

24 And as to habeas jurisdiction, that  
25 was not about monetary relief against states.

1 That was not about hauling states into federal  
2 court. It was just about granting relief,  
3 habeas relief, to get prisoners out of state  
4 prison.

5 I -- I don't think that that's  
6 anywhere near as on point as what you have with  
7 the intellectual property clause, where clearly  
8 the framers' contemplation is these are  
9 exclusive rights that anyone who may infringe  
10 has to pay for.

11 Congress's job is to secure those  
12 rights. It cannot do that without abrogating  
13 state sovereignty --

14 JUSTICE SOTOMAYOR: Well, you're  
15 assuming --

16 MR. SHAFFER: -- within this discrete  
17 realm.

18 JUSTICE SOTOMAYOR: -- the latter part  
19 you're assuming. Nothing about it -- it says  
20 securing the copyright, but it doesn't say  
21 making sure that the copyright owners are paid.

22 MR. SHAFFER: To promote progress.

23 JUSTICE SOTOMAYOR: Number one --

24 MR. SHAFFER: To promote progress,  
25 Justice Sotomayor. It is a preamble that is not

1 echoed anywhere else in Article I.

2 JUSTICE SOTOMAYOR: Some would say  
3 that injunctive relief promotes progress.

4 MR. SHAFFER: Well, James Madison --

5 JUSTICE SOTOMAYOR: That's a damages  
6 question. That's not a -- an issue of what  
7 promotes the arts.

8 MR. SHAFFER: James Madison's  
9 conception reflected in the text of what the  
10 monopoly would achieve is that the authors and  
11 inventors would get paid for their inventions.  
12 They would get paid for their creations.

13 And as the Court, as I indicated, back  
14 in 1888 recognized, it is antithetical to that  
15 to say that government of any kind, certainly  
16 the federal government, can infringe those  
17 exclusive rights that -- that Congress is to be  
18 securing.

19 But, as to Section 5 of the Fourteenth  
20 Amendment, Your Honor, this is a case and a  
21 legislative record different from what the Court  
22 had before it in Florida Prepaid.

23 It is much stronger in relevant part.  
24 In part, that's because of the fundamental  
25 difference between copyright law at issue in

1 this case and patent law that the Court was  
2 looking at in Florida Prepaid.

3 In part, it's also because you have a  
4 legislative record that is so much stronger,  
5 Your Honors. You had the Register of  
6 Copyrights, Ralph Oman, testifying to Congress,  
7 preparing a report based on a 50-state survey,  
8 and in -- a -- a very conscientious compilation  
9 of comments and studies about what was happening  
10 in federal copyrights and why this legislation  
11 was necessary to protect them.

12 JUSTICE ALITO: But you tell us in  
13 your brief that when Congress enacted the CRCA  
14 it had "16 examples over the previous decade of  
15 reported state infringement in 13 states."

16 Is -- is that enough to identify a  
17 serious constitutional problem?

18 MR. SHAFFER: I think so, Justice  
19 Alito. I think, first of all, as to this  
20 serious constitutional problem, you have federal  
21 property rights that are -- have been granted  
22 and that are private property rights, and states  
23 are infringing without paying for them.

24 That is a fundamental intrusion. That  
25 is a fundamental constitutional problem. And I

1 think Congress, if it has a remedy that is  
2 conscientiously tailored around that, should  
3 have, as the Court put it in City of Boerne --

4 JUSTICE ALITO: Sixteen examples is  
5 not enough. And the -- the mere fact that there  
6 were -- that there were state infringements  
7 doesn't necessarily mean that there were state  
8 violations of a constitutional right, does it?

9 MR. SHAFFER: We think it follows in  
10 the copyright context, Justice Alito.

11 JUSTICE ALITO: Every -- every  
12 infringement is a violate -- every infringement  
13 by a state or by the federal government is a  
14 constitutional violation?

15 MR. SHAFFER: The nature of the  
16 exclusive intellectual property right is that  
17 one will have the right respected or else be  
18 compensated for an intrusion. That is the  
19 nature of intellectual property.

20 And for copyright in particular,  
21 Justice Alito, infringement by definition means  
22 someone has copied the protected original  
23 expression of the copyright holder. And, yes,  
24 we think that that is a constitutional violation  
25 pretty much every time.

1                   JUSTICE ALITO: But what if it's  
2 negligent?

3                   MR. SHAFFER: I don't think it --  
4 Justice Alito, I don't think it can be negligent  
5 in a relevant sense.

6                   The -- the -- the -- the government  
7 may permit procedural due process violations by  
8 doing all sorts of things negligently, denying  
9 notice, denying opportunity to be heard, a  
10 spurious welfare cancellation. Those things  
11 offend procedural due process. But there's also  
12 a takings basis for this legislation. And the  
13 Court has been very clear that a taking can  
14 occur even through a regulatory taking, as in  
15 Penn Central.

16                   And so, if there is a predictable  
17 result of a government action that denies  
18 someone their protected property rights and does  
19 that without compensation, that is a Fourteenth  
20 Amendment problem.

21                   I submit that that's true in every  
22 case, but it's certainly true in most cases.  
23 And the Court's been very clear that Congress  
24 has prophylactic and deterrent rights under its  
25 Section 5 power.

1                   And I would also note, as to the 16  
2                   examples that we're talking about, those  
3                   examples are really in the nature of reports,  
4                   Justice Alito.

5                   So one of those reports was from the  
6                   Motion Picture Association of America, which  
7                   said that films were being shown by state prison  
8                   authorities widely.

9                   And when that was pointed out to  
10                  multiple states, two of those states came back  
11                  and said, we're going to stand on our Eleventh  
12                  Amendment sovereign immunity.

13                  One of those is North Carolina, one of  
14                  those states. That's one of the episodes that  
15                  was reported.

16                  And just two other points about this.

17                  The report from Ralph Oman came in  
18                  1988. That was three years after the Court's  
19                  decision in Atascadero. So the register was  
20                  clear, the former register was clear, and the  
21                  Congress was clear that this was an emerging  
22                  problem, and what they had in the way of  
23                  examples was within a three-year band of time.

24                  JUSTICE ALITO: But do you think that  
25                  record is stronger than the record in City of

1 Boerne?

2 MR. SHAFFER: Your Honor, I think the  
3 intrusion here is much lighter than in City of  
4 Boerne.

5 Here, all that states are being held  
6 to substantively is the same rule they've been  
7 under since the founding: Don't infringe  
8 copyrights. Everyone agrees that that is an  
9 obligation of the states.

10 JUSTICE ALITO: Well, that may be  
11 true, but the question is, is there greater  
12 congruence and proportionality here than there  
13 was in City of Boerne, or maybe that we should  
14 reexamine City of Boerne too? That's a --

15 MR. SHAFFER: I'm not urging that.

16 JUSTICE ALITO: It's a -- okay.

17 MR. SHAFFER: I'm -- I'm not urging  
18 that, and I don't think the Court needs to  
19 reexamine that because there isn't the same sort  
20 of congruence and proportionality problem.

21 Part of what was at issue I think in  
22 City of Boerne, and rightfully concerned the  
23 Court, is Congress was redefining the  
24 substantive law. It was intruding upon the  
25 substantive conduct of states and basically

1 changing the substantive rules of what would  
2 constitute a constitutional violation.

3 That's not what you have here,  
4 respectfully, Justice Alito. This is Congress  
5 looking at something that is a cardinal sin. It  
6 is states infringing federal copyrights,  
7 protected federal property.

8 And it's -- it's enacting a remedy  
9 that is precisely tailored to that. States have  
10 to pay what any private infringer would pay.  
11 States have to pay what they would insist an  
12 infringer of their protected copyrights pay.

13 That's all Congress was doing in the  
14 CRCA. And I don't think that there should be  
15 the same sort of empirical scepticism on the  
16 Court's part, especially given the fact that  
17 Congress was so clear about why the problem was  
18 newly emerging and why, to use the words that  
19 are found in the legislative record, this was  
20 just the tip of the iceberg, because copyright  
21 holders, small businesses, individual authors,  
22 did not have the means, did not have the  
23 incentives to be going to court and reporting  
24 instances of deprivation.

25 JUSTICE GINSBURG: You -- you said it

1 was inevitably intentional copying. But North  
2 Carolina says that it used the copyrighted works  
3 only for educational purposes and it got that  
4 right from the settlement that the parties  
5 reached.

6 So that sounds like North Carolina is  
7 saying, we -- we -- far from intentionally  
8 copying, we thought we were just carrying out  
9 the rights we had under the settlement  
10 agreement.

11 MR. SHAFFER: Your Honor, that's what  
12 they say. Of course, we're here on a complaint.  
13 We're here on a motion to dismiss that was  
14 granted. And -- and we are entitled to have all  
15 inferences drawn in favor of the allegations of  
16 the complaint.

17 And if Your Honor looks at the  
18 settlement agreement, it's very clear that it  
19 needed -- there needed to be watermarks and  
20 timestamps that were on North -- on any images  
21 that North Carolina might use. That was not on  
22 the images that they were using.

23 When copyright infringement was  
24 pointed out to them and they were caught red  
25 handed with that, they returned to infringement.

1 The infringement kept up even after the filing  
2 of the lawsuit. That's in the complaint too.

3 Blackbeard's law was then passed by  
4 North Carolina to make sure that they could get  
5 out from under the settlement agreement and they  
6 could basically get off the hook for liability  
7 for their infringement. That, too, is in the  
8 complaint. That's a defense that North Carolina  
9 raised in a parallel state court suit. They  
10 pointed to Blackbeard's law to basically evade  
11 any liability for their copyright infringement.

12 And so, if you look at the complaint,  
13 I'd point the Court to paragraphs 73 through 75  
14 and to paragraph 80, it is explicit that these  
15 were intentional uncompensated infringements by  
16 the state and that they were unconstitutional in  
17 violating both the Fourteenth Amendment and the  
18 takings clause. And that's --

19 JUSTICE KAGAN: Mr. Shaffer -- please.

20 MR. SHAFFER: I'm sorry, Justice  
21 Kagan. I was just going to say under the  
22 rationale that the Court articulated in U.S. v.  
23 Georgia, Tennessee v. Lane, at the very least it  
24 should be open to my clients to be able to  
25 proceed on this complaint and show that there

1 was something unconstitutional here, Justice  
2 Alito --

3 JUSTICE KAGAN: How --

4 MR. SHAFFER: -- and the CRCA is valid  
5 as to that. Sorry, Justice Kagan.

6 JUSTICE KAGAN: How -- how do we  
7 figure out how much is enough in a legislative  
8 record? You said these 16 instances are enough.  
9 In Florida Prepaid, I believe there were eight  
10 instances, and we said that wasn't enough.

11 Now what's the difference between the  
12 two --

13 MR. SHAFFER: I think that --

14 JUSTICE KAGAN: -- other than eight,  
15 you know?

16 MR. SHAFFER: -- part of it is the  
17 fundamental difference between patents and  
18 copyrights. In -- in Florida Prepaid, the  
19 Court's dealing with a body of law where states  
20 can be totally innocent in their infringement.  
21 They could independently arrive at an invention,  
22 they could have no awareness that anyone else  
23 came first, you're still going to be liable for  
24 patent infringement.

25 Copyright law by definition is much

1 more circumscribed. For there to be  
2 infringement, it requires that a state have --  
3 have copied the original expression of someone  
4 else. Absent that, we're not talking about a  
5 copyright violation.

6 JUSTICE KAGAN: Yeah, because you  
7 could look at 16 as a really low number. There  
8 are 50 states, and if 16 of them infringed once,  
9 that gets you to 16. That wouldn't strike me as  
10 a major national problem.

11 MR. SHAFFER: It was reported -- there  
12 were 16 reports oftentimes of multiple instances  
13 of infringement or bad-faith conduct by states.  
14 That's encompassed within the 16 that we're  
15 referring to.

16 And as to that, there were dozens of  
17 comments that were received about is this a  
18 bigger problem, is this an increasing problem?  
19 And Congress, per the Register, found that, yes,  
20 it was.

21 And it might be different, Justice  
22 Kagan, if there were 16 examples after three  
23 decades had passed, but the reality is Congress  
24 saw the tip of the iceberg of this problem. It  
25 saw something that was growing quickly and said

1 this is a serious problem for the Fourteenth  
2 Amendment; we're going to put remedies in place  
3 in order to stop it, in order to deter it.

4 And you have from the amici on our  
5 side a whole chorus of industry associations,  
6 including the Chamber of Commerce, including the  
7 Copyright Alliance, the way that this iceberg  
8 has grown much, much bigger.

9 JUSTICE KAGAN: But how --

10 MR. SHAFFER: Congress was exactly  
11 right.

12 JUSTICE KAGAN: -- do we think about  
13 that? Because a lot of that is not in the  
14 record. Do we close our eyes to that? Do we  
15 act like a trial court with respect to those  
16 sorts of facts? What do we do?

17 MR. SHAFFER: You have a clear  
18 rationale from Congress in the record, which is  
19 that there was a newly emerging problem and a  
20 tip of the iceberg, and Congress wanted to ward  
21 it off, Justice Kagan.

22 And perhaps in a case like City of  
23 Boerne, the Court might be skeptical as to  
24 whether this was a good-faith, sound prediction  
25 by Congress or whether it was paranoia or

1 whether it was pretextual.

2 I think the Court should be heartened  
3 here, Justice Kagan, by the fact that exactly  
4 what Congress feared would come to pass has come  
5 to pass over and over and over again. And  
6 there's a one-sided chorus on this. It just  
7 confirms the reality and the soundness of  
8 Congress's prediction.

9 JUSTICE BREYER: Why hasn't there --  
10 after Florida Prepaid, why -- why -- why do you  
11 think -- why has there not been, have not been,  
12 many, many instances in which states decide,  
13 well, look at all this text stuff, it's  
14 fabulous, we'll just copy all the patents? Why  
15 not?

16 MR. SHAFFER: Justice Breyer, there  
17 has been a lot -- I mean, there has been a lot  
18 of that. And you have that from the amici. And  
19 I think it's also influenced licensing entities.

20 JUSTICE BREYER: All over California.  
21 Why doesn't California have a budget problem?  
22 We'll just take all the Silicon Valley material  
23 and -- and we'll copy it.

24 MR. SHAFFER: If you read from Dow  
25 Jones -- I -- I committed to --

1 JUSTICE BREYER: They're doing it?

2 MR. SHAFFER: Your Honor, that's what  
3 they did tens of thousands of times over with --

4 JUSTICE BREYER: I'm not talking about  
5 copyright. I'm talking about patents.

6 MR. SHAFFER: As to patents, I don't  
7 think that -- that states are in the patent  
8 business to the same extent, Justice Breyer. I  
9 don't --

10 JUSTICE BREYER: Why don't they -- why  
11 don't they -- here's the solution to all their  
12 budget problems?

13 MR. SHAFFER: Well, maybe they're  
14 afraid that this Court might be there at the end  
15 of the day to answer unresolved questions after  
16 Florida Prepaid.

17 JUSTICE BREYER: What? What question?  
18 We apparently said they could go do it.

19 MR. SHAFFER: Well, we think that  
20 there's still an Article I -- a question as to  
21 the Article I basis. That's what we're  
22 respectfully urging. And, certainly,  
23 Congress --

24 JUSTICE BREYER: I, of course,  
25 dissented.

1 (Laughter.)

2 MR. SHAFFER: We -- I -- I know it  
3 well, Justice Breyer.

4 JUSTICE ALITO: Well, you -- what you  
5 say raises an interesting question under Section  
6 5 of the Fourteenth Amendment. When we have  
7 decided that the -- the congressional record at  
8 the time of an enactment that attempts to rely  
9 on Congress's Section 5 power is insufficient,  
10 and in subsequent years there are events that  
11 would have made the record a lot stronger, what  
12 does that do to the decision? Does that -- does  
13 that mean that it's -- it's subject to  
14 reexamination based on what has happened after  
15 that point?

16 So why should we look at events that  
17 occurred after the enactment of this?

18 MR. SHAFFER: Because you've never  
19 looked at this legislative record before. When  
20 you look at this legislative record, you find a  
21 predictive judgment by Congress that is a  
22 well-reasoned and logical and evidence-based  
23 predictive -- predictive judgment that this is a  
24 real phenomenon, it is emerging, it's being  
25 reported from multiple sources, it is quite

1 concerning when you look at this from Fourteenth  
2 Amendment principles, among others.

3 And so they decided to do what they  
4 did. So that rationale is corroborated, Justice  
5 Alito. There's a reality to it, a grounding  
6 that is evident in what has happened subsequent  
7 to that.

8 And I think if the Court were to go,  
9 from our perspective, the wrong way in this  
10 case, the problem will get that much worse,  
11 because that will be taken as a green light for  
12 states to continue with their infringement  
13 without paying for it.

14 JUSTICE ALITO: So -- so can Congress  
15 say we're enacting this under Section 5 and we  
16 recognize that there's not much of a record of  
17 state violations at this point, but we predict  
18 that there is going to be?

19 MR. SHAFFER: If -- if the remedy is  
20 sufficiently well tailored around the  
21 constitutional deprivation, my answer to that is  
22 yes, Justice Alito. I think we are stronger  
23 than that. But to take U.S. -- to take  
24 Tennessee v. Lane and U.S. v. Georgia, there,  
25 the Court was looking at essentially what are

1 the facts of specific cases or a specific set of  
2 cases and saying from the Court's perspective,  
3 yes, this would violate the Constitution,  
4 therefore, the remedy is constitutional as to  
5 those separate cases.

6 JUSTICE ALITO: But I didn't  
7 understand you to be making an argument under  
8 U.S. versus Georgia. Am I wrong? You're making  
9 an as-applied argument to this particular case?

10 MR. SHAFFER: I think it's on North  
11 Carolina to make an as-applied challenge,  
12 Justice Alito. Our respectful submission is  
13 that the CRCA is constitutional as enacted by  
14 Congress and as relied upon by us in this case.

15 And if North Carolina wants to argue  
16 that it is an unconstitutional application as to  
17 them, it's their burden to do so.

18 And we support the arguments of our  
19 amici that say the Court could ultimately decide  
20 this case under a U.S. v. Georgia or a Tennessee  
21 v. Lane rationale. I'm urging the Court, in the  
22 first instance, simply to uphold the CRCA the  
23 way that Congress enacted the CRCA and  
24 envisioned for it to be applied.

25 JUSTICE GINSBURG: But you didn't make

1 below the -- any -- at least I didn't see an  
2 argument based on U.S. v. Georgia.

3 MR. SHAFFER: We didn't, I think, cite  
4 U.S. v. Georgia. I think that is true, Justice  
5 Ginsburg. We do rely upon the arguments of our  
6 amici, and I stand by my submission to Your  
7 Honors that if anyone is -- is trying to argue  
8 that the CRCA is unconstitutionally applied in  
9 this case, it's North Carolina.

10 And the Court can decide, as it  
11 decides so often when it comes to facial  
12 challenges, that the CRCA is not facially  
13 unconstitutional, but it could be open to states  
14 in an appropriate case to make the as-applied  
15 challenge.

16 JUSTICE SOTOMAYOR: You've done a very  
17 nice job of showing in your papers -- the  
18 Blackbeard law does trouble me deeply, but  
19 you're doing nothing with proving the  
20 proportionality to the problem because there are  
21 states that presumably have fine remedies to  
22 handle any infringement.

23 You've shown some failings in this  
24 state's processes, but I don't know how any of  
25 the evidence developed by Congress shows that

1 all 50 states and territories additionally don't  
2 have adequate state systems to address this  
3 issue.

4 MR. SHAFFER: If I may answer the  
5 question, Mr. Chief Justice.

6 CHIEF JUSTICE ROBERTS: Briefly.

7 MR. SHAFFER: Very briefly, Justice  
8 Sotomayor. Number one, in -- in the legislative  
9 record, the House report at -- committee report  
10 at 9 and 10, the House emphasized how important  
11 copyright damages are, specifically statutory  
12 damages and attorneys' fees. It's the  
13 difference between loss of the right and -- and  
14 protection of the right. That's how important  
15 it is.

16 And, of course, the copyright statute  
17 preempts any equivalent state laws. So there is  
18 no recourse for the copyright holder who's  
19 complaining specifically of copyright  
20 deprivation outside of the CRCA.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Mr. Park.

24

25

1 ORAL ARGUMENT OF RYAN PARK  
2 ON BEHALF OF THE RESPONDENTS

3 MR. PARK: Thank you, Mr. Chief  
4 Justice, and may it please the Court:

5 State sovereign immunity is a  
6 fundamental feature of our Constitution's  
7 structure. As this Court has repeatedly  
8 reaffirmed, immunity from private lawsuits  
9 seeking money damages was inherent in the nature  
10 of sovereignty at the founding and remains  
11 today.

12 As the -- and the Constitution  
13 preserves this aspect of state sovereignty  
14 unless there's compelling evidence that the  
15 states surrendered it when they ratified a  
16 particular constitutional provision.

17 And my friend has failed to identify  
18 any historical evidence that anyone at the  
19 founding remotely contemplated that the  
20 intellectual property clause would allow for  
21 damages lawsuits against states. In fact, it  
22 was not until the 1970s, nearly two centuries  
23 after the first Copyright Act, that a federal  
24 court ever awarded damages of this kind.

25 Now Mr. Allen seeks to portray this

1 settled state of affairs as somehow anomalous,  
2 but nothing could be further from the case. All  
3 of Congress's general law-making powers are  
4 subject to limits found elsewhere in the  
5 Constitution, including limits that protect  
6 state sovereignty.

7           And so Congress could not commandeer  
8 state legislatures and force them to pass  
9 copyright protective laws, nor could they, under  
10 separation of powers principles, vest judicial  
11 review of copyright claims in the Senate  
12 Judiciary Committee. And, likewise, state  
13 sovereign immunity limits Congress's authority  
14 to expose state treasuries to the Copyright  
15 Act's exorbitant financial remedies.

16           And for that reason too, the Act  
17 cannot be justified under Section 5 of the  
18 Fourteenth Amendment. Copyright infringement  
19 rarely rises to a constitutional violation at  
20 all, let alone pose the kind of serious  
21 constitutional threat that allows for expansive  
22 remedies like abrogation.

23           And liability under the Act is  
24 expansive. It's vastly greater than anything  
25 required by the Due Process Clause. It includes

1 statutory damages of up to \$150,000 per  
2 infringement, even if the plaintiff cannot prove  
3 she suffered any actual harm.

4 And it creates a strict liability  
5 regime that covers negligent and even innocent  
6 infringement, even though, of course, only  
7 deliberate property deprivations can violate the  
8 Constitution. And these concerns are far from  
9 theoretical.

10 The First Circuit has affirmed a  
11 \$675,000 judgment against a college student for  
12 sharing online a few copyrighted songs, sending  
13 him into bankruptcy. And the due process  
14 concern that is ordinarily raised in a copyright  
15 damages lawsuit is whether they're  
16 constitutionally excessive, not --

17 JUSTICE BREYER: What is there that I  
18 can go to the same question, a wonderful  
19 money-raising thing. What the state decides to  
20 do with its own website, charging \$5 or  
21 something, is to run Rocky, Marvel, whatever,  
22 Spider-Man, and perhaps Groundhog Day, all  
23 right?

24 (Laughter.)

25 JUSTICE BREYER: Now, great idea.

1 Several billion dollars flows into the treasury.

2 Okay? Now, if you win, why won't that happen?

3 And, by the way, if you're writing to  
4 the constitutional convention, you're a member,  
5 okay, and you write these words, copyright is to  
6 promote the progress of science and useful arts  
7 by securing for a limited time to authors -- and  
8 to authors, the exclusive right to their  
9 respective writings.

10 But, of course, California decides  
11 that the person who wrote Rocky, Marvel, et  
12 cetera, will unfortunately receive nothing  
13 because everyone will have seen it on the  
14 state's own streaming device.

15 All right. What is your response to  
16 that?

17 MR. PARK: So there are two important  
18 separate issues at issue there, and I'll start  
19 with the text. So the exclusive right is --  
20 well, sovereign immunity does not invade the  
21 exclusive right.

22 So I think that that hypothetical  
23 misunderstands, respectfully, the role of  
24 sovereign immunity in our constitutional system.  
25 As this Court said in Alden, states are not

1 relieved of their binding obligation to comply  
2 with federal law.

3 And the ordinary remedy required under  
4 the Constitution when a sovereign violates  
5 federal rights is an injunction and not money  
6 damages.

7 JUSTICE BREYER: Oh, it's -- by the  
8 way, we ran it yesterday. You can have your  
9 injunction. Do you see my point?

10 MR. PARK: Yes, exactly. Well, so I  
11 agree that under sovereign immunity, as a  
12 necessary consequence, there will be hard cases  
13 where, you know, statutory violations are not  
14 remedied, but that, I think, the important  
15 understanding that the founders had is that when  
16 you sue a sovereign, on the opposite side of the  
17 judgment are the people and the people's money.

18 And so the entire point of sovereign  
19 immunity, as this Court said in Lewis just a few  
20 terms ago, is to protect state governments and  
21 allow them to make their own choices as to how  
22 to spend scarce --

23 JUSTICE KAVANAUGH: There are not  
24 going to be --

25 MR. PARK: -- government resources.

1 JUSTICE KAVANAUGH: -- there are not  
2 going to be hard cases. There are going to be  
3 easy cases.

4 MR. PARK: Well --

5 JUSTICE KAVANAUGH: And it's not --  
6 and Justice Breyer's point is that it could be  
7 rampant, states ripping off copyright holders.  
8 And how is that -- how can that be squared with  
9 the exclusive right, if states can do this,  
10 which presumably a ruling in your favor will do  
11 nothing but encourage them to do?

12 MR. PARK: So I think that's the  
13 beauty of the Copyright Remedy Act, combined  
14 with this Court's Georgia decision. So, on  
15 extreme hypotheticals, such as Justice Breyer  
16 outlined --

17 JUSTICE KAVANAUGH: Why is it extreme?  
18 You've said hard cases and now extreme. Why  
19 won't it just be a standard case and not so  
20 extreme?

21 MR. PARK: Well, so whenever a  
22 plaintiff can reasonably allege that there has  
23 been intentional copyright infringement and  
24 there are not adequate remedies, then, under  
25 this Court's Georgia decision, they can bring a

1 direct constitutional claim. We don't dispute  
2 that.

3           And so I think, to the extent that the  
4 Georgia issue is relevant here at all, it's to  
5 the fact that it relieves many of these concerns  
6 that, Justice Breyer and Justice Kavanaugh,  
7 you've outlined. I think that -- well, so, if  
8 we were to discuss the Georgia issue here, I  
9 think we have been here litigating this case  
10 against Mr. Allen for four years, and the first  
11 time that he ever raised this Georgia issue of a  
12 direct constitutional challenge was in his reply  
13 brief in this Court.

14           You won't see it in the petition. You  
15 won't see it in his briefs below or in the  
16 transcripts of the argument. And, of course,  
17 for that reason, the lower courts never  
18 addressed it. They never --

19           JUSTICE BREYER: Your view is that --  
20 that, in fact, under the Fourteenth Amendment,  
21 this statute is valid insofar as my Captain  
22 Marvel example deliberately takes property from  
23 people. So is that what your point is?

24           MR. PARK: Yes, if the --

25           JUSTICE BREYER: All right. If that's

1 your point, then you concede their point,  
2 whether they raised it or not, somebody else  
3 would, you concede that this legislation is  
4 valid. You're just saying it only applies to  
5 instances where the state deliberately takes  
6 Captain Marvel.

7 That would cure my problem to a  
8 considerable degree, but that is the concession  
9 on your part?

10 MR. PARK: I think it follows  
11 naturally from this Court's Georgia decision,  
12 but I would add one additional element, which  
13 is, to complete a due process violation for a  
14 deprivation of property, two additional features  
15 are required; you need to be deliberate and  
16 there needs to be no alternative remedy.

17 And, here, there are other alternative  
18 remedies that could be available.

19 JUSTICE GINSBURG: Let -- let's take  
20 deliberate first. So it is alleged that North  
21 Carolina is infringing on copyright, copyrighted  
22 works. There's a settlement. And then North  
23 Carolina starts up doing exactly the same thing  
24 that it did before the first. That sounds  
25 pretty intentional to me.

1           MR. PARK: I think it would be  
2 intentional if the State had not explicitly  
3 bargained for a provision that says we can use  
4 Mr. Allen's images for non-commercial purposes.

5           And now I think that that highlights  
6 how this dispute is really a dispute over the  
7 scope of a contractual license that the State  
8 received. There is a pending breach of contract  
9 lawsuit in state court where the State and Mr.  
10 Allen's business partner, Intersal, are debating  
11 these exact facts, whether we've exceeded the  
12 scope of our license by, for example, not  
13 putting watermarks on the images and that sort  
14 of thing. So I think that relieves --

15           JUSTICE SOTOMAYOR: Do -- I'm sorry,  
16 finish.

17           MR. PARK: I just was going to point  
18 out as well that I think that relieves any  
19 actual due process violation that could be here  
20 because, of course, there's -- the alternative  
21 remedy is a breach of contract lawsuit, which we  
22 have not asserted sovereign immunity for. We've  
23 affirmatively waived our immunity in state court  
24 for breach of contract claims.

25           JUSTICE SOTOMAYOR: What do I do with

1 the Blackbeard law? It is deeply troubling.  
2 It's a state saying, even if I'm infringing, you  
3 can't get anything. That's basically how I read  
4 that law.

5 What remedies do they have under  
6 federal law for a state doing something like  
7 that?

8 MR. PARK: So I agree it's a strange  
9 law. I think there are two separate points I'd  
10 like to make.

11 So, first, it can't possibly have any  
12 relevance to this lawsuit because it was passed  
13 in 2015, two years after the alleged  
14 infringements in question. And it was --

15 JUSTICE SOTOMAYOR: Well, it could to  
16 a Georgia argument, obviously.

17 MR. PARK: Well, so I think -- and I  
18 think that exposes the second issue, which is  
19 that there are -- there are two types of claims  
20 in this complaint. There are -- there's a  
21 copyright infringement claim and related claims,  
22 and there's a declaratory judgment claim asking  
23 that that law be declared preempted.

24 Now Mr. Allen has not sought cert on  
25 the declaratory judgment claim, and that would

1 be the remedy in that circumstance. But the  
2 district court -- sorry, the Fourth Circuit --  
3 and this is on pages 37 to 39 of the Petition  
4 Appendix -- the Fourth Circuit rejected the  
5 declaratory judgment claim because it held that  
6 the 2013 settlement agreement said that your --  
7 your images, Mr. Allen, are subject to the  
8 public records law, and the 2013 version of the  
9 law said that photographs that the state  
10 receives in public business are public records.

11 And so that amendment couldn't  
12 possibly have affected Mr. Allen's rights to his  
13 images.

14 JUSTICE ALITO: So why wasn't it a  
15 taking? Why wasn't the passage of that law a  
16 taking when -- when the law declares that  
17 something that is private property is now a  
18 public record?

19 MR. PARK: So I think it possibly  
20 could be on different facts, if Mr. Allen hadn't  
21 already agreed in the contract that his images  
22 were public records, but I think that this would  
23 be a pretty extraordinary vehicle for this Court  
24 to decide when copyright infringement can  
25 constitute a taking.

1           I'm not aware of any federal court  
2           that has ever reached that question because it  
3           hasn't been litigated. He never alleged that  
4           the use of the images was a taking below. He  
5           mentions it in his brief here, but he doesn't  
6           even describe the substantive standards that  
7           would apply under either a direct physical  
8           invasion analysis or a Penn Central deprivation  
9           of economic value analysis.

10           And so I think that the images here  
11           could not possibly be a taking because the  
12           question here is whether our display of a  
13           handful of images in a few educational videos  
14           and a museum nonprofit newsletter constituted a  
15           complete deprivation of economic value. Surely,  
16           it wasn't physical occupation of those images.

17           And so I don't think the takings  
18           clause is relevant here.

19           JUSTICE KAGAN: Well, what about  
20           Section 5, Mr. Park? Congress clearly wanted to  
21           abrogate the state sovereign immunity, so what  
22           would it have had to have done in your view in  
23           order to do that successfully?

24           MR. PARK: I think that it should have  
25           followed the rules laid out by this Court in

1 City of Boerne and subsequent cases. And I  
2 think that, to be in all fairness to Congress,  
3 those decisions postdated the statute here.

4 And so they weren't even trying to  
5 meet those standards. And it is an unfortunate  
6 consequence, but this Court --

7 JUSTICE KAGAN: What would a record  
8 that does meet those standards, what would it  
9 look like?

10 MR. PARK: So it would be trained on  
11 identifying copyright infringement that also  
12 violated the Constitution. So it would be  
13 intentional infringement, and it would be  
14 infringement where there's no alternative  
15 remedy.

16 JUSTICE KAGAN: Well, can't Congress  
17 say something like in copyright, you know, any  
18 violation requires actual copying? So we're  
19 going to assume that 80 percent of the  
20 violations in the world are intentional?

21 MR. PARK: So I think that that would  
22 activate the danger that this Court designed the  
23 City of Boerne test to prevent, which is  
24 changing the substance of law under Section 5.

25 Now, under copyright law, that willful

1 infringement is a recognized --

2 JUSTICE KAGAN: Whoa --

3 MR. PARK: -- standard.

4 JUSTICE KAGAN: -- whoa, whoa, whoa.

5 Because there's clearly some allowance for  
6 Congress to devise prophylactic rules, and this  
7 would seem to be a perfect example of like, you  
8 know what, given the requirements of a copyright  
9 violation, we think the vast majority of them  
10 are going to be intentional and, therefore, are  
11 going to be constitutional violations.

12 Are you saying Congress can't say that  
13 and just target copyright violations generally?

14 MR. PARK: I think that they could. I  
15 think, on a different record, if they had  
16 focused on intentional infringement and said,  
17 you know, this is widespread, there are no  
18 adequate alternative remedies, this is a serious  
19 national constitutional problem, and -- and we  
20 will enact prophylactic remedies to address  
21 this.

22 JUSTICE KAGAN: Well, how do they show  
23 that?

24 MR. PARK: Well, I think, at the very  
25 least, they focused on intentional infringement.

1 I would direct the Court to Mr. --

2 JUSTICE KAGAN: I think I just talked  
3 about that.

4 MR. PARK: Right.

5 JUSTICE KAGAN: They've decided that  
6 80 percent of copyright violations are  
7 intentional because copyright violations always  
8 involve actual copying. It's hard to actually  
9 copy something negligently.

10 MR. PARK: Yeah --

11 JUSTICE KAGAN: Not impossible, but  
12 hard. So -- so Congress has decided, you know,  
13 the vast majority of these are intentional,  
14 therefore, are constitutional violations. Now  
15 what does Congress have to do?

16 MR. PARK: So I think there would be  
17 the additional analysis, which is the  
18 proportionality prong of the test, which  
19 requires that there be some tailoring of the  
20 remedies that are given by Congress to what is  
21 required by the Due Process Clause.

22 And no one has ever claimed -- I'm not  
23 aware of any copyright holder that has ever  
24 claimed that the exorbitant remedies found in  
25 the Copyright Act are required by due process.

1 I mean, we're talking about \$150,000 per  
2 infringement even for an infringement where the  
3 plaintiff says I cannot prove any actual  
4 damages, but because this infringement was so  
5 egregious on its merits, I deserve statutory  
6 damages.

7 JUSTICE BREYER: Here, as I -- I see  
8 the problem, which you've clarified very much  
9 for me, it's that the choice for us now is, say,  
10 your view would be that -- that states can copy  
11 without doing anything unless that copying  
12 violates the Due Process Clause. And in that  
13 respect, you agree that the statute can be  
14 upheld.

15 Now, if we accept your view, we've got  
16 to decide how copyright, copying, and the Due  
17 Process Clause fit together, which, to my  
18 knowledge, this Court hasn't really gone into.  
19 And it sounds like a pretty good mare's nest.

20 Now the other view would be -- you'd  
21 lose, which you don't want to do --

22 (Laughter.)

23 JUSTICE BREYER: -- but the other view  
24 would be it's likely that there are enough cases  
25 where it would violate the Due Process Clause

1 for us to accept the statute as a whole, thereby  
2 creating in a sense another somewhat different  
3 exception to the statement in Florida Prepaid.

4 I'm trying to get our issue, and I'm  
5 trying to say it fairly from your point of view  
6 and from the other point of view.

7 MR. PARK: So -- so let me clarify in  
8 terms of your first construct. I don't think  
9 that's actually accurate, so under copyright  
10 law, a whole range of copying doesn't violate  
11 the Copyright Act at all, when there's fair use  
12 that applies, when, as here, it's contractually  
13 authorized. And so an additional element is  
14 required for that to be considered intentional.  
15 And copyright law -- law has a built-in set of  
16 standards here.

17 What Nimmer says and what the Second  
18 Circuit says, what is fairly well accepted in  
19 the lower courts is that willful infringement is  
20 when the -- the -- the defendant has actual  
21 knowledge that their act constitutes copyright  
22 infringement.

23 Now there is some dispute as to  
24 whether recklessness -- as to whether it  
25 constitutes copyright infringement is enough,

1 but I -- I'm not aware of any court that has  
2 ever said that the intentionality requirement,  
3 as is sometimes relevant in copyright law, is  
4 ever met by mere copying.

5 In fact, you know, 504(c)(2) of the  
6 Copyright Act says "innocent infringement is  
7 still liable." And "innocent" is defined as  
8 when the defendant had no reason to be aware  
9 that the infringement was --

10 JUSTICE KAGAN: Do you think Congress  
11 is able to make judgments about what proportion  
12 of copyright violations are indeed intentional?  
13 If -- if Congress had said, given the  
14 requirement of actual copying, we think a vast  
15 majority of copyright infringements are  
16 intentional, would that be precluded? Would  
17 that -- would that fall within Congress's power  
18 or not?

19 MR. PARK: Yes, I think that Congress  
20 warrants a great deal of deference in this area.  
21 And so, if they had conducted that examination  
22 and they had made that conclusion in a finding  
23 or it was clear in the legislative record that  
24 that was what Congress was focusing on --

25 JUSTICE KAGAN: So do you think that's

1 what Congress has to do here? Congress has to  
2 say, we think most copyright violations are  
3 indeed intentional and therefore violate due  
4 process? And here there are 30 examples, would  
5 that be enough?

6 MR. PARK: I don't -- I don't believe  
7 that there is a strict numerical threshold that  
8 is required to legislate under Section 5. I  
9 think that what City of Boerne says is that the  
10 remedy has to be tailored to the scope of the  
11 constitutional violation. Right?

12 So, if there were 30 violations, then  
13 Congress could say, well, here's a proportional  
14 remedy to that level of --

15 JUSTICE KAGAN: Well, why isn't the  
16 proportional remedy the same remedy that  
17 everybody else has to pay?

18 MR. PARK: Because --

19 JUSTICE KAGAN: I mean, once Congress  
20 has decided that we think that there are loads  
21 of constitutional violations going on, why  
22 doesn't the state have to pay what every other  
23 actor would have to pay when it engages in those  
24 constitutional violations? Why isn't that  
25 almost sort of, by definition, proportional?

1 That's what people pay.

2 MR. PARK: It would be proportional to  
3 the -- the Copyright Act, but Section 5 has to  
4 be focused on enforcing the Due Process Clause,  
5 and the Due Process Clause only requires at most  
6 compensatory relief.

7 And so I think that that exposes how  
8 my friend on the other side is trying to  
9 constitutionalize copyright law. What we're  
10 talking about is the Due Process Clause and what  
11 that requires, and not ordinary infringement.

12 JUSTICE BREYER: But it's both you and  
13 your friend, because what you will have the  
14 courts doing is, case by case, when -- when,  
15 say, California tries to run -- they won't run  
16 Captain Marvel, maybe it's some old movie, you  
17 know, and they say it's fair use. And we can  
18 think of millions -- I'm -- not a million, but  
19 thousands of examples.

20 And case by case, when someone tries  
21 to stop them, the courts have to decide whether  
22 the Due Process Clause in this instance, where  
23 the University of California thought it was fair  
24 use to make 50,000 copies of Norman Mailer's  
25 book or something, you know, you say case by

1 case, we have to decide the constitutional  
2 question.

3 I think that's what -- where -- where  
4 -- where you're leaving me. And it's -- it's --  
5 it's tough. It's tough sort of both ways.

6 MR. PARK: Well, so I don't think  
7 that's going -- going to be difficult for the  
8 lower courts to -- to wade through that state of  
9 the law because they're merely applying the  
10 ordinary rules of copyright.

11 So willful infringement, we think,  
12 would constitute intentional infringement. And  
13 they merely assess whether alternative remedies  
14 are available, and that is something that courts  
15 are very well equipped to do, to decide whether  
16 an alternative claim would be meritorious.

17 Now one other alternative remedy that  
18 no one disputes here is that they could try to  
19 sue the individual officers personally. Of  
20 course, we wouldn't like that at all, but I  
21 think the settled state of the law, at least in  
22 the lower courts, is that copyright infringement  
23 claims can be sued -- can be brought against  
24 individual state --

25 JUSTICE GINSBURG: But they won't --

1 MR. PARK: -- employees.

2 JUSTICE GINSBURG: -- have the same  
3 deep pocket that the state has.

4 Let me ask one aspect of this  
5 question, Mr. Park. States can hold copyrights.  
6 They can be copyright holders. And they can sue  
7 anybody in the world for infringement. There's  
8 something unseemly about a state saying, yes, we  
9 can hold copyrights and we can hold infringers  
10 to account to us, but we can infringe to our  
11 heart's content and be immune from any  
12 compensatory damages.

13 Could Congress say -- condition the  
14 copyright privileges that states have by saying,  
15 States, we're going to allow you to copyright  
16 works, but the price is you have to be fair to  
17 the other side so that when you are infringing,  
18 you'll be liable? Could -- does Congress have  
19 Article I authority to do that?

20 MR. PARK: So I don't think that they  
21 could do that because I think that would be an  
22 unconstitutional condition. It would be a hard  
23 case that this Court would probably decide.

24 But what they could do to bring the  
25 parties into parity would be to say that,

1 States, you can't hold copyrights at all. The  
2 states have never claimed a constitutional  
3 entitlement to be able to hold copyrights. The  
4 United States Government can't hold copyrights.

5 What it has done is as a matter of  
6 statute, and this is an interpretation of the  
7 1909 Copyright Act, where because Congress said,  
8 United States, you can't hold copyright --  
9 copyrights, courts have said, well, that implies  
10 that states can hold copyrights.

11 But I think that they would be within  
12 their rights to -- to remove that right and  
13 remove that anomaly.

14 CHIEF JUSTICE ROBERTS: Counsel, just  
15 to get back to your statement that all you have  
16 to do is sue the state officers, you -- you'd  
17 certainly reimburse the officer, wouldn't you?

18 MR. PARK: Yes, that's -- that's  
19 correct.

20 CHIEF JUSTICE ROBERTS: So is that all  
21 they have to do, just name the officer, rather  
22 than the state, in their infringement action?

23 MR. PARK: Well, I think that -- so,  
24 yes, that most states would reimburse their  
25 state officers if -- if it was within the scope

1 of their employment, and that there would be  
2 additional hurdles in that kind of case.  
3 Qualified immunity would apply.

4 And qualified immunity applied in this  
5 case, and that's why the -- the claims were  
6 dismissed against the individual officers.

7 CHIEF JUSTICE ROBERTS: Well, then  
8 it's not much of a -- it's not much of a  
9 response to say, well, you can sue the officer.

10 MR. PARK: Again --

11 CHIEF JUSTICE ROBERTS: It gets thrown  
12 out right away, but you can still sue him. So  
13 that's a reason not to hold the state liable?

14 MR. PARK: Well, I think it is in this  
15 context and -- and here's why, because  
16 intentionality under the Due Process Clause is  
17 roughly equivalent to the qualified immunity  
18 analysis.

19 That's what this Court said in  
20 Kingsley versus Hendrickson, that it's --  
21 intentionality is judged by an objective  
22 standard under all the facts and circumstances  
23 available to the officer, is what they did, can  
24 that be construed as intentional. That's very  
25 similar to the qualified immunity analysis, and

1 I think it mirrors what the Fourth Circuit did  
2 here where it says, well, there's this contract.  
3 It's a little bit ambiguous. It's not clear  
4 whether this is -- these are non-commercial  
5 uses.

6 But we won't say that what they did  
7 was intentional, when a reasonable officer would  
8 read that contract and say, well, I think that  
9 educational videos and a museum newsletter are  
10 commercial -- non-commercial uses and so they're  
11 covered by the contract.

12 JUSTICE ALITO: Mr. Park, can I take  
13 you back to the -- the interesting suggestion  
14 that perhaps Congress could have justified what  
15 it did in this act by saying that we predict  
16 that a high percentage of copyright  
17 infringements are intentional and, therefore,  
18 violate due process.

19 If we were to accept that, is there  
20 any reason why the same reasoning would not  
21 apply in patent litigation?

22 MR. PARK: No, I don't believe there  
23 is any -- any distinction there. And I -- I  
24 think that that highlights how -- I don't think  
25 that that is actually what Congress could do if

1 it didn't match the -- this Court's  
2 jurisprudence or at least the jurisprudence of  
3 the lower federal courts.

4 If the lower federal courts have not  
5 said that most copyright infringement is  
6 intentional, it's the rare exception that  
7 infringement is held to be willful.

8 And -- and so I think that it would be  
9 based on the legislative record. You'd evaluate  
10 whether Congress had a good-faith basis for  
11 making that conclusion. And I -- I think on the  
12 current state of the law, as I understand it,  
13 they would not have that good-faith basis.

14 So I'd like to just turn very quickly  
15 to this idea that future infringement could be  
16 enough or that these, you know, examples that  
17 have arisen after the copy -- the Copyright  
18 Remedy Act could be relevant to this analysis.

19 I think that that would be at odds  
20 with all of this Court's Section 5 cases,  
21 including the cases where this Court has upheld  
22 abrogations as valid, such as Hibbs. In all of  
23 those cases, they said Congress must identify a  
24 widespread pattern of constitutional violations  
25 and in the legislative record before it.

1                   And I think that that goes to the  
2 heart of the entire -- of the City of Boerne  
3 test, which is evaluating Congress's work and  
4 making sure they're not trying to change  
5 constitutional law through Section 5. They --  
6 they have -- they have to be enforcing the law  
7 as interpreted by this Court.

8                   I think -- if I can make just a few  
9 words on stare decisis, because I think that's  
10 incredibly important in this case. I think that  
11 my friend has acknowledged that a ruling in his  
12 favor, at least on Article I, would effectively  
13 overrule Florida Prepaid, that there would be  
14 some interesting law review articles written  
15 about whether it did so on its own merits or  
16 whether there has to be subsequent litigation or  
17 whether it automatically revived the -- the Act.

18                   But no one that has ever evaluated the  
19 intellectual property clause has been -- ever  
20 been able to identify any distinction between  
21 copyrights and patents that could be relevant to  
22 this analysis.

23                   And so, yes, if this Court rules on  
24 the basis of Article I, we think that -- that  
25 Florida Prepaid would be overruled.

1                   And I don't think that Katz can -- can  
2 bear the weight that Mr. Shaffer tries to place  
3 on it. So Katz -- and this is at page 363 of  
4 Katz -- it says, "our assumptions about the  
5 Bankruptcy Clause were erroneous."

6                   And I think that that was a reasonable  
7 thing for Congress -- for this Court to say,  
8 given that there had been nearly a century of  
9 precedent, going all the way back to 1933 in New  
10 York versus Irving Trust, saying that bankruptcy  
11 discharge proceedings --

12                   JUSTICE KAVANAUGH: You said the  
13 blanket statement in Seminole Tribe was  
14 incorrect and Florida Prepaid relied on that  
15 same blanket statement in Seminole Tribe. It  
16 seems to be a problem for that blanket statement  
17 in Florida Prepaid.

18                   MR. PARK: Yes, I -- I completely  
19 agree. I think that the reasoning of Florida  
20 Prepaid's Article I holding has been undercut  
21 and that would be a reason to revisit --

22                   JUSTICE KAVANAUGH: It's two  
23 sentences.

24                   MR. PARK: That's correct, Your Honor.  
25 It's very limited. And it's based on a

1 principle that has been undermined by Katz. I  
2 think -- so you would apply the ordinary rules  
3 of stare decisis. That's the only point here.  
4 Not that it has not been undermined in any  
5 respect.

6           And I think if you view this question  
7 in terms of the principles that stare decisis is  
8 supposed to uphold, you know, legal stability,  
9 reliance on this Court's decisions, that that  
10 would really bring this issue into focus,  
11 because everyone who has evaluated Florida  
12 Prepaid and whose job it is to evaluate this  
13 Court's rulings and say what are my legal rights  
14 and obligations has said that it covers both the  
15 Copyright Remedy Act and the Patent Remedy Act,  
16 including the United States Government, which  
17 has --

18           JUSTICE GINSBURG: I just -- I really  
19 don't follow your reliance argument. Yes, the  
20 state may be relying, but who other than the  
21 state relies on the state's right to infringe  
22 without damage liability, who other than the  
23 state?

24           MR. PARK: I -- I think that I am  
25 speaking about the state's reliance interests,

1 for the states generally. And I think here is  
2 why that matters, and I would bring it back to  
3 this case.

4 So the -- our Cultural Resources  
5 Department is operating on a shoestring budget  
6 trying to recover and excavate and preserve the  
7 remaining aspects of the Queen Anne's revenge,  
8 around 40 percent of which under their estimates  
9 is still on the bottom of the ocean.

10 And they are doing that work. And  
11 it's when there are competing legislative  
12 priorities, such as school funding and disaster  
13 relief, and all sorts of other more important  
14 priorities, it's hard to get money to fund  
15 important work like this for the state's  
16 history.

17 JUSTICE KAGAN: I think, though, Mr.  
18 Park, what Justice Ginsburg was suggesting, that  
19 it's not the strongest reliance argument to say  
20 we relied on this -- this Court's holding to  
21 infringe other people's rights.

22 MR. PARK: Not -- not to infringe on  
23 other people's rights. I think that what they  
24 did here is that they posted online on good  
25 faith -- faith reliance on a contract. It could

1 have also been on fair -- on good-faith reliance  
2 and perhaps an aggressive reading of fair use in  
3 other situations, but they did that because they  
4 thought that they wouldn't have infringement  
5 liability of up to \$150,000 per work.

6           And there are -- you know, I can give  
7 legions of examples where juries have awarded  
8 astronomical copyright damages. There was a  
9 jury in Minnesota that awarded \$1.9 million  
10 against a single mother of four for downloading  
11 and sharing a few copyrighted images online, and  
12 the Eighth Circuit reduced that judgment to  
13 \$220,000. She still went bankrupt.

14           But because these issues are  
15 ordinarily thought to be a due process problem  
16 on the other side, and so I think that you would  
17 see states retract from their uses of  
18 copyrighted works in a way that benefit the  
19 public.

20           There is an amicus brief from the  
21 library association saying that this would  
22 imperil -- copyright infringement liability,  
23 monetary liability, would imperil digitization  
24 projects and other works of archives.

25           And I think the states are simply

1 different. I -- I don't think it's respectful  
2 to the interests of state governments to say --

3 CHIEF JUSTICE ROBERTS: You can finish  
4 the sentence.

5 MR. PARK: -- that they will -- that  
6 they will infringe at will if damages liability  
7 is taken off the table.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
10 Park.

11 Four minutes, Mr. Shaffer.

12 REBUTTAL ARGUMENT OF DEREK L. SHAFFER

13 ON BEHALF OF PETITIONERS

14 MR. SHAFFER: Mr. Chief Justice, and  
15 may it please the Court:

16 Starting with Blackbeard's law,  
17 Justice Sotomayor, I want to be clear,  
18 Blackbeard's law was passed after the  
19 allegations of infringement in -- in this case,  
20 after North Carolina had been caught infringing.

21 It was then used, as -- as alleged in  
22 the complaint, by North Carolina to defend  
23 against the state court suit by Intersal because  
24 they said Blackbeard's law had voided the  
25 settlement agreement.

1                   It was now contrary to North  
2                   Carolina's public policy and they couldn't be  
3                   held to the settlement agreement, nor could they  
4                   be held liable. That's in the complaint. That  
5                   is as alleged, and I don't think there's any  
6                   ability by the State in this posture to  
7                   contradict those allegations.

8                   As to the Intersal dispute that Mr.  
9                   Park talks about, in North Carolina State Court,  
10                  Intersal does not hold the copyrights, so  
11                  they're sued by definition. It's not trying to  
12                  vindicate the copyrights.

13                  That suit was just decided by the  
14                  North Carolina Supreme Court after North  
15                  Carolina for years interposed sovereign immunity  
16                  defenses saying that the breach of contract  
17                  action had not been properly filed  
18                  administratively, there needed to be  
19                  administrative exhaustion. So that suit is  
20                  continuing on. It's not as though sovereign  
21                  immunity was no impediment, and it's certainly  
22                  not out to vindicate copyrights.

23                  As to the images in question, I just  
24                  have to emphasize, Your Honor, my clients have  
25                  put in two decades of work, essentially, trying

1 to be there to ex- -- when these images are  
2 excavated underwater, at great expense, at great  
3 risk, and this is all essentially my clients get  
4 out of it, the copyrighted images.

5 And the allegations of the complaint  
6 are that North Carolina, not once or twice but  
7 repeatedly and systematically, was infringing  
8 those copyrights, was caught doing it, paid  
9 \$15,000 under the terms of the settlement  
10 agreement, went back to doing it. Even after  
11 this complaint was filed, they continued to  
12 infringe the copyrights. And the resolution by  
13 the Fourth Circuit is everything is dismissed.

14 And as to injunctive relief, Justice  
15 Breyer, Congress found it provides no meaningful  
16 remedy in this context, different from the  
17 patent context, but it's all about getting paid  
18 for past damages in order for this to be a  
19 meaningful remedy.

20 And in this case, the request for  
21 injunctive relief was thrown out. Why? Because  
22 North Carolina did exactly what you articulated,  
23 Justice Breyer. They said: Well, we've stopped  
24 infringing those images now that you've pointed  
25 it out in court. We've taken those down. What

1 else have you got? And without benefit of  
2 discovery, the Fourth Circuit viewed that as the  
3 end of the request for injunctive relief. And  
4 that's how it goes in copyright cases.

5 Now, as to the notion that there could  
6 be individual suits against individual officers  
7 under 1983, you're exactly right, Chief Justice,  
8 qualified immunity is a defense in this context.  
9 I'd commend to the Court the Fourth Circuit's  
10 decision on this point. It's at 37a, 39a. They  
11 basically said, because there's some defense  
12 that's available to these officials, they say  
13 they read the settlement agreement differently,  
14 maybe they didn't know it was copyright  
15 infringement, maybe they weren't looking for the  
16 watermarks or the -- the time stamps, that is a  
17 good enough defense. Qualified immunity gets  
18 them out of the case, and those claims, too,  
19 were dismissed.

20 That's why it's so important, part of  
21 why it's so important, in copyright cases that  
22 there be secure remedies for copyright holders.  
23 That's true against states and it's true against  
24 anyone. Most copyright holders, unlike patent  
25 holders, Justice Alito, these are small fish,

1 they have not sunk costs into this sort of a  
2 registration.

3 And they need to have secure statutory  
4 damages and attorneys' fees in order to come to  
5 court at all because, in copyright cases, as  
6 Congress found from the testimony before it and  
7 the -- and the submissions of the register, you  
8 need to have statutory damages. Otherwise, how  
9 can you quantify what the harm was?

10 And especially given how small the  
11 stakes are in copyright cases and how  
12 under-heeled most copyright plaintiffs are, if  
13 you don't have those statutory damages, you  
14 don't have a right. And that is specifically  
15 found by Congress in the House report at pages 9  
16 and 10.

17 So, Justice Kavanaugh, you asked about  
18 what happens in ordinary cases. This is exactly  
19 what Congress looked at. They said the rule in  
20 copyright cases, absent the CRCA, is that  
21 copyright infringement pays for states. They  
22 will get away with it every time. You will not  
23 have copyright holders who have incentives and  
24 means and attorneys to bring suit. That should  
25 not be the outcome in this case.

1                   And to say it, respectfully, that it's  
2                   incumbent upon every copyright plaintiff who  
3                   sues a state to prove a constitutional violation  
4                   and willfulness in the way that Mr. Park  
5                   articulates is to render the right nugatory and  
6                   the CRCA as well.

7                   Thank you, Mr. Chief Justice.

8                   CHIEF JUSTICE ROBERTS: Thank you,  
9                   counsel. The case is submitted.

10                   (Whereupon, at 12:04 p.m., the case  
11                   was submitted.)

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