

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

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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7 NORTH CAROLINA, ET AL.,)
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9 - - - - -
10 Washington, D.C.
11 Tuesday, November 5, 2019
12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 11:04 a.m.
16
17 APPEARANCES:
18
19 DEREK L. SHAFFER, ESQ., Washington, D.C.;
20 on behalf of the Petitioners.
21 RYAN PARK, Deputy Solicitor General, Raleigh, North
22 Carolina; on behalf of the Respondents.
23
24
25

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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 dig
4 big deal, but that is the necessary upshot of
5 the Seminole Tribe holding as it was articulated
6 by 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. To
23 promote progress, Justice Sotomayor. It is a
24 preamble that is not echoed anywhere else in
25 Article I.

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

3 MR. SHAFFER: Well, James Madison --

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

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

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

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

22 It is much stronger in relevant part.
23 In part, that's because of the fundamental
24 difference between copyright law at issue in
25 this case and patent law that the Court was

1 looking at in Florida Prepaid.

2 In part, it's also because you have a
3 legislative record that is so much stronger,
4 Your Honors.

5 You had the Register of Copyrights,
6 Ralph Oman, testifying to Congress preparing a
7 report based on a 50-state survey and in -- a --
8 a very conscientious compilation of comments and
9 studies about what was happening in federal
10 copyrights and why this legislation was
11 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 the 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 has 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 have 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 took exactly
11 the --

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: Why? 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 know it well,
3 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 we
8 were to discuss the Georgia issue here, I think
9 we have been here litigating this case against
10 Mr. Allen for four years. And the first time
11 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 is
13 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'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.

23 We've affirmatively waived our
24 immunity in state court for breach of contract
25 claims.

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

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

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

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

16 JUSTICE SOTOMAYOR: It could to a
17 Georgia argument, obviously.

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

25 Now Mr. Allen has not sought cert on

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

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

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

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

1 constitute a taking.

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

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

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

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

25 MR. PARK: I think that it should have

1 followed the rules laid out by this Court in
2 City of Boerne and subsequent cases. And I
3 think that to be in all fairness to Congress,
4 those decisions postdated the statute here.

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

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

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

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

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

1 Now, under copyright law, that willful
2 infringement is a recognized --

3 JUSTICE KAGAN: Whoa --

4 MR. PARK: -- standard.

5 JUSTICE KAGAN: -- whoa, whoa.

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

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

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

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

25 MR. PARK: Well, I think, at the very

1 least, they focused on intentional infringement.

2 I would direct the Court to Mr. --

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

5 MR. PARK: Right.

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

11 MR. PARK: Yeah --

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

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

23 And no one has ever claimed -- I'm not
24 aware of any copyright holder that has ever
25 claimed that the exorbitant remedies found in

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

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

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

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

23 (Laughter.)

24 JUSTICE BREYER: -- but the other view
25 would be it's likely that there are enough cases

1 where it would violate the due process clause
2 for us to accept the statute as a whole, thereby
3 creating in a sense another somewhat different
4 exception to the statement in Florida Prepaid.

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

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

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

24 Now, there is some dispute as to
25 whether recklessness -- as to whether it

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

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

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

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

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

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

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

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

19 MR. PARK: Because --

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

1 almost sort of, by definition, proportional?
2 That's what people pay.

3 MR. PARK: It would be proportional to
4 the -- the Copyright Act, but Section 5 has to
5 be focused on enforcing the due process clause,
6 and the due process clause only requires at most
7 compensatory relief.

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

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

21 And case by case when someone tries to
22 stop them, the courts have to decide whether the
23 due process clause in this instance, where the
24 University of California thought it was fair use
25 to make 50,000 copies of Norman Mailer's book or

1 something, you know, you say case by case, we
2 have to decide the constitutional question.

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

6 MR. PARK: Well, so I don't think
7 that's going to be difficult for the lower
8 courts to -- to wade through that state of the
9 law because they're merely applying the ordinary
10 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
15 courts are very well equipped to do, to decide
16 whether an alternative claim would be
17 meritorious.

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

1 JUSTICE GINSBURG: But they won't --

2 MR. PARK: -- employees.

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

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

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

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

25 But what they could do to bring the

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

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

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

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

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

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

24 MR. PARK: Well, I think that -- so,
25 yes, that most states would reimburse their

1 state officers if -- if it was within the scope
2 of their employment, and that there would be
3 additional hurdles in that kind of case.
4 Qualified immunity would apply.

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

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

11 MR. PARK: Again --

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

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

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

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

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

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

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

23 MR. PARK: No, I don't believe there
24 is any -- any distinction there. And I -- I
25 think that that highlights how -- I don't think

1 that that is actually what Congress could do if
2 it didn't match the -- this Court's
3 jurisprudence or at least the jurisprudence of
4 the lower federal courts.

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

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

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

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

1 and in the legislative record before it.

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

9 I think -- if I can make just a few
10 words on stare decisis, because I think that's
11 incredibly important in this case. I think that
12 my friend has acknowledged that a ruling in his
13 favor, at least on Article I, would effectively
14 overrule Florida Prepaid.

15 That there would be some interesting
16 law review articles written about whether it did
17 so on its own merits or whether there has to be
18 subsequent litigation, or whether it
19 automatically revived the -- the Act.

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

25 And so, yes, if this Court rules on

1 the basis of Article I, we think that -- that
2 Florida Prepaid would be overruled.

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

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

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

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

24 JUSTICE KAVANAUGH: It's two
25 sentences.

1 MR. PARK: That's correct, Your Honor.
2 It's very limited. And it's based on a
3 principle that has been undermined by Katz. I
4 think -- so you would apply the ordinary rules
5 of stare decisis. That's the only point here.
6 Not that it has not been undermined in any
7 respect.

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

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

1 MR. PARK: I -- I think that I am
2 speaking about the state's reliance interests,
3 for the states generally. And I think here is
4 why that matters, and I would bring it back to
5 this case.

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

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

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

24 MR. PARK: Not -- not to infringe on
25 other people's rights. I think that what they

1 did here is that they posted online on good
2 faith -- faith reliance on a contract. It could
3 have also been on fair -- on good-faith reliance
4 and perhaps an aggressive reading of fair use
5 and other situations, but they did that because
6 they thought that they wouldn't have
7 infringement liability of up to \$150,000 per
8 work.

9 And there are -- you know, I can give
10 legions of examples where juries have awarded
11 astronomical copyright damages. There was a
12 jury in Minnesota that awarded \$1.9 million
13 against a single mother of four for downloading
14 and sharing a few copyrighted images online, and
15 the Eighth Circuit reduced that judgment to
16 \$220,000. She still went bankrupt.

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

23 There is an amicus brief from the
24 library association saying that this would
25 imperil copyright infringement liability,

1 monetary liability, would imperil digitization
2 projects and other works of archives.

3 And I think the states are simply
4 different. I -- I don't think it's respectful
5 to the interests of state governments to say --

6 CHIEF JUSTICE ROBERTS: You can finish
7 the sentence.

8 MR. PARK: -- that they will -- that
9 they will infringe at will if damages liability
10 is taken off the table.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, Mr.
13 Park.

14 Four minutes, Mr. Shaffer.

15 REBUTTAL ARGUMENT OF DEREK L. SHAFFER

16 ON BEHALF OF PETITIONERS

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

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

24 It was then used as -- as alleged in
25 the complaint by North Carolina to defend

1 against the state courts by Intersal because
2 they said Blackbeard's law had voided the
3 settlement agreement.

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

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

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

1 As to the images in question, I just
2 have to emphasize, Your Honor, my clients have
3 put in two decades of work, essentially, trying
4 to be there to -- when these images are
5 excavated underwater, at great expense, at great
6 risk, and this is all essentially my clients get
7 out of it, the copyrighted images.

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

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

23 And in this case, the request for
24 injunctive relief was thrown out. Why? Because
25 North Carolina did exactly what you articulated,

1 Justice Breyer. They said: Well, we've stopped
2 infringing those images now that you've pointed
3 it out in court. We've taken those down. What
4 else have you got? And without benefit of
5 discovery, the Fourth Circuit viewed that as the
6 end of the request for injunctive relief. And
7 that's how it goes in copyright cases.

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

23 That's why it's so important, part of
24 why it's so important, in copyright cases that
25 there be secure remedies for copyright holders.

1 That's true against states and it's true against
2 anyone. Most copyright holders, unlike patent
3 holders, Justice Alito, these are small fish,
4 they have not sunk costs into this sort of a
5 registration.

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

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

20 So, Justice Kavanaugh, you asked about
21 what happens in ordinary cases. This is exactly
22 what Congress looked at. They said the rule in
23 copyright cases, absent the CRCA, is that
24 copyright infringement pays for states. They
25 will get away with it every time. You will not

1 have copyright holders who have incentives and
2 means and attorneys to bring suit. That should
3 not be the outcome in this case.

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

10 Thank you, Mr. Chief Justice.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel. The case is submitted.

13 (Whereupon, at 12:04 p.m., the case
14 was submitted.)

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