

No. 18-____

IN THE
**Supreme Court of the
United States**

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

v.

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

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress validly abrogated state sovereign immunity via the Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990), in providing remedies for authors of original expression whose federal copyrights are infringed by States.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Frederick L. Allen and Nautilus Productions, LLC were plaintiffs-appellees-cross-appellants below.

Respondents Roy A. Cooper, III, as Governor of North Carolina; Susi H. Hamilton, Secretary of the North Carolina Department of Natural and Cultural Resources, in her official capacity; Susan Wear Kluttz, former Secretary of the North Carolina Department of Natural and Cultural Resources, individually; D. Reid Wilson, Chief Deputy Secretary of the North Carolina Department of Natural and Cultural Resources, in his official capacity; Karin Cochran, former Chief Deputy Secretary of the North Carolina Department of Natural and Cultural Resources, individually; Kevin Cherry, Deputy Secretary of the North Carolina Department of Natural and Cultural Resources, individually and in his official capacity; G. Neel Lattimore, Director of Communications of the North Carolina Department of Natural and Cultural Resources, in his official capacity; Catherine A. Oliva, Director of Marketing of the North Carolina Department of Natural and Cultural Resources, in her official capacity; Cary Cox, former Assistant Secretary, Marketing and Communications of the North Carolina Department of Natural and Cultural Resources, individually; Stephen R. Claggett, a/k/a Steve Claggett, State Archaeologist, individually and in his official capacity; John W. Morris, a/k/a Billy Ray Morris, Deputy State Archaeologist, Underwater and Director of the Underwater Archaeology Branch of the North Carolina Department of Natural and Cultural Resources, individually and in his official

capacity; North Carolina Department of Natural and Cultural Resources; and the State of North Carolina were defendants-appellants-cross-appellees below.

Friends of Queen Anne's Revenge, a non-profit corporation, was a defendant below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Nautilus Productions LLC states that it has no parent corporation and that no publicly-held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDINGS BELOW	ii
CORPORATE DISCLOSURE STATEMENT	iv
TABLE OF AUTHORITIES.....	vii
INTRODUCTION.....	1
OPINIONS BELOW	4
JURISDICTION	4
PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS.....	5
STATEMENT OF THE CASE	6
A. Statutory Framework.....	6
B. Factual Background.....	7
C. Proceedings Below.....	9
REASONS FOR GRANTING THE WRIT	12
I. THE QUESTION PRESENTED	
WARRANTS THIS COURT’S REVIEW	12
A. The Fourth Circuit’s Invalidation Of A Federal Statute Warrants This Court’s Review.....	12
B. Rampant Copyright Infringement By States Poses An Important, Continuing Problem That Warrants This Court’s Review.....	16
II. THIS CASE IS AN IDEAL VEHICLE FOR DECIDING THE QUESTION PRESENTED....	20

III. THE DECISION BELOW IS MANIFESTLY INCORRECT	22
A. The CRCA Validly Subjects States To Suit Pursuant To Congress’s Article I Power	22
B. The CRCA Also Validly Subjects States To Suit Pursuant To Congress’s Power To Enforce The Fourteenth Amendment	28
CONCLUSION	37
APPENDIX A – Fourth Circuit Opinion, July 10, 2018.....	App. 1a
APPENDIX B – District Court Opinion & Order, March 23, 2017.....	App. 42a
APPENDIX C – Fourth Circuit Order Denying Rehearing <i>En Banc</i> , August 9, 2018	App. 79a

TABLE OF AUTHORITIES

<u>Cases</u>	Page(s)
<i>Arnstein v. Marks Corp.</i> , 82 F.2d 275 (2d Cir. 1936).....	35
<i>Atascadero State Hosp. v. Scanlon</i> , 473 U.S. 234 (1985)	33
<i>Bonito Boats, Inc. v. Thunder Craft Boats, Inc.</i> , 489 U.S. 141 (1989)	26
<i>Campinha-Bacote v. Regents of Univ. of Mich.</i> , 2016 WL 223408 (S.D. Ohio Jan. 19, 2016).....	15
<i>Capitol Records v. Mercury Records Corp.</i> , 221 F.2d 657 (2d Cir. 1955).....	27
<i>Central Virginia Community College v. Katz</i> , 546 U.S. 356 (2006)	<i>passim</i>
<i>Chavez v. Arte Publico Press</i> , 204 F.3d 601 (5th Cir. 2000)	15, 32
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997)	34
<i>Coyle v. Univ. of Ky.</i> , 2014 WL 866626 (E.D. Ky. Mar. 4, 2014).....	15
<i>De Romero v. Inst. of Puerto Rican Culture</i> , 466 F. Supp. 2d 410 (D.P.R. 2006).....	15
<i>Dep't of Transp. v. Ass'n of Am. R.R.s.</i> , 135 S. Ct. 1225 (2015)	12
<i>Dep't of Transp. & Dev. v. PNL Asset Mgmt. Co.</i> <i>(In re Fernandez)</i> , 123 F.3d 241 (5th Cir. 1997), <i>amended</i> 130 F.3d 1138 (5th Cir. 1997)	24

<i>Design Basics, LLC v. Lexington Homes, Inc.</i> , 858 F.3d 1093 (7th Cir. 2017)	35
<i>EEOC v. Wyoming</i> , 460 U.S. 226 (1983)	32
<i>Ex parte Young</i> , 209 U.S. 123 (1908)	11
<i>Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.</i> , 499 U.S. 340 (1991)	35
<i>Fitzpatrick v. Bitzer</i> , 427 U.S. 445 (1976)	28
<i>Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank</i> , 527 U.S. 627 (1999)	<i>passim</i>
<i>Goldstein v. California</i> , 412 U.S. 546 (1973)	25
<i>Granite Music Corp. v. United Artists Corp.</i> , 532 F.2d 718 (9th Cir. 1976)	34
<i>Hans v. Louisiana</i> , 134 U.S. 1 (1890)	25
<i>Holder v. Humanitarian Law Project</i> , 561 U.S. 1 (2010)	12
<i>Jacobs v. Memphis Convention & Visitors Bureau</i> , 710 F. Supp. 2d 663 (W.D. Tenn. 2010).....	15
<i>Jehnsen v. N.Y. State Martin Luther King, Jr., Institute for Nonviolence</i> , 13 F. Supp. 2d 306 (N.D.N.Y. 1998)	15
<i>Kimel v. Fla. Bd. of Regents</i> , 528 U.S. 62 (2000)	32
<i>Matal v. Tam</i> , 137 S. Ct. 1744 (2017)	12

<i>Mazer v. Stein</i> , 347 U.S. 201 (1954)	35
<i>Mitchell v. Franchise Tax Bd. (In re Mitchell)</i> , 209 F.3d 1111 (9th Cir. 2000)	24
<i>Munn v. Illinois</i> , 94 U.S. 113 (1876)	12
<i>Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.</i> , 633 F.3d 1297 (11th Cir. 2011)	15
<i>Nelson v. La Crosse Cnty. Dist. Att'y (In re Nelson)</i> , 301 F.3d 820 (7th Cir. 2002)	24
<i>Nettleman v. Fla. Atl. Univ. Bd. of Trs.</i> , 228 F. Supp. 3d 1303 (S.D. Fla. 2017)	15
<i>Nev. Dep't of Human Res. v. Hibbs</i> , 538 U.S. 721 (2003)	4, 29, 34
<i>Reiner v. Canale</i> , 301 F. Supp. 3d 727 (E.D. Mich. 2018)	15
<i>Rodriguez v. Texas Comm'n on the Arts</i> , 199 F.3d 279 (5th Cir. 2000)	15
<i>Roth v. Pritikin</i> , 710 F.2d 934 (2d Cir. 1983)	28
<i>Roy v. N.H. Dep't of Corr.</i> , 2015 WL 5054652 (D.N.H. July 8, 2015)	15
<i>Sacred Heart Hosp. v. Dep't of Pub. Welfare (In re Sacred Heart Hosp.)</i> , 133 F.3d 237 (3d Cir. 1998)	24
<i>Salerno v. City Univ. of N.Y.</i> , 191 F. Supp. 2d 352 (S.D.N.Y. 2001)	15

<i>Schlossberg v. Comptroller of Treasury</i> (<i>In re Creative Goldsmiths of Wash., D.C.</i>), 119 F.3d 1140 (4th Cir. 1997)	24
<i>Seminole Tribe of Florida v. Florida</i> , 517 U.S. 44 (1996)	<i>passim</i>
<i>United States v. Alvarez</i> , 567 U.S. 709 (2012)	12
<i>United States v. Comstock</i> , 560 U.S. 126 (2010)	12
<i>United States v. Edge Broad. Co.</i> , 509 U.S. 418 (1993)	4
<i>United States v. Haymond</i> , 139 S. Ct. 398 (2018)	12
<i>United States v. Kebodeaux</i> , 570 U.S. 387 (2013)	12
<i>United States v. Stevens</i> , 559 U.S. 460 (2010)	12
<i>United States v. Williams</i> , 553 U.S. 285 (2008)	12
<i>Wolf v. Oakland Univ.</i> , 2016 WL 7048812 (E.D. Mich. Dec. 5, 2016)	15
<i>Zivotofsky v. Kerry</i> , 135 S. Ct. 2076 (2015)	12

Constitution, Statutes and Rules

U.S. Const. art. I, § 8, cl. 8	2, 5, 23, 25
U.S. Const. amend. XI	5
U.S. Const. amend. XIV	28
17 U.S.C. 501	1, 5, 6

17 U.S.C. 504	35
17 U.S.C. 505	35
17 U.S.C. 511	1, 6
28 U.S.C. 1254	5
28 U.S.C. 1338	17, 19
Copyright Remedy Clarification Act of 1990, Pub. L. No. 101-553, 104 Stat. 2749 (1990)	<i>passim</i>
N.C. Gen. Stat. § 121-25(b)	8, 9

Other Authorities

Christopher L. Beals, <i>Comment: A Review of the State Sovereignty Loophole in Intellectual Property Rights Following Florida Prepaid and College Savings</i> , 9 U. PA. J. CONST. L. 1233 (2007)	33
Stephanie Berg, <i>Remedying the Statutory Damages Remedy for Secondary Copyright Infringement Liability: Balancing Copyright and Innovation in the Digital Age</i> , 56 J. COPYRIGHT SOC'Y U.S.A. 265 (2009).....	35
Mitchell N. Berman et al., <i>State Accountability for Violations of Intellectual Property Rights: How to “Fix” Florida Prepaid (And How Not To)</i> , 79 TEX. L. REV. 1037 (2001)	33
<i>Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liability of States: Hearing on H.R. 1131 Before the Subcomm. on Courts, Intellectual Prop., and the Admin. of Justice of the H. Comm. on the Judiciary</i> , 101st Cong. (1989).....	30, 33

<i>Copyright Remedy Clarification Act: Hearing on S. 497 Before the S. Subcomm. on Patents, Copyrights and Trademarks of the Comm. on the Judiciary</i> , 101st Cong., 1st Sess. (1989).....	33
John T. Cross, <i>Suing The States for Copyright Infringement</i> , 39 BRANDEIS L.J. 337 (2000)....	19, 20
THE FEDERALIST NO. 43	26
THE FEDERALIST NO. 81	23, 25
H.R. Rep. No. 101-282 (1989).....	19, 33
H.R. Rep. No. 101-887 (1989).....	32
Jason Karasik, <i>Leveling the IP Playing Field: Conditional Waiver Theory and the Intellectual Property Protection Restoration Act</i> , 27 HASTINGS COMM. & ENT. L.J. 475 (2005)	20
Peter S. Menell, <i>Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights</i> , 33 LOY. L.A. L. REV. 1399 (2000).....	19
Robert T. Neufeld, <i>Closing Federalism's Loophole in Intellectual Property Rights</i> , 17 BERKLEY TECH. L.J. 1295 (2002)	17, 18
S. Rep. No. 101-305 (1990).....	30, 31, 33
<i>Sovereign Immunity and the Protection of Intellectual Property: Hearing Before the S. Judiciary Comm.</i> , 107th Cong. 2d Sess. (2002)	17, 19, 20

<i>State Sovereign Immunity and Protection of Intellectual Property: Hearing Before the Subcomm. on Courts and Intellectual Prop. of Comm. on the Judiciary, 106th Cong. 2nd Sess. (2000)</i>	18
U.S. COPYRIGHT OFFICE, A REPORT OF THE REGISTER OF COPYRIGHTS: COPYRIGHT LIABILITY OF STATES AND THE ELEVENTH AMENDMENT (June 1988)	7, 17, 29, 33
U.S. GEN. ACCOUNTING OFFICE, INTELLECTUAL PROPERTY: STATE IMMUNITY IN INFRINGEMENT ACTIONS (Sept. 2001)	17, 19, 20
Edward C. Walterscheid, <i>To Promote the Progress of Useful Arts: American Patent Law & Administration, 1787-1836</i> , 2 J. INTELL. PROP. L. 1 (1994)	26

INTRODUCTION

This petition asks the Court to review a lower court's invalidation of an act of Congress, resulting in the denial of remedies to authors whose copyrights are infringed by States. Absent this Court's review, hard, careful work by the Legislature will be thwarted and creators of original expression will be left without remedy when States trample their federal copyrights.

The parties to this case disagree on many things, but not on one basic premise: the federal statute at issue—the Copyright Remedy Clarification Act of 1990, Pub. L. No. 101-553, 104 Stat. 2749 (1990) (“CRCA” or “Act”)—reflects Congress's unmistakable intent to protect federal copyrights against infringement by States. The Act specifically defines potential infringers of copyright to include “any State, any instrumentality of a State, and any officer of a State or instrumentality of a State acting in his or her official capacity,” and provides that such entities and persons shall be subject to copyright liability “in the same manner and to the same extent as any nongovernmental entity.” 17 U.S.C. 501(a). And the statute further specifies that such entities and persons “shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal Court by any person” alleging copyright infringement. *Id.* § 511(a).

There is no dispute that Congress intended thereby to abrogate state sovereign immunity for copyright infringement. The only question is whether Congress has the constitutional authority to

do what it did. The answer to that question is plainly yes.

The Intellectual Property Clause of the Constitution specifically authorizes Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8. And even if that facially plenary power did not allow Congress to protect federal copyrights against state infringement, Section 5 of the Fourteenth Amendment specifically authorizes Congress to protect property rights (including intellectual property rights) from state deprivation.

The Fourth Circuit nevertheless concluded below that neither of these sources of authority allows Congress to abrogate state sovereign immunity for copyright infringement as set forth in the CRCA. Other lower courts that have considered that issue—apart from the district court in this case—have reached the same conclusion by over-reading and misreading this Court’s teachings. As a result, no circuit split will prompt this Court’s review any more than is true right now. Nor will a petition by the Solicitor General occasion this Court’s review, for the Department of Justice has avowedly abandoned any further defense of the CRCA.

What should occasion this Court’s review is the federal judiciary’s relatively unexamined disregard of a law enacted by Congress as a co-equal branch, and the distension of vital principles that should properly define and limit each branch’s respective powers. As a matter of basic inter-branch comity, this Court—not an inferior federal court—should

now be the final arbiter of foundational questions that determine the scope of Congress' constitutional authority. Recognizing as much, this Court generally grants review where, as here, a federal court refuses to enforce a federal statute on constitutional grounds.

Furthermore, the decision below is incorrect. As to Congress's Article I authority, the need for this Court's review is especially acute because both the lower courts and the Executive Branch have over-read statements in this Court's previous decisions in this area—specifically, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999)—by reflexively concluding that Congress cannot rely on its Article I powers (the very core of its constitutional authority) to abrogate state sovereign immunity. But any such suppositions in this Court's prior decisions should be read in light of this Court's subsequent, more nuanced instruction on the proper scope of Congress' enumerated powers, particularly in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), which recognized that Congress *can* properly abrogate state sovereign immunity pursuant to an Article I power. See *id.* at 362 (characterizing earlier language as “dicta” reflecting an “erroneous” assumption). Only this Court can reconcile its decisions and bring much-needed clarity to this font of Congressional power.

In the alternative, Congress properly exercised its power under Section 5 of the Fourteenth Amendment, for Congress considered a robust legislative record demonstrating that abrogation of

state sovereign immunity is a textbook example of a congruent and proportional remedy for States' pattern of continuing copyright abuses. See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2003) (upholding Congressional abrogation of state sovereign immunity on similarly robust record). This record well exceeds in important respects the one Congress considered when it passed the Patent Remedy Act, which this Court held insufficient in *Florida Prepaid*. As Congress recognized, the very nature of copyrights makes them more in need of protection from state infringement than patents are, just as the statutory remedy is more circumscribed.

“Because the court below declared a federal statute unconstitutional and applied reasoning that was questionable,” this Court’s review is warranted. *United States v. Edge Broad. Co.*, 509 U.S. 418, 425 (1993). There is compelling reason for this Court now to grant certiorari and reverse the judgment.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fourth Circuit is reported at 895 F.3d 337 and is reproduced at App. 1a-41a. The Fourth Circuit’s order denying rehearing *en banc* is reproduced at App. 79a-82a. The district court’s opinion and order is reported at 244 F. Supp. 3d 525 and is reproduced at App. 42a-78a.

JURISDICTION

The Fourth Circuit denied rehearing *en banc* on August 9, 2018. App. 82a. On October 19, 2018, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 6,

2019. This Court has jurisdiction under 28 U.S.C. 1254(1).

**PERTINENT CONSTITUTIONAL AND
STATUTORY PROVISIONS**

Article I, Section 8, Clause 8 of the U.S. Constitution grants Congress the power:

To promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The Eleventh Amendment to the U.S. Constitution provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State

As amended by the CRCA, 17 U.S.C. 501(a) provides:

Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 ... is an infringer of the copyright or right of the author, as the case may be. ... As used in this subsection, the term “anyone” includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provi-

sions of this title in the same manner and to the same extent as any nongovernmental entity.

As amended by the CRCA, 17 U.S.C. 511(a) provides:

Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal Court by any person, ... for a violation of any of the exclusive rights of a copyright owner provided by sections 106 through 122 ... or for any other violation under this title.

STATEMENT OF THE CASE

A. Statutory Framework

In 1990 Congress passed the CRCA, amending the Copyright Act to strip “any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity” of Eleventh Amendment immunity for copyright infringement. 17 U.S.C. 511(a); see also *id.* § 501(a) (states and state officials explicitly included in scope of potential infringers).

The CRCA was enacted only after Congress designated Ralph Oman, Register of Copyrights, “to assess the nature and extent of the clash between the Eleventh Amendment and the federal copyright law.” U.S. COPYRIGHT OFFICE, A REPORT OF THE REGISTER OF COPYRIGHTS: COPYRIGHT LIABILITY OF

STATES AND THE ELEVENTH AMENDMENT, at ii (June 1988) (“Register’s Report”), available at <http://files.eric.ed.gov/fulltext/ED306963.pdf>. Mr. Oman collected public comments, conducted a 50-state survey, and submitted an extensive report to Congress, warning of the “dire financial and other repercussions that would flow from state Eleventh Amendment immunity for damages in copyright infringement suits.” *Id.* at ii-iii; see also *id.* at vii (concluding that “Congress intended to hold states responsible under the federal copyright law, and that copyright owners have demonstrated that they will suffer immediate harm if they are unable to sue infringing states in federal court for money damages”).¹ Following receipt of Mr. Oman’s report, as well as statements and testimony at House and Senate hearings, Congress passed the CRCA by voice vote.

B. Factual Background

The instant dispute arises from the discovery of Blackbeard’s flagship, *Queen Anne’s Revenge*, which ran aground at Beaufort, North Carolina in 1718. App. 6a-7a. The shipwreck was discovered in November 1996 by Intersal, Inc., a private research

¹ Mr. Oman filed an *amicus* brief in the Fourth Circuit, in which he describes the Copyright Office’s study, the evidence it compiled, and his Congressional testimony. See Brief of Ralph Oman as *Amicus Curiae* Supporting Appellees, *Allen v. Cooper*, No. 17-1522, Doc. 45-1 (4th Cir. Oct. 20, 2017). As Mr. Oman explained, the report “clearly established an emerging pattern of copyright infringement by states and state agencies, along with a total absence of effective remedies to stem such abuse.” *Id.* at 11.

and salvage firm, which retained petitioners Frederick Allen and his company Nautilus Productions, LLC (collectively, “Nautilus”) to document salvage of the ship. App. 7a-8a. Through this arrangement, Allen and his company have been serving as the videographer and production company filming the shipwreck for nearly two decades, resulting in their creation of original videos and still images of the wreck and salvage efforts (the “Works”). App. 8a-9a. Allen registered with the U.S. Copyright Office copyrights for the Works, which are licensed to and commercialized by Nautilus Productions. App. 9a; 4th Cir. J.A. 25-26.

At some point before October 2013, the State of North Carolina and its Department of Natural and Cultural Resources (“DNCR,” and collectively with North Carolina and various state officials, the “State”) infringed Nautilus’s copyright in the Works—specifically, the State copied and publicly displayed the Works without Nautilus’s permission by uploading and posting them online. App. 9a, 43a. In October 2013, North Carolina, the DNCR and others entered into a settlement agreement with Nautilus, whereby they (i) paid Nautilus \$15,000 for prior infringements; and (ii) agreed not to infringe the Works going forward.

Although the State initially took down the infringing uses, it quickly resumed its infringing activities in both online and print forms. App. 12a, 44a. The State then attempted to insulate itself from liability for that subsequent infringement by passing “Blackbeard’s Law,” H.B. 184, N.C. Gen. Stat. § 121-25(b), which purportedly converted the Works into “public record” materials that can be freely used by

the State without any ostensible consequence or remedy. App. 44a.² Nautilus issued takedown notices for these infringements, which the State failed to follow. App. 12a.

C. Proceedings Below

On December 1, 2015, Nautilus sued the State in the U.S. District Court for the Eastern District of North Carolina. App. 12a. Relevant here, the suit seeks to hold the State liable for copyright infringement of the Works pursuant to the Copyright Act. App. 13a, 45a.

The State moved to dismiss the copyright claim on the ground that the Eleventh Amendment's provision of state sovereign immunity shields the State from suit in federal court. App. 13a, 45a. In particular,

² On August 18, 2015, the State passed N.C. Gen. Stat. § 121-25(b), which provides:

All photographs, video recordings, or other documentary materials of a derelict vessel or shipwreck or its contents, relics, artifacts, or historic materials in the custody of any agency of North Carolina government or its subdivisions shall be a public record pursuant to G.S. 132-1. There shall be no limitation on the use of or no requirement to alter any such photograph, video recordings, or other documentary material, and any such provision in any agreement, permit, or license shall be void and unenforceable as a matter of public policy.

App. 44a. Thus, the State tried to insulate itself from *any* liability—under federal or state law—for its infringement, thereby depriving Nautilus of any monetary remedy. The State modified the law one year later in a cosmetic effort to tweak terminology without changing substance. See App. 45a.

the State relied heavily on *Florida Prepaid*, where this Court held that Congress exceeded its powers in enacting the Patent Remedy Act and attempting to abrogate state sovereign immunity for patent infringement. See 4th Cir. J.A. 59-60 (citing *Fla. Prepaid*, 527 U.S. at 630). *Florida Prepaid* relied in turn on this Court's decision in *Seminole Tribe*, holding that Congress could not rely on its Article I powers in passing the Indian Gaming Regulatory Act, 517 U.S. at 72-73.

The district court (Boyle, J.) denied the motion to dismiss with respect to the claim for copyright infringement, holding that the CRCA validly abrogated the State's sovereign immunity from suit. App. 53a, 64a-65a.

First, the court determined that “there can be no doubt that Congress has stated clearly its intent to abrogate sovereign immunity for copyright claims against a state, its instrumentalities, or its officers or employees in their official capacities.” App. 49a-50a.

Second, as to whether Congress acted pursuant to a valid exercise of power, the court ruled that, under *Seminole Tribe* and *Florida Prepaid*, Congress was not permitted to rely upon Article I authority to abrogate state sovereign immunity (although it recognized the tension between those earlier cases and *Katz*). App. 50a-51a. But the court went on to rule that Congress acted appropriately pursuant to its authority under Section 5 of the Fourteenth Amendment. App. 53a. Specifically, based on the court's “review of the legislative history of the CRCA,” it found that Congress “acted in response to sufficient evidence of infringement of copyrights by the states” and “was clearly responding to a pattern

of current and anticipated abuse by the states of the copyrights held by their citizens.” App. 52a-53a. The district court concluded that, “in this particular case Congress has clearly abrogated state immunity in cases arising under the CRCA, and such an abrogation is congruent and proportional to a clear pattern of abuse by the states.” App. 64a-65a.

A unanimous panel of the Fourth Circuit (Niemeyer, C.J.) reversed the district court’s ruling on state sovereign immunity, holding that the CRCA did not validly abrogate Eleventh Amendment immunity. See App. 30a-31a.³

First, the court of appeals held that any reliance by Congress on Article I’s Intellectual Property Clause was an invalid basis for enacting the CRCA because “*Seminole Tribe* and its progeny ... make clear that Congress cannot rely on its Article I powers to abrogate Eleventh Amendment immunity.” App. 18a.

Second, as to Nautilus’s alternative argument, the court of appeals held that Congress did not validly enact the CRCA pursuant to Section 5 of the Fourteenth Amendment because, in order to do so, “Congress must both (1) make clear that it is relying on [Section] 5 of the Fourteenth Amendment as the source of its authority and (2) ensure that any

³ The Fourth Circuit further held that (i) the State had not waived sovereign immunity in the 2013 settlement agreement and; (ii) the claims against the state officials could not proceed under the exception to Eleventh Amendment immunity recognized in *Ex parte Young*, 209 U.S. 123 (1908). App. 16a-17a, 32a-36a. Nautilus does not seek review of those aspects of the decision below.

abrogation of immunity is ‘congruen[t] and proportional[]’ to the Fourteenth Amendment injury to be prevented or remedied.” App. 20a-21a (quoting *Fla. Prepaid*, 527 U.S. at 639-42). According to the Fourth Circuit’s holding, “Congress satisfied neither requirement” in enacting the CRCA. App. 21a.

The Fourth Circuit denied Nautilus’s timely petition for rehearing *en banc*. App. 82a.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION PRESENTED WARRANTS THIS COURT’S REVIEW

A. The Fourth Circuit’s Invalidation Of A Federal Statute Warrants This Court’s Review

The court of appeal’s invalidation of the CRCA as unconstitutional itself warrants this Court’s immediate review. See *United States v. Kebodeaux*, 570 U.S. 387, 391 (2013) (“[I]n light of the fact that a Federal Court of Appeals has held a federal statute unconstitutional, we granted the petition.”). In such circumstances, the Court generally does not wait for a circuit conflict to manifest. See, e.g., *United States v. Haymond*, 139 S. Ct. 398 (2018); *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015); *Dep’t of Transp. v. Ass’n of Am. R.R.s*, 135 S. Ct. 1225 (2015); *United States v. Alvarez*, 567 U.S. 709 (2012); *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010); *United States v. Comstock*, 560 U.S. 126 (2010); *United States v. Stevens*, 559 U.S. 460 (2010); *United States v. Williams*, 553 U.S. 285 (2008). Given that “[e]very statute is presumed to be constitutional,” *Munn v. Illinois*, 94 U.S. 113, 123 (1876), the Fourth Circuit’s ruling indicates a

division relative to jurisdictions that have yet to identify any constitutional defect in the CRCA.

Moreover, the contours of Congress's constitutional authority to abrogate state sovereign immunity from suits for copyright infringement should ultimately be addressed, definitively, by this Court. In the meantime, lower courts have been giving short shrift to the notion that Congress has competence to legislate along the lines of the CRCA. For example, in rejecting Nautilus's argument that Congress could abrogate state sovereign immunity through its Article I powers, the Fourth Circuit maintained an overbroad interpretation of *Seminole Tribe* and ignored subsequent precedent of this Court, particularly *Katz*, which has clarified and narrowed the proper application of *Seminole Tribe*. Compare *Fla. Prepaid*, 527 U.S. at 636 ("*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers"), with *Katz*, 546 U.S. at 363 (acknowledging this language in *Seminole Tribe* was based on an "erroneous" assumption that was "not fully debated" and thus is nonbinding dicta).

The "erroneous" assumption that Congress is powerless under Article I to abrogate state sovereign immunity has so thoroughly colored lower courts' analysis that Congress's Article I power was not even argued to this Court in *Florida Prepaid*, as this Court expressly noted. See 527 U.S. at 636. And although the court of appeals in this case tried to distinguish this Court's subsequent decision in *Katz* as somehow "unique to the Bankruptcy Clause," App. 19a, nothing in *Katz* forecloses Congress from relying on its Article I powers to abrogate state sovereign

immunity in other contexts, to the extent consonant with the basic federal-state balance struck at the Founding.

Similarly, in determining that the CRCA was not “a congruent and proportional response to the Fourteenth Amendment injury” of state copyright infringement, App. 25a, the Fourth Circuit disregarded critical differences between the record before Congress immediately preceding the enactment of the Patent Remedy Act and that relative to the CRCA, as further discussed below. See *infra* at 31-35. And the Fourth Circuit refused to credit Congress’s prediction—well vindicated—that the CRCA was appropriate not only to address past violations but also to address “*a potential* for greater constitutional violations in the future,” for purposes of informing congruence and proportionality under Section 5 of the Fourteenth Amendment. App. 30a (emphasis in original).

This petition offers the Court the chance to correct widespread misinterpretation of its relevant precedent. Notably, it also affords opportunity for the Court to address application of its precedent specifically to Congressional power under the Intellectual Property Clause, which this Court has yet to examine rigorously and presents an especially strong case for measured abrogation of state sovereign immunity as an essential corollary to securing uniform, inviolable federal protections. See *infra* at 23-27. Nor has this Court examined the carefully-compiled legislative record specifically surrounding the CRCA, or the aspects of copyright law, quite different from patent law, that make state infringement so problematic and the statutory

remedy so congruent and proportional from a constitutional perspective. See *infra* at 28-36.

Finally, it bears emphasizing that, unless this petition is granted, the CRCA will be rendered a dead letter by default, without Congress or aggrieved copyright holders ever getting their due. Lower courts have largely refused to enforce (or have outright invalidated) the CRCA without undertaking meaningful analysis.⁴ The Solicitor General has similarly disavowed any defense of the legislation. See Letter from Jeffrey B. Wall, Acting Solicitor Gen. U.S. Dep't of Justice, to Hon. Paul D. Ryan, Speaker U.S. House Rep. (May 5, 2017), and Letter from Janet Reno, Att'y Gen., to Hon. J. Dennis Hastert, Speaker U.S. House Rep. (Oct. 13, 1999), both

⁴ See, e.g., *Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297 (11th Cir. 2011); *Rodriguez v. Texas Comm'n on the Arts*, 199 F.3d 279 (5th Cir. 2000); *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000); *Reiner v. Canale*, 301 F. Supp. 3d 727, 749 (E.D. Mich. 2018); *Nettleman v. Fla. Atl. Univ. Bd. of Trs.*, 228 F. Supp. 3d 1303, 1309 (S.D. Fla. 2017); *Wolf v. Oakland Univ.*, 2016 WL 7048812, at *5 (E.D. Mich. Dec. 5, 2016); *Campinha-Bacote v. Regents of Univ. of Mich.*, 2016 WL 223408, at *5 (S.D. Ohio Jan. 19, 2016); *Roy v. N.H. Dep't of Corr.*, 2015 WL 5054652, at *7 (D.N.H. July 8, 2015), *report & recommendation adopted*, 2015 WL 5054762 (D.N.H. Aug. 26, 2015); *Coyle v. Univ. of Ky.*, 2014 WL 866626, at *2-3 (E.D. Ky. Mar. 4, 2014); *De Romero v. Inst. of Puerto Rican Culture*, 466 F. Supp. 2d 410, 416-18 (D.P.R. 2006); *Salerno v. City Univ. of N.Y.*, 191 F. Supp. 2d 352, 355-56 (S.D.N.Y. 2001); *Jacobs v. Memphis Convention & Visitors Bureau*, 710 F. Supp. 2d 663, 669 (W.D. Tenn. 2010); *Jehnsen v. N.Y. State Martin Luther King, Jr., Inst. for Nonviolence*, 13 F. Supp. 2d 306, 311 (N.D.N.Y. 1998).

available at https://www.justice.gov/oip/foia-library/osg_530d_letters_5_5_2017/download.

This is a disquieting state of affairs. Congress's prescription should not be so lightly invalidated, nor should a coordinate branch be left undefended and relegated to unexamined dismissal by lower courts. The lower courts are strongly signaling to Congress that not only the CRCA but any such statutory enactment will be reflexively tossed aside without regard for important nuances, including specifics of the legislative record and calculus. Decisions to date read as though the Legislature simply cannot furnish statutory remedy for this recurring problem nationwide, thereby leaving Congress and innumerable copyright holders frozen, at best, and likely disabled from arriving at any satisfying solution.

If nothing else, this Court should take the opportunity to address for itself the careful work Congress did in enacting the CRCA. By rendering its own considered judgment, this Court would recognize the constitutional validity of Congress's statutory prescription, or else, presumably, provide a constructive, reliable roadmap for how Congress could better accomplish its desired result; either outcome would be salutary from an inter-branch perspective.

B. Rampant Copyright Infringement By States Poses An Important, Continuing Problem That Warrants This Court's Review

The infringement by the State in this case is by no means isolated. Before Congress adopted the CRCA,

States had been flagrantly copying works and threatening to copy others, claiming sovereign immunity as a defense. See, e.g., Register's Report, at 8-9, 92-93. Since *Florida Prepaid*, moreover, instances of state copyright infringement predictably spiked.

In 2001, the United States General Accounting Office reported to Congress on the frequency of state infringements of intellectual property. It identified 58 lawsuits between 1985 and 2001 that "alleged infringement or unauthorized use of intellectual property [including patent, trademark, and copyright] by state entities." U.S. GEN. ACCOUNTING OFFICE, INTELLECTUAL PROPERTY: STATE IMMUNITY IN INFRINGEMENT ACTIONS, at 7 (Sept. 2001), available at <https://www.gao.gov/assets/240/232603.pdf> (the "GAO REPORT").⁵ In 2002, Congress heard testimony regarding 77 examples of state infringement of intellectual property. See *Sovereign Immunity and the Protection of Intellectual Property: Hearing Before the S. Judiciary Comm.*, 107th Cong. 2d Sess. 41-58, 91-93 (2002) ("2002 Senate Hearing").

⁵ While only a fraction of the suits surveyed by the GAO involved a State as infringer, "given that state entities constitute only a tiny fraction of the total number of parties using intellectual property, fifty-eight lawsuits implicating state entities as defendants seems like a substantial number." Robert T. Neufeld, *Closing Federalism's Loophole in Intellectual Property Rights*, 17 BERKLEY TECH. L.J. 1295, 1315 (2002) ("the small number of lawsuits may be attributable to a general belief that states were not subject to suit for infringement during much of the 15-year period surveyed [in the GAO Report] in view of *Atascadero*, *Florida Prepaid*, and the federal courts' exclusive jurisdiction under 28 U.S.C. 1338(a)").

According to more recent statistics, the numbers are actually much higher. A list of lawsuits filed in another case identified 154 lawsuits against state actors for copyright infringement between 2000 and 2017. See Pl.’s Response to Mot. to Dismiss, Ex. E, *Bynum v. Texas A&M Univ. Athletic Dep’t*, No. 4:17-cv-00181, Doc. 62-1 (S.D. Tex. Jan. 16, 2018). Getty Images also reported over 50 instances of state copyright infringement of photographs and film footage—16 of which occurred between 2015 and 2017 alone. See Brief of The Copyright Alliance as *Amicus Curiae* Supporting Appellees at 7, *Allen v. Cooper*, No. 17-1522, Doc. 44-1 (4th Cir. Oct. 20, 2017) (“Copyright Alliance Br.”). While state infringements accumulate unabated, see Neufeld, 17 BERKLEY TECH. L.J. at 1317, reported instances of state infringement of copyrighted works are vastly understated relative to actual incidence.⁶ Many instances of state infringement are resolved out of court, as they were here, without copyright holders obtaining adequate remedy; state actors may

⁶ See *State Sovereign Immunity and Protection of Intellectual Property: Hearing Before the Subcomm. on Courts and Intellectual Prop. of Comm. on the Judiciary*, 106th Cong. 2nd Sess. (2000) (Statement of Marybeth Peters, Register of Copyrights), available at <https://www.copyright.gov/docs/regstat72700.html> (“Merely reviewing dismissed court cases would overlook a potentially large number of cases never brought because potential plaintiffs see such a suit as futile in the face of the Court’s rulings. ... What appears certain is that so long as States remain immune from suits for damages from infringements of copyrights and other intellectual property rights, States are likely to be tempted to infringe and the number of actual infringements by States is likely to increase.”).

promise to cease infringing while assuming the shield of sovereign immunity to avoid paying for past infringement (and thereafter potentially resuming infringement with virtual impunity). See 2002 Senate Hearing, at 91-92.

There is no satisfying substitute for the remedies afforded by the CRCA. Injunctive relief does not compensate copyright holders for past infringement, yet is attended by daunting litigation costs. See H.R. Rep. No. 101-282, at 8 (1989) (“The Committee believes ... that injunctive relief is not alone an adequate remedy, and that actual damages must be available to fully protect copyright owners. Injunctive relief is often obtained only at great cost. It deters only future conduct, and does not compensate for past harm.”). State remedies are similarly unavailing. Indeed, the original and exclusive jurisdiction of federal courts over copyright claims presents “an insurmountable bar to a plaintiff who would seek a remedy for ... copyright infringement in state court, regardless of whether the defendant was a state or private party.” GAO REPORT, at 18; see also John T. Cross, *Suing The States for Copyright Infringement*, 39 BRANDEIS L.J. 337, 338 (2000) (“those state tribunals are unavailable in copyright because Congress has vested exclusive jurisdiction over copyright infringement cases in the federal judiciary”); 28 U.S.C. 1338(a).

Analogous state court causes of action, such as for breach of contract and unlawful takings, are likewise illusory; they are “of little use in helping a State satisfy its due process obligations in patent and copyright cases.” Cross, 39 BRANDEIS L.J. at 405-09; see also Peter S. Menell, *Economic Implications of*

State Sovereign Immunity from Infringement of Federal Intellectual Property Rights, 33 LOY. L.A. L. REV. 1399, 1413-28 (2000); GAO REPORT, at 20. Moreover, States often shield themselves with immunity from suit, apart from limited exceptions in “each state’s constitution, specific statutes, or judicial interpretation.” GAO REPORT, at 23; see also Jason Karasik, *Leveling the IP Playing Field: Conditional Waiver Theory and the Intellectual Property Protection Restoration Act*, 27 HASTINGS COMM. & ENT. L.J. 475, 498 (2005); Cross, 39 BRANDEIS L.J. at 365-66.

Those most vulnerable to state copyright infringement are small businesses. See Copyright Alliance Br., at 8. Because small businesses lack the resources necessary to fight state actors effectively and typically need promise of recompense for past infringement before initiating litigation, they currently find themselves largely helpless in the face of state infringement.

Absent adequate remedies, authors, performers, composers, and producers will lose their incentive to create, at the expense of the economy and the arts. See 2002 Senate Hearing, at 10-11 (Statement of Marybeth Peters, Register of Copyrights). This Court’s intervention stands to safeguard copyright holders’ interests in their works as well as incentives for creating and publicizing new works.

II. THIS CASE IS AN IDEAL VEHICLE FOR DECIDING THE QUESTION PRESENTED

Not only is the Question Presented worthy of this Court’s review, but this case presents an ideal vehicle for resolving it. The same question was

decided on a motion to dismiss (just as issues of state sovereign immunity naturally are), confirming it is cleanly presented as one of pure law. Because resolution of the Question Presented is dispositive of the State's sovereign immunity defense, it can never be better presented than it is here.

As for the specific facts of this case, they provide a vivid backdrop for deciding whether States can be held accountable for copyright infringement as provided by Congress. Nautilus created its original and creative Works over the course of two decades and registered them with the U.S. Copyright Office. App. 9a. Having systematically and repeatedly infringed those Works, the State entered into a settlement agreement with Nautilus, in which it agreed to cease its infringement. App. 43a-44a. Nonetheless, two years later, the State resumed its infringing activity. Even worse, the State passed its own law that purportedly dispelled Nautilus's rights to its federal copyrights by designating them "public records" that the State could continue to trample with total impunity. App. 44a-45a; see *supra* at 8-9 & n.2.

These facts dramatically illustrate and validate the concerns that moved Congress to enact the CRCA as it did. They also bring into stark relief the perversity of lower courts' decisions that ostensibly disable Congress from vindicating copyrights in the face of systematic, documented infringement by States—infringement that threatens to render federal protections nugatory. Not only has the State here infringed Nautilus's copyrights in the Works, but it frontally attacked the federal copyrights by effectively dragging the Works into the public,

unprotected domain under auspices of state law; the upshot very clearly and designedly eviscerates federal copyrights. Such conduct by States profoundly imperils federal protections that are meant to be uniform nationwide and epitomizes what Congress sought to protect against when enacting the CRCA.

To be sure, North Carolina's infringement at issue is but the protruding tip of a much larger iceberg of state infringement nationwide, see *supra* at 16-18—and it is the larger iceberg that should concern this Court, much as it concerned Congress. Still, it is difficult to imagine a case that could cry out more than this one does for this Court's consideration of whether state sovereign immunity properly persists notwithstanding Congress's contrary prescription in the CRCA.

III. THE DECISION BELOW IS MANIFESTLY INCORRECT

Beyond the legal, institutional and practical importance of the Question Presented, certiorari review is called for to correct manifest constitutional errors in the decision below. Contrary to the Fourth Circuit's holding, Congress validly abrogated sovereign immunity for copyright infringement pursuant to Article I of the Constitution and/or Section 5 of the Fourteenth Amendment.

A. The CRCA Validly Subjects States To Suit Pursuant To Congress's Article I Power

Article I expressly empowers Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors

the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8. Authority to abrogate States’ sovereign immunity for infringing these federal protections is part and parcel of this established Article I power and its animating purpose. Only by surrendering their sovereign immunity did the States empower Congress to secure uniform, nationwide protection for federally-conferred patents and copyrights, consistent with the constitutional design.

This Court has never analyzed whether the Intellectual Property Clause reflects a Plan-of-the-Convention waiver of sovereign immunity. See THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (States do not retain sovereign immunity if “surrender of this immunity [is] in the plan of the convention”). Instead, this Court and lower courts have generally assumed since *Seminole Tribe* that *no* Article I power allows Congress to subject States to suit. But this Court specifically concluded in *Katz* “that that assumption was erroneous.” 546 U.S. at 363.

Lower courts’ confusion traces back to *Seminole Tribe*, where this Court confronted the narrow question whether Article I’s Indian Commerce Clause specifically enables Congress to abrogate state sovereign immunity. Although “both the majority and the dissenting opinions in *Seminole Tribe* ... reflected an *assumption* that the holding in that case would apply to the Bankruptcy Clause,” *Katz*, 546 U.S. at 363 (emphasis added), and Intellectual Property Clause, see *Seminole Tribe*, 517 U.S. at 73; *id.* at 93–94 (Stevens, J., dissenting), this Court did not confront those questions.

This Court then relied on that same unexamined “assumption” in *Florida Prepaid*, where College Savings and the United States did not even contend any Article I power was a basis for subjecting the States to suit. 527 U.S. at 636. Without analyzing the question or having it posed by the parties, this Court relied on *Seminole Tribe* to conclude that “Congress may not abrogate state sovereign immunity pursuant to its Article I powers.” *Id.*

In *Katz*, however, the Court recognized that it had gone too far by pronouncing in *Florida Prepaid*—based on *Seminole Tribe* and without benefit of on-point briefing—that Congress is altogether foreclosed from abrogating state sovereign immunity based on an Article I power. 546 U.S. at 363. Notably, before *Katz*, lower courts had been reading the Court’s earlier pronouncements too broadly. Five of six circuits to consider the question had held that the States’ sovereign immunity may not be abrogated for adversary proceedings in bankruptcy.⁷ Yet this Court, upon conducting its own careful analysis of the particular Article I power at issue and the history and intent surrounding it, reached the

⁷ See *Nelson v. La Crosse Cnty. Dist. Att’y (In re Nelson)*, 301 F.3d 820, 832 (7th Cir. 2002); *Mitchell v. Franchise Tax Bd. (In re Mitchell)*, 209 F.3d 1111, 1121 (9th Cir. 2000); *Sacred Heart Hosp. v. Dep’t of Pub. Welfare (In re Sacred Heart Hosp.)*, 133 F.3d 237, 244 (3d Cir. 1998); *Dep’t of Transp. & Dev. v. PNL Asset Mgmt. Co. (In re Fernandez)*, 123 F.3d 241, 243 (5th Cir. 1997), *amended* 130 F.3d 1138, 1139 (5th Cir. 1997); *Schlossberg v. Comptroller of Treasury (In re Creative Goldsmiths of Wash., D.C.)*, 119 F.3d 1140, 1145-46 (4th Cir. 1997) (all holding that sovereign immunity has not been abrogated for adversary proceedings in bankruptcy).

opposite conclusion—specifically, that “States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to ‘Laws on the subject of Bankruptcies.’” *Katz*, 546 U.S. at 377.

Corresponding analysis of the Intellectual Property Clause commends the same conclusion. The text and history of that Clause show that the Plan of the Convention was to empower Congress to bestow federal patents and copyrights and to secure uniform protection for them throughout the United States. It was indispensable to this Plan that the States surrender their sovereign immunity within a discrete, exclusive federal realm. See *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (quoting THE FEDERALIST NO. 81).

First, the text of the Intellectual Property Clause sets it apart from other Article I powers. The Intellectual Property Clause grants Congress the power to “*secur[e]* for limited Times to Authors and Inventors the *exclusive Right* to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8 (emphasis added). This Court has already recognized the great import of this power: “When Congress grants an exclusive right or monopoly, its effects are pervasive; *no citizen or State may escape its reach.*” *Goldstein v. California*, 412 U.S. 546, 560 (1973) (emphasis added). This conclusion follows inexorably. As this case demonstrates, essential federal protections for intellectual property are not “*secur[ed]*” in any meaningful way if—as was true under the Articles of Confederation and the Framers set out to rectify—intellectual property holders are bereft of recourse when States deviate and trespass.

Second, the history of the Clause at the Constitutional Convention indicates that the States agreed to waive sovereign immunity under the Plan of the Convention. Like the Bankruptcy Clause, the Intellectual Property Clause was inserted into Article I without significant debate or opposition because, as James Madison aptly observed in the *Federalist Papers*, “the utility of this power will scarcely be questioned.” THE FEDERALIST NO. 43, at 268 (Clinton Rossiter ed. 2003); see *Katz*, 546 U.S. at 369 (“The absence of extensive debate over the text of the Bankruptcy Clause or its insertion indicates that there was general agreement on the importance of authorizing a uniform federal response”); Edward C. Walterscheid, *To Promote the Progress of Useful Arts: American Patent Law & Administration, 1787-1836*, 2 J. INTELL. PROP. L. 1, 50-51 & n.171 (1994) (noting no recorded debate and unanimous approval of the Intellectual Property Clause).

Third, abrogation of a State’s Eleventh Amendment immunity is inherent in the very power to confer and secure federal rights to intellectual property. This Court has recognized the primary importance of “national uniformity in the realm of intellectual property.” *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989) (citing THE FEDERALIST NO. 43); see also *Capitol Records v. Mercury Records Corp.*, 221 F.2d 657, 667 (2d Cir. 1955) (Hand, J., dissenting) (“Uniformity was one of the principal interests to be gained by devolving upon the Nation the regulation of this subject.”). Of course, uniformity cannot be achieved unless the intellectual property rights conferred by Congress are enforceable against *all* infringers, throughout *all* States. That States provided for Congress to secure

uniform protections nationwide should suffice to establish that States were surrendering sovereign immunity to the extent one State or another decided to violate resulting protections. Otherwise, security might give way to incursion and uniformity to deviation once States saw fit to claim and to use federally-protected works as their own.

The Fourth Circuit, however, neglected to analyze specific indicia of whether the Intellectual Property Clause entails authority for Congress to abrogate state sovereign immunity. Instead, the Fourth Circuit dispensed with the Article I question as though—contrary to this Court’s approach in *Katz*, 546 U.S. at 363—it has been altogether pretermitted. App. 18a-20a (“[T]hat ground for enactment of an abrogation is foreclosed by *Seminole Tribe* and its progeny, which make clear that Congress cannot rely on its Article I powers to abrogate Eleventh Amendment immunity.”). The Fourth Circuit thereby erred, and erred consequentially, for proper examination of the relevant Article I power should lead to recognition that Congress has authority to legislate precisely as it did via the CRCA.

Absent this Court’s review, proper examination may never occur. Every indication is that the lower courts will continue to repeat the assumption set forth in *Florida Prepaid* as to the Intellectual Property Clause without engaging in the “[c]areful study and reflection” that is appropriate. *Katz*, 546 U.S. at 363. If, on the other hand, this Court does grant review, proper examination will confirm that the States agreed to surrender any sovereign immunity defense to the extent they allegedly

infringe federal patents and copyrights secured by Congress.

B. The CRCA Also Validly Subjects States To Suit Pursuant To Congress’s Power To Enforce The Fourteenth Amendment

Alternatively, regardless of whether Congress validly exercises its Article I powers, the CRCA was a valid exercise of Congress’s power to abrogate state sovereign immunity pursuant to Section 5 of the Fourteenth Amendment. Section 5 imbues Congress with “power to enforce, by appropriate legislation, the provisions of this article,” including the clause prohibiting States from “depriv[ing] any person of life, liberty, or property, without due process of law,” U.S. Const. amend. XIV. Those due-process protections extend to the private property rights that exist in copyright.⁸ See *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983) (“An interest in a copyright is a property right protected by the due process and just compensation clauses of the Constitution.”); cf. *Fla. Prepaid*, 527 U.S. at 642 (describing patents as a “species of property ... of which no person may be deprived by a State without due process of law”). And this Court has made clear that Congress’s power to enforce such protections through Section 5 includes the authority to abrogate state sovereign immunity, see *Fitzpatrick v. Bitzer*, 427 U.S. 445,

⁸ As the State conceded and the Fourth Circuit correctly presumed, copyright infringement by a State can deprive a copyright owner of property in violation of the Fourteenth Amendment. See App. 27a; Appellants’ Opening Br. at 33, *Allen v. Cooper*, No. 17-1522, Doc. 34 (4th Cir. Aug. 21, 2017) (acknowledging copyrights are property).

456 (1976), provided Congress fashions a remedy that “is congruent and proportional” to the constitutional violation, *Hibbs*, 538 U.S. at 740.

Congress acted consistent with any principled conception of its Section 5 prerogatives when it abrogated state sovereign immunity for unremedied, unconstitutional copyright violations. Like the Congressional record in *Hibbs*—which contained “weighty” evidence of “the States’ record of unconstitutional participation in, and fostering of, gender-based discrimination ... to justify the enactment of prophylactic Section 5 legislation,” *id.* at 734—the legislative record of the CRCA contained substantial evidence of copyright infringement by States that, as even the Fourth Circuit recognized, “presumably violated the Fourteenth Amendment’s Due Process Clause,” App. 27a-28a. Among that evidence was a 150-page report compiled by the Register of Copyrights (at the request of Congress) on the scope of state copyright infringement. See *supra* at 6-7 & n.1. After investigating for a year and gathering dozens of comments from textbook publishers, motion picture producers, composers, software companies, financial advisors, trade groups, and agencies, the Register reported and documented before Congress a pattern of unremedied copyright infringement by states and state agencies while warning of the “dire” consequences of permitting states to retain immunity against suits for copyright infringement. See Register’s Report, at 5.

In particular, the Congressional record catalogued substantial copyright infringement by state universities that “critically impair[ed]” creative incentives by “creators and producers of computer

data bases, software, scholarly books and journals, textbooks, educational testing materials, microfilm, educational video materials, music and motion pictures.” S. Rep. No. 101-305, at 9 (1990). Educational publishers were among those most vulnerable to state infringement, because their principal markets were state universities that regularly infringed copyrights. *Id.* Congress heard testimony that, “if State agencies are not required to pay for use of copyright material, software companies and textbook publishers will not be able to economically market creative works to State entities,” and continued state immunity from damage suits would “result in such adverse consequences as increases in the prices charged non-State users, diminution in the economic incentive to create new works, and decline in the quantity and quality of published works.” *Id.* at 10. Congress found “it particularly disturbing that one of the leading cases applying State immunity to copyright infringement ... involved [the] copying of [a] computer program,” by a “large State entity,” “of a small, entrepreneurial software company with revenues of less than \$250,000.” *Id.* at 11.

Beyond the specific abuses Congress was able to pinpoint, it also was evident to Congress that, absent abrogation of sovereign immunity, copyright owners would have no remedy when confronting systematic infringement by States. See *Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liability of States: Hearing on H.R. 1131 Before the Subcomm. on Courts, Intellectual Prop., and the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 8 (1989) (“1989 House Hearing”). “Unlike others whose remedies are

foreclosed by eleventh amendment immunity, copyright owners are only able to seek relief in Federal court.” S. Rep. No. 101-305, at 8. And injunctive relief was deemed insufficient to protect copyrighted material because it cannot provide compensation for past violations; is ineffective for works of limited life; does not provide meaningful remedy for materials that do not furnish a tangible product; and tends to be prohibitively expensive for small companies to procure absent reimbursement for attorneys’ fees. See *id.* at 8, 12.

Congress responded to the evidence and problem it identified by prescribing that States be subject to liability for copyright infringement just as private infringers are. In doing so, Congress reasonably determined this to be a proportionate remedy—one tailored to address the identified problem of States “violat[ing] authors’ copyrights with impunity from damages” where an “effective remedy” was otherwise lacking. *Id.* at 5. Such abrogation was a valid exercise of Congress’s authority under Section 5 of the Fourteenth Amendment to enforce the constitutional guarantees of the Due Process Clause, just as the district court ruled. App. 53a, 64a-65a.

The court of appeals ignored the specific evidence of state copyright infringement and the Congressional rationale behind abrogation, erroneously concluding that the legislative record of the CRCA was “materially similar” to the record this Court considered in *Florida Prepaid*. App. 28a.⁹

⁹ To the extent the Fourth Circuit separately faulted Congress for not more clearly “relying on [Section] 5 of the Fourteenth Amendment as the source of its authority,” App.

That assessment was wrong in at least two critical respects.

First, as a factual matter, the legislative record of state copyright infringement was, as detailed above, substantially more extensive than that underlying the Patent Remedy Act, which contained “at best ... scant support for Congress’s conclusion that States were depriving patent owners of property without due process of law.” *Fla. Prepaid*, 527 U.S. at 646; see *id.* at 658 n.9 (Stevens, J., dissenting) (in contrast to the Patent Remedy Act, “[t]he legislative history of [the CRCA] includes many examples of copyright infringements by States—especially state universities”); *Chavez*, 204 F.3d at 605 (acknowledging “the legislative history for the CRCA documents a few more instances of copyright infringement than the [Patent Remedy Act’s] legislative history did of patent violations”). Unlike the legislative record underlying the Patent Remedy Act, which “provide[d] only two examples of patent infringement suits against States” and “only eight patent infringement suits prosecuted against the States” in the previous 110 years, 527 U.S. at 640, there were at least twelve examples of reported state

20a, it failed to credit Congress’s express concern that States “are injuring the property rights of citizens,” H.R. Rep. No. 101-887, at 5 (1989), combined with this Court’s teaching that “Congress need [not] anywhere recite the words ‘section 5’ or ‘Fourteenth Amendment,’” *EEOC v. Wyoming*, 460 U.S. 226, 243 & n.18 (1983). See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 78-80 (2000) (considering Section 5 as possible basis for abrogation, even though Congress did not expressly legislate pursuant thereto).

infringement in ten different States in the ten years preceding the CRCA—including two cases pending before the Fourth and Ninth Circuits, see Register’s Report, at ii, 8-9, 92-93; 1989 House Hearing, at 143, 189; *Copyright Remedy Clarification Act: Hearing on S. 497 Before the S. Subcomm. on Patents, Copyrights and Trademarks of the Comm. on the Judiciary*, 101st Cong., 1st Sess. 141-42, 152-56 (1989).¹⁰ The Fourth Circuit also ignored extensive testimony and evidence Congress received on the inadequacy of state remedies for copyright infringement, *supra* at 30-31, which Congress had “barely considered” in the Patent Remedy Act, see 527 U.S. at 643.

In sum, while this Court faced a “truly awful legislative record” in *Florida Prepaid* that did “not have any evidence of massive or widespread violation of patent laws by the States,” the CRCA is cut from different legislative cloth. Mitchell N. Berman et al., *State Accountability for Violations of Intellectual Property Rights: How to “Fix” Florida Prepaid (And How Not To)*, 79 TEX. L. REV. 1037, 1061-62, 1073 (2001); see also *Fla. Prepaid*, 527 U.S. at 658 n.9 (Stevens, J, dissenting) (contrasting legislative history of the two acts); Christopher L. Beals,

¹⁰ Congress explained why earlier years had not engendered the same concern: before this Court decided in 1985 that Congress could abrogate state sovereign immunity only by “unequivocal statutory language,” *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985), the general consensus among States was that copyright laws applied to them and that they faced liability for infringement. See H.R. Rep. 101-282, at 5-6; S. Rep. No. 101-305, at 6; Register’s Report, at 75.

Comment: A Review of the State Sovereignty Loophole in Intellectual Property Rights Following Florida Prepaid and College Savings, 9 U. PA. J. CONST. L. 1233, 1252 (2007) (faulting appellate decisions invalidating the CRCA for “pa[ying] no attention ... to the congressional studies supporting the CRCA when it was passed”). Like the legislative record in *Hibbs*, the evidence behind the Act shows the abrogation of state sovereign immunity was a “congruent and proportional” response “to the *targeted* violation”—state deprivations of private property through systematic, unchecked copyright infringement. See *Hibbs*, 538 U.S. at 721, 737 (emphasis added).¹¹

Second, the Fourth Circuit also failed to appreciate critical differences between copyright law and patent law that distinguish the CRCA. By its nature, copyright infringement entails an element of intentionality that patent infringement does not. It requires that a defendant specifically *copy* another’s work. See *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 720 (9th Cir. 1976) (“one may therefore infringe a patent by innocent and independent reproduction,” but “independent reproduction of a copyrighted musical work is not infringement; nothing short of plagiarism will

¹¹ Although the legislative record of the CRCA contained substantially more examples of state copyright infringement than that of the Patent Remedy Act, the Fourth Circuit also erred by focusing solely on the *quantity* of unconstitutional infringements, contrary to this Court’s rejection of such formalistic inquiries in Section 5 cases. See *City of Boerne v. Flores*, 521 U.S. 507, 531 (1997).

serve”) (quoting *Arnstein v. Marks Corp.*, 82 F.2d 275, 275 (2d Cir. 1936) (Hand, J.)); see also, e.g., *Mazer v. Stein*, 347 U.S. 201, 218 (1954) (“Absent copying there can be no infringement of copyright.”); *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1099 (7th Cir. 2017) (“A plaintiff must prove that the defendant actually copied its original work.”). Thus, unlike with patent infringement, a defendant’s “independent creation” of a work—even if it is *identical* to the plaintiff’s—is a complete defense to copyright infringement. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 353 (1991). Congress therefore has all the more reason to hold a State liable for copyright infringement: it is less likely that a State would infringe a copyrighted work inadvertently as compared to a patented invention.

Copyright cases also tend to involve lower stakes than patent cases. Indeed, this dynamic explains why Congress prescribed that the infringer of a registered copyrighted work stands liable for both statutory damages and attorney’s fees, thereby “ensur[ing] that the copyright owner receive[s] some compensation” and providing “some measure of deterrence.” Stephanie Berg, *Remedying the Statutory Damages Remedy for Secondary Copyright Infringement Liability: Balancing Copyright and Innovation in the Digital Age*, 56 J. COPYRIGHT SOC’Y U.S.A. 265, 274 (2009); see also 17 U.S.C. 504, 505. That Congress embraced the need for a robust remedial scheme peculiar to copyright infringement reflects the reality that copyright owners are especially unlikely to litigate their injuries absent Congressional assistance.

By ignoring these critical distinctions between the CRCA and Patent Remedy Act that further support this particular abrogation of state sovereign immunity, the Fourth Circuit reached a holding that undermines Congress's irreproachable intent to vindicate private property rights in federally copyrighted works. Relatedly, the Fourth Circuit denied Congress its fair measure of discretion in exercising Section 5 powers.

According to the holding below, a federal statute enabling federal copyright holders to recover from States specifically and solely for copyright infringement somehow is not "congruent and proportional" to the pattern of unremedied copyright infringement by States that Congress specifically identified en route to enacting the CRCA. Such a holding, with all due respect, detaches the requirement of congruence and proportionality from its moorings. Far from ensuring that Congress does not misuse Section 5 to expand underlying constitutional rights, invalidation of the CRCA stymies an unassailable effort by Congress simply to provide a natural, straightforward remedy for an undeniable constitutional problem: States' pattern of flouting copyright holders' private property rights, while copyright holders are left without meaningful recourse short of the CRCA. Judicial construction of Congress's Section 5 powers should not be so begrudging.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1522

FREDERICK L. ALLEN; NAUTILUS PRODUCTIONS, LLC,

Plaintiffs – Appellees,

v.

ROY A. COOPER, III, as Governor of North Carolina; SUSI H. HAMILTON, Secretary of the North Carolina Department of Natural and Cultural Resources, in her official capacity; SUSAN WEAR KLUTTZ, former Secretary of the North Carolina Department of Natural and Cultural Resources, individually; D. REID WILSON, Chief Deputy Secretary of the North Carolina Department of Natural and Cultural Resources, in his official capacity; KARIN COCHRAN, former Chief Deputy Secretary of the North Carolina Department of Natural and Cultural Resources, individually; KEVIN CHERRY, Deputy Secretary of the North Carolina Department of Natural and Cultural Resources, individually and in his official capacity; G. NEEL LATIMORE, Director of Communications of the North Carolina Department of Natural and Cultural Resources, in his official capacity; CATHERINE A. OLIVA, Director of Marketing of the North Carolina Department of Natural and Cultural Resources, in her official capacity; CARY COX, former Assistant Secretary, Marketing and Communications of the North

Carolina Department of Natural and Cultural Resources, individually; STEPHEN R. CLAGGETT, a/k/a Steve Claggett, State Archaeologist, individually and in his official capacity; JOHN W. MORRIS, a/k/a Billy Ray Morris, Deputy State Archaeologist-Underwater and Director of the Underwater Archaeology Branch of the North Carolina Department of Natural and Cultural Resources, individually and in his official capacity; NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES; STATE OF NORTH CAROLINA,

Defendants – Appellants,

and

FRIENDS OF QUEEN ANNE’S REVENGE, A NON-PROFIT CORPORATION,

Defendant.

THE COPYRIGHT ALLIANCE; RALPH OMAN,

Amici Supporting Appellees.

No. 17-1602

FREDERICK L. ALLEN; NAUTILUS PRODUCTIONS, LLC,

Plaintiffs – Cross-Appellants,

v.

ROY A. COOPER, III, as Governor of North Carolina; SUSI H. HAMILTON, Secretary of the North Carolina Department of Natural and Cultural Resources, in her

official capacity; SUSAN WEAR KLUTTZ, former Secretary of the North Carolina Department of Natural and Cultural Resources, individually; D. REID WILSON, Chief Deputy Secretary of the North Carolina Department of Natural and Cultural Resources, in his official capacity; KARIN COCHRAN, former Chief Deputy Secretary of the North Carolina Department of Natural and Cultural Resources, individually; KEVIN CHERRY, Deputy Secretary of the North Carolina Department of Natural and Cultural Resources, individually and in his official capacity; G. NEEL LATTIMORE, Director of Communications of the North Carolina Department of Natural and Cultural Resources, in his official capacity; CATHERINE A. OLIVA, Director of Marketing of the North Carolina Department of Natural and Cultural Resources, in her official capacity; CARY COX, former Assistant Secretary, Marketing and Communications of the North Carolina Department of Natural and Cultural Resources, individually; STEPHEN R. CLAGGETT, a/k/a Steve Claggett, State Archaeologist, individually and in his official capacity; JOHN W. MORRIS, a/k/a Billy Ray Morris, Deputy State Archaeologist-Underwater and Director of the Underwater Archaeology Branch of the North Carolina Department of Natural and Cultural Resources, individually and in his official capacity; NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES; STATE OF NORTH CAROLINA,

Defendants – Cross-Appellees,

and

FRIENDS OF QUEEN ANNE'S REVENGE, A NON-PROFIT CORPORATION,

Defendant.

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh, Terrence W. Boyle, District Judge. (5:15-cv-00627-BO)

Argued: March 20, 2018

Decided: July 10, 2018

Before NIEMEYER and KING, Circuit Judges, and Leonie M. BRINKEMA, United States District Judge for the Eastern District of Virginia, sitting by designation.

Reversed and remanded with instructions by published opinion. Judge Niemeyer wrote the opinion, in which Judge King and Judge Brinkema joined.

ARGUED: Ryan Y. Park, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellants/Cross-Appellees. Susan Freya, Olive, OLIVE & OLIVE, P.A., Durham, North Carolina, for Appellees/Cross-Appellants. Andrew Michael Gass, LATHAM & WATKINS LLP, San Francisco, California, for Amicus Ralph Oman. **ON BRIEF:** Josh Stein, Attorney General, Matthew W. Sawchak, Solicitor General, Amar Majmundar, Senior Deputy Attorney General, Olga E. Vysotskaya de Brito, Special Deputy

Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellants/Cross-Appellees. G. Jona Poe, Jr., POE LAW FIRM, PLLC, Durham, North Carolina; David L. McKenzie, OLIVE & OLIVE, P.A., Durham, North Carolina, for Appellees/Cross-Appellants. Kelly M. Klaus, MUNGER, TOLLES & OLSON LLP, San Francisco, California, for Amicus Copyright Alliance. Perry J. Viscounty, Allison S. Blanco, Costa Mesa, California, Jennifer L. Berry, San Diego, California, Patrick K. O'Brien, LATHAM & WATKINS LLP, San Francisco, California, for Amicus Ralph Oman.

NIEMEYER, Circuit Judge:

Frederick Allen, a videographer, and Nautilus Productions, LLC, Allen's video production company, commenced this action, which, at its core, alleges that North Carolina, its agencies, and its officials (collectively, "North Carolina") violated Allen's copyrights by publishing video footage and a still photograph that Allen took of the 18th-century wreck of a pirate ship that sank off the North Carolina coast. Allen and Nautilus obtained the rights to create the footage and photograph through a permit issued by North Carolina to the ship's salvors, and Allen subsequently registered his work with the U.S. Copyright Office. Allen and Nautilus also seek to declare unconstitutional a 2015 state law—N.C. Gen. Stat. § 121-25(b) (providing that photographs and video recordings of shipwrecks in the custody of North Carolina are public records)—which

Allen and Nautilus claim was enacted in bad faith to provide the State with a defense to their federal copyright infringement action.

North Carolina filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), asserting sovereign immunity under the Eleventh Amendment, qualified immunity, and legislative immunity. North Carolina's claim of sovereign immunity prompted Allen and Nautilus to argue (1) that in a 2013 Settlement Agreement, North Carolina waived sovereign immunity; (2) that in any event the federal Copyright Remedy Clarification Act of 1990 had abrogated the State's sovereign immunity; and (3) that as to their claims for injunctive relief, *Ex parte Young* provided an exception to sovereign immunity for ongoing violations of federal law.

The district court rejected North Carolina's claims of immunity, and North Carolina filed this interlocutory appeal. Allen and Nautilus filed a cross-appeal. For the reasons that follow, we reverse and remand with instructions to dismiss *with prejudice* the claims against the state officials in their individual capacities and to dismiss *without prejudice* the remaining claims.

I

In 1717, the pirate Edward Teach, better known as Blackbeard, captured a French merchant vessel and renamed her *Queen Anne's Revenge*. Teach armed the *Revenge* with 40 cannons and made her his flagship. But the following year, the *Revenge* ran aground about

a mile off the coast of Beaufort, North Carolina, and Teach abandoned her. Under state law, the ship and its artifacts later became the property of North Carolina and subject to its “exclusive dominion and control.” N.C. Gen. Stat. § 121-22.

More than two-and-a-half centuries later, on November 21, 1996, Intersal, Inc., a private research and salvage firm operating under a permit issued by North Carolina, discovered the wreck of the *Revenge*, and on September 1, 1998, Intersal, along with Maritime Research Institute, Inc., an affiliated entity, entered into a 15-year salvage agreement with the North Carolina Department of Natural and Cultural Resources (“the Department”). Under the agreement, Intersal and Maritime Research acknowledged North Carolina’s ownership of the shipwreck and the ship’s artifacts, and North Carolina acknowledged Intersal’s and Maritime Research’s salvage rights, agreeing that Intersal and Maritime Research could retain a designated portion of the financial proceeds arising from the sale of media relating to the *Revenge* and replicas of its artifacts.

As relevant to this case, the agreement provided that:

Except as provided in paragraph 20 and this paragraph, Intersal shall have the exclusive right to make and market all commercial narrative (written, film, CD Rom, and/or video) accounts of project related activities undertaken by the Parties.

The agreement, however, made an exception for the creation of a “non commercial educational video and/or film documentary” and provided that the parties would cooperate in making such an educational documentary. And Paragraph 20 provided:

The Department shall have the right to authorize access to, and publish accounts and other research documents relating to, the artifacts, site area, and project operations for non commercial educational or historical purposes. Nothing in this document shall infringe to any extent the public’s right to access public records in accordance with Chapters 121 and 132 of the General Statutes of North Carolina.

The agreement also provided:

[Maritime Research], Intersal and the Department agree to make available for duplication by each other, or, when appropriate, to provide the Department with, relevant field maps, notes, drawings, photographic records and other such technical, scientific and historical documentation created or collected by [Maritime Research], Intersal or the Department pursuant to the study of the site and the recovery of materials therefrom. These materials shall become public records curated by the Department.

Following execution of this salvage agreement, Intersal retained Nautilus, Allen’s production company, to document the salvage of the *Revenge*, and under that arrangement, Allen accumulated, as he alleged in the

complaint, “a substantial archive of video and still images showing the underwater shipwreck and the efforts of teams of divers and archaeologists to recover various artifacts from [it].” Allen registered 13 copyrights in these materials with the U.S. Copyright Office, each copyright covering a year’s worth of footage.

In 2013, Allen and Nautilus took the position that the Department’s publication of Allen’s work on the Internet without his consent infringed Allen’s copyrights, and this prompted a dispute leading ultimately to a settlement agreement dated October 15, 2013, to which the Department, Intersal, Nautilus, and Allen were parties. In that agreement, none of the parties admitted to any wrongdoing but agreed to the clarification of preexisting arrangements so that the salvage operation could continue.

The 2013 Settlement Agreement divided Allen and Nautilus’s video and photographic documentation, treating some of the footage as “commercial documentaries” and some as “non-commercial media,” for purposes of clarifying the parties’ respective rights. With respect to “commercial documentaries,” the 2013 Settlement Agreement provided:

Intersal, through Nautilus, has documented approximately fifteen (15) years of underwater and other activities related to the QAR [*Queen Anne’s Revenge*] project. For purposes of this Commercial Documentaries section, Intersal represents to [the Department] that Nautilus Productions shall remain Intersal’s designee. Intersal shall have the exclusive

right to produce a documentary film about the [*Revenge*] project for licensing and sale. Intersal may partner with [the Department] if it chooses to do so. . . . If [the Department] and Intersal do not partner to make a documentary, the Intersal documentary script shall be reviewed by [the Department] for historical accuracy prior to final release by Intersal or its agents. Intersal agrees to allow [the Department] to use its completed documentary, free of charge, in its museums and exhibits for educational purposes.

With respect to “non-commercial media,” the Agreement provided in relevant part:

All non-commercial digital media, regardless of producing entity, shall bear a time code stamp, and watermark (or bug) of Nautilus and/or [the Department], as well as a link to [the Department], Intersal, and Nautilus websites, to be clearly and visibly displayed at the bottom of any web page on which the digital media is being displayed.

[The Department] agrees to display non-commercial digital media only on [the Department’s] website.

As to Nautilus’s archival footage, the Agreement provided that archival footage and photographs that did not “bear a time code stamp and a Nautilus Productions watermark (or bug)” would be returned to Nautilus. But it also provided that the Department could “retain, for research purposes, archival footage, still photographs, and other media that contain a time code

stamp and watermark [or bug], and as to such media [the Department] [would] provide Nautilus with a current, accurate list.”

Finally, the 2013 Settlement Agreement addressed the video footage and still photographs as public records, providing:

Nothing in this Agreement shall prevent [the Department] from making records available to the public pursuant to North Carolina General Statutes Chapters 121 and 132, or any other applicable State or federal law or rule related to the inspection of public records.

During the recovery phase of the [*Revenge*] project, [the Department] and Intersal agree to make available to each other records created or collected in relation to the [*Revenge*] project. The entity requesting copies bears the cost of reproduction. Within one (1) year after the completion of the recovery phase, Intersal shall allow [the Department] to accession duplicate or original records that were created or collected by Intersal during the project and that are related to the site, or the recovery or conservation of the [*Revenge*] materials. Such records shall include relevant field maps, notes, drawings, photographic records, and other technical, scientific and historical documentation created or collected by [the Department] or Intersal pursuant to the study of the site and the recovery of materials therefrom. These materials shall become public records curated by [the Department]. All digital media provided by Intersal under the terms of

this paragraph shall include a time code stamp and watermarks (or bugs).

Following execution of the 2013 Settlement Agreement, as Allen and Nautilus alleged in their complaint, the Department “resumed infringing [Allen’s] copyrights” by “publish[ing] . . . and/or display[ing]” various “works” on the Internet. The complaint identified six “infringing works” along with their Internet addresses. Five of those works were videos about the *Revenge* shipwreck that were posted on the Department’s YouTube channel, and the remaining “infringing work” was a newsletter about North Carolina’s maritime museums, which contained an article about the *Revenge* with one of Allen’s still photographs. Accordingly, Allen and Nautilus sent North Carolina a “Takedown Notice,” and North Carolina maintained that it complied before the hearing on its motion to dismiss filed in the district court. It provided the district court with documentary evidence confirming that fact, and at oral argument on this appeal, counsel for Allen and Nautilus also confirmed that the six alleged infringements had ceased.

Allen and Nautilus commenced this action in December 2015, naming as defendants the State of North Carolina, the Department, the Governor, and six officials in the Department, among others. Except for the Governor, who was sued only in his official capacity, each of the individual defendants was sued in both his or her official and individual capacities. The complaint, as amended, contained five counts. In Count I, Allen and Nautilus alleged that in 2015, the defendants

enacted N.C. Gen. Stat. § 121-25(b) (making shipwreck videos and photographs in North Carolina’s custody public records) in bad faith to “create a defense” to the copyright infringement claim asserted in Count II. They sought a declaratory judgment that § 121-25(b) was unenforceable because it was preempted by federal copyright law and was otherwise unconstitutional under the Takings Clause and Due Process Clause of the Constitution. In Count II, Allen and Nautilus claimed copyright infringement under 17 U.S.C. § 501(a)–(b). In Count III, they alleged that the defendants “acted under color of state law to enact § 121-25(b) and to threaten plaintiffs . . . with enforcement thereof,” in violation of 42 U.S.C. § 1983. Finally, in Counts IV and V, they alleged state law claims for unfair trade practices and civil conspiracy. For relief, Allen and Nautilus sought, in addition to the declaratory judgment sought in Count I, an order enjoining copyright infringement and enforcement of § 121-25(b), as well as compensatory, statutory, treble, and punitive damages.

North Carolina filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), maintaining that the institutional defendants and individual defendants in their official capacities were shielded from suit in federal court by sovereign immunity under the Eleventh Amendment and that the officials sued in their individual capacities were entitled to qualified and legislative immunity. Allen and Nautilus responded to the claim of sovereign immunity, arguing (1) that North Carolina waived sovereign

immunity in the 2013 Settlement Agreement; (2) that North Carolina's sovereign immunity was also abrogated by the federal Copyright Remedy Clarification Act of 1990, 17 U.S.C. § 511; (3) and that, in any event, injunctive relief was available under *Ex parte Young*, 209 U.S. 123 (1908). They also argued that the individual officials could not invoke qualified immunity because reasonable officials under the circumstances alleged would have known that they were violating Allen's rights under federal copyright law, and that they could not invoke legislative immunity because none of the officials had performed any legislative functions.

Following a hearing, the district court, by order dated March 23, 2017, denied North Carolina's motion to dismiss as to Counts I and II, concluding that its Eleventh Amendment immunity for those counts was validly abrogated by the Copyright Remedy Clarification Act; that the state officials sued in their individual capacities were not entitled to qualified immunity; and that a determination of those officials' legislative immunity would be "premature" at that time. It granted the motion as to the remaining counts on the basis of sovereign immunity.

From the district court's interlocutory order, North Carolina filed this appeal, challenging the district court's denial of immunity in all forms. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 (1993) (recognizing the right to interlocutory appeal of an order denying sovereign immunity); *Occupy Columbia v. Haley*, 738 F.3d 107, 115 (4th Cir. 2013) (same as to qualified immunity); *England v.*

Rockefeller, 739 F.2d 140, 142 (4th Cir. 1984), *overruled on other grounds by Young v. Lynch*, 846 F.2d 960 (4th Cir. 1988) (same as to legislative immunity). Allen and Nautilus cross-appealed, challenging several of the district court’s specific conclusions regarding sovereign immunity.

II

Invoking the Eleventh Amendment, North Carolina and its officials acting in their official capacities claim that they are immune from suit in federal court, *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100–01 (1984); *Kentucky v. Graham*, 473 U.S. 159, 169 (1985), and they contend that the immunity applies regardless of the form of relief sought by the plaintiffs, *see Pennhurst*, 465 U.S. at 101–02, 114 n.25; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996).

Allen and Nautilus disagree, arguing that North Carolina waived sovereign immunity when it signed the 2013 Settlement Agreement; that the State’s sovereign immunity was abrogated by the federal Copyright Remedy Clarification Act; and that, in any event, *Ex parte Young* provides them with an exception for the injunctive relief they request as to ongoing violations of federal law. We address these arguments in order.

A

The 2013 Settlement Agreement, on which Allen and Nautilus rely to argue that North Carolina waived its sovereign immunity, provides in relevant part:

In the event [North Carolina], Intersal, or [Allen and] Nautilus breaches this Agreement, [North Carolina], Intersal, or [Allen and] Nautilus may avail themselves of all remedies provided by law or equity.

Allen and Nautilus maintain that by agreeing to the availability of *all* remedies, North Carolina agreed that the remedies being sought in this action may be obtained from it, thereby effecting a waiver of sovereign immunity from suit in federal court.

We cannot, however, read this provision as a waiver of North Carolina's Eleventh Amendment immunity. First, Eleventh Amendment immunity protects the States, their agencies, and officials from suit *in federal court*. Yet, the subject provision in the 2013 Settlement Agreement makes no reference to federal court, state court or, for that matter, any court. Moreover, the provision states only that each party may pursue available remedies *as provided by* law or equity. Consequently, legal or equitable limitations on those remedies must also apply. And one of those limitations is that a State, its agencies, and its officials acting in their official capacities cannot be sued *in federal court* without their consent. We readily conclude that the provision falls far short of the clear statement that is required to effect a waiver of Eleventh Amendment

immunity. As the Supreme Court has made clear, a State must *expressly* consent to suit *in federal court* to waive its immunity under the Eleventh Amendment. See *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305–06 (1990); see also *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) (explaining that “a State does not consent to suit in federal court merely by consenting to suit in [its own] courts,” or by “stating its intention to ‘sue and be sued,’” “or even by authorizing suits against it ‘in any court of competent jurisdiction’” (citations omitted)).

B

Allen and Nautilus also contend that Congress validly abrogated North Carolina’s Eleventh Amendment immunity with the enactment of the Copyright Remedy Clarification Act. That Act provides:

Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person . . . for a violation of any of the exclusive rights of a copyright owner provided by [federal copyright law].

17 U.S.C. § 511(a); see also *id.* § 501(a) (providing that “[a]nyone who violates any of the exclusive rights of [a] copyright owner . . . is an infringer” and that “the term

‘anyone’ includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity”).

It is well established that any abrogation of a State’s Eleventh Amendment immunity requires both a clear statement of congressional intent—which, to be sure, § 511 provides—and a valid exercise of congressional power. *See Lizzi v. Alexander*, 255 F.3d 128, 134 (4th Cir. 2001) (citing *Seminole Tribe*, 517 U.S. at 55), *abrogated in part on other grounds by Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003). Thus, the question presented here reduces to whether Congress validly exercised its constitutional power when enacting the Copyright Remedy Clarification Act.

Allen and Nautilus contend first that Congress validly enacted the Copyright Remedy Clarification Act because it properly invoked Article I’s Patent and Copyright Clause, which authorizes Congress to “secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. Art. I, § 8, cl. 8. But, as North Carolina correctly notes, that ground for enactment of an abrogation is foreclosed by *Seminole Tribe* and its progeny, which make clear that Congress cannot rely on its Article I powers to abrogate Eleventh Amendment immunity. *See Seminole Tribe*, 517 U.S. at 72–73; *Alden v. Maine*, 527 U.S. 706, 731–33 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636 (1999) (“*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity

pursuant to its Article I powers; hence the Patent Remedy Act cannot be sustained under either the Commerce Clause or the Patent Clause”).

Allen and Nautilus argue, however, that those cases were impliedly overruled by the Supreme Court’s more recent decision in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), which relied on Article I’s Bankruptcy Clause to hold that a proceeding initiated by a bankruptcy trustee to set aside preferential transfers by a debtor to a state agency was not barred by sovereign immunity. The *Katz* holding, however, was made in a completely distinguishable context that was unique to the Bankruptcy Clause, and the Court limited its holding to that Clause. *See id.* at 362–77; *see also id.* at 362–63 (“The history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation . . . enacted under its auspices immediately following ratification . . . demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena”). Indeed, the Court made clear that its holding in *Katz* was not intended to overrule *Seminole Tribe* and its progeny, stating that it was not disturbing the broader jurisprudence regarding Congress’s power to abrogate Eleventh Amendment immunity. *See id.* at 375 n.12, 378–79 (noting “the Framers’ intent to exempt laws ‘on the subject of Bankruptcies’ from the operation of state sovereign immunity principles” and the “limited” “scope of [the States] consent” to this exemption); *see also id.* at 382

(Thomas, J., dissenting) (noting that “the majority does not purport to overturn” “our established sovereign immunity jurisprudence”). In short, even after *Katz*, it remains clear that Congress cannot rely on the enumerated power in Article I over copyright to compel a State to litigate copyright cases in a federal court.

Allen and Nautilus contend that, in any event, Congress validly enacted the Copyright Remedy Clarification Act under the authority granted to it in § 5 of the Fourteenth Amendment, which affords Congress the “power to enforce, by appropriate legislation,” the Amendment’s substantive guarantees. U.S. Const. amend. XIV, § 5. As they maintain, it is settled that Congress can abrogate sovereign immunity “through a valid exercise of its § 5 power,” *Hibbs*, 538 U.S. at 727, because the Eleventh Amendment and the principle of state sovereignty that it embodies “are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment,” *id.* (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)). North Carolina argues, however, that Congress did not validly exercise its § 5 power in enacting the Copyright Remedy Clarification Act because (1) it did not, as required, purport to rely on its § 5 authority, and (2) it did not, as also required, tailor the Act to an identified, widespread pattern of conduct made unconstitutional by the Fourteenth Amendment.

In construing the scope of § 5 power, the Supreme Court has been careful to strike a considered balance between upholding the dignity of States as sovereign entities, on the one hand, and safeguarding individual

rights protected by the Fourteenth Amendment, on the other. It has accordingly explained that Congress has plenary authority to abrogate sovereign immunity for claims arising from state conduct that amounts to an *actual violation* of the Fourteenth Amendment’s substantive guarantees. *See United States v. Georgia*, 546 U.S. 151, 158 (2006) (holding that Title II of the Americans with Disabilities Act validly abrogated state sovereign immunity “insofar as [it] create[d] a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment”). The Court has also interpreted § 5 as permitting Congress to abrogate sovereign immunity for “a somewhat broader swath of [state] conduct, including that which is not itself forbidden by the [Fourteenth] Amendment.” *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001). Yet again, however, in light of the competing equities at stake, it has circumscribed Congress’s authority to do so in two respects. Congress must both (1) make clear that it is relying on § 5 of the Fourteenth Amendment as the source of its authority and (2) ensure that any abrogation of immunity is “congruen[t] and proportiona[l]” to the Fourteenth Amendment injury to be prevented or remedied. *Florida Prepaid*, 527 U.S. at 639–42 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

In this case, we conclude that in enacting the Copyright Remedy Clarification Act, Congress satisfied neither requirement.

First, it is readily apparent that in enacting the Copyright Remedy Clarification Act, Congress relied

on the Copyright Clause in Article I of the Constitution, rather than § 5 of the Fourteenth Amendment. This invocation of Article I authority was expressly and repeatedly stated in the Act’s legislative history. *See, e.g.*, H.R. Rep. No. 101-282, pt. 1, at 7 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3949, 3955 (stating that, based on “the Copyright Clause,” the bill would “effect[] a constitutional abrogation of State sovereign immunity”); S. Rep. No. 101-305, at 8 (1990) (stating that “Congress has the power under article I of the Constitution to abrogate the immunity of States” and specifically citing Congress’s “plenary power” under “the Copyright Clause”); *see also Nat’l Ass’n of Boards of Pharmacy v. Bd. of Regents*, 633 F.3d 1297, 1313 (11th Cir. 2011) (“The legislative history of the [Copyright Remedy Clarification Act] makes clear that Congress intended to abrogate state sovereign immunity under its Article I powers”). Neither the text of the statute nor its legislative history indicates any invocation of authority conferred by § 5 of the Fourteenth Amendment. And without such an invocation, the Act cannot effect a valid abrogation under § 5.

This was made clear in *Florida Prepaid*, where the Supreme Court addressed the constitutionality of the Patent Remedy Act, which abrogated the States’ immunity from suit in federal court for patent infringement. After noting that the legislative history indicated that Congress relied on the Commerce Clause, the Patent Clause, and § 5 of the Fourteenth Amendment, the Court stated that the Commerce and Patent Clauses could not sustain the Act in light of

Seminole Tribe. Florida Prepaid, 527 U.S. at 636. Similarly, the Court rejected the plaintiff’s alternative argument that the Act could be justified under the Fifth Amendment’s Just Compensation Clause:

There is no suggestion in the language of the statute itself, or in the House or Senate Reports of the bill which became the statute, that Congress had in mind the Just Compensation Clause. . . . Since Congress was so explicit about invoking its authority under Article I and its authority to prevent a State from depriving a person of property without due process of law under the Fourteenth Amendment, we think this omission precludes consideration of the Just Compensation Clause as a basis for the Patent Remedy Act.

Id. at 642 n.7.

Here, the legislative history of the Copyright Remedy Clarification Act shows that Congress relied on its Article I power over copyrights and not on § 5 of the Fourteenth Amendment, similarly “preclud[ing] consideration” of § 5 as a proper basis for the Act’s abrogation of States’ Eleventh Amendment immunity.

Allen argues that the Supreme Court’s decisions in *EEOC v. Wyoming*, 460 U.S. 226 (1983), and *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), undermine any need to invoke *expressly* the Fourteenth Amendment. In *EEOC*, the Court noted that when exercising § 5 power, there is no need to “recite the words ‘section 5’ or ‘Fourteenth Amendment.’” 460 U.S. at 243

n.18. But that quotation does not help Allen and Nautilus because the Court also explained that, regardless of whether the terms “§ 5” or “Fourteenth Amendment” are used, it must “be able to discern some legislative purpose or factual predicate that supports the exercise of [§ 5] power.” *Id.* More importantly, *EEOC* was not a case about the abrogation of Eleventh Amendment immunity, and the *EEOC* Court never addressed whether the legislation before it—the Age Discrimination in Employment Act—was a valid exercise of Congress’s power under § 5.

Similarly, *Kimel* provides Allen and Nautilus with little support. The *Kimel* Court concluded that the Age Discrimination in Employment Act’s abrogation of sovereign immunity was invalid because it was not a congruent and proportional response to unconstitutional age discrimination by the States. *See Kimel*, 528 U.S. at 91–92. They argue that, because the Court reached that conclusion despite the absence of any congressional invocation of the Fourteenth Amendment by Congress, no such invocation should be required here. The *Kimel* Court, however, did not even mention the omission on which Allen and Nautilus rely. And more to the point, no case since *Florida Prepaid* has disavowed the Supreme Court’s instruction that an abrogation of sovereign immunity cannot be sustained by a source of constitutional authority that Congress never invoked. *See Beck v. McDonald*, 848 F.3d 262, 273 (4th Cir. 2017) (explaining that “[t]his court is ‘bound by [the] holdings’ of the Supreme Court, not its ‘unwritten

assumptions’” (quoting *Fernandez v. Keisler*, 502 F.3d 337, 343 n.2 (4th Cir. 2007))).

Not only did Congress not invoke its authority under § 5, it also did not, as required, limit the scope of the Copyright Remedy Clarification Act to enforcement of rights protected by the Fourteenth Amendment. Rather, in abrogating sovereign immunity, Congress used language that sweeps so broadly that the Act cannot be deemed a congruent and proportional response to the Fourteenth Amendment injury with which it was confronted.

Our conclusion is required by *Florida Prepaid*, where the circumstances were analogous to those before us. The Supreme Court there concluded that the Patent Remedy Act did not appropriately enforce the Fourteenth Amendment because there was no “congruence and proportionality between the [Fourteenth Amendment] injury to be prevented or remedied and the means adopted to that end.” *Florida Prepaid*, 527 U.S. at 638–39 (quoting *City of Boerne*, 521 U.S. at 519–20). While the Court acknowledged that patents are a “species of property” and that patent infringement by States could therefore implicate the Fourteenth Amendment’s prohibition against deprivations of property without due process, it explained that a due process violation would not result merely from a State’s infringement of a patent. *Id.* at 642–43. Rather, the infringement would both have to go unremedied and have to be done intentionally or at least recklessly. *See id.* at 643, 645 (noting that “a [State’s] negligent act that causes unintended injury to a person’s property

does not ‘deprive’ that person of property within the meaning of the Due Process Clause” and that “Congress did not focus on instances of intentional or reckless infringement on the part of the States”).

Citing at length to the legislative record of the Patent Remedy Act, the *Florida Prepaid* Court then determined that Congress was not faced with sufficient evidence of *unconstitutional* patent infringement to justify abrogation. It observed that there were fewer than 10 patent infringement suits against States in the century preceding the enactment of the Patent Remedy Act; that most state infringement was apparently accidental; and that while state remedies for governmental infringement were disuniform and rather tenuous, the evidence before Congress did not prove such remedies to be constitutionally inadequate. See *Florida Prepaid*, 527 U.S. at 640–45. In the Court’s view, this evidence “suggest[ed] that the Patent Remedy Act does not respond to a history of ‘widespread and persisting deprivation of constitutional rights’ of the sort Congress has faced in enacting proper prophylactic § 5 legislation,” *id.* at 645 (quoting *City of Boerne*, 521 U.S. at 526); rather, it provided only “scant support” for the assertion that States were depriving patent owners of property without due process of law, *id.* at 646.

The Court then compared that evidence to the Patent Remedy Act’s sweeping abrogation provisions, which made the States liable for patent infringement to the same extent as private parties, and concluded that the provisions were “‘so out of proportion to a

supposed remedial or preventive object that [they] [could not] be understood as responsive to, or designed to prevent, unconstitutional behavior.’” *Florida Prepaid*, 527 U.S. at 646 (first alteration in original) (quoting *City of Boerne*, 521 U.S. at 532). In particular, the Court observed that Congress had done “nothing to limit the coverage of the [Patent Remedy] Act to cases involving arguable constitutional violations,” such as where a State authorized infringement as a matter of official policy or otherwise intentionally infringed patents without providing any remedy. *Id.* at 646–47. Nor had Congress included durational limits or abrogated immunity only for States presenting the greatest incidence of infringement. *Id.* at 647. The absence of such tailoring, juxtaposed with the limited evidence of unconstitutional patent infringement, “ma[de] it clear” that the Patent Remedy Act did not appropriately enforce the Fourteenth Amendment. *Id.*

In this case, a similar legislative record and an equally broad enactment likewise leads to the conclusion that the Copyright Remedy Clarification Act’s abrogation of sovereign immunity cannot be sustained under § 5.

While we may presume that a copyright, like a patent, is a “species of property” that could be deprived without due process in violation of the Fourteenth Amendment, not every infringement violates the Constitution, as the *Florida Prepaid* Court explained. To be sure, the legislative record of the Copyright Remedy Clarification Act did include some evidence of copyright infringement by States that presumably violated

the Fourteenth Amendment's Due Process Clause. The record of such infringement, however, was materially similar to that in *Florida Prepaid*.

As Allen and Nautilus note, most of the evidence was compiled in a 1988 report prepared at Congress's request by Ralph Oman, who was then the United States Register of Copyrights. See U.S. Copyright Office, *Copyright Liability of States and the Eleventh Amendment: A Report of the Register of Copyrights* (June 1988) ("Oman Report"). In preparing the report, the Copyright Office solicited public comments regarding the issue of state immunity from copyright claims and received several dozen responses from various industry groups, among others, expressing grave concerns about the prospect of such immunity. See Oman Report at 5–6. But, the Oman Report reveals that only five of the commenters "document[ed] actual problems . . . in attempting to enforce their [copyright] claims against state government infringers." *Id.* at 7. And the commenters' responses described at most seven incidents in which States invoked sovereign immunity to avoid liability for copyright infringement. See *id.* at 7–9. Only two of those incidents recounted in the Register's Report—where States invoked sovereign immunity and continued to display copyrighted films to prison inmates for free even after the copyright holders notified them of the infringement—were described with sufficient detail to show clearly the requisite willfulness of state officials to amount to a due process violation. See *id.* at 7–8. Besides these incidents in the Oman Report, Congress learned of just a few other

comparable incidents of unremedied State infringement from hearing testimony. *See, e.g., Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liability of States: Hearings on H.R. 1131 Before the Subcomm. on Courts, Intellectual Prop. & the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 139–40 (1990) (hereinafter, “House Hearing”) (testimony of Bert van der Berg, President, BV Engineering Professional Software); *The Copyright Clarification Act: Hearing on S. 497 Before the Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary*, 101st Cong. 151–52 (1990) (hereinafter, “Senate Hearing”) (statement of William Taylor). In total, even assuming that all of the incidents of unremedied infringement were intentional, the record before Congress contained at most a dozen incidents of copyright infringement by States that could be said to have violated the Fourteenth Amendment.

This evidence plainly falls short of establishing the “widespread and persisting deprivation of constitutional rights” that is required to warrant prophylactic legislation under § 5. *City of Boerne*, 521 U.S. at 526. Indeed, the evidence here appears little different in quality or quantity than the historical evidence underlying the Patent Remedy Act, which was found insufficient in *Florida Prepaid*. Critically, in each case, Congress did not identify an extant pattern of infringement giving rise to violations of the Fourteenth Amendment across a significant number of States. *See Florida Prepaid*, 527 U.S. at 640. At most, the record of

the Copyright Remedy Clarification Act, like that of the Patent Remedy Act, indicated that there was a *potential* for greater constitutional violations in the future and that Congress simply “acted to head off this speculative harm.” *Id.* at 641; *see also* House Hearing, at 7 (Statement of Ralph Oman) (explaining that the evidence of state infringement “demonstrated at least the potential for harm”); Senate Hearing, at 42 (Statement of Ralph Oman) (“[W]e do not have a great deal of hard evidence [of state copyright infringement]”).

Acting against this backdrop of limited evidence, Congress enacted the Copyright Remedy Clarification Act to make States broadly, immediately, and indefinitely accountable for copyright infringement to the same extent as private parties, imposing sweeping liability for *all violations* of federal copyright law, whether the violation implicates the Fourteenth Amendment or not. *See* 17 U.S.C. §§ 501(a), 511. Congress thus declined to narrow whatsoever the Act’s reach, instead abrogating immunity indiscriminately in a manner that was wholly incongruous with the sparse record of unconstitutional conduct before it. This failure to adopt any limitation along the lines discussed in *Florida Prepaid* cannot be reconciled with the requirement that legislation enacted under § 5 be “tailor[ed] . . . to remedying or preventing [unconstitutional] conduct.” *Florida Prepaid*, 527 U.S. at 639.

Accordingly, we conclude that the Copyright Remedy Clarification Act’s wholesale abrogation of sovereign immunity for claims of copyright infringement is grossly disproportionate to the relevant injury under

the Fourteenth Amendment, and therefore the abrogation cannot be sustained as an enactment that “appropriate[ly]” “enforce[s]” that Amendment.

In concluding otherwise, the district court sought to distinguish the record in *Florida Prepaid* by relying primarily on the “many examples of copyright infringements by States” in the Copyright Remedy Clarification Act’s legislative history. In so relying, however, the court failed to consider whether any of those examples involved intentional and unremedied infringement, as *Florida Prepaid* clearly instructs. Also, as an alternative basis for holding that the Copyright Remedy Clarification Act had validly abrogated North Carolina’s immunity, the district court relied on “the amount of suits filed against allegedly infringing states in recent years.” That reliance, however, did not comport with the Supreme Court’s determination that *Congress* must identify a pattern of unconstitutional conduct *before* it abrogates Eleventh Amendment immunity. *See Florida Prepaid*, 527 U.S. at 639–40; *see also Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 42 (plurality opinion) (“States may not be subject to suits . . . unless *Congress has identified* a specific pattern of constitutional violations” (emphasis added)).

In concluding that the Copyright Remedy Clarification Act does not validly abrogate Eleventh Amendment immunity, we join the numerous other courts to have considered this issue since *Florida Prepaid*, all of which have held the Act invalid. *See, e.g., Chavez v. Arte Publico Press*, 204 F.3d 601, 607–08 (5th Cir. 2000);

Issaenko v. Univ. of Minn., 57 F. Supp. 3d 985, 1007–08 (D. Minn. 2014) (collecting a dozen cases).

C

Finally, Allen and Nautilus contend that, at the very least, their claims against the state officials for injunctive and declaratory relief may proceed under the exception to Eleventh Amendment immunity recognized in *Ex parte Young*, 209 U.S. 123 (1908). The parties argued the issue before the district court, but the court, in light of its ruling on the Copyright Remedy Clarification Act, did not address it. Because we reverse the district court on abrogation, we address the *Ex parte Young* exception and conclude that the exception does not apply in this case.

Under *Ex parte Young*, private citizens may sue state officials in their official capacities in federal court to obtain prospective relief from ongoing violations of federal law. *See Franks v. Ross*, 313 F.3d 184, 197 (4th Cir. 2002); *Antrican v. Odom*, 290 F.3d 178, 184 (4th Cir. 2002). This exception to Eleventh Amendment immunity “is designed to preserve the constitutional structure established by the Supremacy Clause” and rests on the notion, often referred to as “a fiction,” that a state officer who acts unconstitutionally is “stripped of his official or representative character and [thus] subjected in his person to the consequences of his individual conduct.” *Antrican*, 290 F.3d at 184 (quotation marks and citations omitted). To invoke the exception, the plaintiff must identify and seek prospective

equitable relief from an *ongoing* violation of federal law. *Id.* at 186.

Allen and Nautilus maintain that they have alleged two ongoing violations from which they seek prospective relief: (1) North Carolina's continuing infringement of Allen's copyrights and (2) its continuing enforcement of an unconstitutional statute, namely, N.C. Gen. Stat. § 121-25(b), which designates images of shipwrecks in the State's custody as public records.

As to the alleged ongoing copyright infringement, Allen and Nautilus identified in their complaint six specific "infringing works" that are "now publicly viewable" at six locations on the Internet, specifying the Internet address for each. North Carolina, however, maintains that shortly before the November 2016 hearing on its motion to dismiss, it removed those allegedly infringing materials from the Internet and provided exhibits to the district court to confirm that it had done so. While Allen and Nautilus acknowledged at oral argument that the six alleged violations had ceased, they argue that the complaint nonetheless alleged generally instances of ongoing Internet infringement beside those six violations, referring to a paragraph that alleged, in a conclusory fashion, that displays of copyrighted materials were continuing "at least at th[ose] locations." But such a general and threadbare catchall, suggesting *the possibility* of other infringing displays, does not plausibly allege the existence of an ongoing violation of federal law. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007)). In the

same vein, Allen and Nautilus argue that because they alleged a history of infringements both before and after the 2013 Settlement Agreement, there is “no reasonable prospect that infringements will cease unless they are enjoined.” This argument, however, which relies on the asserted possibility that North Carolina will resume infringing Allen’s copyrights, conflates the *Ex parte Young* exception with the doctrine of mootness. Even assuming that North Carolina has failed to provide reasonable assurances that it will avoid infringing Allen’s copyrights in the future, as would foreclose the voluntary-cessation exception to mootness, it remains Allen’s burden in the context of sovereign immunity to establish an *ongoing* violation of federal law to qualify for relief under *Ex parte Young*. See *Watkins v. Blinzinger*, 789 F.2d 474, 483–84 (7th Cir. 1986) (citing *Green v. Mansour*, 474 U.S. 64 (1985)); see also *DeBauche v. Trani*, 191 F.3d 499, 505 (4th Cir. 1999) (noting that *Ex parte Young* requires “an ongoing violation of federal law” and thus “does not apply when the alleged violation . . . occurred entirely in the past”). Because the only ongoing infringement that Allen and Nautilus plausibly alleged has concededly ended, they cannot employ the *Ex parte Young* exception to address their fear of future infringements.

Allen and Nautilus also identify as an ongoing violation North Carolina’s purported continuing “enforcement” of § 121-25(b) to provide a defense against their claims of copyright infringement. This allegation, however, also cannot support application of the *Ex parte Young* exception because when a plaintiff sues “to

enjoin the enforcement of an act alleged to be unconstitutional,” the exception applies “only where a party defendant in [such] a suit . . . has ‘*some connection with the enforcement of the Act.*’” *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 550 (4th Cir. 2014) (emphasis added) (quoting *Ex parte Young*, 209 U.S. at 157). As we explained in *Hutto*, the “requirement that there be a relationship between the state officials sought to be enjoined and the enforcement of the state statute prevents parties from circumventing a State’s Eleventh Amendment immunity.” *Id.* We thus noted “that a governor cannot be enjoined by virtue of his general duty to enforce the laws,” nor can an “attorney general . . . be enjoined where he has no specific statutory authority to enforce the statute at issue.” *Id.* By contrast, however, we have held that a State’s circuit court clerk had the requisite connection to the enforcement of the State’s marriage laws to be enjoined from enforcing them because the clerk was charged with the particular responsibilities for granting and denying applications for marriage licenses. *See Bostic v. Schaefer*, 760 F.3d 352, 371 n.3 (4th Cir. 2014).

In this case, Allen and Nautilus sued the State, the Governor, the Department, and several Department officials, alleging at most that several of the officials supported enactment of § 121-25(b) and providing no further explanation regarding any connection between the officials and the challenged enactment. Indeed, Allen and Nautilus have not even shown that § 121-25(b) can be enforced against a private party. In any event, in view of the officials’ roles, it is apparent that

none of them would or could have any role in enforcing the statute, as required. *See Hutto*, 773 F.3d at 550.

Accordingly, we conclude that *Ex parte Young* does not provide Allen and Nautilus with an exception to the Eleventh Amendment immunity claimed by North Carolina.

III

The North Carolina officials who were sued in their individual capacity for monetary damages contend that the district court erred in denying them qualified immunity and legislative immunity from suit. In doing so, the district court explained that these defendants were not protected by qualified immunity because “the law of [copyright] infringement is clearly established.” The court also denied them legislative immunity because it was “premature” to resolve that issue. As we explain, however, we also reverse on these issues.

Qualified immunity “shields officials from civil liability so long as their conduct ‘does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). The inquiry as to whether the law is “clearly established” is a demanding one:

A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he [or she] is doing violates that right. In other words,

existing precedent must have placed the statutory or constitutional question beyond debate.

* * *

The Supreme Court has repeatedly told courts . . . not to define clearly established law at a high level of generality. Thus, we consider whether a right is clearly established in light of the specific context of the case, not as a broad general proposition.

Adams v. Ferguson, 884 F.3d 219, 226–27 (4th Cir. 2018) (quotation marks and citations omitted).

In this case, Allen and Nautilus obtained their rights to take videos and photographs of the *Revenge* shipwreck from Intersal, who in turn obtained the rights from the Department. And any rights that Allen and Nautilus have to those videos and photographs are circumscribed by the provisions of the 2013 Settlement Agreement with the Department. In that Agreement, Intersal asserted—and the Department, Allen, and Nautilus agreed—that Intersal had documented “fifteen (15) years of underwater and other activities related to the [*Queen Anne’s Revenge*] project” and that it had the right to produce and retain an interest in a commercial documentary film about those activities. The Agreement provided that the Department could “use [the] completed documentary, free of charge, in museums and exhibits for educational purposes.” And the Agreement provided, with respect to non-commercial digital media, that such media should bear “a time code stamp and watermark” of “Nautilus and/or [the Department]” and that the Department

would display them only on the Department’s website. The Agreement also provided that the Department could retain the archival footage with a time stamp and watermark “for research purposes,” although it would return to Nautilus any footage and photographs that did not bear a time code stamp and watermark. Moreover, it provided that “[d]uring the recovery phase of the [*Revenge*] project, [the Department] and Intersal [would] *make available to each other records* created or collected in relation to the [*Revenge*] project,” (emphasis added), defining “records” to include “field maps, notes, drawings, photographic records, and other technical, scientific and historical documentation created or collected by [the Department] or Intersal pursuant to the study of the site and the recovery of materials therefrom.” These materials were designated “public records” to be “*curated* by [the Department].” (Emphasis added).

Notably, the 2013 Settlement Agreement stated that “[n]othing in [the] Agreement shall prevent [the Department] from making records available to the public pursuant to North Carolina General Statutes Chapters 121 and 132, or any other applicable State or federal law or rule related to the inspection of public records.” At that time—*i.e.*, in 2013, before § 121-25(b) was enacted—N.C. Gen. Stat. § 132-1 provided that “all . . . photographs [and] films . . . made or received pursuant to law . . . in connection with the transaction of public business by any agency of North Carolina” are “public records,” and that it is “the policy of [the] State that the people may obtain copies of . . . public records

. . . free or at minimal cost unless otherwise specifically provided by law.”

Based on these provisions of the 2013 Settlement Agreement and the then applicable public records law, it is far from clear whether the Department was prohibited from displaying Allen’s copyrighted materials in the manner alleged in the complaint. This is especially so in view of the Department’s role in the salvage project to preserve for the public the site and artifacts and to document their salvage in furtherance of research and the education of the public.

Of course, we need not resolve whether North Carolina’s display of the video footage and the still photograph violated the Copyright Act to resolve the issue of qualified immunity. *See Pearson*, 555 U.S. at 231. What we do conclude is that reasonable officials in the position of the North Carolina officials would not have understood *beyond debate* that their publication of the material violated Allen’s rights under the Copyright Act. The issue is indeed debatable. Accordingly, we conclude that Allen and Nautilus’s copyright claims against the North Carolina officials in their individual capacities are precluded by qualified immunity.

We also conclude that legislative immunity shields the North Carolina officials in their individual capacities for their alleged involvement in the enactment of § 121-25(b).

The district court did not expressly resolve whether the individual officers were entitled to legislative immunity, concluding instead that such a ruling

would be “premature.” But its *deferral* in ruling amounted to a *denial* of the immunity because the immunity protects officials “not only from the consequences of litigation’s results, but also from *the burden of defending* themselves” in court. *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 732 (1980) (emphasis added); see also *Nat’l Ass’n of Soc. Workers v. Harwood*, 69 F.3d 622, 639 (1st Cir. 1995) (noting that legislative immunity is “not simply a defense to liability” but rather “an immunity from suit”). Thus, the very purpose of the immunity is thwarted when an official must expend “time and energy . . . to defend against a lawsuit” arising from his legislative acts. *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998). Accordingly, the North Carolina officials can appropriately appeal the district court’s deferral in ruling on legislative immunity.

Legislative immunity entitles public officials to absolute immunity for their performance of legislative functions. See *Kensington Vol. Fire Dep’t, Inc. v. Montgomery Cty.*, 684 F.3d 462, 470 (4th Cir. 2012). And it attaches whenever state officials—including those outside the legislative branch—engage in any conduct within the “sphere of legitimate legislative activity.” *Id.* (quoting *Bogan*, 523 U.S. at 54). Determining whether official conduct is shielded by legislative immunity “turns on the nature of the act,” without regard to the “motive or intent” of the official performing it. *Id.*

In this case, the North Carolina officials were sued in their individual capacities for “conspir[ing] to

convert [Allen’s] copyrighted works into public documents” through the enactment of § 121-25(b). But the only actual conduct alleged in furtherance of the conspiracy—that the officers “wrote, caused to be introduced, lobbied for passage of, and obtained passage” of § 121-25(b)—is quintessentially legislative in nature and falls squarely within the scope of legislative immunity. Allen and Nautilus’s only argument to the contrary is that the complaint alleges that the officers sought enactment of § 121-25(b) with *impure motives*, seeking to benefit an affiliated nonprofit entity and to remove the threat of legal liability. As noted, however, motive is irrelevant to the issue. *Kensington Vol. Fire Dep’t*, 684 F.3d at 470; *McCray v. Md. Dep’t of Transp., Md. Transit Admin.*, 741 F.3d 480, 485 (4th Cir. 2014) (noting that “[l]egislative immunity is a shield that protects despicable motives as much as it protects pure ones”).

* * *

For the foregoing reasons, we reverse each of the district court’s rulings on immunity and remand with instructions that the district court dismiss without prejudice Allen and Nautilus’s claims against North Carolina, the Department, and the public officials acting in their official capacities and to dismiss with prejudice the remaining claims against the officials in their individual capacities.

REVERSED AND REMANDED WITH INSTRUCTIONS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION
No. 5:15-CV-627-BO

FREDERICK L. ALLEN)	
and NAUTILUS)	
PRODUCTIONS, LLC,)	
Plaintiffs)	<u>ORDER</u>
v.)	(Filed Mar. 23, 2017)
ROY A. COOPER, <i>et al.</i> , ¹)	
Defendants.)	

This cause comes before the Court on a motion to dismiss filed by State defendants [DE 49] and a motion to dismiss filed by defendant Friends of the *Queen Anne’s Revenge*. [DE 47]. The appropriate responses and replies have been filed and a hearing was held before the undersigned on November 2, 2016, in Edenton, North Carolina. For the reasons discussed below, the motions to dismiss are denied in part and granted in part.

BACKGROUND

Plaintiffs, Frederick Allen and his production company Nautilus Productions, have been the substantially

¹ Pursuant to Federal Rule of Civil Procedure 25(d), Roy A. Cooper, Governor of North Carolina, has been added as a party. Former Governor Patrick L. McCrory has been terminated as a party.

exclusive underwater photographers of the shipwreck *Queen Anne's Revenge* ("QAR"), the ship of the pirate commonly known as Blackbeard.² The shipwreck was discovered near the Beaufort inlet off the North Carolina coast in 1996. Allen's work documenting the shipwreck through video and still images began in 1998. Allen has registered copyrights in the works created in relation to his documenting of the QAR, and such works are licensed to and commercialized by Nautilus.

Plaintiffs allege that prior to October 2013, the State of North Carolina and its Department of Natural and Cultural Resources ("DNCR") infringed, contributed to infringement, and induced infringement of Allen's registered copyrights by uploading Allen's video footage to the internet without consent. On October 15, 2013, plaintiff, the State, and DNCR entered into a written settlement agreement which provided for payment to plaintiffs from the DNCR of \$15,000 for any copyrights it had infringed prior to that date. The agreement referred to some specific instances of infringement, including the Friends of the Maritime Museum display photograph of the pile (the central

² Edward Teach, more famously known as Blackbeard, notoriously pirated vessels across the Caribbean and eastern coast of Britain's North American colonies. In 1717 Teach captured a French merchant vessel, renamed her *Queen Anne's Revenge*, and equipped her with 40 guns. After giving himself the rank of commodore, Teach formed an alliance of pirates and blockaded the port of Charles Town, South Carolina. Shortly after ransoming the town's inhabitants, he ran the *Queen Anne's Revenge* aground on a sandbar near Beaufort, North Carolina. This year marks the 399th anniversary of his death in a battle with Lieutenant Robert Maynard in Ocracoke, North Carolina.

portion of the shipwreck), DNCR's Flickr account showing an anchor on the pile, and the Friends of the *QAR* website showing mapping dividers. The State and DNCR paid plaintiffs the \$15,000 provided by the settlement agreement on February 3, 2014.

Plaintiffs allege that after entry of the settlement agreement the State and DNCR resumed infringing on plaintiffs' copyrights. Plaintiffs allege that the State and DNCR have published, performed, and/or displayed plaintiffs' video footage as well as still images in print materials. Plaintiffs further allege that in an effort to convert plaintiffs' copyright assets to State property without payment to plaintiff, defendants collectively wrote and obtained passage of an amendment to an existing North Carolina statute, the effect of which is to convert copyrighted works of plaintiffs and others into public record, upon which under state law there is no limitation on use. N.C. Gen. Stat. § 121-25(b). The full text of the amended statute at the time of the filing of the complaint read as follows:

(b) All photographs, video recordings, or other documentary materials of a derelict vessel or shipwreck or its contents, relics, artifacts, or historic materials in the custody of any agency of North Carolina government or its subdivisions shall be a public record pursuant to G.S. 132-1. There shall be no limitation on the use of or no requirement to alter any such photograph, video recordings, or other documentary material, and any such provision in any agreement, permit, or license shall be void and unenforceable as a matter of public policy.

Effective July 1, 2016, Session law 2016-94, s. 162, amended subsection (b) to read as follows:

All photographs, video recordings, or other documentary materials of a derelict vessel or shipwreck or its contents, relics, artifacts, or historic materials in the custody of any agency of North Carolina government or its subdivisions shall be a public record pursuant to Chapter 132 of the General Statutes.

N.C. Gen. Stat. § 121-25(b).

Plaintiffs seek a declaratory judgment that § 121-25(b) as amended is void and unenforceable as it is preempted by the Copyright Act, 17 U.S.C. §§ 101 *et seq.*, and violates the Takings and Due Process Clause of the United States Constitution. U.S. Const. Amends. V and XIV. Plaintiffs further allege claims for copyright infringement, for unconstitutional taking pursuant to § 1983, as well as state law claims for unfair and deceptive trade practices and civil conspiracy.

The State defendants have moved to dismiss plaintiffs' amended complaint, arguing that it is barred by the Eleventh Amendment, that the individual defendants sued in their individual capacities are protected by qualified immunity and legislative immunity, that the complaint fails to state a plausible claim for relief, that plaintiffs lack standing to challenge § 121-25(b) as amended, and that this Court should abstain from issuing an opinion of first impression regarding North Carolina's public record statute. Fed. R. Civ. P. 12(b)(1), (2), (6). Defendant Friends of *Queen Anne's Revenge*

move to dismiss plaintiffs' complaint for failure to state a plausible claim for relief. Fed. R. Civ. P. 12(b)(6).

DISCUSSION

Federal Rule of Civil Procedure 12(b)(1) authorizes dismissal of a claim for lack of subject matter jurisdiction. When subject matter jurisdiction is challenged, the plaintiff has the burden of proving jurisdiction to survive the motion. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647–50 (4th Cir. 1999). Rule 12(b)(2) of the Federal Rules of Civil Procedure authorizes dismissal for lack of personal jurisdiction. When personal jurisdiction has been challenged on the papers alone, the plaintiff must make a prima facie case showing that personal jurisdiction exists, and a court construes all facts and inference in favor of finding jurisdiction. *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989).

Rule 8 of the Federal Rules of Civil Procedure “requires only a short and plain statement of the claim showing that the pleader is entitled to relief” and which provides “the defendant fair notice of what the claim is and the grounds upon which it rests.” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (internal quotations, alterations, and citations omitted). A Rule 12(b)(6) motion tests the legal sufficiency of the complaint. *Papasian v. Allain*, 478 U.S. 265, 283 (1986). When acting on a motion to dismiss under Rule 12(b)(6), “the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff.” *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130,

1134 (4th Cir. 1993). A complaint must allege enough facts to state a claim for relief that is facially plausible. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Facial plausibility means that the facts pled “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,” and mere recitals of the elements of a cause of action supported by conclusory statements do not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The Court addresses first the immunity defenses raised by the State and DNCR defendants.

I. *Eleventh Amendment Immunity*

“The Eleventh Amendment bars suit against non-consenting states by private individuals in federal court.” *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001). This guarantee applies not only to suits against the state itself but also to suits where “one of [the state’s] agencies or departments is named as the defendant.” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). State officials sued in their official capacity for damages are also protected by Eleventh Amendment immunity. *Ballenger v. Owens*, 352 F.3d 842, 845 (4th Cir. 2003). Eleventh Amendment immunity may be waived expressly, *Edelman v. Jordan*, 415 U.S. 651, 673 (1974); if the defendants removed an action from a state court with jurisdiction, *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002); or if Congress has exercised its authority

to abrogate Eleventh Amendment immunity. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

Plaintiffs argue in earnest that the State has waived its Eleventh Amendment immunity by the express language in the 2013 settlement agreement. That language reads: “In the event DCR, Intersal, or Nautilus breaches this agreement, DCR, Intersal, or Nautilus may avail themselves of all remedies provided by law or equity.” [DE 1-1 ¶ 32]. “The Supreme Court repeatedly has admonished that ‘[t]he test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.’” *In re Sec’y of Dep’t of Crime Control & Pub. Safety*, 7 F.3d 1140, 1145 (4th Cir. 1993) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985)). “[A] State will be deemed to have waived its immunity “only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.’” *Atascadero*, 473 U.S. at 239–40 (1985) (quoting *Edelman*, 415 U.S. at 673).

General consent to suit, including such consent as found in sue-and-be-sued clauses, has been found to be insufficient to waive a state’s Eleventh Amendment immunity. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 306 (1990); *Baum Research & Dev. Co. v. Univ. of Massachusetts at Lowell*, 503 F.3d 1367, 1370 (Fed. Cir. 2007). Even where a state has authorized suits against it “in any court of competent jurisdiction,” *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) (quoting *Kennecott*

Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 577–579 (1946)), courts have been reluctant to find waiver of Eleventh Amendment immunity.

Although the State’s consent to suit in this instance is broad, in the absence of any clear declaration of its intent to submit to suit in federal court, the Court is constrained to find that the State has not waived its Eleventh Amendment immunity by entering into its settlement agreement with plaintiffs. *See, e.g., Maynard v. Bd. of Regents of Div. of Universities of Florida Dep’t of Educ. ex rel. Univ. of S. Florida*, 342 F.3d 1281, 1288 (11th Cir. 2003) (state’s consent to “sue and be sued in all courts of law and equity” not valid waiver of Eleventh Amendment immunity).

The Court next turns to the question of whether, in passing the Copyright Remedy Clarification Act of 1990 (“CRCA”), 17 USC § 501(a), Congress abrogated North Carolina’s state sovereign immunity to be sued for copyright violations of the type alleged by plaintiffs. Two questions must be answered in the affirmative in order for Congress to have properly abrogated the states’ sovereign immunity: (1) Congress must have unequivocally expressed its intent to abrogate sovereign immunity, and (2) and [sic] in so doing Congress must have acted “pursuant to a valid exercise of power.” *Green v. Mansour*, 474 U.S. 64, 68 (1985).

By enacting the CRCA, there can be no doubt that Congress has stated clearly its intent to abrogate sovereign immunity for copyright claims against a state, its instrumentalities, or its officers or employees in

their official capacities.³ Turning to the second question, neither the Supreme Court nor the Fourth Circuit has directly considered whether the CRCA is an attempt to abrogate sovereign immunity pursuant to a valid exercise of power. *But see, e.g., Hairston v. N. Carolina Agr. & Tech. State Univ.*, No. 1:04 CV 1203, 2005 WL 2136923, at *3 (M.D.N.C. Aug. 5, 2005). In *Seminole Tribe* and *Florida Prepaid*, the Supreme Court held that Congress may not rely on its Article I authority to abrogate state sovereign immunity. *But see Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) (holding that the Bankruptcy Clause of Article I “was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena”).

³ The full text of the CRCA is as follows:

Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term ‘anyone’ includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

17 U.S.C. § 501(a).

Thus, as Congress may not rely on Article I alone to abrogate the state's sovereign immunity, remaining for consideration is whether it may do so under Section 5 of the Fourteenth Amendment. Section 5 of the Fourteenth Amendment "grants Congress the power to enforce the provisions of the Amendment by creating private remedies against the States for *actual* violations of those provisions." *United States v. Georgia*, 546 U.S. 151, 158 (2006) (internal quotation and alteration omitted). Congress may also "pass prophylactic legislation which deters or remedies Fourteenth Amendment violations even if in the process it prohibits conduct which is not itself unconstitutional," so long as "there is a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Nat'l Ass'n of Boards of Pharmacy v. Bd. of Regents of the Univ. Sys. of Georgia*, 633 F.3d 1297, 1316 (11th Cir. 2011) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 518–20 (1997)) (internal alterations omitted).

It is well-understood that the Fourteenth Amendment was "specifically designed to alter the federal-state balance." *Florida Prepaid*, 527 U.S. at 670. Indeed, whatever amount of sovereign immunity the states retained upon ratification of the Constitution was unmistakably reined in by the passage of the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) ("the Eleventh Amendment, and the principle of state sovereignty which it embodies, see *Hans v. Louisiana*, 134 U.S. 1 (1890), are necessarily limited by the

enforcement provisions of § 5 of the Fourteenth Amendment.”).

In *Florida Prepaid*, the Supreme Court considered whether the Patent Remedy Act could be viewed as “remedial or preventive legislation aimed at securing the protections of the Fourteenth Amendment” for holders of patents. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 627, 639 (1999). The Court found that Congress had not identified a pattern of infringement by the states, and had thus acted to “head off this speculative harm” of unremedied patent infringement by the states. 527 U.S. at 640–41. This Court’s review of the legislative history of the CRCA leads it to conclude that Congress has acted in response to sufficient evidence of infringement of copyrights by the states. The House Report relied on testimony regarding “the extensive use of copyrighted materials by the States” which predicted that “States might ultimately come to view immunity from monetary relief as comparable to immunity from liability . . .”. H.R.Rep. 101-282, pt.2, at 8 (1989); *but see Chavez v. Arte Publico Press*, 204 F.3d 601, 606 (5th Cir. 2000) (finding that testimony presented to Congress primarily concerned threat of future abuse of immunity from damages by the States as opposed to evidence of current constitutional deprivations). Additionally, the legislative history of that Act includes many examples of copyright infringements by States. *See Hearings on HR. 1131 before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary*, 101st

Cong., 1st Sess., 93, 148 (1989); *Hearing on S. 497 before the Subcommittee on Patents, Copyrights, and Trademarks of the Senate Committee on the Judiciary*, 101st Cong., 1st Sess., 148 (1989).

Congress was clearly responding to a pattern of current and anticipated abuse by the states of the copyrights held by their citizens. If the text of the CRCA and the legislative history were not enough to demonstrate this pattern of abuse, the amount of suits filed against allegedly infringing states in recent years, even despite little chance of success, demonstrates the extent of the issue.⁴ As a result, this Court finds that Congress appropriately exercised its Section 5 powers under the Fourteenth Amendment in passing the CRCA to abrogate state sovereign immunity to copyright claims.

⁴ See, e.g., *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000); *Hairston v. N.C. Agric. & Tech. State Univ.*, 2005 U.S. Dist. LEXIS 20442 (M.D.N.C. Aug. 5, 2005); *Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of Univ. Sys. of Ga.*, 2008 U.S. Dist. LEXIS 32116 (M.D. Ga. Apr. 18, 2008); *Mktg. Information Masters, Inc. v. Bd. of Trustees of the Cal. State Univ. Sys.*, 552 F. Supp. 2d 1088 (S.D. Cal. 2008); *InfoMath, Inc. v. Univ. of Ark.*, 633 F. Supp. 2d 674 (E.D. Ark. 2007); *De Romero v. Inst. of Puerto Rican Culture*, 466 F. Supp. 2d 410 (D.P.R. 2006); *Salerno v. City Univ. of N.Y.*, 191 F. Supp. 2d 352 (S.D.N.Y. 2001); *Jehnsen v. N. Y. Martin Luther King, Jr. Inst. for Nonviolence*, 13 F. Supp. 2d 306 (N.D.N.Y. 1998); *Rainey v. Wayne State Univ.*, 26 F. Supp. 2d 973 (E.D. Mich. 1998); *Jacobs v. Memphis Convention and Visitors Bureau*, 710 F. Supp. 2d 663 (W.D. Tenn. 2010); *Romero v. California Dept. of Transportation*, 2009 U.S. Dist. LEXIS 23193 (C.D. Cal., Mar. 12, 2009).

Having found that Congress appropriately abrogated State defendants' immunity to copyright claims under the standards set out by the Supreme Court in recent cases, the Court finds it appropriate at this point to note its disagreement with those very standards which have resulted from *Hans* and the Eleventh Amendment jurisprudence it has spawned. If not constrained by the Supreme Court's commands on this point, this Court believes that, under a proper understanding of the Eleventh Amendment, defendants would have no basis upon which to raise a defense of sovereign immunity in petitioning for a dismissal of this action. The Court is mindful that such an opinion is contrary to the decisions of courts in this nation which extend as [sic] least as far back as *Hans v. Louisiana*, 134 U.S. 1 (1890). Nonetheless, the Court is convinced that the central holding found by *Hans* and its progeny—namely that the Eleventh Amendment embodies a general doctrine of state sovereign immunity that extends to federal question cases in federal court—is flawed and contrary to the fundamental nature and meaning of the Constitution. These cases rest on an understanding of the Eleventh Amendment that is unsupported by the original meaning and plain text of the Constitution or the Amendment itself and which does harm to the fundamental rule of law in this nation.

The Eleventh Amendment was meant to be only what it purports to be by its plain language: a bar of suits against states by citizens of other states or nations brought under the federal courts' diversity jurisdiction. Indeed, it is clear to this Court that the

Eleventh Amendment was meant to clarify the basis of diversity jurisdiction in the federal courts, commanding simply that the basis of diversity jurisdiction granted in Article III (“The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State” and “between a State . . . and foreign . . . Citizens or Subjects”) should no longer be extended so far, but instead “*shall not be construed* to extend to any suit in law or equity . . . against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State.” U.S. Const. Amend. XI.

The literature supports this view. Many commentators and jurists have undertaken intensive studies of the history and structure of the Amendment. Rather than undertake a rigorous exegesis of the text of the Amendment here, the Court is content to cite to the substantial body of work that demonstrates convincingly that the history and structure of the Eleventh Amendment show that it reaches only to suits subject to federal jurisdiction exclusively under the diversity clauses. The body of commentary broadly agrees with this point, as it also agrees that *Hans’s* holding that a principle of sovereign immunity derived from the common law insulates a State from federal-question jurisdiction at the suit of its own citizen was wrongly decided.⁵ The Court will not rehash here these points

⁵ See, e.g., Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1 (1988); Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425 (1987); Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L.Rev. 1033 (1983);

that have been made in painful detail before, but instead will simply quote Justice Brennan on this point:

A sober assessment of the ratification debates thus shows that there was no firm consensus concerning the extent to which the judicial power of the United States extended to suits against States. Certain opponents of ratification, like Mason, Henry, and the “Federal Farmer,” believed that the state-citizen diversity clause abrogated state sovereign immunity on state causes of action and predicted dire consequences as a result. On the other hand, certain proponents of the Constitution, like Pendleton, Randolph, and Pickering, agreed concerning the interpretation of Article III but believed that this constituted an argument in favor of the new Constitution. Finally, Madison, Marshall, and Hamilton believed that a State could not be made a defendant in federal court in a state-citizen diversity suit. The majority of the recorded comments on the question contravene the Court’s statement in *Hans* . . . that suits against States in federal court were inconceivable. . . .

The language of the Eleventh Amendment, its legislative history, and the attendant historical

Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L.Rev. 1889 (1983); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. Pa. L.Rev. 1203 (1978). The literature is “remarkably consistent in its evaluation of the historical evidence and text of the amendment as not supporting a broad rule of constitutional immunity for states.” Jackson, 98 Yale L.J. at 44, n. 179.

circumstances all strongly suggest that the Amendment was intended to remedy an interpretation of the Constitution that would have had the state-citizen and state-alien diversity clauses of Article III abrogating the state law of sovereign immunity on state-law causes of action brought in federal courts. The economy of this explanation, which accounts for the rather legalistic terms in which the Amendment and Article III were written, does not require extravagant assumptions about the unexpressed intent of Congress and the state legislatures, and is itself a strong point in its favor. The original Constitution did not embody a principle of sovereign immunity as a limit on the federal judicial power. There is simply no reason to believe that the Eleventh Amendment established such a broad principle for the first time.

Atascadero, 473 U.S. at 278–79 (Brennan, J., dissenting). The congruence of the Amendment’s language with the debates at ratification and following the adoption of the Amendment suggests the modest and clear conclusion that the Amendment means what it says: that henceforth a state could no longer be sued in federal court where the basis of jurisdiction was solely the diversity of the plaintiffs from the state.

The position that the Eleventh Amendment was intended to constitutionalize a broad principle of sovereign immunity does not comport with the historical evidence or the plain meaning of the Amendment. There was no consensus at the time of ratification

whether the doctrine of state sovereign immunity would have any application in federal court. Even if the evidence could show a consensus view that the Eleventh Amendment should embody such a position, that still would not explain why the particular language of the amendment was ratified. Any person embarking on a study of the Amendment and its subsequent reinterpretations can be forgiven for the confusion that is sure to follow from trying to understand how these laconic words could have spawned such a far reaching doctrine. As Justice Stevens wrote, there are two Eleventh Amendments: the one in the Constitution and the one created by the Supreme Court. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989) (Stevens, J., concurring) (“It is important to emphasize the distinction between our two Eleventh Amendments. There is first the correct and literal interpretation of the plain language of the Eleventh Amendment. . . . In addition, there is the defense of sovereign immunity that the Court has added to the text of the Amendment” in cases involving suits against a state by one of its own citizens.). The Court, therefore, sees no reason, in considering either the understanding of the Amendment at the time it was ratified or the structure of the Constitution, that the courts should deviate from the plain language of the Amendment’s text. See *Sturges v. Crowninshield*, 17 U.S. 122, 202–03 (1819) (“But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the

provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.”).

The founders envisioned and wrote a Constitution founded upon the sovereignty of the people, not the states. There is little doubt that the whole purpose of the Constitution was to replace the failed government of sovereign confederate states with a government of sovereign individuals whose rights and liberties were ensured by a federal Constitution and a system of courts bound to that supreme law. The people of the United States delegated through the Constitution limited powers to the various organs and branches of government. Indeed, it is clear from the first words of the Constitution (“We the People of the United States . . .”) that the true sovereignty in our system lies with the people, not any entity of government. Ours is a limited government, and only those powers expressly granted may be exercised by this limited government. This is an animating principle inherent in our founding and very society; it is an idea birthed in the Declaration of Independence and memorialized in the Constitution. No government can be sovereign when it transgresses the fundamental rights of individuals or the limits of its delegation. Just as King George III lost sovereign authority when he transgressed the inalienable rights of the colonists, neither can any organ of government maintain its sovereign immunity when it acts in violation of the Constitution. To hold otherwise is to disregard the very basis for our limited, constitutional, government.

The doctrine of state sovereign immunity to federal law in federal court has frustrated the essential function of the federal courts to ensure the uniform interpretation and enforcement of the supreme law of the land. It frustrates the ability of individuals to receive what may be the only practical remedy available to them as plaintiffs. It does not enhance constitutional protections or advance the ideals of our constitutional form of government in which the people are sovereign. It is not required by the structure of the federal system designed by the Founders, and in fact has strangely turned our federal form of government and the Supremacy Clause on its head by leaving states free to resist at their pleasure that federal law which we claim is the supreme law of the land. Far from protecting the dignity of the states or ensuring domestic harmony, in modern times this anachronistic vestige of English commonwealth doctrine has been shown to accomplish one thing only: to shield state governments from the consequences of their illegal conduct that intrudes upon federal protections.

Fundamental to the Founders' understanding of the new constitutional government they were enacting was the principle that the federal government's judicial power must be coextensive with its legislative power. *See* *The Federalist*, No. 80, p. 535 (J. Cooke ed. 1961) ("If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number"); 3 *Elliot's Debates*, at 532 (remarks of Madison) ("With respect to the laws of the Union, it is

so necessary and expedient that the judicial power should correspond with the legislative, that it has not been objected to”). Indeed, any honest assessment of these circumstances must note the peculiar absurdity of a government in which the lawmaking body can create rights and remedies that cannot be recognized in any court of law. The Founders could hardly have imagined constitutionalizing such an exercise in futility, but that is precisely what the extra-textual and unmoored application of the Eleventh Amendment has created today.

In this particular case, the effects are indeed troubling because, without express abrogation of immunity by Congress under the stringent standards laid out by the Supreme Court, plaintiffs would have been left with the unenviable and unjust position of holding a Constitutional right which cannot be vindicated in any court, federal or state.⁶ Plaintiffs hold a right of such importance to the founders that it was, unique among most functions undertaken by the federal government today, expressly mentioned in Article I as an important protection to be ensured by the national government. But according to the Supreme Court today, it is not the obligation of the courts to ensure that for every right be a remedy, and the lower courts are commanded to be comfortable with meaningless declarations of form which do nothing for those harmed by the unlawful actions of their state. As Professor Akhil Reed Amar eloquently stated,

⁶ See *Alden v. Maine*, 527 U.S. 706 (1999).

In the end, the Supreme Court's vision of state sovereign immunity warps the very notion of government under law. The Court's invocation of state 'sovereign' immunity in cases where the state plainly is not sovereign—because it has acted *ultra vires*—resurrects the British theory of governmental supremacy that was anathema to the framers. It puts governments above, not under, the law. It makes government officers masters, not servants, of the People.

Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1480 (1987).

Though the Supreme Court's current interpretation of the Eleventh Amendment reaches back to the nineteenth century, longstanding doctrines do not become correct simply by virtue of being beholden to tradition. It is true that the honoring of precedent promotes stability in society and protects the interests of those who have relied on judicial pronouncements when ordering their affairs. But just because a doctrine is long accepted does not make it right, and the principle of *stare decisis* is perverted when relied upon as a defense for deliberate violations of federal law. See *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 98 (2000) (Stevens, J., dissenting). As Justice Holmes wrote, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897); see also Jackson,

Decisional Law and Stare Decisis, 30 A.B.A.J. 334, 334 (1944) (“I never have, and I think few lawyers ever have, regarded that rule [stare decisis] as an absolute. There is no infallibility about the makers of precedents.”). The immunity of states to federal law in federal court has degraded our structure of federalism, undermined the legitimacy of the federal courts, and so betrayed the very rights this constitution was meant to protect that it is the duty of the courts of this nation to reconsider this doctrine.

For these reasons, this Court is convinced that the holding of *Hans* and its progeny are in error.⁷ The

⁷ The Court also notes the particularly troubling context in which the decision of *Hans* was written. According to many commentators, the precedential value of the opinion should be reconsidered because the decision was “an integral part of the nation’s surrender to southern intransigence and racial oppression” and constituted a “rejection of both established Eleventh Amendment doctrine and the principles of the new post-Civil War Constitution.” Purcell, *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and “Federal Courts”*, 81 N.C.L.Rev. 1927 (2003); see also Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 2000 (1983) (“Without weakening the contract clause, which over the next two decades the [*Hans*] Court might need both in its fight against government regulation of business and as a weapon against defaulting local governments, the justices needed a way to let the South win the repudiation war. The means [the *Hans* court] chose was to rewrite the eleventh amendment and the history of its adoption”); J. ORTH, *JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* 9 (1982); but see generally Collins, *The Conspiracy Theory of the Eleventh Amendment*, 88 Colum. L. Rev. 212, 243 (1988) (suggesting that the Southern debt crisis may not have been the only factor driving the Court’s Eleventh Amendment jurisprudence during this period, but acknowledging that “[i]t is perfectly conceivable that

Court recognizes the substantial body of law that is to the contrary, and the numerous admonishments of the Supreme Court that the Eleventh Amendment should be interpreted as having encompassed and memorialized a broad doctrine of sovereign immunity that extends beyond the literal words of the Amendment. However, this Court being in doubt of the soundness of such a doctrine being imported to words that, on their very face and plain meaning, do not extend so broadly, and not being convinced that such was the intended meaning of the Eleventh Amendment nor that the doctrine of sovereign immunity as it has been construed today was the original intent of the framers of the Constitution, expresses its disagreement with the holding of *Hans* and its progeny. Such a doctrine being antithetical to the plain text of the Constitution and to the structure of our government, this Court believes that such a defense should be without merit in these proceedings. To the extent it can, this Court humbly calls for the higher courts to reconsider this doctrine.

Nonetheless, this Court is constrained, under the absolute hierarchical system of courts in the federal judiciary, to hold that the defense of sovereign immunity is available to the states in federal court in a case arising under this Court's federal question jurisdiction. However, as discussed above, in this particular case Congress has clearly abrogated state immunity in cases arising under the CRCA, and such an abrogation

Compromise-related politics exerted their influence at the margin—in doubtful cases in which the Court might have gone either way”).

is congruent and proportional to a clear pattern of abuse by the states. Therefore, plaintiffs' copyright claims shall not be dismissed on state immunity grounds.

As to the state law causes of action that plaintiff asserts against the State defendants, the Court finds that such claims must be dismissed on immunity grounds. Congress cannot abrogate a state's immunity to state law causes of action, only state immunity to federal causes of action. Absent a state's express waiver of sovereign immunity, under the Eleventh Amendment, a federal court lacks subject matter jurisdiction to determine if state officers have violated the state's own law:

A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment. We conclude that *Young* and *Edelman* are inapplicable in a suit against state officials on the basis of state law.

Pennhurst, 465 U.S. at 106. Therefore, the State defendants are immune to state law causes of action in federal court, and counts IV and V against State defendants must be dismissed.

Finally, this Court must hold, under Fourth Circuit precedent, that plaintiffs' takings claims brought under § 1983 are barred by the Eleventh Amendment when North Carolina courts are available for such a claim to be brought. *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014) (“[W]e conclude that the Eleventh Amendment bars Fifth Amendment taking claims against States in federal court when the State’s courts remain open to adjudicate such claims.”). Because such a remedy is available in the State’s courts, the Court finds that count III must be dismissed.

II. *Legislative and Qualified Immunity*

Eleventh Amendment immunity does not protect the individual state defendants who have been sued in their individual capacities. The Court declines to dismiss plaintiffs' claims against the individual defendants in their individual capacities under *Martin v. Wood*, 772 F.3d 192 (4th Cir. 2014), as the court of appeals has not addressed the holding of *Martin* in the § 1983 context. *See, e.g., Dyer v. Maryland State Bd. of Educ.*, 187 F. Supp. 3d 599 n. 17 (D. Md. 2016). Rather, the Court is instructed by the panel in *Richard Anderson Photography v. Brown*, 852 F.2d 114 (4th Cir. 1988), which in a copyright case against a state university held that the “mere fact that [defendant’s] conduct was undertaken in the course of her state employment does not of course relieve her of individual liability, even if her employer could not be sued for it. A state may no more than an individual principal give its agent

authority to commit torts without civil recourse.” 852 F.2d at 122.

These individual defendants have raised additional defenses of legislative and qualified immunity. However, “the Court does not believe that qualified immunity applies to the individual defendants as a matter of law because the law of [copyright] infringement is clearly established, relegating the application of such immunity to be decided as a question of fact.” *Kersavage v. Univ. of Tennessee*, 731 F. Supp. 1327, 1330 (E.D. Tenn. 1989). The claims against the individual defendants in their individual capacities may thus proceed.

The individual state defendants further raise legislative immunity as a defense to counts I, III, IV and V. “Legislative immunity protects those engaged in legislative functions against the pressures of litigation and the liability that may result.” *McCray v. Maryland Dep’t of Transp., Maryland Transit Admin.*, 741 F.3d 480, 484 (4th Cir. 2014). Plaintiffs allege that the individual defendants collectively wrote, caused to be introduced, and lobbied for passage of the amendment to N.C. Gen. Stat. § 121-25. [DE 12 ¶¶ 50-51]. Legislative immunity also extends to those who advise legislators, and it “is a shield that protects despicable motives as much as it protects pure ones.” *Id.* at 485. The Court finds that, based on the allegations in the amended complaint, a ruling on whether legislative immunity applies is premature at this time, and the Court thus defers its decision.

III. *Standing*

Defendants argue that plaintiffs do not have standing to assert [sic] contest the validity of N.C. Gen. Stat. § 121-25(b) because they are not harmed by the statute and are under no imminent threat of harm. The Court does not agree and finds that plaintiffs sufficiently allege ongoing and imminent harm resulting from passage of the statute.

Federal courts may consider only cases or controversies, and “the doctrine of standing has always been an essential component” of the case or controversy requirement. *Marshall v. Meadows*, 105 F.3d 904, 906 (4th Cir. 1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). To demonstrate standing, plaintiffs must establish that they have suffered an injury in fact that is concrete and particularized, that the injury is fairly traceable to the challenged action of the defendant, and that the injury is likely to be redressed by a favorable decision from the Court. *Chambers Med. Techs. of S.C., Inc. v. Bryant*, 52 F.3d 1252, 1265 (4th Cir. 1995). “The standing doctrine [] depends not upon the merits, but on whether the plaintiff is the proper party to bring the suit.” *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 460–61 (4th Cir. 2005) (citations and quotations omitted).

Plaintiffs allege in their complaint that defendants have taken the position that the 2013 settlement is no longer valid or binding on the parties as a result of the passage of N.C. Gen. Stat. § 121-25(b). This is a concrete and particularized harm. Plaintiffs further

allege in their complaint that defendants are taking advantage of the statute, and their position that the settlement agreement is invalid because of the statute, to enter into contracts that grant to third parties benefits reserved to plaintiffs under the settlement agreement. This is an ongoing harm and, accordingly, plaintiffs have alleged sufficient injuries to contest the validity of the statute.

IV. *Abstention*

Defendants next ask this Court to abstain from assessing plaintiffs' claims concerning N.C. Gen. Stat. § 121-25(b) because no North Carolina court has had the opportunity to interpret the meaning of the statute or reviewing its validity. The Court declines defendants' invitation to exercise its discretion to abstain from hearing this case.

Under *Railroad Commission v. Pullman Co.*, federal courts should abstain from hearing and ruling on matters of state law if the issues essential to the case are uncertain such that a ruling by a state court might obviate the need for the federal court's ruling. 312 U.S. 496, 500 (1941). This form of abstention allows state courts to resolve questions of unsettled state law and prevents unnecessary constitutional rulings. *Pullman* abstention applies where (1) there is an unclear issue of state law presented for decision (2) the resolution of which may moot or present in a different posture the federal constitutional issue such that state law is potentially dispositive. *Educ. Servs., Inc., v. Maryland*

State Bd. of Higher Educ., 710 F.2d 170, 174 (4th Cir. 1983). The result is that federal courts properly decline to exercise jurisdiction where an unresolved issue of state law is the most important issue in the case and predominates the questions of federal law presented to the court. The simple fact that no state court has yet interpreted a statute or ordinance does not itself provide grounds for *Pullman* abstention. *Id.*

Alternatively, and as articulated in *Burford v. Sun Oil Co.*, federal courts should also abstain from hearing and ruling on matters that involve a state’s complex regulatory scheme or efforts to create a coherent policy with respect to a matter of substantial public concern. 319 U.S. 315, 318 (1943). *Burford* abstention is appropriate where a case raises difficult and important questions of state law. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). However, where the primary issue in a case is whether a state body violated federal law, *Burford* abstention is not proper. *See New Orleans Public Serv. Inc. v. Council of New Orleans*, 491 U.S. 350, 359 (1989). Such abstention should be construed narrowly and used only in rare circumstances. *See Quackenbush*, [5]17 U.S. at 722–23.

Further, in *Martin v. Stewart*, 499 F.3d 360 (4th Cir. 2007), the Fourth Circuit noted that *Burford* abstention is not necessary anytime “federal litigation affects an important state interest.” *Id.* at 369. In fact, a great number of decisions by federal district courts will impact state interests. As such, *Burford* abstention is only appropriate where: (1) the case involves difficult questions of state law “whose importance transcends

the result in the case then at bar,” or (2) the exercise of federal review in this matter would be disruptive of state attempts to build coherent policy regarding a significant public interest. *New Orleans Public Service, Inc.*, 491 U.S. at 361 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)). In finding that remand was not appropriate, the *Martin* court noted that a direct challenge to the constitutionality of a statute did not implicate the second prong of the *Burford* analysis because it did not threaten uniformity of application—meaning if the law was unconstitutional it would be unenforceable everywhere.

The Court finds that, though no North Carolina state court has reviewed the statute at issue, such an unresolved question of state law is not the predominate issue in the case and does not outweigh the important questions of federal law presented to the court. The simple fact that no state court has yet interpreted a statute or ordinance does not itself provide grounds for *Pullman* abstention, and such abstention is not appropriate here where state court clarification would do little to resolve the predominate federal questions before the Court. The Court also finds that this case does not present difficult questions of state law or that the exercise of federal review would be disruptive of state attempts to build coherent policy regarding a significant public interest. The primary state law question before the Court is clear: whether the statute is superseded by federal law and in violation of the Constitution. Such a question does not involve difficult

questions of state law, and review of the statute would not threaten uniformity of application of state policy because the Court's determination would either uphold or strike down the statute in its entirety. Additionally, the case primarily concerns federal copyright and Constitutional law, and does not require that the Court engage itself in difficult matters of interpreting state law or significant policy schemes. Copyright law cannot impact a vital state interest as copyright protection is the exclusive domain of the federal government. It is a matter that originates in the Constitution and is exclusively regulated by federal statute. U.S. Const. Art. I, cl. 8; 17 USC § 101 *et seq.* For these reasons, the Court finds that abstention is not warranted and that the Court should continue to hear the case.

V. *Motions to Dismiss under Rule 12(b)(6)*

Defendant Friends of the QAR moved to dismiss plaintiffs' complaint, arguing that plaintiffs' complaint fails to plausibly allege that it engaged in any acts of copyright infringement, unfair and deceptive trade practices, or civil conspiracy. The State defendants similarly argue that plaintiffs' complaint fails to support claims against the State or individuals sued in both their individual and official capacities.

Count I

The Court finds that plaintiffs have pled facts sufficient to allow this Court to draw the reasonable inference that § 121-25(b) is invalid as it purports to

regulate a matter in the express domain of federal law. “[A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by [the Copyright Act].” 17 USC § 301(a). “[N]o person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.” *Id.* State laws are pre-empted by the Copyright Act when a two-prong test is met: “(1) the work must be within the scope of the subject matter of copyright . . . and (2) the rights granted under state law must be equivalent to any exclusive rights within the scope of federal copyright.” *United States ex rel. Berge v. Board of Trs. of the Univ. of Ala.*, 104 F.3d 1453, 1463 (4th Cir. 1997) (internal quotation marks omitted) (quoting *Rosciszewski v. Arete Assocs., Inc.*, 1 F.3d 225, 229 (4th Cir. 1993)). To determine if the state law rights are equivalent to the exclusive rights within the scope of copyright, courts look to whether “the act of reproduction, performance, distribution or display will *in itself* infringe the state created right.” *Madison River Mgmt. Co. v. Bus. Mgmt. Software Corp.*, 351 F. Supp. 2d 436, 442 (M.D.N.C. 2005) (internal quotations omitted) (emphasis in original). If so, the state law claim is preempted by the Copyright Act. *Id.* If, however, “other elements are required, in addition to or instead of, the acts of reproduction, performance, distribution, or display,” then there is no preemption. *Id.*

Central to this case is the State’s passage of N.C. Gen. Stat. § 121-25(b), which even in its current form purports to convert copyrighted materials into the

public record of the State where such materials are “in the custody of agency of North Carolina government or its subdivisions.” N.C. Gen. Stat. § 121-25(b). Public records are “the property of the people” under North Carolina law. N.C. Gen. Stat. § 132-1(b). North Carolina’s statute therefore purports to regulate the right to use and copy “photographs, video recordings, or other documentary materials,” N.C. Gen. Stat. § 121-25(b), which is subject matter within the scope of the Copyright Act. Plaintiffs assert the right to use such photographs, video recordings, and other documentary materials under exclusive copyright, but the state statute in question purports to transfer those exact same rights to the public domain. By asserting copyright over those works, plaintiffs would be in violation of this statute. For these reasons, plaintiffs have sufficiently stated a plausible claim that the statute is pre-empted by federal law and therefore invalid.

Count II

The Court also finds that plaintiffs have sufficiently stated a claim of copyright infringement on the part of all defendants. Original works of authorship that are fixed in a tangible medium of expression are federally protected rights, rooted in the United States Constitution and protected by the federal Copyright Act. 17 USC § 101 *et seq.* 17 USC § 102; *U.S. Ex Rel. Berge v. Board of Trustees of Univ. of Ala.*, 104 F.3d 1453 (4th Cir. 1997). The Copyright Act provides that the copyright owner shall have the exclusive right to (1) reproduce the copyrighted work; (2) prepare derivative

works; (3) distribute copies of the work by sale or otherwise; (4) perform the work publicly; and (5) display the work publicly. 17 USC § 106. A copyright owner is equipped with a “potent arsenal of remedies against an infringer of his work,” including injunctions, recovery of actual or statutory damages, and attorneys’ fees. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 433–34 (1984). Those remedies are invoked by pleading a claim for copyright infringement, alleging that the plaintiff owns a copyright registration that has been infringed. *Universal Furniture Int’l, Inc. v. Collezione Europa USA, Inc.*, 618 F.3d 417, 435 (4th Cir. 2010).

In their complaint, plaintiffs sufficiently pled specific facts that allow the inference that each defendant has infringed plaintiffs’ registered copyright works after the 2013 settlement agreement. Plaintiffs identify federal registrations and detail specific instances of infringement, including the type of media allegedly infringed, where examples of the infringements can be found, and how the infringement has allegedly continued. The State defendants are not shielded by the Eleventh Amendment’s immunity from this claim, and plaintiffs have pled sufficient facts that, if true, allow the inference that both State defendants and defendant Friends of the QAR have violated plaintiffs’ federal copyrights. The defenses defendants raise to this claim, such as whether such uses of plaintiffs’ work can constitute “fair use” under federal law, is a question of fact

that cannot be determined at this stage of the proceedings.⁸

Counts IV and V

Finally, plaintiffs brought claims alleging violations of North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA") and civil conspiracy. As discussed before, State defendants are immune to such state law causes of action in federal court. As to defendant Friends of the QAR, the Court finds that plaintiffs have failed to state a [sic] plausible claims for relief and that these claims must be dismissed.

In order to state a claim for unfair or deceptive trade practices, a plaintiff must show that: (1) the defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff. *Dalton v. Camp*, 548 S.E.2d 704, 711 (2001) (citations omitted). "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v.*

⁸ 17 U.S.C. § 107 ("In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.").

Miller, 276 S.E.2d 397, 403 (1981). Additionally, “some type of egregious or aggravating circumstances must be alleged and proved before the Act’s provisions may take effect.” *Id.* Whether an act is unfair or deceptive is a question of law for the court. *Id.*

To the extent plaintiffs allege a violation of UDTPA on the basis of copyright infringement, such a cause of action is preempted by the Copyright Act. *See* 17 U.S.C. § 301(a). To the extent plaintiffs allege a violation of UDTPA on the basis of Friends of the QAR’s efforts in favor of passage of N.C. Gen. Stat. § 121-25, such allegations fail to state a plausible claim for relief. “The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances,” *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 286 (1984), and this right to petition one’s government extends to lobbying. *See Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1967). The mere act of advocating for passage of legislation cannot constitute an unfair or deceptive trade practice, and plaintiffs have alleged no plausible facts showing egregious or aggravating conduct necessary to state a claim under UDTPA.

Plaintiffs’ claim of civil conspiracy fails for similar reasons. Under North Carolina law, “[t]here is no independent cause of action for civil conspiracy.” *Toomer v. Garrett*, 574 S.E.2d 76, 92 (2002). Additionally, such a claim is preempted by federal law to the extent it is based on copyright infringement, *see* 17 U.S.C. § 301(a), and barred by the First Amendment to the extent it is

based upon the conduct of lobbying and advocating for passage of a statute. *Minnesota State Bd. for Cmty. Colleges*, 465 U.S. at 286; *see also Liberty Lobby*, 390 F.2d at 491.

CONCLUSION

For the foregoing reasons, State defendants' motion to dismiss [DE 49] is DENIED IN PART and GRANTED IN PART and defendant Friends of the *Queen Anne's Revenge's* motion to dismiss is DENIED IN PART and GRANTED IN PART. [DE 47]. Plaintiffs' first and second claims remain against all defendants, while claims three, four, and five are dismissed.

SO ORDERED, this 23 day of March, 2017.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
UNITED STATES
DISTRICT JUDGE

79a

FILED: August 9, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1522 (L)
(5:15-cv-00627-BO)

FREDERICK L. ALLEN;
NAUTILUS PRODUCTIONS, LLC

Plaintiffs - Appellees

v.

ROY A. COOPER, III, as Governor of North Carolina;
SUSI H. HAMILTON, Secretary of the North Carolina
Department of Natural and Cultural Resources, in
her official capacity; SUSAN WEAR KLUTTZ,
former Secretary of the North Carolina Department
of Natural and Cultural Resources, individually;
D. REID WILSON, Chief Deputy Secretary of the
North Carolina Department of Natural and
Cultural Resources, in his official capacity;
KARIN COCHRAN, former Chief Deputy Secretary
of the North Carolina Department of Natural and
Cultural Resources, individually; KEVIN CHERRY,
Deputy Secretary of the North Carolina Department
of Natural and Cultural Resources, individually
and in his official capacity; G. NEEL LATTIMORE,
Director of Communications of the North Carolina
Department of Natural and Cultural Resources,
in his official capacity; CATHERINE A. OLIVA,
Director of Marketing of the North Carolina
Department of Natural and Cultural Resources,

in her official capacity; CARY COX, former Assistant Secretary, Marketing and Communications of the North Carolina Department of Natural and Cultural Resources, individually; STEPHEN R. CLAGGETT, a/k/a STEVE CLAGGETT, State Archaeologist, individually and in his official capacity; JOHN W. MORRIS, a/k/a BILLY RAY MORRIS, Deputy State Archaeologist-Underwater and Director of the Underwater Archaeology Branch of the North Carolina Department of Natural and Cultural Resources, individually and in his official capacity; NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES; STATE OF NORTH CAROLINA

Defendants - Appellants

and

FRIENDS OF QUEEN ANNE'S REVENGE,
A NON-PROFIT CORPORATION

Defendant

THE COPYRIGHT ALLIANCE; RALPH OMAN

AmicI Supporting Appellee(s)

DAVID NIMMER, RALPH OMAH,
ERNEST A. YOUNG, and MIKE BYNUM

Amici Supporting Rehearing

No. 17-1602
(5:15-cv-00627-BO)

FREDERICK L. ALLEN;
NAUTILUS PRODUCTIONS, LLC

Plaintiffs - Appellants

v.

ROY A. COOPER, III, as Governor of North Carolina;
SUSI H. HAMILTON, Secretary of the North Carolina
Department of Natural and Cultural Resources, in
her official capacity; SUSAN WEAR KLUTTZ,
former Secretary of the North Carolina Department
of Natural and Cultural Resources, individually;
D. REID WILSON, Chief Deputy Secretary of the
North Carolina Department of Natural and
Cultural Resources, in his official capacity;
KARIN COCHRAN, former Chief Deputy Secretary
of the North Carolina Department of Natural and
Cultural Resources, individually; KEVIN CHERRY,
Deputy Secretary of the North Carolina Department
of Natural and Cultural Resources, individually
and in his official capacity; G. NEEL LATTIMORE,
Director of Communications of the North Carolina
Department of Natural and Cultural Resources,
in his official capacity; CATHERINE A. OLIVA,
Director of Marketing of the North Carolina
Department of Natural and Cultural Resources,
in her official capacity; CARY COX, former Assistant
Secretary, Marketing and Communications of the
North Carolina Department of Natural and Cultural
Resources, individually; STEPHEN R. CLAGGETT,

82a

a/k/a STEVE CLAGGETT, State Archaeologist,
individually and in his official capacity; JOHN W.
MORRIS, a/k/a BILLY RAY MORRIS, Deputy State
Archaeologist-Underwater and Director of the
Underwater Archaeology Branch of the North
Carolina Department of Natural and Cultural
Resources, individually and in his official
capacity; NORTH CAROLINA DEPARTMENT
OF NATURAL AND CULTURAL RESOURCES;
STATE OF NORTH CAROLINA

Defendants - Appellees

and

FRIENDS OF QUEEN ANNE'S REVENGE,
A NON-PROFIT CORPORATION

Defendant

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk
