

Nos. 17-1522 (L) and 17-1602

**IN THE UNITED STATE COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

FREDERICK L. ALLEN, et al.,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On appeal from the United States District Court
for the Eastern District of North Carolina

REPLY BRIEF FOR APPELLEES

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Introduction

This case involves allegations of copyright infringement brought by Plaintiff videographer and his company (collectively, “Allen”) against an agency of the State of North Carolina and certain State employees. (The State and its official-capacity employees are collectively referred to as the State; those employees who are sued in their individual capacities are referred to as the “individual Defendants.”) Compl. at, e.g., ¶¶ 1, 29, 44-46 (J.A. 17, 25, 28-29).

This was not the first incident of infringement; earlier allegations had been settled by payment to Allen and execution of a settlement agreement. Compl. ¶¶ 35-39 (J.A. 26-27).

After the State paid to settle the earlier allegations of copyright infringement of Allen’s works, it and the individual Defendants set about to again infringe—but this time with enhanced protection for those involved. They again copied many of the same works (which each of the individually-sued employees¹ personally knew was prohibited) and posted them on the Internet, then conspired to insulate themselves from liability by working outside of their legitimate governmental responsibilities to draft and seek passage of a law that purported to permit copying of those works. Their efforts were successful, resulting in passage of an amendment to N.C. Gen. Stat. §121-25(b) purporting to deprive Allen of the

¹ Governor Cooper is not sued in his individual capacity despite the State’s implication to the contrary (Response/Reply brief at 52).

power to control copying of his works, in violation of Sec. 301 of the Copyright Act. Defendants continue to post the accused works on the Internet to this very day.² Compl. at, e.g., ¶¶ 2-5, 44-46, 49-50, 61 (J.A. 17, 29-30, 33).

The Copyright Remedy Clarification Act, Pub. L. No. 101-533, 104 Stat. 2749 (1990), codified in pertinent part at 17 U.S.C. §§ 501 and 511, permits copyright owners to sue State as well as individual infringers for copyright infringement. After Allen brought suit, seeking declaratory judgment that the state statute was unconstitutional and unenforceable, and that he was entitled to injunctive relief and to recover damages, the State moved to dismiss the amended complaint on grounds of, inter alia, the asserted immunities of the State and individual Defendants. J.A. 40, 43-80.

The State argued that the Copyright Remedy Clarification Act cannot be sustained under Section 5 of the Fourteenth Amendment, and also argued that it cannot be sustained under the Article I powers of Congress set out in the Copyright Clause and the Necessary and Proper Clause of the Constitution. The State and individual Defendants also denied that immunity was lost as a result of any waiver. The State asserted Eleventh Amendment immunity while the individual Defendants asserted legislative and qualified immunity.

² For example, as of the date of filing of this brief, works identified or described in ¶¶ 44 and 46 of the Complaint are posted on the Internet in State-controlled locations, including “Blackbeard’s Queen Anne’s Revenge 1718 (Image)” at <http://www.maritimefriends.org/Blackbeards-Queen-Annes-Revenge-Exhibit-Friends-NC-Maritime-Museum.html>.

The district court agreed with the State as to the Article I powers of Congress, and as to the waiver issue, believing that it was precluded by earlier Supreme Court decisions from deciding in Plaintiffs' favor as to the Article I authority of Congress, and by a prior decision of this Court from deciding in Plaintiffs' favor as to waiver. The district court also found that to the extent based on Fifth Amendment takings claims, Plaintiff's claims could be entertained only in state court. As to the remaining issues, the lower court decided in favor of Plaintiff.

The issues of individual Defendant immunity and the Fourteenth Amendment authority of Congress to abrogate state sovereign immunity were addressed in the initial three briefs of the parties. Although Plaintiff believes that certain facts and arguments asserted by the State in its reply are inaccurate, Plaintiff recognizes that its only further opportunity to address those points will come at oral argument.

The remaining issues, including the State's newly raised issue that the underlying legislation is barred from review and declaratory judgment by the State's Eleventh Amendment immunity, are addressed hereafter.

Summary of Argument

In addition to the Fourteenth Amendment authority of Congress (previously briefed), Congress had authority under Article I of the Constitution to

enact the Copyright Remedy Clarification Act. Proper reading of the most recent guidance from the Supreme Court compels the conclusion that Article I authority can be invoked by Congress, and Congress acted rationally and with ample support in proceeding under that Article.

The State argues that it is entitled to belatedly assert Eleventh Amendment immunity to Allen's claim for declaratory judgment of statutory invalidity, and that the declaratory judgment claim must fail because it arises under copyright law and is barred by Eleventh Amendment immunity. Because sovereign immunity is an affirmative defense, however, it is indeed subject to waiver and the State's failure to address the declaratory judgment action in its opening brief acts as a waiver—at least at this stage of the proceeding—of any right to argue that Count I of the complaint is barred. In addition, the law with respect to declaratory judgment actions, which do not seek state funds, is not identical to that applicable to claims more directly aimed at a state's treasury. Here, the Supremacy Clause of the Constitution is effectuated through the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and *Ex parte Young* to permit Allen's declaratory judgment action to proceed even if (which ought not be the case) his infringement and other claims were barred.

With respect to Allen's Takings Claim, the State argues that this Court's decision in *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014) bars relief and requires that the claim be re-filed in state court. *Hutto*, however, does not control

for each of two reasons: Allen’s claim falls within one of the exceptions *Hutto* predicted would arise, and North Carolina law bars the defense of sovereign immunity to takings claims.

Argument

I. State Sovereign Immunity Does Not Supersede the Article I Authority of Congress

The State does not deny that, if Congress had authority to act under Article I of the United States Constitution, it unequivocally exercised that power. Neither does the State deny that Congress articulated a rational basis for its actions, sufficient to support legislation under Article I. The State focuses its objections on a fundamental denial that Congress had power to act under Article I.

A. The Supreme Court Has Not Precluded Article I Authority, and Instead its Recent *Katz* Decision Supports Article I Authority

The State acknowledges that the Supreme Court changed course after its decisions in *Seminole Tribe v. Fla.*, 517 U.S. 44 (1996) and *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), and held that state sovereign immunity does not supersede the Article I authority of Congress in at least some instances. (State Response/Reply Br. at 10).

In 2006, seven years after the 5:4 decisions of *Seminole Tribe* and *Fla. Prepaid*, the Supreme Court held:

[t]he relevant question is not whether Congress has ‘abrogated’ States’ immunity in proceedings to recover preferential

transfers.... The question, rather, is whether Congress' determination that States should be amenable to such proceedings is within the scope of its power to enact 'Laws on the subject of Bankruptcies.'

Central Va. Community College v. Katz,³ 546 U.S. 356, 379 (2006) (internal citations omitted). Indeed, *Katz* went so far as to say that a statute explicitly abrogating state sovereign immunity was not even necessary. *Id.* at 361.

The *Katz* decision was grounded in the Supreme Court's re-examination of the "plan of the Convention"—i.e. the shared understanding of the States as they joined together to create the Constitution and to become joint members of the United States of America. *Katz*, 546 U.S. at 377. The Supreme Court noted and relied on the absence of controversy as to inclusion of the bankruptcy clause within the Constitution, and the references to the value of a uniform system. *Id.*, at 366, 373.

Specifically with respect to the power of Congress to secure to authors the exclusive right to their works, the plan of the Convention embodied the following understanding:

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. ... The States cannot make effectual provision for ... these cases, and most of them have anticipated the decision of this point by laws passed at the instance of Congress.

³ Although immaterial to its import, we note that *Katz* was decided on appeal from the Court of Appeals for the Sixth Circuit—not, as our initial brief mistakenly stated, on appeal from this Circuit. We apologize for the error.

The Federalist No. 43 (A. Hamilton) (J. Cooke ed. 2003), at 267. It is perhaps significant that Hamilton considers this power so significant that it was listed first amongst the “miscellaneous powers” conveyed to Congress, and certainly clear that the power of Congress in this regard was considered beyond debate. In that regard, the rationale provided for federal authority and legislation was very similar to that explained as to bankruptcy: “The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce ... that the expediency of it seems not likely to be drawn into question.” *Id.* at 266.

Furthermore, concerning the authority of Congress to legislate in those Article I fields in which it was given power (including copyright and bankruptcy), Hamilton said,

[N]o part of [the Constitution] can appear more completely invulnerable. Without the *substance* of this power, the whole Constitution would be a dead letter.

The Federalist No. 44 (A. Hamilton) (J. Cooke ed. 2003), at 279-80.

The State attempts to limit *Katz* to the field of bankruptcy proceedings, but such a limitation is wrong. It certainly is true that the Court in *Katz* discussed the *in rem* nature of bankruptcy proceedings, but it did so only because that feature of bankruptcy proceedings informed the requisite historical analysis. See, e.g., 546 U.S. at 373 (“Insofar as orders ancillary to the bankruptcy courts’ *in rem* jurisdiction, like orders directing turnover of preferential transfers, implicate States’ sovereign immunity from suit, the States agreed in the plan of the Convention not to assert that immunity.”). Thus, it is simply incorrect to interpret *Katz* as having no effect outside the bankruptcy context. Indeed, its focus with

respect to sovereign immunity analysis can more fairly be said to have emphasized the non-*in rem* side of those proceedings.

Instead, *Katz* stands for two points that are central to the resolution of this case.

- First, *Katz* makes clear that the suggestion in *Seminole Tribe* that Congress may never subject states to suit pursuant to an Article I power, was **non-controlling dicta**. *Katz*, 546 U.S. at 363.
- Second, *Katz* instructs that whether states may be subjected to suit depends on an historical analysis of the specific constitutional power under which Congress authorized the cause of action. *Id.* at 375-378.

As discussed above, the concept that with respect to its Article I powers, Congress has the right to legislate and the federal judiciary has the right to adjudicate, is well-confirmed by the founders. For example, Hamilton confirmed that,

It seems scarcely to admit of controversy that the judicial authority of the Union ought to extend to these several descriptions of cases: 1st, to all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; ...

The first point depends upon this obvious consideration, that there ought always to be a constitutional method of giving efficacy to constitutional provisions. ... This power must either be a direct negative on the State laws, or an authority in the federal courts to overrule such as might be in manifest contravention of the articles of the Union. ... The latter appears to have been thought by the convention preferable to the former, and I presume will be most agreeable to the States.

The Federalist No. 80, at 474-75. Such a philosophy is consistent with the Supremacy Clause of the United States Constitution: “This Constitution and the Laws of the United States ... shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2. Certainly the Supremacy Clause does not provide an independent right of action (*Armstrong v. Excep. Child. Ctr., Inc.*, ___ U.S. ___, 135 S.Ct. 1378, 1383 (2015)), but it does provide appropriate instruction as to the deference due the clear dictates of Congress, when Congress elects to legislate. Moreover, pursuant to the Supremacy Clause, “as we have long recognized, if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted.” *Id.* at 1384, citing *Ex parte Young*, 209 U.S. 123, 155-56 (1908).

Looking then to the second prong of the *Katz*-suggested analysis, we find that from the very inception of the United States, Congress provided a uniform national system of copyright legislation, and that uniformity was respected by the States as well as individual citizens. As discussed in Allen’s initial brief (at 18-19), from the founding of our nation until the decision in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), it was widely accepted that states were not entitled to assert immunity to suit for copyright infringement and although this Circuit had no occasion to rule on the subject during that time, at least one lower court followed the common understanding. *Johnson v. Univ. of Va.*, 606 F. Supp. 321 (W.D. Va. 1985). The Congressional hearings surrounding the Copyright Remedy Clarification Act were replete with confirmation that all sides—citizens, States,

and Congress—had until that time assumed that States were subject to the Copyright Act, including its remedial provisions. This is precisely the same evidence on which *Katz* found that Article I bankruptcy authority of Congress superseded any otherwise-applicable state sovereign immunity; and it leads to the inevitable conclusion that this Court, in reliance on *Katz*, should find the CRCA constitutional.

While *Katz* alone is sufficient to show that the Supreme Court’s mandate has changed, *Katz* is not alone in upholding congressional authority to abrogate state sovereign immunity. Similar results have been reached with respect to statutes enacted to vindicate the constitutional rights of individuals. *Tennessee v. Lane*, 541 U.S. 509 (2004) (holding Congress validly abrogated state sovereign immunity under Title II of the Americans with Disabilities Act); *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (holding individuals can sue state employers for damages under the Family and Medical Leave Act).

For all of these reasons, *either* no legislation at all was necessary and the States were subject to the remedy provisions of the Copyright Act even without passage of the Copyright Remedy Clarification Act; *or*, at the least, Congress had the power to adopt the CRCA pursuant to its Article I authority, chose to do so in order to (as the title of the Act states) “clarify” that the States are indeed subject to that Act, and—as set out below—acted rationally in passing that legislation.

B. Congress Acted Rationally and with Ample Support

The State concedes that at least one basis articulated by Congress in support of its passage of the CRCA was its Article I authority. Response/Reply Br. at 7. The State does not dispute that if such authority exists—as Section A above shows it does—then it is well-settled that a “rational basis” test should be employed to determine the propriety of the legislation. *Eldred v. Ashcroft*, 537 U.S. 186, 204-05 (2003). In applying that test, the courts are directed to “defer substantially to Congress.” *Id.* The statute is presumptively constitutional, and the burden is on the State to show that Congress exceeded its constitutional bounds. *United States v. Bollinger*, 798 F.3d 201, 207 (4th Cir. 2015).

The rational basis for congressional action is set out in Allen’s opening brief. In short, Congress determined that the Supreme Court’s *Atascadero* decision had upended the national understanding of the scope of copyright law that had persisted since initial enactment of that law. Congress initiated preparation of a report from the Register of Copyrights (who has filed a brief in support of Allen, *see* [D45-1], and additional materials reflecting a subset of those considered in preparing the report), held hearings and took testimony and received additional reports. Only after doing so, and concluding that a significant problem existed that would only get worse if delayed, did Congress act to pass the Copyright Remedy Clarification Act, which did no more than reinstate that which all agreed had previously been understood as the state of the law. State’s Opening Br., at 20-28. The Register’s own brief further explains the substantial basis for the rational

decision of Congress.

The State attempts to denigrate the evidence on which Congress acted by reinterpreting it and by, in multiple instances, providing information as to subsequent events—while at the same time suggesting that information concerning subsequent events provided in the brief of the Copyright Alliance, [D44-1], should be disregarded. But Congress was entitled to act based on the information that was then before it—not what the State wishes it had learned. And, information as to subsequent events is relevant to confirm that Congressional fear that copyright violations and resultant litigation would increase if the states were not clearly subject to suit for infringement. In fact, if one searches Pacer for suits against states alleging copyright infringement, even if limiting it only to suits since 2000, one would find more than 150 such suits,⁴ suits that likely are only the tip of the iceberg since one can credibly assume that most infringements do not make it to court in view of the states' positions. This is not a *de minimis* problem, and Congress was right—and entitled—to take action to restore the status quo.⁵

C. While Article I Authority was Not the Sole Basis for Congress's Action, it was a Sufficient Basis

While Congress also relied on its authority under Sec. 5 of the Fourteenth

⁴ Such a list has been compiled and filed in a currently pending lawsuit in Texas, *Bynum v. Texas A&M Univ. Ath. Dept.*, Doc. 54-1 at 45-57 (Case No. 4:17-cv-00181, Nov. 30, 2017).

⁵ It is worth repeating that not a single state appeared to object to the proposed legislation, despite notification.

Amendment to enact the CRCA (*see, e.g.*, House Hearings⁶ at 20-21; Senate Hearing⁷ at 80; and Conference Report⁸ (“[i]f the states violate the copyright law, they are injuring the property rights of citizens”)), even the State does not dispute that Congress claimed to be acting at least in part on its Article I authority. *See*, Response/Reply Br. at 7.

Katz makes clear that where Congress has Article I authority to legislate, it may do so. And, as shown above, Congress did have such authority. No more is required to sustain validity of the Copyright Remedy Clarification Act.

II. The State’s Belated Argument that It and its Officials are Immune to Allen’s Right to Seek Declaratory Judgment with Respect to an Unconstitutional State Statute is neither Procedurally nor Substantively Correct

The State has newly raised and argued—in response to Allen’s assertion in Allen’s initial brief that the State had waived any such claim—that Count I of Allen’s complaint is also barred by sovereign immunity. *See* Allen Opening/Response Br. at 62-63; Response/Reply Br. at 36-40. The State claims

⁶ Copyright Remedy Clarification Act and Copyright Office Report on the Liability of States: Hearing on H.R. 1131 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Judiciary Comm., 101st Cong., 1st Sess. (1989).

⁷ 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. (1989).

⁸ H. R. Rep. 101-887 (Conf. Rep.) (1989).

that its mention of copyright preemption was sufficient to impliedly bring within its appeal Count I of the complaint (seeking declaratory judgment of statutory invalidity), even though its entire discussion related to Allen's claims of infringement (under Count II of the complaint); and that it is in any event entitled to raise an Eleventh Amendment immunity defense at any time. As a result, argues the State, the issue is properly raised by its Response/Reply brief. Response/Reply Br. at 36-40.

The State is wrong to imply that it cannot waive, by failing to raise in its opening brief, a defense of sovereign immunity to Count I of the complaint. This Court confronted and decided that issue in *Hutto v. S.C. Ret. Sys.* There, this Court held that:

Because a defendant otherwise protected by the Eleventh Amendment can waive its protection, it is, as a practical matter, structurally necessary to require the defendant to assert the immunity. We therefore conclude that sovereign immunity is akin to an affirmative defense, which the defendant bears the burden of demonstrating.

Hutto, 773 F.3d at 543. As set out in Allen's initial brief and is evident from a fair reading of the State's opening brief, the issue was not raised in that brief, and was waived. *Walker v. Prince George's Cnty, Md.*, 575 F.3d 426, 429 n* (4th Cir. 2009).

As a fallback position, the State argues that if, as the complaint asserts, the State's amendment to North Carolina's statutes is indeed an unconstitutional attempt to legislate in the field of copyright, Allen nonetheless has no remedy. The

State's apparent theory is that if the State and its employees are immune from suit for money damages under the Copyright Act, they also are immune (under the Eleventh Amendment) from any other suit that asserts claims based in part on the Copyright Act. *Id.*

The State's argument ignores the Supremacy Clause of the United States Constitution, and the way in which it is given effect in *Ex parte Young*. U.S. Const. art. VI, cl. 2. As the Supreme Court most recently pointed out in *Armstrong*, 135 S.Ct. at 1384, when—as here—“an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted.” That is, in effect, the relief Allen seeks through Count I of the complaint—a declaration that the statute is ineffective and a resulting injunction (prospective injunctive relief) prohibiting its use by Defendants to violate Allen's rights. Here, the parties sought to be enjoined are the very persons most likely (at least with respect to Allen's own property) to use and assert the statute in ways that violate Allen's rights, as they already have done. Enjoining these Defendants will end the violations, and is precisely the type of relief intended and encompassed by *Ex parte Young*.

Thus, independent of Allen's claim for copyright infringement, his claim for a declaratory judgment of statutory invalidity, and an injunction against its enforcement, is entitled to proceed.

III. The Circumstances Surrounding the Waiver, Signed by the State, Granting Allen the Right to Sue the State, Encompass a Waiver of Sovereign Immunity Consistent with the Supreme Court's Decisions in *Atascadero* and *Port Authority*

The State does not deny that it entered into an agreement with Allen, the purpose of which was to settle claims of copyright by Allen against the State. J.A. 84 *et seq.* The State also does not deny that the agreement expressly permitted Allen to bring claims against the State at law and in equity, should the State again infringe Allen's copyrights. J.A. 89 ¶ 26. Neither does the State deny that the only forum in which Allen would be permitted to bring suit for copyright infringement is federal court. 17 U.S.C. § 301.

Nonetheless, the State asserts that it did not intentionally waive its immunity to suit for copyright infringement, relying on *Fla. Prepaid* for the principle that waivers of state sovereign immunity must be unequivocally expressed. (Response/Reply Br. at 41.)

In so doing, the State ignores the teaching of *Atascadero*, 473 U.S. at 239-40, that requires looking at the text of the waiver in context. *Atascadero* provided that waiver is to be found where review of the text "leave[s] no room for any other reasonable construction." *Atascadero's* instruction was implemented by the Supreme Court in *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990), a case ignored by the State. There, the Court found waiver of immunity in a statutory provision stating, as here, that the state "consents to suits, actions, or proceedings of any form or nature at law, in equity or otherwise,"

against the particular state agency. *Id.* at 306-08. The Court looked to surrounding circumstances—there, other aspects of the statute—to conclude that what it described as a waiver “express[] in expansive terms” was indeed a waiver of immunity to suit in federal court.

This method of determining whether a State has waived otherwise applicable immunities is not, strictly speaking, a theory of “implied waiver” although the State tries to describe it as such. Rather, it is a principle of interpretation—requiring that waivers be **interpreted** in light of the surrounding text and circumstances. And here, the circumstances compel a finding of waiver.

First, there is no doubt that the State had paid money to settle a copyright claim. The State asserts that it did not admit infringement, but that is irrelevant. It was accused of infringement, and it paid money to settle that claim (in a section of the Settlement Agreement specifically titled “Copyright Violations”), while providing agreement to be sued if it did so in the future. J.A. 88-90 ¶¶ 22, 32.

Second, the State’s allegation that it was allowed to retain a limited subset of documents did not in any way speak to its handling of other parts of Allen’s works, nor did it in any way authorize the State to do more than retain the records. The State’s assertion that it was entitled to display the works publicly following the agreement, or that Paragraph 21 of the Settlement Agreement constituted an agreement by Allen that all or any part of its work was converted into a public record mischaracterizes the Agreement and is wrong for each of three

reasons:

1. as the State and its employees well knew, under the Settlement Agreement the State was entitled to retain, even for archival purposes, only a limited subset of documents (*see* App. 91, ¶ 21);
2. neither in the paragraph on which the State relies, or elsewhere in the Settlement Agreement, did Allen agree that his photography would be converted into a public record (*id.*); and
3. prior to the date of the Settlement Agreement, the State's own Attorney General had provided an opinion recognizing that possession of copyrighted documents did **not** include any right beyond possession, despite the existence of the Public Records Act, because any interpretation that the Public Records Act would subject such works to disclosure is preempted by the Copyright Act. *See*, NCAJ Advis. Opin. (Oct. 19, 1993), Allen's Opening/Response Br. at Addendum B.

Third, the release set out in the Settlement Agreement, provided to State by Allen with respect to potential past claims, expressly defined "all claims" as encompassing federal lawsuits. J.A. 89 ¶ 26 ("any and all claims, demands, causes of action, ... whether arising out of common law or statute, whether state or federal claim"), making clear that the parties considered both state **and federal** claims to come within the ambit of the agreement's provisions.

Fourth, the Agreement focused, with respect to Allen, on copyright claims (e.g., the last sentence of the release provided by the State expressly warranted that as of that date, the State was not party to any contracts that would infringe Allen’s intellectual property rights; and the paragraph providing compensation to Allen for “Copyright Violations;” *see* J.A. 88-89, ¶¶ 22, 26).

Fifth, suits for copyright violations can be brought only in federal court. 17 U.S.C. § 301.

Knowing all of these facts, the State agreed that if copyright infringement did occur, it could be sued “at law or in equity”—using language virtually identical to the broad remedial provision that, in combination with facts analogous to those set out here, led the Supreme Court to conclude, in *Port Authority*, that waiver had occurred. 495 U.S. 306-08.

Consistent with the teaching of *Atascadero* as implemented and further explained in *Port Authority*, this Court should find that the State has waived any right to assert sovereign immunity to Allen’s claims of copyright infringement.

IV. Takings Claims Alleging 14th Amendment Violations, Including the Claim Here, Can be Brought in Federal Court and are Not Barred

While ignoring *Hutto*’s instruction as to waiver of claims of sovereign immunity, the State seeks to rely on its teachings to preclude Allen from bringing his takings claim in federal court. *Hutto*, 773 F.3d at 552. The State is wrong for each of two reasons: *Hutto* ought not be extended to takings of federally created

property rights, which fall within the predicted exception suggested in *Hutto* itself; and the Supreme Court of North Carolina has held the defense is not available in such cases.

A. *Hutto* Should Not be Applied to Takings of Federally Created Property Rights

Hutto was decided in the context of an attempt by South Carolina retirees to protect pension rights created under South Carolina law. South Carolina had modified its pension plan terms to require that, although all active employees must make contributions to the pension plans, those who had return to work after already dipping into the benefits of the plans would not be allowed to accrue enhanced benefits. The *Hutto* court determined that at least under those circumstances, the Eleventh Amendment bars Fifth Amendment taking claims against States in federal court when the State's courts remain open to adjudicate such claims. *Hutto*, 773 F.3d at 552.

But the claim here is far different, and *Hutto* should not be applied to it. Here, the claim at issue is one that was created by federal law, not by state statute, and that has its origin in the power granted to Congress under the Copyright Clause and the Necessary and Proper Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 8 and § 8, cl. 18. Moreover, it concerns property as to which Congress expressly stated that federal law, not state law, should control. 17 U.S.C. § 301.

The rule crafted in *Hutto* is one of deference in the light of competing claims, not a rule that is constitutionally required, as is reflected in *Hutto*'s recognition that an alternative solution would likely apply if state courts could not or would not adjudicate the takings claim.

Here, the takings claim involves property as to which Congress assigned title and exclusive ownership to Allen pursuant to the Copyright Act. 17 U.S.C. § 201. The State purported to take that property from Allen by means of a state law allowing it to copy and use Allen's property without compensation—acts that are expressly forbidden by the Copyright Act. 17 U.S.C. § 301. The State now seeks to perpetuate that problem by litigating, in its own courts, subject matter over which it has no jurisdiction. *Id.*

This case, then, presents one of the exceptions forecast by *Hutto*, and Allen should not be prohibited from bringing his takings claim in federal court.

B. *Hutto* also is Inapplicable Because the North Carolina Constitution Waives Sovereign Immunity as to Takings Claims and the State is Prohibited from Relying Upon that Defense

The State, in its response brief, raises sovereign immunity as a defense to Allen's taking claim. Even if sovereign immunity might otherwise properly be asserted to copyright claims in general, the State has waived its immunity to a takings claim by reason of North Carolina's constitution and by the fact that the sovereign immunity of the State of North Carolina is not constitutionally based but

rather a matter of common law—factors not considered in *Hutto*.

The Supreme Court of North Carolina holds that sovereign immunity does not bar direct state constitutional claims against the state and its agents. *Corum v. Univ. of N.C.*, 413 S.E. 2d 276, 291-92 (N.C. 1992). In effect, the North Carolina Constitution’s ““Declaration of Rights,” N.C. Const. art. I, itself acts as a waiver of sovereign immunity for rights covered therein. Property rights (a class of rights that concededly covers copyrights) are protected from takings by the “Law of the Land” clause of the Declaration of Rights. N.C. Const. art. I, cl. 19.

Furthermore, that Court holds that North Carolina has no constitutional basis for any state claim of sovereign immunity to claims against state actors, and that such immunity arises exclusively from judge-made law. *Id.*, 413 S.E. 2d at 291. Finally, that Court rejects any theory that the State can rely upon sovereign immunity as a defense to takings claims:

this Court has long held that when public officials invade or threaten to invade the personal or property rights of a citizen in disregard of law, they are not relieved from responsibility by the doctrine of sovereign immunity even though they act or assume to act under the authority and pursuant to the directions of the State.

Id. While applied in *Corum* to a suit in state court, the principles enunciated therein are not so restricted and should apply here as well.

For all of these reasons, Allen’s Takings Claim should proceed in federal court.

Conclusion

Both for the reasons set out in his Opening/Response Brief and those hereinabove, Allen should be permitted to pursue his claims in district court. Allen respectfully requests that this Court find and order that:

- The Copyright Remedy Clarification Act was duly and properly passed by Congress under both its Article I and Fourteenth Amendment powers, either of which would independently have been sufficient. As a result, the State is not entitled to invoke sovereign immunity as a defense to copyright claims.
- Takings claims for the taking of copyrights are not subject to sovereign immunity assertions by the State of North Carolina.
- To the extent, if any, that sovereign immunity applies, the *Ex parte Young* exception to sovereign immunity applies to claims against the State's officials in their official capacity. The State has not ceased its infringements, and its repeated infringements adequately support the necessity of prospective injunctive relief.
- Neither legislative nor qualified immunity applies to the individual Defendants, whose activities were far in excess of their duties and do not qualify for legislative immunity shielding; and whose actions violated well-known standards of copyright infringement. A "reasonable person" in Defendants' position would have possessed the knowledge of Defendants, and would have known their actions were unlawful.

- The State cannot assert qualified immunity, even if it otherwise would have been entitled to do so, because it waived immunity in the prior Settlement Agreement it entered with Allen following earlier accusations of infringement.
- The State waived any right to seek reversal of the district court's refusal to dismiss Allen's declaratory judgment claim; and would not be entitled to rely upon sovereign immunity (its only defense) to defeat that claim in any event.

Allen further respectfully requests that for the reasons and on the bases set out above, the district court's refusal to dismiss Plaintiff's Counts I and II of the complaint should be affirmed, and the decision dismissing Count III as to the State Defendants should be reversed.

Respectfully submitted this the 18th day of December, 2017.

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Certificate of Compliance

I certify that this brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-volume limitations of Rule 32(a)(7)(B). The brief was prepared using **Microsoft Word** and the text of the brief is in **14-point Times New Roman font**. Excluding the parts of the brief described in Rule 32(f), namely cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, and attachments, the brief contains **5,902** words, as counted by Microsoft Word.

/s/ Susan Freya Olive
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Certificate of Service

The undersigned certifies that the foregoing brief together with any and all attachments was filed through the CM/ECF system, which will automatically serve copies thereof on all counsel of record for Defendants-Appellants, on this the 18th day of December, 2017.

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