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

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

FREDERICK L. ALLEN, et al.,
Plaintiffs-Appellees-Petitioners
v.
ROY A. COOPER, III, as Governor of North Carolina, et al.,
Defendants-Appellants-Respondents,
and
FRIENDS OF QUEEN ANNE'S REVENGE, a non-profit corporation,
Defendant.

On Appeal from the United States District Court
for the Eastern District of North Carolina
Case No. 5:15-cv-00627-BO, Hon. Terrence W. Boyle

BRIEF OF *AMICUS CURIAE* DAVID NIMMER, RALPH OMAN, ERNEST YOUNG AND MIKE BYNUM IN SUPPORT OF PETITIONERS FREDERICK L. ALLEN AND NAUTILUS PRODUCTIONS, LLC'S PETITION FOR REHEARING *EN BANC*

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

INDEX OF AUTHORITIES iii

IDENTITY AND INTEREST OF *AMICI* 1

INTRODUCTION 2

ARGUMENT 4

A. States Waived Immunity from Copyright Claims in the Plan of the Convention 4

1. Hamilton, *Katz*, and the Plan of the Convention 4

2. The History and Text of the Copyright Clause Support Waiver 5

3. Federal Enforcement of Copyrights Has Minimal Impact on State Sovereignty 8

B. *Seminole Tribe* and Its Progeny Do Not Foreclose Application of Plan-of-the-Convention Waiver. 9

CONCLUSION 12

CERTIFICATE OF COMPLIANCE 13

CERTIFICATE OF SERVICE 14

INDEX OF AUTHORITIES

Page(s)

Cases

Alden v. Maine,
527 U.S. 706 (1999) 4

Allen v. Cooper,
244 F.Supp.3d 525 (E.D.N.C. 2017) 2

Bell v. Indiana University
No. 1:16-cv-02463 (S.D. Ind. 2016) 3

Blatchford v. Native Village of Noatak,
501 U.S. 775 (1991) 4

Bynum v. Texas A&M University Athletic Department
No. 4:17-cv-00181 (S.D. Tex.) 2

Campinha-Bacote v. Regents of the Univ. of Michigan
No. 1:15-cv-330 (S.D. Ohio 2016) 3

Central Virginia Community College v. Katz,
546 U.S. 356 (2006) 3, 4, 5, 6, 9, 10, 11

College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 148 F.3d 1343 (Fed. Cir. 1998) 11

County of Suffolk v. First Am. Real Estate Solutions
261 F.3d 179 (2d Cir. 2001) 9

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) 9, 10, 11

Goldstein v. California,
412 U.S. 546 (1973) 6

Murphy v. NCAA,
138 S. Ct. 1461 (2018) 8

Nettleman v. Florida Atlantic Univ. Bd. of Trustees
No. 16-cv-81339 (S.D. Fla. 2016) 3

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) 3, 4, 9, 10, 11

United States v. L.A. Tucker Truck Lines, Inc.,
344 U.S. 33 (1952) 11

United States v. Texas,
143 U.S. 621 (1892) 4

Constitution, Statutes and Rules

U.S. Const. art. I, §8, cl. 4 (the "Bankruptcy Clause") 5

U.S. Const. art. I, §8, cl. 8 (the "Copyright Clause") .... passim

U.S. Const. amend. XI 9

U.S. Const. amend XIV, §5 11

17 U.S.C. §105 9

17 U.S.C. §106 8

17 U.S.C. §511(a) 2

Act of May 31, 1790 8

Rev. Stat. §711 para. 5 (1873) 8

Act of Feb. 15, 1819, ch. 19, 3 Stat. 481, 481 8

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Vol. 1, §1.07 6

Vol. 1, §5.14 9

Vol. 8, App. 6 8

Vol. 8, App. 7(B) 5

Vol. 8, App. 7(C) 7

Vol. 8, App. 7(D) 8

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IDENTITY AND INTEREST OF *AMICI*

Amici are authors and scholars who have a strong interest in ensuring that copyrights, including their own, are protected against unwanted infringement, including by state actors.

David Nimmer is the author of the leading treatise, NIMMER ON COPYRIGHT, first published in 1963 by his late father, Melville B. Nimmer. The treatise is regularly cited by the Supreme Court and appellate courts across the country, as well as courts around the world.

Ralph Oman was the Register of Copyrights from 1985 to 1993. At the request of Congress, he studied the problems associated with state copyright infringement, and testified in support of the Copyright Remedy Clarification Act ("CRCA"). Oman now teaches at George Washington University Law School.

Ernest Young is the Alston and Bird Professor of Law at Duke University, who researches, writes, and teaches about federal constitutional law and federal courts. He has written extensively on the Supreme Court's sovereign immunity jurisprudence, including how that jurisprudence bears on federal intellectual property laws.

Michael Bynum has written and published approximately 100 books, focusing on sports history. Bynum is the victim of copyright infringement by state actors at Texas A&M University, who currently contend that sovereign immunity

protects them from liability for copying one of Bynum's books, removing his name, publishing it on the Internet, and then promoting a link to that book to approximately four hundred thousand A&M alumni. *See* Case No. 4:17-cv-00181, *Bynum v. Texas A&M University Athletic Department* (S.D. Tex.) ("*Bynum*").

Amici believe their background, research, and experience with state sovereign immunity and copyright infringement by state actors will help the Court understand the significance of this case and some of the errors in the Panel's decision.[3]

INTRODUCTION

This case presents an exceptionally important issue of constitutional law that warrants further review: whether Congress had authority to subject states to suit for copyright infringement, as Congress clearly intended to do in the CRCA, 17 U.S.C. §511(a). (Op. at 13-14).

The district court correctly recognized that many copyright infringement lawsuits have been filed against state actors in recent years.[4] *Amici* have located over 150 such cases filed since 2000.[5] State actors have invoked sovereign immunity as an excuse for a wide range of unauthorized conduct, including:

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[3] This brief was prepared by *Amici* and their counsel. No other person has authored this brief or contributed money for its preparation.
[4] *See Allen v. Cooper*, 244 F.Supp.3d 525, 535 & n.4 (E.D.N.C. 2017).
[5] *See Bynum*, Dkt. No. 62-1, Exhibit E.

publishing copyrighted photos to promote university programs,[6] reproducing copyrighted class materials,[7] publishing a researcher's health care model,[8] and in Bynum's case, publishing one of his books on the Internet after deliberately removing his name from the work. The Panel's decision will encourage other state actors to engage in similar misconduct, perhaps even worse.

There are significant errors in the Panel decision. This brief focuses on the error in failing to recognize that states waived immunity in 1789 when they ratified Article I's Copyright Clause—*i.e.* in the "Plan of the Convention." Although the Panel writes that *Seminole Tribe* and its progeny foreclosed a waiver based on Article I powers (Op. at 14), the Court's decision in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006)—ten years after *Seminole Tribe*—shows otherwise. *Katz* relied on Article I's Bankruptcy Clause to find a waiver of state immunity. The Court distinguished (a) Congress's authority to "abrogate" state immunity through legislation (*i.e.* the question addressed in *Seminole Tribe* and its progeny), from (b) those circumstances where states had already waived their immunity in 1789 when they ratified the Constitution (*i.e.* the question addressed in *Katz*). 546 U.S. at 379. Any speculation in *Seminole Tribe* concerning the

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[6] Case No. 1:16-cv-02463, *Bell v. Indiana University* (S.D. Ind. 2016).
[7] Case No. 16-cv-81339, *Nettleman v. Florida Atlantic Univ. Bd. of Trustees*, (S.D. Fla. 2016).
[8] Case No. 1:15-cv-330, *Campinha-Bacote v. Regents of the Univ. of Michigan* (S.D. Ohio 2016).

decision's effect on copyrights—like *Seminole Tribe's* speculation on bankruptcy—constitutes non-binding dicta. *Id.*at 363.

The Panel failed to recognize the doctrinal significance of *Katz* in recognizing Plan-of-the-Convention waivers of immunity. The Panel further erred when it dismissed *Katz* as "distinguishable" and involving a "unique" circumstance relating to bankruptcy cases (Op. at 15), without even addressing the history or text of the Copyright Clause, which are similar to the Bankruptcy Clause and show that states waived immunity for copyright claims when they ratified the Constitution.

ARGUMENT

A. STATES WAIVED IMMUNITY FROM COPYRIGHT CLAIMS IN THE PLAN OF THE CONVENTION

1. Hamilton, Katz, and the Plan of the Convention

Alexander Hamilton first discussed Plan-of-the-Convention waivers of sovereign immunity when he wrote that immunity "is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States." Federalist No. 81. The Supreme Court acknowledged this theory on several occasions,[9] but *Katz* was the first time the Court held that states waived some of their immunity from suits involving private parties in the Plan of the Convention.

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[9] *See Alden v. Maine*, 527 U.S. 706, 713 (1999); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991); *see also United States v. Texas*, 143 U.S. 621, 646 (1892) (recognizing that states waived immunity from suits brought by the United States when they ratified the Constitution).

See 546 U.S. at 373. The Court relied on the history and text of Article I's Bankruptcy Clause to hold that states waived immunity in bankruptcy preferential transfer cases seeking monetary recovery: "States agreed in the plan of the [Constitutional] Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'" *Id.* at 377-79 (quoting U.S. Const. art. I, §8, cl. 4). *Katz* emphasized the need for "uniform" federal bankruptcy laws to solve the problem existing at the time of the Convention associated with inconsistent enforcement of discharge rights from state to state. *Id.* at 366-69.

2. The History and Text of the Copyright Clause Support Waiver

The Supreme Court has not yet considered whether states waived their immunity in copyright cases when they ratified the Constitution. Ample historical and textual evidence demonstrates that they did. The Continental Congress encouraged states to adopt legislation securing the "exclusive rights" of authors to their works. *See* 8 NIMMER ON COPYRIGHT, App. 7(B) (reprinting the 1783 Resolution). James Madison argued, however, that Article I's Copyright Clause was necessary in the new 1787 Constitution because "[t]he States cannot separately make effectual provisions" for copyrights and patents. Federalist No. 43. Similar to the Bankruptcy Clause, the Copyright Clause was adopted to address the problems encountered under the Articles of Confederation with state-by-state

enforcement of conduct with a national reach. *See id.;* Donner, at 361-62, 370-74. In that era, it was impractical for an author to travel the states to try to obtain protection for a work, and virtually impossible to achieve uniform protection. *Id.* at 374. Although 12 of the 13 states adopted their own copyright laws, each law applied only within that particular state. *Id.* at 361-62. In some states, the laws did not even take effect because they were conditioned on all other states adopting similar laws (which Delaware never did). *Id.* The Framers wanted "a uniform national system of copyright law which would supplant a patchwork system of local state control," thereby preventing individual states from withholding protection. *See* Jones at 723 ("The framers envisioned a uniform national system in which state regulatory powers would be subservient."). "The framers envisioned that monetary damages in private citizen suits would be an important element in the establishment of this superior federal authority." *Id.*

The Copyright Clause grants Congress authority to enact laws to secure to authors "the exclusive Right to their respective Writings." U.S. Const. art. I, §8, cl. 8. "Congress manifestly has the power either to grant complete exclusivity or no protection at all." 1 NIMMER ON COPYRIGHT §1.07. The states adopted this Clause without any reservations from Congressional authority. "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) (addressing

Copyright Clause). Copyright protections are not exclusive to the author if states may freely use the work without liability for infringement. Recognition of Plan-of-the-Convention waiver in copyright cases enforces the plain language of the Constitution and gives it the meaning the Framers intended.

Noah Webster's story reinforces this point. Described as "the father of American copyright legislation," Webster wrote a textbook on the English language in 1782 and literally went from state to state advocating for copyright protections of literary works. Donner at 370-75. Twelve states adopted copyright laws, none of which exempted state actors from their reach. *See* 8 NIMMER ON COPYRIGHT, App. 7(C) (reprinting the statutes). At the time of the Constitutional Convention, "[t]he frustrations of Webster in his travels to obtain copyrights was well known throughout the states," and influenced the Framers when they adopted the Copyright Clause. Donner at 371-72, 374. Given that state schools were primary consumers of textbooks like Webster's, the Framers must have intended the "exclusive" protection authorized under the Copyright Clause to protect against infringement by state actors, too.[10] It makes no sense that the Framers would act to redress the national problem identified by Webster, only to leave Webster's

[10] State-sponsored education was on the rise by the 1780's. *See, e.g,* www.uga.edu/history.php (University of Georgia chartered in 1785); https://www.northcarolina.edu/about-our-system/220-years-history (University of North Carolina chartered in 1789).

particular situation unprotected against state infringers.[11]

3. Federal Enforcement of Copyrights Has Minimal Impact on State Sovereignty

From 1790 through today, Congress has granted authors "exclusive rights" or "sole rights" in their protected works. *See, e.g.,* 17 U.S.C. §106; Copyright Act of 1909, §1; Act of May 31, 1790.[12] Copyright laws long ago emphasized the importance of federal forums to protect copyrights, granting jurisdiction to federal district courts to hear copyright claims in 1819—56 years before granting those courts general jurisdiction over all federal questions. *See* Act of Feb. 15, 1819, ch. 19, 3 Stat. 481, 481. And, in 1873, Congress made that jurisdiction exclusive of the state courts. *See* Rev. Stat. §711 para. 5. None of those Acts suggested an intent to allow state actors to infringe copyright holders' exclusive rights.

Holding state actors liable for their acts of infringement will exert only minimal impact on state sovereignty. Federal intellectual property obligations govern state and private entities alike, and impose no limits on state regulatory autonomy. *Cf. Murphy v. NCAA*, 138 S. Ct. 1461, 1478-79 (2018) (finding no interference with state sovereignty under the anti-commandeering doctrine where "Congress evenhandedly regulates an activity in which both States and private actors engage" and "does not regulate the States' sovereign authority to regulate

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[11] For additional discussion of the Copyright Clause's origin and early copyright laws, *see* Fenning; Constitutional Rights Foundation Paper; HistoryofCopyright.org,

[12] The copyright laws adopted in 1790, 1802, 1819, 1831, 1856, 1861, 1873, and 1909 are reprinted at 8 NIMMER ON COPYRIGHT, App. 6 & 7(D).

their own citizens"). And copyright suits—unlike suits to recover state debts or enforce state bonds that gave rise to the Eleventh Amendment—are unlikely to pose the threat of government insolvency that has motivated most of the Supreme Court's sovereign immunity jurisprudence. *See generally* Young, 35 HARV. J. L. & PUB. POL'Y 593.

State entities routinely seek copyright protections for their works, even filing suit to enforce their rights. *See, e.g., County of Suffolk v. First Am. Real Estate Solutions* 261 F.3d 179 (2d Cir. 2001); *see also* 1 NIMMER ON COPYRIGHT §5.14.[13] Federal statutes that hold states to the same rules for respecting and enforcing federally-created property rights that apply to everyone else pose no significant threat to state sovereignty. Given that Plan-of-the-Convention waivers focuses on the text and history of a specific clause—here the Copyright Clause—recognizing waiver will have only a limited impact on state sovereignty.

B. *SEMINOLE TRIBE* AND ITS PROGENY DO NOT FORECLOSE APPLICATION OF PLAN-OF-THE-CONVENTION WAIVER.

Seminole Tribe and its progeny do not address Plan-of-the-Convention waivers. As *Katz* shows, the broad statements regarding Article-I based immunity waivers in *Seminole Tribe* and *Fla. Prepaid Postsecondary Educ. Expense Bd. v.*

[13] Although the U.S. may not claim copyrights in its own works, 17 U.S.C. §105, no similar prohibition applies to state-created works.

College Sav. Bank, 527 U.S. 627 (1999)—relied on by the Panel (Op. at 14-15)—are dicta, which should not be followed today.

The *Seminole Tribe* Majority wrote that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." 517 U.S. at 73. Justice Stevens dissented, expressing concerns that the Majority's reasoning could protect states against claims involving bankruptcy, copyright, or antitrust violations. *Id.* at 77 n.1 (Stevens, J., dissenting). The Majority dismissed his concerns as "exaggerated," *Id.* at 72 n.16, but when later faced with a case actually presenting the issue of immunity in bankruptcy cases, the Court found there was no immunity, rejecting parts of *Seminole Tribe* as dicta. *Katz*, 546 U.S. at 363 ("we are not bound to follow dicta in a prior case in which the point now at issue was not fully debated"). The same vindication of Justice Stevens' concerns holds true regarding the Copyright Clause. *Seminole Tribe* did not address that clause, and any purported statements regarding its meaning are dicta.

Florida Prepaid's statements regarding Article I powers, including the sentence quoted by the Panel (Op. at 14), likewise constitute dicta. That decision asserted that "*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to Article I powers; hence the Patent Remedy Act cannot be sustained under either the Commerce Clause or the Patent Clause." 527 U.S. at 636. But the next sentence admits the Article I issue was not presented for

decision in that case: "The Federal Circuit recognized this, and College Savings and the United States do not contend otherwise." *Id.* Although the Federal Circuit found abrogation of immunity in *Fla. Prepaid*, it focused on the ability to abrogate immunity under Section 5 of the Fourteenth Amendment, and did not rely on Article I powers. *See College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,* 148 F.3d 1343, 1347-55 (Fed. Cir. 1998). And, on review in the Supreme Court, neither respondent asserted an Article I-based waiver as an alternate basis for affirming the Federal Circuit. Thus, the issue of the scope of Article I powers, and their effect on state immunity, was not presented to the Court for decision, and the Court's comments on Article I cannot qualify as binding precedent.[14] *See Katz*, 546 U.S. at 363.

The Panel erred by following the dicta from *Seminole Tribe* and *Fla. Prepaid*, and failing to perform the Plan-of-the-Convention analysis compelled by the Court's more recent decision in *Katz*. As explained above, states waived immunity for copyright claims when Article I's Copyright Clause was ratified. Thus, Congress has been free since 1789 to grant authors the "exclusive rights" provided for under the Copyright Clause without regard to state immunity, which Congress did in the CRCA.

[14] Decisions are not binding on jurisdictional issues lurking in a case, yet not expressly addressed. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

CONCLUSION

Amici pray that rehearing be granted.

Respectfully submitted by:

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CERTIFICATE OF COMPLIANCE

I, W. Scott Hastings, hereby certify that on this 31st day of July, the foregoing Amicus Brief of *Amicus Curiae* David Nimmer, Ralph Oman, Ernest Young and Mike Bynum complies with type-volume limits under Federal Rule of Appellate Procedure 29(b)(4) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 2,566 words, and is proportionally spaced using a 14-point Times New Roman font.

/s/ W. Scott Hastings
W. Scott Hastings

CERTIFICATE OF SERVICE

I, W. Scott Hastings, hereby certify that I electronically filed the foregoing Brief of *Amicus Curiae* David Nimmer, Ralph Oman, Ernest Young, and Mike Bynum in Support of Petitioners Frederick L. Allen and Nautilus Productions, LLC's Petition for Rehearing *En Banc* with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on July 31, 2018, which will send notice of such filing to all registered CM/ECF users.

/s/ W. Scott Hastings