No. 18-877

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

BRIEF OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

J. MAX ROSEN
MUNGER, TOLLES & OLSON LLP
560 Mission Street
San Francisco, CA 94105
(415) 512-4094
max.rosen@mto.com

ELAINE J. GOLDENBERG
Counsel of Record
MUNGER, TOLLES & OLSON LLP
1155 F Street NW
Washington, DC 20004
(202) 220-1114
elaine.goldenberg@mto.com

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. A Grant Of Certiorari Is Warranted Given The Critical Importance Of The CRCA's Protections For Copyright Holders 3

A. In Light Of Decisions Invalidating The CRCA, Copyright Infringement By States Is A Serious And Accelerating Problem 3

B. Alternative Remedies For Copyright Infringement Are Not An Adequate Substitute For Monetary Remedies Under Federal Copyright Law 10

C. Music Creators And Owners Suffer Harm In The Absence Of A Federal Damages Remedy Against State Copyright Infringement 14

II. Only This Court Can Resolve The Tension In Its Existing Sovereign Immunity Decisions, Which Is Unduly Constraining Lower Courts 16

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Alden v. Maine,
527 U.S. 706 (1999) 18

Atascadero State Hospital v. Scanlon,
473 U.S. 234 (1985) 5

Bank of Am. Corp. v. City of Miami,
137 S. Ct. 1296 (2017) 16

Biomedical Patent Mgmt. Corp. v. California, Dep't of Health Servs.,
505 F.3d 1328 (Fed. Cir. 2007)..... 19

Bowles v. Russell,
551 U.S. 205 (2007) 20

BV Eng'g v. Univ. of California, Los Angeles,
858 F.2d 1394 (9th Cir. 1988) 5

Cent. Virginia Cmty. Coll. v. Katz,
546 U.S. 356 (2006) 3, 16, 18, 19

Chavez v. Arte Publico Press,
204 F.3d 601 (5th Cir. 2000) 8, 13

City of Boerne v. Flores,
521 U.S. 507 (1997) 21

EEOC v. Wyoming,
460 U.S. 226 (1983) 20

TABLE OF AUTHORITIES
(continued)

Page(s)

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,
527 U.S. 627 (1999) 3, 8, 18, 20

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 17

Hurst v. Florida,
136 S. Ct. 616 (2016) 20

Johnson v. Univ. of Virginia,
606 F. Supp. 321 (W.D. Va. 1985)..... 4

Kimel v. Fla. Bd. of Regents,
528 U.S. 62 (2000) 10, 20

Kirtsaeng v. John Wiley & Sons, Inc.,
136 S. Ct. 1979 (2016) 12, 16

Lane v. First Nat. Bank of Bos.,
871 F.2d 166 (1st Cir. 1989)..... 5

Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,
551 U.S. 877 (2007) 20

Los Angeles Cty., Cal. v. Humphries,
562 U.S. 29 (2010) 10

McDonald v. City of Chicago,
561 U.S. 742 (2010) 20

TABLE OF AUTHORITIES
(continued)

Page(s)

Mills Music, Inc. v. Arizona,
591 F.2d 1278 (9th Cir. 1979) 4, 14, 17

National Association of Boards of Pharmacy v. Board of Regents of the University System of Georgia,
633 F.3d 1297 (11th Cir. 2011) 19, 20

Richard Anderson Photography v. Brown,
852 F.2d 114 (4th Cir. 1988) 5, 13

Schine Chain Theatres, Inc. v. United States,
334 U.S. 110 (1948) 11

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) 2, 8, 10, 17

Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.,
135 S. Ct. 2507 (2015) 17

Washingtonian Publishing Co. v. Pearson,
306 U.S. 30 (1939) 10, 15

Ex parte Young,
209 U.S. 129 (1908) 10

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL PROVISIONS

U.S. Const. Article I § 8 8

FEDERAL STATUTES

17 U.S.C. 301 13

17 U.S.C. 501(a)-(b) 3, 6

17 U.S.C. 502-505 3

17 U.S.C. 511(a) 6

17 U.S.C. 511(b) 6

28 U.S.C. 1338 13

Copyright Remedy Clarification Act of 1990, Pub. L. No. 101-553, 104 Stat. 2749 1

FEDERAL RULES

Supreme Court Rule 37.6 1

LEGISLATIVE MATERIALS

H.R. Rep. No. 282, 101st Cong., 1st Sess. (1989) 7

S. Rep. No. 305, 101st Cong., 2d Sess. (1990) ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

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

Hearing on Sovereign Immunity and the Protection of Intellectual Property Before the Senate Judiciary Comm., 107th Cong. (2002) ..... *passim*

OTHER AUTHORITIES

Amicus Br. of Copyright Alliance (4th Cir. No. 17-1522) 9

Canada Hockey v. *Texas A&M University Athletic Dep't*, Dkt. No. 62-1, Ex. E (S.D. Tex. No. 17cv00181) 9

General Accounting Office, *Intellectual Property: State Immunity in Infringement Actions: Report to the Hon. Orrin G. Hatch, Ranking Minority Member, Senate Judiciary Comm.* (Sept. 2001) 9, 13, 14, 17

TABLE OF AUTHORITIES
(continued)

Page(s)

U.S. Copyright Office, *A Report of the Register of Copyrights: Copyright Liability of States and the Eleventh Amendment* 5-18, 91-97 (June 1988), *available at* http://files.eric.ed.gov/fulltext/ED306963.pdf 6, 11, 13, 16

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Recording Industry Association of America (RIAA) is a nonprofit trade organization representing the American recording industry. The RIAA supports and promotes the creative and financial vitality of the major recorded music companies. Its members are the music labels that comprise the most vibrant record industry in the world. The RIAA's members create, manufacture, and/or distribute approximately 85 percent of all legitimate recorded music produced and sold in the United States. In support of its members, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels.

In the Copyright Remedy Clarification Act of 1990 (CRCA), Pub. L. No. 101-553, 104 Stat. 2749, Congress abrogated the States' sovereign immunity from suit for copyright infringement. Resolution of the question presented in this case regarding the validity of the CRCA is highly significant to the RIAA because of its strong interest in ensuring that copyright holders can effectively enforce their rights and obtain monetary relief for infringement, regardless of whether an infringer is affiliated with state government or is part of the private sector.

---

[1] Counsel for all parties were provided with notice more than ten days in advance of the filing of this brief and have consented to the filing. In accordance with Rule 37.6, *amicus* confirms that no party or counsel for any party authored this brief in whole or in part, and that no person other than *amicus* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Congress enacted the CRCA to abrogate state sovereign immunity so as to permit monetary remedies against States when they infringe copyrights. But the lower courts, including the court of appeals in this case, have ruled that Congress lacked the power to take that step under the Copyright Clause in Article I of the Constitution or under Section 5 of the Fourteenth Amendment. Those rulings have effectively rendered the CRCA a dead letter.

The result is that States are free to infringe copyrights with impunity, with nothing to deter them from that bad behavior. Such infringement is therefore a serious and accelerating problem that meaningfully undermines copyright holders' rights. That problem is not ameliorated by the existence of an injunctive remedy against state officers or by the possibility that an aggrieved party might bring some state-law claim for relief. And it visits significant harms on music creators and owners like *amicus*'s members, as well as on other copyright holders. In light of the seriousness of the real-world injury created by lower courts' invalidation of the CRCA, this Court's review is warranted here.

Review is also warranted because that pernicious state of affairs arises in large part from tension between this Court's decisions that it is within this Court's sole authority to correct. In analyzing Congress's power under the Copyright Clause, lower courts have considered themselves bound by broad language in older sovereign immunity decisions of this Court stating that Congress has no authority under Article I to abrogate States' immunity, see *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44

(1996); *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627 (1999), and have therefore failed to give sufficient attention to a highly pertinent recent decision indicating that the language in question should not be regarded as authoritative, see *Cent. Virginia Cmty. Coll.* v. *Katz*, 546 U.S. 356 (2006). Without this Court's review, lower courts will simply stagnate, continuing to decide the Article I question in CRCA cases based on obedience rather than reason. Moreover, there are serious questions here regarding the validity of the CRCA pursuant to Section 5 that involve disagreement among the circuits and merit this Court's consideration.

ARGUMENT

I. A Grant Of Certiorari Is Warranted Given The Critical Importance Of The CRCA's Protections For Copyright Holders

A. In Light Of Decisions Invalidating The CRCA, Copyright Infringement By States Is A Serious And Accelerating Problem

1. Under federal copyright law, "[a]nyone who violates any of the exclusive rights of [a] copyright owner * * * or who" illicitly "imports copies or phonorecords into the United States" is "an infringer" and is subject to "an action for infringement." 17 U.S.C. 501(a)-(b). In such an action, a copyright holder can obtain injunctive relief as well as actual or statutory damages and, in some cases, costs and attorneys' fees. See 17 U.S.C. 502-505.

For much of the 20th century, it was understood that copyright holders could seek monetary relief against the States for copyright infringement.[2] For instance, in *Mills Music*, *Inc.* v. *Arizona*, 591 F.2d 1278 (9th Cir. 1979), decided shortly after enactment of the Copyright Act of 1976 (Copyright Act), the Ninth Circuit declared that "a state may not, consistent with the Constitution, infringe the federally protected rights of the copyright holder, and thereafter avoid the federal system of statutory protections." *Id.* at 1286; see, *e.g.*, *Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liability of States: Hearing on H.R. 1131 Before the Subcomm. on Courts, Intellectual Property and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong. 97 (1989) (CRCA Hearing) (former Register of Copyrights explains there is "no doubt * * * that the 1976 [copyright] law not only covered States and State entities, but that" they "understood that they were covered by that law at that time").

Of course, under that regime States sometimes infringed the copyrights of musicians or other creators. See, *e.g.*, *Mills Music*, 591 F.2d at 1281 (noting the finding that a State infringed a musician's copyright "willful[ly]" and "with full notice and knowledge of plaintiff's copyrights") (citation omitted); *Johnson* v. *Univ. of Virginia*, 606 F. Supp. 321, 322 (W.D. Va. 1985) (addressing state entity's unauthorized copying of photographs taken at sporting events). But the existence of a monetary

[2] References in this brief to infringement by "States" also encompass infringement by State actors—including universities, school systems, hospitals, and prisons—that are cloaked with state sovereign immunity.

remedy helped to deter States from engaging in such infringement and gave them strong incentives "to negotiate settlements or to enter into licensing agreements." *Hearing on Sovereign Immunity and the Protection of Intellectual Property Before the Senate Judiciary Comm.*, 107th Cong. 7 (2002) (Sovereign Immunity Hearing) (statement of James Rogan).

This Court's 1985 decision in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), which stated that a waiver of state sovereign immunity must be "unequivocal," changed the legal landscape. *Id.* at 241. Applying *Atascadero*, federal courts of appeals held that the Copyright Act did not clearly abrogate state sovereign immunity and that monetary relief therefore was not available against state infringers. See *Lane* v. *First Nat. Bank of Bos.*, 871 F.2d 166, 166-167 (1st Cir. 1989) (addressing misuse of compilations of financial data); *BV Eng'g* v. *Univ. of California, Los Angeles*, 858 F.2d 1394, 1395 (9th Cir. 1988) (addressing unauthorized copying of a computer program and manual); *Richard Anderson Photography* v. *Brown*, 852 F.2d 114, 116, 122 (4th Cir. 1988) (addressing unauthorized use of photographs created for a student prospectus). Courts expressed concern that the absence of such a monetary remedy would "allow states to violate the federal copyright laws with virtual impunity," but concluded that it was up to "Congress * * * to remedy this problem." *BV Eng'g*, 858 F.2d at 1400.

Congress acted swiftly to provide that remedy. As an initial matter, Congress commissioned a report from the Register of Copyrights to assess the scope of the problem. That Report, issued in 1988, identified numerous instances of copyright infringement by the

States, including many that had never come to court. See U.S. Copyright Office, *A Report of the Register of Copyrights: Copyright Liability of States and the Eleventh Amendment* 5-18, 91-97 (June 1988) (Register's Report), *available at* http://files.eric.ed.gov/fulltext/ED306963.pdf. The Report also discussed the deterrent effect of monetary relief for state infringement and the difficulties associated with the post-*Atascadero* change in the law. In one striking example of those difficulties, the Report noted a case in which a state entity had reproduced and then offered for sale copyrighted educational materials for nurses, but the copyright owner decided not to file suit upon learning that state sovereign immunity barred any monetary recovery (including costs or attorneys' fees) from the infringer. See *id.* at 8.

In 1990, with the Report in hand, Congress enacted the CRCA. The CRCA provides that "[a]ny 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," for "importing copies of phonorecords in violation of" statute, or for "any other violation under" federal copyright law. 17 U.S.C. 511(a); see 17 U.S.C. 501(a). It also provides that in such a suit against a State "remedies * * * are available for the violation to the same extent as such remedies are available for such a violation in a suit against any public or private entity other than a State," including actual damages, statutory damages, costs, and attorneys' fees. 17 U.S.C. 511(b).

The legislative history of the CRCA states that Congress's "purpose" in enacting the statute was to "abrogate State sovereign immunity to permit the recovery of money damages against States." H.R. Rep. No. 282, 101st Cong., 1st Sess. 2 (1989). That history also extensively recounts States' record of copyright infringement; takes the Report and its findings into account; notes that "copyright owners" had "found injunctive relief, which would be the only remedy available in copyright infringement cases against states if states have Eleventh Amendment immunity," to be "inadequate as a deterrence to copyright infringement"; discounts the effectiveness of state-law remedies; and concludes that "actual harm has occurred and will continue to occur if this legislation is not enacted." *Id.* at 2-12; see S. Rep. No. 305, 101st Cong., 2d Sess. 4-13 (1990); CRCA Hearing 53 (statute to act as a "deterrent to the States so that they are more careful about what they do").

2. Since the enactment of the CRCA, courts have rendered that statute essentially defunct by ruling that it is not a valid exercise of Congress's power to abrogate state sovereign immunity. Under those decisions, including the decision of the court of appeals in this case, States are once again free to engage in copyright infringement—no matter how widespread or blatant—without fear of having to pay any money as a result. Unsurprisingly, then, despite Congress's efforts, copyright infringement by States is once again a very serious problem. Because that problem could well be ameliorated by this Court's review in this case, a grant of certiorari is warranted here.

Beginning in the late 1990s, States seized on a pair of this Court's decisions to assert that the CRCA had

not validly abrogated States' sovereign immunity. Both of those decisions found that Congress lacked authority to abrogate state sovereign immunity under particular circumstances, but their holdings did not address the CRCA itself or, more generally, Congress's power under Article I of the Constitution "[t]o promote the Progress of Science and useful Arts[] by securing for limited Times to Authors * * * the exclusive Right to their respective Writings." U.S. Const. Art. I Section 8; see *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 63-64, 72 (1996) (holding that Congress lacked authority under Article I's Indian Commerce Clause to abrogate state sovereign immunity); *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627, 635-636, 647-648 (1999) (holding that the Patent and Plant Variety Protection Remedy Clarification Act had not validly abrogated state sovereign immunity under Section 5 of the Fourteenth Amendment).

The States' argument that the CRCA was invalid under those decisions met with some success in the courts of appeals, however, see, *e.g.*, *Chavez* v. *Arte Publico Press*, 204 F.3d 601, 607-608 (5th Cir. 2000)—and incidents of copyright infringement by States then began to multiply. For instance, in 2002, a photographer reported that, although a State had for years licensed his copyrighted photographs, after this Court's decision in *Seminole Tribe* that same State had abruptly repudiated the existing licensing contract and refused to pay anything for use of such copyrighted materials. Sovereign Immunity Hearing 90-91; see *ibid.* (recounting similar reports by other photographers). At the same time, the software industry reported 77 recent instances of "obvious and

flagrant * * * piracy" by States, including one instance in which a state hospital "all but admitted wrong doing and appeared potentially willing to settle * * * for hundreds of thousands of dollars in damages" before suddenly reversing its position and asserting that the CRCA's abrogation of sovereign immunity was invalid. *Id.* at 91-92.

In subsequent years, States have been further emboldened by additional lower court decisions holding that the CRCA is outside the scope of Congress's authority and that States are therefore immune from copyright claims for monetary relief. Copyright suits against States do not "accurately reflect the amount of intellectual property infringement engaged in by state entities because," in the absence of any possibility of monetary recovery, "many—if not most—instances of intellectual property infringement never find their way into the courts." Sovereign Immunity Hearing 92 (letter from software industry association). Still, using the existence of such suits as a very rough marker for the relative amount of copyright infringement in which States have engaged over time, such infringement is now accelerating at an alarming rate. Compare General Accounting Office, *Intellectual Property: State Immunity in Infringement Actions: Report to the Hon. Orrin G. Hatch, Ranking Minority Member, Senate Judiciary Comm.* 9-10 (Sept. 2001) (GAO Report) (identifying approximately 24 copyright suits against States between 1985 and 2001), with *Canada Hockey* v. *Texas A&M University Athletic Dep't*, Dkt. No. 62-1, Ex. E (S.D. Tex. No. 17cv00181) (collecting over 150 copyright cases filed against States between 2000 and 2017); see also, *e.g.*, Amicus Br. of Copyright Alliance 6-7 (4th Cir. No. 17-1522) (noting

that of more than fifty instances of copyright infringement by States documented in the records of Getty Images, an agency that distributes photographs and film footage, sixteen instances arose in the last three years alone).

B. Alternative Remedies For Copyright Infringement Are Not An Adequate Substitute For Monetary Remedies Under Federal Copyright Law

As this Court observed in *Washingtonian Publishing Co.* v. *Pearson*, 306 U.S. 30 (1939), a copyright is of no "value" to its owner if it cannot be effectively enforced in the courts. *Id.* at 39-40. When a State has engaged in copyright infringement, neither the possibility of seeking an injunction against a State officer under *Ex parte Young*, 209 U.S. 129 (1908), nor the possibility of pursuing a state-law theory of liability provides a meaningful alternative to a suit for monetary relief under federal copyright law.[3]

1. As Congress made clear in enacting the CRCA, "[i]njunctive relief for copyright violations does not provide adequate compensation or effective deterrence for copyright infringement." S. Rep. No. 305, at 12.

An injunction against a state officer barring copyright infringement is necessarily prospective only. See generally *Los Angeles Cty., Cal.* v. *Humphries*, 562 U.S. 29, 31 (2010). Accordingly, a State that fac-

[3] This Court has inquired into the existence of alternative remedies in assessing whether a State has sovereign immunity from suit. See *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 91-92 (2000); *Seminole Tribe*, 517 U.S. at 71 n.14.

es nothing more burdensome than an injunction can infringe with complete impunity until such time as the infringement is detected, a lawsuit against a State official is brought, and a court issues injunctive relief. States are highly unlikely to be deterred from infringement under those circumstances. See CRCA Hearing at 99; Register's Report 6.

States may also be able to avoid or circumvent injunctions. A State that can freeload on the copyrights of another until a court prospectively bars that wrongdoing has a strong incentive to conceal its infringement for as long as possible. And because any injunction will issue only against particular state officers in their official capacities, and will of necessity cover only specifically defined infringing activity, even in the face of an injunction a State may be able to continue with infringement very similar to the activity that the injunction addresses—especially given that enforcement of an injunction against a State officer through a contempt sanction may be an onerous undertaking. See Register's Report 15; cf. Pet. App. 12a, 44a.

Moreover, a copyright holder who brings suit for an injunction does not receive any compensation for infringing activity by the State that has already taken place, even if that activity has drained substantial value from the copyright. Cf. *Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110, 128 (1948) (ruling in antitrust case that "injunction against future violations is not adequate to protect the public interest" because "[i]f all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact"), *overruled on other grounds*, *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984). That is

especially problematic now that technological advances have made it possible for a State to engage in substantial copyright infringement very quickly and costlessly. See, *e.g.*, Sovereign Immunity Hearing 43 (statement of Prof. Paul Bender) (advances in internet technology "now make it possible for a university to distribute copies or performances of copyrighted works to unlimited numbers of faculty, students, and even members of the general public"). It is also particularly unsatisfying with respect to copyrighted works that lose value over time, such that the material damage to the copyright holder already has been done when an injunction finally issues.

Finally, for some copyright holders, an injunction may not justify the cost of suit against a state infringer. The Copyright Act's provisions for damages and attorneys' fees reflect a careful "balance of interests." Sovereign Immunity Hearing 14 (statement of Register of Copyrights). But without any prospect of such recovery, a copyright holder may not be able to secure counsel willing to take on an infringement case in the first place, see CRCA Hearing 99, or may lack the wherewithal to pursue the case to its conclusion, see S. Rep. No. 305, at 10 ("A company that licenses performance rights for musical compositions withdrew an infringement suit against a community college because it was too expensive to contest."); cf. *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1986-1987 (2016) (discussing litigation incentives created by possibility of attorneys' fee award in copyright cases).

2. In addition, if monetary remedies for copyright infringement by States are unavailable under federal law because of state sovereign immunity, state law is unlikely to provide a viable alternative remedy to

which copyright holders can turn to recoup their losses or attempt to deter States from future infringement. See, *e.g.*, GAO Report 2, 17-24.

First, with certain exceptions, Congress generally has provided for exclusive jurisdiction in federal courts over copyright claims, 28 U.S.C. 1338, and for preemption of state-law causes of action that protect copyright or an "equivalent right," 17 U.S.C. 301. As Congress understood when it enacted the CRCA, those statutory provisions can make it difficult for plaintiffs to seek relief for copyright infringement in state courts or under state law. See S. Rep. No. 305, at 5; Register's Report 2; Sovereign Immunity Hearing 8 (statement of James Rogan) (stating that "it is difficult to imagine any sufficient and practical alternative State remedy for State infringement of a copyright").[4]

Second, even assuming that a state-law claim can survive application of those federal provisions, there are numerous other reasons why such a claim may not provide effective relief. A state-law claim that is not preempted may require plaintiffs to conceive of "untested legal theories" to attempt to protect their copyright rights under state law. Sovereign Immunity Hearing 8. In the case of widespread infringement, plaintiffs must undertake that task with respect to a number of different jurisdictions. Such untested theories may well fail. Moreover, as plaintiffs develop theories, States may amend their

[4] One court of appeals has emphasized the fact that Congress itself is responsible for some limitations on state remedies. See *Chavez*, 204 F.3d at 607. But those limitations help ensure the national uniformity of copyright law, which is part of Congress's mandate under Article I's Copyright Clause. See, *e.g.*, *Richard Anderson Photography*, 852 F.2d at 118.

laws to subvert those theories. Indeed, in this very case, North Carolina amended its laws in 2015 to declare that "photographs, video recordings, or other documentary materials of a derelict vessel or shipwreck or its contents" are "public record[s]," regardless of whether those materials are copyrighted or whether the owners of the copyrights might otherwise have some state-law claim for relief based on the State's unauthorized use of the materials. Pet. App. 44a-45a.[5]

C. Music Creators And Owners Suffer Harm In The Absence Of A Federal Damages Remedy Against State Copyright Infringement

The absence of a federal monetary remedy for state copyright infringement and the general inadequacy of other remedies is problematic for music creators and owners, who have suffered from State infringement in the past and are likely to do so again in the future. See, *e.g.*, *Mills Music*, 591 F.2d at 1280; Sovereign Immunity Hearing 46 (statement of Prof. Paul Bender) ("Copyrighted software, music, motion pictures, sound recordings and other works are used by many State departments and agencies."); S. Rep. No. 305, at 12 (for "[s]ome copyrighted materials, such as music[,] * * * the only meaningful remedy for infringement is damages"); *id.* at 9 ("creators and

[5] A State also may have broad-based sovereign immunity in its own courts. See Sovereign Immunity Hearing 8 (statement of James Rogan); GAO Report 23. Notably, in a 2001 study the GAO identified only four copyright cases that had been filed in state court from 1985 to 2001, none of which had proceeded to judgment. GAO Report 22.

producers" of "music" are "hurt" without federal damages remedy against state infringement).

As an initial matter, the absence of an adequate monetary remedy is particularly pernicious in that context because of the nature of the copyrighted works. Digital piracy of sound recordings and musical works, including by States, can be quick and easy to accomplish and is especially prevalent at the time of initial release. That is precisely the period during which such a work may have its highest earning potential. Thus, "by the time unauthorized use is discovered and an injunction obtained," it may well be that "the music has lost value and enjoining future use is of little worth." Register's Report 14; Sovereign Immunity Hearing 14 (statement of Register of Copyrights); see S. Rep. No. 305, at 12.

More generally, for many music creators and owners, including *amicus*'s members, the entire value of the enterprise in which they are engaged lies in their copyrights. When those copyrights cannot be meaningfully enforced against the States, the resulting harm is serious in and of itself, cf. *Washingtonian Publishing Co.*, 306 U.S. at 39-40—but it also extends outward, to circumstances in which States are not involved. As a former Register of Copyrights explained in connection with the enactment of the CRCA, "[w]hen one group, whether rightly or wrongly, thinks it has found a loophole that gives its members a free copyright ride, * * * the result inevitably is a miasmic atmosphere of disorder and lawlessness that tears the fabric not only of the copyright law but of the disciplines and enterprises involved." CRCA Hearing 96. That tearing of the fabric of copyright law ultimately undermines the incentive to make music (and other creative works) in

the first place. See *Kirtsaeng*, 136 S. Ct. at 1982 (objective of copyright law is to "enrich[ ] the general public through access to creative works") (citation omitted); Sovereign Immunity Hearing 14 (statement of Register of Copyrights) (stating that when there is "diminution of incentives to create" the "American economy and culture will be poorer for it").

II. Only This Court Can Resolve The Tension In Its Existing Sovereign Immunity Decisions, Which Is Unduly Constraining Lower Courts

Certiorari is warranted here not only because of the importance of the question presented to protection of copyright rights but also because of a significant tension in this Court's sovereign immunity decisions that this Court alone can resolve. The courts that have addressed whether Congress has the power to abrogate sovereign immunity under Article I's Copyright Clause have, like the court below, considered themselves compelled to follow broad statements in this Court's older sovereign immunity decisions while giving short shrift to the relevant analysis in this Court's more recent decision in *Central Virginia Community College* v. *Katz*, 546 U.S. 356 (2006), which points strongly in favor of the conclusion that the CRCA is valid. Under those circumstances, the issue is not percolating in the lower courts; rather, it is stagnating, and only this Court can provide guidance by clarifying the state of the law. See, *e.g.*, *Bank of Am. Corp.* v. *City of Miami*, 137 S. Ct. 1296, 1310 (2017) (Thomas, J., concurring in part and dissenting in part) (noting that the Court granted certiorari "despite the absence of a circuit conflict" to decide if "language" in this

Court's earlier decisions by which court of appeals "felt bound" had "survived" this Court's later decisions); *Tex. Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507 (2015) (granting certiorari to decide whether disparate-impact claims could be brought under the Fair Housing Act after the circuits had uniformly concluded that they could be in light of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)).

1. In *Seminole Tribe*, this Court held that Congress could not abrogate state sovereign immunity pursuant to Article I's Indian Commerce Clause. See 517 U.S. at 47. The Court stated in dicta that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 72-73. And the Court suggested, again in dicta, that its analysis might sweep in the Copyright and Bankruptcy Clauses of Article I, neither of which was at issue in the case. See *id.* at 44 n.16.[6]

In subsequent cases, this Court again broadly stated, but did not hold, that Congress lacked power under any portion of Article I to abrogate state sovereign immunity. For instance, in *Florida Prepaid*, the Court asserted that "*Seminole Tribe*

---

[6] Addressing the dissent's suggestion that such an extension would be problematic, the Court stated that "there is no established tradition in the lower federal courts of allowing enforcement of" the federal copyright statutes "against the States." *Ibid.* As explained in Part I above, that is incorrect. See, *e.g.*, *Mills Music*, 591 F.2d at 1285; GAO Report 4 ("Historically, state governments have sued and been sued by others in federal court for intellectual property infringement just like any other owner or user of intellectual property.").

makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers"—but, because of the patentee's waiver, the question of Congress's power to abrogate under Article I was not before the Court in that case. 527 U.S. at 633, 636; see *id.* at 636-637 (stating that *Seminole Tribe* "reaffirm[ed] the view that state sovereign immunity does not yield to Congress' Article I powers"); see also *Alden* v. *Maine*, 527 U.S. 706, 712 (1999).

In *Katz*, this Court tackled a question never addressed in this Court's previous decisions: whether Congress can abrogate state sovereign immunity under Article I's Bankruptcy Clause. See 546 U.S. at 363. The Court acknowledged that its previous decisions "reflected an *assumption* that the holding in [*Seminole Tribe*] would apply to the Bankruptcy Clause." *Ibid.* (emphasis added). Nevertheless, the Court made clear that the relevant discussion in *Seminole Tribe* constituted "dicta" because it was based on an "erroneous" assumption that "was not fully debated." *Ibid.* The Court then analyzed the history of the Bankruptcy Clause and concluded that, given the importance placed on uniformity in bankruptcy law at the time of the Founding, the Clause was intended "to authorize limited subordination of state sovereign immunity in the bankruptcy area." *Id.* at 362-378.

Plainly, *Katz* is highly pertinent to the question whether Congress had the power under the Copyright Clause to abrogate state sovereign immunity in the CRCA. Indeed, the dissent in *Katz* noted that the Copyright Clause would be a valid source of such power under the majority's analysis because—"no less than the Bankruptcy Clause"—it was "motivated

by the Framers' desire for nationally uniform legislation." 546 U.S. at 384-385 (Thomas, J., dissenting). At a minimum, faithful application of *Katz* to the question of the validity of the CRCA would require analysis of the history of the Copyright Clause and the degree to which it reflects the Founders' desire for uniformity in copyright law.

But lower courts addressing the CRCA, including the court of appeals in this case, have not proceeded to that analysis, because they have felt constrained by the broad statements in this Court's earlier decisions about Congress's lack of power under Article I—regardless of the fact that *Katz* itself casts doubt on those statements. For instance, the decision below asserts that "*Seminole Tribe* and its progeny * * * make clear that Congress cannot rely on Article I powers to abrogate Eleventh Amendment immunity." Pet. App. 18a. Similarly, in *National Association of Boards of Pharmacy* v. *Board of Regents of the University System of Georgia*, 633 F.3d 1297 (11th Cir. 2011), the Eleventh Circuit stated that *Katz* "did not expressly overrule either *Seminole Tribe* or *Florida Prepaid*, and they remain precedent by which we are still bound." *Id.* at 1314-1315; accord, *e.g.*, *Biomedical Patent Mgmt. Corp.* v. *California, Dep't of Health Servs.*, 505 F.3d 1328, 1343 (Fed. Cir. 2007).

Under those circumstances, only this Court can clarify the law and lift the constraint created by its own decisions. See *Katz*, 546 U.S. at 379 (Thomas, J., dissenting) (suggesting that it is "impossible to square [*Katz*] with this Court's settled state sovereign immunity jurisprudence"). The Court regularly grants certiorari to decide whether and how to reconcile its older decisions with its more recent

precedent, and the same result is warranted here. See pp. 16-17, *supra*; see also, *e.g.*, *Hurst* v. *Florida*, 136 S. Ct. 616, 620-621, 623-624 (2016); *McDonald* v. *City of Chicago,* 561 U.S. 742, 758-759 (2010); *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 887-889 (2007); *Bowles* v. *Russell*, 551 U.S. 205, 213-214 (2007).

2. In addition, this Court's review is warranted to address whether the CRCA is a valid exercise of congressional power to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment.

As an initial matter, the decision below conflicts with a decision of the Eleventh Circuit on the question of how specifically Congress must invoke Section 5 in order to abrogate state sovereign immunity under that provision. In this case, the Fourth Circuit ruled that a statute "cannot effect a valid abrogation under [Section] 5" without an "invocation of authority conferred by" Section 5. Pet. App. 22a (citing *Florida Prepaid*, 527 U.S. at 642 n.7); see *id.* at 21a-25a. The Eleventh Circuit reached the opposite result in *National Association of Boards of Pharmacy*, concluding that Section 5 could be a source of authority for abrogation of state sovereign immunity under the CRCA even if "Congress only stated that it was relying on its Article I powers." 633 F.3d at 1315 n.30 (citing *EEOC* v. *Wyoming*, 460 U.S. 226 (1983), and *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (2000)). That issue is within the scope of the question presented, and this case therefore presents the Court with the opportunity to resolve the disagreement.

This Court's consideration also is warranted to make clear that a congressional abrogation of immunity under Section 5 may properly be premised on de-

terrence of future harm to property rights. The court below dismissed the relevance of Congress's findings that, without the CRCA, there was "a potential for greater * * * violations in the future." Pet. App. 30a. But it was eminently reasonable for Congress to conclude that copyright infringement by States would accelerate significantly without a deterrent monetary remedy in place. See pp. 7-10, *supra*. This Court should clarify that such an analysis is an appropriate basis for exercise of Congress's power to abrogate state immunity under Section 5. See, *e.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507, 518 (1997) (stating that, pursuant to Section 5, Congress may pass legislation "which deters or remedies constitutional violations").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ELAINE J. GOLDENBERG
Counsel of Record
MUNGER, TOLLES & OLSON LLP
1155 F Street NW
Washington, DC 20004
(202) 220-1114
elaine.goldenberg@mto.com

J. MAX ROSEN
MUNGER, TOLLES & OLSON LLP
560 Mission Street
San Francisco, CA 94105
(415) 512-4094
max.rosen@mto.com

February 7, 2019