No. 18-877

IN THE

Supreme Court of the United States

FREDERICK L. ALLEN, *et al.*,

Petitioners,

—v.—

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

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether Congress' abrogation of state sovereign immunity under the Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990), was necessary when the States surrendered any sovereign immunity to enforcement of exclusive rights secured by the Constitution's Copyright and Patent Clause and the States have no traditional immunity to suits enforcing an individual's intellectual property rights.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Association of the Bar of the City of New York ("Association"), through its Council on Intellectual Property, submits this amicus curiae brief in response to the Supreme Court's June 3, 2019 Order, granting the petition for certiorari of Frederick L. Allen et al. ("Petitioner") and setting forth the question presented that is in turn set forth above. The Association files this brief in accordance with this Court's Rule 37 in support of neither party; the parties to the appeal have consented to the filing of this amicus brief.[1]

The Association is a private, non-profit organization of more than 24,000 members who are professionally involved in a broad range of law-related activities. Founded in 1870, the Association is one of the oldest bar associations in the United States. The Association seeks to promote reform in the law and to improve the administration of justice at the local, State, federal, and international levels through its more than 150 standing and special committees. The Council on Intellectual Property (the "Council") is a

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1. With regard to inquiries raised by Supreme Court Rule 37.6, no party's counsel authored this brief in whole or in part. No party's counsel or no person—other than *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparation or submission of this brief. Sup. Ct. R. 17. Petitioner and Respondent each filed a blanket consent on June 24, 2019.

long-established standing committee of the Association, and is constituted principally of the Chairs of the following Committees: Art Law; Communications & Media Law; Copyright & Literary Property; Entertainment Law; Fashion Law; Information Technology & Cyber Law; Patents; Sports Law; Trade Secrets; and Trademark & Unfair Competition. The Council's membership reflects a wide range of corporate, private practice and academic experience in intellectual property law, and is dedicated to promoting the Association's objective of improving the administration of intellectual property laws.

SUMMARY OF THE ARGUMENT

In order to provide for full enforcement of rights granted under U.S. Const. art. I, § 8, cl. 8 (the "Copyright and Patent Clause") against all potential infringers, States surrendered any sovereign immunity they may have had at the time of the ratification of the U.S. Constitution. *See Cent. Va. Cmmty. Coll. v. Katz*, 546 U.S. 356 (2006) ("*Katz*"). Any finding otherwise fails to accord full breadth to the language "by securing" and "the exclusive Right" set forth in that clause. U.S. Const. art. I, § 8, cl. 8. The plain meaning of those phrases at that time (and today) requires that the rights granted are authors' and inventors' alone, including the right to exclude all others without exception. This Court has recognized the crucial importance of the right to exclude. *See Cont'l Bag Co. v. E. Paper Bag Co.,* 210 U.S. 405, 424–30 (1908); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979); *Wheaton v. Peters*, 33 U.S. 591, 660–64 (1834) ("*Wheaton*").

The Founding Generation was well aware of the difficulties authors had in securing rights on a State-by-State basis, and the Federalist Papers make clear that the goal was national uniformity. Indeed, the Copyright and Patent Clause was passed with no debate at the Constitutional Convention and the first Congress quickly enacted copyright and patent statutes. This historical context further establishes that States surrendered any sovereign immunity.

In fact, the States had no expectation of "common law sovereign immunity" to private copyright and patent enforcement suits prior to the founding, and therefore there was no such immunity to be retained. Pre-ratification copyright statutes suggest that the States gave up at ratification their rights to publish copyrighted works. Further, individuals had the right to appeal to the crown if dissatisfied with a colonial government encroaching onto crown-granted exclusive rights.

The States also retain no "law of nations sovereign immunity" from the enforcement of copyright and patent rights. An exception to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330; 1602-11 ("FSIA") applies to any foreign sovereign's "commercial activity". *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 766 (2019) (citing 28 U.S.C. § 1605(a)(2)). Infringements of copyright and patent rights are eminently commercial in nature, as evidenced by lower court holdings that foreign sovereign entities distributing copyrighted material in the United States are not immune to private

suit, and as such the "commercial activity" exception applies.

Finally, even if the States had not surrendered or retained any sovereign immunity to private copyright infringement suits, Congress's enactment of the Copyright Remedy Clarification Act, 17 U.S.C. § 511 ("CRCA") was proper under its powers under the Fourteenth Amendment. Abrogation under § 5 of that amendment is appropriate where it is remedial and intended to cure inadequate State-law remedies. *See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627, 639–40 (1999). Congress's clear purpose in enacting the CRCA was remedial—it was predicated on significant testimony illustrating the breadth and depth of copyright infringement by States and inadequacy of injunctive relief in State courts.

ARGUMENT

I. The States Surrendered Any Sovereign Immunity to Enforcement of Exclusive Rights Secured by the Constitution's Copyright and Patent Clause According to the Plan of the Convention.

Over a century ago, this Court, quoting the "eighty-first number of the Federalist, written by Hamilton," noted that "one of the attributes of sovereignty, [which] is now enjoyed by the government of every State in the Union" is "not to be amenable to the suit of an individual without its consent." *Hans v. Louisiana*, 134 U.S. 1, 12–13 (1890) (citation omitted). Again quoting Hamilton, the *Hans* court recog-

nized that the States consented to such private suits where "there is a surrender of this immunity in the *plan of the convention*." *Id.* at 13 (emphasis added); *see also Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1494–95 (2019) ("*Hyatt*") (quoting *Alden v. Maine*, 527 U.S. 706, 713 (1999)).

Hamilton's phrase "the plan of the convention" is a "synonym for the abrogation of the states' sovereignty through constitutional provisions that either transferred power to the federal government or placed direct restrictions on the states." James E. Pfander, *Waiver of Sovereign Immunity in the Plan of the Convention*, 1 Geo. J.L. & Pub. Pol'y 13, 27 (2002). In *Katz*, this Court established a framework for analyzing whether an Article I grant of power to Congress effected a plan-of-the-convention surrender of State sovereign immunity in connection with that power. In that case, the Congressional power at issue was to "establish uniform laws upon the subject of bankruptcies" under Article I, § 8, cl. 4 of the Constitution (the "Bankruptcy Clause"). 546 U.S. at 359. And *Katz* made clear that each Article I power granted must be independently analyzed for such a surrender.[2] *Id.* at 363 ("[W]e are not bound to follow our

2. Accordingly, the holding in *Florida Prepaid* (i.e. that "Congress may not abrogate state sovereign immunity [to private patent infringement suits] pursuant to its Article I powers[.]") is inapposite, as it did not address whether the Copyright and Patent Clause effected a plan-of-the-convention surrender of State sovereign immunity to private suit. *See Florida Prepaid*, 527 U.S. at 636 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996)). *Seminole Tribe*,

dicta in a prior case in which the point now at issue was not fully debated." (citation omitted)); *see also Hyatt*, 139 S. Ct. at 1497 ('[T]he Constitution affirmatively altered the relationships between the States . . . . Article I divests the States of the traditional diplomatic and military tools that foreign sovereigns possess."). The Court examined the language of the text of the Bankruptcy Clause and what "[t]he Framers would have understood" by that language. *Katz*, 546 U.S. at 359, 370, 376. The *Katz* court also presumed that "the Framers of the Constitution were familiar with the contemporary legal context when they adopted" the Bankruptcy Clause, and conducted a detailed analysis of that context as well as the history of Congress's enactments that the Clause empowered. *Id.* at 362–69, 372–76. The Court held that Congress's power to "treat States in the same way as other[s] . . . arises from the Bankruptcy Clause itself" and was "effected in the plan of the Convention[,]" whereby any State immunity to private suit under the bankruptcy laws was surrendered. *Id.* at 379.

A. The Plain Language of the Copyright and Patent Clause Expresses the States' Surrender of Sovereign Immunity.

When determining the scope of a Constitutional right, this Court "start[s] with the text . . . that defines that right in the first place." *Gamble v. United*

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however, confirmed the continuing vitality of plan-of-the-convention surrender of State immunity to private suits. *Seminole Tribe*, 517 U.S. at 68, 70 n.13.

States, 139 S. Ct. 1960, 1965 (2019); *Katz*, 546 U.S. at 359, 370, 376 (analyzing the text of the Bankruptcy Clause for plan-of-the-convention surrender of immunity).[3] Only one clause of the United States Constitution empowers Congress to grant exclusive rights to individuals:

> The Congress shall have power . . . [t]o promote the Progress of Science and useful Arts, by *securing* for limited Times to Authors and Inventors the *exclusive Right* to their respective Writings and Discoveries."

U.S. Const. art. I, § 8, cl. 8 (emphasis added). Contemporary dictionaries make clear that it was understood at the founding that an "exclusive" right was one "that has the force of excluding," "i.e. "shut[ting] out or keep[ing] from." J. Kersey, A New English Dictionary (8th ed. 1772); N. Bailey, Dictionarium Britannicum (1780) ("To Exclude . . . to shut out, debar or keep from"; 'Exclusive, pertaining to or having the force of excluding."); *see also* N. Webster, An American Dictionary of the English Language (1st ed. 1828) ("EXCLUSIVE, . . . Having the power of preventing entrance . . . Debarring from participation; possessed and enjoyed to the exclusion of others[.]"). And the Founders would have understood "secur[e]" to mean "to make secure," i.e. "out of danger, safe[.]" J. Ker-

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3. The scope of the States' sovereign immunity "neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Hyatt*, 139 S. Ct. at 1496 (quoting *Alden*, 527 U.S. at 713).

sey, A New English Dictionary (8th ed. 1772); N. Bailey, Dictionarium Britannicum (1780) ("Secure . . . that is safe, out of danger . . . To Secure . . . to make secure, to save, protect, or shelter[.]"); *see also* N. Webster, An American Dictionary of the English Language (1st ed. 1828) (SECURE, . . . To guard effectually from danger; to make safe. . . . To make certain; to put beyond hazard."). The express language of the Copyright and Patent Clause is clear: any rights granted to authors and inventors were theirs alone, and Congress was empowered to grant these rights such that the individuals receiving them were safe and certain in their possession thereof.

This Court's jurisprudence recognizes the absolute nature of the "exclusive right[s]" protected by the Copyright and Patent Clause. In *Continental Paper Bag Co.*, this Court recognized the right to exclude as imperative for protecting intellectual property. *See* 210 U.S. at 423 ("[T]he language of complete monopoly has been employed[.]"); *id.* at 430 ("It hardly needs to be pointed out that the right can only retain its attribute of exclusiveness by a prevention of its violation."); *Goldstein v. California*, 412 U.S. 546, 560 (1973) ("When Congress grants an exclusive right or monopoly, its effects are pervasive; no citizen or State may escape its reach."). And in *Kaiser Aetna*, this Court held that "the 'right to exclude,' [is] universally held to be a fundamental element of the property right," even as against "the Government[.]" 444 U.S. at 179–80.

Moreover, this Court specifically addressed the meaning of "secure" in *Wheaton* as meaning to "pro-

tect, insure, save, ascertain," and holding that the copyright owner in that case had a "sole right and liberty of printing" originating from Congress. 33 U.S. at 660–64.

There should be no doubt that neither the States nor the federal government are permitted to retain an exception in the "exclusive Right" under the Copyright and Patent Clause:

> The United States has no such prerogative as that which is claimed by the sovereigns of England, by which it can reserve to itself, either expressly or by implication, a superior dominion and use in that which it grants by letters-patent to those who entitle themselves to such grants. The government of the United States, as well as the citizen, is subject to the Constitution; and when it grants a patent the grantee is entitled to it as a matter of right, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor.

James v. Campbell, 104 U.S. 356, 358 (1881); *see also Fox Films Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("Congress did not reserve to the United States any interest . . . in the copyright, or in the profits that may be derived from its use."). Granting an "exclusive Right," but barring the author or inventor from bringing a private suit against the State or federal government for infringing that right, would fail to "secur[e]" that right in direct contradiction of the express language of the Copyright and Patent Clause.

The plain—and unique—language of the Copyright and Patent Clause reveals that Congress is empowered to imbue individual authors and inventors with the right to exclude *all others* from appropriating "their respective Writings and Discoveries." Therefore, under the express terms of the Clause, Congress may grant an individual the right to exclude *any* sovereign—whether State, federal, tribal, or foreign—from usurping that individual's copyright and patent rights, rights exercisable by suing the infringing sovereign. By ratifying the Constitution, and as set forth in the plain language ratified as part of the plan of the convention, each State surrendered any objection it might have had to an author's or inventor's enforcement of that right, against a State's infringement in a private suit.

B. The Legal Context and History of the Copyright and Patent Clause Implies a Plan-of-the-Convention Surrender of Sovereign Immunity.

In *Katz*, this Court examined the contemporary legal context of the Bankruptcy Clause, noting that the need for nationwide "uniform" bankruptcy laws was predicated by the pre-ratification "patchwork of insolvency and bankruptcy laws." *Katz*, 546 U.S. at 357, 366. "The Convention adopted [the clause] . . . with very little debate," and it received "immediate consideration" by the First Congress. *Id.* at 368–69, 377. The *Katz* court relied on this context and history in holding that "the power to enact bankruptcy legislation was understood to carry with it the power to subordinate state sovereignty." *Id.* at 377.

The founders would have been well-acquainted with the difficulty that authors and inventors had in securing rights for their writings and discoveries on a State-by-State basis:

> Numerous examples may be found in our early history of the difficulties which the creators of items of national import had in securing protection of their creations in all States. For example, Noah Webster, in his effort to obtain protection for his book, A Grammatical Institute of the English Language, brought his claim before the legislatures of at least six States, and perhaps as many as 12. Similar difficulties were experienced by John Fitch and other inventors who desired to protect their efforts to perfect a steamboat.

Goldstein, 412 U.S. at 556 n.12 (citation omitted). Although Madison made no specific reference to those examples in addressing the Copyright and Patent Clause in the Federalist No. 43, he made clear that the uniform national exclusive rights to be secured by that Clause would result in claims by private individuals against State infringers:

> 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 right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with *the claims of individuals*. The States cannot separately make effectual provision for either of the cases, and most of them

> have anticipated the decision of this point, by laws passed at the instance of Congress.

Id. at 555–56 (quoting The Federalist No. 43, p. 309 (B. Wright ed. 1961) (emphasis added)); *see also Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989) ("One of the fundamental purposes behind the Patent and Copyright Clauses of the Constitution was to promote *national uniformity* in the realm of intellectual property." (citation omitted) (emphasis added)). There was only "extremely limited" debate over the Clause at the Constitutional Convention, *Goldstein*, 412 U.S. at 555, and "[s]oon after the adoption of the Constitution, the First Congress enacted the Patent Act of 1790" as well as the Copyright Act of the same year. *Bonito Boats*, 489 U.S. at 146; *see also Goldstein*, 412 U.S. at 562 n.17.

Parallels between the Bankruptcy Clause and the Copyright and Patent Clause are clearly evident: this Court's discussions of their origins, lack of uniformity among State laws, non-controversial adoption by the Convention, and rapid exercise of Congress's Constitutional power grant. Accordingly, and analogously to the analysis of *Katz*, Congress's power to secure exclusive rights to authors and inventors also carries the power to subordinate a State's sovereignty to the private claims of individual authors and inventors under the plan of the convention.

II. The States Have No Traditional Immunity to Suits Enforcing an Individual's Intellectual Property Rights.

Recently, this Court noted that at the time of the founding, the States retained aspects of "traditional" sovereign immunity, which relied on concepts of both "'common law sovereign immunity' and 'law-of-nations sovereign immunity.'" *Hyatt*, 139 S. Ct. at 1493. In determining whether "common law sovereign immunity" was present, the *Hyatt* court reviewed "preratification examples" of private suits relating to the particular type of action at issue (namely private suits against a State in the courts of another State). *Id.* at 1494–95. The court also addressed applicable "international-law immunity principles" because "[a]fter independence, the States considered themselves fully sovereign nations." *Id.* at 1493.

A. The States Retained No "Common-Law Sovereign Immunity" to Suits Enforcing Government-Granted Exclusive Intellectual Property Rights.

Under the Statute of Anne, the royal library retained the right to use copyrighted works. Statute of Anne 1710, 8 Ann. c. 19 § V. Similarly, the State of North Carolina ("Respondent") retained rights for the State in copyrighted works. *See* An Act for Securing Literary Property § 1 (N.C. 1785), *reprinted in* 10 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, App. 7–33 (2019) (Requiring authors to "deliver[] to the secretary of the State one copy of such book, map or chart *for the use of the executive of the State* . . . ." (emphasis added)). Respondent could

have preserved these valuable and extensive rights during ratification, but did not.

Individuals' suits to enforce *British* copyright and patent grants in the colonies were unknown before independence, as the underlying statutes were never in force in the colonies. *See Wheaton*, 33 U.S. at 677, 690 (Thompson, J. dissenting); Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 49 J. Copyright Soc'y U.S.A. 675, 685–86 [ii] (2002) (citing, *inter alia*, 1 Sir William Blackstone, *Commentaries on the Laws of England* 107–08 (1771) ("Our American plantations . . . are subject however to the control of the parliament, though . . . not bound by any acts of parliament, unless particularly named.").

Hyatt, however, suggests that it would be appropriate to examine colonial-era common-law legal proceedings involving enforcement of private rights against colonial governments. *Hyatt*, 139 S. Ct. at 1493 (referring to Blackstone's 1765 explanation of "the common-law rule" of sovereign immunity). Under British common law, at least since the Declaration of Right in 1689, "it is the Right of the Subjects to petition the King." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 396 (2011) (citation omitted). Accordingly, when the Mohegan Indians were dissatisfied with the Colony of Connecticut's failure to abide by an order issued under the imprimatur of Queen Anne granting them exclusive rights in "lands which they had reserved to themselves and their tribe for their hunting and planting," Chief Sachem petitioned George II to relieve his tribe from Connecticut's "en-

croachments."[4] Petition of the Chief Sachem of the Mohegan Indians to the King (May 1736), https://www.british-history.ac.uk/cal-state-papers/colonial/america-west-indies/vol42/pp196-207 at 300.i-ii. The Sachem's petition makes clear that the colonies were subject to proceedings brought by individual British subjects to enforce exclusive rights granted to them by the Crown. By analogy, then, the States, by ratifying the Constitution and once again shouldering the burden of a superior—and this time, federal—sovereign, should not have expected to retain common-law immunity to the private suits of an individual to enforce an exclusive right granted by that federal sovereign.

B. States Retained No "Law-Of-Nations Sovereign Immunity" to Copyright and Patent Infringement Suits.

Earlier this term, in *Jam v. Int'l Fin. Corp.*, this Court explored the "concept" of "immunity enjoyed by foreign governments," holding that the Court must rely on a "body of (potentially evolving) law." 139 S. Ct. at 769–70; *see Hyatt*, 139 S. Ct. at 1493–94 (citing "law-of-nations" cases and commentaries dated from 1812 to 1916). While at the founding, a foreign sovereign's immunity was "virtually absolute[,] . . . under

4. Before independence, British subjects included both "Anglo-American colonists" and native American "Indians," as recognized "by both British officials and Native peoples themselves." Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings*, 70 Stan. L. Rev. 1025, 1056 (2018) (citation omitted).

the rules applicable today, it is more limited." *Jam*, 139 S. Ct. at 770; *Hyatt*, 139 S. Ct. at 1493. Accordingly, to determine whether a State could claim immunity under the law-of-nations, it is appropriate to consider the scope of the immunity that foreign sovereigns currently enjoy, which is "codified" in the FSIA, which includes "exceptions" that subject the foreign sovereign to suit. *Jam*, 139 S. Ct. at 766 (citing 28 U.S.C § 1602 *et seq.*).

One such exception is a foreign sovereign's "commercial activity[5] that has sufficient nexus with the United States." *Id.* (citing 28 U.S.C § 1605(a)(2)). More specifically, foreign sovereign immunity does not apply to any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]" 28 U.S.C § 1605(a)(2).

The exclusive rights protected by the Copyright and Patent Clause are eminently commercial in nature, as they prevent the unauthorized use of authors'

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5. Regarding attempts by sovereigns to avoid their "commercial obligations," this "restrictive theory of immunity . . . [has] receive[d] general acceptance within the international community." M. Sornarajah, *Problems in Applying the Restrictive Theory of Sovereign Immunity*, 31 Int'l & Comp. L.Q. 661, 663 (Oct. 1982).

writings and inventors' discoveries. Not surprisingly, lower courts have found that foreign sovereign entities that distributed copyrighted videos and photographs in the United States are not immune to private suit. *L.A. News Serv. v. Conus Commc'n Co. L.P.*, 969 F. Supp. 579, 585–86 (C.D. Cal. 1997) (Canadian government entity's broadcast into the United States of plaintiff's video footage was commercial activity under the FSIA, precluding immunity); *Pablo Star Ltd. v. Welsh Gov't*, 378 F. Supp. 3d 300, 308–10 (S.D.N.Y. 2019) (Welsh Government's use of plaintiff's photograph in travel brochures distributed in the United States subjected it to suit under the FSIA's commercial activity exception). In summary, foreign nations that engage in commercial activities in violation of the copyright or patent statutes enacted by Congress under the Copyright and Patent Clause are not immune to private suits brought by authors or inventors. Under *Jam*, to the extent that States retain any law-of-nations immunity, that immunity does not extend to private suits brought to enforce copyright and patent rights.

III. Enactment of the CRCA Was a Proper Use of Congress' Fourteenth Amendment Powers to Abrogate State Sovereign Immunity to Private Copyright Suits.

Even if the States had not surrendered their immunity to private copyright and patent enforcement suits, *Florida Prepaid* confirmed Congress's ability to use its powers under § 5 of the Fourteenth Amendment to abrogate that immunity under appropriate circumstances.

Katz permits the Court to take a fresh look at the text and history of the CRCA and conclude that abrogation was proper. 546 U.S. at 378–79. Abrogation under § 5 necessitates the enacted statute to be remedial, requiring evidence of a pattern of wrongdoing by the States on enactment. *Fla. Prepaid*, 527 U.S. at 640; *see also City of Boerne v. Flores*, 521 U.S. 507 (1997). There, this Court held that Congress did not validly abrogate sovereign immunity, under § 5, based on its failure to show that the States had a history of infringing the rights of patent owners. *Fla. Prepaid*, 527 U.S. at 640. This was a factual determination, based on examining the legislative history specific to the Patent and Plant Variety Protection Remedy Clarification Act ("Patent Remedy Act"), 35 U.S.C. §§ 271(h), 296(a).

Congress's clear purpose in enacting the CRCA 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). Congress' action was predicated on a 1988 report that illustrated both the breadth and depth of copyright infringements by the States. *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), http://files.eric.ed.gov/fulltext/ED306963.pdf. Additionally, a report by the General Accounting office found 58 copyright infringement lawsuits commenced against a State between 1985 and 2001. U.S. Gen. Accounting Office, *Intellectual Property: State Immunity in Infringement Actions* 7 (Sept. 2001), https://www.gao.gov/assets/240/232603.pdf. At least

one scholar considered this number to be "substantial." Robert T. Neufeld, *Closing Federalism's Loophole in Intellectual Property Rights*, 17 Berkeley Tech. L.J. 1295, 1315 (2002). Where Congress may have failed to find a history of infringement on patent owners' rights when enacting the Patent Remedy Act, Congress succeeded in evidencing a history of wrongdoing by the States upon enactment of the CRCA.

Successful abrogation of State sovereign immunity under § 5 of the Fourteenth Amendment also requires either no or inadequate state remedies. *Fla. Prepaid*, 527 U.S. at 643–44. *Florida Prepaid* evaluated Congressional testimony and found that the State remedies for patent violations were merely inconvenient, which is insufficient for abrogation under § 5. 527 U.S. at 644. When enacting the CRCA, Congress was particularly concerned with the portions of the 1988 report specifying that, if sovereign immunity applied, then the only available State remedy was injunctive relief, which inadequately deterred states from infringing copyrights. H.R. Rep. No. 282 at 2-12; *see* S. Rep. No. 305, 101st Cong., 2d Sess. 4-13 (1990); CRCA Hearing 53. When enacting the CRCA, Congress found a substantial pattern of State wrongdoing and insufficient remedies under State law, and thus validly abrogated state sovereign immunity under § 5 of the Fourteenth Amendment.

CONCLUSION

The plain language of the Copyright and Patent Clause expresses the States' surrender of sovereign immunity. Moreover, under the analytical framework of *Katz*, the States surrendered any sovereign im-

munity they may have had as part of the plan of the convention. States cannot avail themselves of common law or law-of-nations sovereign immunity. And even if immunity did apply, Congress's enactment of the CRCA was proper under § 5 of the Fourteenth Amendment.

Respectfully Submitted,

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