

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

In the
United States Court of Appeals
for the Fourth Circuit

FREDERICK L. ALLEN et al.,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

BRIEF OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

I certify, pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, that no appellant is in any part a publicly held corporation, a publicly held entity, or a trade association, and that no publicly held corporation or other publicly held entity has a direct financial interest in the outcome of this litigation.

Dated: August 21, 2017

/s/ Ryan Y. Park
Ryan Y. Park

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JURISDICTIONAL STATEMENT

This appeal involves an order that rejects several forms of governmental immunity. The collateral-order exception to the final-judgment rule allows orders of that kind to be appealed immediately. See *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 (1993) (sovereign immunity); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity); *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982) (legislative immunity).

This appeal is timely because it was filed within thirty days after the entry of the district court's order. See Fed. R. App. P. 4(a)(1)(A). The district court's order was entered on March 23, 2017. Appellants filed their notice of appeal on April 21, 2017.

The district court had subject-matter jurisdiction over appellees' federal claims under 28 U.S.C. § 1331. It had supplemental jurisdiction over appellees' state-law claims under 28 U.S.C. § 1367.

ISSUES PRESENTED

- I. The Copyright Remedy Clarification Act purports to abrogate the states' immunity for alleged violations of federal copyright law. Section 5 of the Fourteenth Amendment allows Congress to abrogate the states' Eleventh Amendment immunity, but only if the abrogation is narrowly tailored to remedy widespread unconstitutional conduct. In deliberations over the Clarification Act, Congress cited only a few reported instances of copyright infringement, none of which rose to the level of a constitutional violation. Was the Clarification Act's abrogation of Eleventh Amendment immunity effective?
- II. The *Ex parte Young* exception to Eleventh Amendment immunity allows lawsuits that seek to enjoin ongoing violations of federal law. Plaintiffs here seek an injunction to bar the display of their copyrighted works—an event that occurred in the past. Does the *Ex parte Young* exception apply?
- III. Legislative immunity protects government officials from being sued based on their participation in the legislative process. Plaintiffs here allege that the individual defendants proposed, lobbied for, and

secured passage of an amendment to a North Carolina statute. Can the individual defendants be sued for their roles in enacting that statute?

- IV. Qualified immunity protects government officials from liability unless any reasonable official would know that the conduct in question violated clearly established law.
- A. North Carolina's Department of Natural and Cultural Resources produced educational media that described the recovery of a historically important shipwreck. Some of these media included snippets of plaintiffs' copyrighted works. Would it have been unreasonable for an official to conclude that the Department's actions were fair use?
- B. Plaintiffs entered an agreement that allowed the Department to use their copyrighted works. That agreement expressly adopted a North Carolina law that authorizes the Department to disclose media that it obtains in connection with public business. Would

it have been unreasonable for an official to conclude that
plaintiffs had agreed to let the Department display their works?

INTRODUCTION

Departing from every other modern decision on the issue, the district court held here that states can be sued for garden-variety copyright infringement. That ruling overlooked settled principles of Eleventh Amendment immunity, as well as other government immunities.

This case involves North Carolina's effort to educate the public about a significant episode in the state's history: the pirate Blackbeard's 18th-century exploits off the North Carolina coast. After the underwater discovery of Blackbeard's flagship, the State began to recover and preserve the shipwreck. North Carolina's Department of Natural and Cultural Resources allowed filmmaker Frederick Allen, a plaintiff here, to document the excavation.

To promote public understanding of the project, the Department posted online five short videos that each contained a few seconds of Allen's video footage. The Department also published, in an online newsletter, one of Allen's images alongside an article about the shipwreck.

Allen sued for copyright infringement. He also requested a declaration that the federal Copyright Act preempts a North Carolina statute that authorizes the Department to display some of his copyrighted works.

Defendants moved to dismiss. For the claims at issue in this brief, the district court denied the motion. That ruling misapplied established law that limits when states and their officials may be sued.

First, for copyright claims, Congress has not abrogated Eleventh Amendment immunity in any valid way. Congress has purported to authorize copyright lawsuits against states by enacting the Copyright Remedy Clarification Act, 17 U.S.C. § 511(a) (2012). The Clarification Act is invalid, however, because it was enacted under a constitutional provision—the Copyright Clause in Article I—that does not allow Congress to abrogate Eleventh Amendment immunity.

Even if the Clarification Act had instead been enacted under Section 5 of the Fourteenth Amendment, the outcome here would be no different. Section 5 allows Congress to abrogate Eleventh Amendment immunity, but only when states violate the Constitution and do so repeatedly. When Congress passed the Clarification Act, it was not responding to a pattern of constitutional violations by states. In fact, Congress's deliberations did not cite even one case of unconstitutional conduct. For these reasons, the Clarification Act is not a valid exercise of Congress's Section 5 authority.

Second, the *Ex parte Young* exception to defendants' Eleventh Amendment immunity does not apply here. That exception allows courts to enjoin ongoing violations of federal law. Here, any copyright violation alleged in the complaint is not ongoing: the State is no longer posting Allen's works. The only possible relief would be to hold state officials liable for past events. As a result, *Ex parte Young* does not apply.

Third, legislative immunity bars Allen's claims that involve the Department's efforts to secure an amendment to a North Carolina statute. Legislative immunity prevents government officials from being sued for this type of conduct.

Finally, Allen's copyright-infringement claim is barred by qualified immunity. The Department displayed snippets of Allen's copyrighted works for a noncommercial purpose: to educate the public about an important chapter in North Carolina history. A reasonable government official could conclude that this use was non-infringing fair use. A reasonable official could also conclude that an agreement with Allen allowed the Department to display his works.

For these reasons, defendants respectfully request that this Court reverse the district court's order that denied their motion to dismiss.

STATEMENT OF FACTS

A. The Department Is Recovering the Queen Anne's Revenge.

In the early 18th century, the pirate Blackbeard captured a French merchant vessel in the Caribbean and named it the Queen Anne's Revenge. Blackbeard made the Queen Anne's Revenge his flagship, outfitted it with forty cannons, and sailed it up the east coast of North America. After using the Queen Anne's Revenge to blockade what is now Charleston, South Carolina, Blackbeard ran the ship aground and abandoned it. Shortly afterward, Blackbeard was killed in a battle with the Royal Navy near Ocracoke, North Carolina. J.A. 254-55.

In 1996, the wreck of the Queen Anne's Revenge was discovered off the coast of North Carolina. J.A. 25, ¶ 29; J.A. 94. Recognizing the shipwreck's historical and archaeological value, the North Carolina Department of Natural and Cultural Resources began a twenty-year process of recovering, preserving, and archiving the wreckage. J.A. 93. This project reflects the Department's duty to preserve "historic, architectural, or archaeological structures and sites of great importance" to the State. N.C. Gen. Stat. § 121-4(13) (2015) (Addendum 6).

Since the discovery of the Queen Anne's Revenge, the State has owned the ship's remains and related artifacts. *See* Abandoned Shipwreck Act of 1987, 43 U.S.C. § 1205(a)(1), (c) (Addendum 5); N.C. Gen. Stat. § 121-22 (Addendum 7). Many of the artifacts are on display at the North Carolina Maritime Museum in Beaufort, a museum operated by the Department. *See* J.A. 94; J.A. 28, ¶ 44.

B. Allen Documents the Recovery of the Queen Anne's Revenge.

Allen is a documentary filmmaker. J.A. 18, ¶ 7. He operates a video-production company, Nautilus Productions, LLC.¹ J.A. 19, ¶ 8.

In 1998, Allen agreed with the Department to document the recovery of the Queen Anne's Revenge. J.A. 18, ¶ 7; J.A. 83. He has taken video footage and photographs that depict the recovery of artifacts from the shipwreck. J.A. 25, ¶ 30. He has registered thirteen copyrights in these materials with the U.S. Copyright Office. J.A. 25, ¶ 33. Each copyright covers a year's worth of Allen's footage. J.A. 25, ¶ 33.

¹ This brief refers to Allen and Nautilus collectively as Allen, unless the context requires a more specific reference.

In 2013, Allen accused the Department of copyright infringement because it had posted two images of the shipwreck's anchor on the Department's website and one image on an independent website. J.A. 88, ¶ 22. The Department agreed to settle the dispute for \$15,000, but did not admit liability. J.A. 84, ¶ 2; J.A. 88, ¶ 22.

As part of the settlement agreement, the Department and Allen agreed to “continue their mutual efforts to promote the history of Blackbeard the Pirate, and continue the archaeological recovery and conservation of . . . the Queen Anne's Revenge.” J.A. 84. To that end, Allen expressly allowed the Department to “retain, for research purposes, archival footage, still photographs and other media” of the shipwreck. J.A. 88, ¶ 21. The agreement called for the Department to put a watermark on the media to show that Allen held the copyright. J.A. 87-88, ¶¶ 16-17. Based on this agreement, the Department retained over eighty hours of video footage. J.A. 28, ¶ 43.

In the agreement, Allen also agreed that the Department may “mak[e] records available to the public” in accordance with North Carolina's public-records act. J.A. 88, ¶ 17. North Carolina's definition of a public record

includes photographs and films that the State obtains in connection with public business. N.C. Gen. Stat. § 132-1 (Addendum 8).

The public business of the Department includes the following statutory duties:

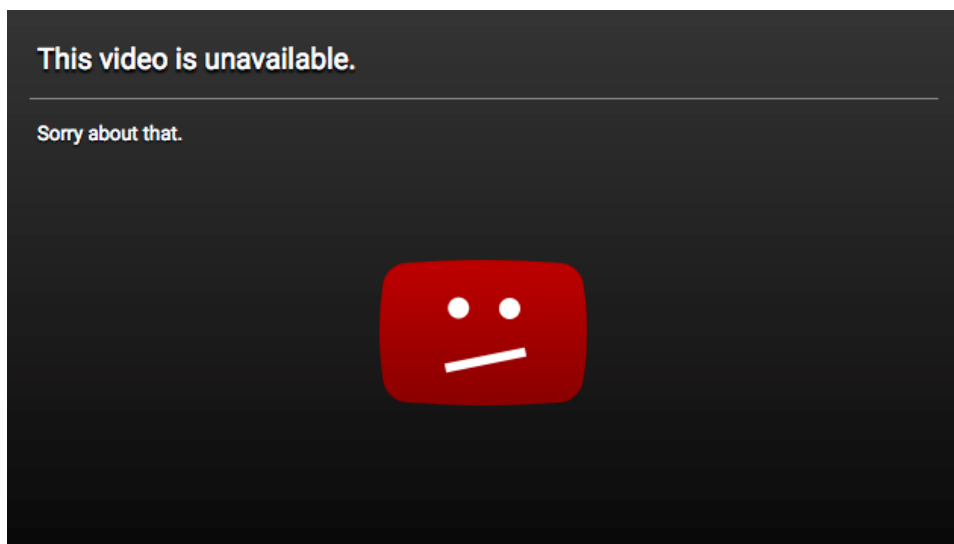
- to “publish” “historical records and other documentary materials relating to the history of North Carolina,” *id.* § 121-4(3) (Addendum 6); and
- to “promote and encourage” “knowledge and appreciation of North Carolina history and heritage” through multiple means, including “the display . . . of historical materials,” *id.* § 121-4(13) (Addendum 6).

C. The Department Displays Limited Parts of Allen’s Works.

The complaint alleges that, after the settlement agreement, the Department posted five short videos and one photograph that depicted the State’s recovery of artifacts from the Queen Anne’s Revenge. The videos were posted on the popular video-sharing website YouTube. J.A. 28, ¶ 44. Each video contained just a few seconds of Allen’s copyrighted footage. *See* J.A. 28, ¶ 44; J.A. 195:4-6, 209:21-22.

In addition, the Department's Maritime Museum published a digital newsletter that included one image from Allen's archive. J.A. 28, ¶ 44. The image accompanied an article that described the Department's ongoing efforts to recover the remains of the Queen Anne's Revenge. J.A. 165-66. The image covered only about an eighth of a page of the newsletter. See J.A. 166.

Shortly after the filing of this lawsuit, the Department removed the videos from YouTube. After this removal, anyone who tried to access the videos would see the following message:



See J.A. 28, ¶ 44; see also J.A. 159-63; J.A. 249:2-12.

Around the same time, the Department also removed the newsletter image from its website. The Department published a new version of the

newsletter with a black space where the image had been. J.A. 165-66; see J.A. 28, ¶ 44.

D. The General Assembly Clarifies the Public-Records Act.

In 2015, the North Carolina General Assembly enacted a bill that clarified the State's public-records act. Even before this 2015 enactment, the public-records act stated that photographs and videos obtained by the State during public business were public records. The 2015 enactment confirms that the preexisting definition of a public record includes photographs and videos of shipwrecks and related artifacts. See Act of Aug. 18, 2015, ch. 218, sec. 4(a), § 121-25(b), 2015 N.C. Sess. Laws 578, 583 (Addendum 9).

The complaint in this lawsuit alleges that the Department and its employees "wrote, caused to be introduced, [and] lobbied for passage of" the 2015 statute. J.A. 30, ¶¶ 50-51. The complaint does not say which Department employees allegedly drafted the bill or how they lobbied for its enactment. J.A. 30-31, ¶¶ 50-55.

E. Allen Sues for Copyright Infringement.

In 2016, Allen filed this lawsuit in the Eastern District of North Carolina. He claims that the Department's display of the YouTube videos

and the newsletter image constitutes copyright infringement under the federal Copyright Act. J.A. 36, ¶¶ 76-80. In addition, Allen requests a declaratory judgment that the Copyright Act preempts the 2015 enactment that is discussed above.² J.A. 33, ¶¶ 62-65.

Allen has sued the State of North Carolina, the Department, the Governor of North Carolina in his official capacity, and a number of Department officials in both their individual and official capacities.³ J.A. 19-22, ¶¶ 9-15.

Defendants moved to dismiss. The motion raised, among other issues, Eleventh Amendment immunity, legislative immunity, and qualified

² Allen's complaint asserted several other claims, but the district court dismissed them. J.A. 271, 279-80. Allen has filed a cross-appeal from these dismissals. *See* Appellants' Corrected Docketing Statement, No. 17-1522, Dkt. No. 31 (4th Cir. May 24, 2017). If and when Allen briefs that cross-appeal, defendants reserve the right to contest appellate jurisdiction over the cross-appeal.

³ Allen sued the Department's senior leadership, including its Secretary and Chief Deputy Secretary, as well as the Department's senior archeological staff. For the official-capacity aspect of Allen's claims, several of these defendants have been replaced by their successors. Order, No. 17-1522, Dkt. No. 27 (4th Cir. May 19, 2017). The former Department officials remain defendants in their individual capacities.

immunity. On these issues, the district court (Judge Boyle) denied the motion to dismiss.

The court acknowledged that, for over a century, the Supreme Court has held that states are usually immune from lawsuits in federal court. J.A. 263, 269 (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)). Although the district court analyzed this immunity here, it opined that the immunity is “flawed” and “harm[ful] to the fundamental rule of law in this nation.” J.A. 263; see also J.A. 263-70 (discussing this view at length).⁴

In copyright cases, the Clarification Act purports to abrogate the states’ Eleventh Amendment immunity. 17 U.S.C. § 511(a) (Addendum 4). The district court admitted that insofar as the Act stems from Congress’s Article I power to regulate copyrights, it is invalid. J.A. 260 (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66, 72 (1996)).

The court went on, however, to consider whether Congress had the power to enact the Clarification Act under Section 5 of the Fourteenth Amendment. J.A. 260-62. To abrogate Eleventh Amendment immunity

⁴ See also *Richard Anderson Photography v. Brown*, 852 F.2d 114, 123-25 (4th Cir. 1988) (Boyle, J., sitting by designation, dissenting in part) (arguing that Congress had validly invoked Article I’s copyright clause and had abrogated a state’s Eleventh Amendment immunity).

under that provision, Congress must decide that abrogating the immunity is necessary to remedy a widespread pattern of constitutional violations by states. J.A. 261.

According to the court, the Clarification Act fell within Congress's Section 5 powers, for two reasons.

First, the court stated that the legislative history of the Act contains "sufficient evidence of infringement of copyrights by the states." J.A. 261.

Second, the court opined that states are currently engaged in a "pattern of abuse" of copyrights. J.A. 262. To show this perceived pattern, the court cited eleven copyright lawsuits against states, filed over the last nineteen years. J.A. 262 n.4.

On this basis, the court held that Congress had authority under Section 5 to abrogate North Carolina's Eleventh Amendment immunity from copyright claims.

Although the individual defendants made freestanding arguments for legislative immunity and qualified immunity, the district court addressed these immunities only briefly.

On legislative immunity, the court stated only that a ruling would be "premature at this time." J.A. 273.

On qualified immunity, the court held that the doctrine does not apply here because “the law of copyright infringement is clearly established.” J.A. 272. The court did not decide whether a reasonable official could conclude that the Department’s display of Allen’s works constituted fair use. Instead, the court stated that fair use was “a question of fact that cannot be determined at this stage of the proceedings.” J.A. 279.

Finally, the court did not address an independent basis for qualified immunity: that reasonable officials could conclude that Allen had authorized the Department to display his works. J.A. 254-81.

This appeal followed.

SUMMARY OF THE ARGUMENT

The district court slighted the immunity doctrines that defeat Allen’s complaint. The court departed from well-settled law in at least four ways.

First, the district court erred by holding that Eleventh Amendment immunity does not bar this lawsuit. The district court ruled that the immunity does not apply because Congress abrogated the immunity by passing the Clarification Act. The Clarification Act, however, is not a valid abrogation, because Congress had no constitutional authority to enact it.

When Congress passed the Clarification Act, it relied only on Article I. As the district court admitted, however, Article I does not allow Congress to authorize lawsuits against states. *See infra* pp. 22-25.

The district court went on to conclude, however, that the Act is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. That conclusion was mistaken. Courts may not uphold a congressional abrogation of Eleventh Amendment immunity by citing powers that Congress never intended to exercise. *See infra* pp. 26-30.

Even if the Act had emanated from Section 5, moreover, it would still be an invalid exercise of that power. Section 5 empowers Congress only to correct a pattern of *unconstitutional* state conduct. Copyright infringement alone—even copyright infringement by the government—does not violate the Constitution. In deliberations over the Clarification Act, Congress did not identify any constitutional violations at all, let alone a widespread pattern of constitutional violations. Thus, Section 5 gave Congress no basis for abrogating the states' immunity from copyright lawsuits. *See infra* pp. 30-45.

For these reasons, Congress's abrogation of Eleventh Amendment immunity for copyright claims is invalid.

Second, the district court erred by not applying Eleventh Amendment immunity to the individual defendants. Allen's claims against the individual defendants do not fit into the narrow *Ex parte Young* exception to the immunity. That exception applies to lawsuits for prospective relief to stop an ongoing violation of federal law. But here, any violation of law described in the complaint has ended: the Department no longer publicly displays Allen's works. Allen thus seeks only retrospective relief—relief for an alleged copyright infringement that occurred entirely in the past. *See infra* pp. 46-49.

Third, the district court erred by not holding that legislative immunity bars Allen's attempt to hold the individual defendants liable for seeking an amendment to a North Carolina statute. As this Court has recognized, legislative immunity protects advocacy for legislation. *See infra* pp. 49-53.

Fourth, the copyright claim against the individual defendants fails because of qualified immunity.

A reasonable government official could conclude that the Department's display of Allen's works was fair use. In displaying limited parts of those works, the Department did not seek to profit. Instead, it

sought to educate the public about an important chapter of North Carolina history. These are classic marks of fair use. *See infra* pp. 56-65.

Qualified immunity bars the copyright claim for another reason as well: A reasonable official could conclude that Allen had authorized the Department to display his works. Allen entered an agreement that allowed the Department to keep copies of Allen's videos and photographs that documented the recovery of the Queen Anne's Revenge. That agreement expressly incorporated a statute that allows the State to display media it obtains through official government business. A reasonable official could have interpreted the agreement as authorizing the Department to display Allen's works. *See infra* pp. 66-69.

In sum, multiple immunities bar Allen's claims. Defendants respectfully request that this Court reverse the parts of the district court's order that denied their motion to dismiss.

ARGUMENT

Standards of Review

This appeal involves the district court's denial of several forms of governmental immunity. Denials of governmental immunities are reviewed

de novo. See *Wright v. North Carolina*, 787 F.3d 256, 261 (4th Cir. 2015) (Eleventh Amendment immunity); *Occupy Columbia v. Haley*, 738 F.3d 107, 115 (4th Cir. 2013) (qualified immunity); *Kensington Volunteer Fire v. Montgomery Cty.*, 684 F.3d 462, 470-71 (4th Cir. 2012) (legislative immunity); *CSX Transp., Inc. v. Bd. of Pub. Works*, 138 F.3d 537, 541 (4th Cir. 1998) (*Ex parte Young* exception to Eleventh Amendment immunity).

This Court also applies de novo review to a copyright defendant's fair-use defense. *Stonehenge Eng'g Corp. v. Employers Ins. of Wausau*, 201 F.3d 296, 301 (4th Cir. 2000). Similarly, matters of contract interpretation, including the question whether a contract allows particular conduct, are reviewed de novo. See *Traxys N. Am. LLC v. Concept Mining Inc.*, 510 F. App'x 262, 268 n.6 (4th Cir. 2013).

When the Court reviews an order denying a motion to dismiss, the Court considers the facts alleged in the complaint, materials incorporated by reference in the complaint, and matters that are subject to judicial notice. *Birmingham v. PNC Bank, N.A.*, 846 F.3d 88, 92 (4th Cir. 2017). Dismissal is proper when these items reveal that a claim is barred by an affirmative defense, such as a governmental immunity. *Occupy Columbia*, 738 F.3d at 116.

Discussion

I. The Clarification Act Did Not Validly Abrogate the States' Eleventh Amendment Immunity.

Although the Clarification Act purports to authorize copyright lawsuits against states, the Act is not a valid abrogation of the Eleventh Amendment.

Congress enacted the Clarification Act under its Article I powers.

Those powers do not include the power to abrogate Eleventh Amendment immunity.

Nor can the Clarification Act be justified under Section 5 of the Fourteenth Amendment. When Congress enacted the Act, it did not rely on this provision of the Constitution. Moreover, even if Congress had relied on Section 5, the Act would still be invalid: the legislative record makes clear that Congress did not pass the Act to remedy widespread unconstitutional conduct.

A. Article I does not allow Congress to abrogate Eleventh Amendment immunity.

Congress's Article I powers do not include the power to authorize lawsuits against states in federal court.

This limit on Congress's powers overlaps with the Eleventh Amendment, but does not stem exclusively from that Amendment. *Seminole*

Tribe of Fla. v. Florida, 517 U.S. 44, 66, 72 (1996). Instead, the limit stems from two general constitutional principles.

First, “each State is a sovereign entity in our federal system.” *Id.* at 54.

Second, “[i]t is inherent in the nature of sovereignty” not to be sued without the sovereign’s consent. *Id.* (quoting *The Federalist* No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

The history of the Eleventh Amendment confirms these principles. *Id.* The Amendment was enacted to overturn *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). In *Chisholm*, the Supreme Court allowed a private citizen to sue the State of Georgia in federal court. *Id.* at 466 (opinion of Wilson, J.); see *Seminole Tribe*, 517 U.S. at 69 (describing this history). The founding generation considered *Chisholm* so “contrary to the well-understood meaning of the Constitution” that Congress immediately passed, and the states immediately ratified, the Eleventh Amendment to overturn the decision. *Seminole Tribe*, 517 U.S. at 69.

As this history confirms, the federal courts cannot hear most lawsuits against nonconsenting states. *Hans v. Louisiana*, 134 U.S. 1, 15 (1890).

Congress can abrogate the states’ Eleventh Amendment immunity, but an abrogation is valid only if it derives from an appropriate source of

congressional power. *Seminole Tribe*, 517 U.S. at 59. Not every aspect of the Constitution meets this test. In *Seminole Tribe*, for example, the Supreme Court held that the Eleventh Amendment bars Congress from using its Article I powers to expose states to lawsuits in federal court. *Id.* at 72.

This ban on Article I-based abrogation extends to Article I's Patent-and-Copyright Clause. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Supreme Court held that this clause does not allow Congress to authorize patent lawsuits against states. 527 U.S. 627, 636 (1999). The Court therefore struck down the Patent Remedy Act, which purported to abrogate Eleventh Amendment immunity for patent claims. *Id.*

The logic of *Florida Prepaid* also invalidates the statute at issue here, the Clarification Act. The Patent-and-Copyright Clause gives Congress coextensive powers over patents and copyrights. The clause refers to copyrights and patents in the same breath: it allows Congress to grant “to authors and inventors the exclusive right to their respective writings and discoveries.” U.S. Const. art. I, § 8, cl. 8 (emphasis added) (Addendum 2).

This “kinship between patent law and copyright law” calls for these two areas of intellectual-property law to be interpreted consistently. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439 (1984). Under

such an interpretation, the limits on the scope of Congress's patent power under Article I apply equally to Congress's copyright power.⁵

This analysis has found favor with every court that has considered the question. *See, e.g., Chavez v. Arte Publico Press*, 204 F.3d 601, 603-04 (5th Cir. 2000).⁶ There is every reason for this Court to join those courts.

⁵ The context of the Clarification Act adds further support to this conclusion. The Patent Remedy Act that the Supreme Court struck down in *Florida Prepaid* was one of three laws, all passed in the early 1990s, that purported to abrogate states' Eleventh Amendment immunity for intellectual-property claims. The statute at issue here, the Clarification Act, is also part of this trio of statutes. *See* Patent Remedy Act, Pub. L. No. 102-560, 106 Stat. 4230 (1992) (codified at 35 U.S.C. § 271(h)); Trademark Remedy Clarification Act, Pub. L. No. 102-542, 106 Stat. 3567 (1992) (codified at 15 U.S.C. § 1121); Copyright Remedy Clarification Act, Pub. L. No. 101-533, 104 Stat. 2749 (1990) (codified at 17 U.S.C. § 511(a)).

In a pair of cases decided the same day, the Supreme Court held that the patent and trademark statutes in this trio are unconstitutional. *Florida Prepaid*, 527 U.S. at 636; *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670, 691 (1999). In contrast, the Supreme Court has not yet addressed the constitutionality of the Clarification Act.

⁶ *Accord Jacobs v. Memphis Convention & Visitors Bureau*, 710 F. Supp. 2d 663, 669 (W.D. Tenn. 2010); *Romero v. Cal. Dep't of Transp.*, No. 08-8047, 2009 U.S. Dist. LEXIS 23193, at *9 (C.D. Cal. Mar. 12, 2009); *Mktg. Info. Masters, Inc. v. Bd. of Trustees of the Cal. State Univ. Sys.*, 552 F. Supp. 2d 1088, 1092 (S.D. Cal. 2008); *De Romero v. Inst. of P.R. Culture*, 466 F. Supp. 2d 410, 414 (D.P.R. 2006); *Hairston v. N.C. Agric. & Tech. State Univ.*, No. 04-1203, 2005 U.S. Dist. LEXIS 20442, at *17 (M.D.N.C. Aug. 5, 2005).

B. The district court erred by finding a valid abrogation under sources other than Article I.

Here, the district court agreed that Article I does not authorize Congress to abrogate the states' Eleventh Amendment immunity. J.A. 260.

Despite this conclusion, however, the court went on to explore other possible sources of authority for the abrogation. The court ultimately held that Section 5 of the Fourteenth Amendment supplied that authority. J.A. 262. The court reached that conclusion despite the warnings of Allen's counsel herself, who stated that if the court found a valid abrogation, a reversal on appeal was likely. J.A. 245:2-7.

Those warnings were justified. As shown below, the district court's finding of a valid abrogation should be reversed for at least two reasons.

- First, the court erred by looking at sources of authority on which Congress itself did not rely.
- Second, the source that the court cited—section 5 of the Fourteenth Amendment—does not apply here.

1. The court erred by relying on sources of constitutional authority other than Article I.

When courts analyze authority for an abrogation, they may not go beyond the sources of authority that Congress itself cited. Here, the district court violated this rule.

In *Florida Prepaid*, the Supreme Court held that in the context of abrogation, courts may not consider sources of constitutional authority on which Congress did not expressly rely. 527 U.S. at 630, 636. The briefs in *Florida Prepaid* discussed whether the Patent Remedy Act had support in the Fifth Amendment's Just Compensation Clause. *Id.* at 641-42. The Court, however, held that it was "preclude[d]" from upholding the statute based on that clause because "[t]here is no suggestion in the language of the statute itself, or in the House or Senate Reports of the bill which became the statute, that Congress had in mind the Just Compensation Clause." *Id.* at 642 n.7.

Here, likewise, neither the text nor the history of the Clarification Act suggests that, when Congress passed the Act, it was relying on any authority other than the Copyright Clause of Article I.

The text of the Clarification Act does not say which provision of the Constitution it was based on. See 17 U.S.C. § 511(a) (Addendum 4).

The Act's legislative history, in contrast, makes clear that Congress passed the Act only under Article I:

- The House Report states that Congress was passing the Clarification Act under “the Copyright Clause of Article I.” H.R. Rep. No. 101-282, pt. 1, at 7 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3949, 3955.
- The Senate Report states that “Congress has the power under Article I of the Constitution to abrogate [Eleventh Amendment immunity] when it legislates under . . . the Copyright Clause.” S. Rep. No. 101-305, at 6 (1990).
- Senator Charles Grassley, a member of the relevant Senate committee, agreed that the bill at issue was based on Article I. He stated: “Congress has plenary powers in the area of Copyright Law. That is clearly spelled out in the Constitution in Article I, Section 8. . . . That . . . is what this bill is all about.”⁷

⁷ *The Copyright Remedy Clarification Act: Hearing Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 101st Cong. 123, at 130 (1989) [hereinafter Senate Hearing].*

- Representative Robert Kastenmeier, the bill's primary sponsor in the House, likewise stated that "Congress has constitutional authority to override Eleventh Amendment immunity under its article I powers."⁸

As all this history shows, Congress passed the Clarification Act exclusively under Article I. Thus, under *Florida Prepaid*, the Act must stand or fall based on Congress's Article I powers alone. 527 U.S. at 642 n.7.

The district court here overlooked this point. Immediately after the court concluded that it could not sustain the Clarification Act under Article I, it concluded that it could sustain the Act under Section 5 of the Fourteenth Amendment. J.A. 260-62.

That analysis violated *Florida Prepaid*, in which the Supreme Court held that it could not sustain an abrogation based on sources of authority that Congress itself did not have in mind. 527 U.S. at 641-42; *supra* p. 27.

⁸ *Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liability of States: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong. 53, at 78 (1989) [hereinafter House Hearing].

The district court also overlooked other decisions that have applied the same limit on abrogation to the Clarification Act. Those courts have held directly that the Clarification Act “cannot be defended and sustained . . . under the Fourteenth Amendment.” *Jacobs v. Memphis Convention & Visitors Bureau*, 710 F. Supp. 2d 663, 672 (W.D. Tenn. 2010); accord *Jehnsen v. N.Y. State Martin Luther King, Jr. Inst. for Nonviolence*, 13 F. Supp. 2d 301, 311 (N.D.N.Y. 1998). Here, the district erred by sustaining the Act under that inapplicable theory.

C. The Clarification Act is not a valid exercise of Congress’s Section 5 powers.

When the district court applied Section 5 of the Fourteenth Amendment, it also misapplied the test that governs that source of constitutional authority.

Unlike Article I, the Fourteenth Amendment allows Congress to abrogate the states’ Eleventh Amendment immunity. *Seminole Tribe*, 517 U.S. at 59. However, Section 5 is not a limitless source of authority for abrogation. Instead, Congress’s authority under Section 5 extends no further than the substantive law under the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507, 525 (1997).

Here, for example, the district court reasoned that the Clarification Act enforces the Fourteenth Amendment's Due Process Clause. J.A. 262. For a statute to be a valid way of enforcing that clause, the statute must meet three conditions. First, Congress must identify a "widespread pattern" of unconstitutional conduct by states. *Id.* at 531. Second, Congress must decide that existing state remedies are inadequate to remedy those constitutional violations. *Florida Prepaid*, 527 U.S. at 644. Third, Congress's remedy must be narrowly tailored. *Id.* at 639.

As shown below, the Clarification Act fails all of these requirements.

- First, when Congress enacted the Act, it did not identify any constitutional violations by states, let alone a widespread pattern of constitutional violations.
- Second, Congress barely considered the adequacy of state remedies.
- Third, Congress's chosen remedy—a blanket authorization to sue states in federal court for copyright infringement—was wholly out of proportion to any problem Congress sought to address.

In the eighteen years since *Florida Prepaid*, the decision below appears to be the only decision that has upheld the Clarification Act. Every other modern decision holds the opposite: that Section 5 does not authorize the Act.⁹

These points call for reversal of the decision below.

1. Congress did not identify a pattern of unconstitutional conduct by states.

To enact valid legislation under Section 5, Congress must respond to state conduct that actually violates the Constitution, and the constitutional violations must rise to the level of a widespread pattern. *Florida Prepaid*, 527 U.S. at 645. The Clarification Act fails both parts of this test.

a. Congress did not identify any constitutional violations.

First, when Congress enacted the Clarification Act, it did not identify any constitutional violations at all.

⁹ See *Chavez*, 204 F.3d at 607; *Jacobs*, 710 F. Supp. 2d at 682; *Romero* 2009 U.S. Dist. LEXIS 23193, at *13; *Mktg. Info.*, 552 F. Supp. 2d at 1094; *InfoMath v. Univ. of Ark.*, 633 F. Supp. 2d 674, 680-81 (E.D. Ark. 2007); *De Romero*, 466 F. Supp. 2d at 418; *Hairston*, 2005 U.S. Dist. LEXIS 20442, at *23.

Copyright infringement is not categorically unconstitutional. Instead, copyright infringement violates the Constitution only when it rises to the level of a property deprivation without due process of law. *Chavez*, 204 F.3d at 607; see also *Florida Prepaid*, 527 U.S. at 643 (making the same point about patent infringement).

To commit such a due-process violation, a state must infringe a copyright *intentionally*. A mere “negligent act that causes unintended injury to a person’s property does not ‘deprive’ that person of property within the meaning of the Due Process Clause.” *Florida Prepaid*, 527 U.S. at 645.

A finding of copyright infringement alone does not satisfy the intent requirement that marks a constitutional violation of this type. Infringement, after all, “does not require that the infringer know that he is infringing or that his conduct amount to a willful violation of the copyright owner’s rights.” *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549 (4th Cir. 2004). Instead, only a subset of copyright infringements can show due-process violations: intentional infringements by states.

Here, in its deliberations over the Clarification Act, Congress did not identify even one case in which a state had infringed a copyright intentionally. See *Chavez*, 204 F.3d at 607. To the contrary, the legislative

record shows that Congress was responding to possible *negligent* infringement:

- Ralph Oman, the Register of Copyrights, testified that the Clarification Act would “act as a guard against sloppiness” and “honest mistakes.” Senate Hearing at 8-9. He agreed that the Act would make states liable even for “the occasional error or misunderstanding or innocent infringement.” House Hearing at 8.
- Dorothy Schrader, Chief Counsel for the Copyright Office, testified that the bill addressed possible “sloppy practices” in states’ use of copyrighted material. Senate Hearing at 42.
- The Copyright Office’s written report to Congress discussed seven examples of alleged copyright infringement, but it did not say that any of those examples involved intentional infringement. *See* Copyright Office Report at 8-9.
- Dave Eskra, chairman and chief executive officer of Panasonic Systems, Inc., stated that the bill sought to stamp out “any infringement” by states—even “non-willful” infringement. Senate Hearing at 106-07.

This coverage of unintentional infringement—that is, infringement that does not violate the Constitution—defeats any argument that the Act was designed to address a “widespread and persisting deprivation of constitutional rights.” *Florida Prepaid*, 527 U.S. at 645.

b. Congress did not identify a widespread pattern of violations.

When Congress passed the Clarification Act, it also did not make the other finding that Section 5 would require: a finding that any constitutional violations that led to the Act were widespread.

To the contrary, the legislative record shows that Congress considered state infringement of copyrights—even infringements of non-constitutional magnitude—to be rare:

- The bill’s primary sponsor in the House, Representative Kastenmeier, stated that “thus far there have not been any significant number of wholesale takings of copyright rights by States or State entities.” House Hearing at 48.
- Likewise, the bill’s primary sponsor in the Senate, Senator Dennis DeConcini, agreed that state copyright violations were not a “big problem.” Senate Hearing at 130.

- Ralph Oman, the Register of Copyrights, admitted that the Copyright Office had not identified any “hard evidence” of widespread copyright infringement by states. Senate Hearing at 42.
- To the contrary, Oman testified that states “are all respectful of the copyright laws,” House Hearing at 8, and that “if you fail to enact this law . . . states will continue to respect the law,” Senate Hearing at 8.

Thus, the legislative history of the Clarification Act belies any view that the states are engaged in a widespread pattern of unconstitutional copyright violations.

Here, the district court did not say anything to the contrary. The court opined that “the legislative history of [the] Act contains many examples of copyright infringements by States.” J.A. 262. The court, however, did not ask whether those examples rise to the level of constitutional violations—let alone attribute that reasoning to Congress. J.A. 262.

The court also relied on “the amount of suits filed against allegedly infringing states in recent years.” J.A. 262. That reasoning not only misses

the added requirements for constitutional violations; it also focuses on the wrong time period.

Under Section 5 of the Fourteenth Amendment, the validity of a statute depends on the evidence that was before Congress *at the time it enacted the statute*.

- In *Florida Prepaid*, for example, the Supreme Court held that the Patent Remedy Act was invalid because only a “handful of instances of state patent infringement” were cited in the Act’s “legislative record.” 527 U.S. at 645.
- Similarly, in *Coleman v. Court of Appeals*, the Court struck down a part of the Family and Medical Leave Act because Congress did not identify a pattern of constitutional violations during congressional deliberations over that provision. 132 S. Ct. 1327, 1337 (2012).

Even aside from the anachronism of the eleven cases that the district court cited, those cases do not suggest that state copyright violations are widespread.

First of all, the cases that the court cited involved mere *allegations* of state misconduct, not proof of actual infringement. *See* J.A. 262 n.4. None of the cited cases involved a judicial finding that a state had committed copyright infringement. *See* J.A. 262 n.4. For example, in *De Romero v. Institute of Puerto Rican Culture*, the court dismissed copyright claims against a state agency because those claims were barred by the Eleventh Amendment. 466 F. Supp. 2d 410, 421 (D.P.R. 2006). The *De Romero* court never even considered whether the plaintiff's allegations of infringement were plausible, let alone meritorious. *See id.* at 413.

In addition, the low number of cases that the district court cited here—eleven lawsuits from 1998 through 2010—shows that lawsuits against states are a trivial fraction of the total number of copyright lawsuits. *See* J.A. 262 n.4. For example, over the year that ended on June 30, 2010, 4527 copyright lawsuits were filed in the federal courts.¹⁰ In fact, a Government Accountability Office report noted only a “few examples” of states being even “accused of intellectual property infringement.” Government Accountability

¹⁰ Federal Judicial Center, Statistical Tables for the Federal Judiciary, tbl.C-2 at 3, available at http://www.uscourts.gov/sites/default/files/statistics_import_dir/Co2Jun10.pdf.

Office, *Intellectual Property: State Immunity in Infringement Actions* 32 (2001) [hereinafter GAO Report].

For these reasons, the district court erred when it held that Congress passed the Clarification Act in response to a pattern of copyright violations of any type—let alone a widespread pattern of violations that reach constitutional magnitude. *See* J.A. 262.

The Clarification Act therefore fails the first part of the Section 5 test.

2. Congress did not adequately assess the availability of state remedies.

The Clarification Act likewise founders on the second part of the Section 5 test. This part of the test asks whether Congress reasonably found state remedies insufficient to address the constitutional problems that Congress had identified. The Clarification Act cannot meet this standard, because Congress barely considered state remedies for copyright infringement at all.

Before Congress may exercise its Section 5 power to enforce the Due Process Clause, it must reasonably determine that due process cannot be satisfied through existing state remedies. *Florida Prepaid*, 527 U.S. at 630, 643; *see City of Boerne*, 521 U.S. at 536. Courts can decide that Congress

implicitly found state remedies inadequate, but any implicit congressional finding must be reasonably grounded in the legislative record. *See Florida Prepaid*, 527 U.S. at 643.

When a legislative record mentions state remedies only sparingly, this sparseness is conclusive proof that Congress never found state remedies inadequate. *Id.*; *Coleman*, 566 U.S. at 39. In *Florida Prepaid*, for example, the Supreme Court observed that during deliberations over the Patent Remedy Act, Congress had “barely considered the adequacy of state remedies.” 527 U.S. at 643. Specifically, “Congress itself said nothing about the existence or adequacy of state remedies in the statute or in the Senate Report, and made only a few fleeting references to state remedies in the House Report.” *Id.* at 644. Because Congress had barely considered state remedies at all, the Court held that Congress could not possibly have found state remedies inadequate. 527 U.S. at 643; *see also Coleman*, 566 U.S. at 39 (reaching the same conclusion for a provision of the Family and Medical Leave Act).

The Clarification Act has the same fatal flaw. When Congress enacted the Act, it did not analyze whether plaintiffs could use existing state remedies to sue states for intentional copyright infringement. *Chavez*, 204 F.3d at 606. Congress considered state remedies only at two points. First, a

witness testified that the bill was necessary because his company's lawyer had told him that state courts could not hear copyright claims. *Id.* at 606 (citing House Hearing at 51). Second, the Copyright Office Report contained an appendix that surveyed state waivers of sovereign immunity. *Id.* (citing Copyright Office Report app'x C).

This meager consideration of state-law remedies overlooked a number of possible remedies that dispel any due-process concern. For example, copyright holders can pursue state-law claims for breach of contract, unfair competition, takings, or conversion. *See Chavez*, 204 F.3d at 606; GAO Report at 54. Congress did not consider any of these possible remedies.¹¹

¹¹ Congress also slighted another alternative to federal-court lawsuits when it rejected a proposal to grant the state courts concurrent jurisdiction over copyright-infringement claims. *See* H.R. Rep. 101-282, pt. 1, at 9-11; *cf.* 28 U.S.C. § 1338 (granting federal courts exclusive jurisdiction over copyright claims). This proposal was rejected “not because it was an inadequate remedy, but because Congress believed concurrent jurisdiction would undermine the uniformity of copyright law.” *Chavez*, 204 F.3d at 607; *see* H.R. Rep. 101-282, pt. 1, at 9-11.

Although nationwide uniformity of copyright doctrine is an important objective, it “is a factor which belongs to the Article I . . . calculus,” not Section 5's inquiry into the availability of state-law remedies. *Chavez*, 204 F.3d at 607.

This case illustrates the possibility of state-law remedies for alleged copyright infringement. Here, Allen has pursued a number of state-law claims, including a state-law takings claim. J.A. 31-32, ¶ 57. Although the district court dismissed these state-law claims, it did not necessarily dismiss them because they are unavailable. It dismissed them because they belong, if anywhere, in state court.¹² J.A. 271.

In sum, the Congress that enacted the Clarification Act did not find—let alone find reasonably—that state remedies were inadequate to address any copyright infringements by state governments. *See Florida Prepaid*, 527 U.S. at 643. The Clarification Act therefore fails the second part of the Section 5 test.

3. Congress’s chosen remedy was not proportional to any problem that Congress identified.

The Clarification Act also fails the third step in the Section 5 test, which requires that Congress’s remedy be narrowly tailored. As shown above, Congress did not identify a single constitutional violation by a state,

¹² In fact, in a pending state-court lawsuit, Allen’s business partner has sued the Department for allegedly violating the business partner’s “media rights” under the 2013 settlement agreement. Second Am. Compl. at 10, ¶ 26, *Intersal, Inc. v. Hamilton*, No. 15 CVS 9995 (N.C. Bus. Ct. Feb. 17, 2017).

let alone a widespread pattern of constitutional violations. Under those circumstances, wholesale abrogation of Eleventh Amendment immunity fails Section 5's narrow-tailoring requirement.

Narrow tailoring demands that any remedies adopted by Congress be “congruen[t] and proportional[]” to any unconstitutional state behavior that Congress has identified. *Id.* at 639. Under this test of proportionality, the “indiscriminate” remedy of abrogating Eleventh Amendment immunity, *id.* at 647, would be possible only if Congress had found pervasive constitutional violations.

The Clarification Act fails this test. “Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations.” *Id.* (discussing the Patent Remedy Act). For example, Congress could have limited the Clarification Act to intentional infringement. Likewise, Congress could have limited the Act's coverage to states that fail to provide an adequate state-law remedy. Congress also could have included a sunset provision that would have allowed states to regain their immunity if they did not engage in intentional copyright infringement over a stated period. Congress, however, did not tailor the Clarification Act in any of these ways.

The history of another remedial statute shows that this tailoring is possible. The Voting Rights Act, an enactment under Section 5, is “limited to those classes of cases in which constitutional violations were most likely,” covers only “those regions of the country where voting discrimination had been most flagrant,” and includes a termination mechanism for states that do not engage in voting discrimination after a period of time. *City of Boerne*, 521 U.S. at 525-27, 533 (discussing *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)). These limits ensure that the Voting Rights Act is a tailored response to the constitutional problem—racially discriminatory state voting laws—that Congress had targeted. *Id.*

In the Clarification Act, Congress did no similar tailoring. It made all fifty states “immediately amenable to suit in federal court” for any alleged violation of the Copyright Act. *Florida Prepaid*, 527 U.S. at 646-47 (quoting *City of Boerne*, 521 U.S. at 532). The abrogation also covers a wide variety of conduct—such as negligent copyright infringement—that does not violate the Constitution. It is not narrowly tailored.

For these reasons, the Clarification Act fails the third part of the Section 5 test.

* * *

In sum, even if Congress had passed the Clarification Act under Section 5 of the Fourteenth Amendment, the Act was an invalid exercise of that authority. The Act therefore failed to abrogate North Carolina's Eleventh Amendment immunity for copyright claims.

D. North Carolina's sovereign immunity extends to state officials who are sued in their official capacity.

The states' Eleventh Amendment immunity also applies to state officials who are sued in their official capacity. *Ballenger v. Owens*, 352 F.3d 842, 845 (4th Cir. 2003). After all, "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989).

Here, Allen sued a number of state officials in their official capacity. *See supra* p. 14, n.3. Because the State is immune from Allen's claims, these government officers are likewise immune from the official-capacity claims against them.

The only possible exception to these officials' immunity arises from *Ex parte Young*. As the next section shows, however, that exception does not apply.

II. Because There Is No Ongoing Violation of Law Here, the *Ex Parte Young* Exception to Eleventh Amendment Immunity Does Not Apply.

Allen's claims fall outside the narrow *Ex parte Young* exception to Eleventh Amendment immunity. That exception allows federal courts to enjoin state officers from participating in ongoing violations of federal law. *See Ex parte Young*, 209 U.S. 123 (1908). Here, though, there is no ongoing violation: the State has stopped any public display of Allen's copyrighted works. Thus, the *Ex parte Young* exception does not apply.

Under the *Ex parte Young* doctrine, plaintiffs may sue state officials for certain forms of injunctive and declaratory relief. However, this narrow exception to Eleventh Amendment immunity "applies only [1] when there is an ongoing violation of federal law [2] that can be cured by prospective relief." *DeBauche v. Trani*, 191 F.3d 499, 505 (4th Cir. 1999). These two requirements often overlap, but they are separate. For the *Ex Parte Young* exception to apply, both requirements must be satisfied. *Rep. of Paraguay v. Allen*, 134 F.3d 622, 627 (4th Cir. 1998).

Moreover, the *Ex parte Young* exception must be satisfied "at all stages" of a lawsuit, or the federal courts lack subject-matter jurisdiction. *Friedman's, Inc. v. Dunlap*, 290 F.3d 191, 197 (4th Cir. 2002); *see Martin v.*

Wood, 772 F.3d 192, 193 (4th Cir. 2014) (holding that Eleventh Amendment immunity affects subject-matter jurisdiction). Whenever it becomes apparent that a claim against a state official no longer seeks prospective relief to enjoin an ongoing violation of federal law, federal courts lose subject-matter jurisdiction over the claim. *E.g.*, *Stockbridge-Munsee Cmty. v. New York*, No. 86-1140, 2013 U.S. Dist. LEXIS 102569, at *9-11 (N.D.N.Y. July 23, 2013).

These principles call for dismissing Allen’s claims against the individual defendants.

First, there is no ongoing violation of law here. The Department no longer publicly displays Allen’s copyrighted works. At least eight months before the appeal in this case was filed, all six of the copyrighted works cited in the complaint had been removed from the public domain. J.A. 159-66; J.A. 249:2-12. The web addresses that once displayed these works—web addresses that the complaint cites—confirm that Allen’s works are no longer on public display.¹³ See J.A. 28, ¶ 44.

¹³ This Court may consider the content of these websites because they are “integral to and explicitly relied on” in Allen’s complaint. *Phillips v. LCI Int’l, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999). In particular, paragraph 44 of the

As this Court has recognized, *Ex parte Young* does not apply when the defendants are not currently engaged in the challenged conduct. *DeBauche*, 191 F.3d at 505. In *DeBauche*, the plaintiff was a political candidate who alleged that state officials had excluded her from a political debate. *Id.* In an attempt to fit her case within *Ex parte Young*, the candidate alleged that she and other candidates from her party might be excluded from future debates. *Id.* at 503. This Court disagreed. It held that *Ex parte Young* did not apply because the candidate's allegations did not describe a "continuing governmental practice." *Id.* at 505.

The same is true here. The hypothetical possibility that state officials could display Allen's works in the future does not create an ongoing wrong. "[C]onjecture regarding discrete future events" does not create an ongoing violation for purposes of *Ex parte Young*. *Id.*

complaint contains the full web addresses of the sites where Allen's work was once displayed online. J.A. 28, ¶ 44.

Where, as here, a complaint includes web addresses, courts routinely take judicial notice of the content of the websites located at those addresses. *E.g.*, *Martingano v. Am. Int'l Group Inc.*, 309 F. App'x 495, 498 (2d Cir. 2009); *Knieval v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005); *Viridis Dev. Corp. v. Bd. of Supervisors*, 92 F. Supp. 3d 418, 422 (E.D. Va. 2015).

Second, for similar reasons, any relief issued in this case would not be prospective. Allen seeks “injunctive relief” that would require the State to stop “posting or authorizing the posting” of his works “in locations accessible to the public.” J.A. 35-36, ¶¶ 70, 75. Here, though, no such posts are occurring. See J.A. 28, ¶ 44. As a result, any injunctive relief that the district court issued would not require any defendant to change her behavior in any way.

In sum, there is no ongoing violation of law in this case. Moreover, any relief ordered here would have only retrospective effect. For both reasons, the *Ex parte Young* exception to Eleventh Amendment immunity does not apply.

III. Legislative Immunity Protects the Individual Defendants from Being Sued for Seeking to Enact a State Statute.

Allen alleges that the Governor of North Carolina and several Department officials encouraged the North Carolina General Assembly to enact a statute that Allen considers unconstitutional. J.A. 30-32, ¶¶ 50-57. Based on these allegations, Allen has filed several claims against these individuals: a takings claim, a state-law claim for unfair and deceptive trade practices, a civil-conspiracy claim, and a declaratory-judgment claim. J.A.

33-34, ¶¶ 62-69; J.A. 36-38, ¶¶ 76-89. To the extent that those claims are based on the individual defendants' roles in enacting a state statute, the claims fail because of legislative immunity.¹⁴

Legislative immunity protects government officials from being sued, in any capacity, because of their involvement in the legislative process. *Bruce v. Riddle*, 631 F.2d 272, 273, 279-80 (4th Cir. 1980). The immunity exists to give government officials “the breathing room necessary” to participate in the lawmaking process. *EEOC v. Wash. Suburban Sanitary Comm’n*, 631 F.3d 174, 181 (4th Cir. 2011).

Because of this purpose, legislative immunity is an absolute immunity. It applies even when government officials are accused of enacting legislation for an improper reason. *Hollyday v. Rainey*, 964 F.2d 1441, 1443 (4th Cir. 1992). Moreover, legislative immunity frees public officials not only from liability, but also from the costs and distractions of litigation. *Id.* The immunity bars not only damages claims, but also claims for declaratory and

¹⁴ The district court dismissed all but one of these claims, the declaratory-judgment claim, for reasons unrelated to legislative immunity. J.A. 271. Allen, however, has filed a cross-appeal from that dismissal. See *supra* p. 14 n.2.

injunctive relief. *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732 (1980).

Despite what its name might suggest, legislative immunity is not limited to legislators and their staff. Instead, it extends to executive-branch officials who participate in the legislative process. *McCray v. Md. Dep't of Transp.*, 741 F.3d 480, 485 (4th Cir. 2014). For example, this Court has held that executive-branch officials are immune from claims based on “proposing” legislation, “submitting” legislation to a legislative body, or “advocating for” particular legislation. *Kensington Volunteer Fire v. Montgomery Cty.*, 684 F.3d 462, 470-71 (4th Cir. 2012); accord *Baker v. Mayor & City Council*, 894 F.2d 679, 680-81 (4th Cir. 1990) (same).

Here, Allen’s complaint alleges that the individual defendants from the Department engaged in exactly these kinds of protected activities. Specifically, the complaint alleges that the Department officials “introduced, lobbied for passage of, and obtained passage of” a statute that clarified the scope of the state public-records act. J.A. 30, ¶ 50. The complaint also alleges that the legislators who sponsored the public-records amendment introduced the bill at the request of Department officials. J.A. 31, ¶ 53. Because framing legislation and lobbying for its passage are “integral steps in

the legislative process,” *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998), legislative immunity protects the Department officials from claims based on these activities.

As for the Governor, the complaint alleges that he signed the bill that became the challenged statute. The Supreme Court has squarely held, however, that a “Governor’s signing or vetoing of a bill” is an immune legislative act. *Id.*

Based on these points, the individual defendants moved to dismiss, invoking legislative immunity. For reasons that the district court did not explain, the court “defer[red]” a ruling on that part of the motion to dismiss. J.A. 273.

That outcome calls for this Court to apply legislative immunity and reverse the district court on the merits. Legislative immunity protects government officials against the burdens of litigation. *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). The district court’s conscious refusal to rule denied the individual defendants a core protection of legislative immunity: freedom from litigation itself.

For these reasons, the district court erred when it addressed the individual defendants' motion to dismiss the declaratory-judgment claim because of legislative immunity.

IV. Qualified Immunity Bars the Copyright-Infringement Claim.

Finally, the district court erred further when it refused to apply qualified immunity to the copyright-infringement claim against the individual defendants.

Qualified immunity prevents government officials from being sued individually over conduct that did not violate clearly established federal law about which a reasonable person would have known. At the pleading stage, qualified immunity bars a claim unless (1) the complaint plausibly alleges a violation of federal law, and (2) the legal principle at issue was clearly established. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 741 (2011).

To be clearly established, the legal principle that a defendant is accused of violating had to be clear enough at the time of the challenged conduct "that every 'reasonable official would have understood that what he is doing violates'" that principle. *Id.* at 741 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In other words, "qualified immunity affords protection to a government officer who takes an action that is not clearly

forbidden—even if the action is later deemed wrongful.” *Rogers v. Pendleton*, 249 F.3d 279, 286 (4th Cir. 2001).

Here, the district court misapplied the “clearly established law” element of qualified immunity. The court defined the relevant legal principles at a far more general level than qualified-immunity doctrine allows.

When one defines the law at an appropriately specific level, qualified immunity applies here for two reasons. First, a reasonable government official could conclude that the Department’s limited display of Allen’s works was fair use. Second, a reasonable government official could also believe that Allen had agreed, in a binding agreement with the Department, to allow the Department to display his works.

A. The district court erred by defining the relevant law at an overly broad level of generality.

Courts that weigh qualified immunity must assess the state of the law in the “specific context of the case, not as a broad general proposition.” *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Indeed, the Supreme Court has “repeatedly told courts . . . not to define clearly established law at a high level of generality.” *al-Kidd*, 563 U.S.at 742.

Here, the district court violated these principles. The court rejected qualified immunity because “*the law of copyright infringement is clearly established.*” J.A. 272 (emphasis added).

The correct questions here are far more specific:

- Was it clearly established, under the circumstances faced by the individual defendants, that displaying Allen’s works could not satisfy the fair-use exception to copyright infringement?
- Was it clearly established that the Department’s agreement with Allen did not allow the Department to display Allen’s works?

For the reasons described below in subsections B and C, the answer to both of the above questions is no.

But in any event, the district court’s failure to assess the law in case-specific terms independently warrants reversal. *See, e.g., Brousseau v. Haugen*, 543 U.S. 194, 199 (2004) (reversing denial of qualified immunity where the court below incorrectly defined the relevant legal principle “at a high level of generality”).

B. A reasonable official could have believed that the Department's display of Allen's works was fair use.

In copyright lawsuits against government officials, qualified immunity applies when a reasonable official could have believed that her display of copyrighted materials was fair use. Indeed, qualified immunity applies even if “it is ambiguous whether the use was fair use.” *Ass'n for Info. Media & Equip. v. Regents of the Univ.*, No. 10-9378, 2012 U.S. Dist. LEXIS 187811, at *6 (C.D. Cal. Nov. 20, 2012).¹⁵

The fair-use doctrine allows any person to use copyrighted material “in a reasonable manner” without the copyright holder’s consent. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985). This public privilege reflects the fundamental principle that copyrights “are limited in nature and must ultimately serve the public good.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994). By protecting the public’s “right to discover facts and exchange ideas freely,” *Bond v. Blum*, 317 F.3d 385, 394 (4th Cir. 2003),

¹⁵ See also, e.g., *Tresona Multimedia, LLC v. Burbank High Sch. Vocal Music Ass'n*, No. 16-4781, 2016 U.S. Dist. LEXIS 186059, at *23-24 (C.D. Cal. Dec. 22, 2016) (dismissing copyright lawsuit because state defendants had an objectively reasonable belief that they were in compliance with copyright law); *Issaenko v. Univ. of Minn.*, 57 F. Supp. 3d 985, 1013 (D. Minn. 2014) (same); *Campinha-Bacote v. Bleidt*, No. 10-3481, 2011 U.S. Dist. LEXIS 113430, at *8 (S.D. Tex. Oct. 3, 2011) (same).

fair use furthers the “constitutional policy of promoting the progress of science and the useful arts,” *Harper*, 471 U.S. at 549.

Fair use is an equitable doctrine that requires a case-by-case analysis of whether a particular use was reasonable. *Id.* at 552, 561.

At the same time, in section 107 of the Copyright Act, Congress has laid out a nonexclusive list of factors to guide the application of fair use. That section first sets out six prototypical examples of fair use: “criticism, comment, news reporting, teaching . . . , scholarship, or research.” 17 U.S.C. § 107 (Addendum 3). It then lists four factors that courts should analyze possible fair use. Those factors are:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

This list of factors is “not meant to be exclusive, but rather illustrative, representing only general guidance about the sorts of copying that courts and Congress most commonly have found to be fair uses.” *Bond*, 317 F.3d at 394 (quoting *Harper*, 471 U.S. at 560). Although this Court has put primary focus on the first section 107 factor—the purpose and character of the use—the fair-use doctrine is ultimately “an equitable rule of reason” that is guided by the public interest. *Bouchat v. Baltimore Ravens Ltd. P’ship*, 737 F.3d 932, 937 (4th Cir. 2013).

Here, a reasonable official, considering these factors and the public interest, could conclude that the Department’s use of Allen’s materials was fair. This is true for four reasons:

- First, the Department did not profit from its display of Allen’s works.
- Second, the Department displayed those works to educate the public about a notable episode in local history.
- Third, the Department displayed only limited excerpts of the copyrighted material.
- Fourth, the Department’s actions did not reduce the market value of Allen’s copyrights.

1. The Department did not profit from its use of the works.

First, the Department did not use the copyrighted works for commercial gain.

There is a presumption of fair use when the user of copyrighted material does not “stand[] to profit.” *Harper*, 471 U.S. at 562. This presumption applies in particular when copyrighted materials are used as part of a “noncommercial, nonprofit activity.” *Sony*, 464 U.S. at 449.

Here, there is no indication that the Department exploited Allen’s works for profit or any other form of commercial gain. Although Allen baldly asserts that the Department expected to profit from its use of his works, J.A. 18, ¶ 5, the complaint makes no specific allegations to support this claim.

To the contrary, the complaint makes clear that the Department displayed the works “to the general public or [,] free of charge.” *Bouchat*, 737 F.3d at 948. The complaint alleges that the videos were displayed on YouTube—a video-sharing website on which any member of the public could watch the videos for free. J.A. 28, ¶ 44. Similarly, the Department

displayed the image in question in a state museum's digital newsletter—a newsletter that is available online for free. J.A. 28, ¶ 44.

Because the Department displayed Allen's works only in non-revenue-producing ways, a reasonable official could conclude that the Department's noncommercial display of Allen's works was presumptively fair.

The fact that *Allen* hopes to profit from his works does not undermine the fair-use presumption. Noncommercial use of copyrighted works is presumptively fair, even if the copyright holder himself has used those works commercially. In *Bond*, for example, this Court held that the noncommercial use of a book manuscript was fair, even though the manuscript had been promoted to commercial publishers. 317 F.3d at 395. Similarly, in *Devil's Advocate*, the Court held that the noncommercial use of a copyrighted resume was fair, even though the resume had been used earlier in commercial marketing. *Devil's Advocate, LLC v. Zurich Am. Ins. Co.*, 666 F. App'x 256, 266 (4th Cir. 2016).

The Department's noncommercial use of Allen's works warrants a presumption that the use was fair.

2. The Department used the works to educate the public about an important historical event.

The Department displayed Allen's works to educate the public about an important episode in North Carolina's history. This educational purpose strongly supports a finding of fair use.

The works at issue depict the Department's excavation of the Queen Anne's Revenge, the flagship of the famed pirate Blackbeard. J.A. 17, ¶¶ 1-2. Even Allen's own complaint acknowledges that the videos and image address a historically important subject and qualify as educational material. J.A. 17, ¶ 2; J.A. 26, ¶ 34.

Displaying copyrighted materials "for nonprofit educational purposes" typically qualifies as fair use. 17 U.S.C. § 107 (Addendum 3). Moreover, "[f]air use is more likely to be found in factual works," such the media at issue here. *Stewart v. Abend*, 495 U.S. 207, 237 (1990).

In particular, courts have found fair use when people have used copyrighted material to convey history. For example, this Court has held that the Baltimore Ravens football team's use of a copyrighted "Flying B"

logo at its football stadium is fair because the image is “displayed for its historical significance.”¹⁶ *Bouchat*, 737 F.3d at 948.

Like the Flying B logo, images of the Queen Anne’s Revenge are features of local history. See J.A. 254 n.1; J.A. 186:8-9. Because of the historical significance of the Queen Anne’s Revenge project, the “public has an interest in retaining in the public domain the right” to see images of the project without charge. *Bond*, 317 F.3d at 394. Indeed, by displaying these images, the Department complied with its statutory duty to promote “knowledge and appreciation of North Carolina history and heritage.” N.C. Gen. Stat. § 121-4(13) (Addendum 6).

In sum, the educational and historical nature of the copyrighted works would convince a reasonable government official that displaying those works was fair use.

¹⁶ See also, e.g., *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609-10 (2d Cir. 2006) (holding that using copyrighted concert posters in a coffee-table biography of the Grateful Dead was fair because the images “serve as historical artifacts”).

3. The Department displayed only limited parts of the copyrighted works.

The fact that the Department displayed only short excerpts of the copyrighted works strengthens the case for fair use even further.

Where, as here, a copyrighted work is used for noncommercial, educational purposes, courts often find that use fair even when the defendant displays the entire work. *E.g.*, *Sony*, 464 U.S. at 425, 449-50 (upholding copying of entire television shows); *Bond*, 317 F.3d at 396 (upholding copying of entire book manuscript).

Here, though, the Department displayed only short excerpts of Allen's copyrighted works. The Department scattered a few seconds of his footage across five educational videos and displayed a single image in a museum newsletter. *See* J.A. 28, ¶ 44.

Because the Department displayed only a tiny fraction of Allen's copyrighted works, a reasonable government official would have had even more reason to conclude that the Department's use of those works was fair.

4. The Department's use of the copyrighted works did not reduce their market value.

A reasonable government official could also have concluded that the Department's limited display of Allen's copyrighted works did not reduce their market value.

When a defendant raises a fair-use defense, the copyright holder has the burden to establish "with reasonable probability" that the alleged infringement caused a "loss of revenue." *Harper*, 471 U.S. at 567. This burden is especially heavy where, as here, the "challenged use of a copyrighted work is noncommercial." *Bond*, 317 F.3d at 395.

Here, there is no indication that the Department reduced the market value of Allen's works. In fact, the complaint does not even allege that there is *any* market for Allen's footage. Nor does the complaint allege that the Department's display of Allen's works caused Allen direct financial harm. In particular, the complaint does not allege that the Department's actions caused any third party to use the works without paying for them.

To the contrary, an official could have reasonably expected the Department's display of Allen's works to *enhance* their market value. One reason why Allen filmed the Department's recovery of the Queen Anne's Revenge was to produce a documentary film for commercial licensing and

sale. J.A. 86-87, ¶ 14. The Department's many efforts to foster public interest in the Queen Anne's Revenge and its excavation—including the display of small parts of Allen's works—were likely to generate interest for such a commercial documentary. As the Supreme Court has recognized, even widespread copying of a copyrighted work is fair use if the copying is likely to “aid plaintiffs rather than harm them.” *Sony*, 464 U.S. at 453 & n.8. Here, a reasonable official could reasonably have expected just such an effect.

* * *

In sum, the Department displayed small parts of Allen's works to educate the public about an important event in local history. The Department did not profit from Allen's works or undermine Allen's ability to do so. Under these circumstances, a reasonable official could have believed that the Department's use was fair. As a result, qualified immunity bars Allen's copyright-infringement claim against the individual defendants.

C. A reasonable official could also have believed that Allen had agreed to allow the Department to display his works.

Qualified immunity also applies here for a second reason: a reasonable government official could have believed that Allen had authorized the Department to display his copyrighted works.

1. Allen entered an agreement that confirmed that North Carolina's public-records act applied to his works.

In 2013, Allen and the Department made a written agreement to settle Allen's earlier accusations of copyright infringement. In that agreement, Allen agreed that the Department could retain a number of still images and over eighty hours of video footage on the excavation of the Queen Anne's Revenge. J.A. 27-28, ¶ 40. Allen asked only that the Department put a watermark on the media to denote Allen's copyright. J.A. 87, ¶ 16; J.A. 88, ¶ 17.

In the agreement, Allen acknowledged that North Carolina's public-records act applied to the Department's handling of his works. J.A. 88, ¶ 17. The agreement stated: "Nothing in this Agreement shall prevent [the Department] from making records available to the public" under North Carolina law. J.A. 88, ¶ 17.

A reasonable government official could construe this agreement as allowing the Department to display Allen's media to the public. After all, even at the time of the settlement agreement, North Carolina's definition of a public record included "photographs" and "films" that the State receives "in connection with the transaction of public business." N.C. Gen. Stat. § 132-1 (Addendum 8).

Here, for two reasons, a reasonable official could conclude that this case satisfies the "public business" test.

First, the copyrighted works provide an official record of the Department's recovery of the Queen Anne's Revenge. Creating that record advances the Department's statutory responsibility to "collect and preserve" important cultural artifacts related to the history of North Carolina. N.C. Gen. Stat. § 121-4(6) (Addendum 6).

Second, the Department obtained the rights to possess and use the copyrighted works as part of its settlement of a legal dispute with Allen. The settlement of a threatened lawsuit against a state agency, by itself, is a "transaction of public business." *Id.* § 132-1 (Addendum 8); *see id.* § 114-2.4.

In sum, the Department obtained the copyrighted works in an agreement that specifically incorporated the public-records act. Under these

circumstances, a reasonable official could have believed that the agreement authorized the Department to display these public records. That authorization shows that qualified immunity bars Allen's copyright claim against the individual defendants.

2. The General Assembly's 2015 public-records amendment is consistent with qualified immunity.

The complaint alleges that, in 2015, unnamed Department officials encouraged the General Assembly to amend a North Carolina statute to clarify that Allen's works are public records. For three reasons, the public-records amendment does not negate the defendants' qualified immunity.

First, as Allen admits, the Department's display of Allen's works preceded the defendants' efforts to encourage passage of the public-records amendment. J.A. 30, ¶¶ 49-50. Those efforts therefore say nothing about what a reasonable official would have understood "at the time of the challenged conduct." *al-Kidd*, 563 U.S. at 735.

Second, the 2015 amendment contradicts Allen's suggestion (J.A. 30, ¶ 49) that the law was designed to immunize the Department's earlier use of Allen's works. As the amendment's session law shows, the amendment applies only to agreements entered after August 11, 2015. See Chapter 218,

§ 4(a), 2015 N.C. Sess. Laws at 583 (Addendum 9). The amendment therefore had no effect on the Department's rights under its 2013 agreement with Allen.

Third, as the title of the amendment shows, the public-records amendment was expressly designed to clarify the scope of existing law, not to change the law. *Id.* title, 2015 N.C. Sess. Laws at 578 (Addendum 9).¹⁷ Under North Carolina law, a clarifying statute simply explains “the correct meaning of a prior statute.” *Burgess v. Your House of Raleigh*, 388 S.E.2d 134, 141 (N.C. 1990).

For all these reasons, the 2015 amendment simply confirms what a reasonable government official could have understood about the Department's authority to display Allen's works. A reasonable official's understanding would have mirrored the understanding of the General Assembly, as clarified by the 2015 amendment.

¹⁷ The operative part of the title is “an act . . . to clarify that photographs and video recordings of derelict vessels or shipwrecks are public records when in the custody of North Carolina agencies.” Chapter 218, title, 2015 N.C. Sess. Laws at 578 (capitalization changed).

CONCLUSION

Defendants respectfully request that this Court reverse the parts of the district court's order that denied defendants' motion to dismiss. Defendants request that the Court remand the case with instructions to dismiss with prejudice all of Allen's remaining claims.

REQUEST FOR ORAL ARGUMENT

Defendants respectfully request oral argument on this appeal. Oral argument would help the Court decide the complex issues raised in this case.

Respectfully submitted,

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August 21, 2017

CERTIFICATE OF SERVICE

I certify that on this 21st day of August, 2017, I filed the foregoing brief with the Clerk of Court using the CM/ECF system, which will automatically serve electronic copies on all counsel of record.

/s/ Ryan Y. Park

Ryan Y. Park

CERTIFICATE OF COMPLIANCE

I certify that this petition complies with the type-volume limitations of Fed. R. App. P. 32(a) (7)(B) because it contains 12,664 words, excluding the parts of the petition exempted by Fed. R. App. P. 32(f). This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) & (6) because it has been prepared in a proportionally spaced typeface: 14-point Constantia font.

/s/ Ryan Y. Park
Ryan Y. Park

- Addendum 1 -

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- Addendum 2 -

United States Constitution

Article I.

Section 8.

The Congress shall have power . . .

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

Amendment XIV.

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

...

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

- Addendum 3 -

United States Code

Title 17.

Chapter 1.

Subject matter and scope of copyright.

17 U.S.C. § 107. Limitations on exclusive rights: Fair use.

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

- Addendum 4 -

Chapter 5.

Copyright infringement and remedies.

17 U.S.C. § 511. Liability of States, instrumentalities of States, and State officials for infringement of copyright.

- (a) In general. Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal Court by any person, including any governmental or nongovernmental entity, for a violation of any of the exclusive rights of a copyright owner provided by sections 106 through 122, for importing copies of phonorecords in violation of section 602, or for any other violation under this title.

- Addendum 5 -

Title 43

Chapter 39.

Abandoned shipwrecks.

43 U.S.C. § 2105. Rights of ownership.

(a) United States title The United States asserts title to any abandoned shipwreck that is—

(1) embedded in submerged lands of a State;

....

(c) Transfer of title to States

The title of the United States to any abandoned shipwreck asserted under subsection (a) of this section is transferred to the State in or on whose submerged lands the shipwreck is located.

- Addendum 6 -

North Carolina General Statutes

Chapter 121.

Article 1.

General provisions.

N.C. Gen. Stat. § 121-4. Powers and duties of the Department of Natural and Cultural Resources.

The Department of Natural and Cultural Resources shall have the following powers and duties:

...

- (3) To preserve and administer, in the North Carolina State Archives, such public records as may be accepted into its custody, and to collect, preserve, and administer private and unofficial historical records and other documentary materials relating to the history of North Carolina and the territory included therein from the earliest times.

...

- (8) In accordance with G.S. 121-9 of this Chapter, to acquire real and personal properties that have statewide historical, architectural, archaeological, or other cultural significance, by gift, purchase, or devise; to preserve and administer such properties; and, when necessary, to charge reasonable admission fees to such properties.

...

- (13) To promote and encourage throughout the State knowledge and appreciation of North Carolina history and heritage by encouraging the people of the State to engage in the preservation

- Addendum 7 -

and care of archives, historical manuscripts, museum items, and other historical materials; the writing and publication of State and local histories of high standard; the display and interpretation of historical materials; the marking and preservation of historic, architectural, or archaeological structures and sites of great importance; the teaching of North Carolina and local history in the schools and colleges; the appropriate observance of events of importance to the State's history; the publicizing of the State's history through media of public information; and other activities in historical and allied fields.

...

Article 3.

**Salvage of abandoned shipwrecks and
other underwater archaeological sites**

**N.C. Gen. Stat. § 121-22. Title to bottoms of certain waters and
shipwrecks, etc., thereon declared to be in State.**

Subject to Chapter 82 of the General Statutes, entitled "Wrecks" and to the provisions of Chapter 210, Session Laws of 1963, and to any statute of the United States, the title to all bottoms of navigable waters within one marine league seaward from the Atlantic seashore measured from the extreme low watermark; and the title to all shipwrecks, vessels, cargoes, tackle, and underwater archaeological artifacts which have remained unclaimed for more than 10 years lying on the said bottoms, or on the bottoms of any other navigable waters of the State, is hereby declared to be in the State of North Carolina, and such bottoms, shipwrecks, vessels, cargoes, tackle, and underwater archaeological artifacts shall be subject to the exclusive dominion and control of the State.

- Addendum 8 -

Chapter 132.

Public records.

N.C. Gen. Stat. § 132-1. “Public records” defined.

- (a) “Public record” or “public records” shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.
- (b) The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. . . .

- Addendum 9 -

North Carolina Session Laws

Act of Aug. 18, 2015.

Chapter 218.

An act to . . . clarify that photographs and video recordings of derelict vessels or shipwrecks are public records when in the custody of North Carolina agencies.

Section 4(a). G.S. 121-25 reads as rewritten:

Section 121-25. License to conduct exploration, recovery or salvage operations.

...

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