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One can’t help but wonder if the Supreme Court decided to hear *Allen v. Cooper* because it involves a pirate ship. The (not very glamorous) legal issue the Supreme Court will decide is whether states can be sued in federal court for copyright violations.

North Carolina owns a ship Blackbeard captured, renamed *Queen Anne’s Revenge*, and sunk between 1717-18. In the late 1990s North Carolina permitted a private research and salvage firm to photograph the ship. North Carolina continued to own the shipwreck and its artifacts, and the company could make money from the sale of media related to the ship. Frederick Allen, who was hired by the salvage firm to take photos and videos of the ship, sued North Carolina for infringing on images Allen copyrighted.

The Eleventh Amendment protects states and state officials acting in their official capacity from being sued in federal court. Congress may abrogate sovereign immunity by making a clear statement of its intent and validly exercising congressional power. Allen claims North Carolina can be sued in federal court for infringing on his copyright because Congress abrogated states’ sovereign immunity in the Copyright Remedy Clarification Act.

Both parties agree that Congress made a clear statement of intent to abrogate sovereign immunity. So, the only issue in the case is whether Congress validly exercised its power to abrogate sovereign immunity. The Fourth Circuit concluded Congress did not.

In the Copyright Remedy Clarification Act Congress invoked the U.S. Constitution Article I Patent and Copyright Clause, which authorizes Congress to “secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” But the Fourth Circuit pointed out that in *Seminole Tribe v. Florida* (1996), the Supreme Court held that Congress can’t use its Article I power to abrogate Eleventh Amendment immunity.

Allen also argued Congress validly enacted the Copyright Remedy Clarification Act under the authority granted to it in § 5 of the Fourteenth Amendment, which affords Congress the “power to enforce, by appropriate legislation,” the Amendment’s substantive guarantees.

North Carolina countered Congress did not validly exercise its § 5 power in enacting the Act because (1) it did not purport to rely on its § 5 authority, and (2) it did not tailor the Act to an “identified, widespread pattern of conduct made unconstitutional by the Fourteenth Amendment.”

The Fourth Circuit agreed with North Carolina that in adopting the Act Congress found no widespread pattern of states infringing copyrights “that presumably violated the Fourteenth Amendment’s Due Process Clause.” (Congress did find two instances where states invoked sovereign immunity to continue playing copyrighted films in prison where the willfulness of state officials amounted to a due process violation.) “Acting against this backdrop of limited evidence, Congress enacted the Copyright Remedy Clarification Act to make States broadly, immediately, and indefinitely accountable for
copyright infringement to the same extent as private parties, imposing sweeping liability for all violations of federal copyright law, whether the violation implicates the Fourteenth Amendment or not."

In his **certiorari** [4] petition Allen notes that the federal circuit courts of appeals aren’t divided on the issue in this case. According to Allen, “[w]hat should occasion this Court’s review is the federal judiciary’s relatively unexamined disregard of a law enacted by Congress as a co-equal branch, and the distension of vital principles that should properly define and limit each branch’s respective powers.”

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