

No. 15-55287

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

FLO & EDDIE, INC.,

Plaintiff-Appellee,

– v. –

PANDORA MEDIA, INC.,

Defendant-Appellant,

On Appeal from the United States District Court for the Central District of California
Case No. CV14-7648 PSG

**MOTION OF LAW PROFESSORS GARY PULSINELLI, JULIE
ROSS, PETER JASZI, AND BRANDON BUTLER FOR LEAVE
TO FILE AS *AMICI CURIAE* IN SUPPORT OF
DEFENDANT-APPELLANT PANDORA MEDIA, INC.
SUPPORTING REVERSAL**

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September 8, 2015

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**MOTION OF LAW PROFESSORS GARY PULSINELLI, JULIE ROSS,
PETER JASZI, AND BRANDON BUTLER FOR LEAVE TO FILE AS *AMICI
CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT**

Pursuant to Federal Rule of Appellate Procedure 29(b) counsel for prospective *amici curiae* respectfully moves for leave to file the attached BRIEF OF LAW PROFESSORS GARY PULSINELLI, JULIE ROSS, PETER JASZI, AND BRANDON BUTLER AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT SUPPORTING REVERSAL. Defendant-Appellant consented to the filing, but Plaintiff-Appellee did not.

Based on the background and interest of *amici*, counsel respectfully requests that the Court grant this motion. In support of the present motion, counsel states the following:

1. *Amici* are law professors at U.S. universities, with a particular expertise in intellectual property law, including copyright law. *Amici* write and teach on topics that include all aspects of intellectual property law. Certain of the *amici* have independently authored law review articles that directly address important federalism and preemption issues raised by the case at bar and similar cases pending in other jurisdictions.

2. *Amici* maintain a professional interest in the development and application of the federal copyright law, and its relationship to state copyright law. In this case in particular, *amici* desire to see that the Court consider Congress's carefully constructed and balanced federal copyright law provisions and how they are likely to be negated by expansive application of state copyright law to new uses of pre-1972 sound recordings.

3. *Amici* seek to provide the Court with an impartial discussion and analysis of the proper application of federal preemption, pursuant to the Supremacy Clause (Article VI, cl. 2 of the U.S. Constitution), to the interpretation of state statutory and common copyright law. In particular, they seek to call to the attention of the Court important aspects of federal copyright and constitutional law directly bearing on the instant case that the parties did not raise below and the District Court did not consider. These statutory and constitutional issues are of national import, and the resolution of these federal questions could make it unnecessary for this Court to address the issue of the scope of California state law protection for performances of sound recordings upon which the District Court based its holding below.

4. *Amici* are well-situated to advise the court about the purpose and scope of federal copyright law and federalism principles relevant to this matter. Proposed *amici* believe that their expertise will be of assistance to the court in resolving the issues raised by this case.

WHEREFORE, the undersigned counsel respectfully requests that the Court grant its motion for leave to file an *amicus curiae* brief.

Respectfully Submitted

Dated: September 8, 2015

By: /s/ Julia Ross

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INTEREST OF *AMICI CURIAE*¹

Amici curiae seek leave of the Court to file this brief under Federal Rule of Appellate Procedure 29(a).

Amici curiae are law professors who teach and write about intellectual property law, including copyright law. We have no personal stake in the outcome of this case. Our interest is in seeing that the Court consider the important federal question of whether state laws providing public performance rights to owners of pre-1972 sound recordings necessarily conflict with federal copyright law and are preempted under the Supremacy Clause, Article VI, cl. 2, of the U.S. Constitution.

In particular, we seek to demonstrate for the Court how the District Court's interpretation of California Civil Code § 980(a)(2)² and California common law creates an obstacle to the accomplishment of the objectives of Congress expressed in the federal copyright law and its legislative

¹ Pursuant to Fed. R. App. P. 29(c)(5), counsel for the parties have not authored any part of this brief; no party or a party's counsel contributed money for the brief; and no one other than *amici* have contributed money for this brief.

² Cal. Civ. Code § 980(a)(2) (West 2014).

history. The Supremacy Clause requires that these conflicts be resolved in favor of the federal law, and thus reversal is warranted.

SUMMARY OF ARGUMENT

In 1995, federal copyright law recognized a limited digital performance right that allows sound recording owners and performers to receive royalties when their works are transmitted via the Internet or satellite radio. However, this federal protection does not extend to pre-1972 sound recordings, which are excluded from federal copyright and instead left to the protections of state law. Although no state law explicitly provides any performance right for pre-1972 recordings, the District Court held that Plaintiff-Appellee had such a right under California Civil Code § 980(a)(2) and California common law.

However, such an interpretation of California law should have been preempted under the conflict preemption principles of the Supremacy Clause of the U.S. Constitution. Although a savings clause in § 301 of the Copyright Act leaves pre-1972 sound recordings outside the Copyright Act's explicit preemption provision, state laws purporting to grant digital public performance rights to owners of those recordings

may nevertheless be preempted under ordinary conflict preemption principles for two related reasons. First, such protection would interfere with the fundamental principle of national uniformity underlying the Copyright Act. Second, such protection is inconsistent with the carefully delineated system of exclusions and statutory licenses that Congress effectuated when it created the federal digital performance right. Holding that federal copyright law preempts a state-law public performance right as a matter of law would obviate the need for this Court to establish the exact parameters of any such right.

ARGUMENT

I. CONFLICT PREEMPTION ANALYSIS OF STATE-LAW PERFORMANCE RIGHTS IN PRE-1972 SOUND RECORDINGS IS REQUIRED UNDER THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION DESPITE THE SAVING CLAUSE FOR PRE-1972 SOUND RECORDINGS IN 17 U.S.C. § 301(C).³

In our federal system of government, the Constitution's Supremacy Clause⁴ dictates that the laws of the federal government take precedence over the laws of the states, and thus state laws that conflict with federal laws are invalid.⁵

Current Supreme Court doctrine analyzes federal preemption of state laws using two broad categories: express preemption and implied

³ The arguments in this Brief derive substantially from two articles by certain of the *amici* that explore the presented preemption arguments in more depth: Gary Pulsinelli, *Happy Together? The Uneasy Coexistence of Federal and State Law Protection for Sound Recordings*, 82 TENN. LAW REV. 167 (2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2593182; and Julie L. Ross, *[Un]Happy Together: Why the Supremacy Clause Preempts State Law Digital Performance Rights in Radio-Like Streaming of Pre-1972 Sound Recordings*, — J. COPYRIGHT SOC. U.S.A. — (forthcoming Summer 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2595794.

⁴ U.S. CONST. art. VI, cl. 2.

⁵ See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES §§ 5.1–5.2 (4th ed. 2011).

preemption.⁶ First, the Court looks to see if the federal statutory scheme contains a provision that expressly states that the federal enactment is meant to preempt state law in the area; if so, then the Court analyzes whether the state law falls within the scope of the preemption provision.⁷

Section 301(a) of the Copyright Act is such a provision, preempting essentially all state copyright laws.⁸ However, § 301(c) specifically exempts pre-1972 sound recordings from express preemption under § 301(a).⁹ Thus, a digital performance right under California law for the pre-1972 recordings at issue in this case would not be expressly preempted. However, this conclusion is only the first step in determining whether a state-law performance right would be preempted by federal copyright law, not the end of it.

If the federal law does not contain an express preemption provision, or the challenged state provision does not fall within it, the state law may

⁶ *See id.* § 5.2.1.

⁷ *See id.* § 5.2.2.

⁸ 17 U.S.C. § 301(a) .

⁹ *Id.* § 301(c).

nevertheless be impliedly preempted.¹⁰ One type of implied preemption is conflict preemption: A particular state law may so conflict with some part of the federal law that the two cannot coexist.¹¹ In that case, the state law is invalidated under the Supremacy Clause. The relevant standard the Supreme Court applies is whether the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹²

Although it addressed a very different federal statutory scheme and state law, the Supreme Court’s analysis in *Geier v. American Honda Motor Co.*¹³ is particularly relevant to the preemption analysis in the present case. In *Geier*, the Court analyzed a statutory scheme for automobile safety requirements that contained both an express preemption provision and a saving clause.¹⁴ The Court concluded that the saving clause foreclosed express preemption,¹⁵ but “the saving clause (like the

¹⁰ See CHEMERINSKY, *supra* note 5, § 5.2.1.

¹¹ See *id.* §§ 5.2.4–5.2.5.

¹² *Goldstein v. California*, 412 U.S. 546, 561 (1973) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

¹³ 529 U.S. 861 (2000).

¹⁴ *Id.* at 867–68 (quoting 15 U.S.C. § 1397(k) (1988)).

¹⁵ *Id.*

express pre-emption provision) does *not* bar the ordinary working of conflict pre-emption principles.”¹⁶

The Court then went further, stating “[n]either do we believe that the pre-emption provision, the saving provision, or both together, create some kind of ‘special burden’ beyond that inherent in ordinary pre-emption principles—which ‘special burden’ would specially disfavor pre-emption here.”¹⁷ It also recognized that “this Court has repeatedly ‘decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.’”¹⁸ Just as the saving clause in *Geier* did not preclude the application of ordinary conflict preemption principles, § 301(c) does not foreclose conflict preemption analysis here, or even create a “special burden.”¹⁹ In fact, *Geier* tells us any such saving clause must be read narrowly.²⁰

In *Goldstein v. California*, the Court addressed preemption in the context of pre-1972 sound recordings, considering the validity of a

¹⁶ *Id.* at 869 (emphasis in original).

¹⁷ *Id.* at 870; *see also id.* at 870–74 (further exploring the problems that would be created if a special burden applied).

¹⁸ *Id.* at 870 (quoting *United States v. Locke*, 529 U.S. 89, 106–07 (2000)).

¹⁹ *Geier*, 529 U.S. at 870–71.

²⁰ *See id.* at 870.

California criminal law that implicated only the rights of copying and distribution.²¹ The case came to the Court in 1973, after sound recordings had been granted federal copyright protection on a prospective basis, but before the 1976 Copyright Act added the express preemption provisions.²² The Court upheld the particular California law as a valid exercise of the state's power.²³

The Court expressly analyzed the issue of conflict preemption, framing it as “whether, in actual operation, the exercise of the power to grant copyrights by some States will prejudice the interests of other States.”²⁴ Because the law only impacted physical copying or sales that took place within California, and thus placed no burden on non-protecting states, it did not create “a need for uniformity such as that which may apply to the regulation of interstate shipments” or

²¹ 412 U.S. at 548–49.

²² This timing makes modern interpretation of the case somewhat problematic, as the law has changed significantly in the interim.

²³ *Goldstein*, 412 U.S. at 571.

²⁴ *Id.*

“prejudicial conflicts.”²⁵ Absent such issues, the Court held, the California statute was not preempted.²⁶

In the present case, a state-law digital performance right “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²⁷ First, the “full purposes and objectives” of federal copyright law include a fundamental commitment to national uniformity with only very narrow exceptions, as revealed in both the history of copyright law and the specific structure of the present law. Second, enforcement of state-law digital public performance rights in pre-1972 sound recordings will necessarily conflict with Congress’s careful balancing of interests in establishing the federal statutory license for digital audio transmissions in the 1995 Digital Performance Rights in Sound Recordings Act (“DPRA”).²⁸

²⁵ *Id.* at 559.

²⁶ *Id.* at 560.

²⁷ *See id.* at 561.

²⁸ Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified as amended at 17 U.S.C. §§ 106, 114).

II. STATE-LAW DIGITAL PERFORMANCE RIGHTS CONFLICT WITH CONGRESS'S GOAL OF NATIONAL UNIFORMITY IN THE COPYRIGHT SYSTEM.

A. The History of Copyright Law Demonstrates Congress's Strong Desire for National Uniformity.

Federal copyright law in the United States has long strived for uniformity. Prior to 1790, most states had their own copyright laws.²⁹ However, the different laws in each state created logistical difficulties for authors, and the laws sometimes conflicted with each other.³⁰ To address these problems,³¹ the Framers drafted copyright protection into the Constitution.³² Congress enacted the first Copyright Act in 1790, then made major revisions in 1909 and 1976, each time moving further in the direction of national uniformity.

This desire for national uniformity provided the impetus for the express preemption provision found in § 301(a) of the 1976 Copyright

²⁹ See Irah Donner, *The Copyright Clause of the U.S. Constitution: Why Did the Framers Include It with Unanimous Approval?*, 36 AM. J. LEGAL HIST. 361, 373 (1992).

³⁰ See *id.* at 374, 376–77; ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 432 (6th ed. 2012).

³¹ See MERGES ET AL., *supra* note 30, at 432.

³² U.S. CONST. art. I, § 8, cl. 8.

Act, as the House Report accompanying the 1976 Act makes abundantly clear:

One of the fundamental purposes behind the copyright clause of the Constitution, as shown in Madison's comments in *The Federalist*, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States. Today, when the methods for dissemination of an author's work are incomparably broader and faster than they were in 1789, national uniformity in copyright protection is even more essential than it was then to carry out the constitutional intent.³³

Courts have also repeatedly recognized national uniformity as a crucial goal of federal copyright law. Judge Learned Hand made this point emphatically in dissent:

Uniformity was one of the principal interests to be gained by devolving upon the Nation the regulation of [copyright law]. . . . [I]n the 43rd number of the *Federalist*, Madison made this short comment on the Clause, 'The States cannot separately make effectual provision for [patents or copyrights]', 'and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.' He assumed that it was obvious that the states could not make any such 'effectual provision,' and so it was; for, although a state may prohibit the importation of pirated

³³ H.R. REP. NO. 94-1476, at 129 (1976).

‘works’ published elsewhere, and even confiscate them, that has again and again proved an ineffective protection³⁴

The Supreme Court subsequently made this same point very explicitly in *Goldstein*, stating “[t]he objective of the Copyright Clause was clearly to facilitate the granting of rights national in scope”³⁵ and quoting the same passage from Madison.³⁶ Later, in *Bonito Boats v. Thunder Craft Boats*, the Court stated: “One of the fundamental purposes behind the Patent and Copyright Clauses of the Constitution was to promote national uniformity in the realm of intellectual property.”³⁷ And Judge Kozinski of this Court has made in dissent an analogous argument, stating “A copyright licensee must be able to exercise rights which are inherently federal in nature without worrying that 50 separate states will burden those rights.”³⁸

³⁴ *Capitol Records v. Mercury Records Corp.*, 221 F.2d 657, 667 (2d Cir. 1955) (Hand, J., dissenting) (footnote omitted) (quoting THE FEDERALIST NO. 43, at 309 (James Madison) (B. Wright ed. 1961)).

³⁵ *Goldstein*, 412 U.S. at 555.

³⁶ *Id.* at 555–56 (quoting THE FEDERALIST NO. 43, at 309).

³⁷ 489 U.S. 141, 162 (1989).

³⁸ *Wendt v. Host Int’l, Inc.*, 197 F.3d 1284, 1288 (9th Cir. 1999) (Kozinski, J., dissenting from order denying rehearing *en banc*) (citations omitted).

B. A State-Law Digital Performance Right Conflicts with Congress’s Strong Desire for National Uniformity.

A state-law digital performance right presents a conflict with the Copyright Act’s fundamental purpose of national uniformity that far exceeds the minimal conflict presented by state law duplication and distribution rights addressed in *Goldstein*. The District Court’s interpretation of California law means that any digital broadcasts of pre-1972 sound recordings that are received in California, regardless of their point of origin—including broadcasts that are legal where made³⁹—will be infringing in California.

The main sources of digital performances are webcasting and satellite radio—media that are inherently unlimited by state boundaries. Pandora and other webcasters transmit their broadcasts, some of which include pre-1972 sound recordings, to listeners all over the country via the Internet simultaneously, thus making a “digital performance” of each work. In most cases, these performances will create no issues—the pre-1972 recordings are not protected under federal law or historically under

³⁹ Notably, both North and South Carolina have statutes that explicitly *deny* broadcast rights for pre-1972 sound recordings. *See* N.C. GEN. STAT. § 66-28 (2010); S.C. CODE ANN. § 39-3-510 (2011).

any other state law, so transmissions to those states will not infringe any rights in the recordings. However, any transmissions that are received in California will be infringing, exposing webcasters to lawsuits brought under California law by owners of pre-1972 recordings that are included in broadcasts. Streaming services would thus be forced to comply with the most restrictive state laws, because their streams reach all jurisdictions simultaneously.

Exacerbating the problem, California does not have the compulsory license scheme found in the federal system, and so webcasters like Pandora would have to negotiate individually with each recording artist or record label that owns a pre-1972 sound recording it plays (making it very problematic to do anything with pre-1972 sound recordings in California). Furthermore, they would confront a fundamental problem in limiting any negotiated license fees just to California performances: webcasters generally cannot control, or even tell, *where* a customer is listening to their webcasts.

The benefits of a uniform, nation-wide, efficient system would be nullified if streaming services were forced to distinguish between

individual sound recordings that are streamed over their services to (1) ascertain the date of recording, (2) identify its owner; (3) identify all performers on the recording who might assert performance rights in it; (4) evaluate whether the laws of any of the fifty-plus states/territories provide performance rights to the owner and/or performers on the recording; (5) determine which performances to which listeners were covered under that law; and (6) negotiate a license to stream the particular work for a fee that is acceptable to both the streaming service and the owner/performers. Entities seeking to provide nationwide streaming services would find their efforts thwarted by the inherent difficulties in each of the steps detailed above for determining the nature, scope, and applicability of state laws to performances of individual sound recordings.⁴⁰

C. Because a State-Law Digital Performance Right Conflicts with Congress's Strong Desire for National Uniformity, It Should Be Preempted under the Supremacy Clause.

Because a state-law digital performance right destroys national copyright uniformity and thus poses an obstacle to the accomplishment

⁴⁰ *Cf. Geier*, 529 U.S. at 881 (discussing importance of predictability and uniformity in a nation-wide standard of care).

of the full purposes and objectives of the Copyright Act, this Court should hold that conflict preemption bars the establishment of any such right.

The structure of the Supreme Court’s analysis in *Geier* applies nicely to assessing the availability of a digital performance right under state law. First, the express preemption provision strongly expresses an intent for national uniformity.⁴¹ The Court in *Geier* observed that “the pre-emption provision itself reflects a desire to subject the industry to a single, uniform set of federal safety standards.”⁴² Having found that this provision did not bar conflict preemption, the Court considered the scope and purpose of the federal laws at issue and concluded that the suit was preempted because it would conflict with that purpose, including the goal of national uniformity.⁴³ In fact, the case for Copyright Act preemption is even more persuasive than that in *Geier*,

⁴¹ See 17 U.S.C. § 301(a).

⁴² *Geier*, 529 U.S. at 871.

⁴³ *Id.* at 874–86; see also 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01[B][3][a] (suggesting that the *Geier* analysis would apply to copyright law).

because the need for national uniformity is rooted in the Constitution itself, in the Intellectual Property Clause.⁴⁴

Second, just as the existence of a saving clause in the federal statute at issue in *Geier* did not negate the need for uniform implementation of federal safety standards or prevent the application of ordinary preemption principles,⁴⁵ the exception in § 301(c) for state law as applied to pre-1972 sound recordings does not negate the strong interest in uniformity underlying the 1976 Act or prevent the application of ordinary preemption principles. At the time the exception was drafted, the only relevant state laws in existence were limited to sound recording piracy,⁴⁶ involving the copying and distribution rights. Furthermore, the federal Copyright Act itself at the time explicitly *denied* all public

⁴⁴ U.S. CONST. art. I, § 8, cl. 8.

⁴⁵ 529 U.S. at 868–74.

⁴⁶ See REGISTER OF COPYRIGHTS, FEDERAL PROTECTION FOR PRE-1972 SOUND RECORDINGS 20–21 (2011), *available at* <http://www.copyright.gov/docs/sound/pre-72-report.pdf> (describing the state laws prior to *Goldstein* as “laws making it a criminal offense to duplicate and distribute sound recordings, without authorization, for commercial purposes”); *id.* at 44 (noting that “[i]n general, state law does not appear to recognize a performance right in sound recordings”).

performance rights in sound recordings.⁴⁷ The narrow reading of the § 301(c) exception demanded by *Geier*⁴⁸ thus suggests limiting its scope to the type of anti-piracy rights Congress knew existed in many states at the time.⁴⁹

Furthermore, the degree of conflict between the goal of uniformity underlying the Copyright Act and a state-law digital performance right is much greater than that for the traditional state rights of copying and distribution. Copying and distribution of phonorecords are relatively localized activities. In contrast, digital broadcasting and webcasting are, by their very natures, immediately national in scope. They are therefore particularly suitable for federal regulation and, conversely, particularly unsuitable for state regulation.

Also on point is *Capital Cities Cable, Inc. v. Crisp*.⁵⁰ In *Capital Cities*, the Supreme Court considered federal preemption of Oklahoma's

⁴⁷ 17 U.S.C. § 114(a) (1976).

⁴⁸ *See Geier*, 529 U.S. at 870.

⁴⁹ *E.g.*, S. REP. NO. 92-72, at 3–4 (1971) (discussing “widespread unauthorized reproduction” of sound recordings and noting statutes enacted in New York and California to suppress record piracy).

⁵⁰ 467 U.S. 691 (1984).

prohibition against alcohol advertising.⁵¹ The specific issue was whether federal law preempted the Oklahoma law as it applied to alcohol advertising carried on cable television.⁵² The Court first found that the FCC’s comprehensive regulations pertaining to cable television preempted state regulations,⁵³ noting that Oklahoma’s ban “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal regulatory scheme.”⁵⁴ The Court then went on to apply the same standard to conflict preemption under the Copyright Act.⁵⁵ Noting that Congress, in the 1976 Act, had implemented special rules for cable television, “to facilitate the cable industry’s ability to distribute broadcast programming on a national basis,”⁵⁶ the Court found that Oklahoma’s advertising ban interfered with this purpose and was therefore preempted.⁵⁷

⁵¹ *Id.* at 694 & n.1.

⁵² *Id.* at 696.

⁵³ *Id.* at 698–709.

⁵⁴ *Id.* at 706.

⁵⁵ *Id.* at 709–11.

⁵⁶ *Id.* at 709.

⁵⁷ *Id.* at 716.

Moreover, although it recognizes the state’s power to regulate pre-1972 sound recordings, *Goldstein* reinforces the conclusion that any state-law performance right should be preempted. While protecting works of “local importance” may be accomplished when the only activities prohibited are copying and distribution,⁵⁸ the same is not true when the activities prohibited involve transmissions that are unavoidably national in scope. Limiting the state-law digital performance right protections to works of “local importance” to Californians is simply impossible when the targeted technologies are webcasts and satellite radio. Although a Pandora webcast or Sirius XM broadcast of a pre-1972 sound recording may be non-infringing where made and also in most places where it is received, the District Court’s ruling would make it infringing in California. Enforcing a state-law digital performance right would thus “prejudice the interests of other States” in a way that the California Penal Code provision at issue in *Goldstein* did not.⁵⁹ Indeed, transmissions of pre-1972 sound recordings are more comparable to the “interstate shipments” that the Court suggested needed uniform

⁵⁸ *Goldstein*, 412 U.S. at 557–60; *accord id.* at 576 (Marshall, J., dissenting).

⁵⁹ *Id.* at 558.

regulation than they are to copies of sound recordings of “local interest.”⁶⁰ In these situations, the federal interest is much stronger than it was in *Goldstein*, and thus state-law digital performance rights should be preempted for conflicting with the national uniformity of the copyright system.

These points also highlight the significance of another statement the Court made in *Goldstein*:

To interpret accurately Congress’ intended purpose in passing the 1909 Act and the meaning of the House Report petitioners cite, we must remember that our modern technology differs greatly from that which existed in 1909. The Act and the report should not be read as if they were written today, for to do so would inevitably distort their intended meaning; rather, we must read them against the background of 1909, in which they were written.⁶¹

Technology has changed even more dramatically between the time of the 1976 Act and today than it did between the 1909 Act and *Goldstein* in 1973. In 1976, Congress was willing to preserve state law protection for pre-1972 sound recordings via § 301(c),⁶² which at the time meant provisions like California’s Penal Code section preventing localized

⁶⁰ *See id.*

⁶¹ *Id.* at 564.

⁶² 17 U.S.C. § 301(c).

copying and distribution. Given the absence of any state law performance rights in 1976 and the broadcast industry practice of freely performing sound recordings without permission from or payment to their owners, Congress could not have foreseen or necessarily intended to permit state laws limiting the types of digital performance uses reached by the District Court's ruling. Thus, the § 301(c) saving clause does not stand in the way of finding that state-law digital performance rights are preempted.

Furthermore, nothing in the decision limits it to digital performances; the District Court seems to have recognized a general public performance right for pre-1972 sound recordings. Recognizing such a broad public performance right subjects an enormous number of parties to unexpected liability, including any radio station whose signal can be received in California—and such an expansive performance right is specifically denied to post-1972 sound recordings under federal law.⁶³ This enormous expansion of state law copyright liability for uses expressly permitted by federal copyright law only enhances the case for

⁶³ See *id.* §§ 114(a), (d)(i).

preemption under the Copyright Act. Thus, the Plaintiff-Appellee's requested state-law public performance right should have been preempted, and Pandora should not be liable for transmitting its sound recordings to California.

III. STATE-LAW DIGITAL PERFORMANCE RIGHTS CONFLICT WITH CONGRESS'S CAREFULLY BALANCED RESTRICTIONS ON AND REGULATION OF THE FEDERAL DIGITAL PERFORMANCE RIGHT.

Even if the Court were to conclude that the conflict between state-law recognition of public performance rights in pre-1972 recordings and the general goal of uniformity underlying the federal Copyright Act is insufficient alone to justify preemption, the Court must still consider whether the Supremacy Clause preempts such state laws to the extent that they conflict with the compulsory statutory licensing provisions of § 114 of the Copyright Act.⁶⁴

⁶⁴ *Id.* § 114(d)(2).

A. The Section 114 Compulsory License Reflects Congress's Comprehensive Balancing of Competing Interests in Enacting a Digital Public Performance Right.

When Congress created the digital public performance right in the DPRA in 1995,⁶⁵ it simultaneously created a complex, carefully balanced system for compensating copyright owners and recording artists for uses implicating this right while protecting the public interest. The statutory scheme included a compulsory statutory licensing system for qualifying digital audio transmissions of sound recordings.⁶⁶

As a general matter, compulsory statutory licenses have been created by Congress to allow for a more efficient mechanism in both guaranteeing public access to specific types of works and compensating copyright owners for qualifying uses.⁶⁷ Such licenses impose a limitation on both the owner's ability to control access to the category of works

⁶⁵ Pub. L. No. 104-39, 109 Stat. 336 (1995).

⁶⁶ 17 U.S.C. § 114(d)(2).

⁶⁷ *See, e.g.*, Harry G. Henn, THE COMPULSORY LICENSE PROVISIONS OF THE U.S. COPYRIGHT LAW 2, n.13 (General Revision of the Copyright Law, Study No. 5, Senate Subcomm. on the Judiciary) (Comm. Print 1956), *available at* <http://www.copyright.gov/history/studies/study5.pdf> (discussing § 1(e) of the 1909 Act). Today, the Copyright Act establishes several different types of statutory licenses, many of which apply to musical compositions or sound recordings and their uses in various media.

and the owner's ability to set a price for use of those works by others. Statutory licenses thus inevitably reflect both a considered balancing by Congress of the rights of copyright owners and the rights of those who wish to use the works. Statutory licenses also require a carefully crafted system to define who qualifies for the license and how royalties will be determined and paid.

In the DPRA, Congress created an addition to the existing bundle of federal property rights in sound recordings for the benefit of copyright owners and performing artists, but ensured unimpeded access to these works by licensees in narrowly defined circumstances through a compulsory statutory license. This careful balancing in the drafting of statutory license provisions adopted under the DPRA is reflected both in the structure of § 114 and in the legislative history of the DPRA.

The § 114 statutory license is precisely tailored to accomplish its intended purpose: to authorize qualifying, radio-like digital services that perform a variety of sound recordings selected by the service (rather than by users) to digitally perform those sound recordings without a license from the copyright owners, provided that a statutory royalty is

paid to the designated collective.⁶⁸ Section 114(d) specifically limits the scope of the digital performance right in sound recordings established by the DPRA in § 106(6), including the creation of a statutory license for specified categories of digital audio services that transmit non-interactive public performances of sound recordings meeting a precise set of eligibility requirements.⁶⁹ Its structure reflects the congressional intent to address the potential impact of new digital music services on the recording industry, with a particular concern about the potential for interactive digital transmissions to serve as a substitute for record sales. Section 114 also reflects Congress's intent to avoid stifling technology or imposing unnecessary burdens on certain existing distribution services.⁷⁰

Sections 114(e) through (j) address at length a variety of considerations and procedures relating to the implementation of this new statutory license, including authority to negotiate license fees collectively without antitrust liability,⁷¹ specific instructions for how licensing proceeds are to be divided among both copyright owners and

⁶⁸ See S. REP. NO. 104-128 at 16, 24 (1995).

⁶⁹ 17 U.S.C. § 114(d)(2).

⁷⁰ S. REP. NO. 104-128 at 15–16; H.R. REP. NO. 104-274 at 14 (1995).

⁷¹ 17 U.S.C. § 114(e).

performers on sound recordings,⁷² and limitations on licensing to affiliated entities.⁷³

Overlaying the strict qualification requirements for the statutory license are a host of specific procedures and the creation of an administrative apparatus established in § 114(f) for determining rates for different types of statutory licensees.⁷⁴ The statute lays out standards to be applied when setting statutory rates and a detailed rate-setting process.⁷⁵ Although different standards are identified for different types of licensees, some of the factors to be used in setting digital streaming royalties for preexisting services are maximizing the availability of works to the public, affording a fair return to copyright owners and a fair income to copyright users, and minimizing any disruptive impact on the relevant industries.⁷⁶

Nowhere in the § 114 statutory license provisions or in the grant of a limited digital performance right in sound recordings in § 106(6) is there

⁷² *Id.* § 114(g).

⁷³ *Id.* § 114(h).

⁷⁴ *Id.* § 114(f).

⁷⁵ *See* 17 U.S.C. § 114(f)(1)(A) & (B), (f)(2)(A) & (B).

⁷⁶ *See id.* § 801(b)(1).

a reference to pre-1972 recordings. The provisions of § 114 and supporting analysis in the Senate and House reports were focused on establishing a streamlined compulsory license system that would both benefit owners and performers of sound recordings and simplify the licensing process for digital streaming services; Congress simply did not consider the possibility that state laws might place additional burdens on services complying with the federal statutory license for digital performances.

Both the Senate Report and House Report repeatedly noted the careful balance that the DPRA was striking between multiple competing interests.⁷⁷ It sought to create a narrowly defined revenue stream for owners of—and performers in—sound recordings whose livelihoods were threatened by the advent of online access to and uncompensated downloads of musical recordings. Congress also sought to protect entities that were engaged in developing what has become one of the preferred sources of music listening for today’s consumers—streaming services offering music to consumers in a manner similar to that of

⁷⁷ S. REP. NO. 104-128 at 15–16; H.R. REP. NO. 104-274 at 14.

terrestrial radio. The statutory license was thus a necessary corollary to the new digital performance right, streamlining the licensing process for digital performances that were “radio-like” and thus were less likely to substitute for sales of recordings. The Senate Report stated,

[T]he Committee has sought to address the concerns of record producers and performers regarding the effects that new digital technology and distribution systems might have on their core business without upsetting the longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades. Accordingly, the Committee has chosen to create *a carefully crafted and narrow performance right*, applicable only to *certain* digital transmissions of sound recordings.⁷⁸

The intent of Congress to reconcile competing interests in light of changed circumstances in the music industry is a repeated theme in the legislative history:

⁷⁸ S. REP. NO. 104-128 at 13, *quoted in and emphasis added by Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 497 (3d Cir. 2003); *see also* H.R. REP. NO. 105-796 at 79–80 (1998) (Conf. Rep.) (stating that later amendments to §§ 112 & 114 of the Copyright Act were “intended to achieve two purposes: first, to further a stated objective of Congress when it passed the [DPRA] to ensure that recording artists and record companies will be protected as new technologies affect the ways in which their creative works are used; and second, to create fair and efficient licensing mechanisms that address the complex issues facing copyright owners and copyright users as a result of the rapid growth of digital audio services”).

The limited right created by this legislation reflects changed circumstances: the commercial exploitation of new technologies in ways that may change the way prerecorded music is distributed to the consuming public. It is the Committee's intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.⁷⁹

The Senate Report discussed “the need to strike a balance among all of the interests affected” by the new performance right, with that balance “reflected in various limitations on the new performance right” set forth in the DPRA.⁸⁰ It further expressed the need for the legislation to address concerns about the performance right making it “economically infeasible for some transmitters to continue certain current uses of sound recordings.”⁸¹

Both the House and the Senate Reports reflect the belief of Congress that a performance right in sound recordings was necessary to protect recording artists and record companies, but that the right needed to be limited to allow the public to benefit from new digital transmission

⁷⁹ S. REP. NO. 104-128 at 15.

⁸⁰ *Id.* at 15–16.

⁸¹ *Id.* at 16.

technologies and to “strike a balance among all of the interests” affected by the new right.⁸² Because of the anticipated continued advancement of digital transmission technology, both reports stated the intent that “both the rights and exemptions and limitations created by the bill be interpreted in order to achieve their intended purposes.”⁸³

Throughout the legislative history of the DPRA, the baseline presumption was that except for those uses that fell within the digital performance right under federal law, other performances of sound recordings remained in the public domain and were freely permitted without any payment obligation to the owner. Reports of the Copyright Office demonstrate a similar understanding of pre-DPRA law as permitting radio stations to perform sound recordings freely without any payment obligation.⁸⁴ Based on the compulsory statutory licensing system established by Congress in 1995, digital radio and satellite

⁸² *Id.* at 14; *see also* H.R. REP. NO. 104-274 at 13 (1995).

⁸³ S. REP. NO. 104-128 at 14; H.R. REP. NO. 104-274 at 13.

⁸⁴ *E.g.*, REGISTER OF COPYRIGHTS, COPYRIGHT IMPLICATIONS OF DIGITAL AUDIO TRANSMISSION SERVICES (1991) at 142–57 (referring repeatedly to broadcast radio and other entities that perform sound recordings as doing so for “free”).

services grew rapidly, with business models relying on the absence of the need for individual licensing negotiations with sound recording owners.

B. Because a State-Law Digital Performance Right Conflicts with the Federal Compulsory License for Digital Audio Transmissions, It Should Be Preempted Under the Supremacy Clause.

Allowing owners of pre-1972 works to assert state law digital performance rights directly conflicts with the purposes and objectives of the federal compulsory license in § 114(d)(2), because it requires digital streaming services that qualify for the federal compulsory license to negotiate separate licenses with individual owners of pre-1972 sound recordings based on a patchwork of differing state laws, for performances that are not specific to any one state but that are available everywhere that an Internet connection or satellite radio exists. In other words, even when a streaming service meets the rigorous requirements for a statutory license under § 114, it would still be required to check millions of sound recordings with tens of millions of owners and performers against fifty-plus state regimes to determine whether any further licenses were needed beyond the federal statutory license.

The Court's reasoning in *Capital Cities Cable, Inc. v. Crisp*⁸⁵ so precisely fits the current situation that it bears quoting at length:

In revising the Copyright Act . . . , Congress concluded that cable operators should be required to pay royalties to the owners of copyrighted programs retransmitted by their systems on pain of liability for copyright infringement. At the same time, Congress recognized that “it would be impractical and unduly burdensome to require every cable system to negotiate [appropriate royalty payments] with every copyright owner” in order to secure consent for such retransmissions. [from the footnote: “In developing this approach, Congress was aware that cable operators would face virtually insurmountable technical and logistical problems if they were required to block out all programs as to which they had not directly obtained copyright permission from the owner.”] Section 111 of the 1976 Act codifies the solution devised by Congress. It establishes a program of compulsory copyright licensing that permits cable systems to retransmit distant broadcast signals without securing permission from the copyright owner and, in turn, requires each system to pay royalty fees to a central royalty fund. . . .

In devising this system, Congress has clearly sought to further the important public purposes framed in the Copyright Clause, U.S. Const., Art. I, § 8, cl. 8, of rewarding the creators of copyrighted works and of “promoting broad public availability of literature, music, and the other arts.” Compulsory licensing not only protects the commercial value of copyrighted works but also enhances the ability of cable systems to retransmit such programs carried on distant broadcast signals, thereby allowing the public to benefit by the wider dissemination of works carried on television broadcast signals. . . . Of course, it is possible for cable systems to comply with the Oklahoma ban by simply abandoning their

⁸⁵ 467 U.S. 691 (1984).

importation of the distant broadcast signals covered by the Copyright Act. But such a loss of viewing options would plainly thwart the policy . . . of facilitating and encouraging the importation of distant broadcast signals.⁸⁶

As it did with cable, Congress foresaw the problems creating a new digital performance right in sound recordings would present in licensing rights for national digital transmissions and so enacted a comprehensive statutory licensing scheme.⁸⁷ The *Capital Cities* Court's reasoning regarding preemption of state laws interfering with the compulsory license for cable retransmissions applies equally to state laws interfering with the compulsory license for digital public performances of sound recordings. Compulsory licenses by their nature are designed to make individual licensing unnecessary; state laws that would add individual licensing burdens to entities eligible for the federal compulsory license stand as obstacles to that design.

The application of conflict preemption principles in this situation—where Congress has stepped in with a comprehensive federal program after courts had previously ruled that related state laws were not

⁸⁶ *Id.* at 709–11 (citations and footnotes omitted).

⁸⁷ 17 U.S.C. § 114(d)–(j).

preempted—is also implicated by the Supreme Court’s analysis in *Arizona v. United States*.⁸⁸ There, the Court considered whether certain provisions of an Arizona statute aimed at addressing the problem of illegal immigration were preempted under the Supremacy Clause.⁸⁹ Of particular relevance here is the Court’s discussion of section 5(C) of the Arizona law, which made it a misdemeanor for unauthorized aliens to “apply for work, solicit work in a public place, or perform work as an employee or independent contractor” in Arizona.⁹⁰ Before there had been any “comprehensive federal program regulating the employment of unauthorized aliens,”⁹¹ the Court had upheld a California statute regulating employment of aliens against a preemption challenge, finding that “States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.”⁹² However, at the time, “the Federal Government had expressed no more than ‘a peripheral concern with [the] employment of illegal

⁸⁸ 132 S. Ct. 2492 (2012).

⁸⁹ *Id.* at 2497.

⁹⁰ *Id.* at 2503.

⁹¹ *Id.*

⁹² *Id.* (citing *De Canas v. Bica*, 424 U.S. 351, 356 (1976)).

entrants.”⁹³ In *Arizona*, the Court found that because federal law had changed and a comprehensive framework relating to employment of illegal aliens had been put into place, with a deliberate choice by Congress to not impose criminal penalties on aliens who seek to work in the U.S., the Arizona law “would interfere with the careful balance struck by Congress.”⁹⁴

As *Goldstein* recognized and as § 301(c) confirms, the states possess some authority to protect pre-1972 sound recordings. However, just as the states’ interest in regulating employment in *Arizona* did not outweigh a subsequently enacted federal regime when specific state laws interfered with the ability of the federal law to accomplish its objectives, neither should states’ continuing interests in and power to protect pre-1972 recordings be permitted to interfere with the goals and objectives of the national compulsory licensing regime enacted by Congress for digital performances of sound recordings.

⁹³ *Id.* (quoting *De Canas*, 424 U.S. at 360).

⁹⁴ *Id.* at 2504–05. The Court also found that the existence of an express preemption provision in the relevant federal statute had no effect on the Supremacy Clause preemption analysis. *Id.*

CONCLUSION

This case presents important issues under the Supremacy Clause of the U.S. Constitution that this Court should consider. Although § 301(c) of the Copyright Act saves state-law protections for pre-1972 sound recordings from express statutory preemption, it does not prevent the application of ordinary conflict preemption principles. The state-law digital performance right that the District Court recognized conflicts with Congress's goal of national uniformity for copyright law. It also interferes with Congress's carefully delineated parameters and restrictions on the federal digital performance right and related statutory license that resulted from balancing the many and varied interests implicated by the right.

The music industry is in a period of substantial transition, with digital streaming revenues recently surpassing sales of physical compact discs and approaching revenues from digital downloads. Although owners and performers of pre-1972 sound recordings may have justifiable complaints about exclusion from some parts of this growing revenue stream, only Congress is in a position to evaluate how the interests of owners of pre-1972 recordings can best be balanced with all other

interested parties—including the interests of the public in having access to those recordings. Individual state laws addressing digital performance rights post too great a risk to the federal interest in uniformity and the delicate balance struck by Congress in the DPRA. Enforcement of these conflicting state laws should therefore be preempted under the Supremacy Clause.

Dated: September 8, 2015

Respectfully Submitted

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**CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. P. 32(a)**

I certify that the foregoing Brief complies with the type-volume limitations of the Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6983 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

I certify that the foregoing Brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2011 in 14-point font of Garamond type style.

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CERTIFICATE OF SERVICE

I, Julia L. Ross, hereby certify that I electronically filed the foregoing *Motion of Law Professors Gary Pulsinelli, Julie Ross, Peter Jaszi, and Brandon Butler for Leave to File as Amici Curiae in Support of Defendant-Appellant Pandora Media, Inc. Supporting Reversal* and *Brief of Law Professors Gary Pulsinelli, Julie Ross, Peter Jaszi, and Brandon Butler as Amici Curiae in Support of Defendant-Appellant Pandora Media, Inc. Supporting Reversal* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 8, 2015, which will send notice of such filing to all registered CM/ECF users.

Dated: September 8, 2015

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