No. SC16-1161

IN THE SUPREME COURT OF FLORIDA

FLO & EDDIE, INC., et al.,

Appellant,

v.

SIRIUS XM RADIO INC., et al.,

Appellee.

On Certified Questions from the United States Court of Appeals
for the Eleventh Circuit Case No. 15-13100

BRIEF OF iHEARTMEDIA, INC. AND PANDORA MEDIA, INC. AS *AMICI CURIAE* IN SUPPORT OF SIRIUS XM RADIO, INC.

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INTEREST OF *AMICI*

Amicus iHeartMedia, Inc. is the largest owner of terrestrial radio stations in the United States and operates a popular internet radio service known as iHeartRadio. *Amicus* Pandora Media, Inc. is the largest provider of internet radio service in the United States, with nearly 80 million active users. In this case, Flo & Eddie asserts that broadcaster Sirius XM Radio Inc. has an obligation under Florida law to pay royalties for the right to broadcast certain sound recordings to the listening public, despite the universal understanding for nearly a century that no such right exists. *Amici* have been named defendants in over a dozen similar suits by Flo & Eddie and other copycat plaintiffs around the country. If accepted, these claims would disrupt settled expectations around which iHeartMedia and Pandora have structured their businesses. *Amici* submit this brief to explain why Flo & Eddie's claims are wrong.

INTRODUCTION AND SUMMARY OF ARGUMENT

Flo & Eddie alleges that the common law of Florida makes it illegal to broadcast sound recordings without paying royalties, even though "not paying royalties for public performances of sound recordings was an accepted fact of life in the broadcasting industry for the last century." *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325, 340 (S.D.N.Y. 2014). For all the reasons explained by Sirius XM, the alleged conduct is, and always has been, entirely

lawful. *Amici* submit this brief to bolster those arguments in two respects.

First, we present additional historical background that demonstrates the fundamentally anachronistic character of the claims in this case. For decades, performers and record labels fought tooth-and-nail before the U.S. Congress to establish the right that Flo & Eddie now asserts under state common law. The American Federation of Musicians famously launched a strike lasting more than two years during World War II to acquire it via contract. Those efforts failed. If the legal right at stake in those battles somehow existed all along, then all of those legislative and union efforts would have been pointless. They were not. And there is no basis for this Court to hand plaintiffs a legal entitlement they could not earn through those other failed initiatives.

Second, we explain why Fla. Stat. § 543.02 is fatal to Flo & Eddie's claim of any copyright protection in the sound recordings at issue here, despite its repeal. When Flo & Eddie published those recordings in the 1960s, that statute unambiguously abolished any Florida copyright protection with their first sale in commerce. Those rights are gone and have been for more than 30 years. Even if the Florida Legislature's 1977 repeal of § 543.02 eliminated the rule of divestive publication for sound recordings going forward, nothing about that modest enactment indicates any intent to take the radical and constitutionally dubious further step of granting a new perpetual term of copyright protection for millions of

sound recordings that had entered the public domain while § 543.02 was in force.

HISTORICAL BACKGROUND

By and large, copyright protection in the United States is the province of federal law. *See* 17 U.S.C. § 301(a). By virtue of a lengthy and tumultuous history, however, Congress has left to the States the question whether and to what extent to protect sound recordings made before February 15, 1972. *Id.* § 301(c). That history is instructive here and so we write to supplement Sirius XM's recitation in several important respects.

A. Federal Copyright Protection For Sound Recordings

1. Federal copyright law has always treated songs differently from *recordings* of songs. Songs (also known as "musical compositions" or "musical works") are the actual notes and lyrics written by the composer and author. Since 1831, songs have enjoyed federal copyright protection. *See* Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436. Historically, however, there was no separate federal copyright protection for the *recording* of a given performance of a song. To be sure, playing a recorded song over the radio required a license from the holder of the copyright in the composition itself (*i.e.*, the notes and lyrics). But not from the artists who performed on the recording or the company that created it.

As Sirius XM notes (at 8-9), between 1925 and 1971, dozens of bills were introduced in Congress that would have addressed this divergent treatment by

granting some form of independent copyright protection to sound recordings that vested not in songwriters and publishers, but in performing artists or record companies.[1] It is difficult to overstate the controversy that ensued.

The bills, of course, had the support of performing artists, who testified that "[o]ne of the most flagrant evils in our profession today is the use of phonograph records … by broadcasters." *Hearings Before the H. Comm. on Patents*, 74th Cong. 679 (1936). "No permission is required from the artist and no compensation is given him," they explained. *Id.*[2] And the recording industry echoed their concerns. Their phonograph records "were performed constantly on the radio," yet they received no compensation. *Hearings Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 89th Cong., pt. 2, 951 (1965). "It must shock one's conscience that the playing of the delayed performance of a phonograph recording artist ... results in no compensation to the person who made that phonograph record." *1967 Hearings*, 90th Cong., pt. 2, 498.[3]

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[1] *See, e.g.*, H.R. 11258, 68th Cong. (1925); H.R. 10632, 74th Cong. (1936); H.R. 7173, 77th Cong. (1942); H.R. 1270, 80th Cong. (1947); H.R. 4347, 89th Cong. (1966).

[2] *See also id.* at 658 ("[N]o person should be able to profit by our efforts unless we shall be entitled to a share of such profit."); *Hearings Before the S. Comm. on the Judiciary*, 90th Cong., pt. 4, 1076 (1967) ("*1967 Hearings*") ("Our petition besp[eaks] the aspirations of all American performers—the aspiration which, for more than three decades, have been voiced in vain by actors and singers, as well as by instrumental musicians … but thus far denied ….").

[3] *See also id.* at 496 ("The record company receives nothing from the widespread

Opposition to these efforts, however, was equally fierce. Songwriters and composers complained that granting record labels or performers a copyright in sound recordings would unfairly diminish the utility of *their* rights in the underlying musical work.[4] Meanwhile, broadcasters argued that penalizing radio stations for broadcasting sound recordings would be unfair, since broadcasting "inures to the benefit of the record manufacturer, the performer, and the songwriter" by giving records "the widest possible exposure." *1967 Hearings*, 90th Cong., pt. 3, 865.[5]

So the battle raged. And for nearly 50 years, the efforts to secure federal copyright protection for sound recordings failed in Congress, again and again. The baseline premise of this four-decade-plus public policy stalemate was that under the then-prevailing *status quo*, *there was no legal right to a royalty for playing a*

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performance-for-profit of its products ….”); *Hearings Before the H. Comm. on the Judiciary*, 80th Cong. 56 (1947) (“*1947 Hearings*”) (“[T]he record manufacturer who may have spent thousands of dollars for that recording will get nothing except the retail price of that record.”).

[4] *See 1947 Hearings*, 80th Cong. 19 (“I don’t want every interpretative artist from the little hoity-toity saloon getting a copyright on the creations of my brain and utilize it and stop, through their copyright, the freedom that my works are entitled to under the ‘exclusive’ right.”); *1967 Hearings*, 90th Cong., pt. 3, 880 (“We ask only that the copyright law not ... destroy [our] fundamental right.”).

[5] *See also id.* at 1086 (pt. 4) (“[Performing artists already] get paid twice … when they enter into contract for their services to the recording company, and … on a contract basis … each time a record is sold.”); *Hearings Before the H. Comm. on Patents*, 72nd Cong. 193 (1932) (“This would be very prejudicial to the smaller broadcasting stations ....”).

sound recording on the radio. If state law already afforded the rights that the record labels and artists were trying to persuade Congress to adopt, then everyone involved in this half-century of legislative wrangling was wasting their time.

2. Federal copyright protection was extended to sound recordings for the first time in the Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 ("1971 Act"). The 1971 Act, however, focused exclusively on preventing record piracy—*i.e.*, the "reproduction and distribution of recorded performances" by "unauthorized manufacturers." H. Comm. on the Judiciary, *Prohibiting Piracy of Sound Recordings*, H.R. Rep. No. 92-487, at 4 (1971). Unlike a musical work copyright, the new federal copyright in sound recordings did not grant the owner an exclusive right of "public performance." *See* 85 Stat. at 391. So playing a sound recording over the radio still required only *one* license (for the musical work). *See* H.R. Rep. No. 92-487, at 8. And to address the reliance interests of those utilizing existing sound recordings, the 1971 Act provided that even these limited new rights applied only to sound recordings "fixed"—*i.e.*, made—after the Act went into effect, on February 15, 1972. 17 U.S.C. § 301(c).

3. This remained the state of federal law until 1995, when Congress broadened the legal protection for post-1972 sound recordings, granting them a limited form of "public performance" right for the first time. *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109

Stat. 336. But even then, Congress provided only the exclusive right to publicly perform a sound recording via digital transmission. 17 U.S.C. § 106(6). And Congress created a compulsory license regime for companies, like Sirius XM, Pandora, and iHeartMedia, who sought to engage in such digital public performances. *See id.* § 114. That law, as amended, remains in effect today. So for sound recordings protected by federal copyrights, there is (and has always been) no royalty obligation for over-the-air radio plays or in-person public performances, but there is (after the 1995 amendment) one for public performances carried out over a digital medium.

B. Protection For Sound Recordings Under Florida Law

1. For most of U.S. history, from the first U.S. copyright law adopted in 1790 through the Copyright Act of 1976, federal statutory copyright protection was available principally for *published* works. *Compare* Copyright Act of 1790, ch. 15 § 2, 1 Stat. 124 (conditioning copyright on the "publishing" of a map, chart, or book), *with* Act of Oct. 19, 1976, Pub. L. No. 94-553, § 102, 90 Stat. 2541, 2544-45 ("1976 Act") (extending protection to all unpublished works). In the absence of any federal statutory protection, many States recognized a "common law" copyright in unpublished works. *See generally* U.S. Copyright Office, *Study No. 29: Protection of Unpublished Works* (1961). It was "the accepted rule of law," however, that "the property right which the author has under the common law is

terminated by publication of the work." *Id.* at 1. And Florida's common law copyright regime was no exception. *See Schleman v. Guar. Title Co.*, 15 So. 2d 754, 760 (Fla. 1943) ("[T]he common law extends its protection *no further* than the first publication." (emphasis added)).

For some works, publication thus marked a transition from state copyright protection to federal protection—provided the author abided by the various formal requirements in that era for procuring a federal copyright, like depositing a copy with the Copyright Office and including the copyright symbol "©" on published copies. *See* Act to Amend and Consolidate the Acts Respecting Copyright, ch. 320, §§ 9, 12, 35 Stat. 1075, 1077-78 (1909). When sound recordings started gaining commercial traction in the early 20th century, however, they were not subject to federal copyright protection at all. *See supra* at 3-6. So it became important for performing artists, recording companies, and broadcasters to know precisely what it meant for a record to be "published." For sound recordings, rather than marking a transition from state to federal copyright protection, publication would extinguish copyright protection altogether.

2. Courts in other States were the first to consider whether publication divested *sound recordings* of copyright protection, just as it did other types of works. In *Waring v. WDAS Broadcasting Station, Inc.*, 194 A. 631 (Pa. 1937), the Supreme Court of Pennsylvania adopted something close to Flo & Eddie's view

here. The Court recognized that, "according to the general American doctrine," publication terminated any common law property rights. *Id.* at 635-36. But it held that, if a record producer labeled the albums it sold as "Not licensed for Radio Broadcast," that restriction could be enforced in equity by the performer of the sound recordings contained on the album. *See id.* at 638. Two years later, a federal district court predicted North Carolina would follow the same rule. *Waring v. Dunlea*, 26 F. Supp. 338, 340 (D.N.C. 1939).

The *Waring* decisions, however, were quickly and widely repudiated, including under Florida law. Notably, Judge Learned Hand expressly disagreed with their reasoning and result in *RCA Manufacturing Co. v. Whiteman*. *See* 114 F.2d 86, 89 (2d Cir. 1940) ("We have ... given the most respectful consideration to the conclusions of [the Pennsylvania Supreme Court], but with much regret we find ourselves unconvinced ...."). Judge Hand concluded that New York would follow the "general American doctrine," and find that any common-law protection for sound recordings "ended with the sale of the records." *Id.* at 88.

Several state legislatures—including Florida's—also confirmed that they disagreed with the *Waring* rule. *See* § 543.02, Fla. Stat. (1941); 1939 S.C. Acts 53; 1939 N.C. Sess. Laws 129. The laws, which were materially identical, provided that:

> When any phonograph record ..., upon which musical performances are embodied, is sold in commerce for use

> within this state, all asserted common law rights to further restrict or to collect royalties on the commercial use made of any such recorded performances by any person are hereby abrogated and expressly repealed. When such article or chattel has been sold in commerce, any asserted intangible rights shall be deemed to have passed to the purchaser upon the purchase of the chattel itself, and the right to further restrict the use made of phonograph records or electrical transcriptions, whose sole value is in their use, is hereby forbidden and abrogated.

§ 543.02, Fla. Stat. (1941). In other words, these States' copyright regimes would follow the general common law rule, rather than creating an exception for sound recordings. Copyright protection for recordings, just as for any other work, was divested—"abrograted and expressly repealed"—by the public sale of the work.

The practical consequences of these developments were not lost on the public or the industry. It was widely appreciated that the *Whiteman* decision "opened the door for the unrestricted, unauthorized, and unrecompensed use of phonograph records on radio stations." Staff of Subcommittee on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary, 95th Cong., *Performance Rights in Sound Recordings* 654 (Comm. Print 1978). In its wake, performing artists adopted a two-pronged strategy to advocate for the creation of royalty rights. First, they ramped up their efforts in Congress to change the law, spurring the introduction of six new bills from 1942-1951 that would have granted federal copyright protection for sound recordings, including an exclusive right of "public performance." *See* U.S. Copyright Office, *Study No. 26: The*

Unauthorized Duplication of Sound Recordings, at 34-37 (1961).

Second, they turned to their union, the American Federation of Musicians. In 1942, the Federation organized a nationwide recording strike and demanded to be paid every time "their music was played in jukeboxes or on the radio." Geoffrey C. Ward, *Jazz: A History of America's Music* 310 (2012). The labor stoppage lasted 27 long months. By November 1944, the recording companies had agreed to pay royalties to the union for each record *sold*; but recording artists continued not to be paid for radio "spins." *See* Robert A. Gorman, *The Recording Musician and Union Power*, 37 Sw. L.J. 697, 705-09 (1983).

In 1955, the Second Circuit would overrule *Whiteman* insofar as it held that the rights to copy and sell sound recordings did not survive the works' authorized dissemination in commerce, under New York law. *See Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 663 (2d Cir. 1955). But it said nothing about performance rights. And, in any event, § 543.02 remained on the books here. In Florida and elsewhere, until this recent wave of litigation, neither record labels nor performers asserted a right to royalties for the radio broadcast of sound recordings. *See* Robert L. Bard & Lewis S. Kurlantzick, *A Public Performance Right in Recordings*, 43 Geo. Wash. L. Rev. 152, 155-56 (1974). And so the law stood for decades—including throughout the entire period when the sound recordings at issue in this case were recorded and released.

3. In the 1970s, two noteworthy developments occurred in Florida law. First, in 1971, just before the U.S. Congress passed the Sound Recording Act, the Florida Legislature enacted its own prohibition on record piracy. *See* Ch. 71-102, at 255-57, Laws of Fla., codified at § 543.041, Fla. Stat. (1971). The law made it a *crime* to knowingly and willfully copy any sound recording from one record, disc, or other article to another record, disc, or article without the consent of the owner of the master record "with the intent to sell or cause to be sold for a profit" the resulting article. *Id.* § 1, at 256. It had no effect on common law copyright protection of sound recordings, on the operation of Fla. Stat. § 543.02, or on anyone's ability to demand royalties for broadcasting a published sound recording. *See id.*[6]

Second, in 1977, the Legislature repealed every provision of chapter 543 other than the new prohibition on record piracy, including Fla. Stat. § 543.02. *See* Ch. 77-440, § 1, at 1802, Laws of Fla. Before the repeal, chapter 543 principally governed the use and licensing of musical works (not sound recordings), including musical works already protected by federal copyright law. *See generally* Ch. 543, Fla. Stat. (1975). The federal 1976 Act, however, contained a sweeping preemption

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[6] In 1989, the provision was amended to also prohibit copies made with the intent to publicly perform them for a profit. Ch. 89-181, § 1, at 749-51, Laws of Fla. Contrary to Flo & Eddie's assertion (at 24), however, the prohibited conduct remains unauthorized duplication, not unauthorized public performance—it now just includes unauthorized copies made *with the intent to* publicly perform them instead of the intent to sell them. The law exempts such copies made by a broadcaster "as part of, a radio, television, or cable broadcast transmission." *Id.* at 752.

clause that expressly overrode "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of [federal] copyright law." 17 U.S.C. § 301(a). Much of chapter 543 was therefore preempted and ineffectual. *See* Fla. H. Comm. on Commerce, HB 1780 (1977), Staff Report at 2 (Apr. 27, 1977) ("House Report") ("The owners are protected under the Federal Copyright Law.").[7]

As for § 543.02's codification of the divestive publication rule for sound recordings, under the 1976 Act, federal copyright law now applied to any works "fixed in any tangible medium of expression"—published or unpublished. 17 U.S.C. § 102(a). Going forward, no new sound recordings could be eligible for state law copyright protection, because federal law, to the exclusion of state law, would cover all of those works. So there was little reason to leave a statutory provision on the books *extinguishing* state protection upon publication. *See* Senate Report ("This bill would leave the regulation of copyright owners to the federal government under the [1976 Act].").

As noted, the record piracy provision enacted in 1971 was retained (and slightly expanded to include unauthorized copies made from live broadcasts). Without that provision, the Legislature explained, "the owners of the rights to music fixed before February 15, 1972 w[ould] not be protected under *any law*,

[7] Other provisions not preempted by § 301 were duplicative of state and federal antitrust laws. *See* Fla. S. Comm. on Commerce, SB 1007 (1977), Staff Analysis & Economic Statement (May 16, 1977) ("Senate Report").

state or Federal." *See* House Report at 2 (emphasis added); *see also* Fla. S. Comm. on Commerce, SB 1007 (1977), Staff Analysis & Economic Statement (May 10, 1977) ("Protection against unauthorized duplication of sound recordings would not be accorded owners of the rights to music fixed prior to 1972.").

In stark contrast to the decades of rancorous public policy debate and legislative wrangling over federal copyright protection for sound recordings, the 1977 repeal of § 543.02 was met with resounding silence. The Senate passed the bill unanimously and the vote in the House was 98 to 2. *See* 40 Fla. Sen. J. 856 (June 3, 1977); Fla. H.J. 1224 (June 3, 1977). Under the heading "Economic Benefits to Public or Industry," the Senate Judiciary Committee report indicated simply "None." Senate Report.

ARGUMENT

FLORIDA COMMON LAW COPYRIGHT DOES NOT EXTEND ANY PROTECTION TO SOUND RECORDINGS THAT WERE SOLD IN COMMERCE PRIOR TO 1977

The Eleventh Circuit has asked this Court whether the sale and distribution of phonorecords to the public divests any common law copyright protection for sound recordings embedded in those phonorecords. Sirius XM explains (at 22-27) that, under Florida common law, the answer is (and always has been) yes—the well-established "divestive publication" doctrine applies to sound recordings just as it does any other work. We fully agree. But, in fact, the Court need not go that

far to resolve this case. All the sound recordings at issue in this case were first sold to the public in the 1960s, at a time when even Flo & Eddie agrees that their public sale divested all such protection under the plain terms of Fla. Stat. § 543.02. Contrary to Flo & Eddie's suggestion, nothing in the text, purpose, or history surrounding the repeal of that provision indicates that the Florida Legislature quietly *resurrected* those rights—and no one noticed for 30 years.

A. Flo & Eddie's Florida Copyrights Expired When The Turtles Sold Their Recordings Prior To 1977

Florida law unambiguously divested Flo & Eddie's sound recordings of state copyright protection when the Turtles first sold those recordings to the public nearly fifty years ago. The Complaint in this case alleges that the works in suit include that band's "numerous iconic hits" from 1965-69, which Flo & Eddie has been "selling and licensing" since 1971. Amended Compl. ¶ 2. By Flo & Eddie's own admission, these sound recordings were thus "sold in commerce," within the meaning of former § 543.02 long before the provision's repeal. Accordingly, on the date of those records' first sales, it is undisputable that "all asserted common law rights to further restrict or to collect royalties on the commercial use made of any such recorded performances by any person" were "abrograted and expressly repealed." § 543.02, Fla. Stat. (1941). "[A]ny asserted intangible rights … passed to the purchaser" of the record, and any right to further restrict the use made of those records was "forbidden." *Id.* Not even Flo & Eddie contends otherwise.

B. The 1977 Repeal Of Section 543.02 Did Not Resurrect Flo & Eddie's Copyrights

The 1977 repeal of § 543.02 did not resurrect previously divested copyright protection for sound recordings. That enactment did nothing more than revise (and largely repeal) chapter 543 of the Florida code to account for the fact that federal law had recently preempted most state copyright protection, including for all sound recordings that would be created in the future. Nothing about it evinces any intent to expand the copyright protection afforded to sound recordings for the previous 35 years, much less fundamentally transform the State's copyright regime by granting a new term of protection to every sound recording ever sold in the State.

Certainly, the text of the enactment provides no indication that the Legislature intended that result. *See Hopkins v. State*, 105 So. 3d 470, 473 (Fla. 2012) ("[W]e begin with the actual language in the statute because 'legislative intent is determined primarily from the statute's text.'" (citation omitted)). The law did not specify that any of the "common law rights" that had been divested by prior record sales were being revived, or indicate that any "intangible rights" that had "passed to the purchaser" were being rescinded. Indeed, it added no text concerning Florida copyright to the Florida code *at all*.

Nor does the legislative history and historical backdrop of the 1977 enactment show any intention to resurrect previously divested copyright protection for sound recordings and imbue them with a new perpetual grant of copyright

protection. *See State v. Webb*, 398 So. 2d 820, 824 (Fla. 1981) ("To determine legislative intent, we must consider ... 'the evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of the law already in existence bearing on the subject.'" (emphasis omitted) (citation omitted)). To the contrary, the legislative history clearly shows that the purpose of the 1977 enactment was *to remove* ineffectual and duplicative laws from the Florida code and to "leave the regulation of copyright owners to the federal government under the new Federal Copyright Law." Senate Report. In keeping with that modest purpose, the bill passed both houses with a combined vote 127 to 2.

It is unthinkable that the Legislature effected such a revolutionary change without any serious objection to the bill and without any evidence that a single songwriter or anyone in the broadcasting industry so much as wrote a letter to the editor against it. More incredible still is the suggestion that not a single record label or performing artist noticed this windfall, or raised an alleged entitlement to it in any court, for the ensuing 30 years. It took more than four decades of lobbying by performers and the recording industry, against the vociferous opposition of broadcasters and songwriters, to convince Congress to grant any form of federal copyright protection to sound recordings in 1971. And, even then, Congress was careful to grant protection only for new recordings and to withhold the public performance right. Yet, in Flo & Eddie's telling, six years later the Florida

Legislature granted retroactive protection—including the public performance right—to the millions of recordings Congress left out. And no one said a word?

Such a broad-scale and retroactive rescission of works from the public domain would also raise serious constitutional concerns. In *Golan v. Holder*, the Supreme Court upheld the constitutionality of Congress' targeted extension of copyright protection to a collection of foreign-authored works, pursuant to the United States' treaty obligations. 132 S. Ct. 873, 878, 894 (2012). In so doing, however, the Court noted a series of elaborate protections Congress provided for "reliance parties" to mitigate the "disturbance of the public domain" and make the Act "compatib[le] with the Fifth Amendment's Takings Clause." *Id.* at 882-83 & 892 n.33. Florida's 1977 enactment, of course, contains no such cautionary measures. If the law was nevertheless construed to accomplish the largest rescission of works from public domain in U.S. history, the absence of any protections for reliance interests would raise serious constitutional concerns. That is reason enough to avoid such a construction. *See State v. McDonald*, 357 So. 2d 405, 407 (Fla. 1978) ("[I]f fairly possible a statute should be construed to avoid not only an unconstitutional interpretation, but also one which even casts grave doubts upon the statute's validity." (citation omitted)).

Finally, such a regime would be completely unworkable. Who, precisely, would own these zombie copyrights? The performing artists? Which ones—all of

them jointly? The label? One of the least likely candidates would be an alleged third-party assignee of those divested rights, like Flo & Eddie. Resurrecting protection for recordings going back to the earliest days of the medium would thus have created an impossible-to-administer system of rights going back decades before anyone knew they existed, owned in large part by heirs of artists or record label executives long since deceased, for no discernible public policy reason.

Flo & Eddie's only answer is that the repeal of § 543.02 must have resurrected their copyrights because "when a statute changing the common is repealed, the common law is restored to its former state." *Fla. Fertilizer & Mfg. Co. v. Boswell*, 34 So. 241, 242 (Fla. 1903). But that argument fails.

For one thing, as Sirius XM explains, the premise is wrong. Section 543.02 did not change the common law; it confirmed it. Florida common law copyright had always and only granted an author "a property right in his intellectual productions *prior to publication*." *Glazer v. Hoffman*, 16 So. 2d 53, 55 (Fla. 1943) (emphasis added). There is not so much as a hint, let alone a holding, in any Florida judicial opinion that sound recordings would merit some special exemption from this black-letter rule.[8]

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[8] The Florida Bar notes that *Glazer* refers to this as the "general rule." But the only exception to that general rule is for a so-called "limited publication"—a disclosure "'to a definitely selected group and for a limited purpose, and without the right of diffusion, reproduction, distribution or sale.'" *See Manasa v. Univ. of Miami*, 320 So. 2d 467, 468 (Fla. Dist. Ct. App. 1975) (per curiam) (citation omitted).

But, even if the premise were correct, it would be no help to Flo & Eddie. In the counterfactual world in which, prior to the enactment of § 543.02, the first public sale of a record would not divest a sound recording of all common law copyright protection, all the repeal of § 543.02 would have done is reinstate *that rule*: public sales after 1977 would not divest all copyright protection in unpublished recordings. It would not automatically *resurrect* copyright in works that had already been published and thus fallen into the public domain under the then-prevailing rule.

By the time § 543.02 was repealed, the divesture of Flo & Eddie's copyrights was a *fait accompli*. Their records had been sold in commerce for years and thus all common law rights had been "abrogated and expressly repealed." Flo & Eddie offers no reason to think by taking that provision off its books, the Florida Legislature *sub silentio* rescinded decades-worth of sound recording copyrights from the public domain. And for all the reasons described above, there is none. Nothing short of an extraordinary legislative enactment could bring those rights back. And the 1977 bill on which Flo & Eddie rests its claims isn't such a law.

CONCLUSION

For the foregoing reasons, this Court should hold that Florida common law copyright does not extend any protection to sound recordings, like those at issue here, that were sold in commerce prior to 1977.

Dated: November 28, 2016

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 28, 2016, a true and correct copy of the foregoing was served on the following:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210 of the Florida Rules of Appellate Procedure, including that Rule's font requirements.

DATED this 28th day of November, 2016.

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