

No. 18-877

IN THE

Supreme Court of the United States

FREDERICK L. ALLEN and
NAUTILUS PRODUCTIONS, LLC,

Petitioners,

v.

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

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether Congress validly abrogated state sovereign immunity via the Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990), in providing remedies for authors of original expression whose federal copyrights are infringed by States.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Frederick L. Allen and Nautilus Productions, LLC were plaintiffs-appellees-cross-appellants below.

Respondents Roy A. Cooper, III, as Governor of North Carolina; Susi H. Hamilton, Secretary of the North Carolina Department of Natural and Cultural Resources, in her official capacity; Susan Wear Kluttz, former Secretary of the North Carolina Department of Natural and Cultural Resources, individually; D. Reid Wilson, Chief Deputy Secretary of the North Carolina Department of Natural and Cultural Resources, in his official capacity; Karin Cochran, former Chief Deputy Secretary of the North Carolina Department of Natural and Cultural Resources, individually; Kevin Cherry, Deputy Secretary of the North Carolina Department of Natural and Cultural Resources, individually and in his official capacity; G. Neel Lattimore, Director of Communications of the North Carolina Department of Natural and Cultural Resources, in his official capacity; Catherine A. Oliva, Director of Marketing of the North Carolina Department of Natural and Cultural Resources, in her official capacity; Cary Cox, former Assistant Secretary, Marketing and Communications of the North Carolina Department of Natural and Cultural Resources, individually; Stephen R. Claggett, a/k/a Steve Claggett, State Archaeologist, individually and in his official capacity; John W. Morris, a/k/a Billy Ray Morris, Deputy State Archaeologist, Underwater and Director of the Underwater Archaeology Branch of the North Carolina Department of Natural and Cultural Resources, individually and in his official capacity;

North Carolina Department of Natural and Cultural Resources; and the State of North Carolina were defendants-appellants-cross-appellees below.

Friends of Queen Anne's Revenge, a non-profit corporation, was a defendant below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Nautilus Productions, LLC states that it has no parent corporation and that no publicly-held corporation owns 10% or more of its stock.

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INTRODUCTION

The basic question in this case is whether Congress's power to secure to authors exclusive rights to federal copyrights properly overcomes States' immunity for infringing those copyrights. Both Section 8, Clause 8 of Article I and Section 5 of the Fourteenth Amendment independently indicate that the correct answer is "yes." By so holding, this Court would vindicate a quintessential congressional power along with the rights and creative incentives of authors whose copyrights are imperiled by States. A contrary holding would leave Congress stymied and creators of original expression helpless as States continue to trample federal copyrights—an alarming trend that Congress saw with clear eyes and enacted on-point legislation to stop.

No one denies that the federal statute at issue—the Copyright Remedy Clarification Act of 1990, Pub. L. No. 101-553, 104 Stat. 2749 (1990) ("CRCA" or "Act")—reflects Congress's express intent to protect copyrights against infringement by States. See 17 U.S.C. 501(a), 511(a). It is equally clear that Congress enacted the CRCA precisely to address what it found to be a serious problem of unremedied copyright infringement by States. Nor should there be any doubt that Congress had constitutional authority to legislate as it did.

The Intellectual Property Clause of the Constitution expressly authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. Federal copyrights would not be "secure," nor would rights to them be

“exclusive,” nor would creative incentives be “promoted” were Congress powerless to abrogate States’ immunity when States threaten federal copyrights. Never before has this Court examined the text, history, and essence of this particular Article I power as a basis for abrogation. To be sure, the Court’s earlier decisions in this area—specifically, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999)—sweepingly dismissed any prospect that Congress might rely on any Article I power, including this one, as a basis for abrogation. But this Court has since corrected course, recognizing that Congress *can* properly abrogate state sovereign immunity pursuant to an Article I power. See *Central Virginia Community College v. Katz*, 546 U.S. 356, 362 (2006) (characterizing earlier language as “dicta” reflecting an “erroneous” assumption). Upholding the instant abrogation follows from this Court’s clause-specific approach in *Katz*. Indeed, the Intellectual Property Clause supplies a singularly strong basis for abrogation as compared to any other authorization set forth in Article I, including the Bankruptcy Clause.

Additionally, and independently, Congress properly exercised its power under Section 5 of the Fourteenth Amendment. Congress legislated only after carefully compiling a record demonstrating that abrogation of state sovereign immunity is a congruent and proportional remedy for States’ pattern of continuing copyright abuses. See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2003) (upholding congressional abrogation of state sovereign immunity on comparable record). The

legislative record and findings surrounding the CRCA supply precisely the sort of predicate that this Court held in *Florida Prepaid* was missing from the Patent Remedy Act but would suffice to justify exercise of Congress's enforcement power under Section 5. Simply surveying this robust record and accounting for fundamental differences between copyright and patent law affords a straightforward path to upholding the CRCA's abrogation, consistent with *Florida Prepaid* and Section 5.

The Court can choose between its grounds, but it should uphold the validity of the CRCA and reverse the judgment below.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fourth Circuit (Pet. App. 1a-41a) is reported at 895 F.3d 337. The order of the court of appeals denying rehearing *en banc* (Pet. App. 79a-82a) is unreported. The district court's opinion and order (Pet. App. 42a-78a) is reported at 244 F. Supp. 3d 525.

JURISDICTION

The court of appeals denied rehearing *en banc* on August 9, 2018. Pet. App. 82a. Petitioners filed a petition for a writ of certiorari on January 4, 2019, pursuant to the Chief Justice's order extending the time in which to file. The Court granted the petition on June 3, 2019. The Court has jurisdiction under 28 U.S.C. 1254(1).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

U.S. Constitution art. I, § 8, cl. 8 provides:

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.

U.S. Constitution amend. XI provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State

U.S. Constitution amend. XIV, § 5 provides:

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

As amended by the CRCA, 17 U.S.C. 501(a) provides:

Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 ... is an infringer of the copyright or right of the author, as the case may be. ... As used in this subsection, the term “anyone” includes 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. Any State, and any such instrumentality, officer, or

employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

As amended by the CRCA, 17 U.S.C. 511(a) provides:

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, ... for a violation of any of the exclusive rights of a copyright owner provided by sections 106 through 122 ... or for any other violation under this title.

STATEMENT OF THE CASE

A. Constitutional Background

The first English copyright statute—the Statute of Anne, 8 Ann. c. 19 (1710)—was enacted to provide authors with exclusive copyrights in published books.¹ See *Feltner v. Columbia Pictures Television*,

¹ The Statute of Anne was titled “An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned,” and it granted authors the “sole Right and Liberty of Printing” their works “for the Encouragement ... to Compose and Write useful Books.” 8 Ann. c. 19 § 1 (1710). For a detailed account of Parliament’s passing of the Statute of Anne and its legal transplant into the U.S. copyright

Inc., 523 U.S. 340, 349 (1998). Authors' rights as conferred by the Statute of Anne inspired colonial legislatures to embrace similar copyright grants for authors. "[T]his emphasis on the author's property rights was in accord with the major theme of republicanism which occupied much of Revolutionary American thought." 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, 375 (1992).

So paramount was securing uniform, nationwide copyright protection that the delegates at the Constitutional Convention codified the sweep of Congress's power to grant copyright protections when framing the Constitution:

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.

U.S. CONST. art. I, § 8, cl. 8 ("Intellectual Property Clause"). This clause was passed unanimously with "no record of any debate." Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 338 (2004). As James Madison noted during the ratification debates, "[t]he utility of this power will scarcely be questioned," because "[t]he public good fully coincides ... with the claims of individuals." THE FEDERALIST No. 43.

regime, see generally Oren Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant*, 25 BERKELEY TECH. L. J. 1427 (2010).

B. Statutory Background

Before the CRCA was passed in 1990, it was generally understood that States would be subject to liability for their acts of copyright infringement, just like any other infringer. See, *e.g.*, *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1284 (9th Cir. 1979). In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985), however, this Court warned that, in passing a law, Congress must “unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court.” As *Atascadero* sowed seeds of doubt and invited arguments by States that they should be immune for their copyright infringement, Congress was spurred to act.

Specifically, in 1987, Congress commissioned Ralph Oman, then-Register of Copyrights, “to assess the nature and extent of the clash between the Eleventh Amendment and the federal copyright law.” U.S. COPYRIGHT OFFICE, A REPORT OF THE REGISTER OF COPYRIGHTS: COPYRIGHT LIABILITY OF STATES AND THE ELEVENTH AMENDMENT (1988) (“Register’s Report”), available at <http://files.eric.ed.gov/fulltext/ED306963.pdf>.²

² Congress asked Mr. Oman to: (1) “conduct an inquiry concerning the practical problems relative to the enforcement of copyright against state governments”; (2) “conduct an inquiry concerning the presence, if any, of unfair copyright or business practices vis a vis state government with respect to copyright issues”; and (3) “produce a ‘green paper’ on the current state of the law in this area and an assessment of what constitutional limitations there are, if any, with respect to Congressional action in this area,” including a 50-state survey. Letter from Reps. Robert W. Kastenmeier & Carlos Moorhead, H.

Mr. Oman and his staff embarked on a year-long investigation into the issue of State copyright infringement—during which they collected more than 40 comments from textbook publishers, motion picture producers, composers, and others in response to a published Request for Information, and conducted a 50-state survey on States’ waiver of sovereign immunity. See Brief for Ralph Oman as Amicus Curiae Supporting Petitioners 8-9 (Feb. 7, 2019) (“Oman Br.”). In 1988, Mr. Oman submitted his findings to Congress in the form of a 158-page report, where he warned Congress of the “dire financial and other repercussions that would flow from state Eleventh Amendment immunity for damages in copyright infringement suits.” Register’s Report iii; see also *id.* at vii (concluding that “Congress intended to hold states responsible under the federal copyright law, and that copyright owners have demonstrated that they will suffer immediate harm if they are unable to sue infringing states in federal court for money damages”). The Report detailed numerous examples of blatant copyright infringement by States (which were likely just the tip of the iceberg, see Oman Br. 13-14), and ultimately concluded:

Subcomm. on Courts, Civil Liberties, and the Admin. of Justice, to Ralph Oman, Register of Copyrights (Aug. 3, 1987).

The Copyright Office is convinced that ... copyright proprietors have demonstrated they will suffer immediate harm if they are unable to sue infringing states in federal court. ... Congress should act quickly to amend the [Copyright] Act to ensure that states comply with the requirements of the copyright law.

Register's Report 103.

Next, Congress held hearings in both the House and Senate to consider the CRCA.³ Mr. Oman testified first, presenting his findings and noting the "great dilemma" arising from certain cases that "held that the eleventh amendment immunizes States from suit for copyright infringement." H.R. Hearings 5-9. Congress also heard testimony and received written statements from nine other witnesses, and considered 16 other written submissions. See *id.* at iii-iv; S. Hearing iii-iv. Mr. Oman's predecessor, Barbara Ringer, also testified that the Register's Report revealed a "problem[]" of State infringement that was "likely to get worse." H.R. Hearings 81-83. Further still, Congress received evidence of substantial copyright infringement by state universities that "critically impair[ed]" creative incentives for

³ See Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liability of States: Hearings on H.R. 1131 Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the H. Comm. on the Judiciary, 101st Cong. III (1989) ("H.R. Hearings"); The Copyright Clarification Act: Hearing on S. 497 Before the Subcomm. on Patents, Copyrights, and Trademarks of the S. Comm. on the Judiciary, 101st Cong. III (1989) ("S. Hearing").

“creators and producers of computer data bases, software, scholarly books and journals, textbooks, educational testing materials, microfilm, educational video materials, music and motion pictures.” S. Rep. No. 101-305, at 9 (1990). Ultimately, the record established pressing need for congressional abrogation. See, *e.g.*, S. Hearing 109 (D. Eskra) (instances of state copyright infringement are “clearly widespread and they are clearly increasing”).

The congressional record also established that, absent Eleventh Amendment abrogation, copyright owners would have no other satisfying means of remedying state infringement. See S. Rep. No. 101-305, at 8 (“Unlike others whose remedies are foreclosed by eleventh amendment immunity, copyright owners are only able to seek relief in Federal court.”); H.R. Hearings 126 (choice “is not between the federal forum and the state forum—it is between the federal forum and *no forum*”). Alternative remedies to monetary damages, such as injunctive relief, had proved “meaningless” in practice. Register’s Report 13; see S. Rep. No. 101-305, at 8 (“Injunctions against copyright infringement are like closing the barn door after the horses have run away.”); H.R. Rep. No. 101-282, at 8 (1989) (“Injunctive relief is often obtained only at great cost.”).

This legislative record stands in stark contrast to the record underlying Congress’s passage of the Patent and Plant Variety Protection Remedy Clarification Act (“Patent Remedy Act”), 5 U.S.C. 271(h), 296(a), which abrogated state sovereign immunity for States’ acts of patent infringement on a substantially less developed record. Among other things, the Patent Remedy Act’s record did not

involve a comprehensive study commissioned by Congress; it reflected the view that patent holders could already obtain effective remedies against States; and it failed to pinpoint instances of actual or likely patent infringement by States. See, e.g., *Fla. Prepaid*, 527 U.S. at 658 n.9 (Stevens, J. dissenting) (detailing distinctions between legislative histories of Patent Remedy Act and CRCA, noting “many examples of copyright infringements by States” and “[p]erhaps most importantly,” the Register’s Report); *id.* at 644-45 & n.9 (record failed to demonstrate inadequacy of state remedies for patent infringement).

In October 1990, Congress passed the CRCA by voice vote, amending the Copyright Act by expressly clarifying that “[a]ny State ... shall not be immune, under the Eleventh Amendment ... from suit in Federal court by any person ... for a violation of any of the exclusive rights of a copyright owner.” 17 U.S.C. 511(a); see also 17 U.S.C. 501(a) (“Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.”).

C. Factual Background

In 1717, the pirate Edward Teach—the famed and feared Blackbeard—captured a French vessel. The pirate equipped her with 40 guns, made her the flagship, and renamed her *Queen Anne’s Revenge*. Pet. App. 6a, 43a & n.2. Blackbeard’s flagship ran aground and was abandoned a little over a mile from Beaufort Inlet, North Carolina, in 1718. Pet. App. 6a-7a, 43a.

Almost three centuries later, in November 1996, the shipwreck of *Queen Anne's Revenge* was discovered by Intersal, Inc., a private research and salvage firm. Pet. App. 7a. In 1998, Intersal retained petitioners Frederick Allen and his production company, Nautilus Productions, LLC, to document the salvage of the ship. Pet. App. 7a-8a. Through this arrangement, Allen and his company have been serving as the videographer and production company filming the shipwreck for nearly two decades, resulting in “a substantial archive of video and still images showing the underwater shipwreck and the efforts of teams of divers and archaeologists to recover various artifacts from [it]” (the “Works”). Pet. App. 8a-9a. Allen registered copyrights for the Works with the U.S. Copyright Office, which are licensed to and commercialized by Nautilus Productions (hereinafter, collectively with Allen, “Nautilus”). Pet. App. 9a, 43a.

At some point before October 2013, the State of North Carolina and its Department of Natural and Cultural Resources (“DNCR,” and collectively with state officials, the “State”) infringed Nautilus’s copyrights in the Works, including by copying and publicly displaying the Works online without Nautilus’s permission. Pet. App. 9a, 43a. In October 2013, the State entered into a settlement with Nautilus, whereby it paid Nautilus \$15,000 for prior infringements and agreed not to infringe the Works in the future. Pet. App. 9a-12a, 43a-44a. The State initially complied with the agreement by taking down its infringing uses, but then quickly resumed its infringement by *again* copying and publicly displaying Nautilus’s copyrighted videos and photographs online and in print. Pet. App. 12a, 44a.

Nautilus issued takedown notices to the State for its infringement, which the State refused to follow. Pet. App. 12a. Instead, the State attempted to insulate itself from any liability (state or federal) for its subsequent infringement by passing “Blackbeard’s Law,” H.B. 184, N.C. Gen. Stat. § 121-25(b) (Aug. 18, 2015), which purportedly converted the Works into “public record” materials that can be freely used by the State without any ostensible consequence or remedy. Pet. App. 44a-45a. Under Blackbeard’s Law:

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.

Pet. App. 44a.⁴

⁴ The State modified the law one year later in a cosmetic effort to tweak terminology without changing its substance. See Pet. App. 45a; N.C. Session Law 2016-94, s. 162 (July 1, 2016).

D. Proceedings Below

1. District Court Proceedings

Nautilus filed this action against the State in 2015 in the U.S. District Court for the Eastern District of North Carolina. Pet. App. 12a. As relevant here, the suit seeks to hold the State monetarily liable for copyright infringement of the Works. Pet. App. 13a, 45a.

The State moved to dismiss the copyright claim on the ground that the Eleventh Amendment shields the State from suit in federal court. Pet. App. 13a, 45a. The State relied heavily on *Florida Prepaid*, where this Court held that Congress exceeded its powers in enacting the Patent Remedy Act to abrogate state sovereign immunity for patent infringement, 527 U.S. at 647-48. *Florida Prepaid* relied in turn on *Seminole Tribe*, which held that Congress could not rely on its Article I powers in passing the Indian Gaming Regulatory Act, 517 U.S. at 72-73.

The district court (Boyle, J.) denied the State's motion to dismiss with respect to the claim for copyright infringement, holding that the CRCA validly abrogated the State's sovereign immunity from suit. Pet. App. 53a, 64a-65a.

As a threshold matter, the court noted "there can be no doubt that Congress has stated clearly its intent to abrogate sovereign immunity for copyright claims against a state, its instrumentalities, or its officers or employees in their official capacities." Pet. App. 49a-50a & n.3 (citing 17 U.S.C. 501(a)).

As to whether Congress had a valid basis for enacting the CRCA, the court ruled that, based on

Seminole Tribe and *Florida Prepaid*, “Congress may not rely on its Article I authority to abrogate state sovereign immunity” (although it acknowledged the tension between those decisions and *Katz* through a “but see” signal). Pet. App. 50a-51a.

The court went on to rule, however, that Congress *did* legislate appropriately under Section 5 of the Fourteenth Amendment. Pet. App. 51a-65a. Specifically, based on its “review of the legislative history of the CRCA,” the court determined that Congress “acted in response to sufficient evidence of infringement of copyrights by the states” and “was clearly responding to a pattern of current and anticipated abuse by the states of the copyrights held by their citizens.” Pet. App. 52a-53a. The court derived support for its holding from “the text of the CRCA and the legislative history,” as fortified by “the amount of suits filed against allegedly infringing states in recent years, even despite little chance of success.” Pet. App. 53a & n.4 (citing examples). The court concluded that, “in this particular case Congress has clearly abrogated state immunity in cases arising under the CRCA, and such an abrogation is congruent and proportional to a clear pattern of abuse by the states.” Pet. App. 64a-65a.

2. Fourth Circuit Decision

A unanimous panel of the Fourth Circuit (Niemeyer, J., joined by King, J., and Brinkema, J.) reversed the district court’s ruling on state sovereign immunity, holding that the CRCA did not validly

abrogate Eleventh Amendment immunity. See Pet. App. 30a-31a.⁵

First, the Fourth Circuit held that any reliance by Congress on Article I’s Intellectual Property Clause was an invalid basis for enacting the CRCA because “*Seminole Tribe* and its progeny ... make clear that Congress cannot rely on its Article I powers to abrogate Eleventh Amendment immunity.” Pet. App. 18a. Because it viewed this Court’s holding in *Katz* “[a]s made in a completely distinguishable context that was unique to the Bankruptcy Clause,” Pet. App. 19a, the court of appeals did not separately examine whether the Intellectual Property Clause provides an Article I ground for abrogation.

Second, as to Section 5 of the Fourteenth Amendment, the Fourth Circuit reversed the district court’s decision and held that Congress did not validly enact the CRCA pursuant to Section 5. The court of appeals held that Congress had not made sufficiently clear that it was “relying on § 5 of the Fourteenth Amendment as the source of its authority” because it did not use the words “Section 5.” Pet. App. 21a; see also Pet. App. 20a-25a. Even setting that issue aside, however, the court of appeals held the CRCA was not “congruen[t] and proportional[]’ to the Fourteenth Amendment injury to be prevented or remedied.” Pet. App. 21a (alterations in original)

⁵ The Fourth Circuit further held that: (i) the State had not waived sovereign immunity in the 2013 settlement agreement; and (ii) the claims against the state officials could not proceed under the exception to Eleventh Amendment immunity recognized in *Ex parte Young*, 209 U.S. 123 (1908). Pet. App. 16a-17a, 32a-36a. Those issues are not now before this Court.

(quoting *Fla. Prepaid*, 527 U.S. at 639-42); see also Pet. App. 25a-30a (stating its “conclusion is required by *Florida Prepaid*, where the circumstances were analogous,” while discounting the Register’s Report).

SUMMARY OF ARGUMENT

I. Congress validly exercised its powers under the Intellectual Property Clause in enacting the CRCA. The distinctive text, history, and purpose of the Intellectual Property Clause confirm that Congress is authorized to abrogate state sovereign immunity in order to secure authors’ exclusive rights, just as the CRCA reflects.

A. States surrendered their immunity from copyright liability as part of the plan of the Constitutional Convention. The plain text of the Intellectual Property Clause—which empowers Congress to “*secur[e]*” to authors an “*exclusive Right*” to their works—demonstrates that the Framers afforded Congress plenary power within this realm. Moreover, the history and purpose of the Intellectual Property Clause, which was passed unanimously without debate or opposition, confirm the Framers’ shared conviction that federal protection over intellectual property must, to achieve its aims, be unalloyed. There could be no “*secur[e]*” or “*exclusive*” right for holders of intellectual property if any category of infringer—governmental or otherwise—were left free to infringe without penalty.

B. Nor do this Court’s prior decisions foreclose Congress from abrogating state sovereign immunity under the Intellectual Property Clause. After employing broad language foreclosing reliance on Article I in *Seminole Tribe* (which language this

Court repeated without analysis in *Florida Prepaid*), the Court since clarified in *Katz* that any such “assumption” that *Seminole Tribe* categorically forecloses reliance on *any* Article I power was “erroneous.” Changing tack in *Katz*, this Court endorsed a clause-by-clause approach and held that Congress validly abrogated state sovereign immunity under the Bankruptcy Clause. Against that backdrop, the Intellectual Property Clause presents an even clearer case for abrogation, once duly examined.

C. So long as the Intellectual Property Clause empowers Congress to abrogate state sovereign immunity, the CRCA should be beyond reproach as reflecting Congress’s judgment that abrogation of state sovereign immunity is necessary and proper in order to secure authors’ exclusive rights in their copyrights.

II. Independently, Congress validly exercised its enforcement power under Section 5 of the Fourteenth Amendment when it passed the CRCA. The relevant legislative record reflects and substantiates the congressional judgment that authors will otherwise be deprived of their property and left without remedy when States unconstitutionally infringe.

A. Copyright infringement deprives authors of a property right that the Fourteenth Amendment protects. This Court has long recognized that copyrights are a form of property. States violate due process when they deny protected property rights without affording an adequate remedy. Correspondingly, deprivation of these property rights can be remedied by Congress, as this Court recognized in *Florida Prepaid* (even while noting factual deficiencies in the legislative record there before it).

Certainly where States have been shown to be systematically infringing copyrights while evading remedy, as is true here, it is within Congress's remedial rights to fill the remedial void.

B. The CRCA is a congruent and proportional remedy to a demonstrated pattern of infringement by States. Far from expanding authors' underlying rights, the CRCA reflects a principled, considered response to what is otherwise a real constitutional menace. Comprising the relevant findings and record were a lengthy report commissioned by Congress and submitted by the Register of Copyrights, multiple hearings, and a catalogue of examples; these all pointed to the growing pattern and danger of allowing States to infringe with impunity. As a result, Congress found that nothing short of the established monetary remedies for copyright infringement would suffice to vindicate copyrights and hold States in check. This record is far more robust and on-point than the one this Court confronted in *Florida Prepaid*. Not only was the legislative record surrounding the Patent Remedy Act weaker, but it connected to a body of patent law that makes patent infringement by States less likely to be constitutionally problematic, as a rule, by comparison to copyright infringement.

ARGUMENT**I. IN ENACTING THE CRCA, CONGRESS
VALIDLY EXERCISED ITS POWER
UNDER THE INTELLECTUAL
PROPERTY CLAUSE TO MAKE STATES
AMENABLE TO SUIT**

In *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), this Court adopted a clause-by-clause approach to evaluating whether a particular clause of Article I empowers Congress to abrogate state sovereign immunity. Viewed through that lens, the Intellectual Property Clause supplies singular warrant for Congress to abrogate state sovereign immunity. Even if no other Article I power authorized Congress to abrogate, this one would.

The Intellectual Property Clause expressly empowers Congress to “secur[e] ... to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8. Of course, Congress could not “secur[e]” authors’ “exclusive Right” to their works if Congress were powerless to hold States liable when and if they infringe. It follows that the States surrendered their sovereign immunity as necessary for Congress to secure the uniform, nationwide copyright protection necessary to “promote Progress of Science and useful Arts,” just as the Framers contemplated. Once the Intellectual Property Clause is so understood, the CRCA—and its purpose of protecting the “exclusive Right[s]” “secur[ed]” by Congress and holding States liable for their infringement—should be upheld.

**A. The Intellectual Property Clause
Reflects A Plan-Of-The-Convention
Waiver Of Sovereign Immunity**

Petitioners recognize, just as this Court long has, that immunity from suit is “a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution.” *Alden v. Maine*, 527 U.S. 706, 713 (1999). States retain that immunity from suit today “except as altered by the plan of the Convention or certain constitutional Amendments.” *Id.* But, even as the Framers appreciated the importance of state sovereign immunity, they considered it axiomatic that States could surrender such immunity in ratifying the Constitution. *Id.* (States do not retain sovereign immunity if “surrender of this immunity [is] in the plan of the convention”) (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)); see also *Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934) (same); *Pennsylvania v. Union Gas*, 491 U.S. 1, 19 (1989) (same) (plurality). Accordingly, this Court has held that Congress wields power to abrogate state sovereign immunity under Article I when there is “‘compelling evidence’ that the States were required to surrender this power to Congress pursuant to the constitutional design.” *Alden*, 527 U.S. at 713 (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 781 (1991)).

Such “compelling evidence” exists here, establishing that States surrendered their immunity from suit for infringement through the Intellectual Property Clause.

1. The Plain Text Of The Intellectual Property Clause Evinces Waiver

Analysis of the Intellectual Property Clause begins with its text, which sets the Clause apart from other Article I powers. Specifically, Congress is vested with the power to “secur[e] ... to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8. As the Framers conceived it, a “Plan of the Convention” waiver arises when the Constitution reserves an enumerated power exclusively for Congress:

“[A]s the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and *which were not by that act exclusively delegated to the United States*. This exclusive delegation or rather this alienation of State sovereignty would only exist in three cases; *where the Constitution in express terms granted an exclusive authority to the Union*; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and *where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant*.

THE FEDERALIST No. 32 (Alexander Hamilton)
(emphases added).

The text of the Intellectual Property Clause squarely grants Congress such exclusive domain,

relative to which retention of sovereign immunity by States as and if they encroach would be repugnant. The Clause authorizes Congress to “*secur[e]*” certain rights, employing “a verb active” that “signifies to protect, insure, save, [and] ascertain.” *Wheaton v. Peters*, 33 U.S. 591, 660 (1834) (analyzing Intellectual Property Clause); see also SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 238 (London, W. G. Jones 3d ed. 1768) (defining “Secure” as “1. to make certain; to put out of hazard; to ascertain. 2. To protect; to make safe.”).⁶ To “*secur[e]*” authors’ copyrights, Congress must be able to “put [them] beyond hazard” and protect them from any and all intrusion. See NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1214 (1828) (“WEBSTER”) (defining “Secure” as “[t]o make certain; to put beyond hazard. Liberty and fixed laws *secure* to every citizen.”); cf. U.S. CONST. amend. IV (“The right of the people to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”) (emphasis added).

Similarly, by referring to the property rights that exist in creative works as “*exclusive* Right[s],” the Intellectual Property Clause denotes that those rights are to belong solely to the copyright holder, who may “enjoy [them] to the exclusion of others.”

⁶ See *NLRB v. Noel Canning*, 573 U.S. 513, 527 (2014) (looking to “[f]ounding-era dictionaries” to understand constitutional text); *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346-47 (1999) (Scalia, J., concurring in part) (relying on “[d]ictionaries roughly contemporaneous with the ratification of the Constitution”).

WEBSTER, *supra*, at 474 (defining “Exclusive”). The same contemporaneous use of “exclusive” is reflected in Article I, Section 8, Clause 17, which grants Congress the power “[t]o exercise *exclusive* Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may ... become the Seat of the Government of the United States.” U.S. CONST. art. I, § 8, cl. 17 (emphasis added). In construing the scope of Congress’s authority under that clause, this Court has interpreted the phrase “*exclusive* Legislation” to “exclude all State legislative power; and to vest in Congress, in addition to its general powers over the whole Union, all possible powers of legislation over the District.” *Cohens v. Virginia*, 19 U.S. 264, 431-32 (1821) (emphasis added); see also *Palmore v. United States*, 411 U.S. 389, 397 (1973) (describing Congress’s power under Article I, Section 8, Clause 17 as “plenary”). Corresponding use of the term “exclusive” in Article I, Section 8, Clause 8 serves to confer upon Congress a power to secure copyright holders’ rights that is likewise “absolute” vis-à-vis the States. *Cohens*, 19 U.S. at 434; see *Ft. Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 532 (1885) (“Broader or clearer language could not be used to exclude all other authority than that of congress ...”).

The text of the Intellectual Property Clause is definitive: Congress’s ability to “secur[e]” an “exclusive Right” under the Intellectual Property Clause calls for administration exclusively by the federal government, whose conferral of rights upon Authors is properly conclusive as against all others. This Court has already noted that States themselves necessarily answer to the sweep of the federal command over copyright protection pursuant to the

Intellectual Property Clause: “When Congress grants an *exclusive right* or *monopoly*, its effects are pervasive; *no citizen or State may escape its reach.*” *Goldstein v. California*, 412 U.S. 546, 560 (1973) (emphases added). Any notion that States would retain their own sovereign authority and immunity to infringe upon federally-conferred copyrights is incompatible with Congress’s express power to secure copyrights, as to which authors are to hold exclusive rights.

The Framers left no doubt that Congress was to grant and protect creators’ *exclusive* rights over their intellectual property. By doing so, the Framers foreclosed any notion that States would retain their own sovereign license to infringe these exclusive rights—or, what is tantamount, that States would retain immunity for any such infringement. James Madison characterized the rights of creators as “monopolies.” *Eldred v. Ashcroft*, 537 U.S. 186, 246 (2003) (Breyer, J., dissenting) (citing *Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments.* in JAMES MADISON, WRITINGS 756 (J. Rakove ed. 1999) (“MADISON ON MONOPOLIES”)). While the Framers agreed the Constitution generally should not replicate the monopolies of England, “Madison noted that the Constitution had ‘limited them to two cases, the authors of Books, and of useful inventions.’” *Id.* (quoting MADISON ON MONOPOLIES 756).

Madison explained that monopolies over intellectual property were justified because the creation of such works benefit the community as a whole, with the monopoly granted for only a “limited Time,” as warranted to “promote Progress.” See *id.*; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S.

417, 429 (1984) (referencing “[t]he monopoly privileges that Congress may authorize” under Article I, Section 8). Part and parcel of this monopoly was the surrendering by States of any parallel authority to intrude upon the tightly-bounded federal domain over intellectual property. By definition and by design, the monopoly and exclusivity needed to be uniform and complete; that is how creators would be afforded the desired incentives and rewards to promote progress. The conception embraced by the Framers leaves no place for States to retain sovereign immunity once Congress sees fit to grant a copyright and to entitle the holder to enforce the resulting, exclusive rights against *any* would-be infringer.

For these reasons, the text of the Intellectual Property Clause should itself suffice to establish a waiver of States’ sovereign immunity.

2. The History And Purpose Of The Intellectual Property Clause Confirm The Clause Embodies A Waiver Of State Sovereign Immunity

Beyond the text, the very power to confer and secure exclusive federal rights to intellectual property entails abrogation of a State’s sovereign immunity from suit. Both Congress’s enactment of the Copyright Act of 1790 and the history of the Intellectual Property Clause add to the evidence that the Framers viewed the Clause as effectuating a Plan-of-the-Convention waiver.

This Court has recognized the paramount importance of “national uniformity in the realm of intellectual property.” *Bonito Boats, Inc. v. Thunder*

Craft Boats, Inc., 489 U.S. 141, 162 (1989) (citing THE FEDERALIST NO. 43 (James Madison)); see also *Capitol Records v. Mercury Records Corp.*, 221 F.2d 657, 667 (2d Cir. 1955) (Hand, J., dissenting) (“Uniformity was one of the principal interests to be gained by devolving upon the Nation the regulation of this subject.”). And these exclusive rights, by their very nature, must also run against the government. As this Court explained in 1888, in upholding a patent holder’s judgment against the United States, Congress’s power to “secur[e]” “exclusive” rights to writings and discoveries “could not be effectuated if the government had a reserved right to publish such writings, or to use such inventions, without the consent of the owner.” *United States v. Palmer*, 128 U.S. 262, 271 (1888).

The First Congress recognized the intent of the Intellectual Property Clause to confer such uniform protection, as evidenced by contemporaneous legislation. See *Katz*, 546 U.S. at 363 (sovereign immunity under Article I informed by “legislation both proposed and enacted under its auspices immediately following ratification of the Constitution”). The Copyright Act of 1790 “launched a uniform national system” that importantly applied to works predating the Act. *Golan v. Holder*, 565 U.S. 302, 321 (2012).⁷ Such uniformity could not be

⁷ The Copyright Act of 1790 provided for authors to hold “sole” right to their works, and to be entitled to “damages” for infringements. See Act of May 31, 1790, 1 Stat. 124, § 1 (“authors of any map, chart, book or books ... shall have the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books”); *id.* § 6 (infringers “shall be

achieved unless the intellectual property rights conferred by Congress were enforceable against *all* infringers, throughout *all* States. As Justice Story emphasized in 1833:

It is beneficial to all parties, that the national government should possess this power [under the Intellectual Property Clause]; to authors and inventors, because, otherwise, they would be subjected to the varying laws and systems of the different states on this subject, which would impair, and might even destroy the value of their rights

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 502, at 402 (R. Rotunda & J. Nowak eds. 1987).

That States provided at the Founding for Congress to have “power” to secure uniform protections nationwide confirms that States surrendered sovereign immunity to the extent they decided to violate federal protections. As one court held prior to the enactment of the CRCA, “[t]he ‘exclusive Rights’ of an author, guaranteed under the Constitution and Copyright Act, would surely be illusory were a state permitted to appropriate with impunity the rights of lawful copyright holder.” *Mills Music*, 591 F.2d at 1286. Absent abrogation, security might give way to incursion and uniformity to deviation once States saw fit to claim and use federally protected works as their own without consequence.

liable to suffer and pay to the said author or proprietor all damages occasioned by such injury”).

The history of the Intellectual Property Clause at the Constitutional Convention similarly indicates that States agreed to waive sovereign immunity under the Plan of the Convention. Like the Bankruptcy Clause, the Intellectual Property Clause was inserted into Article I without significant debate or opposition because, as James Madison observed during the ratification debates, “the utility of this power will scarcely be questioned,” THE FEDERALIST NO. 43. “The absence of extensive debate” over the text of or insertion of the Intellectual Property Clause, as with the Bankruptcy Clause, “indicates that there was general agreement on the importance of authorizing a uniform federal response.” *Katz*, 546 U.S. at 369. Indeed, the Intellectual Property Clause was passed *unanimously* by the Constitutional Convention without record of *any* debate. See Nachbar, *supra*, at 338 (Clause unanimously passed with “no record of any debate”); Edward C. Walterscheid, *To Promote the Progress of Useful Arts: American Patent Law & Administration, 1787-1836*, 2 J. INTELL. PROP. L. 1, 50-51 & n.171 (1994) (similar). The acknowledged utility of the Intellectual Property Clause in “promot[ing] the Progress of Science and useful Arts” obviated any question or concern about whether States should be yielding to federal control and authors’ exclusive rights within this realm. THE FEDERALIST NO. 43 (James Madison) (“[t]he public good” it promotes “fully coincides ... with the claims of individuals”).

Nor is it plausible that the Framers were somehow unconcerned about threats that *governmental* overreach, in particular, would pose to the exclusive intellectual property rights that were Congress’s responsibility to protect. To the contrary, the

Framers took pains throughout the Constitution to protect the rights of private citizens against intrusion by the government, and even to provide for monetary recompense as an essential means of securing those rights. See U.S. CONST. amends. III (quartering), IV (search and seizure), V (takings). As Chief Justice Marshall wrote early for this Court, and as this Court later reiterated in enabling monetary remedies for Fourth Amendment violations, “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

For the Framers, then, there could be no such thing as secure, exclusive rights to intellectual property that government would nevertheless be free to infringe without liability. See *Palmer*, 128 U.S. at 271 (Congress’s power to “secur[e]” “exclusive” rights to writings and discoveries “could not be effectuated if the government had a reserved right to publish such writings or to use such inventions without the consent of the owner”). When Article I provides for Congress to secure exclusive rights for authors, it signals that authors should be afforded full recourse whenever *anyone*, be it a State or otherwise, violates those rights.

Indeed, a contrary understanding does violence to the federal-state balance. Considered alongside other Article I powers, the Intellectual Property Clause is singularly and remarkably pointed—as well as circumscribed—in calling for exclusive rights

to intellectual property that the federal government is to grant and secure. Leaving States free to violate those federal rights while disabling Congress from protecting them would be antithetical to the constitutional structure and conception—allowing States to intrude upon and upset a unique federal scheme for securing exclusive rights to creators to encourage and reward their efforts. As apparent as this problem is from first principles, decades of experience bring it into sharp focus, see *infra*, at II.B, as do the facts of this case, see *supra*, at 11-13. Affirming the decision below would invite worsening abuse by States and degradation of the federal copyright regime. That state of affairs would offend the constitutional design along with the ability of Congress to do its assigned job under Article I, Section 8, Clause 8.

B. This Court’s Prior Decisions Do Not Foreclose Congressional Reliance On The Intellectual Property Clause To Abrogate State Sovereign Immunity

After previously stating in dicta that Congress may not ever rely on any Article I power to abrogate sovereign immunity, this Court has more recently held that proper analysis of Congress’s abrogation authority under Article I proceeds clause by clause. *Katz*, 546 U.S. at 363 (describing the “erroneous” dicta), *id.* at 368-79 (setting forth a clause-specific analysis). As explained *supra*, States waived any immunity from suit for copyright infringement as part of the Plan of the Convention pursuant to the specific clause at issue. Consistent with this Court’s governing precedent, therefore, Congress may rely on the Intellectual Property Clause as a valid source of

Congress's power to abrogate Eleventh Amendment immunity. Any contrary holdings this Court previously reached have already been superseded—or else, if not yet superseded, should be overruled in relevant part. *Cf. Franchise Tax Bd. of Cal. v. Hyatt*, 139 S.Ct. 1485, 1492 (2019) (overruling *Nevada v. Hall*, 440 U.S. 410 (1979), on the grounds that *Hall* was “contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution”).

Seminole Tribe. This Court's assumption that Congress would be foreclosed from relying on any provision of Article I to abrogate sovereign immunity stemmed initially from *Seminole Tribe*. There, the Court addressed a statute governing States' compacts with Indian tribes to regulate gaming, which statute had been “passed by Congress under the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3.” 517 U.S. at 47. In addressing the statute's validity, the Court held that “the Indian Commerce Clause does not grant Congress that power [to abrogate sovereign immunity],” and invalidated the statute. *Id.*

Seminole Tribe explicitly overruled *Union Gas*, which had held Congress does have authority to abrogate state sovereign immunity through the Article I Commerce Clause. See *Seminole Tribe*, 517 U.S. at 59-60, 72-73 (discussing and overruling *Union Gas*, 491 U.S. 1). The Court reasoned that “the plurality opinion in *Union Gas* allows no principled distinction in favor of the States to be drawn between the *Indian Commerce Clause* and the *Interstate Commerce Clause*.” *Id.* at 63 (emphasis added). But the Court then ventured well beyond its

equation of the Indian and Interstate Commerce Clauses as relevant to that case, pronouncing that the “[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.” *Id.* at 73.

Florida Prepaid. After *Seminole Tribe*, this Court considered whether Congress had the power to abrogate Eleventh Amendment immunity so as to allow claims for patent infringement against States in federal court. *Fla. Prepaid*, 527 U.S. at 633-34. In *Florida Prepaid*, the Court did not examine specifically whether the Intellectual Property Clause vests Congress with the ability to subject the States to suit for patent infringement. *Id.* at 635. Indeed, that question was not even before the Court; respondent College Savings Bank had *conceded* that “*Seminole Tribe* stands for the proposition that Congress cannot use its Article I powers to abrogate the states’ Eleventh Amendment immunity.” Brief of Respondent College Savings Bank, *Fla. Prepaid*, 1999 WL 164439, at *22 (Mar. 24, 1999).

As a result, the only question the Court substantively analyzed in *Florida Prepaid* was whether Congress’s enactment of the Patent Remedy Act was valid under Section 5 of the Fourteenth Amendment. In doing so, the Court assumed without deciding (because the parties did not “contend otherwise”) that “*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers.” *Fla. Prepaid*, 527 U.S. at 636.

At no point in either *Seminole Tribe* or *Florida Prepaid* did this Court undertake to search for any “‘compelling evidence’ that the States were required

to surrender [sovereign immunity] pursuant to the constitutional design.” *Alden*, 527 U.S. at 713. Rather, the Court relied solely on *Seminole Tribe*’s unchallenged statement for the categorical assumption—untethered to specific constitutional text or history—that no provision of Article I would ever be worthy of study in this context. Never has the Court inquired into whether the Intellectual Property Clause entailed a Plan-of-the-Convention waiver at the Founding.

Katz. Following *Seminole Tribe*, lower courts assumed (as the respondents in *Florida Prepaid* did) that no Article I power could possibly allow Congress to subject States to suit. As this Court subsequently held, however, that assumption is “erroneous” and the broad language in *Seminole Tribe* is “dicta.” *Katz*, 546 U.S. at 363.

In *Katz*, the Court plumbed the text and history of the Article I Bankruptcy Clause, before concluding that the clause authorizes Congress to subject States to suit for violations of “Laws on the subject of Bankruptcies” through a Plan-of-the-Convention waiver of sovereign immunity. *Id.* at 377-79. The Court so held even though “statements in both the majority and dissenting opinions in *Seminole Tribe* ... reflected an assumption that the holding in that case would apply to the Bankruptcy Clause,” because “[c]areful study and reflection have convinced us ... that that assumption was erroneous.” *Id.* at 363.⁸ Thus, *Katz* rejected the notion that Article I is

⁸ Notably, those same “statements” in *Seminole Tribe* also coupled copyright laws with bankruptcy laws. 517 U.S. at 72 n.16; *id.* at 77 & n.1, 93-94 (Stevens, J., dissenting).

incapable of giving rise to the power to abrogate sovereign immunity, and explained that the Court is “not bound to follow ... dicta in a prior case in which the point now at issue was not fully debated.” *Id.*

Finding no categorical bar, *Katz* examined the special nature of bankruptcy laws and the need for national uniformity. See *id.* at 375-77 & n.13. After carefully analyzing the particular Article I power at issue and the history and intent surrounding it, this Court concluded that “States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to ‘Laws on the subject of Bankruptcies.’” *Id.* at 377.

Per *Katz*, a clause-by-clause analysis properly determines whether Congress may act pursuant to its Article I authority to abrogate State sovereign immunity. *Katz* supersedes the unexamined “assumption” in *Florida Prepaid*, 527 U.S. at 636, and has replaced that assumption with a call for clause-specific examination. The same methodology should now apply when analyzing the Intellectual Property Clause, on its own and afresh. Once properly examined, the Clause evinces a Plan-of-the-Convention waiver like no other does.

While the Fourth Circuit attempted to distinguish *Katz* as “unique to the Bankruptcy Clause,” Pet. App. 19a, nothing in *Katz* suggests that its framework for assessing a Plan-of-the-Convention waiver is confined to the Bankruptcy Clause, or that Congress is foreclosed from relying on all other Article I powers to abrogate. To the contrary, allowing States to infringe copyrights with impunity would thwart the very idea of Congress “securing ... exclusive

Right[s]” for authors, and undermine Congress’ ability to “promote the Progress of Science and useful Arts.” U.S. CONST. art. I, § 8, cl. 8. That the regime governing copyrights is entirely, exclusively, and designedly federal in nature, see 17 U.S.C. 301(a) (federal copyright law preempts equivalent state laws or common law), adds to the appropriateness, and necessity, of abrogation.

The appeal to *in rem* jurisdiction that animates *Katz*, 546 U.S. at 369-71, has like force under the Intellectual Property Clause. Copyright involves *in rem* interests in personal property. See 17 U.S.C. 201(d)(1) (recognizing copyright as “personal property”); Gideon Parchomovsky & Alex Stein, *Intellectual Property Defenses*, 113 COLUM. L. REV. 1483, 1487 (2013) (“[I]ntellectual property rights are rights in rem that avail against the rest of the world.”). Notably, unlike the sundry relations and theories that may occasion disputes between States and debtors in bankruptcy, the property at issue in copyright disputes is uniquely and inherently *federal*, including as reflected in a *federal* registration regime.

All told, the CRCA presents an even cleaner case than *Katz* for abrogation under Article I: The Intellectual Property Clause alone authorizes Congress to “secur[e]” a specific, enumerated “exclusive Right.” And it does so in connection with an exclusively federal regime involving private property for which national uniformity and inviolable security were imperative for the Framers, as reflected in the constitutional text and design. To the extent that any Article I power can ever justify

abrogation, as *Katz* holds it can, this Clause presents the strongest possible case for abrogation.

Florida Prepaid should be no impediment to this Court conducting the clause-specific examination called for by *Katz*, especially considering that this Court's decision in *Florida Prepaid* predated *Katz*, did not address specifics of the Intellectual Property Clause, and was not even informed by argument supporting the Article I power. Alternatively, this Court should overrule *Florida Prepaid's* unexamined assumption about Congress's inability to abrogate under the Intellectual Property Clause, based upon what full and fair examination of this Clause now reveals.

C. Congress Validly Exercised Its Authority Under The Intellectual Property Clause To Abrogate State Sovereign Immunity For Copyright Infringement

Once the Intellectual Property Clause is understood as empowering Congress to abrogate sovereign immunity, there should be no doubt that the CRCA reflects a valid exercise of that power. Indeed, the State has never contended otherwise.

Congress's exercise of its Article I powers, and its enactment of statutes as necessary-and-proper incidents thereof, are subject to deferential review. *McCulloch v. Maryland*, 17 U.S. 316, 423-24 (1819) (“[W]here the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to

tread on legislative ground.”); see also, *e.g.*, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 559 (2012); *United States v. Five Gambling Devices Labeled in Parts “Mills,” and Bearing Serial Nos. 593-221*, 346 U.S. 441, 459 (1953). And the congressional judgment reflected in the CRCA is irreproachable in this context and on this record.⁹ By subjecting States to liability for their copyright infringement, the CRCA affords a straightforward, natural remedy for the “exclusive Right” that Congress is tasked with “securing.” See *Seminole Tribe*, 517 U.S. at 77 n.1 (Stevens, J., dissenting) (state sovereign immunity for violations of federal copyright law would mean that “persons harmed by state violations of federal copyright ... laws have no remedy”).

II. THE CRCA ALSO REFLECTS A VALID EXERCISE OF CONGRESS’S POWER TO ENFORCE THE FOURTEENTH AMENDMENT

Section 5 of the Fourteenth Amendment furnishes an independent basis for Congress to have abrogated state sovereign immunity via the CRCA. This constitutional provision vests Congress with important, distinct authority to enforce the substantive protections of the Fourteenth Amendment, including by abrogating state sovereign immunity and allowing

⁹ Because the CRCA qualifies as a valid exercise of Congress’s enforcement powers under Section 5 of the Fourteenth Amendment, see *infra* at II.B., it follows *a fortiori* that the CRCA also satisfies the more deferential standard associated with “necessary and proper” review under Article I.

suits against the States for damages. As long as Congress retains due berth to make legislative judgments in furnishing constitutional remedies, the Court should uphold the CRCA as a congruent and proportional remedy for States' unconstitutional deprivations surrounding copyrights.

This particular abrogation of Eleventh Amendment immunity represents a direct, targeted, conscientious response by Congress to a demonstrated pattern of unremedied copyright infringement by the States. Moreover, the specific remedy Congress prescribed—holding States liable for copyright infringement just as private infringers are—makes perfect sense and follows from an extensive, on-point record Congress adduced. The CRCA's legislative record is replete with: (1) a year-long, rigorous study commissioned by Congress and conducted by the Register of Copyrights, concluding that infringement of copyrights by States was a serious and growing problem; (2) testimony by witnesses in lengthy congressional hearings attesting to the need for States to be liable for damages for their infringing acts; and (3) a catalogue of documented State infringement, particularly by universities, confirming the specific need for a monetary remedy.

The mounting problem of State copyright infringement in recent years has only further vindicated Congress's judgment. If the CRCA is nonetheless invalidated, then no meaningful remedy is within sight.

A. Copyright Infringement By States Is A Rightful Concern Of Congress And Basis For Abrogation Under The Fourteenth Amendment

Section 5 of the Fourteenth Amendment imbues Congress with “power to enforce, by appropriate legislation, the provisions of this article,” including the clause prohibiting States from “depriv[ing] any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV. It is well settled that Congress may abrogate state sovereign immunity pursuant to its power under Section 5. See, e.g., *United States v. Georgia*, 546 U.S. 151, 158-59 (2006); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (“In [Section 5] Congress is expressly granted authority to enforce ... the substantive provisions of the Fourteenth Amendment” by providing actions for money damages against States).

Especially when it comes to “*actual* violations” of Section 1 of the Fourteenth Amendment, “no one doubts that § 5 grants Congress the power to ‘enforce ... the provisions’ of the Amendment by creating private remedies against the States.” *Georgia*, 546 U.S. at 158. And “Congress may, in the exercise of its § 5 power, do more than simply proscribe conduct that we have held unconstitutional.” *Hibbs*, 538 U.S. at 727. “Congress’ power ‘to enforce’ the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.” *Id.* (quoting *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356,

365 (2001)); see *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (“Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional.”). Constraining Congress’s power is the requirement that an enforcement effort remain “congruent and proportional” to the underlying violation, inasmuch as it does not “prohibit[] constitutional state action in an effort to remedy or to prevent unconstitutional state action.” *Fla. Prepaid*, 527 U.S. at 647.

Consistent with the established framework, Congress’s Fourteenth Amendment rationale for the CRCA is straightforward. Rights to intellectual property are no less cognizable and protected under the Fourteenth Amendment than rights to other property are—and unlawful deprivations by the government no less warrant remedy. It was well within the Legislature’s prerogative to recognize as much, and to furnish legislative remedy.

In enacting the CRCA, Congress did more than enough to convey its concern with protecting “the property rights of citizens” against States that “are injuring” those rights while evading meaningful remedy. H.R. Rep. No. 101-887, at 5; see S. Rep. No. 101-305, at 7 (identifying this Court’s precedent as “creat[ing] an exception to the eleventh amendment based on the enforcement provisions of section 5 of the fourteenth amendment”) (citing *Fitzpatrick*, 427 U.S. 445); see also *infra*, at II.B.1. Contrary to the decision below (Pet. App. 20a), “Congress need [not] anywhere recite the words ‘section 5’ or ‘Fourteenth Amendment’” in order to invoke its Section 5 powers

to abrogate state sovereign immunity. *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) (citing *Fullilove v. Klutznick*, 448 U.S. 448, 476-78 (1980)); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) (“The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.”); see also *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 78-80 (2000) (considering Section 5 as possible basis for abrogation even though Congress did not expressly legislate pursuant thereto).¹⁰

Under this Court’s precedent, the CRCA passes muster as a valid exercise of Congress’s established Section 5 power. Notably, this Court has already indicated in *Florida Prepaid* that Congress can

¹⁰ The other circuits have followed this Court’s teachings in considering Congress’s potential resort to its Section 5 powers, without demanding a particular legal incantation from Congress before doing so. See, e.g., *CSX Transp., Inc. v. N.Y. State Office of Real Prop. Servs.*, 306 F.3d 87, 98 (2d Cir. 2002) (“[T]he legislative history ... coupled with the clear intent of Congress to alleviate allegedly discriminatory taxing schemes is sufficient to demonstrate that the 4–R Act was passed pursuant to Congress’ Section 5 powers.”); *Timmer v. Mich. Dep’t of Commerce*, 104 F.3d 833, 837-38 (6th Cir. 1997) (“Congress need [not] anywhere recite the words ‘section 5’ or ‘Fourteenth Amendment’ or ‘equal protection’”) (quoting *EEOC*, 460 U.S. at 243 n.18); *Ore. Short Line R.R. Co. v. Dep’t of Revenue*, 139 F.3d 1259, 1265-66 (9th Cir. 1998) (Congress need not have “pointed to the right part of the Constitution,” as long as “the Fourteenth Amendment will support the [statute]”) (citing *EEOC*, 460 U.S. at 243 n.18); see also *Brinkman v. Dep’t of Corr.*, 21 F.3d 370, 371-72 (10th Cir. 1994) (Congress’s intention to abrogate state sovereign immunity “made clear” based on statute’s text and congressional history).

properly use Section 5 as a basis for holding States liable for infringing intellectual property, provided that Congress establishes appropriate foundation via a legislative record. Because the CRCA supplies the factual predicate that was lacking in *Florida Prepaid*, this Court’s reasoning in *Florida Prepaid* points the way to reversal in this case.

In *Florida Prepaid*, the Court considered whether the Patent Remedy Act validly abrogated sovereign immunity for State acts of patent infringement. 527 U.S. at 633-34. This Court ultimately held that abrogation invalid only because Congress neglected to identify any Fourteenth Amendment violation at all as a basis for the Act, *id.* at 639-40; and Congress “barely considered the availability of state remedies for patent infringement,” *id.* at 643. As explained *infra*, the CRCA evinces no such defect.

What the CRCA has in common with the Patent Remedy Act is the basic congressional premise that intellectual property rights deserve constitutional protection, and that governmental deprivations deserve constitutional remedy. Far from quarreling with that premise, this Court agreed in *Florida Prepaid* that due process protects patents—“[a]nd if the Due Process Clause protects patents, we know of no reason why Congress might not legislate against their deprivation without due process under § 5 of the Fourteenth Amendment.” *Fla. Prepaid*, 527 U.S. at 642. Neither is there any “reason why” Congress cannot legislate to remedy state deprivations of copyrights.

As in *Florida Prepaid*, the notion that the intellectual property at issue is subject to constitutional protection—and, correspondingly, that

state infringement occasions constitutional concern—should be beyond question. Copyrights have long been understood as “property” subject to the protections of the Fourteenth Amendment. The Copyright Act itself refers to the interests that exist in copyright as personal property quite “distinct from [the] ownership of any material object in which the work is embodied.” 17 U.S.C. 202; see also, *e.g.*, *id.* § 201(d)(1) (“The ownership of a copyright may ... pass as personal property by the applicable laws of intestate succession.”). Copyright also confers a power to exclude others. See, *e.g.*, 17 U.S.C. 106 (“exclusive rights”); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The owner of the copyright, if he pleases, may ... content himself with simply exercising the right to exclude others from using his property.”).

Consequently, this Court has viewed copyrights as “property” for more than a century. See, *e.g.*, *Fox Film*, 286 U.S. at 128 (“copyright is property” akin to land and patents); *Holmes v. Hurst*, 174 U.S. 82, 84-86 (1899) (describing ancestry of copyright in common law as species of property); *Ager v. Murray*, 105 U.S. 126, 127-28 (1881) (“A patent or a copyright ... is property ...”); *Paige v. Banks*, 80 U.S. 608, 614 (1871) (“Independent of any statutory provision the right of an author in and to his unpublished manuscripts is full and complete. It is his property”).

Of course, States violate the Due Process Clause when they deny protected property rights without affording adequate recourse. See *Daniels v. Williams*, 474 U.S. 327, 333 (1986). The same holds for copyrights no less than any other protected

property. See, e.g., *Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of Univ. Syst. of Ga.*, 633 F.3d 1297, 1317 (11th Cir. 2011) (“A copyright is a property interest protected under the Due Process Clause.”); see also Pet. App. 27a-28a (instances of States’ infringement “presumably violated the Fourteenth Amendment’s Due Process Clause”). The key question for purposes of due process is whether adequate remedies exist for infringement by States. “[O]nly where the State provides no remedy, or only inadequate remedies, to injured [copyright] owners for its infringement of their [copyright] could a deprivation of property without due process result.” *Fla. Prepaid*, 527 U.S. at 643.

Furthermore, it bears noting that Congress via the CRCA was also protecting against unconstitutional, uncompensated takings that would otherwise continue in this context. See *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 123-25 (1978); cf. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 481 n.10 (1987) (citing *Chicago B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226 (1897) (applying the Takings Clause of the Fifth Amendment to the states through the Fourteenth Amendment)).

As explained in the ensuing section, Congress deemed the CRCA imperative precisely because it found—for good reason and on a rich record—that leaving States immune was tantamount to denying meaningful remedy for copyright infringement. Particularly given Congress’s judgment that no adequate remedy to infringement could be realized solely through injunctive relief, and because no meaningful alternative relief is available under state law, see 17 U.S.C. 301(a), the CRCA’s promise of

access to monetary damages neatly addresses the unconstitutional deprivation of authors' rights.

B. Unlike The Patent Remedy Act, The CRCA's Record Addresses A Fourteenth Amendment Violation That Lacks An Adequate State Remedy

The CRCA's legislative record contains the very sort of evidence and findings that this Court looked for but did not find in *Florida Prepaid*. See 527 U.S. at 640. Congress here found, from a robust record, both a pattern of mounting copyright infringement by States and an absence of any satisfactory remedy short of monetary damages. Intervening experience since 1990 has only fortified Congress's rationale—and predictive judgment—that continued immunity for States would result in more and more uncompensated deprivations for copyright holders. Fairly read, the CRCA reflects a textbook example of a congruent and proportional remedy to a serious constitutional problem.

1. The Legislative Record Shows That, In Enacting The CRCA, Congress Sought To Remedy A Pattern Of Fourteenth Amendment Violations

In arriving at the CRCA, Congress established that States were systematically infringing copyrights without paying what they should. This legislative record therefore supplies precisely the sort of evidence, findings, and predicate that were missing from the Patent Remedy Act's legislative record, at issue in *Florida Prepaid*. The House Report supporting the CRCA expressly noted that, through unchecked state copyright infringement, States "are

injuring the property rights of citizens.” H.R. Rep. No. 101-887, at 5. The Senate discerned a “clearly widespread” and “clearly increasing” pattern of copyright infringement by the States. S. Hearing 109 (D. Eskra). And Congress was informed that copyright holders would “suffer immediate harm if they are unable to sue infringing states in federal court.” Register’s Report 103.

This stands in stark contrast to what the Court confronted in *Florida Prepaid*, where the Patent Remedy Act’s legislative record revealed “no pattern of patent infringement by the States” and “little evidence of infringing conduct on the part of the States.” 527 U.S. at 640. Instead, the record before Congress demonstrated that, as a general rule, States were respecting patent rights. As such, the Court concluded that “the legislative record ... provides little support for the proposition that Congress sought to remedy a Fourteenth Amendment violation in enacting the Patent Remedy Act.” *Id.* at 642.

The CRCA, however, is cut from different legislative cloth. Three aspects of this record highlight just how robust and compelling a predicate Congress established for exercising its enforcement powers under Section 5: (1) the Register’s Report; (2) the testimony at the Hearing; and (3) specific examples of growing copyright infringement by States.

Register’s Report. Animating and informing the CRCA was the 158-page Register’s Report. See *supra*, at 7-9. At Congress’s request, then-Register of Copyrights Ralph Oman conducted a year-long investigation and issued a Request for Information

for public comment relating to: (1) “any practical problems faced by copyright proprietors who attempt to enforce their claims of copyright infringement against state government infringers,” and (2) “any problems state governments are having with copyright proprietors who may engage in unfair copyright or business practices with respect to state governments’ use of copyrighted materials,” Register’s Report 5.

The dozens of ensuing public comments overwhelmingly indicated the need for congressional remedy.

In response to the first question, “the comments *almost uniformly* chronicled dire financial and other repercussions flowing from state Eleventh Amendment immunity for damages in copyright infringement suits,” *id.* at 5-6 (emphasis added), with five commentators documenting “actual problems faced in attempting to enforce their [copyright] claims” against States, *id.* at 7; see also Oman Br. 9-14 (detailing pattern of copyright infringement).

In response to the second question, “the comments did not reflect *a single complaint*” against copyright holders. Register’s Report iv (emphasis added). To the contrary, one comment noted that States “are in a powerful position ... to exact substantial concessions in negotiating copyright contracts,” even while otherwise facing liability. *Id.*; see also *id.* at 6; Oman Br. 11 n.4.

The comments also reflected the consensus that injunctive relief “is neither an adequate remedy nor a deterrent,” especially because “small companies do not have the resources to battle States,” Register’s Report 6, and that other negative consequences

would necessarily flow from State immunity, *id.* at 6-7. The Report urged Congress “to hold states responsible under the federal copyright law” and found “that copyright owners have demonstrated that they will suffer immediate harm if they are unable to sue infringing states in federal court for money damages.” *Id.* at vii, 103.

Hearings. Congress next held hearings on the CRCA over multiple days, received testimony from 10 different witnesses (beginning with Mr. Oman), and received at least 16 supplemental letters detailing the necessity for the CRCA. See H.R. Hearings iii-iv; S. Hearing iii-iv. Congress specifically heard testimony that, if State agencies are not required to pay for use of copyright material, “publishers, software companies, and other copyright owners whose businesses rely, in whole or in part, on public universities or other state agencies” would be “substantial[ly] impact[ed].” S. Hearing 70 (Statement of J. Healy, Copyright Remedies Coalition). Congress also heard testimony that textbook publishers and other individual creators “could be put out of business if the states [are permitted] to engage in wholesale copying of their property with impunity,” thereby causing “the prices charged non-state users [to] rise” and diminishing the “economic incentive to create new works” as well as “the quality of efforts” to do so. *Id.* at 63, 70. Congress found “it particularly disturbing that one of the leading cases applying State immunity to copyright infringement ... involved [the] copying of [a] computer program,” by a “large State entity,” “of a small, entrepreneurial software company with revenues of less than \$250,000.” S. Rep. No. 101-305, at 11.

The CRCA record spotlighted substantial copyright infringement by state universities that “critically impair[ed]” creative incentives by “creators and producers of computer data bases, software, scholarly books and journals, textbooks, educational testing materials, microfilm, educational video materials, music and motion pictures.” S. Rep. No. 101-305, at 9. Educational publishers were among those most vulnerable to state infringement because their principal markets were state universities that regularly infringed copyrights. *Id.*

Numerous Examples. Finally, the record details “numerous examples of blatant copyright infringement that had already occurred,” Oman Br. 11, with the record reflecting at least sixteen examples over the previous decade of reported state infringement in thirteen States—including two cases that had recently come out of the Fourth and Ninth Circuits. See Register’s Report ii, 7-9, 91-96; H.R. Hearings 143-44, 189; S. Hearing 141-42, 152-56. (In contrast, the record underlying the Patent Remedy Act “provide[d] only two examples of patent infringement suits against the States” and “only eight patent infringement suits prosecuted against the States” in the *previous 110 years. Fla. Prepaid*, 527 U.S. at 640.).

Mr. Oman further explained why these “were just the tip of the iceberg,” particularly because: (1) the Copyright Office did not have subpoena power to “gather a truly comprehensive catalogue” and had to rely on self-reporting by “savvy” organizations, Oman Br. 13; (2) the Office “did not seek public comments about all known instances,” so the set received “was illustrative rather than exhaustive,”

id.; and (3) before this Court decided in 1985 that Congress could abrogate state sovereign immunity only by “unequivocal statutory language,” *Atascadero*, 473 U.S. at 246, the consensus among States had been that copyright laws applied to them and that they faced liability for infringement, Oman Br. 14; see also H.R. Hearings 8, 37, 102; H.R. Rep. No. 101-282, at 2, 5-6; S. Rep. No. 101-305, at 2, 7.

Conclusions. Consistent with this record, the CRCA was seen and understood by Congress as a necessary remedy for widespread state infringement, strongly supported by the Copyright Office. H.R. Hearings 10 (Copyright Office “recommended remedial legislation”); *id.* at 83 (“[t]here is nothing premature about [the copyright] issue that is facing you”). Indeed, Congress expressly *rejected* testimony that “no actual harm had yet occurred as a result of the application of State sovereign immunity in copyright cases.” H.R. Rep. No. 101-282, at 8. To the contrary, Congress knew that “actual harm ha[d] [already] occurred and [would] continue to occur if this legislation [wa]s not enacted.” *Id.*

The inability of copyright owners to recover money damages “had already had a direct and negative impact on ... businesses” and, Congress feared, “would continue to do so,” if left unchecked. *Id.* at 4. To name just one example, a publisher of college textbooks and general business books testified that, during licensing negotiations with two state institutions, the institutions said, “We don’t understand why we should pay a license for this, because as we now understand ... we really are not obligated to comply with the Copyright Act.” S. Hearing 82. In light of this compelling evidence,

Congress understandably decided to act against mounting infringement. “[T]he States’ record of unconstitutional participation in, and fostering of,” such copyright infringement, “is weighty enough to justify the enactment of prophylactic § 5 legislation.” *Hibbs*, 538 U.S. at 735.

Congress’s justification for the CRCA has proved especially prescient. As Mr. Oman warned, the tip of the iceberg that emerged post-*Atascadero* has continued to grow, as States have become increasingly emboldened to infringe in the absence of any deterrent. Since *Florida Prepaid*, the instances of actual infringement have ballooned. U.S. GEN. ACCOUNTING OFFICE, GAO-01-811, INTELLECTUAL PROPERTY: STATE IMMUNITY IN INFRINGEMENT ACTIONS 7 (2001), available at <https://www.gao.gov/assets/240/232603.pdf> (identifying 58 lawsuits between 1985 and 2001 that “alleged infringement or unauthorized use of intellectual property [including patent, trademark, and copyright] by state entities”); Sovereign Immunity and the Protection of Intellectual Property: Hearing Before the S. Judiciary Comm., 107th Cong., 2d Sess. 91-93 (2002) (noting 77 examples of state infringement of intellectual property); Plaintiff’s Response to Motion to Dismiss, Exhibit E, *Bynum v. Tex. A&M Univ. Athletic Dep’t*, No. 4:17-cv-00181 (S.D. Tex. Jan. 16, 2018), ECF No. 62-1 (identifying 154 lawsuits against state actors for copyright infringement between 2000 and 2017); Brief of The Copyright Alliance as Amicus Curiae Supporting Appellees at 7, *Allen v. Cooper*, No. 17-1522 (4th Cir. Oct. 20, 2017), ECF No. 44-1 (Getty Images reporting over 50 instances of state copyright infringement of photographs and film footage—16 of which occurred

between 2015 and 2017 alone). The Section 5 basis for the CRCA is further fortified by this reality of mounting copyright infringement by States—the very conduct Congress set out to deter in enacting the CRCA. See *Hibbs*, 538 U.S. at 727 (Section 5 enforcement authority includes power to act as necessary to “to deter violation of rights”); *cf. Tennessee v. Lane*, 541 U.S. 509, 530-31 (2004) (taking cognizance of post-enactment developments, including regulations and case law, in upholding reasonableness of abrogation under Section 5 as to class of cases implicating fundamental right of access to courts).

Given this record, the CRCA passes muster where the Patent Remedy Act—which had no study, few witnesses, and essentially no examples of infringement—failed. See *Fla. Prepaid*, 527 U.S. at 658 n.9 (Stevens, J., dissenting) (in contrast to the Patent Remedy Act, “[t]he legislative history of [the CRCA] includes many examples of copyright infringements by States—especially state universities”). This Court faced a “truly awful legislative record” in *Florida Prepaid* that did “not have any evidence of massive or widespread violation of patent laws by the States.” Mitchell N. Berman et al., *State Accountability for Violations of Intellectual Property Rights: How to “Fix” Florida Prepaid (And How Not To)*, 79 TEX. L. REV. 1037, 1061-62 (2001). Because the same indictment does not hold for the CRCA, the CRCA should not meet with the same result the Patent Remedy Act did.

2. The Remedy Afforded By Congress In The CRCA Represents A Congruent And Proportional Response To States' Copyright Infringement

Once the existence of a proper constitutional predicate is accepted, the specific remedy Congress prescribed in the CRCA should be beyond judicial reproach. Congress enacted the CRCA only upon finding that States infringed copyrights while shielding themselves from liability under auspices of their immunity. And Congress specifically found and explained why no alternative remedy short of monetary damages sufficed to address state infringement—while going no further than authorizing the same monetary remedies that had long served as proper medicine for all other infringement. Such a remedy is congruent and proportional under Section 5.

The question whether a legislative remedy is “congruent and proportional” boils down to whether a statute is truly enforcing an underlying Fourteenth Amendment right against States, rather than inventing a new one. See *Hibbs*, 538 U.S. at 728 (noting that *City of Boerne*’s “congruence and proportionality” test requires that Section 5 legislation be “an appropriate remedy for identified constitutional violations, not ‘an attempt to substantively redefine the States’ legal obligations.’”) (quoting *Kimel*, 528 U.S. at 88).

Here, there should be no doubting the *bona fides* of Congress’s effort to protect authors’ copyrights against unconstitutional, unremedied deprivations by States. The resulting federal statute simply enables federal copyright holders to recover from

States specifically and solely for copyright infringement—*i.e.*, actual copying of an author’s original expression. The notion that such a statute is not “congruent and proportional” to the pattern of unremedied copyright infringement by States that Congress specifically identified en route to enacting the CRCA detaches the requirement of congruence and proportionality from its moorings. Far from ensuring that Congress does not misuse Section 5 to expand underlying constitutional rights, invalidation of the CRCA would block Congress from affording a natural, straightforward remedy for a vexing constitutional problem.

Unlike in *Florida Prepaid*, where Congress had “barely considered the availability of state remedies for patent infringement and hence whether the States’ conduct might have amounted to a constitutional violation under the Fourteenth Amendment,” 527 U.S. at 643, Congress here specified why nothing short of abrogation and monetary liability would suffice to rectify and deter States’ violations. See *supra*, at II.B.1.

True to Congress’s judgment, infringement by States would, absent abrogation, pose an insoluble problem under the federal copyright regime. “Unlike others whose remedies are foreclosed by eleventh amendment immunity, copyright owners are only able to seek relief in Federal court” given federal courts’ original jurisdiction over copyright claims. S. Rep. No. 101-305, at 5, 8; 28 U.S.C. 1338(a). State-law and common-law claims for copyright infringement (or any “equivalent right”) are preempted by federal law. 17 U.S.C. 301(a). Moreover, injunctive relief has proved inadequate in the copyright context

because it does not compensate copyright holders for past infringement and “is often obtained only at great cost.” H.R. Rep. No. 101-282, at 8; see Register’s Report 13; S. Rep. No. 101-305, at 8. Lest there be any doubt, the facts of this case well illustrate that efforts to obtain an injunction prohibiting a particular infringement are likely to be for naught—as a State can purport to cease one identified infringement only (as here) to replace it with another, while altogether evading remedy. Pet. App. 32a-36a.

Analogous state court causes of action (such as for breach of contract and unlawful takings) fare no better. Even if copyright holders pursue those remedies in state courts or state administrative processes, States must have waived sovereign immunity and consented to suit before an intellectual-property owner can pursue many of the available causes of action. Peter S. Menell, *Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights*, 33 LOY. L.A. L. REV. 1399, 1413, 1417, 1423, 1425 (2000). Moreover, the procedures and available remedies “vary across jurisdictions,” *id.* at 1413, thereby frustrating the whole purpose of a uniform federal copyright scheme. Some States require exhaustion, some limit the total amount and types of damages that may be awarded, and others establish special courts or boards to resolve such disputes. *Id.* at 1418. Atop that is the problem posed by preemption, which prevents States from duplicating or revising the federal protections for copyrights. See *id.* at 1422; 17 U.S.C. 301(a).

Therefore, while causes of action theoretically may exist in certain cases against certain States, the remedies available under state law “are generally inferior to federal relief” and afford “little incentive for intellectual property owners to pursue th[o]se remedies for state infringement.” Menell, *supra*, at 1413; see also John T. Cross, *Suing the States for State Copyright Infringement*, 39 BRANDEIS L.J. 337, 405-09 (2000) (finding state law remedies for copyright infringement to be “of little use in helping a State satisfy its due process obligations in patent and copyright cases”). As in *Hibbs*, where “the evidence before Congress” indicated a lesser remedy “would not have achieved Congress’ remedial object,” 538 U.S. at 738, Congress rightly concluded here that remedies other than abrogation were inadequate and could not be relied upon to satisfy due process.

Further distinguishing this case from *Florida Prepaid* are the ways that copyrights differ fundamentally from patents, as relevant to Congress’s enforcement basis. By comparison to patent enforcement, the monetary remedies afforded by copyright law are uniquely indispensable to copyright enforcement, and the liability imposed by copyright law is limited to actual copying of original expression. These defining features of copyright law afford all the more reason to uphold the congressional decision to abrogate States’ immunity specifically as to copyright infringement.

Recognizing that copyright cases tend to involve lower stakes than patent cases, Congress prescribed that the infringer of a registered copyrighted work stands liable for both statutory damages and

attorney's fees, thereby "ensur[ing] that the copyright owner receive[s] some compensation" and providing "some measure of deterrence." Stephanie Berg, *Remedying the Statutory Damages Remedy for Secondary Copyright Infringement Liability: Balancing Copyright and Innovation in the Digital Age*, 56 J. COPYRIGHT SOC'Y U.S.A. 265, 274 (2009); see also 17 U.S.C. 504, 505. That Congress embraced the need for a robust remedial scheme peculiar to copyright infringement reflects the reality that copyright owners are especially unlikely to litigate their injuries absent congressional assistance. See H.R. Hearings 95 ("A reality of copyright life is that, for individual authors and small entrepreneurs, statutory damages and attorney's fees are the difference between protection and loss of rights. Unless there is some reasonable possibility of monetary recovery, a lawyer will not take a copyright case no matter how blatant the infringement."). In such circumstances, Congress correctly uses its "enforcement power ... to abrogate state sovereign immunity by authorizing private suits for damages against the States." *Georgia*, 546 U.S. at 158-59.

In addition, the very nature of copyright law makes copyright remedies tailored to States' culpability. Unlike patent infringement, copyright infringement tends to involve "intentional" conduct because it requires that a defendant both access *and* copy another's work. See *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1099 (7th Cir. 2017) ("A plaintiff must prove that the defendant actually copied its original work."); *Mazer v. Stein*, 347 U.S. 201, 218 (1954) ("Absent copying there can be no infringement of copyright."). Further still, copyright protections can never extend as far as

ideas; they cover only original expression. “*Unlike a patent*, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself.” *Mazer*, 347 U.S. at 217 (emphasis added); see also *Eldred*, 537 U.S. at 219 (copyright law “distinguishes between ideas and expression and makes only the latter eligible for copyright protection”).

As such, the bounds of copyrights are relatively narrow and well defined—and States should be expected to appreciate and respect them, or else to be held accountable. *Cf. Fla. Prepaid*, 527 U.S. at 646 (remedy not proportional where “[a]n unlimited range of state conduct would expose a State to claims of ... patent infringement” because “it[']s difficult for us to identify a patented product or process which might not be used by a state”) (quotations omitted; second alteration in original).

Beyond that, traditional copyright defenses underline the congruent and proportional nature of the CRCA’s remedy for States’ infringing acts. For example:

Independent creation. A defendant’s “independent creation” of a work—even if it is identical to the plaintiff’s—is a complete defense to copyright infringement. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 353 (1991). Such a defense is unavailable in patent law. See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 478 (1974) (patent protection extends “not only to copying the subject matter, which is forbidden under the Copyright Act, *but also* to independent creation”) (emphasis added; citation omitted); *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 720 (9th Cir. 1976) (“one

may therefore infringe a patent by innocent and independent reproduction,” but “independent reproduction of a copyrighted musical work is not infringement; nothing short of plagiarism will serve”) (quoting *Arnstein v. Marks Corp.*, 82 F.2d 275, 275 (2d Cir. 1936) (Hand, J.)).

Fair use. “Fair use” of a copyrighted work is “not an infringement.” 17 U.S.C. 107. Such a defense—unknown to patent law—allows appropriate uses of another’s work “for purposes such as ... teaching ..., scholarship, or research,” *id.*, and is available to States, in particular. See 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 10:73 (“In light of th[e] potential liability [for States], fair use is occasionally asserted as a defense for unauthorized government copying.”); *Ass’n of Am. Med. Colls. v. Cuomo*, 928 F.2d 519, 523 (2d Cir. 1991) (finding fair use by State where “the purported harm ... stem[med] from a non-commercial, non-competing use”). And fair use can resolve easy cases at early stages. See, e.g., *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 692 (7th Cir. 2012) (“When a defendant raises a fair use defense claiming his or her work is a parody, a court can often decide the merits of the claim without discovery or a trial.”).¹¹

¹¹ Similarly, because actual copying is an essential element of a copyright claim, such claims can be dismissed at the pleading stage based on the absence of substantial similarity between the works. See, e.g., *Rentmeester v. Nike*, 883 F.3d 1111, 1121-23 (9th Cir. 2019) (affirming dismissal of copyright infringement claim under Fed. R. Civ. P. 12(b)(6) based on lack of substantial similarity); *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64-65 (2d Cir. 2010) (same) (citing cases).

Merger and ***scènes à faire***. The merger defense “provides that, when there are a limited number of ways to express an idea, the idea is said to ‘merge’ with its expression, and the expression becomes unprotected.” *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1359 (Fed. Cir. 2014). Similarly, the *scènes à faire* defense provides that “expressive elements of a work of authorship are not entitled to protection against infringement if they are standard, stock, or common to a topic, or if they necessarily follow from a common theme or setting.” *Id.* at 1363.

In short, the limited, discrete, and targeted nature of copyright liability ensures that a monetary remedy for a violation of the property right will not be disproportionate to the preventative object. As in *Hibbs*, therefore, the abrogation of state sovereign immunity was a “congruent and proportional” response “to the targeted violation”—namely, States’ deprivations of private property through systematic, unchecked copyright infringement. 538 U.S. at 737.

CONCLUSION

The Fourth Circuit's judgment should be reversed.

Respectfully submitted,

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