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 OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text, history, and values. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC therefore has a strong interest in this Court's interpretation of Congress's enforcement powers under the Fourteenth Amendment, including Congress's power to abrogate state sovereign immunity.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress passed the Copyright Remedy Clarification Act of 1990 (CRCA or the Act), Pub. L. No. 101-553, 104 Stat. 2749 (codified at 17 U.S.C. § 511(a)), it expressly abrogated state sovereign immunity from private suit under the Copyright Act, 17 U.S.C. § 101 *et seq*. Petitioners in this case have sued North Carolina under the Copyright Act, as amended by the CRCA, alleging that the State infringed their copyrighted works documenting a historic shipwreck. Pet. App. 42a-45a. According to Petitioners, North Carolina posted their works online without compensating them, even though the State had entered into a

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

settlement agreement with them in which it agreed, after previous infringements, not to infringe those copyrights. *Id.* at 43a-44a. Petitioners also allege that North Carolina subsequently passed a law purporting to give it free rein to use Petitioners' copyrighted works, N.C. Gen. Stat. § 121-25(b) (2016). Pet. App. 44a-45a. The question in this case is whether Congress's decision to abrogate state sovereign immunity in the CRCA—thus allowing Petitioners to sue North Carolina in federal court for money damages for intentional copyright infringement—is constitutional. This Court should hold that it is.

As the text and history of the Fourteenth Amendment make clear, Section 5 of that Amendment grants Congress broad enforcement authority. Congress's abrogation of state sovereign immunity in the CRCA falls well within its power under Section 5 "to enforce" the Fourteenth Amendment's substantive guarantees through "appropriate legislation." U.S. Const. amend. XIV, § 5.

First, the CRCA validly abrogates state sovereign immunity insofar as it prohibits conduct that actually violates the Fourteenth Amendment, like the conduct alleged in this case. In *United States v. Georgia*, 546 U.S. 151 (2006), this Court unanimously held that a statute is constitutional under Section 5 at least insofar as it "creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment." *Id.* at 159. Here, Petitioners have alleged conduct by North Carolina that actually violates not only the Copyright Act, but also the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment, which the Fourteenth Amendment incorporates, *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). Accordingly, this Court should uphold the CRCA at

least as applied to this case, which involves conduct that actually violates the Constitution.

Second, and more broadly, the CRCA is constitutional across the board, and its validity is particularly clear in the class of cases involving States' intentional copyright infringement. This Court has repeatedly recognized that Congress's power under Section 5 of the Fourteenth Amendment includes both the authority to pass laws to enforce the Amendment's substantive guarantees and the authority to enact legislation "to remedy and to deter violation of rights guaranteed [by the Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000). The CRCA satisfies the three-part test this Court established in *City of Boerne v. Flores*, 521 U.S. 507 (1997), to determine whether enforcement legislation falls within that broad congressional authority. That is, the CRCA is a congruent and proportional response to a history of unconstitutional conduct by States that Congress sought to remedy and deter.

Finally, this Court should reject the suggestion that the CRCA is not valid legislation under Section 5 simply because Congress, in unequivocally stating its intent to abrogate state sovereign immunity under the CRCA, did not also specify the basis for its abrogating authority. This Court has never held that Congress must affirmatively identify the source of its authority to validly abrogate immunity, and such a requirement would be contrary to this Court's longstanding practice and constitutional principles.

ARGUMENT

I. CONGRESS HAS BROAD ENFORCEMENT AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.

The text and history of Section 5 make clear that, by design, Congress has substantial power to enact legislation enforcing the Fourteenth Amendment.

A. The plain language of the Fourteenth Amendment gives Congress significant discretion to choose the means by which it enforces constitutional rights. The Framers of the Amendment deliberately chose language calculated to give Congress wide latitude in selecting the legislative measures it deemed necessary to uphold the Fourteenth Amendment's guarantees. This plain language vests Congress with the "power to enforce" the substantive protections "by appropriate legislation." U.S. Const. amend. XIV, § 5.

The use of the phrase "by appropriate legislation" was no accident. By echoing Chief Justice Marshall's classic statement in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), that established the fundamental principle for determining the scope of Congress's powers under the Necessary and Proper Clause, *id.* at 421 ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate*, which are plainly adapted to that end, which are not prohibited, but consist[ent] with the letter and spirit of the constitution, are constitutional." (emphasis added)), Section 5 gave effect to the wishes of the Amendment's supporters who wanted Congress to have a powerful role in protecting against unconstitutional action by the States. *See Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 615 (1869) ("[I]t must be taken then as finally settled . . . that the words" of the Necessary and Proper Clause are "equivalent" to the word

"appropriate."); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev. 1801, 1810-15 (2010); Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 822-27 (1999); Steven A. Engel, *The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding of Section 5*, 109 Yale L.J. 115, 131-34 (1999); *see also* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153, 178 n.153 (1997) ("In *McCulloch v. Maryland*, the terms 'appropriate' and 'necessary and proper' were used interchangeably." (citation omitted)). Indeed, in *McCulloch*, Chief Justice Marshall had used the word "appropriate" to describe the scope of congressional power no fewer than nine times. *E.g.*, 17 U.S. at 354, 356, 357, 408, 410, 415, 421, 422, 423.

Because Section 5 embraced the Supreme Court's classic elucidation of congressional power under Article I—well known at the time of the Amendment's ratification—it was understood that Congress would have wide discretion to choose whatever legislative measures it deemed "appropriate" for achieving the Amendment's purposes. *See id.* at 421 (indicating that "the sound construction of the constitution must allow to the national legislature that discretion, which respect to the means by which the powers it confers are to be carried into execution"). Thus, by giving Congress the power to enforce the Fourteenth Amendment's commands by "appropriate legislation," the Framers "actually embedded in the text" of Section 5 the language of *McCulloch*. Balkin, *supra*, at 1815.

With Southern States acting to strip African Americans of their fundamental rights, the Framers of the Amendment chose this broad, sweeping language to grant Congress a leading role in enforcing the Constitution's new guarantees of liberty and equality. "[T]he

remedy for the violation" of the Fourteenth Amendment "was expressly not left to the courts. The remedy was legislative, because . . . the amendment itself provided that it shall be enforced by legislation on the part of Congress." Cong. Globe, 42d Cong., 2d Sess. 525 (1872) (Sen. Morton); *see Ex parte Virginia*, 100 U.S. 339, 345 (1879) (explaining that the Reconstruction Amendments "were intended to be" and "really are[] limitations of the power of the States and enlargements of the power of Congres[s]"). Indeed, in the aftermath of *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), the Framers were reluctant to leave the judiciary with the sole responsibility for protecting constitutional rights. *See* McConnell, *supra*, at 182 (explaining that the Enforcement Clause was "born of the fear that the judiciary would frustrate Reconstruction by a narrow interpretation of congressional power"); Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 743, 765 (1998) (observing that the Framers "did not entrust the fruits of the Civil War to the unchecked discretion of the Court that decided *Dred Scott*").

The Framers thus expected that Congress would be the primary arbiter of the necessity of any measure that was directed at a legitimate end, Cong. Globe, 39th Cong., 1st Sess. 1118 (1866) (Rep. Wilson), and that the courts would review acts of Congress pursuant to Section 5 with the deferential posture taken by Chief Justice Marshall in *McCulloch*, 17 U.S. at 423 (refusing "to pass the line which circumscribes the judicial department, and to tread on legislative ground"). Under this standard of review, a court would strike down an act of Congress only when Congress "adopt[s] measures which are prohibited by the constitution." *Id.*

B. The debates over the Fourteenth Amendment confirm that the Framers sought to confer broad discretion on Congress to enforce the Amendment.

From early on, the leading proponents of the Fourteenth Amendment—Senator Jacob Howard and Representative John Bingham—made clear that the Amendment would shift the balance of power between the States and the federal government by giving Congress wide latitude to enact "appropriate" measures. Introducing the Amendment to the Senate in May 1866, Senator Howard emphasized that the antebellum Constitution had not granted Congress adequate authority to protect constitutional rights against state infringement. *See* Cong. Globe, 39th Cong., 1st Sess. 2764-66 (1866). According to Senator Howard, the Enforcement Clause in Section 5 would remedy this deficiency by providing a "direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution." *Id.* at 2766.

Senator Howard rejected any narrow reading of Congress's enforcement power. Section 5, he declared, conferred authority to pass any "laws which are appropriate to the attainment of the great object of the amendment." *Id.* Further, Section 5 cast "upon Congress the responsibility of seeing to it, for the future, that . . . no State infringes the rights of persons or property." *Id.* at 2768.

Members of the House of Representatives echoed these sentiments, confirming the breadth of congressional enforcement power. Representative Bingham emphasized that Section 5 would bring a fundamental and essential change in the balance of power between the federal and state governments. *Id.* at 2542 (noting that Section 5 would correct the constitutional defect that had led to "many instances of State injustice and

oppression"). Other supporters concurred, praising the proposal to give Congress broad enforcement power and the protection this power would provide citizens from state encroachments. *See id.* at 2498 (Rep. Broomall) ("We propose . . . to give power to the Government of the United States to protect its own citizens within the States, within its own jurisdiction. Who will deny the necessity of this? No one."); *id.* at 2510 (Rep. Miller) ("And as to the States it is necessary . . . ."). These supporters understood, moreover, that the Amendment would grant Congress the authority to decide what is "appropriate" for an enforcement mechanism. *See id.* at 43 (1865) (Sen. Trumbull) ("What that 'appropriate legislation' is, is for Congress to determine, and nobody else."); *id.* at 1124 (1866) (Rep. Cook) ("Congress should be the judge of what is necessary . . . .").

The Fourteenth Amendment's opponents did not disagree with this understanding. To the contrary, in State after State throughout the South, opponents of the Amendment feared that the authority to pass "appropriate legislation" would give Congress excessive power to define the obligations of States with respect to their citizens. As one Texas state senator put it, "What is 'appropriate legislation?' The Constitution is silent; therefore, it is left for the Congress to determine." *Journal of the Senate of the State of Texas*, 11th Legis., at 422 (Oct. 22, 1866). In a similar vein, Governor Jenkins of Georgia lamented that Congress would have too much power over the States and that it would "be contended that [members of Congress] are the proper judges of what constitutes appropriate legislation. If therefore, the amendment be adopted, and . . . Congress . . . be empowered 'to enforce it by *appropriate legislation*,' what vestige of hope remains to the people of those States?" Charles J. Jenkins, *Annual*

Message to the Georgia General Assembly (Nov. 1, 1866), *in* 4 *The Confederate Records of the State of Georgia* 547 (Allen D. Candler ed., 1910). While supporters and opponents parted ways on the merit of the Amendment, both sides agreed that it would provide Congress broad enforcement authority.

C. Post-ratification interpretations of Section 5 confirm that the provision was understood to give Congress wide latitude in selecting the legislative measures it deemed appropriate.

First, shortly after the Fourteenth Amendment's ratification, Congress understood the power conferred by Section 5 to be broad. Senator Sumner, for instance, reasoned that "the Supreme Court will not undertake to sit in judgment on the means employed by Congress in carrying out a power which exists in the Constitution." Cong. Globe, 42d Cong., 2d Sess. 728 (1872). Likewise, Representative Lawrence stated that Congress is the "exclusive judge of the proper means to employ" its power under Section 5. 2 Cong. Rec. 414 (1874). Congress's authority in this respect, Representative Lawrence insisted, was "settled in *McCulloch vs. Maryland*." *Id.* In fact, it was widely accepted that Congress has broad discretion in deciding what is "appropriate" enforcement legislation. *See, e.g.*, Cong. Globe, 41st Cong., 2d Sess. 3882 (1870) (Rep. Davis) ("No broader language could be adopted than this with which to clothe Congress with power . . . . Congress, then, is clothed with so much power as is necessary and proper to enforce the [Fourteenth Amendment], and is to judge from the exigencies of the case what is necessary and what is proper."); *id.* at App. 548 (Rep. Prosser) ("The amendments to the Constitution were not adopted for theoretical, but for practical purposes."). Even opponents of enforcement legislation recognized the wide discretion Congress

possesses. *See* 2 Cong. Rec. 4084-85 (1874) (Sen. Thurman) ("[W]hence come these words 'appropriate legislation?' They come from the language of Marshall in deciding the case *McCulloch vs. The State of Maryland*.").

Second, this Court, in its foundational construction of Section 5 in *Ex parte Virginia*, 100 U.S. 339, concurred with this expansive view of Congress's powers. Employing language that tracked *McCulloch*, this Court stated, "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain . . . if not prohibited, is brought within the domain of congressional power." *Id.* at 345-46; *see Strauder v. West Virginia*, 100 U.S. 303, 311 (1879) ("The form and manner of the protection may be such as Congress in the legitimate exercise of its legislative discretion shall provide.").

In short, Congress has broad enforcement authority under Section 5 of the Fourteenth Amendment. As explained below, the CRCA is a valid exercise of that authority.

II. THE CRCA IS VALID LEGISLATION UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT AT LEAST INSOFAR AS IT CREATES A PRIVATE RIGHT OF ACTION FOR DAMAGES AGAINST STATES FOR ACTUAL CONSTITUTIONAL VIOLATIONS, LIKE THOSE ALLEGED IN THIS CASE.

This Court should uphold the CRCA as valid Section 5 legislation. The Court has repeatedly recognized that Congress's power under Section 5 includes both the authority to pass laws to enforce directly the Fourteenth Amendment's substantive guarantees, *e.g.*, *Georgia*, 546 U.S. at 158, and the authority "to

remedy and to deter violation of rights guaranteed [by the Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," *Kimel*, 528 U.S. at 81. While the CRCA is valid even if its coverage extends beyond actual enforcement of the Fourteenth Amendment's substantive guarantees in some instances, *see infra* at 15-23, this Court need not reach that issue in this case. Rather, the Court can resolve this case by holding that the CRCA is valid Section 5 legislation insofar as it creates a private right of action for damages against States for conduct that itself violates the Fourteenth Amendment because Petitioners here have plausibly alleged such conduct. Accordingly, this Court should reject Respondents' broad facial challenge to the CRCA and hold that the Act is constitutional, at least as applied to this case. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

In *United States v. Georgia*, 546 U.S. 151, this Court unanimously held that a statute validly abrogates state sovereign immunity under Section 5 at least insofar as it "creates a private cause of action for damages against States for conduct that *actually* violates the Fourteenth Amendment." *Id.* at 159. The Court explained that "no one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions." *Id.* at 158 (citations omitted); *see City of Boerne*, 521 U.S. at 522 ("Congress was granted the power to make the substantive constitutional prohibitions against the States effective."); *Fitzpatrick v. Bitzer*, 427 U.S. 445,

456 (1976) (recognizing that under Section 5, "Congress is expressly granted authority to enforce . . . the substantive provisions of the Fourteenth Amendment" by abrogating state sovereign immunity from private suits for damages).

Applying this rule in *Georgia*, this Court held that Title II of the Americans with Disabilities Act (ADA) is valid Section 5 legislation at least insofar as it allows for money damages against States for actual constitutional violations. 546 U.S. at 159. The petitioner in that case had alleged conduct that not only "quite plausibl[y]" violated Title II but also "independently violated the provisions of § 1 of the Fourteenth Amendment" because the alleged conduct violated the Eighth Amendment's guarantee against cruel and unusual punishment, which the Due Process Clause of the Fourteenth Amendment incorporates. *Id.* at 157. Thus, this Court held that the court of appeals had erred in concluding that the petitioner's Title II claims "that were based on such unconstitutional conduct" were barred by state sovereign immunity. *Id.* at 159.

Much like the petitioner in *Georgia*, Petitioners in this case have plausibly alleged state conduct that actually violates both a statutory right and the substantive guarantees of the Fourteenth Amendment. In particular, Petitioners allege that they secured copyrights for their works documenting a shipwreck and that North Carolina intentionally infringed those copyrights even after entering into a settlement agreement acknowledging Petitioners' property interests in those works. Pet. App. 43a-44a. Petitioners also allege that the State went so far as to enact a law that purports to make those works available for public use. *Id.* at 44a-45a.

This conduct, which formed the basis for Petitioners' claims under the Copyright Act, as amended by

the CRCA, also provided the foundation for Petitioners' claims that North Carolina violated the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment, which the Fourteenth Amendment's Due Process Clause incorporates, *Palazzolo*, 533 U.S. at 617. *See* Pet. App. 45a. Indeed, upon rejecting the State's bid for immunity, the district court in this case concluded that Petitioners "sufficiently pled specific facts that allow the inference that each defendant . . . infringed [Petitioners'] registered copyright works after the 2013 settlement agreement," *id.* at 75a, and that the property rights the State violated are both "rooted in the United States Constitution and protected by the federal Copyright Act," *id.* at 74a.

The Due Process Clause provides that no State "shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; *see Fox Film Corp. v. Doyal*, 286 U.S. 123, 128 (1932) (recognizing that "a copyright is property"). Even if Respondents in this case are correct that "a state must infringe a copyright *intentionally*" to violate the Due Process Clause, Br. in Opp'n 18 (citing *Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 645 (1999)), Petitioners have alleged ample facts to state a claim that North Carolina intentionally infringed their copyrights without due process by uploading Petitioners' copyrighted works online in contravention of a settlement agreement and by subsequently enacting a state law rendering their copyrighted works "public record," *see* Pet. App. 43a-45a (quoting N.C. Gen. Stat. § 121-25(b)). These detailed allegations plainly demonstrate that North Carolina knew of Petitioners' copyrights and took actions to permanently deprive Petitioners of these intellectual property rights without due process. *See id.*

Likewise, this same alleged conduct, if proven, would violate the Fifth Amendment's Takings Clause, as incorporated against the States through the Due Process Clause of the Fourteenth Amendment, *Palazzolo*, 533 U.S. at 617. The Takings Clause provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V; *see Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 n.6 (1980) (recognizing that the Takings Clause protects "the entire 'group of rights inhering in the citizen's [ownership]'" (alteration in original) (quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945))). Because Petitioners allege that North Carolina took their property without providing compensation by uploading their works online, notwithstanding the previous settlement agreement, and by declaring the works a matter of "public record" under state law, Petitioners have alleged a viable claim for violation of the Takings Clause.[2] *See Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167 (2019) ("A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it."). Thus, the same alleged conduct underlying Petitioners' Copyright Act claim actually violates the Due Process Clause and the Takings Clause.[3]

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[2] Notably, these alleged takings occurred after North Carolina compensated Petitioners under the settlement agreement for past copyright infringements. Thus, Petitioners allege that North Carolina has provided no additional compensation for post-settlement takings. *See* Pet. App. 44a.

[3] While the alleged conduct actually violates both the Due Process Clause and the Takings Clause, this Court need only recognize that it violates one or the other ("or some other constitutional provision," *Georgia*, 546 U.S. at 159) to hold that the CRCA is valid at least as applied to this "class of conduct," *id.*

Because Petitioners have plausibly alleged conduct that actually violates the Constitution, this Court should uphold the constitutionality of the CRCA at least as applied to this case. *Cf. Georgia*, 546 U.S. at 159; *Tennessee v. Lane*, 541 U.S. 509, 531 (2004) (upholding the ADA's abrogation of state sovereign immunity as applied to a particular "class of cases" under Title II). Accordingly, the Court can resolve this case on this basis and need not go further. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) ("Exercising judicial restraint in a facial challenge 'frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.'" (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960))).

III. THE CRCA IS CONSTITUTIONAL UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT BECAUSE IT REMEDIES AND PREVENTS CONSTITUTIONAL VIOLATIONS BY THE STATES.

To the extent this Court undertakes a broader review, it should hold that the CRCA is constitutional under Section 5 of the Fourteenth Amendment because it is a congruent and proportional response to a history of unconstitutional conduct by the States that Congress sought to remedy and prevent. *See City of Boerne*, 521 U.S. at 520; *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727 (2003) ("Congress may, in the exercise of its § 5 power, do more than simply proscribe conduct that we have held unconstitutional."). In *City of Boerne v. Flores*, 521 U.S. 507, this Court established a three-step test to determine whether Section 5 legislation falls within Congress's authority, and the CRCA satisfies each step of this analysis. Ultimately,

"[v]alid § 5 legislation must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,'" *Hibbs*, 538 U.S. at 728 (quoting *City of Boerne*, 521 U.S. at 520), and the CRCA does precisely that.

At the first step of the *Boerne* inquiry, the Court must "identify the constitutional right or rights that Congress sought to enforce when it enacted [the statute]" in question. *Lane*, 541 U.S. at 522. Congress enacted the CRCA to enforce significant constitutional rights—namely, the rights guaranteed by the Due Process Clause and the Takings Clause. The underlying conduct at issue here is the States' infringement on copyrights and the use of state sovereign immunity to deny copyright owners compensation for this invasion of their property rights. *Cf. Fla. Prepaid*, 527 U.S. at 640 (regarding state infringement of patents). As illustrated above, this class of conduct implicates those rights guaranteed by the Fourteenth Amendment.

The second step of the *Boerne* analysis concerns whether Congress identified a sufficient historical predicate to warrant passing Section 5 legislation, *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001), and the CRCA's legislative record amply demonstrates that Congress did so here. Before enacting the CRCA, Congress enlisted the help of the U.S. Copyright Office to prepare a report on States' infringement of copyrights and their immunity from suit. *See* Library of Congress, *Copyright Liability of States and the Eleventh Amendment: A Report of the Register of Copyrights* (1988) (Oman Report). The report described not only the repeated infringement of copyrights by States, but also a lack of legal remedies for redress. In particular, the report detailed several incidents in which States invoked sovereign immunity to avoid suit for copyright infringement and several

additional incidents in which commenters experienced difficulty enforcing their Copyright Act claims against States. *Id.* at 7-9. The report also described multiple incidents of state officials willfully infringing copyright holders' property interests without due process. *Id.* at 7-10; *see* Pet. App. 28a.

In addition to these descriptions, the report "contain[ed] comments from industry groups . . . and legal analysis relating to copyright violations, actual and potential, by States." *Fla. Prepaid*, 527 U.S. at 658 n.9 (Stevens, J., dissenting) (citing hearing transcripts and distinguishing the Patent Remedy Act at issue in *Florida Prepaid* from the CRCA in suggesting that "there is hope that the [CRCA] may be considered 'appropriate' § 5 legislation"). In response to these comments, the report observed that copyright "[o]wners are concerned with widespread copying, particularly in the important and increasingly lucrative area of state educational publishing." Oman Report 99. Indeed, through hearings, Congress also learned of "many examples of copyright infringements by States—especially state universities." *Fla. Prepaid*, 527 U.S. at 658 n.9 (Stevens, J., dissenting) (citing hearing transcripts).

Thus, according to the report, copyright proprietors "caution[ed] that injunctive relief is inadequate—damages are needed." Oman Report 99. The proprietors explained that "if states are not responsible for remunerating copyright owners, . . . marketing to states will be restricted or even terminated; prices to other users will increase; and the economic incentive, even ability, to create works will be diminished." *Id.* "In short," the report concluded, "copyright proprietors clearly demonstrate[d] the potential for immediate harm to them" if States were not subject to damages for copyright infringement. *Id.* This record before Congress

was "weighty enough to justify the enactment" of Section 5 legislation, *Hibbs*, 538 U.S. at 735, because it identified a "pattern of constitutional violations," *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30, 42 (2012), while also demonstrating a real need for congressional action to prevent further violations.

That Congress passed the CRCA not only to remedy past constitutional violations but also to prevent future violations is all the more reason to conclude that its abrogation of state sovereign immunity is valid. This Court has recognized that "[p]reventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." *City of Boerne*, 521 U.S. at 532; *see id.* at 530 (noting that "preventive rules are sometimes appropriate remedial measures"); *Kimel*, 528 U.S. at 91 (recognizing that any "lack of support" in the legislative record demonstrating a history of constitutional violations in particular "is not determinative of the § 5 inquiry"). As Petitioners explain, a State's copyright infringement by its nature entails an element of intentionality and thus—when committed without due process or just compensation—is particularly likely to be unconstitutional. *See* Pet'r Br. 58-60. Accordingly, Congress had good reason to conclude that copyright infringement by the States was an appropriate subject for Section 5 legislation, as such infringement has a significant likelihood of being unconstitutional.

This case is therefore markedly different from *Florida Prepaid*, in which this Court held that Congress had identified "no pattern of patent infringement by the States" in enacting the Patent Remedy Act, 527 U.S. at 640, and where the Court noted that, "[a]t most, Congress heard testimony that patent

infringement by States might increase in the future . . . and acted to head off this speculative harm," *id.* at 641 (citations omitted); *see also Coleman*, 566 U.S. at 41 ("The 'few fleeting references' to how self-care leave is inseparable from family-care leave fall short of what is required for a valid abrogation of States' immunity from suits for damages." (quoting *Fla. Prepaid*, 527 U.S. at 644)). Here, Congress reviewed evidence both of a pattern of constitutional violations and of a particularly strong likelihood of more constitutional violations in the future and permissibly determined that enforcement legislation was appropriate to protect constitutional property rights.

Moreover, unlike the legislative record in *Florida Prepaid*, which indicated that Congress "barely considered the availability" of other remedies for patent infringement besides damages from suit in federal court, 527 U.S. at 643, the legislative record here established that "[a]pplication of the [Eleventh Amendment] leaves copyright owners with no effective remedy against allegedly infringing States," *The Copyright Remedy Clarification Act: Hearing on S. 497 Before the Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary*, 101st Cong., 1st Sess. 7 (1989) (statement of Ralph Oman, Register of Copyrights). The report that Congress commissioned by the U.S. Copyright Office also emphasized the inadequacy of injunctive relief to remedy and deter copyright infringement by States. *E.g.*, Oman Report iv. Accordingly, state infringement on private individuals' copyrights was a sufficient basis for invoking Congress's power to enforce the Fourteenth Amendment. *Cf. Lane*, 541 U.S. at 529 (holding that inadequate provision of public services for people with disabilities was an appropriate subject for Section 5 legislation).

Finally, under the third step of the *Boerne* analysis, the CRCA is a congruent and proportional response to the history Congress identified of constitutional violations by States and the need to prevent future violations, particularly as applied to the class of cases, like this one, involving the intentional infringement of copyrights by States. *See City of Boerne*, 521 U.S. at 520.

This Court has previously taken a class-of-cases approach to determining whether Section 5 legislation is appropriate in scope, and it should do the same here. In *Lane*, for instance, because the Court concluded that Title II of the ADA "unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services," the Court concluded that it "need[ed] [to] go no further." 541 U.S. at 531. The Court emphasized that "nothing in [its] case law require[d] [it] to consider Title II, with its wide variety of applications, as an undifferentiated whole." *Id.* at 530. Similarly, in *Georgia*, the Court remanded so that the *pro se* plaintiff could clarify whether he was alleging any conduct that did not violate the Fourteenth Amendment (in addition to the conduct that plainly did), and the Court instructed the district court on remand to determine, "insofar as [the State's alleged] misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity *as to that class of conduct* is nevertheless valid." 546 U.S. at 159 (emphasis added). In other words, the Court instructed the district court to review the validity of any prophylactic aspects of Title II only as applied to a particular class of conduct.

Here, too, the Court need not consider whether the CRCA is a congruent and proportional remedy or deterrent in all cases. Rather, if the Court addresses the

CRCA's constitutionality in contexts not presented by the facts of this case, it can and should hold that the CRCA is constitutional at least as applied to the class of cases involving States' intentional copyright infringement. After all, Congress determined that the CRCA was an appropriate response to state constitutional violations, and that conclusion is "entitled to much deference," *City of Boerne*, 521 U.S. at 536.

In any event, the CRCA is inherently limited in scope and is therefore appropriate Section 5 legislation as a whole. To obtain money damages against a State under the CRCA, a private plaintiff must establish a violation of the Copyright Act itself, which requires the plaintiff to prove "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). Indeed, "originality is a constitutionally mandated prerequisite for copyright protection." *Id.* at 351. The CRCA is therefore limited in breadth by the requirements of the Copyright Act itself. *Cf. Lane*, 541 U.S. at 531-33 (holding that the provision of the ADA abrogating state sovereign immunity is appropriately tailored Section 5 legislation as applied to a particular class of cases based on the limiting substantive requirements of Title II itself); *Hibbs*, 538 U.S. at 738-40 (holding that the Family and Medical Leave Act (FMLA) validly abrogates state sovereign immunity because of the "many other limitations that Congress placed on the scope of" the FMLA). Accordingly, the CRCA is appropriately tailored to remedy and prevent unconstitutional conduct. *See Fla. Prepaid*, 527 U.S. at 639.

The CRCA also allows private litigants to obtain only the same remedies against States as against other entities, and nothing more. 17 U.S.C. § 511(b). The money damages recoverable under the CRCA are

confined to actual monetary losses or limited statutory damages. *See id.* §§ 504, 510 (enumerating remedies available under the Copyright Act). And the Act maintains a three-year limitations period for civil actions, further restricting the opportunity for private plaintiffs to obtain damages. *Id.* § 507(b). The Court in *Hibbs* found analogous limitations on the scope of the FMLA sufficient to hold that that statute was "congruent and proportional to its remedial object." 538 U.S. at 740; *see id.* (noting that damages under the FMLA are "strictly defined and measured by actual monetary losses, and the accrual period for backpay is limited by the Act's 2-year statute of limitations (extended to three years only for willful violations)" (citations omitted)). There is no reason to conclude differently here.

Indeed, the CRCA is a particularly well-tailored response and deterrent to constitutional violations as applied to cases involving States' intentional copyright infringement. This Court has recognized that "[t]he appropriateness of remedial measures must be considered in light of the evil presented." *City of Boerne*, 521 U.S. at 530. When States have willfully infringed private individuals' property rights by intentionally violating copyrights, Congress has especially broad authority to respond and to prevent this conduct—which likely violates the Constitution—from continuing. Again, as this Court has recognized, "[p]reventive measures prohibiting certain types of laws may be appropriate where there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." *Id.* at 532. Thus, the CRCA is an appropriate remedy, given the history of constitutional violations as well as the significant likelihood of future constitutional violations, particularly as applied to cases involving States' intentional copyright infringement.

See Br. in Opp'n 18 (recognizing that intentional copyright infringement may violate the Due Process Clause).

IV. CONGRESS DID NOT NEED TO IDENTIFY THE SOURCE OF ITS CONSTITUTIONAL AUTHORITY TO EFFECTIVELY ABROGATE STATE SOVEREIGN IMMUNITY.

The CRCA is valid legislation under Section 5 of the Fourteenth Amendment, and this Court should reject Respondents' contention that it is not simply because Congress, in unequivocally stating its intent to abrogate state sovereign immunity under the CRCA, did not also specifically identify the basis for its abrogating authority. *See* Br. in Opp'n 17. This Court has never held that Congress must identify the source of its authority to abrogate immunity, and such a requirement would be contrary to longstanding constitutional principles.

To determine whether federal legislation validly abrogates state sovereign immunity, this Court has consistently reiterated that it "must resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority." *Kimel*, 528 U.S. at 73; *accord Lane*, 541 U.S. at 517. Nothing further is required.

As for the first step of this inquiry, this Court has never held that, in addition to unequivocally expressing its intent to abrogate immunity, Congress must also expressly identify the source of its authority to do so. To the contrary, the Court has stated time and again that to satisfy this first requirement, Congress must simply "mak[e] its *intention to abrogate* unmistakably clear in the language of the statute." *Coleman*,

566 U.S. at 35 (alteration in original) (emphasis added) (quoting *Hibbs*, 538 U.S. at 726); *see Lane*, 541 U.S. at 517 (asking "whether Congress unequivocally expressed its *intent to abrogate* that immunity" (emphasis added) (quoting *Kimel*, 528 U.S. at 73)); *Kimel*, 528 U.S. at 73 ("To determine whether a federal statute properly subjects States to suits by individuals, we apply a simple but stringent test: Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its *intention* unmistakably clear in the language of the statute." (emphasis added) (internal quotation marks omitted) (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989))); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996) ("Congress' *intent to abrogate* the States' immunity from suit must be obvious from 'a clear legislative statement.'" (emphasis added) (quoting *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 786 (1991))); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) ("Congress must express its *intention to abrogate* the Eleventh Amendment in unmistakable language in the statute itself." (emphasis added)). Congress need not also declare which provision of the Constitution supports that intention.

Thus, this Court has repeatedly concluded that the clear-intention-to-abrogate step of the inquiry is satisfied without examining whether Congress expressly named the source of its abrogating authority. Indeed, the Court has determined that this step is satisfied even where Congress has *not* named the source of its authority. In *Kimel*, for instance, this Court concluded that the Age Discrimination in Employment Act (ADEA) satisfied the clear-intention-to-abrogate requirement even though the ADEA's provision purporting to abrogate immunity nowhere stated the constitutional authority underlying that abrogation. *See* 528

U.S. at 73-74 (citing 29 U.S.C. § 626(b)). The Court concluded that, "[r]ead as a whole, the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages," *id.* at 74, even though the provisions of the ADEA the Court was discussing were silent on the source of Congress's authority to take that action. *Cf. EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) (rejecting the view that the ADEA "could not be upheld on the basis of § 5 unless Congress 'expressly articulated its intent to legislate under § 5'" because Congress need not "anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection'" (citation omitted)).

Likewise, in *Lane*, this Court determined that the first question—whether Congress clearly stated its intention to abrogate immunity—was "easily answered" in the affirmative where the legislation in question stated only that "[a] State shall not be immune under the eleventh amendment . . . from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 541 U.S. at 518 (quoting 42 U.S.C. § 12202). The Court concluded that "that expression of Congress' intent to abrogate the States' Eleventh Amendment immunity" was adequate, and, in fact, no party disputed that conclusion. *Id.*; *cf. Garrett*, 531 U.S. at 363-64 (same); *Hibbs*, 538 U.S. at 726 (concluding that "Congress satisfied the clear statement rule" in the FMLA without considering whether Congress stated the source of its authority to abrogate).[4]

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[4] To be sure, the ADA and the FMLA elsewhere state that Congress was acting, at least in part, under its Section 5 power, *see Lane*, 541 U.S. at 516-18 (citing 42 U.S.C. § 12101(b)(4)); *Hibbs*, 538 U.S. at 726-27 & n.1 (citing 29 U.S.C. § 2601(b)(4)-(5)), but this Court did not consider that fact in assessing whether Congress had stated its intent to abrogate immunity with sufficient clarity.

This Court has also never required Congress to have affirmatively identified the source of its abrogating authority at step two of the inquiry—that is, when a court considers whether Congress had the authority to abrogate immunity. In *Kimel*, for instance, this Court did not consider whether Congress expressly identified Section 5 as the basis for the ADEA's abrogation of immunity when it explored "whether Congress effectuated that abrogation pursuant to a valid exercise of constitutional authority." 528 U.S. at 78. Indeed, the Court considered the validity of the ADEA under Section 5 even though the ADEA did *not* explicitly rely on that provision. *See id.* at 80-83.[5] Accordingly, Congress need not specifically designate Section 5 as the source of its abrogating authority to effectively exercise that authority.

The footnote in *Florida Prepaid* on which the court below relied does not require otherwise. *See* Pet. App. 22a-23a (citing *Fla. Prepaid*, 527 U.S. at 642 n.7). That footnote stated that "[s]ince Congress was so explicit about invoking its authority" under both Article I and Section 5 of the Fourteenth Amendment without also mentioning that it was acting under the Takings Clause, "this omission precludes consideration of the [Takings] Clause as a basis for the Patent Remedy Act." 527 U.S. at 642 n.7. For one thing, that footnote did not indicate that Congress must identify the basis of its authority to abrogate immunity; it stated merely

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[5] Although this Court ultimately concluded in *Kimel* that the ADEA was not valid Section 5 legislation, that conclusion had nothing to do with the ADEA's failure to identify the source of its abrogating authority; rather, the Court merely concluded, based on "the ADEA's legislative record," that Congress's decision to extend that "Act to the States was an unwarranted response to a perhaps inconsequential problem." 528 U.S. at 89. As explained above, that is far from the case here.

that where Congress is "so explicit" about invoking a particular source of its abrogating authority, that may preclude the Court from exploring other possible bases for such authority. But that is not the situation here. Congress did not specify in the text of the CRCA that it was enacting the law on some basis other than Section 5 of the Fourteenth Amendment, and there is therefore no reason not to consider whether Congress acted within its broad Section 5 power. Moreover, although the CRCA's legislative history indicates that Congress sought to rely in part on its Article I powers, *see* Pet. App. 21a-22a, that same legislative history reflects that Congress was also concerned that copyright infringement by States would "injur[e] the property rights of citizens," H.R. Rep. No. 101-887, at 5 (1989) (Conf. Rep.)—rights guaranteed by the Fourteenth Amendment. Thus, nothing precludes this Court from holding that the CRCA is appropriate Section 5 legislation, and, indeed, the Court should do just that.

In fact, this Court has recently reaffirmed that the "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 570 (2012) (*NFIB*) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)). In *NFIB*, this Court upheld a provision of the Affordable Care Act under Congress's taxing power, even though the provision purported to impose "a 'penalty,' not a 'tax.'" *Id.* at 564. In doing so, the Court gave "practical effect to the Legislature's enactment," *id.* at 570, and rejected an argument to strike down the law merely "because Congress used the wrong labels," *id.* at 569. The Court explained that the conclusion that a payment would be constitutional as a tax if it were enacted without any labels "should not

change simply because Congress used the word 'penalty' to describe the payment." *Id.*

The same reasoning applies here. An abrogation of immunity that would be valid if Congress explicitly invoked the Fourteenth Amendment is not invalidated where Congress fails to do so. The *Florida Prepaid* footnote cannot be read to require Congress to recite the source of its abrogating authority when this Court's precedents make clear that such a recital is generally not required and when the Court has repeatedly demonstrated that an abrogation analysis does not inquire into whether Congress made such a recital. Thus, the CRCA constitutionally abrogates state sovereign immunity under Section 5 of the Fourteenth Amendment. That the CRCA does not expressly identify Section 5 as the source of its abrogating authority does not change this conclusion.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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