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 Law Professors As *Amici Curiae* Supporting 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.

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INTEREST OF *AMICI CURIAE*[1]

Amici are constitutional law scholars who have studied the history of the Privileges or Immunities Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of Article IV of the United States Constitution. *Amici* regularly engage in legal writing and instruction germane to these topics. Their interest in this litigation is to ensure the proper interpretation of those clauses and how that interpretation informs this Court's analysis of Congress's attempt to abrogate sovereign immunity under the Copyright Remedy Clarification Act, Pub. L. No. 103-553, 104 Stat. 2749 (1990) (the "CRCA").

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[1] In accordance with Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have filed letters granting blanket consent to the filing of *amicus* briefs.

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SUMMARY OF THE ARGUMENT

The Copyright Remedy Clarification Act of 1990 ("CRCA") validly and unambiguously abrogated sovereign immunity for copyright infringement. The Fourth Circuit, however, held that Congress lacked authority to abrogate Eleventh Amendment immunity. In reaching that decision, the court failed to consider Congress's

authority to abrogate sovereign immunity for "actual" violations of the Privileges or Immunities Clause of the Fourteenth Amendment.

From the *Slaughter-House* decision in 1873 to *McDonald v. City of Chicago* in 2010, this Court has repeatedly explained that the Privileges or Immunities Clause protects statutory rights that "owe their existence to the Federal government." *See* the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873). While the Court has used that phrase to reject arguments favoring incorporation of purportedly "fundamental rights," it has rarely had occasion to ask what rights *do* fit within the scope of this guarantee.

This Court's precedents, Congress's enactments, and academic scholarship all establish that intellectual property rights—such as copyrights—are "privileges" of federal citizenship. Indeed, it would be difficult to identify another category of statutory rights that more clearly falls within the sphere of "privileges" that "owe their existence to the federal government." Thus, under this Court's decision in *United States v. Georgia*, it is clear that the CRCA validly abrogated sovereign immunity for a state's "actual" violation of a citizen's constitutional rights. *See* 546 U.S. 151, 158–59 (2006).

As such, this case provides a perfect vehicle for this Court to clarify both (1) the scope of the Privileges or Immunities Clause in a manner that will bring both clarity and consistency to our understanding of the Constitution as well as (2) the doctrine of congressional

abrogation of sovereign immunity for actual constitutional violations.

ARGUMENT

This case provides a rare opportunity for this Court to recognize that federal intellectual property rights in general—and copyrights in particular—are statutory "privileges" protected by the "Privileges or Immunities" Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1. In doing so, it should confirm that Congress acted within its authority when it abrogated state sovereign immunity for copyright infringement—*i.e.*, an "actual violation" of the Privileges or Immunities Clause—under the Copyright Remedy Clarification Act. *See United States v. Georgia*, 546 U.S. 151, 158–59 (2005) ("[N]o one doubts that § 5 [of the Fourteenth Amendment] grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions. . . . This enforcement power includes the power to abrogate state sovereign immunity by authorizing private suits for damages against the States.").

I. Copyrights are Protected by the Privileges or Immunities Clause of the Fourteenth Amendment.

As demonstrated by precedent stretching from 1873 to 2018,[3] copyrights and other federally-granted intellectual property rights fall within the protection of the Privileges or Immunities Clause, which provides that: "No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States." U.S. Const. amend. XIV, § 1. Failure to recognize that the Fourteenth Amendment prohibits North Carolina from abridging a federal copyright would not just ignore more than 100 years of precedent, but would create a conflict with the well-established understanding of the Privileges and Immunities Clause of Article IV. U.S. Const. art. IV, § 2. Such a conflict cannot stand.

A. The "Privileges or Immunities" Clause Protects Statutory Rights that Owe their Existence to the Federal Government.

The Fourteenth Amendment clarified a pre-existing understanding of federal supremacy that dates back to the Founding, confirming that states must

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[3] *See McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010) (reaffirming *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873) declaring that the Privileges or Immunities Clause protects statutory rights which "owe their existence to the Federal government"); *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365 (2018) (discussing federal control of patent rights in terms that would also apply to copyrights).

uniformly recognize and respect federal statutory rights.[4] Importantly, the historical record demonstrates that the framers of the Fourteenth Amendment understood that federal intellectual property rights were "privileges" tied to the federal government.[5] Moreover, this Court's decisions confirm that the relationship between federal intellectual property rights and the protections of the Fourteenth Amendment continue to this day.[6]

This Court established the operative framework for applying the Privileges or Immunities Clause in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). The Court held that the Privileges or Immunities Clause protected those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws," *id.* at 79, as well as those which "depend[] on the Federal government for their existence or protection," *id.* at 77. Within *Slaughter-House*, Justice Miller identified the "right to use the navigable waters of the United States" as one such privilege owing its existence to the national government, *id.* at 79. In doing so, Justice Miller cast the origin of the right as an outgrowth of the type of federal pilotage licensing originally recognized by the Court in *Gibbons v. Ogden*, 22 U.S. 1 (1824) (holding that

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[4] For discussion of original intent regarding national sovereignty issues related to the Privileges or Immunities Clause, *see* William J. Rich, *Patent Rights and State Immunity*, 28 FED. CIR. BAR J. 15, 24 (2019).

[5] *Id.* at 24–26.

[6] *Id*. at 27–28.

Congress had Commerce Clause authority to regulate navigation). Other examples of rights and privileges derived from federal statutes include an 1884 recognition of statutory homestead rights as protected "privileges" of United States citizens. *United States v. Waddell*, 112 U.S. 76, 79–80 (1884) (explaining that "[t]he right assailed . . . is very clearly a right wholly dependent upon the act of Congress").[7] This "National character" conception of the Privileges or Immunities Clause was echoed by this Court's later decision in *Saenz v. Roe*, which found that the "right of free ingress and regress to and from neighboring states" was protected for having "been conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." 526 U.S. 489, 501 (1999).

Taken together, the Privileges or Immunities Clause therefore must include rights—such as those outlined in *Slaughter-House* and *Saenz*—"which owe their existence to the Federal government, its National character, its Constitution, or its laws," *Slaughter-House*, 83 U.S. at 79, as well as those rights which, in order to foster a Union of States, were "conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." *Saenz*, 526 U.S. at 501 (quoting *United States v. Guest*, 383 U.S. 745, 758 (1966)).

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[7] *See also Oyama v. California*, 332 U.S. 633, 640 (1948) (describing deprivation of property owned by a native-born youth with Japanese ancestry as a violation "of his privileges as an American citizen").

More than a century of constitutional commentary confirms this Court's holdings that the Privileges or Immunities Clause protects federal statutory rights. In 1880, Thomas Cooley explained that the Clause protected rights such as participation in foreign and interstate commerce, benefits of postal laws, or navigation rights, "because over all these subjects the jurisdiction of the United States extends, and they are covered by its laws."[8] He questioned the necessity of the provision, given the Supremacy Clause, but noted that the Privileges or Immunities Clause provided express authority for at least some principles that had previously been merely implied.[9] He therefore resolved the would-be redundancy by concluding that "[m]any abuses of power are forbidden more than once in the federal Constitution, under different forms of expression."[10]

In his 1901 treatise, Judge Henry Brannon agreed with Cooley that the Privileges or Immunities Clause was not essential, as it emphasized "pre-existing law, imbedding it in the Constitution forever, not leaving it to mere implication and court decision."[11] He explained the reasons for not limiting the substantive scope of the Clause by noting that "[p]rivileges and immunities

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[8] THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES 245 (1880).

[9] *Id.* at 248 (citing, as an example, the right to visit the national capital).

[10] *Id.*

[11] HENRY BRANNON, A TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 62 (1901).

of the federal citizen may arise from new legislation, so that legislation be within the scope of national authority. This shows the futility, the danger of any infallible definition of 'privileges or immunities.' "[12]

In 1918, Professor D.O. McGovney wrote an article summarizing the privileges or immunities doctrine in which he concurred with his predecessors that the text of the Privileges or Immunities Clause authoritatively reinforced federal supremacy.[13] To capture the essence of the doctrine, he paraphrased the Clause to read: "No State shall make or enforce any law which shall abridge any privilege or immunity conferred *by this Constitution, the statutes or treaties of the United States* upon any person who is a citizen of the United States."[14] He subsequently explained that, to understand the scope of the Clause, counsel must ask "what provision or text of Federal law creates or grants this alleged privilege or immunity."[15]

In his 1969 treatise, Chester Antieau chronicled the series of cases interpreting the Privileges

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[12] *Id.* at 64.

[13] D.O. McGovney, *Privileges or Immunities Clause, Fourteenth Amendment*, 4 IOWA L. BULL. 219 (1918).

[14] *Id.* at 220.

[15] *Id.* at 225. McGovney's article, recognized in 1938 for its "permanent value" by the Association of American Law Schools, also makes it clear that that protected rights of an individual include those conferred "by national law, whether it is conferred upon him because he is a citizen, or because he is a human being . . . it is none the less a privilege 'of citizens of the United States' that others have the same privilege." *Id.* at 240–41.

or Immunities Clause, explaining that "All personal rights arising out of federal statutes were said in the *Slaughter-House Cases* to qualify as national privileges and immunities since it is clear they would not have existed but for the federal government."[16] Contemporary summaries of Supreme Court decisions describe the same basic doctrine. The Congressional Research Service, in its review of Supreme Court precedent intended for the guidance of Congress, describes the *Slaughter-House Cases* as a restatement of federal supremacy.[17]

Viewed together, it is clear that statutory rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws" are privileges of federal citizenship and cannot be abridged by any state without violating the Fourteenth Amendment.[18]

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[16] CHESTER J. ANTIEAU, MODERN CONSTITUTIONAL LAW, VOL. I, § 9:9 (1st Edition, 1969).

[17] CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION, S. DOC. NO. 112-9, at 1842–43 (2d Sess. 2017).

[18] *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that "the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment").

B. Federal Intellectual Property Rights have Long Been Considered a "Privilege" Protected by the Fourteenth Amendment.

In the wake of *Slaughter-House*, there can be no doubt that federal intellectual property rights in general, and copyrights in particular, fall within the scope of the term "privilege" under the Fourteenth Amendment. A federal copyright undeniably "owes [its] existence to the Federal government, its National Character, its Constitution, or its laws" and was "conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." Indeed, copyrights were explicitly contemplated by the Constitution. *See* U.S. Const. art. I, § 8 (empowering Congress to secure to authors "the exclusive Right" to their writings). This places copyrights firmly within *Slaughter-House*'s understanding of "privileges or immunities" under the Fourteenth Amendment. And like the right to travel in *Saenz*, federal copyrights fit cleanly within the "class of rights which the federal government was 'created to establish and secure.'" *Id.* at 76. As this Court has noted:

> Before the Constitution was adopted, some States had granted patents either by special act or by general statute, but when the Constitution was adopted provision for a federal patent law was made one of the enumerated powers of Congress because, as Madison put it in The Federalist No. 43, the States "cannot separately make effectual provision" for either patents or copyrights.

Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 228–31 (1964).

This understanding is confirmed by contemporaneous enactments of Congress and opinions by the federal courts. Immediately following ratification of the Fourteenth Amendment, Congress addressed questions regarding patent protection, which had been traditionally tied to United States citizenship. By extending the preexisting right to obtain a patent of one's invention to resident aliens, an 1870 statute employed, with precision, the following terms: "an alien shall have the *privilege* herein granted if he shall have resided in the United States one year . . . and made oath of his intention to become a citizen."[19] The same Act also reserved trademark rights to those domiciled in the United States or in a "foreign country which by treaty or convention affords similar *privileges* to citizens of the United States." *Id*. § 77 (emphasis added).

Nineteenth century references to "copyright privileges" convey a comparable understanding of references to the "privileges" established by federal law. When Joseph Story, acting as circuit judge, resolved a copyright dispute, he wrote that "if no work could be considered by our law as entitled to the *privilege of copyright* . . . then, indeed, it would be difficult to say, that there could be any copyright in most of the scientific and professional treatises of the present day." *Gray v. Russell*, 10 F. Cas. 1037, 1038 (D. Mass. 1839) (emphasis added). Decades later, after establishing in *Slaughter-House* that the Privileges or Immunities Clause included statutes that owed their existence to

[19] Act of July 8, 1870, ch. 230, § 40, 16 Stat. 198 (emphasis added).

the federal government, Justice Miller addressed the question of whether a photograph of Oscar Wilde fell within the scope of the Copyright Act of 1870. He wrote for this Court that "plaintiff had taken all the steps required by the act of Congress to obtain a copyright of this photograph . . . to secure him the sole *privilege* of reprinting, publishing, copying and vending the same." *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 55 (1884) (emphasis added).[20]

In addition to recurrent references to intellectual property rights as "privileges," this Court's 2018 decision in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365 (2018), reinforced the conclusion that intellectual property rights fall within the scope of rights that owe their existence to the federal government. In *Oil States*, this Court explained that patents are "public rights" that "did not exist at common law" and are rather a "creature of statute law." *Id*., 138 S. Ct. at 1374. However, such rights have a constitutional basis. The Constitution gave Congress the power to secure "for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U.S. Const. art. I, § 8, cl. 8. In upholding the authority of the Patent and Trademark Office, as an Article I tribunal, to review the validity of patent claims, this Court emphasized that: "from the founding [until] today, Congress has authorized the

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[20] For a more recent reference, *see Golan v. Holder*, 565 U.S. 302, 323 (2012) (discussing congressional copyright authority, with reference to " 'all the rights and privileges' the Copyright Act affords" as described in an 1893 legislative text).

Executive Branch to grant patents that meet the statutory requirements for patentability." *Id*.[21] Indeed, once Congress acted under Clause 8, it had to do so in a manner that gave the authors and inventors "the exclusive right" to their works and discoveries. Congress did this in 35 U.S.C. § 271, which provides that the patent owner has the right to seek the exclusion of any manufacture, use, offers to sell, sales or imports into the United States that infringes the patent.

As with patents, 17 U.S.C. § 106 provides the owner of a copyright with six specifically identified "exclusive rights." In other words, the Framers, Congress and the current Supreme Court have agreed that intellectual property involves public rights that are private property belonging to individuals or others at the largesse of the federal government. *See Oil States*, 138 S. Ct. at 1374. The rights are granted by a public institution, *i.e.*, the federal government, but those rights are not owned by the public at large, making them a quintessential "privilege" of federal citizenship.

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[21] The dissent focused on questions about federal control, drawing an analogy between patent rights and homestead rights. *Oil States*, 138 S. Ct. at 1385 (Gorsuch, J., dissenting). Given that homestead rights have been described as an example of federal "privileges," *see United States v. Waddell*, 112 U.S. 76, 79–80 (1884), their dissent should not apply to the question of whether IP rights are protected by the Privileges or Immunities Clause.

C. The History and Text of Article IV Confirm that Intellectual Property is a "Privilege" of Federal Citizenship.

In addition to the history, contemporary legislation, Supreme Court precedent, and academic consensus described above, *amici*'s view that the phrase "privileges or immunities" necessarily embraces statutory rights follows from interpretation of the same words used in Article IV, section 2 of the Constitution.[22] Although rights protected by Article IV are derived from state governments—while those protected by the Fourteenth Amendment are derived from federal authority—the definition of "privileges" and "immunities" remains constant.[23] If states had authority to issue patent rights, then current law would extend access to such protection to citizens of other states.[24] No faithful

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[22] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST., art. IV, § 2.

[23] The Supreme Court recognized this link with an explicit reference to Justice Washington's opinion in the case of *Corfield v. Coryell*, 6 F. Cas. 546, No. 3230 (C.C.E.D. Pa. 1823) (explaining the meaning of the Privileges and Immunities Clause as applied to state laws). *See Slaughter-House*, 83 U.S. at 75. Thus, just as Article IV assures that residents from one state will receive equal treatment of statutory rights in other states where no substantial reasons for discriminatory treatment apply, the Fourteenth Amendment protects rights that owe their existence to the federal government for those who have moved from one state to another. *See Saenz*, 526 U.S. at 501–04 (invalidating discriminatory rates of welfare assistance applied to new state residents).

[24] Supreme Court opinions establish that basic property and employment rights fall within the scope of the Privileges and Immunities Clause of Art. IV, § 2. *See, e.g.*, *Hicklin v. Orbeck*, 437

assessment of the text and structure of the Constitution could support a different interpretation of the words as they appear in the Fourteenth Amendment when referencing rights derived from federal rather than state authority.

This relationship between Article IV and the Fourteenth Amendment goes to the heart of Justice Miller's opinion in *Slaughter-House*. As he explained, "[t]here can be little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each." *Slaughter-House*, 83 U.S. at 75. In keeping with that understanding, Justice Miller explained that the scope of the Privileges or Immunities Clause of the Fourteenth Amendment extended to comparable rights "which owe their existence to the Federal government." *Id.* at 79. The core of the definition of rights protected by the Privileges and Immunities Clause of Article IV thus guides this Court's understanding of the Fourteenth Amendment.

A good starting point for understanding this definition of the terms that appear in Article IV appears in *Ward v. Maryland*, 79 U.S. 418 (1870), decided just two

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U.S. 518 (1978) (explaining the scope of privileges and immunities protected by Article IV to include such matters as state employment); *Austin v. New Hampshire*, 420 U.S. 656 (1975) (applying the Privileges and Immunities Clause to licenses to practice law); *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 298–99 (1998) (explaining the heavy burden on states to justify discriminatory treatment of nonresidents in contexts that include matters related to trades or professions).

years after ratification of the Fourteenth Amendment. In the paragraph devoted to the definition of "privileges and immunities," the Court explained that "the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens." *Id.* at 430. Modern case law remains in accord with this definition, extending the protection of the Privileges and Immunities Clause to matters ranging from a license to practice law[25] to equal tax treatment of nonresidents.[26]

This description supports the conclusion that, if states had authority to issue copyrights, they could not limit those rights to state residents. The same conclusion logically extends to the definition of privileges or immunities protected by the Fourteenth Amendment. Recognition that the Privileges or Immunities Clause protects federal rights in a manner that parallels protection afforded to rights established by state governments maintains clarity and consistency in the constitutional text. The alternative—claims that a particular right would be a constitutionally protected "privilege" if established by a state government but

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[25] *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985).

[26] *See Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287 (1998).

loses all "privilege" status if established by the national government—cannot be sustained.

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Thus, this Court's precedent, the historical record, and academic scholarship establish—and the text of the Constitution requires—that copyrights receive protection under the Privileges or Immunities Clause of the Fourteenth Amendment.

II. Congress Validly Abrogated Sovereign Immunity for "Actual" Violations of the Privileges or Immunities Clause.

The Question Presented asks whether "Congress validly abrogated state sovereign immunity via the Copyright Remedy Clarification Act." The CRCA provides that:

> Any State . . . 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.

17 U.S.C. § 511(a); *see also* 17 U.S.C. § 501(a).

Because the "clarity of Congress' intent here is not fairly debatable," this case turns "on whether Congress acted within its constitutional authority when it sought to abrogate the States' immunity" for violations of the CRCA. *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003).

Congress's power to "enforce" Section 1 of the Fourteenth Amendment "includes the authority to both remedy and deter violations of rights guaranteed thereunder." *Hibbs*, 538 U.S. at 726. That power encompasses the power to both (1) proscribe *actual* violations of the Fourteenth Amendment, and (2) enact "so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct," as long as that legislation is "congruent and proportional to its remedial object, and can 'be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Id.* at 727–28, 740 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997)) (emphasis added). As Justice Scalia explained in *United States v. Georgia*:

> While the Members of this Court have disagreed regarding the scope of Congress's "prophylactic" enforcement powers under § 5 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 for *actual* violations of those provisions. . . . This enforcement power includes the power to abrogate state sovereign immunity by authorizing private suits for damages against the States.

546 U.S. at 158–59.

As this Court's precedent makes clear, Congress's power to abrogate is at its zenith when creating private rights of action for "actual" violations of Section 1

of the Fourteenth Amendment. Thus, "[i]f the State's conduct violated both [the statute] and the Fourteenth Amendment, [the statute] validly abrogates state sovereign immunity." *Hale v. King*, 642 F.3d 492, 498 (5th Cir. 2011) (citing *Georgia*, 546 U.S. at 159).

The Question Presented—whether Congress validly abrogated sovereign immunity—must be answered with a resounding "Yes." Because copyrights are a "privilege" of federal citizenship, a state's act of infringement violates both the Privileges or Immunities Clause of the Fourteenth Amendment and the Copyright Act.[27] The Copyright Remedy Clarification Act sought to remedy actual violations of the Privileges or Immunities Clause, making it a valid exercise of Congressional authority to abrogate sovereign immunity under the Fourteenth Amendment.

Amici note that, given the lack of development of this argument below, there exists a temptation to avoid addressing the impact of the Privileges or Immunities Clause at this stage of proceedings. But in determining whether to confront the issue, the Court should consider the wider implications of its decision.

Most importantly, a ruling against the Petitioners that does not address abrogation under the Privileges

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[27] 17 U.S.C. § 501(a) ("Anyone who violates any of the exclusive rights of the copyright owner . . . or right of the author . . . is an infringer of the copyright or right of the author. . . . As used in this subsection, the term "anyone" includes *any State*. . . . *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*.") (emphasis added).

or Immunities Clause would perpetuate a false assurance that Eleventh Amendment immunity applies in such cases. Indeed, even a decision based upon the more limited test of congruence and proportionality—applied in the context of Due Process Clause violations by the court below—should not apply to questions about congressional authority to enforce positive rights or actual constitutional violations protected by the Privileges or Immunities Clause.[28] As this Court has explained: "In procedural due process claims, the deprivation by state action of a constitutionally protected interest is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 642–43 (1999) (internal ellipses omitted) (emphasis in the original). By contrast, the Privileges or Immunities Clause contains no such qualification: it unequivocally states that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1.

So whereas procedural due process claims require an analysis of whether the alleged harms—when balanced against the available state processes—rise to the level of an "unconstitutional deprivation of due process," state deprivation of a constitutional interest

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[28] *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001) (explaining that "[i]f special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause").

guaranteed by the Privileges or Immunities Clause always creates an actual constitutional harm.

A preferable resolution of this case would affirm the status of copyright privileges as rights that owe their existence to the federal government and are protected by the Privileges or Immunities Clause of the Constitution. That conclusion would reflect faithful application of the Constitution, the CRCA, and this Court's precedent and provide increased guidance for future litigants.

CONCLUSION

Application of the Privileges or Immunities Clause to protect federal copyright holders from state infringement will bring clarity and coherence to the Constitution. The CRCA plainly abrogates state immunity and the Fourth Circuit's decision to the contrary should be reversed.

Respectfully submitted,

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