No. 18-877

IN THE

Supreme Court of the United States

FREDERICK L. ALLEN, ET AL.,

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 LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

In enacting the Copyright Remedy Clarification Act of 1990 (the "CRCA"), Congress purported to abrogate the States' sovereign immunity for alleged violations of federal copyright law. Did the court below correctly hold that the CRCA's abrogation of immunity was invalid?

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professors of intellectual property, constitutional law, and federal courts. They have an interest in the proper development of structural constitutional law, including the doctrine of state sovereign immunity. *Amici* offer their views on whether, in enacting the CRCA, Congress had a valid basis for abrogating state sovereign immunity.

Zachary C. Bolitho, Assistant Professor of Law at Campbell University School of Law,[2] teaches a variety of areas of law, including federal courts.

John T. Cross, Grosscurth Professor of Law at the University of Louisville Louis D. Brandeis School of Law, oversees the intellectual property curriculum at his school and also teaches many of the courses in that curriculum, as well as civil procedure and federal jurisdiction. He has written specifically about the role of state sovereign immunity in the area of intellectual property.

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[1] All parties have filed letters granting blanket consent to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no person other than *Amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

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specializes in intellectual property law but has also taught federal jurisdiction.

Philip Pucillo, Professor in Residence at Michigan State University College of Law, focuses his scholarly interests on federal procedure and jurisdiction. In addition to teaching broadly in the areas of constitutional law and property, he teaches state sovereign immunity in his Federal Jurisdiction and Constitutional Litigation courses.

Gary Pulsinelli, Ph.D., Associate Professor of Law at the University of Tennessee College of Law, teaches a variety of intellectual property courses, including copyright law. He has written specifically about the role of the Eleventh Amendment in intellectual property law and also about the relationship between the federal government and the States in copyright law.

SUMMARY OF ARGUMENT

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), and *Alden v. Maine*, 527 U.S. 706 (1999), properly held "that the powers delegated to Congress under Article I of the United States Constitution do not" provide a basis for abrogating state sovereign immunity. *Alden*, 527 U.S. at 712; *Seminole Tribe*, 517 U.S. at 72–73. Those decisions are consistent with what the Founders plainly considered to be a core assumption in the constitutional project: that the States were fully sovereign nations whose immunity from private suit would not be stripped upon ratification. Contrary to Petitioners' position, that

understanding holds true notwithstanding the enumeration of Congress's powers in Article I, the only purported basis for abrogation Congress claimed in enacting the CRCA. As the Court has explained, "the background principle of state sovereign immunity . . . is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government." *Seminole Tribe*, 517 U.S. at 72. *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), also provides no support for Petitioners' argument for abrogation under Article I, given the unique jurisdictional features of bankruptcy and the Court's correct observation that bankruptcy "does not implicate state sovereignty to nearly the same degree as other kinds of jurisdiction." *Id.* at 378.

Section 5 of the Fourteenth Amendment also does not provide a basis for the CRCA's purported abrogation of immunity. The reasoning of *Seminole Tribe* applies here as fully as it did in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999). That Congress did not validly abrogate immunity in the CRCA does not preclude it from enacting the "appropriate" legislation permitted under Section 5—or a variety of other measures that would protect the interests of copyright holders while avoiding the extreme step of abrogating state immunity. But even if Congress declined to act (as it failed to do in the wake of *Florida Prepaid*), existing federal and state law provides multiple remedies to hold the States and state officials accountable for copyright infringement.

ARGUMENT

I. Immunity from suit is an inherent characteristic of sovereignty, and the States did not surrender that immunity in the plan of convention for any Article I power—including the Intellectual Property Clause.

Much ink has been spilled in the last quarter-century over state sovereign immunity, most of it in articles critical of the Court's jurisprudence. *See* W. Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. 1, 2 n.5 (2017); *accord* Br. of Public Law Scholars 3–18. What this Court has correctly recognized in its decisions—and what some critics overlook or overly discount—is the paramount importance that the Founders and the ratifying states attached to immunity. Acknowledging state immunity as a constitutional "backdrop," *see* S. E. Sachs, *Constitutional Backdrops*, 80 Geo. Wash. L. Rev. 1813 (2012); *accord* Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. 1, helps explain how the Court's jurisprudence properly fulfills the Founders' expectations and the promise of the constitutional plan. It also demonstrates why Congress could not have validly abrogated immunity in the CRCA.

A. *Amici* begin with the basic observation that, "[a]fter independence, the States considered themselves fully sovereign nations." *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1493 (2019); *see also* C. G. Haines, *The Role of the Supreme Court in American*

Government and Politics, 1789–1835, at 89 ("From most of the indications of the time, the states deemed themselves sovereign and independent nations . . . ."). Many attributes define a sovereign state, but one "integral component" is that the sovereign is "immun[e] from private suits." *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751–52 (2002); *accord The Federalist No. 81* at 549 (J. Cooke ed. 1961) ("[T]he exemption [from suit by individuals is] one of the attributes of sovereignty . . . enjoyed by the government of every state in the union."); 1 W. Blackstone, *Commentaries on the Laws of England* 235 (1765) ("[N]o suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him.").

"[T]he doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified." *Alden v. Maine*, 527 U.S. 713, 715–16 (1999). Sovereign immunity was no abstract theory but instead, as this Court has explained, had material consequences:

> Unquestionably the doctrine of sovereign immunity was a matter of importance in the early days of independence. Many of the States were heavily indebted as a result of the Revolutionary War. They were vitally interested in the question whether the creation of a new federal sovereign, with courts of its own, would automatically subject them, like lower

> English lords, to suits in the courts of the "higher" sovereign.

Nevada v. Hall, 440 U.S. 410, 418 (1979) (footnote omitted), *overruled on other grounds*, *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485 (2019). The Founders answered that question in the negative. Indeed, "th[e] great advocates and defenders of the Constitution" recognized that preservation of state sovereign immunity formed part of the canvas on which the Constitution was written. *Hans v. Louisiana*, 134 U.S. 1, 14 (1890).

As Alexander Hamilton pointedly explained in *The Federalist No. 81*—with the state-debt question as background—"[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*." *The Federalist No. 81* at 548 (J. Cooke ed. 1961). According to Hamilton, the only obligations binding states to its contracts were its "good faith" and the "conscience of the sovereign"; there could be "no pretensions to a compulsive force" such as a judicial order. *Id.* at 549. Hamilton's view of sovereignty was such that there would be no "purpose . . . to authorize suits against States for the debts they owe"; the only compulsive force that could be exercised against a State to enforce a "right of action" would be to "wag[e] war against the contracting State." *Id.* "[T]o ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable." *Id.*

James Madison shared Hamilton's perspective. In addressing concerns raised about Article III, Madison unequivocally told the Virginia ratifying convention that "[i]t is not in the power of individuals to call any state into court." 3 *Debates on the Federal Constitution* 533 (J. Elliot 2d ed. 1854). Madison observed that the most Article III does is "give a citizen a right to be heard in the federal courts; and if a state *should condescend* to be a party, this court may take cognizance of it." *Id.* (emphasis added). John Marshall likewise saw sovereign immunity as inviolable under the Constitution, explaining to the Virginia convention that "[i]t is not rational to suppose that the sovereign power should be dragged before a court." *Id.* at 555–56; *see also Alden*, 527 U.S. at 718–19 (summarizing how state ratifying conventions similarly made clear their view that their States were immune from suit).

Thus, when the Court held a few years later in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), that Article III abrogated States' immunity, the "decision fell upon the country with a profound shock." 1 C. Warren, *The Supreme Court in United States History* 96 (1922).

> Both the Bar and the public in general appeared entirely unprepared for the doctrine upheld by the Court; and their surprise was warranted, when they recalled the fact that the vesting of any such jurisdiction over sovereign States had been expressly disclaimed and even

> resented by the great defenders of the Constitution, during the days of the contest over its adoption.

Id. The response was immediate; a constitutional amendment to overturn the decision was proposed the next day, although it was another version that was eventually ratified as the Eleventh Amendment. 5 M. Marcus, *The Documentary History of the Supreme Court of the United States, 1789–1800*, at 597–98 (1994). State legislatures lamented and disparaged the decision, *see* 1 J. Goebel, *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States, Antecedents and Beginnings to 1801* 734–36 (1971) (describing the "furor" and "uproar precipitated by the *Chisholm* decision"), and demanded that their congressional delegations support passage of an amendment. Among state officials, Governor Henry Lee was more temperate than most in requesting the "firm and zealous support" of Virginia's congressional delegation (which included James Madison) in overturning the Court's "unexpected decision." *See, e.g.*, 15 *Papers of James Madison* 158–59 (T. Mason, R. Rutland, & J. Sisson eds. 1985). Motivating the States' push for an amendment were two concerns that remained from the ratification period—not only their political theory of sovereignty, but also the "existential threat to state finances" posed by the prospect, brought home by *Chisholm*, "that a state could be hauled into federal court and made to pay up." E. A. Young, *Its Hour Come Round at Last – State Sovereign Immunity and the Great State Debt Crisis of the Early Twenty-First*

Century, 35 Harv. J. L. & Pub. Pol'y 593, 597 (2012); Warren, *Supreme Court*, at 99 (explaining the "crucial condition" of state finances); J.V. Orth, *The Judicial Power of the United States: The Eleventh Amendment in American History* 7 (1987) (characterizing the Eleventh Amendment as "[a]lways a dollars-and-cents proposition").

Accordingly, the Court's jurisprudence correctly reflects the understanding that, as demonstrated by the "text and history of the Eleventh Amendment . . . [,] Congress acted not to change but to restore the original constitutional design." *Alden*, 527 U.S. at 722.

> The Court has been consistent in interpreting the adoption of the Eleventh Amendment as conclusive evidence "that the decision in *Chisholm* was contrary to the well-understood meaning of the Constitution," *Seminole Tribe,* 517 U.S., at 69, 116 S. Ct. 1114, and that the views expressed by Hamilton, Madison, and Marshall during the ratification debates, and by Justice Iredell in his dissenting opinion in *Chisholm,* reflect the original understanding of the Constitution.

Id. at 727; *see also Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934) (the Eleventh Amendment "established in effective operation the principle asserted by Madison, Hamilton, and Marshall in expounding the Constitution and advocating its ratification"). Although some scholars

have expressed skepticism about this narrative, *see* Marcus, *Documentary History*, at 4–5, "the conventional wisdom has long been" that the Founders and ratifying states viewed preservation of state sovereign immunity as a critical feature of the constitutional plan, *id.* at 4.

Given that overwhelming historical evidence, it is telling how little contrary evidence is marshaled by Petitioners and their amici (to the extent they even argue that abrogation occurred pursuant to Article I). *See, e.g.*, Br. for Pet'rs 21; Br. of Public Law Scholars 14–16. Petitioners' Public Law Scholars *amici* make an easily parried feint when they observe that "the people" are the ultimate sovereigns, *id.* at 14–15, for that does not answer the relevant question. The Constitution was not ratified by the people generally—it was ratified by the individual states on behalf of their residents. *The Federalist No. 39* at 254 (J. Cooke ed. 1961) ("Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its voluntary act."); *see also* Marcus, *Documentary History*, at 232 (Ltr. from Edmund Pendleton to Nathaniel Pendleton (Aug. 10, 1793)) ("The grant was by the People, not by States – true, but how did the people Act in making the Grant? [N]ot individually through America, but by a vote taken in each state, ...").

In response to the relevant question—did the States intend to relinquish their sovereign immunity when they ratified the Constitution?—the weight of

historical fact yields a clear answer: No, they did not.

B. The next question is whether, notwithstanding that constitutional backdrop, Article I allows Congress to strip states of their immunity by statute. At least some scholars assert that Congress has that power, based on the principle that Congress can override the common law when acting pursuant to its enumerated powers. *E.g.*, Br. of Public Law Scholars 3–14. Given the historical record and the lack of any textual basis in the Intellectual Property Clause to support a power to abrogate state sovereign immunity, the Court should hold here that the CRCA's purported attempt at abrogation is invalid.

Amici do not dispute that Congress generally may displace the common law under its enumerated Article I powers. But—assuming that sovereign immunity is a product of common law and not a product of the law of nations as it existed in 1787, *see Hyatt*, 139 S. Ct. at 1494 ("In short, at the time of the founding, it was well settled that States were immune under *both* the common law *and* the law of nations.") (emphasis added)—that does not mean that *every* common-law rule or principle is defeasible by legislation. Indeed, as the Court noted in *Alden*, "[a]lthough the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design." 527 U.S. at 733; *see also* Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. at 13 ("Sovereign

immunity is a rule of common law, not a rule of constitutional law. But constitutional law limits Congress's power to abrogate that common law rule, rendering it a constitutional backdrop."). Thus, the Court was correct to hold that "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe*, 517 U.S. at 72; *see also Fla. Prepaid*, 527 U.S. at 636 ("*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers . . . .").[3]

For Article I's silence on the topic to be construed as authorization for Congress to abrogate state sovereign immunity, the power must be located in the Necessary and Proper Clause or implied from the enumerated powers themselves. Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. at 14 & n.74. As described above, the Founders doubtlessly thought that the States retained their sovereign immunity at the time of ratification, *see supra* Part I.A, and, given how important that power was to the sovereign states, abrogation should be seen as "a great substantive and independent power" that

[3] Article III also does not abrogate immunity. *See Alden*, 727 U.S. at 742-43 ("Although Article III expressly contemplated jurisdiction over suits between States and individuals, nothing in the Article or in any other part of the Constitution suggested the States could not assert immunity from private suit in their own courts or that Congress had the power to abrogate sovereign immunity there.").

cannot be overridden by implication through the Necessary and Proper Clause. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411, 424 (1819); *accord* Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. at 15. The absence of any clear statement in the Constitution that the States were surrendering their immunity, combined with the historical evidence supporting exactly the opposite view, demonstrates that the States simply did not agree that Congress could subject them to suit as a condition of ratifying the Constitution. Concluding that Article I implies a power to force nonconsenting states to the indignity of responding to lawsuits and potentially paying damages would certainly be finding the proverbial elephant hiding in a mousehole. *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).

Petitioners' Public Law Scholars *amici* respond to this conception of state immunity by asserting that the Founders were consciously selective about what English common-law doctrines were received into American law, and that all common-law doctrines are subject to legislative override. *See* Br. of Public Law Scholars 10–13. On the first point, *Amici* do not disagree as a general matter, but it is plain from the historical record that the Founders fully recognized the States' sovereign immunity. *See supra* Part I.A. Thus, it is irrelevant whether "[i]t was the *states*, not the national government, that generally 'received' the common law," Br. of Public Law Scholars 9—all that matters is that the *States* had common-law sovereign immunity, and they did not surrender it in ratifying

Article I of the Constitution. On the second point, *Amici* recognize that the Court has not yet said that the power to abrogate state sovereign immunity is a "great substantive and independent power" that cannot be found in the Necessary and Proper Clause or otherwise implied from Article I. But, given the significance that sovereign immunity held for the Founders, the argument that abrogation is such a power is compelling.

Petitioners are mistaken in claiming support from *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), *see* Br. for Pet'rs 34–37, a decision that is best explained not because of its departure from *Seminole Tribe* but in spite of it. The *Katz* Court itself understood that abrogation was not particularly relevant because "the jurisdiction exercised in bankruptcy proceedings was chiefly *in rem*—a narrow jurisdiction that does not implicate state sovereignty to nearly the same degree as other kinds of jurisdiction." 546 U.S. at 378. Thus, assuming it was correctly decided, "*Katz* can also be consistent with the backdrop theory, because the case ultimately turns on an orthogonal issue." Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. at 21.

Given the historical record and the lack of any textual basis in the Intellectual Property Clause to support abrogation, the Court should hold here that Congress lacked power under Article I to abrogate state sovereign immunity in the CRCA.[4]

[4] Petitioners' Public Law Scholars *amici* claim this this

C. Lastly, congressional abrogation of state sovereign immunity is difficult to distinguish from legislation commandeering the States or their executive officials. *See* C. Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1652 (2002). Whether compelling states to enforce a federal regulatory program, *New York v. United States*, 505 U.S. 144 (1992), or ordering states to appear in court and potentially pay damages out of the treasury, *see The Federalist No. 81*, Congress in both circumstances is attempting to use the coercive power of the federal government to regulate the States *as the States* to take certain actions.

As this Court recognized in *New York v. United States*, the Founders rejected a constitutional design under which the federal Congress could regulate the States rather than the people. 505 U.S. at 163–66. "[T]he necessity of having a government which should at once operate upon the people, and not upon the states, was conceived to be indispensable by every delegation present." *Id.* at 165 (citation and internal quotation marks omitted). As Alexander Hamilton put it, "can we believe that one state will ever suffer itself

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approach is faulty because "Congress's power to enforce the Fourteenth Amendment through 'appropriate' legislation, U.S. Const. amend. XIV, § 5, is generally equated with its 'necessary and proper' authority under Article I" and "would thus call into the question this Court's unanimous and unbroken line of cases holding that Congress may abrogate state sovereign immunity when enforcing the Reconstruction Amendments." Br. of Public Law Scholars 13-14. But the two inquiries need not be linked, for obvious textual and historical reasons.

to be used as an instrument of coercion? The thing is a dream; it is impossible." *Id.*; *see also Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018) ("[C]onspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority.").

Put simply, the Founders and the ratifying states cared deeply about "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869), *overruled in part on other grounds, Morgan v. United States*, 113 U.S. 476 (1885). To that end, the Constitution "confers upon Congress the power to regulate individuals, not States." *New York*, 505 U.S. at 166. While nothing in the Constitution's text prohibits Congress from directly regulating the States (rather than their residents) when it acts pursuant to Article I, nonetheless this Court has found such actions prohibited because "States are not mere political subdivisions of the United States." *New York*, 505 U.S. at 188. If Congress cannot order the States to "enact or administer a federal regulatory program" based on the historical record, *id.*, then *Amici* fail to see how Congress has the authority to force nonconsenting states to appear in court and subject themselves to damages payable from their treasury.

II. Preserving the core holding of *Seminole Tribe* would not eliminate existing remedies for copyright infringement, or disable Congress and the States from providing further remedies for copyright infringement—including making states amenable to suit—in ways that pass constitutional muster.

As demonstrated above, this Court's well-settled precedent—including *Seminole Tribe*—forecloses Petitioners' primary argument, that the CRCA abrogated the States' immunity under Article I. *Amici* briefly address, but largely leave it to others to rebut, Petitioners' second primary argument, that the CRCA validly abrogated immunity under Section 5 of the Fourteenth Amendment. *Amici* emphasize, however, that *Seminole Tribe* does not preclude Congress from enacting appropriate legislation under Section 5 and abrogating state immunity if copyright infringement by states were a sufficiently significant problem. That Congress did not validly abrogate immunity in the CRCA says nothing about its ability to do so through legislation that is appropriately tailored and supported. Congress has a variety of other means at its disposal to subject the States to suit—as do the States themselves. Their failure to act, despite proposed fixes following *Florida Prepaid*, suggests there is no significant problem actually in need of fixing. Indeed, numerous, unobjectionable mechanisms for remedying copyright infringement are already available that stop short of the extreme step of abrogating states' immunity.

A. *Amici* disagree with Petitioners that the CRCA validly abrogated States' immunity under Section 5 of the Fourteenth Amendment. The Court has "held that for Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." *Fla. Prepaid*, 527 U.S. at 639 (characterizing *City of Boerne v. Flores*, 521 U.S. 507 (1997)). As Respondents have compellingly shown, and as the court below correctly held, Congress fell well short of satisfying that standard when enacting the CRCA.

As with the similar Patent Remedy Act at issue in *Florida Prepaid*, in enacting the CRCA "Congress identified no pattern of . . . infringement by the States, let alone a pattern of constitutional violations." 527 U.S. at 640. Among other things, "Congress did not focus on instances of *intentional* or *reckless* infringement on the part of the States. Indeed, the evidence before Congress suggested that most state infringement was innocent or at worst negligent." *Id.* at 645 (emphasis added); *see also, e.g.*, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88–91 (finding that the ADEA did not abrogate state immunity in the absence of a history of unconstitutional conduct by the state).

For instance, as Register of Copyrights Ralph Oman testified, States "respect the law" but the CRCA would apply to "the occasional error or misunderstanding or innocent infringement"; without an abrogation of immunity, "the honest mistakes will

become more and more frequent." Statement of Register of Copyrights Ralph Oman, *Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liability of States: Hr'gs Before Subcomm. on Courts, Intellectual Property, and Admin. of Justice, H. Comm. on the Judiciary*, 101st Cong. 8 (1989). "Such negligent conduct, however, does not violate the Due Process Clause of the Fourteenth Amendment." *Fla. Prepaid*, 527 U.S. at 645; *see also id.* at 644 (noting that "a state actor's negligent act that causes unintended injury to a person's property does not 'deprive' that person of property within the meaning of the Due Process Clause" (citing *Daniels v. Williams,* 474 U.S. 327, 328 (1986)); J. T. Cross, *Suing the States for Copyright Infringement*, 39 Brandeis L.J. 337, 389 (2000) ("A close look at the nature of copyright infringement reveals that very few state copyright infringements actually violate the copyright owner's Fourteenth Amendment rights."). Congress's apparent lack of focus on copyright infringement *that violates due process* fatally undermines Petitioners' claim that the CRCA was a valid use of Section 5 power to "enforce" the Fourteenth Amendment. U.S. Const. amend XIV, § 5.

Moreover, the CRCA was not "appropriate" legislation under Section 5. *Id.* As the court below noted, in the CRCA, just as in the Patent Remedy Act, Congress "impos[ed] sweeping liability for *all violations* of federal [intellectual property] law, whether the violation implicates the Fourteenth Amendment or not." Pet. App. 30a. Such a response

ignores the requirement of a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520. Just like the Patent Remedy Act in *Florida Prepaid*, "the provisions of the [CRCA] are 'so out of proportion to a supposed remedial or preventive object that [they] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Fla. Prepaid*, 527 U.S. at 646 (quoting *City of Boerne*, 521 U.S. at 532).

In sum, in enacting the CRCA, Congress simply failed to vault the properly high bar that exists before allowing the "expansive" remedy of abrogating the States' immunity. 527 U.S. at 646. And "[g]iven the current state of evidence, it seems unlikely that Congress could presently compile a legislative record showing sufficient levels of unconstitutional and unremedied acts of state copyright infringement to justify an across-the-board abrogation of state sovereign immunity in federal copyright infringement suits—at least to a Court scrutinizing the record as sharply as the *Florida Prepaid* Court did." M. Berman, R.A. Reese, and E. Young, *State Accountability for Violations of Intellectual Property Rights: How To "Fix"* Florida Prepaid *(And How* Not *To)*, 79 Tex. L. Rev. 1037, 1083 (2001).

B. *Amici*'s point is not so much that the CRCA is an invalid attempt to abrogate immunity—although it is—but simply that following *Seminole Tribe* here would not foreclose Congress from abrogating immunity in some constitutional manner. *See*

Seminole Tribe, 517 U.S. at 59 (reaffirming the Court's holding in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976), that "§ 5 of the Fourteenth Amendment allow[s] Congress to abrogate the immunity from suit guaranteed by that Amendment"). Despite a variety of permissible paths to make the States amenable to suit for copyright infringement, or to sidestep immunity to hold States liable for infringement, Congress has never taken any of those paths.

Most obviously, Congress could actually do what it purported but failed to do in the CRCA—enact legislation that is "'appropriate' under § 5 as that term was construed in *City of Boerne*." *Fla. Prepaid*, 527 U.S. at 637. In *Florida Prepaid*, the Court even suggested potential limitations that would bring an act within the "appropriate" scope of Congress's Section 5 power. For instance, Congress could "limit the coverage of the Act to cases involving arguable constitutional violations," *Fla. Prepaid*, 527 U.S. at 646; or it could "confine the reach of the Act . . . to certain types of infringement, such as nonnegligent infringement or infringement authorized pursuant to state policy," *id.* at 647; or it could "provid[e] for suits only against States with questionable remedies or a high incidence of infringement," *id.* In short, there were alternatives to what Congress did in the CRCA, which was to make "all States immediately amenable to suit in federal court for all kinds of possible [copyright] infringement and for an indefinite duration." *Id.*

Although Congress has never enacted any such

alternative legislation, that is not owing to a lack of ideas. *See, e.g.*, Statement of Register of Copyrights Marybeth Peters, *State Sovereign Immunity and Protection of Intellectual Property: Hr'g Before Subcomm. on Courts & Intellectual Property, H. Comm. on the Judiciary*, 106th Cong. 24–28 (2000) [hereinafter *2000 Judiciary Committee Hearing*] (identifying and evaluating five "solutions"); P. S. Menell, *Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights*, 33 Loy. L.A. L. Rev. 1399, 1439–45 (2000) (noting that "intellectual property owners can pursue a range of strategies to combat the risk of state infringement" and explaining a number). Indeed, in the wake of *Florida Prepaid*, some members of Congress, understanding that the Court's decision and reasoning "spelled almost certain doom for the CRCA," Statement of Register of Copyrights Marybeth Peters, *2000 Judiciary Committee Hearing* 22; *see also* Br. for Resp'ts at 19–22, proposed different approaches that were intended to avoid the concerns raised by the Court.

In three successive Congresses, bills were introduced that would have limited the abrogation of state immunity only to cases involving infringements violating the Fifth or Fourteenth Amendments, S. 1835, 106th Cong. § 203 (1999); S. 1611, 107th Cong. § 5(a) (2001); H.R. 3204, 107th Cong. § 5(a) (2001); S. 2031, 107th Cong. § 5(a) (2002); S. 1191, 108th Cong. § 5(a) (2003); H.R. 2344, 108th Cong. § 5(a) (2003). The earliest bill would also have required States to waive their immunity from suit as a condition on their

ability to participate in the federal copyright system. *See* S. 1835, 106th Cong. § 133 (1999). Although it is debatable whether all of the proposed measures themselves pass constitutional muster, the point remains an academic one; none of the legislation has come even close to passing. Indeed, all the bills failed even to make it out of committee. Thus, in contrast to the easy passage of the CRCA—by voice vote—just a dozen years before, Congress was unwilling or unable to pass a more limited bill that comported with the Court's guidance in *Florida Prepaid*.

But Congress has other arrows in its quiver too, assuming it needs to let one fly. For instance, although the States' sovereign immunity precludes suits against them by individuals, their immunity does not extend to suits by the United States. Thus, some scholars have proposed that Congress empower the federal government to enforce intellectual property rights against the States, pursuing injunctive relief and collecting damages that then could be allocable to copyright holders. *See, e.g.*, Cross, *Suing the State*, 39 Brandeis L.J. at 360–61; Menell, *Economic Implications,* 33 Loy. L.A. L. Rev. at 1443–44; E. A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 Tex. L. Rev. 1551, 1562–63 (2003). *But see* Statement of Register of Copyrights Marybeth Peters, *2000 Judiciary Committee Hearing* 25–26 (concluding that some of this Court's precedents "cast doubt on whether an effort to substitute a federal agency for the copyright owner in order to circumvent state sovereign immunity would

be upheld").

Scholars have also suggested that Congress might use Spending Clause legislation to incentivize States to waive immunity for copyright infringements. *See, e.g.*, Statement of Register of Copyrights Marybeth Peters, *2000 Judiciary Committee Hearing* 25 (analyzing such a proposal under the factors set forth in *South Dakota v. Dole*, 483 U.S. 203 (1987)); Young, *Is the Sky Falling*, 81 Tex. L. Rev. at 1563–64 ("Because of the States' dependence on federal funding grants and other federal benefits . . . Congress should be able to force immunity waivers whenever it really wants them."). Indeed, the Court appeared to suggest the possibility of spending conditions in *Alden* when, in discussing limits "implicit in the constitutional principle of state sovereign immunity," it cited *South Carolina v. Dole* and commented that the federal government did not "lack the authority or means to seek the States' voluntary consent to private suits." *Alden*, 527 U.S. at 755.

Whatever creative options Congress may devise, faithfully applying *Seminole Tribe* here, and holding that the CRCA invalidly abrogated state immunity, would not preclude Congress from pursuing them.

C. Even if Congress took no action to abrogate state immunity to copyright suits (and States did not voluntarily waive their immunity), a number of remedies may nonetheless remain available to copyright holders under current federal and state law. Indeed, *Florida Prepaid* did "not foreclose intellectual

property owners from seeking legal recourse for infringement of their intellectual property rights by states and state officials, ..." Menell, *Economic Implications*, 33 Loy. L.A. L. Rev. at 1404; *see also id.* at 1439–45 (cataloging remedies); Br. for Resp'ts 39–41 (same); J. Jeffries, *In Praise of the Eleventh Amendment and Section 1983*, 84 Va. L. Rev. 47, 49 (1998) (arguing that the "Eleventh Amendment almost never matters" and pointing out that it "is formally true but substantively misleading" that immunity "categorically forbids actions against states" because "[i]n almost every case . . . suit against a state officer is permitted under Section 1983").

Perhaps most notably, under the doctrine recognized in *Ex parte Young*, 209 U.S. 123 (1908), private citizens may sue state officials in their official capacities in federal court to obtain prospective relief from ongoing violations of federal law. Thus, copyright holders may rely on this exception to immunity to prevent infringement from occurring, "regardless of the state's assertions of sovereign immunity." Berman et al., *How to Fix* Florida Prepaid, 79 Tex. L. Rev. at 1095. To ensure the availability of this remedy, some of the proposed bills introduced after *Florida Prepaid* would have "amend[ed] intellectual property statutes to expressly authorize injunctive suits against state officers in cases of state infringement of federal intellectual property rights." *Id.*; *see also* Menell, *Economic Implications*, 33 Loy. L.A. L. Rev. at 1439–40 (calling for Congress to clarify its intention to allow injunctive relief for intellectual property owners);

Statement of Register of Copyrights Marybeth Peters, *Sovereign Immunity and the Protection of Intellectual Property: Hr'g Before the S. Comm. on the Judiciary*, 107th Cong. 17 (2002) (because "some fear that . . . state sovereign immunity may be extended to nullify this venerable rule, . . . we believe that it is wise to codify this doctrine in federal law").

The Eleventh Amendment also does not prevent a copyright holder from suing, and collecting monetary damages from, a state employee in her individual capacity. Although the official would enjoy qualified immunity from suit unless her conduct (as in infringing a copyright) violated "clearly established statutory or constitutional rights of which a reasonable person would have known," extreme examples of infringement may well fall outside the scope of immunity. *See* Menell, *Economic Implications*, 33 Loy. L.A. L. Rev. at 1407–08 ("While some copying of copyrighted material might fall within the scope of this immunity, such as copying for research or education purposes, outright reproduction of entire software programs would likely be outside of qualified immunity."); *see also* G. Pulsinelli, *Freedom to Explore: Using the Eleventh Amendment to Liberate Researchers at State Universities from Liability for Intellectual Property Infringements*, 82 Wash. L. Rev. 275, 314–54 (2007) (thoroughly analyzing qualified immunity in context of intellectual property rights). Thus, "the availability of damages in personal capacity suits suggests that state sovereign immunity may matter considerably less than people often think." Young, *Is the Sky Falling*, 81 Tex. L. Rev. at

1562; *see also* J. Choper & J. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 Colum. L. Rev. 213, 261 (2006) ("Preventing private plaintiffs from suing states for retrospective money damages poses, at most, a minor barrier to national goals when damages actions against state officers and injunctive actions realistically against state governments are readily available to effectively accomplish all federal ends, ...").

Finally, although some claims may be preempted, copyright holders also may have actionable claims under state law by which to protect their rights. The nature of the claim would depend on the factual scenario and would vary by state (including based on the scope of any waiver of immunity by the state), but potential causes of action could be based in inverse condemnation or state intellectual property laws, or sound in contract or tort. *See generally* Menell, *Economic Implications*, 33 Loy. L.A. L. Rev. at 1413–28. The precise contours of a claim are less important than the overarching point: that applying *Seminole Tribe* here would not leave copyright holders without recourse. Indeed, what the Court observed about patent infringement in *Florida Prepaid* likewise holds true for copyright infringement: "The examples of States avoiding liability for patent infringement by pleading sovereign immunity in a federal-court patent action are scarce enough, but any plausible argument that such action on the part of the State deprived patentees of property and left them without a remedy under state law is scarcer still." 527 U.S. at 647.

CONCLUSION

The decision of the Fourth Circuit should be affirmed.

Respectfully submitted,

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