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 WEST VIRGINIA AND 30 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS


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## QUESTION PRESENTED

The Copyright Remedy Clarification Act purports to abrogate the States' sovereign immunity for alleged violations of federal copyright law.

Did the Court of Appeals correctly hold that the Copyright Remedy Clarification Act's abrogation of state sovereign immunity was invalid?

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## INTRODUCTION AND INTERESTS OF *AMICI CURIAE* [1]

The Constitution is built on a strong default in favor of the sovereign immunity of the States. Just last Term, the Court reiterated that an inherent facet of "our constitutional design" is that the States share sovereign immunity with the federal government—and that this aspect of sovereignty may not be abrogated lightly. *Franchise Tax Bd. of Cal.* v. *Hyatt*, 139 S. Ct. 1485, 1492 (2019). Reversal would work a serious and unwarranted shift in the balance between state and federal power that is critical to our constitutional regime.

The States of West Virginia, Alabama, Alaska, Arizona, Arkansas, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Washington respectfully submit this brief as *amici curiae* in support of Respondents. *Amici* States write to emphasize that a ruling for Petitioners would be an upheaval of this Court's jurisprudence. This Court's recent state sovereign-immunity decisions reflect a renewed understanding of the interests at stake. Holding that States may be sued for monetary damages in federal court under the Copyright Remedy Clarification Act ("the Act") would be a significant step backward.

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties have filed blanket consents to the filing of *amicus curiae* briefs.

*Amici* States also stress the implications of holding that Congress validly abrogated States' sovereign immunity under Article I's Intellectual Property Clause or Section 5 of the Fourteenth Amendment. Because most States have not consented to suits for monetary damages in federal courts, copyright-infringement claims seeking damages strip States of "the dignity that is consistent with their status as sovereign entities." *Fed. Mar. Comm'n* v. *S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002). More concerning, reversal could open the floodgates to federal lawsuits seeking monetary damages against States even well outside the copyright context.

## SUMMARY OF ARGUMENT

Congress lacks authority to abrogate state sovereign immunity in the copyright context under either Article I, Section 8's Intellectual Property Clause or Section 5 of the Fourteenth Amendment. Holding otherwise would mark a sea change in this Court's state sovereign-immunity jurisprudence that could not be squared with the States' status as co-sovereigns in our system and the broad view of immunity from nonconsensual suits for monetary damages that status has traditionally encompassed.

**I.** Reversal would stray from this Court's precedents and have broad, negative consequences for state sovereignty more generally. The history of the Court's jurisprudence is defined by the principle that States retained many of the prerogatives of sovereignty when they adopted the Constitution, including a broad understanding of the States'

sovereign immunity in federal (and other States') courts. Recent decisions have further confirmed the breadth of States' sovereign immunity. Finding that States may be sued under the Act for monetary damages would violate these principles and raise concerning implications for the future of state sovereign-immunity law.

**II.** There is no textual or historical basis to hold that the plan of the Constitutional Convention permits Congress to abrogate state sovereign immunity under the Intellectual Property Clause. The Court has already held that Congress lacks this power under the same Clause in the patent context. Because the Intellectual Property Clause is indivisible with respect to state sovereign immunity, it cannot be parsed to allow abrogation in copyright-infringement cases, but not for patent claims. And reversal would be improper even if the Court revisited its prior decision because there is no historical rationale for concluding that the Framers thought the Intellectual Property Clause contains power to abrogate state sovereign immunity.

**III.** The Act cannot be upheld as a valid exercise of Congress's remedial authority under Section 5 of the Fourteenth Amendment. Congress did not proceed under this provision when passing the Act, relying instead on its purported Article I power. Neither could Congress have justified Section 5 abrogation had it tried. States are not bad actors in the copyright space. They do not routinely violate private parties' copyrights, and there is certainly no

widespread, pervasive record of intentional copyright violations as Section 5 requires. To the contrary, States expend significant time and resources complying with copyright law and protecting the intellectual-property rights of the authors whose work they use.

## ARGUMENT

### I. SOVEREIGN IMMUNITY OF THE STATES IS CRITICAL TO OUR FEDERAL FORM OF GOVERNMENT.

The States' concurrent sovereignty with the federal government is an "indestructible" part of our constitutional framework. *Texas* v. *White*, 74 U.S. 700, 725 (1868), *overruled on other grounds*, *Morgan* v. *United States*, 113 U.S. 476 (1885); see also, *e.g.*, *Gregory* v. *Ashcroft*, 501 U.S. 452, 457 (1991) ("under our federal system, the States possess sovereignty concurrent with that of the Federal Government"). And "immunity from suit is a fundamental aspect" of this sovereignty—which "States enjoyed before the ratification of the Constitution, and which they retain today." *Alden* v. *Maine*, 527 U.S. 706, 713 (1999).

Last Term, the Court underscored the importance of state sovereign immunity in "our constitutional design," concluding that even *stare decisis* did not justify "continued adherence" to precedent that was contrary to the "understanding of sovereign immunity shared by the States that ratified the Constitution." *Franchise Tax Bd. of Cal.* v. *Hyatt*, 139 S. Ct. 1485, 1492 (2019). *Hyatt* advances the larger story of state

sovereign-immunity jurisprudence, a history that reveals deep respect for the broad, historical view of States' immunity, as well as course-corrections (often quite quick) on the occasions the doctrine has come out of joint. At bottom, it highlights state sovereign immunity's central role in our form of government, and the consequences reversal would have for the States under either of Petitioners' proffered theories.

### A. The Court's Sovereign-Immunity Doctrine Trends In Favor Of Robust Protection For The States.

**1.** The Constitution provides that "the judicial Power shall extend to all Cases . . . between a State and Citizens of another State" and "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2, cl. 1. This provision did not provoke debate at the Constitutional Convention because delegates did not believe that it could be interpreted to abrogate the sovereign immunity of the States. See Erwin Chemerinsky, Federal Jurisdiction, 398 (4th ed. 2003).

Nevertheless, concerns began to arise during the ratification period. Some delegates at state conventions believed Article III stripped States of their sovereign immunity. Edmund Pendleton of Virginia, for example, argued it was necessary to vest federal courts with jurisdiction over "controversies to which a state shall be a party." 3 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution, 549 (1891). By contrast, James Madison argued that Pendleton's

interpretation of the draft text was "much objected to" and "without reason," because "it is not in the power of individuals to call any state into court." *Id.* at 533. Further north, Alexander Hamilton echoed Madison's views. He reasoned that States are not "amenable to suit" unless they consent or the Constitutional Convention contemplated abrogation, and reassured delegates that "there is no colour to pretend that the State governments would, by [adopting the Constitution], be divested" of their immunity. The Federalist No. 81, 548-49 (Alexander Hamilton) (Jacob Cooke ed. 1961).

Madison, Hamilton, and others successfully persuaded skeptical delegates that ratifying the Constitution would not spell the end of state sovereign immunity. Less than four years after ratification, however, the Court interpreted Article III and the Judiciary Act of 1789 to do just that, permitting federal courts to exercise subject-matter jurisdiction over suits brought by private parties against the States. *Chisholm* v. *Georgia*, 2 U.S. 419, 450-51 (1793) (opinion of Blair, J.).

The reaction to *Chisholm* was swift. The very next day, a member of the House of Representatives introduced a concurrent resolution proposing a constitutional amendment to overturn *Chisholm*. See David P. Currie, The Constitution in Congress: The Federalist Period 1789-1801, 196 (1997). The Eleventh Amendment was submitted to the States within one month, and was ratified less than one year later. See Chemerinksy at 402.

**2.** The state sovereign-immunity landscape remained largely undisturbed for the next seven decades. Then, in the wake of the Civil War, Congress submitted the Fourteenth Amendment to the States for ratification—including Section 5, which gave Congress power "to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. The following years saw the Court outline the contours of Section 5, which was interpreted to include the powerful tool of abrogating state sovereign immunity. See, *e.g.*, *Civil Rights Cases*, 109 U.S. 3 (1883). Critically—and even with this clear authority under the Fourteenth Amendment—Congress must satisfy a demanding standard before wielding this power. Its intent to abrogate the States' immunity must be clear, it must act based on a widespread, demonstrated pattern of constitutional violations, and the remedy Congress chooses must be congruent and proportional to the harm it seeks to correct. See *City of Boerne* v. *Flores*, 521 U.S. 507, 520, 526 (1997).

Outside the Fourteenth Amendment context, it remained "unquestioned" during this period that a State cannot "be sued as defendant in any court in this country without [its] consent." *Cunningham* v. *Macon & B. R. Co.*, 109 U.S. 446, 451 (1883). In 1890, the Court relied heavily on whether a particular type of suit against the States was "contemplated" by the Constitutional Convention "when establishing the judicial power of the United States." *Hans* v. *Louisiana*, 134 U.S. 1, 15 (1890). Rejecting a contrary reading of the Eleventh Amendment's text, the Court

held that a State could not be hauled into federal court by one of its own citizens; any other "construction [would] never [have been] imagined or dreamed of" by the Founders. *Id.* A year later, the Court reemphasized the breadth of States' sovereign immunity and the need to interpret the Eleventh Amendment consistent with that traditional view: States' immunity is "absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court." *Pennoyer* v. *McConnaughy*, 140 U.S. 1, 9 (1891).

**3.** Almost a century later, two decisions marked the first modern deviation from the traditional mode of construing state sovereign immunity. First, *Nevada* v. *Hall*, 440 U.S. 410 (1979), held that States were subject to suit in other States' courts because there is nothing "implicit in the Constitution that requires all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.* at 418. And second, the Court held in 1989 that "the principle of sovereign immunity found in the Eleventh Amendment" did not bar Congress from abrogating States' immunity under the Commerce Clause. *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 19-20 (1989) (Brennan, J., opinion announcing the judgment of the Court).

Although not quite as swift as the congressional reaction to *Chisholm*, the Court itself corrected *Union Gas* a mere seven years later by overruling it in *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44

(1996). The Court explained in strong terms that overturning *Union Gas* was necessary because its rationale had "deviated sharply" from "established federalism jurisprudence" to the point it had "essentially eviscerated" it. *Id.* at 64. The Court was especially skeptical that Congress could use Article I to "expand the scope of the federal courts' jurisdiction under Article III"—this view contradicted the Court's "unvarying approach to Article III as setting forth the exclusive catalog of permissible federal-court jurisdiction." *Id.* at 65 (quotation and brackets omitted).

*Seminole Tribe* was a turning point. It began a "decade-long decisional trek" defined by a narrow view of Congress's abrogation power and an eye "to expand on state sovereign immunity." Joseph M. Pellicciotti & Michael J. Pellicciotti, *Sovereign Immunity & Congressionally Authorized Private Party Actions Against the States for Violation of Federal Law: A Consideration of the U.S. Supreme Court's Decade Long Decisional Trek, 1996-2006*, 59 Baylor L. Rev. 623, 624 (2007). In another seminal case, the Court held that "Congress may subject the States to private suits in their own courts" under Article I "only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design." *Alden*, 527 U.S. at 730-31 (citation omitted). Similarly, the Court rejected Congress's attempt to abrogate state sovereign immunity in the Patent Remedy Act under both the Intellectual Property Clause in Article I, Section 8 and Section 5 of the

Fourteenth Amendment. *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *Coll. Sav. Bank*, 527 U.S. 627, 635 (1999).

Indeed, the only exception during this period was a 2006 decision involving the Bankruptcy Clause. *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356 (2006). Setting aside whether *Katz* can be reconciled with *Seminole Tribe*'s holding that Congress cannot expand federal courts' jurisdiction through its Article I powers, this decision was limited to the unique context of the Bankruptcy Clause, and has not been expanded since.

By contrast, the Court reemphasized the need to retain a broad view of state sovereignty at least three times in the past two Terms. First, reasoning that the States kept the right "to do *all* . . . Acts and Things which Independent States may of right do" when they "declared their independence," the Court struck down a statute in which Congress dictated to state legislatures the details of permissible gambling laws. *Murphy* v. *Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475, 1478-81 (2018) (emphasis added; citation omitted). The trend continued last year in the criminal context: Although the Court granted review to reexamine the dual-sovereign exception to the Double Jeopardy Clause, it ultimately reaffirmed that States and the federal government are separate sovereigns with distinct legal interests because States retain "the attributes of sovereignty." *Gamble* v. *United States*, 139 S. Ct. 1960, 1968 (2019).

Most important for this case, last Term the Court also overruled *Hall*'s erroneous holding that States could be subject to suit without their consent in other States' courts. *Hyatt*, 139 S. Ct. 1485. The Court made clear that the default is set in favor of state sovereign immunity: Rather than asking whether the Constitution specifically *preserved* immunity in a particular context, the correct approach recognizes that "the States retain[ed] their sovereign immunity *except as otherwise provided*." *Id.* at 1493 (emphasis added). This method is the only way to uphold the "implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter." *Id.* at 1492 (quoting *Hall*, 440 U.S. at 443 (Rehnquist, J., dissenting)). Thus, even principles of *stare decisis* were not strong enough to "compel continued adherence to [*Hall*'s] erroneous precedent." *Id.*

### B. Reversal Would Have Serious Consequences For State Sovereign Immunity Beyond The Copyright Context.

Reversing the Fourth Circuit's decision—and thus permitting suits under the Act seeking monetary damages against States—cannot be reconciled with this Court's opinions or the traditionally broad view of state sovereign immunity they reflect. As discussed further in Parts II and III, Petitioners' arguments fail as a matter of precedent, constitutional text, and historical reality. Moreover, allowing abrogation under either Article I or Section 5 could unsettle state

sovereign-immunity doctrine well outside the intellectual-property law sphere.

If the Court were to hold the Act validly abrogated state sovereign immunity under the Intellectual Property Clause, it would become easier for Congress to invoke this powerful tool pursuant to its other enumerated powers, as well. "[G]reat and important" powers like the ability to abrogate States' immunity should not be found buried within Article I. William Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. 1, 15 (2017) (citing Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1640 (2002); Stephen E. Sachs, *Constitutional Backdrops*, 80 Geo. Wash. L. Rev. 1813, 1874-75 (2012)).

Permitting abrogation under Article I would also undercut *Seminole Tribe*, "the preeminent decision defining the contours of state sovereign immunity." Scott Dodson, *The Metes and Bounds of State Sovereign Immunity*, 29 Hastings Const. L.Q. 721, 743 (2002). The Court has found only one exception to *Seminole Tribe*'s rule that Article I does not contain implicit authority to expand the Article III judicial power, and that was grounded in the specific features of the Bankruptcy Clause and bankruptcy proceedings. *Katz*, 546 U.S. at 363-78. Especially because *Florida Prepaid* already rejected the idea that the Intellectual Property Clause conceals a similar source of authority, reversal could make *Katz* the rule instead of the rare exception—thus casting serious doubt on *Seminole Tribe*'s continued validity.

Indeed, a weaker view of *Seminole Tribe* could open the door to other attempts at abrogation under Article I that would be difficult to reconcile with the Constitution's dual-sovereignty framework. For instance, Congress could purport to make state agencies responsible for regulating weights and measures subject to suits seeking monetary damages in federal court for any errors. See U.S. Const. art. I, § 8, cl. 5. The breadth of Congress's powers under current Commerce Clause jurisprudence also highlights concerns with adopting a broader view of its power to abrogate state sovereign immunity. If the Court's decision in this case expands the list of Article I, Section 8 enumerated powers that contain implicit abrogation power, Congress might try to use the Commerce Clause as a future basis for abrogation. And allowing abrogation on that theory could effectively eviscerate States' sovereignty and pose a grave threat to our federal form of government.

The fallout from a decision under Congress's Fourteenth Amendment remedial authority could be similarly broad. As discussed further in Part III, Congress proceeded under Article I in the Act, and made no attempt to use Section 5 of the Fourteenth Amendment. Approving abrogation under these circumstances—where Congress did not even try to build the demanding record Section 5 requires, and the existing record cannot be retrofitted to meet that standard in any event—would be a serious affront to States' sovereignty. Lowering the Section 5 standard in this manner would make it easier for Congress to subject States to private suits in federal courts based

on little more than speculation of bad acts by the States. Yet abrogating state sovereign immunity is an extreme remedy that demands strict adherence to the Section 5 standard: a demonstrated record of widespread constitutional violations, and proof that Congress's chosen remedy is congruent and proportional to that harm. *City of Boerne*, 521 U.S. at 520.

In short, this case is not just about States' amenability to copyright-infringement claims seeking money damages. Reversal under either Article I or the Fourteenth Amendment would necessarily embrace a watered down view of state sovereign immunity and invite significant confusion in this important area of the law. Just last Term the Court was willing to overturn contrary precedent because sovereign immunity is part of the "implicit ordering of relationships within the federal system," *Hyatt*, 139 S. Ct. at 1492. Because the same is true here, the Court should stay the course.

## II. THE INTELLECTUAL PROPERTY CLAUSE DOES NOT CONFER POWER TO ABROGATE STATE SOVEREIGN IMMUNITY.

Absent a constitutional amendment granting Congress power to abrogate the States' immunity, States retain this sovereign prerogative "except as altered by the plan of the convention." *N. Ins. Co. of N.Y.* v. *Chatham Cty., Ga.*, 547 U.S. 189, 193 (2006) (citation omitted). The Court has already held that the Constitutional Convention did not, through "clear"

evidence, *Alden*, 527 U.S. at 760, give the new federal government power to subject States to suits in federal court under the Intellectual Property Clause. *Florida Prepaid*, 527 U.S. at 635. There is no basis to distinguish or depart from that decision here. And even if the Court were to consider the question on a blank slate, nothing in the Clause's text or history supports reversal, either.

### A. *Florida Prepaid* Controls Because The Intellectual Property Clause Is Indivisible With Respect To State Sovereign Immunity.

This is not the first time the Court has considered whether the Intellectual Property Clause is a valid source of authority to abrogate state sovereign immunity. Congress purported to "justif[y] the Patent Remedy Act" on the same basis, *Florida Prepaid*, 527 U.S. at 635 (citation omitted), but the Court rejected that expansive view of Article I. Instead, it held that the "Patent Remedy Act cannot be sustained under" the Intellectual Property Clause. *Id.* at 636 (citing *Seminole Tribe*, 517 U.S. at 72-73).

In light of *Florida Prepaid*, the only way for Petitioners' Article I argument to prevail is if the Intellectual Property Clause can support opposite state sovereign-immunity conclusions in the patent and copyright contexts—or in other words, if the Clause is divisible. Petitioners do not even try to make out that case, and for good reason.

There is no textual support for cutting the Intellectual Property Clause in two for purposes of abrogating States' sovereign immunity. The Clause speaks with one voice about Congress's authority to "secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8. There is no colon, semicolon, comma, or period separating discussion of Congress's power to protect the interests of "Authors and Inventors" in their "Writings and Discoveries." And unsurprisingly in light of this drafting choice, the delegates to the Constitutional Convention voted on the Intellectual Property Clause as a single proposal. 2 Max Farrand, Records of the Federal Convention of 1787, 509 (1911).

These grammatical and historical clues strongly suggest that the Framers considered the Intellectual Property Clause to be indivisible. This Court should do the same. Indeed, the Court has already applied similar analysis to Article I, Section 8, finding no "principled distinction" for purposes of state sovereign immunity between the enumerated power to "regulate commerce . . . among the several states, and with the Indian tribes." *Seminole Tribe*, 517 U.S. at 63 (quoting U.S. Const. art. I, § 8, cl. 3). The Intellectual Property Clause provides an even weaker basis for a "principled distinction" than the Commerce Clause, which uses commas to set off its references to interstate commerce and commerce with the Indian tribes. *Florida Prepaid* should thus resolve this case, too.

And just as there is no basis to distinguish *Florida Prepaid*, there is also no reason to backtrack from its holding altogether. Although *Florida Prepaid*'s Article I analysis was relatively brief, the discussion cannot be dicta because the case raised two potential grounds for abrogation—the Intellectual Property Clause and Section 5 of the Fourteenth Amendment. *Florida Prepaid*, 527 U.S. at 647-48. The Court could not void Congress's attempt to strip States of their immunity without rejecting *both* theories. See also Resp. Br. 21.

Nor should the Court take up Petitioners' fleeting invitation—in one sentence—to overrule *Florida Prepaid*. See Pet. Br. 32. The question on which the Court granted review did not ask to overturn precedent. Cf. *Yee* v. *City of Escondido, Cal.*, 503 U.S. 519, 535 (1992) ("framing of the question presented has significant consequences" as "we ordinarily do not consider questions outside those presented"). More importantly, Petitioners do not analyze any of the factors the Court considers when deciding whether to overrule a prior decision. See *Hyatt*, 139 S. Ct. at 1499 (describing factors).

If anything, those factors militate against overruling *Florida Prepaid*. When the Court overturned *Hall* last Term, it embraced a more expansive view of state sovereign immunity, even while acknowledging that reliance interests pushed the other direction. *Hyatt*, 139 S. Ct. at 1499. Those concerns are not present here, where States and intellectual property owners have structured their

contracts to align with *Florida Prepaid*, and no federal appellate court has treated copyright-infringement actions different from patent-infringement claims. Moreover, the factors that pushed for overturning *Hall*—and thus *protecting* the States' immunity—support *stare decisis* here. *Hall*'s Achilles heel was that it "failed to account for the historical understanding of state sovereign immunity" and thus stood "as an outlier in" the Court's "sovereign-immunity jurisprudence." *Id.* at 1499. In this case, by contrast, overruling precedent would *create* a jurisprudential outlier by minimizing the robust and historically based view of state sovereign immunity that *Hyatt* reaffirmed.

### B. The Plan Of The Convention Did Not Include Limiting State Sovereign Immunity Under The Intellectual Property Clause.

Even if the Court were inclined to cabin or reconsider *Florida Prepaid*, reversal would still be unwarranted. Demonstrating that the plan of the convention gave Congress power to abrogate state sovereign immunity is no easy task: It requires "compelling evidence" that the States agreed to this result. *Alden*, 527 U.S. at 731 (quoting *Blatchford* v. *Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 781 (1991)). That degree of evidence does not exist here.

**1.** The copyright portion of the Intellectual Property Clause can be traced to the 1710 English Statute of Anne. See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.). The Statute of Anne gave authors the sole

right to publish work for a limited time—21 years for existing works, and 14 years with one 14-year renewal right for new works. *Id.* Copyright protections did not become widely available on this side of the Atlantic, however, for another 70 years. See Edward C. Walterscheid, *To Promote the Progress of Science and the Useful Arts: The Background and Origin of the Intellectual Copyright Clause of the United States Constitution*, 2 J. Intell. Prop. L. 1, 20 (1994). In 1783, the Continental Congress urged States to enact copyright protections; over the next several years, every State except Delaware answered this call. See Copyright Enactments, Laws Passed in the United States Since 1783 Relating to Copyright, 1-21, Copyright Office Bulletin No. 3 (rev.) (1973) ("Copyright Enactments"). Each state statute was modeled on the Statute of Anne. See L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. Copyright Soc'y U.S.A. 365, 376 (2000); Copyright Enactments at 1-21 (compiling the statutes passed in each State).

The Statute of Anne provided remedies against any "bookseller, printer or other person whatsoever" who violated a copyright. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.). Similarly, the state statutes created remedies against a "person or persons." See Copyright Enactments at 1-21. The phrase "person or persons" (like "person" in the Statute of Anne) gives insight into the scope of copyright remedies at the time of the Constitutional Convention. The word "person" meant "[i]ndividual or particular man or woman" in the late 1700's. Samuel Johnson,

Dictionary of the English Language (3d ed. 1768). Its common meaning thus did *not* include States or other governmental entities.

After ratification of the Constitution, the First Congress quickly exercised its new power under the Intellectual Property Clause to enact the Copyright Act of 1790. This statute addressed problems that had arisen from States' limited jurisdiction within their own borders, and for the first time gave authors protection against copyright infringement in other States. 1 Stat. 124. Like the state laws that preceded it, the Copyright Act of 1790 provided substantially the same protections as the Statute of Anne. See *id.* Also following the template of the Statute of Anne and the States' copyright laws, the federal statute authorized remedies against infringements by a "person or persons" only. *Id.*

This statutory progression refutes the idea that the First Congress—much less the States—thought the new constitutional framework included an ability to subject States to copyright-infringement suits in federal court. If the founding generation believed otherwise, the Copyright Act of 1790 would have been an ideal opportunity to do so, especially in light of the problems from not having a national law that had motivated Congress to act in the first place.

Absence of purported authority over States in founding-era copyright legislation is also consistent with the Framers' statements about the Intellectual Property Clause. The Clause was considered a "miscellaneous power," Federalist No. 43, 288 (James

Madison), and it was passed unanimously at the Convention with no debate, Farrand at 509. This unanimity suggests that the delegates did not consider this Clause to be one of the Constitution's more important or controversial elements. See Morgan Sherwood, *The Origins and Development of the American Patent System*, 71 Am. Scientist 500, 500 (1983). Yet given that immunity is a key piece of sovereignty that the States have consistently and closely guarded, it seems beyond belief they would have surrendered it without considered discussion—or in fact, any remark at all—through one of the Constitution's "miscellaneous" powers.

**2.** With history against them, Petitioners rely heavily on the terms "securing" and "exclusive Right" in the Intellectual Property Clause. The text cannot bear this weight. Petitioners' premise that the Clause conferred an exclusive power on Congress is flawed, and in any event, exclusive legislative authority does not necessarily include power to subject States to liability under the laws Congress creates.

To begin, the word "exclusive" in the Intellectual Property Clause does not refer to Congress. The Clause allows Congress to secure for *authors and inventors* the "exclusive" right to their works; it does not make Congress the only body with that power. See U.S. Const. art. I, § 8, cl. 8. Ignoring this grammatical reality would create considerable tension with established law. Both Congress and this Court, for example, have acknowledged that Congress's copyright power does not automatically

divest States of authority to regulate in this area, too. See *Goldstein* v. *California*, 412 U.S. 546, 558 (1973); 17 U.S.C. § 301; see also H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., 130 (1976) (explaining that 17 U.S.C. § 301 is an express preemption provision designed "to preempt and abolish any rights under the common law or statutes of a state that are equivalent to copyright"); Jeanne Fromer & Christopher Sprigman, Copyright Law: Cases and Materials, 676 (2019) (explaining that there is no field preemption for copyright law).

History also undercuts Petitioners' proposed reading. After all, state-level copyright law is not new. As discussed above, 12 of the 13 States had copyright laws when the Constitution was ratified, and those laws did not disappear post-ratification. Neither did Congress seek to preempt those laws in the Copyright Act of 1790. See generally 1 Stat. 124. The fact that federal and state copyright law existed in tandem throughout the founding era shows that Congress viewed its power under the Intellectual Property Clause more modestly than Petitioners do. Similarly, the fact that early federal copyright law continued the tradition of allowing damages against "persons"—not States—refutes the idea that power to "secur[e]" authors' rights reveals a plan-of-convention agreement for Congress to subject States to suit in federal court.

Petitioners' argument also proves too much—and would have dangerous consequences for state sovereign immunity more broadly. Even taking at

face value the notion that the Intellectual Property Clause gives Congress exclusive power to enact copyright legislation, it is a logical leap to equate exclusive legislative authority with the ability to abrogate state sovereign immunity. The Constitution vests Congress with power to preempt state laws in a host of areas, but disabling state legislation in a particular zone does not mean States can be hauled into court under the relevant federal law. That, however, is the theory Petitioners ask this Court to adopt. Reversal on this basis would thus create the potential for abrogating state sovereign immunity in any area where Congress has power to preempt state law. This far-reaching approach directly contradicts *Seminole Tribe*, which emphasized that the "background principle of state sovereign immunity" does not disappear "when the subject of the suit is an area" that is "under the exclusive control of the Federal Government." 517 U.S. at 72.

**3.** Finally, *Katz*'s analysis of the Bankruptcy Clause does not support concluding that the plan of the convention allows Congress to make States amenable to suit in federal court under the Intellectual Property Clause. As an initial matter, the Court need not decide whether *Katz*'s clause-by-clause approach is reconcilable with *Seminole Tribe*'s more categorical language indicating that Article I may never be a valid basis for abrogation. Even assuming *Katz* is correct, its conclusion does not govern here in light of the important differences between the Bankruptcy Clause and the Intellectual Property Clause.

*First*, the Bankruptcy Clause's text makes a stronger case than the language the Intellectual Property Clause employs. The Bankruptcy Clause gives Congress power to establish "*uniform* laws on the subject of bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4 (emphasis added). The idea of uniform laws—without competition from myriad state statutes—is a better textual hook than "secur[e]" for concluding Congress's bankruptcy power might restrict States' preexisting immunity.

*Second*, statements made during and after ratification also support treating the Bankruptcy Clause different from the Intellectual Property Clause. Unlike the Intellectual Property Clause's "miscellaneous" power, the Bankruptcy Clause was specifically designed to promote "the harmony and proper intercourse among the States." Federalist No. 42, 282 (James Madison). Creating a more effective national government with the ability to foster harmony among the disparate States was, of course, the reason the Articles of Confederation were scrapped in favor of the Constitution. And it makes more sense that States agreed to sacrifice some of their sovereign prerogatives in pursuit of this goal than in connection with a "miscellaneous" power to enact federal copyright law *alongside* state laws.

*Third*, there are historical differences between the two Clauses. While, as discussed above, pre-ratification copyright laws did not support an intent to abrogate States' sovereign immunity, the pre-ratification bankruptcy laws paint a different picture.

Between 1755 and 1763, four Colonies passed bankruptcy laws that permitted discharge of debts. Bruce H. Mann, Republic of Debtors: Bankruptcy in the Age of American Independence, 59-65 (2002). Pennsylvania followed suit after the Colonies declared independence. *Id.* at 177-79. Everyone recognized that the purpose of these laws was to give debtors a new start, yet it was difficult to achieve this goal while debtors remained subject to a patchwork of laws state-to-state. See *id.* at 179. When the Founders gathered for the Constitutional Convention, they were thus well aware of the need for uniform bankruptcy laws. Indeed, one delegate had very recently argued a case before the Philadelphia Court of Common Pleas that underscored the need for uniformity. See *James* v. *Allen*, 1 U.S. 188, 190 (C.C.P. Phila. 1786).

*Fourth*, the significant shift in federal-state power that the Bankruptcy Clause represented was recognized early in the nation's history. For example, Thomas Jefferson expressed concern with a 1792 bankruptcy bill that raised a "fundamental question" about the federal government's relationship with the States. 24 The Papers of Thomas Jefferson, 722-23 (Julian P. Boyd *et al.*, eds. 1990). There is no evidence of similar concern over the Intellectual Property Clause.

* * *

Reversal under Congress's Article I powers would require setting aside this Court's holding in the almost identical case of *Florida Prepaid*, or drawing distinctions between the patent and copyright aspects

of the Intellectual Property Clause that neither its text nor history can bear. There is no support for either route, especially where the strongest decision Petitioners cite turned on different language, different statutory backdrops, and different concerns about the nature of state and federal power under the Constitution. Because evidence that the States gave Congress power to subject them to suit under the Intellectual Property Clause is far from "compelling," *Alden*, 527 U.S. at 731, the Court should affirm the States' sovereignty in this sphere.

## III. CONGRESS DID NOT VALIDLY ABROGATE STATES' SOVEREIGN IMMUNITY UNDER THE FOURTEENTH AMENDMENT.

Congress may abrogate States' sovereign immunity under Section 5 of the Fourteenth Amendment only through "appropriate" legislation intended to enforce one of the Amendment's substantive guarantees. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976). Although this power can be "broad" when wielded in proper circumstances, *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 732 (1982), it is not "unlimited." *Tennessee* v. *Lane*, 541 U.S. 509, 520 (2004). The Court has blessed abrogation under Section 5 where Congress clearly invokes its authority under the Fourteenth Amendment, identifies a history of "widespread and persisting deprivation of constitutional rights," and adopts remedial measures showing "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, 526. Here, the text and history of the Act—as well as current evidence about States' respect for intellectual-property rights—do not support abrogation of state sovereign immunity for private copyright-infringement claims.

### A. The Court Should Not Lightly Infer Intent To Abrogate State Sovereign Immunity Under Section 5.

Flowing from the respect due to co-sovereigns in our federal form of government, Congress's authority must be clear when it abrogates the sovereign immunity of the States. Abrogation is a serious remedy that upends "the usual constitutional balance between the States and the Federal Government." *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985). Thus, "it is incumbent upon the federal courts to be certain" that Congress meant to abrogate the States' immunity before ruling on the validity of purported abrogation. *Id.* at 243.

**1.** Petitioners argue that there is no "magic words" requirement for this analysis, and that courts can be certain Congress intended to act under the Fourteenth Amendment even where a statute does not mention Section 5 directly. Pet. Br. 41-42 (citing *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62 (2000); *EEOC* v. *Wyoming*, 460 U.S. 226 (1983); *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 135 (1948)). Yet as this Court has emphasized in cases decided after each of the cases Petitioners cite, for Congress to "abrogate the States' immunity from suit pursuant to its powers under § 5," it "must 'make its intention to abrogate *unmistakably*

*clear in the language of the statute*.'" *Coleman* v. *Court of Appeals of Md.*, 566 U.S. 30, 35 (2012) (emphasis added; brackets omitted) (quoting *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 726 (2003)).

Congress has done exactly that where this Court affirmed abrogation of state sovereign immunity. The Civil Rights Act of 1964—the most sweeping use of Congress's enforcement authority under Section 5—provides a ready example. Congress made clear in the original statutory text its purpose to end "discrimination because of race, color, religion, sex, or national origin." Pub. L. No. 88-352, 78 Stat. 241 (1964). And when it amended the Civil Rights Act in 1972, there was no doubt that Congress "act[ed] under s[ection] 5 of the Fourteenth Amendment." *Fitzpatrick*, 427 U.S. at 447, 453 n.9.

Similarly, Congress directly referenced the Fourteenth Amendment when it abrogated state sovereign immunity as part of the Family and Medical Leave Act. See *Hibbs*, 538 U.S. at 727 n.1. In that statute, Congress addressed "employment discrimination on the basis of sex" in a deliberate effort to enforce "the Equal Protection Clause of the Fourteenth Amendment." 29 U.S.C. § 2601(b)(4). So too when Congress abrogated States' sovereign immunity in the Americans with Disabilities Act: Congress claimed its "power to enforce the fourteenth amendment" to remedy "discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). Congress knows how to make clear when it acts under Section 5.

To be sure, a clear statement is not the only piece of the abrogation analysis. Notwithstanding the ADA's clear textual statement, for example, the Court held that Title I "was not a valid exercise of Congress's § 5 power." *Lane*, 541 U.S. at 521 (citing *Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001)). And the Court demanded strong evidence before upholding abrogation in Title II as "applie[d] to the class of cases implicating the fundamental right of access to the courts." *Id.* at 531. Nevertheless, although clear evidence of Congress's intent to strip States' immunity is not dispositive, the ADA provides an example of what it means to satisfy this threshold requirement.

**2.** In contrast to Congress's clarity when invoking Section 5 in other statutes, all evidence here shows that Congress did not proceed under the Fourteenth Amendment, but rather under the Intellectual Property Clause alone. Although the Act's text is silent on this score, see 17 U.S.C. § 511(a), relevant statements from Congress show that the Fourteenth Amendment was not on its mind.

Looking first to the House of Representatives, the House's committee report described the Act's constitutional authority as "the Copyright Clause of Article I." H.R. Rep. No. 101-282, pt. I, 7 (1989). This statement comports with testimony included in the House Report: Two constitutional lawyers cited Article I's Intellectual Property Clause—and not the Fourteenth Amendment—to buttress their views that Congress had authority to pass the Act. *Id.* at 7 n.32;

see also *Copyright Remedy Clarification Act and Copyright Office Report on Copyright Liability of States: Hearings on H.R. 1131 Before the Subcomm. on Courts, Intellectual Prop. & the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong., 61 (1990) ("House Hearing") (statement of Carol F. Lee); *id.* at 84 (statement of Barbara Ringer). Similarly, at least one representative opined that the Act was constitutional under Congress's "article I powers." *Id.* at 78 (statement of Rep. Kastenmeier). And most telling, the House Report expressly contrasts Congress's powers under Section 5 with the broader "plenary power" Congress believed it possessed under Article I's Intellectual Property Clause. H.R. Rep. No. 101-282, pt. I at 7.

The Senate likewise relied exclusively on Article I. The Senate Report explained that "Congress has the power under Article I of the Constitution to abrogate States' immunity when it legislates under . . . the Copyright Clause." S. Rep. No. 101-305, 6 (1990). The Report went on to reject the position that "only the fourteenth amendment gives Congress the power to subject States to private suits for money damages," *id.* at 8 n.16—again, highlighting an intent to rely on Article I's Intellectual Property Clause and not Section 5. And statements by prominent Senators provide similar insight into the Senators' views. For example, Senator Grassley stated that "Congress has plenary powers in the area of Copyright Law," and that this power "is clearly spelled out in the Constitution in Article I, Section 8." *The Copyright Clarification Act: Hearing on S. 497 Before the*

*Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary*, 101st Cong., 4 (1990) ("Senate Hearing"). In his words, this power was "what this bill is all about." *Id.*

There is thus no evidence that Congress tried to abrogate the States' immunity under Section 5. And where it is "unmistakably clear" that Congress acted pursuant to its purported Article I powers instead, the Court should take Congress at its word. Requiring Congress to invoke the Fourteenth Amendment directly or by clear implication before it takes the extraordinary step of abrogating state sovereign immunity is hardly a demanding ask. This level of accountability is preferable to shoring up Congress's work after-the-fact in an area of law that bears directly on the dignity of the States and the nature of our federal regime.

### B. Abrogation Would Have Been Improper Under Section 5 Even If Congress Proceeded Under That Authority.

Looking beyond the inconvenient fact that Congress did not ground its attempt to strip States of sovereign immunity in Section 5, there is also no way to cobble together support for abrogation from the record Congress did consider—nor, for that matter, from the record that exists today.

**1.** As an initial matter, the Act lacks any congruence or proportionality between the alleged constitutional violations—intentional copyright infringements—and the extreme remedy Congress

chose—abrogation of States' sovereign immunity. As Respondents explain, Congress did not tailor its remedies to the degree and severity of the purported problem it tried to correct. Resp. Br. 52-55. This failure is particularly fatal in comparison to the more careful approach evident in other remedial statutes that, unlike here, seek expressly to protect rights that the Fourteenth Amendment secures. *Id.* at 53-55.

**2.** More fundamentally, there is also no way to refashion the record Congress marshaled in support of the Act to reveal the type of "widespread and persisting deprivation of constitutional rights" needed to justify abrogation. *City of Boerne*, 521 U.S. at 520. *Florida Prepaid*, which held that Congress did not validly abrogate the States' sovereign immunity under Section 5 in the patent-infringement context, provides a blueprint for the almost identical copyright-infringement analysis here. Critically, the Court required Congress to establish a "pattern" of misconduct by the States, and emphasized that examples of mere infringement did not count: Congress needed to show "a pattern of *constitutional* violations." *Florida Prepaid*, 527 U.S. at 640 (emphasis added).

Key to *Florida Prepaid*'s holding that the congressional record did not rise to that level was evidence showing that "[S]tates are willing and able to respect patent rights." 527 U.S. at 640 (quoting *Patent Remedy Clarification Act: Hearing on H.R. 3886 before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the*

*House Committee on the Judiciary*, 101st Cong., 2d Sess., 56 (1990)). Willingness and ability to pay for patented inventions was important because infringement becomes a matter of constitutional import only where it is *intentional*. See *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) (explaining that "deliberate decisions of government officials to deprive a person of . . . property" are required to sustain a due-process challenge). By contrast, a State'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." *Florida Prepaid*, 527 U.S. at 645 (citing *Daniels*, 474 U.S. at 328).

So too here. If States are willing and able to pay for copyrighted materials, it is unlikely Congress could have found a pattern of deliberate copyright violations by the States. As in *Florida Prepaid*, the most that could be inferred from evidence that States are willing and able to pay for copyrighted materials is that sometimes state actors negligently infringe authors' rights. See *Florida Prepaid*, 527 U.S. at 645. In fact, that is all the congressional record showed here.

Congress had scant evidence that States were either unwilling or unable to pay for copyrighted material. Indeed, the primary sponsor in the House conceded that "there have not been any significant number of wholesale takings of copyright rights by States or State entities." House Hearing at 48. The corresponding Senate sponsor admitted that state

copyright infringement was not a "big problem." Senate Hearing at 130. These admissions are especially telling because Congress had elicited responses from a broad range of interested sources through the registrar of copyrights over the course of one year, and uncovered only five comments documenting alleged difficulties enforcing copyright claims against the States. See U.S. Copyright Office, *Copyright Liability of States and the Eleventh Amendment: A Report of the Register of Copyrights*, 7 (June 1988). Nor did the congressional hearings expose a pattern of state copyright infringement, much less intentional violations. Only a few more purported issues came to light at the hearings, for a total of about one dozen allegations that States had violated private parties' copyrights. See House Hearing at 139-40 (testimony of Bert van der Berge); Senate Hearing at 151-52 (statement of William Taylor).

In *Florida Prepaid*, "eight patent-infringement lawsuits prosecuted against States" was not enough to show the requisite pattern of constitutional violations. 527 U.S. at 640. Even crediting every allegation in the record here—despite accuracy concerns, Resp. Br. 44-46, and the fact that Congress did not focus on claims of *deliberate* infringement—adding four examples to the *Florida Prepaid* tally cannot be enough to justify the extreme step of abrogating the immunity of the States.

**3.** Although the validity of abrogation rises or falls with the record when Congress passed the Act,

there is no reason to believe Congress could have found evidence that States are not willing and able to respect copyrights with a more targeted search—nor if it undertook that analysis today. Indeed, the missing pattern of constitutional violations is unsurprising because States respect copyrights and place high importance on paying for the copyrighted materials they use. The lack of an adequate record to support abrogation under Section 5 is thus no fluke because Congress thought (incorrectly) it could invoke the Intellectual Property Clause and did not bother looking for evidence to support a case under the Fourteenth Amendment instead. In other words, States are not bad actors.

A memorable historical example illustrates the point: The Oklahoma Legislature adopted the Rogers and Hammerstein song *Oklahoma!* as the official state song only after entering into the legislative record a 1953 letter from Hammerstein that expressly authorized and encouraged "all the people of Oklahoma" to "play and sing it anywhere to their heart's content." See Rick Rogers, *March 31, 1943 'Oklahoma!' Gives States Theme Song*, The Oklahoman (Apr. 18, 1999). And when copyright questions arose decades later, the Rogers and Hammerstein Organization agreed to a ceremonial, one-time royalty payment of $1 consistent with that earlier letter. *Id.*

Public receipts show that States respect and comply with copyright law as well. States have policies requiring compliance, and spend millions of

dollars every year licensing and purchasing copyrighted material. In West Virginia, for example, a significant number of the total number of contracts the State enters into involve purchasing or licensing copyrighted software. These contracts involve a wide array of entities and range from a few thousand dollars up to millions. Similarly, from 2010 to the present, Texas spent over $571 million licensing copyrighted software.[2]

The practices of state universities also show the weight States give to ensuring that their employees and agents respect copyrights. As just two examples, the University of Michigan and Purdue University both have written policies specifically requiring their employees to respect private parties' copyrights.[3] It is likewise the express "policy of the University of Texas System and its institutions to follow the United States

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[2] Tex. Comptroller's Office, *Payments to Payee*, *available at* https://bivisual.cpa.texas.gov/QvAJAXZfc/OpenDocNoToolbar.htm?document=Documents%2FTR_Master_UI.qvw&host=QVS%40daupswap80&anonymous=true&select=LB00,08&sheet=SH30 (results visible by selecting FYs 2010 to present and "Intangible Property – Computer Software" in "Comptroller Object" field) (last visited Sept. 27, 2019).

[3] See Univ. of Mich, *Copyright Compliance*, *available at* https://safecomputing.umich.edu/be-aware/copyright-compliance (last visited Sept. 27, 2019); Purdue Univ., *Welcome to the University Copyright Office*, *available at* https://www.lib.purdue.edu/uco/index.html (last visited Sept. 27, 2019).

Copyright Law of 1976, as amended."[4] Many universities also pay annual fees to get legal access to copyrighted materials from the Copyright Clearance Center, which provides coverage for "faculty, researchers and other staff members [to] collaborate freely, while respecting the intellectual property of others."[5]

Further, state entities and employees have little incentive to violate copyright laws and other intellectual-property protections. Because public employees do not have "equity stakes in their [divisions'] operations" and States "do not budget with a profit-maximizing framework," state actors "cannot expect to profit in any significant way from infringing activities." Peter S. Menell, *Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights*, 33 Loy. L.A. L. Rev. 1399, 1433 (2000). To the contrary, copyright infringement makes public employees vulnerable "to being sued in their personal capacity for monetary damages" and exposes their employers to "embarrassing public scrutiny." *Id.*

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[4] Univ. of Tex. System, *UTS 107 Use of Copyrighted Materials*, *available at* https://www.utsystem.edu/sites/policy-library/policies/uts-107-use-copyrighted-materials (last visited Sept. 27, 2019).

[5] Copyright Clearance Center, *Annual Copyright License*, *available at* http://www.copyright.com/academia/annual-copyright-license/ (last visited Sept. 27, 2019).

In short, States "are willing to accept the obligation of copyright law" and take significant steps to ensure compliance. Jennifer J. Demmon, *Congress Clears the Way for Copyright Infringement Suits Against States: The Copyright Remedy Clarification Act*, 17 J. Corp. L. 833, 858 (1992). Although there may be instances of negligent copyright infringement by States, violations are generally rare and do not amount to a pattern of constitutional violations that could justify abrogating state sovereign immunity under Section 5. See John T. Cross, *Suing the States for Copyright Infringement*, 39 Brandeis L.J. 337, 402-03 & n.298 (2001) ("it may well be that most state actors who infringe copyrights do not realize that they are infringing"). In any event, concluding that Congress acted based on "a history of 'widespread and persisting deprivation of constitutional rights'" by the States, *Florida Prepaid*, 527 U.S. at 645 (citation omitted), would be built on speculation, not data. As co-sovereigns within our constitutional system, the States deserve better.

## CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted.

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