

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 FOR 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 Act's abrogation of state sovereign immunity was invalid?

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INTRODUCTION

The Copyright Remedy Clarification Act (the Copyright Remedy Act) is one of three laws, all passed in the early 1990s, that purported to abrogate state sovereign immunity for intellectual-property claims.¹ Two decades ago, this Court struck down the patent and trademark statutes in this trio of abrogation laws. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636, 647 (1999) (patents); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (trademarks).

Under this Court's precedents, the Copyright Remedy Act is likewise unconstitutional. On issue after issue, *Florida Prepaid* and other decisions of this Court foreclose the arguments made by petitioner Rick Allen here.

For example, the Court has held that Congress cannot abrogate state sovereign immunity under the Intellectual Property Clause of Article I. *Florida Prepaid*, 527 U.S. at 636. That categorical holding applies fully in this case.

Likewise, under Section 5 of the Fourteenth Amendment, the Court has held that abrogation is an

¹ Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990) (codified at 17 U.S.C. §§ 501(a), 511); *see also* Patent and Plant Variety Protection Remedy Clarification Act, Pub. L. No. 102-560, 106 Stat. 4230 (1992) (codified at 35 U.S.C. §§ 271(h), 296(a)); Trademark Remedy Clarification Act, Pub. L. No. 102-542, 106 Stat. 3567 (1992) (codified at 15 U.S.C. §§ 1122, 1125(a)).

aggressive remedy that is appropriate only to address grave constitutional problems. *Id.* at 645-47. Here, however, Congress did not even examine whether the alleged problem that underlay the Copyright Remedy Act—a few allegations of copyright infringement by States—violated the Constitution.

To try to overcome these obstacles, Allen asks the Court to overrule *Florida Prepaid* and the other precedents that bar his claims. Br. 32. But Allen has not justified such a departure from precedent.

To the contrary, for several reasons, *stare decisis* has enhanced force here. This case involves property rights, where reliance interests are “at their acme.” *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2410 (2015). In addition, state sovereign immunity is protected by a “web of precedents” that would all be threatened if one strand were pulled away. *Id.* at 2411. Further, Congress retains the power to enact a new copyright-abrogation statute that complies with the Constitution’s requirements. When this kind of legislative solution is possible, the Court generally defers to the legislative process. *See id.* at 2409.

Ultimately, then, the proper forum for Allen’s concerns is Congress. If state copyright infringement were truly a grave constitutional problem that warranted expansive remedial legislation, Congress could abrogate state sovereign immunity after compiling an adequate legislative record. The record here, however, cannot justify the Act’s sweeping abrogation.

STATEMENT

This case concerns the online display of a few copyrighted images by a state agency whose purpose is to preserve and promote state history.

When a historically significant shipwreck was discovered off the coast of North Carolina, the agency employed a team of professional divers and research scientists to excavate, preserve, and study the wreck.

The petitioner here, a local videographer named Rick Allen, documented the excavation. The agency secured written guarantees that it could use the resulting materials to further its educational mission.

Despite these agreements, Allen sued the agency for copyright infringement, citing the agency's display of a handful of images in educational videos and a museum newsletter.

In the decision below, the Fourth Circuit held that sovereign immunity bars Allen's copyright claim.

A. The State excavates the Queen Anne's Revenge.

In 1996, a historically significant shipwreck was discovered off the coast of North Carolina.

The wreck is the remains of the Queen Anne's Revenge, the flagship of the famed pirate Blackbeard. Because of the wreck's historical and archaeological value, the North Carolina Department of Natural and Cultural Resources began a decades-long process to

recover and preserve the wreckage. Pet. App. 7a.² Over the years, the State has made substantial investments in these ongoing preservation efforts. For example, the State has established a research facility, dedicated to studying the wreck, at a leading public university.³

Under state and federal law, the State owns the wreck and all its remains. 43 U.S.C. § 2105(c); N.C. Gen. Stat. § 121-22; *see* Pet. App. 7a.

The Department entered into an agreement with Intersal, a private firm, to recover the wreck. Pet. App. 7a. The agreement allowed Intersal to make “commercial narrative accounts” of the project. *Id.* The Department retained the right to “publish accounts relating to [the project] for noncommercial, educational, or historical purposes.” *Id.* at 8a.

Rick Allen is a local videographer. Intersal retained Allen to document the wreck’s salvage. *Id.* The Department agreed to allow Allen to accompany its team of professional divers and scientists to document their recovery efforts. Allen registered copyrights for his photographs and video footage of the recovery. *Id.* at 8a-9a.

In 2013, Allen accused the Department of copyright infringement, citing a few images that were posted online. The parties settled the dispute. *Id.* at 9a. In the settlement agreement, Allen explicitly

² *See Queen Anne’s Revenge Project*, <http://bit.ly/2kxGEXv>.

³ *See Queen Anne’s Revenge Lab*, <http://bit.ly/2lO0vSz>.

warranted that the agreement was not an admission of infringement. C.A. J.A. 84. He also agreed not to disparage the Department's conduct as infringement. C.A. J.A. 89.

To resolve the dispute and to "continue their mutual efforts to promote the history of Blackbeard [and] the *Queen Anne's Revenge*," C.A. J.A. 84, the parties agreed that the Department could "retain, for research purposes, archival footage, still photographs, and other media" of the shipwreck. Pet. App. 10a. The agreement also authorized the Department "to display noncommercial digital media" of the shipwreck online. *Id.*

Allen further agreed that the Department may "mak[e] records available to the public" under North Carolina's public-records law. *Id.* at 11a. When Allen signed the agreement, North Carolina's definition of a public record included media that the State obtains in connection with public business. N.C. Gen. Stat. § 132-1(a). The state legislature later enacted a statute to clarify that this preexisting definition included images of shipwrecks. Pet. App. 13a.⁴

⁴ Allen claims that the State enacted this law "to insulate itself from any liability (state or federal)" for copyright infringement. Br. 13. That assertion makes no sense. As the North Carolina Attorney General has explained in an advisory opinion, "the federal law of copyright" controls over state public-records law. Advisory Opinion, N.C. Att'y Gen., 1993 WL 939498, at *1 (Oct. 19, 1993). The opinion also explains that the State may use copyrighted information "according to the terms of [a] contract or with the express agreement" of the copyright owner. *Id.*

B. Allen sues the Department for copyright infringement.

The Department separately posted online five short videos that show snippets of Allen's footage. A state-run maritime museum also showed one of Allen's images in a newsletter. *Id.* at 12a. These materials were made freely available online to further the Department's educational mission.

Allen then brought this lawsuit, claiming that the Department's use of the images was copyright infringement. Allen sued the Department, as well as several Department employees personally. He also brought parallel state-law tort claims. *Id.* at 12a-13a.

In his complaint, Allen also alleged that the defendants violated his due-process rights by amending the State's public-records law. *Id.* at 39a-41a. However, he did not claim that the Department's *use of the images* violated due process. C.A. J.A. 35-37.

Shortly after Allen filed his complaint, the Department removed the images from their online locations. Pet. App. 12a.

The Department also moved to dismiss. It argued that sovereign immunity bars copyright claims that seek money damages. The district court denied the motion. *Id.* at 14a.

The district court acknowledged that this Court has long held that States are usually immune from

lawsuits in federal court. *Id.* at 54a (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)). The court opined that this Court’s rulings are “flawed” and “harm[ful] to the fundamental rule of law.” *Id.* Despite this view, the district court acknowledged that, under binding precedent, Congress cannot abrogate state sovereign immunity by using its Article I power to regulate copyrights. *Id.* at 50a.

The court went on to hold, however, that Congress had the power to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment. *Id.* at 53a. In the court’s view, the legislative record of the Copyright Remedy Act contains “sufficient evidence of infringement of copyrights by the states” to justify abrogation under Section 5. *Id.* at 52a.

The Fourth Circuit reversed. The court held that Congress cannot abrogate sovereign immunity under Article I’s Intellectual Property Clause. The court rejected Allen’s arguments to the contrary as squarely foreclosed by this Court’s precedents. *Id.* at 18a-20a.

The Fourth Circuit also held that the Copyright Remedy Act was not valid under Section 5.

The court first observed that Congress, in enacting the Act, relied only on its Article I powers. *Id.* at 21a-22a. That focus showed that Congress did not intend the Act as an effort to enforce the Fourteenth Amendment. *Id.* at 22a-23a.

Next, the court held that the Act does not satisfy this Court’s test for a valid Section 5 abrogation. The

court stated that this “conclusion is required by *Florida Prepaid*”—a decision in which this Court struck down a similarly sweeping abrogation on an analogous legislative record. *Id.* at 25a.

The court observed that “the record before Congress [here] contained at most a dozen incidents of [alleged] copyright infringement by States.” *Id.* at 29a. This meager record of state infringement mirrors “the historical evidence underlying the Patent Remedy Act, which was found insufficient in *Florida Prepaid*.” *Id.*

The court also observed that in the Copyright Remedy Act, Congress chose the same remedy that this Court found overbroad in *Florida Prepaid*. In both statutes, Congress “impos[ed] sweeping liability for *all violations* of federal [intellectual-property] law, whether the violation implicates the Fourteenth Amendment or not.” *Id.* at 30a. Because this expansive remedy is “wholly incongruous with the sparse record” of unconstitutional copyright infringement by States, the court held that the Act cannot be justified under Section 5. *Id.*

Finally, the court dismissed the claims against the individual defendants. The court held that those defendants could have reasonably believed that Allen had authorized them to display his works online for noncommercial purposes. *Id.* at 37a-39a.

SUMMARY OF ARGUMENT

State sovereign immunity is a core structural feature of the nation's constitutional system.

Thus, only rarely can Congress authorize private lawsuits against States. For abrogating legislation to be valid, it must be enacted under a constitutional provision that limits state sovereignty either expressly or by "insurmountable implication." *Alden v. Maine*, 527 U.S. 706, 734 (1999). In the nation's history, only two constitutional provisions have been held to satisfy this exacting test: the Bankruptcy Clause and Section 5 of the Fourteenth Amendment.

The Intellectual Property Clause should not be added to this exclusive list. Indeed, this Court has already held that the clause does not allow Congress to abrogate state sovereign immunity. *Florida Prepaid*, 527 U.S. at 636. Although this ruling arose in the context of Congress's patent powers, it applies equally here. After all, Congress has equivalent constitutional authority over patents and copyrights.

Allen urges the Court to reconsider its rejection of the Intellectual Property Clause as a source of abrogating power. His arguments, however, clash with this Court's precedents.

For example, Allen argues that Congress can abrogate immunity under its purportedly "exclusive" power to regulate intellectual property. But this Court has specifically held that even exclusive congressional powers do not include the authority to authorize

lawsuits against States. *Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996). Besides, this Court has also rejected the premise of Allen’s argument: Congress’s powers over copyrights are *not* exclusive. *Goldstein v. California*, 412 U.S. 546, 558 (1973).

In addition, Allen cannot identify any historical evidence that the Founders intended to empower Congress to abrogate state sovereign immunity for copyright claims. This lack of historical evidence defeats Allen’s effort to analogize this case to *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006). The outcome in *Katz* stemmed from “the Bankruptcy Clause’s unique history”—a specific decision by the Framers to limit state sovereign immunity in the bankruptcy context. *Id.* at 369 n.9.

For these reasons, the Copyright Remedy Act was not a valid exercise of the Intellectual Property Clause.

Allen also argues that the Act can be upheld under Section 5 of the Fourteenth Amendment. That argument, too, fails under *Florida Prepaid* and other precedents of this Court.

Section 5 allows Congress to enact “appropriate” measures to “enforce” the Fourteenth Amendment against States. U.S. Const. amend. XIV, § 5. Thus, for legislation to be valid under Section 5, it must be carefully tailored to address unconstitutional conduct by States.

In an effort to meet this high standard, Allen argues that copyright infringement violates the Due Process Clause. That argument overlooks two key limits on the clause’s scope. First, property deprivations violate due process only when the government’s wrongful behavior is intentional. *Florida Prepaid*, 527 U.S. at 645. Second, even intentional property deprivations are not unconstitutional if property owners have access to adequate remedies. *Id.* at 643. Because of these limits, only a subset of copyright infringement implicates the Due Process Clause: intentional infringement that cannot be cured through alternative means.

When Congress enacted the Act, it did not seek to address this narrow subset of unconstitutional infringement. Instead, Congress focused on infringement that was merely negligent. This focus on negligent infringement shows that Congress did not design the Act to enforce the Due Process Clause.

In addition, even if Congress had focused on constitutional enforcement, the record here would not support abrogation as a Section 5 remedy.

This Court has repeatedly held that abrogation of state sovereign immunity is an expansive remedy that is reserved for grave constitutional harms. *See id.* To be appropriate under Section 5, abrogation must therefore counteract “a history of ‘widespread and persisting deprivation of constitutional rights’” by States. *Id.* at 645 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997))).

No such record was present here. Instead, Congress identified only a few instances of state copyright infringement, none of which necessarily violated the Constitution. When this Court considered an analogous legislative record in *Florida Prepaid*, it rejected that record as providing “scant support” for abrogation. *Id.* at 646.

For these reasons, the Copyright Remedy Act was not a valid exercise of Congress’s enumerated powers.

ARGUMENT

I. The Intellectual Property Clause Does Not Allow Congress to Authorize Lawsuits Against States.

A. The Constitution preserves state sovereign immunity.

State sovereign immunity is a central feature of “our constitutional structure.” *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1498 (2019). This feature stems from two “fundamental postulates implicit in the constitutional design.” *Alden*, 527 U.S. at 729.

First, “each State is a sovereign entity in our federal system.” *Seminole Tribe*, 517 U.S. at 54.

Second, “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [the sovereign’s] consent.” *Id.* (quoting *The Federalist No. 81*, at 487 (Hamilton) (Clinton Rossiter ed., 1961)).

Citing these two postulates, this Court has long held that the Constitution preserves the States' sovereign immunity, except as altered by "the plan of the convention" or by a later constitutional amendment. *Hans*, 134 U.S. at 13.

In fact, when the Constitution was drafted and ratified, the "doctrine that a sovereign could not be sued without its consent was universal in the States." *Alden*, 527 U.S. at 715-16. The doctrine saves States from being placed in "the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury." *Id.* at 749. This principle was so central to the founding generation that the Constitution "never would have been ratified" if it had required States to suffer that indignity. *Id.* at 727.

To safeguard this central feature of constitutional structure, this Court has established a presumption that the Constitution does not disturb state sovereign immunity.

Specifically, a constitutional provision can strip States of their immunity only when there is "compelling evidence" that the provision was intended to have that result. *Id.* at 731. Evidence of this magnitude must arise from the Constitution's "express words" or "an insurmountable implication" from the Constitution's text, structure, and history. *Id.* at 734 (quoting *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 449-50 (1793) (Iredell, J., dissenting)).

Thus, in all but exceedingly rare circumstances, state sovereign immunity is a cross-cutting limit on the scope of federal power.

Under Allen’s theory, however, this limit on the scope of federal power would evaporate.

Specifically, Allen claims that “a ‘Plan of Convention’ waiver arises when the Constitution reserves an enumerated power exclusively for Congress.” Br. 22. This Court has held the very opposite: “[T]he background principle of state sovereign immunity” does not “dissipate when the subject of the suit is an area . . . under the exclusive control of the Federal Government.” *Seminole Tribe*, 517 U.S. at 72.

Allen also argues that the States surrendered their immunity whenever they granted Congress the power to enact “uniform” rules that apply nationwide. Br. 28. That argument, too, overlooks this Court’s precedent. The Constitution does not allow abrogation merely because a law is derived from a “national power” to enact uniform rules. *Alden*, 527 U.S. at 732.

For example, during the ratification debates, the Framers repeatedly emphasized that a main reason for establishing a new Constitution was the need for nationally uniform rules of commerce. *The Federalist No. 11*, at 84-85 (Hamilton); *The Federalist No. 42*, at 267-71 (Madison). This Court has therefore recognized that the Commerce Clause embodies a “policy of uniformity.” *Wardair Canada, Inc. v. Fla. Dep’t of Revenue*, 477 U.S. 1, 8 (1986). However, the

Court has also held that Congress's power to enact nationally uniform rules of commerce does not include the power to abrogate state sovereign immunity. *Seminole Tribe*, 517 U.S. at 72.

As these points illustrate, Allen's arguments prove far too much. Accepting them would upend this Court's sovereign-immunity jurisprudence. After all, if the power to enact uniform, national legislation were enough to override state sovereign immunity, every Article I power would allow for abrogation. That result would unsettle "a virtually unbroken line of judicial precedent that has endured for over a century." Ernest Young, *Is the Sky Falling on the Federal Government?*, 81 Tex. L. Rev. 1551, 1556 (2003).

In sum, "abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States." *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989). This Court has therefore established an exacting test for deciding whether a constitutional provision invades state sovereign immunity: The invasion must arise from the Constitution's "express words" or by "insurmountable implication." *Alden*, 527 U.S. at 734.

As the next section shows, very few constitutional provisions satisfy this test.

B. The Constitution overrides state sovereign immunity only rarely.

In the 225 years since the Eleventh Amendment was enacted in 1795, this Court has recognized only two clauses of the Constitution that authorize Congress to abrogate state sovereign immunity: the Bankruptcy Clause of Article I, and Section 5 of the Fourteenth Amendment. *See Katz*, 546 U.S. at 359; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 (1976).

Section 5 meets the Court’s abrogation standard because it empowers Congress to invade state sovereignty in “express terms.” *Fitzpatrick*, 427 U.S. at 453. The text of the amendment explicitly “sanction[s] intrusions by Congress” on state sovereignty. *Id.* at 455.

This Court has also upheld Congress’s authority to expose state agencies to certain proceedings under the Bankruptcy Clause. *Katz*, 546 U.S. at 359. Although that clause does not abrogate state immunity expressly, this Court concluded that on the topic of bankruptcy, the “plan of the Convention” showed an abrogation. *Id.* at 377-78.

The *Katz* Court cited two reasons for this conclusion: “the singular nature of bankruptcy courts’ jurisdiction,” and “the Bankruptcy Clause’s unique history.” *Id.* at 369 n.9.

First, “[b]ankruptcy jurisdiction, at its core, is *in rem*.” *Id.* at 362. Because bankruptcy jurisdiction merely involves jurisdiction over a debtor’s property,

“it does not implicate States’ sovereignty to nearly the same degree as other kinds of jurisdiction.” *Id.* at 362. Indeed, “its exercise does not, in the usual case, interfere with state sovereignty” at all. *Id.* at 370.

This feature of bankruptcy jurisdiction “was as true in the 18th century as it is today.” *Id.* at 362. For this reason, this Court has long held that bankruptcy discharges of debts owed to state creditors do not implicate state sovereign immunity. *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004); *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933).

Second, the Framers explicitly designed the Bankruptcy Clause to intrude on state sovereign immunity.

Founding-era history shows that the Framers’ “primary motivation” for adopting the clause was to forbid States from imprisoning debtors for debts that had been discharged by another State. *Id.* at 370. To achieve this goal, the Constitution would need to empower federal courts to order States to free debtors from state prisons. By discharging debts owed to state treasuries, these orders would encroach on state sovereign immunity. *Id.* at 373-75.

Multiple aspects of the historical record show that the Founders had this understanding of the Bankruptcy Clause.

For example, the Constitutional Convention considered the Bankruptcy Clause in tandem with the

Full Faith and Credit Clause, which requires States to honor court decisions from other States. *Id.* at 368-69; *see* U.S. Const. art. IV, § 1.

As another example, almost immediately after ratification, Congress passed legislation to allow federal courts to intrude on state sovereignty in bankruptcy proceedings. *Katz*, 546 U.S. at 374. During this era—one in which the people swiftly and overwhelmingly enacted the Eleventh Amendment—concerns for state sovereignty were at their apogee. “Yet there appears to be no record of any objection to the bankruptcy legislation or its grant of habeas power to federal courts based on an infringement of sovereign immunity.” *Id.* at 375.

This unique constitutional history shows that the Constitution’s Framers specifically intended the Bankruptcy Clause to empower federal courts to “intru[de] upon state sovereignty.” *Id.* at 377. The founding generation that ratified the Constitution also “would have understood” the clause to have that effect. *Id.* at 370. Thus, as a matter of historical fact, “the States agreed in the plan of the Convention” to forgo “any sovereign immunity defense” to bankruptcy jurisdiction. *Id.* at 377.

The Intellectual Property Clause, in contrast, lacks any equivalent history. For this reason and others described below, that clause does not allow Congress to abrogate state sovereign immunity.

C. The Intellectual Property Clause does not satisfy this Court’s abrogation test.

As shown above, Congress is barred from using its Article-I powers to expose States to lawsuits in federal court, absent compelling historical or other evidence that the Framers intended a particular clause to have that effect. *Alden*, 527 U.S. at 731.

This Court has specifically extended this limit on Article I-based abrogation to the Intellectual Property Clause. *Florida Prepaid*, 527 U.S. at 636.

Allen has not offered any reason to reconsider that settled holding. Nothing in the Intellectual Property Clause’s text, structure, or history gives any hint—let alone provides the required compelling evidence—that the clause was designed to intrude on state sovereign immunity.

1. Allen’s arguments are foreclosed by *Florida Prepaid*.

This Court has held that the Intellectual Property Clause does not allow Congress to authorize private lawsuits against States. On this basis, the Court struck down the Patent Remedy Act, which purported to abrogate state sovereign immunity for patent claims. *Florida Prepaid*, 527 U.S. at 636.

That holding controls here. Article I gives Congress coextensive powers over patents and copyrights. The clause refers to copyrights and patents in the same breath: It allows Congress to

“promote the Progress of *Science and useful Arts*,” by granting “to *Authors and Inventors* the exclusive Right to their respective *Writings and Discoveries*.” U.S. Const. art. I, § 8, cl. 8 (emphasis added). Thus, at every step, the clause interweaves Congress’s power to regulate copyrights and patents. *Graham v. John Deere Co.*, 383 U.S. 1, 5 n.1 (1966) (Congress’s patent and copyright powers are “spliced together”).

Given the “kinship between patent law and copyright law,” this Court has recognized that the two aspects of the Intellectual Property Clause should be interpreted consistently. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439 (1984).

Allen offers no reason for discarding this parallel treatment. Instead, Allen seeks to nullify *Florida Prepaid*: He urges the Court to “overrule” the decision. Br. 37; see pp. 57-63, *infra* (explaining why stare decisis bars that result).

He also claims that the Court could disregard *Florida Prepaid* without overruling it because the Court in that case merely “assumed without deciding” that the Intellectual Property Clause forecloses abrogation. Br. 33. But that argument misreads the decision.

In *Florida Prepaid*, the Court held that “the Patent Remedy Act cannot be sustained under . . . the Patent Clause.” 527 U.S. at 636. The Court agreed with Florida’s argument that the statute was an improper exercise of Congress’s powers under that clause. *Id.* at 633. Far from being an unthinking assumption, the

Court's rejection of the clause as a basis for abrogation could not have been more explicit.

Moreover, if the Court's discussion of Article I in *Florida Prepaid* were mere dicta, as Allen claims, the rest of the opinion would make no sense.

This point becomes clear from the Court's discussion of the Fourteenth Amendment. *Id.* at 637-47. There, the Court repeatedly reinforced its holding that the Intellectual Property Clause does not allow for abrogation. For example, the Court observed that Congress had enacted the law to address "proper Article I concerns," such as the desire for "uniformity in the construction of patent law." *Id.* at 645, 648. But the Court rejected that justification because Article I "does not give Congress the power to enact such legislation." *Id.* at 648.

When the Court made these rulings, moreover, it decided a question that was squarely before it. As the Court noted, Congress had explicitly described the Patent Remedy Act as a valid exercise of the Intellectual Property Clause. *Id.* at 635.

Because state sovereign immunity is a "jurisdictional bar," *Seminole Tribe*, 517 U.S. at 73, the Court was duty-bound to address Congress's claim of an Article I-based abrogation—an abrogation that, if valid, would have expanded Article III jurisdiction. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 118-20 (1984). After all, federal courts have an ongoing obligation to examine their own jurisdiction, even when the parties themselves do not

press jurisdictional issues. *Johnson v. California*, 541 U.S. 428, 430-31 (2004) (per curiam). And federal courts have a corresponding “duty to exercise the jurisdiction that is conferred upon them by Congress.” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015) (calling the duty to exercise jurisdiction granted by Congress “virtually unflagging”).

For these reasons, the Court in *Florida Prepaid* announced a holding, not dicta, when it decided that the Intellectual Property Clause does not empower Congress to authorize federal courts to hear copyright claims against States. 527 U.S. at 636.

Allen’s observation that the plaintiff in *Florida Prepaid* conceded that Article I does not allow for abrogation, Br. 33, does not undermine the Court’s jurisdictional ruling. After all, the parties’ failure to raise a jurisdictional issue in an earlier case “is irrelevant to the force of our holding on [that] issue.” *Am. Nat’l Red Cross v. S.G.*, 505 U.S. 247, 255 n.5 (1992); see also *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100 (1807) (Marshall, C.J.) (giving controlling weight to a previous jurisdictional ruling, even though the parties in the prior case had not raised the issue).⁵

Thus, the Court’s jurisdictional holding in *Florida Prepaid* is binding precedent here.

⁵ In contrast, this Court is not bound by its “implicit” jurisdictional rulings—rulings that assume that the Court had jurisdiction to decide an issue but “did not directly confront the [jurisdictional] question.” *Pennhurst*, 465 U.S. at 119.

2. Allen’s reading of the Intellectual Property Clause clashes with its text and this Court’s precedents.

In addition to specifically deciding that the Intellectual Property Clause does not allow for abrogation, this Court has also rejected the arguments that Allen makes to support his reading of the clause. Thus, even if this Court were inclined to reconsider *Florida Prepaid*, Allen’s arguments would still fail.

At the outset, Allen does not claim that the clause expressly authorizes invasions on state sovereign immunity.

Instead, he argues that the clause indirectly authorizes abrogation by empowering Congress to “secur[e]” “exclusive” rights to intellectual property. Allen reads these words to grant Congress “absolute” powers over intellectual-property rights—powers that include plenary dominion over States. Br. 24. That argument clashes with established precedent.

This Court has specifically rejected Allen’s argument that Congress can “secur[e]” copyrights only by protecting them from “any and all” intrusion. Br. 23. In *Wheaton v. Peters*, the Court held that the term “secure,” as used in the Intellectual Property Clause, does not mean that the Constitution protects preexisting intellectual-property rights. 33 U.S. 591, 661 (1834). Instead, the Constitution gives Congress authority to “create[.]” future statutory rights. *Id.* Then, as now, those statutory rights were subject to

all of the ordinary constitutional limits on federal legislation, including state sovereign immunity.

This Court has also rejected Allen’s argument that the clause’s use of the word “exclusive” means that the States have surrendered sovereign immunity for federal copyright claims. Br. 23-24. As this Court held in *Seminole Tribe*, “[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area,” that power does not extend to “authorization of suits by private parties against unconsenting states.” 517 U.S. at 72.

In addition, Allen’s argument here is premised on a misreading of the Intellectual Property Clause. The clause allows Congress to provide “Authors” with an “exclusive Right” to their “Writings.” U.S. Const. art. I, § 8, cl. 8. It does not, as Allen contends, “reserve an enumerated power exclusively for *Congress*.” Br. 22. (emphasis added).

To the contrary, this Court has held that Congress’s powers under the clause are not exclusive. For example, in *Goldstein*, the Court affirmed the criminal conviction of a California man for copying sound recordings—a practice that violated state copyright law, but was then legal under federal law. 412 U.S. at 550-52, 571. The defendant claimed that the California law was invalid, because the Intellectual Property Clause gave Congress the “exclusive” right to protect copyrights.

The Court squarely rejected that argument. It observed that the clause “does not provide that

[Congress’s power to regulate copyrights] shall vest exclusively in the Federal Government,” nor does it expressly bar States from regulating copyrights. *Id.* at 553. And because copyrights do not inherently implicate the “national interest,” the clause also cannot support “an inference that state power to grant copyrights has been relinquished to exclusive federal control.” *Id.* at 558. Indeed, the clause allows Congress “to stay its hand entirely”—leaving state law as the exclusive protection for copyrights—when issues of “purely local concern” override any need for uniform nationwide regulation. *Id.* at 559.

Thus, the Court in *Goldstein* held that the States “did not surrender [their] power to issue copyrights” in the plan of the convention. *Id.* at 561; see *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 165 (1989) (“the Patent and Copyright Clauses do not, by their own force or by negative implication, deprive the States of the power to adopt rules for the promotion of intellectual creation within their own jurisdictions”).⁶

⁶ The first known copyright case where a federal court awarded money damages against a State was *Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (9th Cir. 1979). In that unprecedented ruling—issued nearly two-hundred years after Congress enacted the first Copyright Act—the Ninth Circuit held that Arizona had waived its sovereign immunity for copyright claims by voluntarily participating in an activity regulated by federal law. *Id.* at 1283 (citing *Parden v. Terminal Ry. of Ala. State Docks Dep’t*, 377 U.S. 184 (1964)). This Court rejected that waiver theory in *College Savings Bank*—the case that struck down the Trademark Remedy Act. See 527 U.S. at 675.

This ruling continued the long tradition of dual federal-state regulation of copyrights. *See Wheaton*, 33 U.S. at 661. Since the nation’s founding, copyright law “has developed along two parallel tracks: federal (statutory) and state (common law).” 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § A.02, at A-9 (2019); *see* Jane C. Ginsburg, *U.S. Federalism and Intellectual Property*, 2 Colum. J. Eur. L. 463, 463-46 (1996) (explaining how States retain an important role in regulating intellectual property, including by serving as “laboratories” for innovative policies that are often adopted later by Congress).

For example, until 1978, unpublished works were protected under only state law. Nimmer § 1.14[B], at 1-76. Thus, until relatively recently, the images that Allen claims were infringed here were not even copyrightable under federal law.⁷

Finally, even if Allen’s textual arguments were valid, he is wrong to claim that state sovereign

⁷ Of course, Congress has always retained the right to preempt state copyright law under the Supremacy Clause. In 1976, after nearly two centuries of concurrent state-federal copyright regulation, Congress exercised this preemption power and displaced much of state copyright law. *See* 17 U.S.C. § 301.

Even today, however, “states may legitimately regulate many aspects [of] copyrightable” property. Nimmer § 1.13[B], at 1-74. For example, works that are not “fixed in a tangible medium of expression,” such as live broadcasts, remain subject to copyright protection under only state law. *Id.* § 1.16[B][1], at 1-142 (quoting 17 U.S.C. § 301). Moreover, a wide variety of state-law claims can still be used to enforce copyrights. *See* pp. 39-40, *infra*.

immunity prevents Congress from securing copyrights. Br. 22. Immunity forecloses only one specific type of relief: a damages action against a State itself. Copyright-holders remain free to pursue a range of other remedies for alleged copyright infringement by States. *See* pp. 39-41, *infra*.

In sum, the text of the Intellectual Property Clause does not show that the States surrendered their sovereign immunity for copyright claims.

3. The Court's ruling in *Katz* does not support abrogation here.

Allen next cites this Court's decision in *Katz* to claim that the Intellectual Property Clause supports abrogation. Br. 27. He misreads both history and *Katz*.

As an initial matter, *Katz* was based largely on the *in rem* nature of bankruptcy jurisdiction. *See* pp. 16-17, *supra*. Here, however, there is no dispute that a copyright lawsuit involves only *in personam* jurisdiction. In this case, for example, Allen has sued the State of North Carolina directly, seeking money damages from the state treasury. Pet. App. 13a. This kind of claim directly collides with sovereign immunity's core function: to protect "state treasuries." *Alden*, 527 U.S. at 759.

Moreover, here, unlike in *Katz*, neither Allen nor his amici can identify any historical evidence to show that the Framers intended the Intellectual Property Clause to limit state sovereign immunity. *Cf.* Brief of

Historian Bruce Mann, *Katz*, 546 U.S. 356, 2005 U.S. S. Ct. Briefs LEXIS 555 (describing founding-era history that supported abrogation in that case).

In an effort to support his historical arguments, Allen mainly argues that some Framers believed that nationally uniform copyright legislation would be “beneficial.” Br. 28. But those general observations about the benefits of federal copyright law provide no support for Allen’s sweeping assumption that the Framers intended Congress’s copyright powers to limit state sovereign immunity. If loose goals like national uniformity were enough to outweigh sovereign immunity, *all* Article I powers would allow for abrogation. *But see Seminole Tribe*, 517 U.S. at 72.

Allen argues that the unanimous passage of the Intellectual Property Clause at the Constitutional Convention somehow shows an intent to displace state sovereign immunity, Br. 29, but that argument rests on a further misunderstanding of this Court’s opinion in *Katz*.

As explained above, the Bankruptcy Clause was proposed specifically to intrude on state sovereignty. *See* pp. 17-18, *supra*. The absence of extensive debate over the clause proves only that the delegates to the Constitutional Convention agreed with that dramatic proposal. *Katz*, 546 U.S. at 369. When the *Katz* Court cited this unique historical context, it did not announce a general rule that uncontroversial constitutional provisions allow for abrogation.

For similar reasons, Allen is wrong that Congress's early adoption of copyright legislation reflects an understanding that States surrendered their sovereign immunity for copyright claims. Br. 27. The first Copyright Act protected only limited classes of writings—books, charts, and maps—against infringement by “persons.” Act of May 31, 1790, 1 Stat. 124, §§ 1, 6. As this Court has explained, “the term ‘person’ does not include the sovereign, and statutes employing the word are ordinarily construed to exclude it.” *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64 (1989).

In contrast, the first Bankruptcy Act made a direct incursion on state sovereign immunity. The Act explicitly authorized federal courts to order debtors discharged from state prisons. *Katz*, 546 U.S. at 374. This provision “represented a significant restriction of state sovereignty” that was “clear” to the founding generation that enacted it. Mann Br. at 43-44. The Copyright Act of 1790 had no comparable provision.

* * *

In sum, Allen has not met his burden to present compelling evidence that the Framers designed the Intellectual Property Clause to intrude on state sovereign immunity. He has thus done nothing to cast doubt on this Court's holding in *Florida Prepaid* that Congress lacks the power under Article I to authorize copyright lawsuits against States.

II. The Copyright Remedy Act Was Not a Valid Exercise of Congress’s Section 5 Power to Enforce the Due Process Clause.

In a second effort to show a valid abrogation, Allen relies on Section 5 of the Fourteenth Amendment. This effort likewise fails.

Section 5 authorizes Congress to “enforce” the Fourteenth Amendment’s substantive provisions by enacting “appropriate” legislation. U.S. Const. amend. XIV, § 5. Because this power is limited to enforcing the Constitution, “Section 5 legislation . . . must be an appropriate remedy for identified constitutional violations, not an attempt to substantively redefine the States’ legal obligations.” *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003).

This Court has established a two-part test to analyze whether Section 5 legislation is appropriately remedial, rather than an improper attempt to “make a substantive change in the governing law.” *Boerne*, 521 U.S. at 519.

- Congress must first identify the scope of the alleged constitutional problem. *Id.* at 520
- Congress must then choose a remedy that is congruent and proportional to the scope of that problem. *Id.*

The result is a sliding scale: “the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent.” *Tennessee v. Lane*, 541 U.S. 509,

523 (2004). “Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.” *Boerne*, 521 U.S. at 530.

Here, Allen claims that the Copyright Remedy Act enforces the Due Process Clause by protecting against copyright infringement by States. That argument fails the Section 5 test, for two main reasons:

First, when Congress enacted the Act, it did not focus on the narrow subset of copyright infringement that could violate the Constitution. The legislative record therefore shows that Congress did not enact the Act to enforce the Due Process Clause.

Second, Congress’s chosen remedy was vastly out of proportion to any modest constitutional problem that Congress might have identified.

For each of these independent reasons, the Act is not valid under Section 5.

A. Congress did not identify widespread unconstitutional conduct by States.

First, Section 5 cannot justify the Copyright Remedy Act because Congress did not enact the Act to address widespread constitutional violations by States.

When Congress legislates under Section 5, the type of evidence Congress must assemble depends on the nature of the underlying constitutional violation that Congress seeks to remedy. *Lane*, 541 U.S. at 520.

For example, when Congress acts to correct race- or sex-based discrimination, “it [i]s easier for Congress to show a pattern of . . . constitutional violations.” *Hibbs*, 538 U.S. at 736. Because those forms of discrimination “trigger[] a heightened level of scrutiny,” most discriminatory state conduct will violate the Constitution. *Id.* Indeed, in every Section 5 abrogation this Court has *ever* upheld, Congress acted to protect fundamental rights.⁸

Copyright infringement, in contrast, does not directly implicate fundamental constitutional rights. Instead, copyright infringement violates the Constitution only when it meets two heightened standards: The infringement must be intentional, and the copyright holder must have no other adequate remedy.

Here, in its lengthy deliberations over the Act, Congress did not focus on copyright infringement that meets these heightened tests. This lack of focus confirms that Congress did not design the Act to enforce the Due Process Clause.

⁸ Compare *Lane*, 541 U.S. at 533-34 (valid abrogation to protect “fundamental right of access to the courts”); *Hibbs*, 538 U.S. at 737-38 (same, sex-based discrimination); *Fitzpatrick*, 427 U.S. at 449 (same), with *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 38 (2012) (invalid abrogation to address mere “economic burdens”); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367-69 (2001) (same, disability discrimination, which is subject to rational-basis review); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 85-86 (2000) (same, age discrimination); *Florida Prepaid*, 527 U.S. at 645 (same, patent infringement).

Moreover, even the purely statutory infringement that Congress did identify was not widespread. At most, Congress identified a few anecdotal allegations of state infringement—none of which necessarily violated the Constitution.

Thus, Congress did not establish the predicate unconstitutional conduct that a valid abrogation under Section 5 would require.

1. Congress paid no attention to whether States had infringed intentionally.

When Congress enacted the Act, it did not even consider whether any state infringement it identified was intentional. The legislative record therefore shows that the Act was not designed to enforce the Constitution.

The Due Process Clause protects against only “*deliberate* decisions of government officials to deprive a person of . . . property.” *Daniels v. Williams*, 474 U.S. 327, 331 (1986). A mere “negligent act that causes unintended injury to a person’s property” does not violate the Constitution. *Florida Prepaid*, 527 U.S. at 645.

Under these principles, copyright infringement, standing alone, does not violate due process. After all, “[i]ntention to infringe” is not an element of infringement. *Buck v. Jewell-Lasalle Realty Co.*, 283 U.S. 191, 198 (1931); see 3 William F. Patry, *Patry on Copyright* § 9.5 (2019) (collecting cases that apply this principle). Instead “copyright infringement is a strict

liability offense, in which a violation does not require a culpable state of mind.” *Brammer v. Violent Hues Prods.*, 922 F.3d 255, 265 (4th Cir. 2019); Patry § 9.5 (same). Under the Copyright Act, an infringer’s state of mind is relevant only to damages. 17 U.S.C. § 504(c)(2).

Because not all copyright infringement violates due process, when Congress legislates under Section 5 to protect intellectual property, it must act to address only the subset of infringement that is intentional. *Florida Prepaid*, 527 U.S. at 645-47.

Here, in deliberations over the Copyright Remedy Act, Congress did not focus on this subset. To the contrary, the legislative record shows that the Act was principally aimed at infringement that was merely negligent or even completely innocent:

- The Senate Report states that the Act was meant to forestall the possibility that States “might become too casual about copyright owners’ property rights.” S. Rep. No. 101-305, at 12 (1990) [Senate Report].
- Ralph Oman, the Register of Copyrights, testified that the Act was designed to apply to

“the occasional error or misunderstanding or innocent infringement.”⁹

- Oman later explained that the Act would “act as a guard against sloppiness” and “honest mistakes” by State employees.¹⁰
- Dorothy Schrader, Chief Counsel for the Copyright Office, similarly testified that the bill addressed possible “sloppy practices” in States’ use of copyrighted material. Senate Hearing 42.
- The Copyright Office’s written report to Congress never mentioned whether any state infringement was intentional.¹¹

This focus on merely negligent infringement shows that the Act was not designed to enforce the Due Process Clause.¹²

⁹ *Hearings on H.R. 1131 Before Subcomm. on Courts, Intellectual Property, and Admin. of Justice, H. Comm. on Judiciary*, 101st Cong. 8 (1989) [House Hearing].

¹⁰ *Hearing on S. 497 Before Subcomm. on Patents, Copyrights and Trademarks, S. Comm. on Judiciary*, 101st Cong. 9 (1989) [Senate Hearing].

¹¹ See U.S. Copyright Office, *Copyright Liability of States and the Eleventh Amendment: A Report of the Register of Copyrights* 7-9 (1988) [Register’s Report].

¹² Even the Act’s leading scholarly supporters acknowledge that the Act’s legislative record “contains essentially no

Instead, Congress’s “apparent aim was to serve the Article I concern” of enforcing State compliance with federal *statutes*. *Lane*, 541 U.S. at 521. That aim falls outside the lawful scope of Section 5. Under that provision, “States may not be subject to suits for damages based on violations of a . . . statute” alone. *Coleman*, 566 U.S. at 42.

Allen tries to sidestep this critical point. In his brief, he never even mentions that the Due Process Clause protects only against infringement that is intentional. Instead, he argues that Congress may validly invoke Section 5 to remedy *any* form of copyright infringement by States—even infringement that is completely innocent. Br. 46.

That argument overlooks this Court’s teachings on Section 5. When Allen seeks to justify the Act based on harms that do not violate the Constitution, he activates the danger that the Section 5 test was designed to avert: that Congress could use Section 5 to “substantively redefine” the States’ constitutional obligations. *Kimel*, 528 U.S. at 88.¹³

consideration of the mental state involved in the acts of state infringement that it discusses.” Mitchell Berman, Anthony Reese & Ernest Young, *State Accountability for Violations of Intellectual Property Rights*, 79 Tex. L. Rev. 1037, 1080 (2001). These scholars therefore agree that Congress did not show, as *Florida Prepaid* requires, “significant instances of infringement that are more than negligent.” *Id.*

¹³ Most “state infringement, to the extent it occurs, is likely to be unintentional.” Young, 81 Tex. L. Rev. at 1564 (quoting Peter

To avoid that forbidden result, Congress must design Section 5 legislation to address the Constitution's substantive requirements, as authoritatively construed by this Court. *Id.* at 81. Here, Congress paid no heed to this Court's limits on the scope of the Due Process Clause when it designed the Act. Thus, the Act cannot be justified under Section 5.

2. Congress did not adequately consider whether alternative remedies satisfied due process.

For a second reason as well, the Copyright Remedy Act cannot be justified as an attempt to enforce the

Menell, *Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights*, 33 Loy. L.A. L. Rev. 1399, 1433 (2000)). This fact arises from “the bureaucratic and public-service-oriented culture of state governmental entities,” and the lack of “profit motive.” *Id.* Thus, the Act disproportionately affects infringement that does not violate the Constitution. *See* pp. 31-37, *supra*.

Indeed, research has shown that States do not take advantage of their immunity to infringe on intellectual property. For example, one empirical analysis found that, following *Florida Prepaid*, public universities did not engage in the kinds of activities that critics of that decision had feared. *See* Tejas N. Narechania, Note, *An Offensive Weapon?: An Empirical Analysis of the "Sword" of State Sovereign Immunity in State-Owned Patents*, 110 Colum. L. Rev. 1574 (2010). Similarly, after the University of Texas prevailed in the *Chavez* litigation in the Fifth Circuit, the university actually took steps to “enhance its compliance” with federal copyright law. Young, 81 Tex. L. Rev. at 1564-65 (emphasis added).

Due Process Clause: Congress barely considered whether alternative remedies could provide constitutionally adequate process. This lack of consideration confirms that Congress was not focused on infringement that might violate the Constitution.

A government intrusion on intellectual-property rights violates due process only when property owners lack adequate procedures to recover for their losses. *Florida Prepaid*, 527 U.S. at 643. Property owners have no right to a particular remedy. They “must either avail themselves of the remedies” available to them “or prove that available remedies are [constitutionally] inadequate.” *Id.*

When Congress does not fully examine alternative remedies, the lack of this analysis shows that Congress did not act to vindicate due process. *Id.* at 643-45. In *Florida Prepaid*, for example, the Court observed that, during deliberations over the Patent Remedy Act, Congress “barely considered” the availability of alternative remedies. *Id.* at 643. Because Congress did not thoroughly consider alternative remedies, Congress could not have “conclu[ded] that States were depriving patent owners of property without due process of law.” *Id.* at 646.

The Copyright Remedy Act has the same fatal flaw. When Congress enacted the Act, it barely even considered whether plaintiffs could use state or other remedies to address copyright infringement by States. *Chavez v. Arte Publico Press*, 204 F.3d 601, 606 (5th Cir. 2000).

The statute itself never mentions alternative remedies. The committee reports, for their part, address only one among many possible remedies: federal injunctions. *See* H.R. Rep. No. 101-282, pt. I, at 8 (1989) [House Report] (concluding that injunctions are inadequate because they do not allow for money damages); *see* Senate Report 12 (same).

The committees' perception that injunctive relief is an inadequate remedy, even if true, does not show that abrogation is necessary to enforce the Due Process Clause. Congress overlooked many other available remedies that do satisfy due process:

- First, many copyright lawsuits involve disputes over the scope of licenses to use copyrighted works. Nimmer § 1.15[A][1], at 1-83. In these cases, copyright holders can pursue state-law claims for breach of contract. Here, for example, the underlying dispute involves the scope of a license that Allen and his business partner granted the Department. Pet. App. 7a-12a, 37a-39a. The business partner has sued the Department on a breach-of-contract theory in state court. *Intersal, Inc. v. Hamilton*, No. 15 CVS 9995 (N.C. Bus. Ct.).¹⁴

¹⁴ Almost all States have waived sovereign immunity for breach-of-contract claims. Menell, 33 Loy. L.A. L. Rev. at 1425-26 (collecting waivers for 47 States). In addition, as the Act's proponents testified to Congress, copyright holders have successfully insisted on sovereign-immunity waivers in their contracts with States. Senate Hearing 152 (testimony of William

- Second, even when there is no contract, copyright holders can seek relief through a variety of state-law torts. Common tort theories include claims for unfair competition, trespass to chattels, misappropriation, and conversion. *Chavez*, 204 F.3d at 606; Nimmer § 1.15[B]-[K], at 1-101 to 1-137 (cataloging state-law tort claims that can be used to recover for copyright infringement).
- Third, copyright holders can bring takings claims under the United States Constitution and state constitutions. This Court has applied takings analysis to other forms of intellectual property. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (trade secrets); *James v. Campbell*, 104 U.S. 356, 358 (1881) (patents). Likewise, “the weight of scholarly opinion is that copyrights are property for takings purposes.” Note, *Copyright Reform and the Takings Clause*, 128 Harv. L. Rev. 973, 982 (2015).
- Fourth, copyright holders can bring infringement claims under section 1983 against responsible state officials individually. In these lawsuits—subject to qualified-immunity and other personal defenses—copyright holders can seek financial compensation directly from the responsible people. *Lane v. First Nat’l Bank*, 871 F.2d 166,

Taylor); (“we have required state institution[s] to obtain an effective waiver of their rights under the Eleventh Amendment before contracting” to sell them products); *id.* at 95 (testimony of David Eskra) (same).

167 & n.1 (1st Cir. 1989) (dismissing copyright claims against State, but allowing claims to proceed against individual state officials); *Richard Anderson Photography v. Brown*, 852 F.2d 114, 122 (4th Cir. 1988) (same).¹⁵

Congress did not consider any of these possible remedies. For example, after surveying the legislative record, the Fifth Circuit in *Chavez* concluded that Congress “never considered” a number of “possible remedies in state courts” when it enacted the Act. 204 F.3d at 606. The Act’s scholarly supporters also acknowledge this deficiency. Berman, 79 Tex. L. Rev. at 1082 (“The record leading up to adoption of the [Act] gave scant attention to the question” of alternative remedies.).¹⁶

Allen seeks to excuse this lack of consideration by arguing that the Copyright Act might preempt some

¹⁵ During Congress’s deliberations over the Act, Ralph Oman agreed that “suits for monetary damages against individual State officials would certainly act as a brake” on state infringement. Senate Hearing 9. However, he argued that States should still be subject to “fat fine[s]” to guard against “honest mistakes.” *Id.* But this concern for unintentional infringement cannot justify abrogation under Section 5. *See* p. 33, *supra*.

¹⁶ The existence of these and other remedies comports with the principle that “States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design.” *Alden*, 527 U.S. at 755. The Act’s scholarly supporters therefore agree that, despite sovereign immunity, “numerous means remain available for holding States” to their legal obligations. Young, 81 Tex. L. Rev. at 1561 (also discussing other alternative remedies, such as lawsuits by the United States and claims for actual due-process violations).

state-law claims. Br. 55-56. In fact, however, most of those claims survive preemption. Takings claims and Section 1983 actions, of course, are federal claims that cannot be preempted. As for state-law claims, one leading commentator has extensively analyzed those claims and has found it “trivially obvious” that many of them stand unpreempted by the Copyright Act. Nimmer § 2.02[D][1], at 2-28.

But even if preemption were an obstacle here, Congress still would have had an alternative to abrogation: It could have made the Copyright Act non-preemptive, either entirely or only for claims against States. *See* p. 53, *infra* (describing the more-proportional remedies that Congress could have enacted instead of abrogation).

To contest this alternative, Allen suggests that relaxing the Copyright Act’s preemptive force would reduce the uniformity of copyright law. Br. 56. But this Court rejected that same argument when it was offered to justify the Patent Remedy Act’s indiscriminate scope. *Florida Prepaid*, 527 U.S. at 645. In any event, the claim that relaxing preemption would unduly undermine the goals of federal copyright law overlooks history: For the vast majority of the nation’s history, the federal Copyright Act did not preempt most state copyright law. Nimmer § A.02, at A-9.

In sum, when Congress enacted the Copyright Remedy Act, it did not adequately consider whether state copyright infringement could be redressed through alternative remedies.

3. Congress did not identify a widespread pattern of violations.

When Congress passed the Copyright Remedy Act, it also did not make the other finding that would allow it to invoke Section 5: a finding that any constitutional violations that led to the Act were widespread.

To the contrary, the legislative record shows that Congress considered state copyright infringement—even infringement of non-constitutional magnitude—to be rare:

- The bill’s primary sponsor in the House stated that “thus far there have not been any significant number of wholesale takings of copyright rights by States or State entities, although there may have been some instances.” House Hearing 48.
- Likewise, the bill’s primary sponsor in the Senate agreed that state copyright violations were not a “big problem.” Senate Hearing 130.
- Ralph Oman admitted that, after a year of investigation, the Copyright Office did not identify “a great deal of hard evidence” of state copyright infringement. *Id.* at 42.
- To the contrary, Oman testified that States “are all respectful of the copyright law,” House Hearing 8, and that “if you fail to enact this bill,” States “will continue to respect the law,” Senate Hearing 8.

Thus, the Act’s legislative history belies any view that Congress enacted the Act to confront “widespread and persisting deprivation of constitutional rights.” *Florida Prepaid*, 527 U.S. at 645.

If there was any evidence before Congress on actual copyright infringement by States, that evidence was not only sparse, but also unreliable. After extensive hearings and other investigation, Congress identified “at most a dozen instances of copyright infringement by States.” Pet. App. 29a.

This underwhelming figure includes a mere seven incidents described by the Copyright Office—a record it compiled after searching for evidence of state infringement for *nearly a year*. *Id.* at 28a. Moreover, of the forty-four comments submitted to the Office, “only five . . . ‘documented actual problems in attempting to enforce their copyright claims’” against States. *Id.* (quoting Register’s Report 7).

This record, moreover, mostly consisted of hearsay statements from company representatives, wholly “unsupported by evidence or [legislative] findings.” *Coleman*, 566 U.S. at 41; *see* Register’s Report 7-9. When deciding whether a constitutional problem justifies abrogation, this Court has discounted this kind of “anecdotal evidence” “clipped from floor debates and legislative reports.” *Kimel*, 528 U.S. at 82 (quoting *Boerne*, 521 U.S. at 531); *see Garrett*, 531 U.S. at 370 (“unexamined, anecdotal accounts” of unconstitutional state conduct are afforded only modest weight in the abrogation analysis).

The wisdom of discounting anecdotes is on full display here. When these anecdotes were tested in court, at least four of them were found to *not even involve state conduct*. Senate Hearing 141-42 (cited in Br. 50).¹⁷ At least two other examples merely described hypothetical ways that States “could” infringe in the future—not actual allegations of past state infringement. *Id.* at 155 (cited in Br. 50).

Even the few reported cases cited by Congress are less than what they seem. In several cases, before the Copyright Remedy Act was enacted, courts had rejected the cited infringement claims on the merits.¹⁸

¹⁷ These examples involved a company’s claims that four states had adopted the company’s proprietary information as legal standards, causing private infringers to argue that the information had passed into the public domain. Senate Hearing 141-42. Ultimately, that concern proved unfounded. *See CCC Info. Servs. v. Maclean Hunter Mkt. Reports*, 44 F.3d 61, 73-74 (2d Cir. 1994) (rejecting the public-domain defense).

¹⁸ Consider three examples from the Register’s Report that Allen cites as evidence of “blatant” copyright infringement by States. Br. 50.

In *Mihalek Corp. v. Michigan*, 814 F.2d 290 (6th Cir. 1987), a company alleged that Michigan had used its advertising materials without permission. Register’s Report 92-93. The Sixth Circuit rejected that claim, holding that Michigan had not infringed. *Mihalek*, 814 F.2d at 297.

Likewise, in *Lane v. First National Bank*, 737 F. Supp. 118 (D. Mass. 1989), a company alleged that Massachusetts had copied its financial data. Register’s Report 9. However, when

In other cases, the evidence showed that any infringement was unintentional.¹⁹

Thus, many of the examples cited by Congress did not show infringement at all—let alone infringement that violated the Constitution.

But even if all of Allen’s examples were credible, evidence on this scale falls well short of the record that a valid abrogation under Section 5 would require.

For example, in *Florida Prepaid*, the Court dismissed a similar number of alleged infringements—in that case, “eight patent-infringement lawsuits prosecuted against States”—as a mere “handful” that came nowhere near the level necessary to justify abrogation. 527 U.S. at 640, 645. As the Fourth Circuit correctly observed below, “the

that claim went to trial, “the jury found that [Massachusetts had] made no use of” the company’s data. *Lane*, 737 F. Supp. at 119.

Similarly, in *Woelffer v. Happy States of America*, 626 F. Supp. 499, 501 (N.D. Ill. 1985), a company alleged that Illinois had infringed its copyrights. Register’s Report 93-94. But the district court held that the company was not likely to succeed on its claim because it could not “establish[] the threshold requirement of infringement.” No. 85 C3301, 1985 WL 641, at *1 (N.D. Ill. Apr. 12, 1985).

¹⁹ For example, in *Richard Anderson*, the defendant argued that she “believed in good faith that [Virginia] owned the slides in question,” because the copyright owner had marked the slides as Virginia’s property. No. 85-373, 1990 WL 538929, at *1 (W.D. Va. Apr. 16, 1990). The district court rejected that argument, however, because innocent intent is not a defense to an infringement claim. *Id.*

evidence here appears little different in quality or quantity than the historical evidence underlying the Patent Remedy Act, which was found insufficient in *Florida Prepaid*.” Pet. App. 29a; see *Chavez*, 204 F.3d at 605-06 (same).

In fact, this Court has rejected far greater numbers of incidents as insufficient to justify abrogation. *Garrett*, 531 U.S. at 371 n.7. In *Garrett*, Congress identified “around 50” allegations of arguably unconstitutional employment discrimination against disabled persons by States. *Id.* The briefs in that case focused on “half a dozen” specific examples in the legislative record. *Id.* at 369. The Court held that these figures “[e]ll far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based.” *Id.* at 370.

In contrast, when this Court upheld abrogation of state immunity in *Lane*, Congress had identified in the legislative record “numerous examples,” from “many individuals, in many states across the country,” of discrete unconstitutional incidents. 541 U.S. at 527. And even that “sheer volume of evidence” was paired with numerous “judicial *findings of unconstitutional* state action”—not mere allegations of statutory violations. *Id.* at 528-29; see *id.* at 524-25 nn.5-14 (compiling dozens of judicial decisions that described unconstitutional discrimination by States).

In *Lane*, Congress also relied on robust statistical evidence that States had engaged in “systematic deprivations of fundamental rights”—in that case, the right of disabled persons to access the courts. *Id.* at

525. For example, evidence showed that “76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities.” *Id.* at 527. Some States had even “categorically excluded” entire classes of disabled persons from jury service. *Id.* at 526 n.14.

Likewise, in *Hibbs*, the Court explained that abrogation was justified by the “long and extensive history of sex discrimination”—a history that far exceeds any efforts at quantification. 538 U.S. at 730. This “pervasive” unconstitutional discrimination was embedded in dozens of enacted state laws, countless formal government policies, and “the vast majority” of government collective-bargaining agreements. *Id.* at 731 & n.5; *see id.* at 730-34. Based on this evidence, Congress made specific legislative findings that States were engaged in unconstitutional sex-based discrimination. *Id.* at 735 n.11.²⁰

When Congress confronts unconstitutional behavior of these kinds—behavior that is formal, systematic, and authorized by law—expansive remedies like abrogation of state sovereign immunity are appropriate. In *South Carolina v. Katzenbach*, for example, this Court held that the Voting Rights Act was valid enforcement legislation under the Fifteenth

²⁰ This Court has cited the absence of legislative findings as a reason to doubt that Congress had identified a widespread pattern of unconstitutional violations by States. *See Garrett*, 531 U.S. at 371 (observing that “had Congress truly understood” the legislative record to “reflect[] a pattern of unconstitutional behavior by States, one would expect some mention of that conclusion in the Act’s legislative findings”).

Amendment because Congress had “document[ed] in considerable detail the factual basis” for its conclusion that States had carried out “unremitting” “racial discrimination in voting.” 383 U.S. 301, 308-09 (1966).

Nothing even approaching that level of unconstitutional activity is present here.

In sum, the record here reveals “scant support for the predicate unconstitutional conduct that Congress intended to remedy.” *Florida Prepaid*, 527 U.S. at 647. Thus, the Act cannot be justified under Section 5.

4. The Act cannot be upheld based on fears of future infringement.

Allen seeks to shift the focus away from the thin record of past state infringement by emphasizing speculative fears that States might infringe copyrights in the future. Br. 52. This Court, however, has rejected fear of future infringement as a proper basis for abrogating state sovereign immunity. To justify a nationwide abrogation like the one here, Congress must amass “evidence that unremedied infringement by States had become”—that is, had already become—“a problem of national import.” *Florida Prepaid*, 527 U.S. at 641.

To be sure, Congress can use Section 5 to deter future constitutional violations. *Hibbs*, 538 U.S. at 727-28. But this Court has upheld expansive remedies like prophylactic abrogations only *after* Congress has assembled actual “evidence of a pattern of constitutional violations” in the past. *Id.* at 729.

The Court has also followed this approach when it has rejected abrogations as invalid. In *Coleman*, for example, the Court held that, even for legislation designed to prevent constitutional violations, “States may not be subject to suits for damages . . . unless Congress has identified a specific pattern of constitutional violations” by States. 566 U.S. at 41-42; *see Garrett*, 531 U.S. at 374 (same); *Kimel*, 528 U.S. at 88-89 (same).

In any event, even if it were possible to invoke Section 5 to protect against possible future infringement alone, the legislative record would not support that action here. Although some of the Act’s supporters did argue before Congress that abrogation was necessary to ward off future infringement, those arguments were based entirely on speculation. For example, Ralph Oman testified only that abrogation was necessary to ward off “the *potential* for harm” in the future. House Hearing 7 (emphasis added).

Even this speculative fear focused on the possibility that “States might become lax in their copyright” compliance—not that States would infringe intentionally. Senate Hearing 9. But only intentional infringement can violate the Constitution. *See pp. 34-35, supra.*²¹

²¹ Allen also cites allegations of state infringement that arose after the Act was enacted. But as this Court has repeatedly held, an abrogation may be upheld based on only the “evidence before Congress” when it enacted the law. *Hibbs*, 538 U.S. at 727; *see Garrett*, 531 U.S. at 368 (abrogation invalid because the

* * *

In sum, when Congress enacted the Copyright Remedy Act, it did not assemble a record of widespread unconstitutional copyright infringement by States. In fact, Congress focused so little on the substantive requirements of the Due Process Clause as to cast doubt on whether Congress understood the Act as a measure to enforce that clause at all.²²

“legislative record” did not show a pattern of unconstitutional conduct by States).

Moreover, many of Allen’s examples of alleged post-enactment infringement involve *patents*. For example, Allen cites a government report that identified 58 intellectual-property lawsuits filed against States from 1985 to 2001. Br. 52. Of those lawsuits, nearly half involved claims of patent infringement. Government Accounting Office, *Intellectual Property: State Immunity in Infringement Actions* 10 (2001).

If post-enactment allegations could justify abrogation, as Allen claims, Br. 53, that theory would allow patent-holders to revive the Patent Remedy Act merely by filing infringement claims against States. Allen can cite no doctrine that would allow private parties to override this Court’s constitutional precedents in this way.

²² Congress made clear in another way that it did not consider the Act to be an exercise of its Section 5 powers: When it identified the source of its constitutional authority to enact the Act, it cited only Article I. Pet. App. 21a-22a; see Senate Report 8; House Report 7. This history confirms that the Act cannot be justified under Section 5. As this Court explained in *Florida Prepaid*, when Congress abrogates state sovereign immunity, the Court analyzes whether “Congress had in mind” a particular constitutional power. 527 U.S. at 642 n.7.

For this reason alone, the Act cannot be upheld as a valid exercise of Congress’s Section 5 power to enforce the Due Process Clause.

B. Congress’s chosen remedy was not proportional to any constitutional problem that Congress identified.

Even if—contrary to the record here—Congress had established that state copyright infringement posed constitutional concerns, the Copyright Remedy Act still would not qualify as a valid abrogation under Section 5. Such an abrogation requires Congress to choose a remedy that is congruent and proportional to the scope of unconstitutional state behavior that Congress has identified. *Florida Prepaid*, 527 U.S. at 639.

The proportionality test ensures that Congress does not use Section 5 to substantively redefine the Fourteenth Amendment, as construed by this Court. *Garrett*, 531 U.S. at 374. Although Section 5 allows Congress to “prohibit[] a *somewhat* broader swath of conduct” than what is strictly “forbidden by the Amendment’s text,” any remedial measures must still be designed to “enforce” the Amendment’s substantive guarantees. *Kimel*, 528 U.S. at 81 (emphasis added).

Thus, to enact valid Section 5 legislation, Congress must carefully tailor its remedies to target actual constitutional violations by States.

Applying this test of proportionality, this Court has specifically held that abrogation of state sovereign

immunity is an “indiscriminate” and “expansive” remedy that must be reserved for grave constitutional harms. *Florida Prepaid*, 527 U.S. at 646-47.

The record here does not rise to this level of gravity. Congress did not concretely identify any constitutional problems posed by state copyright infringement—let alone problems of a magnitude sufficient to justify abrogation. For this reason, the Copyright Remedy Act’s blanket authorization of copyright lawsuits against States cannot be justified under Section 5.

This conclusion is bolstered by the many, better-tailored remedies that Congress slighted.

For example, Congress could have made the Copyright Act non-preemptive, to facilitate the pursuit of parallel state-law claims. *See id.* It also could have allowed state courts to exercise concurrent jurisdiction over copyright claims. *Chavez*, 204 F.3d at 607 (concluding that concurrent copyright jurisdiction was an “alternative solution that would have avoided [the Act’s constitutional] problems”).

In addition, Congress could have “limit[ed] the coverage of the Act to cases involving arguable constitutional violations,” such as by narrowing the abrogation to cover only intentional infringement. *Florida Prepaid*, 527 U.S. at 646. It also could have applied abrogation only to “States with questionable remedies or a high incidence of infringement.” *Id.* at 647. Or it could have curtailed the Act’s “indefinite duration” by including a sunset provision for States

that did not engage in unconstitutional infringement over a given period. *Id.*

The history of other remedial statutes shows that this kind of tailoring is possible. For example, the Voting Rights Act is “limited to those cases in which constitutional violations were most likely,” was designed to cover only “those regions of the country where voting discrimination had been most flagrant,” and included a termination mechanism for States that do not engage in voting discrimination after a period of time. *Boerne*, 521 U.S. at 532-33. “[L]imitations of this kind tend to ensure Congress’ means are proportionate.” *Id.* at 533.

The Copyright Remedy Act, in contrast, is not tailored in any of these ways. Instead, it makes all fifty States “immediately amenable to suit in federal court” for any alleged violation of the Copyright Act. *Florida Prepaid*, 527 U.S. at 647. The abrogation thus covers a wide variety of conduct—such as negligent infringement—that poses no constitutional issue at all.²³

This lack of tailoring afflicts the “remedies available to plaintiffs in infringement actions” as well. *Id.* at 648 n.11. The Act sought to expose States to the full panoply of statutory copyright remedies. Those

²³ Following *Florida Prepaid*, Congress considered numerous proposals to tailor the scope of abrogation in exactly these ways. See Intellectual Property Protection Restoration Act of 1999, S.1835, 106th Cong. § 203 (1999); see Berman, 79 Tex. L. Rev. at 1085. None of these proposals became law.

remedies are expansive. They include disgorgement of profits, statutory damages of up to \$150,000 per infringing work, destruction of infringing works, attorneys' fees, and costs. 17 U.S.C § 511(b). Remedies of this kind go vastly beyond the "compensatory remedies" that the Due Process Clause requires. Berman, 79 Tex. L. Rev. at 1067.

As this Court has held, limiting damages to "actual monetary losses" helps show that an abrogation is appropriately tailored. *Hibbs*, 538 U.S. at 740. Here, though, Congress specifically rejected proposals that would have tailored the copyright remedies available against States. For example, it voted down a proposal to bar the award of attorneys' fees against States. Senate Report 4. Congress also rejected a proposal to limit remedies available against States to the remedies that plaintiffs can recover against the United States: actual damages, or statutory damages of \$750. House Report 10; *see* 28 U.S.C. § 1498(b); 17 U.S.C. § 504(c).

In sum, abrogation of state sovereign immunity is an expansive remedy that must be reserved for grave constitutional harms. Because Congress failed to tailor the Act to any modest constitutional problem posed by state copyright infringement, the Act fails proportionality review.

C. Allen has not alleged a violation of the Due Process Clause.

It is true that Congress may use Section 5 to abrogate state sovereign immunity for the narrow

subset of copyright infringement that is actually unconstitutional. *United States v. Georgia*, 546 U.S. 151, 158 (2006). Thus, although the Act's broader abrogation is invalid, the Act is indisputably valid insofar as it authorizes lawsuits against conduct that actually violates the Due Process Clause.

Some of Allen's amici claim that Allen has alleged a due-process violation here. *See* Public Law Scholars Br. 18-23. They are mistaken.

Because the question presented to this Court focuses on whether the Copyright Remedy Act is valid, only Allen's claim for copyright infringement is relevant here. In this lawsuit, Allen has *never* argued that defendants violated due process when they displayed his copyrighted images online. Pet. App. 12a-13a. Although Allen claimed below that defendants violated due process when they enacted an amendment to the state's public-records law, C.A. J.A. 33-37, he does not repeat that claim here. Thus, no due-process claim is before this Court.

Even if Allen had argued that the alleged infringement violated due process, that claim would fail for two reasons.

First, Allen has not plausibly alleged that any infringement by the State was intentional. Instead, as the Fourth Circuit held, defendants reasonably believed that they could use the images under the settlement agreement, which explicitly authorized them to display Allen's "noncommercial digital media." Pet. App. 37a. Further, defendants had

reason to believe that their noncommercial use of the images to make educational videos was fair use—and therefore non-infringing. *See id.* at 37a-39a.

Second, North Carolina provides a range of alternative remedies that satisfy due process in the circumstances of this case. For example, North Carolina has waived sovereign immunity in its own courts for a number of relevant claims, including claims for breach of contract, takings, and some torts. *Ferrell v. Dep't of Transp.*, 435 S.E.2d 309, 313 (N.C. 1991) (takings); *Teachy v. Coble Dairies, Inc.*, 293 S.E.2d 182, 185 (N.C. 1982) (torts); *Smith v. State*, 222 S.E.2d 412, 423-24 (N.C. 1976) (breaches of contract).

This Court has explicitly recognized that these remedies satisfy due process. *Florida Prepaid*, 527 U.S. at 644 n.9 (observing that Florida provides alternative remedies for patent infringement, including “through a takings or conversion claim”); *Georgia*, 546 U.S. at 158 (recognizing that “Florida satisfied due process by providing remedies for patent infringement by state actors”).

In sum, Allen has never claimed that the alleged copyright infringement here was unconstitutional. And even if he had brought such a claim, it would fail on the merits.

III. Stare Decisis Supports the Decision Below.

As the State has shown, the Copyright Remedy Act cannot be squared with *Florida Prepaid* and other precedents of this Court.

Allen thus calls on the Court to “overrule *Florida Prepaid*.” Br. 37. He goes on to argue that “any [other] holdings [of] this Court” that are “contrary” to his arguments “should be overruled.” Br. 32.

But Allen has failed to meet the high burden that applies when parties ask this Court to disregard its prior rulings.

Stare decisis is “a foundation stone of the rule of law.” *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014). The doctrine reflects the principle that, for our judicial system to operate effectively, “the applicable rule of law [must] be settled.” *Kimble*, 135 S. Ct. at 2409. Thus, departure from precedent demands a “special justification”—one that goes beyond “the belief that [a] precedent was wrongly decided.” *Id.*

Here, Allen seeks to disrupt these values by blithely asking the Court to overrule its key sovereign-immunity precedents.

Accepting that invitation would undermine one of the primary benefits of stare decisis: it “reduces incentives for challenging settled precedents,” thus “saving parties and courts the expense of endless litigation.” *Id.* For this reason, this Court has been especially cautious about reversing precedents that, like *Florida Prepaid*, are closely related “to a whole web of precedents” that would all be threatened if one strand were pulled away. *Id.* at 2411.

After all, even if the Court did not overrule *Florida Prepaid* expressly, challenges to that decision—and many other settled precedents—would surely follow a ruling in Allen’s favor here. For example, the district court expressed its view that “*Hans* and its progeny are in error” and explicitly asked “the higher courts to reconsider” over a century of case law. Pet. App. 63a-64a.

Allen cannot justify such a sweeping result. Neither of the traditional justifications for departing from precedent—that a precedent has proved unworkable, or that it cannot be reconciled with intervening doctrinal developments—are present here. *Kimble*, 135 S. Ct. at 2410-11.

A rule that States cannot be sued for copyright damages is “simplicity itself to apply.” *Id.* at 2411. To enforce this rule, courts simply dismiss copyright claims against States unless the claims plausibly allege an actual violation of the Due Process Clause. Thus, Allen cannot argue that the *Florida Prepaid* rule, as applied to copyrights, is unworkable.

Nor have the rule’s doctrinal underpinnings “eroded over time.” *Id.* at 2410. If anything, this Court’s commitment to state sovereign immunity has only increased in recent years. *E.g.*, *Hyatt*, 139 S. Ct. at 1499.

Moreover, hewing closely to precedent is especially warranted here, given this case’s unique features. This Court has called stare decisis “superpowered” when: (1) overruling precedent would disrupt reliance

interests and (2) Congress has declined opportunities to override the Court's rulings. *Kimble*, 135 S. Ct. at 2410. Both of these circumstances are present here.

First, reliance interests are especially significant here, because this case involves property rights. In property-rights cases, “considerations favoring stare decisis are at their acme,” because “parties are especially likely to rely on [judicial] precedents when ordering their affairs.” *Id.* (applying this rule to a case involving patents).

Indeed, as the Act's legislative record shows, copyright owners have arranged their business affairs to account for state sovereign immunity. For example, multiple company executives testified to Congress that they negotiate for immunity waivers when making contracts to share intellectual property with States. *See* note 14, *supra*.

Reliance interests are implicated here for another reason as well: The precedents at issue protect States against expansive financial liability. As this Court has explained, stare decisis protects precedents when overturning them will “expose governments to new liability.” *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2179 (2019) (explaining that no reliance interests were implicated in that case because this factor was absent).

The fact that this Court has not yet ruled squarely on the Copyright Remedy Act does not materially diminish these reliance interests. Not only have the lower federal courts almost uniformly held that the

Act is unconstitutional, Br. in Opp. 10 (collecting cases), but Congress and the executive branch have also agreed that *Florida Prepaid* left the Act a dead letter.

For example, in the wake of *Florida Prepaid*, the U.S. Department of Justice announced that it would no longer defend the Act in court. Then-Attorney General Reno informed Congress that “[a]fter an extensive review of the legislative history,” the government had concluded that the Act failed to satisfy the standards in *Florida Prepaid* for a valid Section 5 abrogation. Letter from Janet Reno, Att’y Gen., to J. Dennis Hastert, Speaker, U.S. House Rep. (Oct. 13, 1999).

Then-Solicitor General Waxman later described the reasons for this decision. He stated that, despite “exhaustively considering the matter” and draining “the limits of [his] creative faculties,” he “simply could not find an appropriate argument” that would not require this Court “to overrule” *Florida Prepaid*. Seth Waxman, *Defending Congress*, 79 N.C. L. Rev. 1073, 1087 (2001). Thus, in his view, defending the Act would have required the Department to breach its “obligation to honor the important doctrine of stare decisis.” *Id.* at 1085-86.

In the years since, the Department has continued to decline to defend the Act against constitutional challenge. *E.g.*, Letter from Loretta Lynch, Att’y Gen., to Paul Ryan, Speaker, U.S. House Rep. (Nov. 21, 2016).

Congress, too, has agreed that *Florida Prepaid* dooms the Copyright Remedy Act. After that decision, several bills were introduced in Congress to reauthorize copyright lawsuits against States. See note 23, *supra*. During legislative hearings, the bills' supporters made clear that a new statute was necessary because *Florida Prepaid* had disabled the Copyright Remedy Act.²⁴

For a second related reason, then, stare decisis is especially powerful here: Congress is free to “correct any mistake that it sees” in this Court’s decisions. *Kimble*, 135 S. Ct. at 2409. At any time over the past two decades, Congress could have enacted a narrower statute that cures the Act’s constitutional defects. See Berman, 79 Tex. L. Rev. at 1051-71 (describing proposals to re-enact the Act and examining their constitutionality). Instead, Congress chose to leave the status quo in place. This “congressional acquiescence” in a decision of this Court enhances the ruling’s precedential force. *Watson v. United States*, 552 U.S. 74, 82-83 (2007).

Congress’s inaction becomes even more pronounced when compared to the nearly thirty

²⁴ *E.g.*, *Hearing on Sovereign Immunity and the Protection of Intellectual Property Before Comm. on Judiciary*, 107th Cong. 1 (2002) (statement of Senator Leahy, a bill sponsor, that *Florida Prepaid* “threw out” the Copyright Remedy Act); *id.* at 10 (statement of Marybeth Peters, Register of Copyrights, that under *Florida Prepaid*, “[c]opyright owners are unable to obtain monetary relief under the Copyright Act against a State”).

copyright-focused laws that Congress has passed since *Florida Prepaid*.²⁵ As this Court has held in a similar context, “Congress’s continual reworking of the patent laws” further supports leaving this Court’s patent-focused precedents “in place.” *Kimble*, 135 S. Ct. at 2410. The same principle applies here.

For decades now, Congress, the courts, and the executive branch have engaged in an extended interbranch dialogue on state sovereign immunity for intellectual-property claims. That dialogue rose to a crescendo after *Florida Prepaid*—a decision that firmly placed the “ball[in] Congress’s Court.” *Id.* at 2409. Congress’s inaction in the wake of *Florida Prepaid* weighs in favor of letting that decision stand.

²⁵ U.S. Copyright Office, *Copyright Law of the United States* ix-xii (Dec. 2016), <http://bit.ly/2mlnaWy>.

CONCLUSION

The decision of the Fourth Circuit should be affirmed.

Respectfully submitted,

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