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 Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF DAVID NIMMER, ERNEST YOUNG, AND MICHAEL BYNUM AS *AMICI CURIAE* SUPPORTING PETITIONER

ERNEST A. YOUNG
3208 Fox Terrace Dr.
Apex, N.C. 27502
(919) 360-7718
young@law.duke.edu

W. SCOTT HASTINGS
Counsel of Record
LOCKE LORD LLP
2200 Ross Avenue
Suite 2800
Dallas, Texas 75201
(214) 740-8000
shastings@lockelord.com

Counsel for Amici Curiae

February 7, 2019

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Copyright Remedy Clarification Act, Pub. L. No. 103-553, 104 Stat. 2749 (1990) (the "CRCA"), which provides remedies for authors of original expression whose federal copyrights are infringed by States, is constitutional.

This question raises several important sub-issues on which this Court's guidance is urgently needed, including:

1. Did States waive their sovereign immunity in copyright cases in the Plan of the Convention, like they did in bankruptcy cases, *see Central Virginia Community College v. Katz,* 546 U.S. 356, 363 (2006)?

2. Must Congress explicitly invoke its power under Section Five of the Fourteenth Amendment for an Act abrogating sovereign immunity to be upheld under that Section?

3. Is Congress required to show a pattern of past constitutional violations by States, beyond the recurring copyright infringements that Congress identified in this record, before legislating under Section Five?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

FEDERAL CONSTITUTIONS AND STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IDENTITY AND INTEREST OF *AMICI*[1]

Amici are authors and scholars who have a strong interest in ensuring that copyrights are protected against infringement by state actors.

David Nimmer is the author of the leading treatise on copyright law, NIMMER ON COPYRIGHT, first published in 1963 by his late father, Melville B. Nimmer. The treatise is regularly cited by this Court and courts around the world.

Ernest Young is the Alston and Bird Professor of Law at Duke University, where he teaches Constitutional Law and Federal Courts. He has written extensively on this Court's sovereign immunity jurisprudence, including how that jurisprudence bears on federal intellectual property laws.

Michael Bynum has written and published more than 100 books. Bynum is a victim of copyright infringement by state actors in Texas who claim sovereign immunity protects them from liability. *See* Case No. 4:17-cv-00181, *Bynum v. Texas A&M University Athletic Department* (S.D. Tex.).

Amici believe their background, research, and experience with state sovereign immunity and copyright infringement by state actors will help the Court understand why review is urgently needed.

---

[1] All parties have consented to the filing of this brief. Pursuant to Rule 37.6, *Amici* states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *Amici* or their counsel, has made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

"[T]he Framers intended copyright … to be the engine of free expression." *Harper & Row Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 558 (1985). "By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Id.* And similar to the First Amendment's protections of speakers' right not to speak, copyright law empowers authors to control not only whether but where, when, and how to publish their works. *Id.* at 557-59. These free speech values inherent in copyright are particularly threatened when the State itself appropriates copyrighted works for its own purposes.

Copyright infringement by state actors has become a serious problem. *See* Pet. 18-19. There are hundreds of reported incidents of willful infringement by state actors. But if the Fourth Circuit's decision stands, there will be few (if any) remedies available to compensate authors for their losses. This is not what Congress intended. This is not what the Framers envisioned when they drafted Article I's Copyright Clause.

The Fourth Circuit's decision to declare the CRCA unconstitutional is fundamentally flawed. It fails to recognize that States waived their immunity from copyright cases in the Plan of the Convention. It creates confusion and conflicts in the law regarding the scope of Congress's authority to abrogate immunity under Section 5 of the Fourteenth Amendment. It undermines the clear, stated intent of Congress to hold States accountable for infringement, most recently reaffirmed in the Orrin G. Hatch–Bob Goodlatte Music Modernization Act of 2018. And it opens the door to

wide-ranging abuse of the rights of authors at the hands of state actors.

When federal courts take the extraordinary step of declaring an Act of Congress invalid, this Court should take notice. And as this Court's state sovereign immunity jurisprudence has become more complex and nuanced over the years, so too has the need grown for clarification of the background rules against which Congress must legislate.

ARGUMENT

State sovereign immunity must yield in two distinct circumstances: First, States lack sovereign immunity in areas, such as bankruptcy, where they surrendered their immunity "in the plan of the Convention." *Central Virginia Community College v. Katz*, 546 U.S. 356, 373 (2006). In these circumstances, no abrogation statute is necessary. Second, Congress may abrogate State immunity under Section Five of the Fourteenth Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). This case raises certworthy questions under both branches of this Court's immunity jurisprudence.

A. Review Is Warranted to Address Whether States Waived Immunity in Copyright Cases in the Plan of the Convention.

1. This Court's Immunity Jurisprudence Leaves Open the Question Whether States Waived Immunity under the Copyright Laws in the Plan of the Convention.

Prior to *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), it was "not difficult" to conclude that Congress had the power to subject States to suit

for copyright infringement. *Chavez v. Arte Publico Press*, 59 F.3d 539, 546 (5th Cir. 1995), *vacated and remanded*, 517 U.S. 1184 (1996) ("*Chavez I*");[2] *see* H.R. Rep. 101-282(I) (Oct. 13, 1989). Addressing an issue under Article I's Copyright Clause, this Court explained:

> When Congress grants an exclusive right or monopoly, its effects are pervasive; no citizen or State may escape its reach.

Goldstein v. California, 412 U.S. 546, 560 (1973). The CRCA unequivocally expressed Congressional intent to abrogate state immunity. Pet. 18a.

Seminole Tribe significantly restricted Congress's authority to abrogate state immunity under its Article I powers. 517 U.S. at 73. In that case, several Justices expressed concern that the Court's reasoning would extend immunity to cases involving bankruptcy, copyrights, and antitrust laws. *See id.* at 77 n.1 (Stevens, J., dissenting). The *Seminole Tribe* Majority dismissed that concern as "exaggerated," *id.* at 72 n.16, but the dissenters' concerns seemed vindicated when, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), this Court held that Congress had not validly abrogated state immunities in patent cases pursuant to its Section Five power. Nonetheless, the *Seminole Tribe* majority's suggestion that concerns for the validity of core federal statutes were "exaggerated" were exposed as hollow ten years later when the Court held that States lack immunity in bankruptcy cases. *Katz*, 546 U.S. at 379. To the extent *Seminole Tribe* suggested that Congress could not subject States to liability under *any* of its Article I powers, *Katz* rejected that

[2] *Chavez I* was remanded in light of *Seminole Tribe*.

language as *dicta*. *Id.* at 363 ("we are not bound to follow *dicta* in a prior case in which the point now at issue was not fully debated").

Katz decided a different issue than was presented in *Seminole Tribe* or *Florida Prepaid:* "The relevant question is not whether Congress has 'abrogated' States' immunity in proceedings to recover preferential transfers. . . . The question, rather, is whether Congress' determination that States should be amenable to such proceedings is within the scope of its power to enact 'Laws on the subject of Bankruptcies.'" 546 U.S. at 379.[3] That was because "States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'" *Id.* at 377 (quoting U.S. Const. art. I, § 8, cl. 4).[4] *Katz* thus requires courts to scrutinize federal statutes attempting to subject States to liability to determine whether it was enacted pursuant to *either* a valid abrogation of sovereign immunity *or* in an area where States waived immunity long ago.

Here, the Fourth Circuit relied on *dicta* from *Seminole Tribe* and failed to recognize that, as in bankruptcy cases, States waived immunity for copyright cases in the Plan of the Convention. The Fourth Circuit dismissed *Katz* as "completely distinguishable"

---

[3] *See Katz*, 546 U.S. at 362 (noting that although the Court had granted *certiorari* to determine whether a provision of the Bankruptcy Code purporting to abrogate state sovereign immunity was valid, "we are persuaded that the enactment of that provision was not necessary to authorize the Bankruptcy Court's jurisdiction over these preference avoidance proceedings").

[4] *See United States v. Texas*, 143 U.S. 621, 646 (1892) (recognizing that States waived immunity from suits brought by the United States when they ratified the Constitution).

involving issues "unique to the Bankruptcy Clause." Pet. 19a. The Fourth Circuit did not examine the similarities between federal copyright and bankruptcy authority and made no attempt to analyze the history, purpose, or text of the Copyright Clause to determine whether Plan-of-the-Convention waiver equally applies. *Id.*

Other courts have similarly erred. For example, the Eleventh Circuit refused to recognize Plan-of-the Convention waivers in copyright cases in *National Ass'n of Bds. of Pharmacy v. Board of Regents of the Univ. Sys. of Georgia*, but did not substantively analyze the Copyright Clause. 633 F.3d 1297, 1304 (11th Cir. 2011) ("*NABP*"). The Eleventh Circuit also said it was bound to follow *Florida Prepaid*, 527 U.S. 627, which did not even present a question regarding the scope of Article I authority, much less the specific question regarding Plan-of-the-Convention waivers.[5]

The Fifth Circuit has also held the CRCA's immunity waiver is invalid. *See Chavez v. Art Publico Press*, 204 F.3d 601 (5th Cir. 2000) ("*Chavez III*"). But its decision was issued years before *Katz*.

That three circuit courts have weighed in on an issue, all reaching the same conclusion, might ordinarily weigh against review. But here, those three circuits have declared an Act of Congress unconstitutional without even engaging in the correct legal

[5] Although *Florida Prepaid* cited broad language from *Seminole Tribe* regarding the lack of authority to abrogate immunity using Article I powers, the Court acknowledged that the parties did not raise that point for review. *See* 527 U.S. at 636 ("College Savings and the United States do not contend otherwise."). *Florida Prepaid* is not precedent on a question, at best, lurking in the background of the case. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

analysis. Consequences of these decisions continue to mount as States take advantage of their seeming impunity to violate copyrights. But as we discuss further below, Congress continues to legislate on the contrary assumption that it may subject States to liability in copyright. This situation is ripe for clarification—and correction—by this Court.

2. The History and Structure of the Copyright Clause, and Its Role in Promoting Free Expression, Suggest that the States Waived Their Immunity in Copyright Cases.

Petitioners make a compelling case that the Fourth Circuit erred when it refused to enforce the CRCA. Following *Katz*, the correct analysis of whether Plan-of-the-Convention waiver applies should focus on the Constitution's text and history. *See* 546 U.S. at 377-79. *Katz* emphasized three aspects of the Bankruptcy Clause as critical to its conclusion that States had waived immunity under it: (1) the need for "uniform" federal bankruptcy laws to solve the problem existing at the time of the Convention associated with inconsistent enforcement of discharge rights from state to state, *id.* at 366-69; (2) the fact that early federal legislation not only created uniform substantive rules but also empowered the federal courts, *see id.* at 373-77; and (3) that the exercise of bankruptcy jurisdiction "does not, in the usual case, interfere with state sovereignty even when States' interests are affected," *id.* at 370. Federal copyright law is similar in all three respects.[6]

---

[6] *See* James F. Caputo, *Copy*-Katz*: Sovereign Immunity, the Intellectual Property Clause, and* Central Virginia Community College v. Katz, 95 GEO. L. J. 1911, 1930 (2007) (collecting

At the Founding, the Framers focused on promoting free expression by providing uniformity of copyright protections to authors, while simultaneously protecting all speakers from government control over their messages. The Framers could not have intended for States to retain immunity against claims for copyright infringement, as such immunity deters the creation of artistic expression and allows States to interfere with the author's speech, including how he wishes to publish and use his work.

1. The need for uniform copyright laws was recognized before the Founding. The Continental Congress encouraged States to adopt legislation securing the "exclusive rights" of authors to their works. *See* 8 NIMMER ON COPYRIGHT, App. 7(B). James Madison later argued that Article I's Copyright Clause was necessary in the new 1787 Constitution because "[t]he States cannot separately make effectual provisions" for copyrights and patents. Federalist No. 43. Similar to the Bankruptcy Clause, the Copyright Clause was adopted to address the problems encountered under the Articles of Confederation with state-by-state enforcement of conduct with a national reach. *See id.*; Irah Donner, *The Copyright Clause of the U.S. Constitution: Why Did the Framers Include It With Unanimous Approval*, 36 Am. J. L. Hist. No. 3, 361, 361-62, 370-74 (July 1992).

In that era, it was impractical for an author to travel the States to try to obtain protection for a work, and virtually impossible to achieve uniform protection. *Id.* at 374. Although 12 of the 13 States adopted copyright laws, each law applied only within that particular

---

evidence that "the Framers understood the Intellectual Property Clause to embody a tacit waiver of state sovereign immunity").

state. *Id.* at 361-62. In some States, the laws did not even take effect because they were conditioned on all other States adopting similar laws (which Delaware never did). *Id.* The Framers wanted "a uniform national system of copyright law which would supplant a patchwork system of local state control," thereby preventing individual states from withholding protection. *See* Beryl R. Jones, *Copyrights and State Liability*, 76 IOWA L. REV. 701, 723 (1991) ("The framers envisioned a uniform national system in which state regulatory powers would be subservient."). "The framers envisioned that monetary damages in private citizen suits would be an important element in the establishment of this superior federal authority." *Id.*

The Copyright Clause grants Congress authority to enact laws to secure to authors "the exclusive Right to their respective Writings." U.S. Const. art. I, §8, cl. 8. "Congress manifestly has the power either to grant complete exclusivity or no protection at all." 1 NIMMER ON COPYRIGHT §1.07. The States adopted this Clause without any reservations from Congressional authority. "When Congress grants an exclusive right or monopoly, its effects are pervasive; no citizen or State may escape its reach." *Goldstein*, 412 U.S. at 560. Copyright protections are not exclusive to the author if States may freely use the work without liability for infringement. Recognition of Plan-of-the-Convention waiver in copyright cases enforces the plain language of the Constitution and gives it the meaning the Framers intended.

Noah Webster's story reinforces this point. Described as "the father of American copyright legislation," Webster wrote a textbook on the English language in 1782 and literally went from state to state advocating for copyright protections of literary works.

Donner at 370-75. Twelve States adopted copyright laws, none of which exempted state actors from liability. See 8 NIMMER ON COPYRIGHT, App. 7(C) (reprinting the statutes). At the time of the Constitutional Convention, "[t]he frustrations of Webster in his travels to obtain copyrights was well known throughout the states," and influenced the Framers when they adopted the Copyright Clause. Donner at 371-72, 374. Given that state schools were primary consumers of textbooks like Webster's, the Framers must have intended the "exclusive" protection authorized under the Copyright Clause to protect against infringement by state actors, too. It makes no sense that the Framers would act to redress the national problem identified by Webster, only to leave Webster's particular situation unprotected against state infringers.

2. As in bankruptcy, Congress has long recognized an important and exclusive role for the federal courts in copyright. From 1790 through today, Congress has granted authors "exclusive rights" or "sole rights" in their protected works. *See, e.g.*, 17 U.S.C. §106; Copyright Act of 1909, §1; Act of May 31, 1790. Copyright laws long ago emphasized the importance of federal forums to protect copyrights, granting jurisdiction to federal district courts to hear copyright claims in 1819—56 years before granting those courts general jurisdiction over all federal questions. *See* Act of Feb. 15, 1819, ch. 19, 3 Stat. 481, 481. And, in 1873, Congress made that jurisdiction exclusive of the state courts. See Rev. Stat. §711 para. 5.[7]

---

[7] *See also* Amy B. Cohen, *"Arising Under" Jurisdiction and the Copyright Laws*, 44 HASTINGS L. J. 337, 351 (1993) ("Congress recognized a need for federal courts to decide matters of patent and copyright law long before it supported federal court interpretation of federal laws in general.")

3. Also as in bankruptcy, holding state actors liable for their acts of infringement will exert only minimal impact on state sovereignty. Federal intellectual property obligations govern state and private entities alike, and impose no limits on state regulatory autonomy.[8] Just as *Katz* emphasized the *in rem* nature of bankruptcy as minimizing adverse impacts on States, *see* 546 U.S. at 369-71, copyright also targets *in rem* interests in personal property.[9] And copyright suits—unlike suits to recover state debts or enforce state bonds that gave rise to the Eleventh Amendment—are unlikely to pose the threat of government insolvency that has presented the most compelling case for immunity in this Court's sovereign immunity jurisprudence. *See generally* Ernest A. Young, *Its Hour Come Round at Last?: State Sovereign Immunity and the Great State Debt Crisis of the Early Twenty-First Century*, 35 HARV. J. L. & PUB. POL'Y 593 (2012).

State entities routinely acknowledge the legitimacy of enforceable copyright protections by seeking such protection for their own works, even filing suit to enforce their rights. *See* 1 NIMMER ON COPYRIGHT

---

[8] *Cf. Murphy v. NCAA*, 138 S.Ct. 1461, 1478-79 (2018) (finding no interference with state sovereignty under the anti-commandeering doctrine where "Congress evenhandedly regulates an activity in which both States and private actors engage" and "does not regulate the States' sovereign authority to regulate their own citizens").

[9] *See* 17 U.S.C. §201(d)(1) (recognizing copyright as "personal property"); Gideon Parchomovsky & Alex Stein, *Intellectual Property Defenses*, 113 COLUM. L. REV. 1483, 1487 (2013) ("intellectual property rights are rights in rem that avail against the rest of the world."); *see also Horne v. Department of Agriculture*, 135 S. Ct. 2419, 2426 (2015) (intellectual property rights are property for purposes of the Takings Clause).

§5.14. Federal statutes that hold states to the same rules for respecting and enforcing federally-created property rights that apply to everyone else pose no significant threat to state sovereignty.

4. The case for recognizing Plan-of-the-Convention waiver is even more compelling here than in the bankruptcy context because of the role of copyrights in promoting free expression. "The Copyright Clause and the First Amendment seek related objectives—the creation and dissemination of information." *Eldred v. Ashcroft*, 537 U.S. 186, 219, 244 (2003) (Breyer, J., dissenting). With the Copyright Clause and First Amendment, the Framers were expanding the rights and protections for authors to engage in creative expression, while limiting the government's ability to impair such expression.

This Court explains the importance of the Copyright Clause:

> The economic philosophy behind the clause … is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

Mazer v. Stein, 347 U.S. 201, 219 (1954); *see also Fox Film Corp. v. Doyal,* 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."). Allowing State infringements of copyrights removes the economic incentive for authors to create expressive works. When the State copies that

expression, the result may be to destroy the incentive altogether. The result is to suppress expression.

Given its focus on expression, the Copyright Clause should be read in conjunction with the First Amendment; they "were adopted close in time" and "are compatible." *Eldred*, 537 U.S. at 219; *see* Pamela Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTEL. PROP. L. 319, 325-26 (2003) (the Copyright Clause "embodies" First Amendment principles and represents a "repudiation of speech-suppressing, anti-competitive and otherwise repressive" government behaviors that once prevailed in England:). For present purposes, the key point is that the Framers and the States strongly opposed government intrusion on the rights of free expression.[10] Neither the Framers nor the States themselves intended to grant government actors a free license to interfere with, or steal, an author's copyrights and expressions. States waived immunity in copyright cases when they ratified the Constitution.

"If every volume that was in the public interest could be pirated away by a competing publisher ... the public [soon] would have nothing worth reading." *Harper & Row Publishers*, 471 U.S. at 559 (quoting Sobel, *Copyright and the First Amendment: A Gathering Storm*, 19 ASCAP COPYRIGHT LAW SYMPOSIUM 43, 78 (1971)). The same holds true when the competing publisher is the State. Just as a State may not take a work to suppress its message, a State should also not be able to take and use a work without authorization to obtain benefits rightfully belonging to the author. Where, as here, a State takes expression to use as its

---

[10] *See, e.g.,* Mass. Const. Art. XVI (1780); Pa. Const. Art. XII (1776); S.C. Const. Art. XLIII (1778); Va. Const. Sec. 12 (1776).

own, it has taken away the author's "exclusive right" to his work. U.S. Const. art. I, §8, cl. 8; *Fox Film Corp.,* 286 U.S. at 127 ("The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property."). The Framers would have held the State accountable for this conduct.

B. Review Is Also Warranted to Clarify the Standard for Abrogation of State Immunity when Congress Acts Pursuant to Section Five of the Fourteenth Amendment.

Even where States did not waive their immunity in the Plan of the Convention, Congress may abrogate immunity pursuant to its power to enforce the Reconstruction Amendments. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Important questions regarding the scope and exercise of that power remain unresolved. This case presents two distinct certworthy questions:

First, the Fourth Circuit held that Congress must explicitly invoke its power under Section Five of the Fourteenth Amendment, notwithstanding the general principle that Congress need not specify the power under which it acts and this Court's practice in prior Section Five abrogation cases. This holding directly conflicts with the Eleventh Circuit's holding in *NABP*, 633 F.3d at 1315 n.30.

Second, the Fourth Circuit added to this Court's "congruence and proportionality" analysis under the Section Five power a requirement that Congress document a record of prior constitutional violations by States in order to act. Although some language in this Court's decisions supports such a requirement, it is

inconsistent with other holdings of this Court and with the general character of this Court's enumerated powers jurisprudence.

1. This Court Should Resolve Conflicting Authority Concerning Whether Congress Must Explicitly Invoke Its Section Five Power, and Reject the Fourth Circuit's Double-Clear Statement Rule.

1. "[T]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). In *Woods*, the Court upheld federal rent control legislation as an exercise of Congress's war powers, notwithstanding Congress's failure to invoke that power explicitly. The important point was that "the war was a direct and immediate cause" of the conditions addressed by Congress's action. *Id.* The Court invoked *Woods* more recently in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 570 (2012), upholding the Affordable Care Act's individual mandate under the taxing power despite Congress's failure to explicitly frame the mandate in those terms.

In the present case, the Fourth Circuit said flatly that "[n]either the text of the [CRCA] nor its legislative history indicates any invocation of authority conferred by § 5 of the Fourteenth Amendment. And without such an invocation, the Act cannot effect a valid abrogation under § 5." Pet. 22a. This holding added an additional hoop for Congress to jump through when overriding state sovereign immunity. This Court has already required that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the

statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). The Fourth Circuit transformed this stringent requirement into a *double* clear statement rule: Congress must not only make its intent to abrogate State immunity unmistakably clear (which Congress *did* in the CRCA), but it must also clearly specify the enumerated power upon which it relies to do so.

This Court rejected this sort of reasoning in *EEOC v. Wyoming*, writing: "whatever else may be said about the § 5 question in this case, the District Court erred in . . . holding that Congressional action could not be upheld on the basis of § 5 unless Congress 'expressly articulated its intent to legislate under § 5,'" 460 U.S. 226, 243 n.18 (1983) (quoting *EEOC v. Wyoming*, 514 F. Supp. 595, 600 (D. Wyo. 1981)). The Court explained:

> It is in the nature of our review of congressional legislation defended on the basis of Congress's powers under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words "section 5" or "Fourteenth Amendment" or "equal protection," *see, e.g., Fullilove v. Klutznick*, 448 U.S. 448, 476–478 (1980) (Burger, C.J.), for "[t]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Miller*, 333 U.S. 130, 144 (1948).

Id.

Likewise, the Court demanded no such "clear statement" of reliance on Section Five in *Kimel v. Florida*

Board of Regents, 528 U.S. 62 (2000). There, the Court determined that Congress had clearly stated its intent to subject the States to damages liability under the Age Discrimination in Employment Act, then went on to assess whether that statute could pass *City of Boerne*'s "congruence and proportionality" test *See id.* at 73-78, 80-91. The Court applied no *double* clear statement rule of the sort fashioned by the Fourth Circuit here.[11]

The Fourth Circuit attempted to explain away *EEOC v. Wyoming* and *Kimel*, but its reasoning is the very argument rejected by the Eleventh Circuit in *NABP*, 633 F.3d at 1315 n.30. The Eleventh Circuit correctly holds that there is no need for Congress to say it is relying on Section Five when enacting abrogation legislation. *Id.*

2. It is easy to understand why Congress did not invoke Section Five of the Fourteenth Amendment in the CRCA: Under the law as it stood when the CRCA was enacted, Congress didn't have to rely on that power. The CRCA was enacted in 1990 in response to *Atascadero*, which held that Congress must clearly state its intent to subject State governments to damages actions. *See* H.R. Rep. 101-282(I) (Oct. 13, 1989).

---

[11] This Court has said in *dicta* that Congress should explicitly invoke its Section Five powers, *see, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 469-70 (1991). But the Court's task in *Gregory* was to construe the reach of Congress's statute—an enterprise that this Court viewed in *Wyoming* as quite different from "adjudg[ing] its constitutional validity." 460 U.S. at 243 n.18. Some of this Court's Section Five abrogation cases have likewise noted that Congress did invoke the Section Five power. *See Florida Prepaid*, 527 U.S. at 636. Nonetheless, contrary to the Fourth Circuit's assertion, Pet. 22a-25a, these cases do not say that such invocation is a requirement for valid abrogation.

But this Court had held the year before that Congress may abrogate the States' immunity pursuant to its ordinary Article I powers. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). It thus did not matter whether abrogation rested on the Commerce Clause, the Copyright Clause, or the Reconstruction Amendments until this Court's 1996 decision in *Seminole Tribe*, well after the CRCA had become law. To hold that Congress must revisit this issue a third time in order to specify under which enumerated power it seeks to abrogate is to play Lucy with Charlie Brown's football.

The Fourth Circuit's holding will affect the validity of any statute that might be defended under the Section Five power. It will encourage courts to speculate whether other powers must also be specifically invoked in order to ground a federal statute. It invites the question whether, when Congress *does* invoke Section Five of the Fourteenth Amendment, it may nonetheless miscarry by not properly stating the particular constitutional *theory* that may sustain the legislation. And Congress may respond by simply inserting boilerplate legislative history invoking a blunderbuss-shot of constitutional authorities for courts to sort out later. This Court should accept review to return to the settled rule of *Woods* and *Sebelius* that Congress need not specify the enumerated power upon which a particular enactment rests.

2. The Court Should Clarify the Extent to Which Congress Must Show a Pattern of Past Constitutional Violations Before Legislating under Section Five.

The Fourth Circuit did not consider whether the terms of the CRCA were congruent and proportional to the Due Process Clause's protections for property. Rather, like several other circuits, the Fourth Circuit

erected an additional hurdle for Section Five legislation by ruling that Congress may not legislate under that power if the legislative record does not show a pattern of *past* constitutional violations by the States. To make matters worse, the Fourth Circuit disregarded evidence of significant State violations of copyrights when Congress enacted the CRCA and, even more strikingly, that such violations have radically increased in the years since. Pet. 16a-19a. *Amici* agree with Petitioner that, because there is a very large record of unconstitutional state deprivations of copyright interests, the CRCA handily vaults any such requirement. If this Court agrees that Section Five does impose a "pattern of past violations" requirement, then it should take this case to clarify how extensive a pattern is required and whether the pattern should be judged at the time of enactment or at the time the statute is challenged. But we also believe that Section Five imposes no such requirement, and that this case affords the Court a valuable opportunity to clarify that point.

No other national enumerated power is thought to entail such a requirement. If Congress wishes to prohibit a particular activity under the Commerce Clause, it need not show that anyone is already engaging in such activity or that the activity would harm the interstate economy. If Congress wished to set safety standards for driverless cars, for example, it might consider it prudent to wait until those cars had been introduced, but the Constitution does not foreclose Congress from regulating wholly prospectively.

So, too, with the Section Five power. In *City of Boerne v. Flores*, this Court recognized that Section Five confers authority to "remedy or prevent unconstitutional actions." 521 U.S. 507, 519-20 (1997). If

Congress wished to prevent States from adopting new genetic screening technologies in hiring state employees, it could do so under the Section Five power even if no State had yet adopted those technologies: the only question would be whether use of the technology by a State would actually violate the Fourteenth Amendment. To hold otherwise would force this Court to consider a host of unanswerable questions, such as exactly how many past violations are necessary to "activate" the Section Five power, or whether state violations occurring after Congress enacts a statute count towards validating that statute under Section Five.

To be sure, this Court emphasized the lack of a legislative record showing instances of state violations of patent rights in *Florida Prepaid*, 527 U.S. at 640-41, and in some cases upholding Section Five legislation it has noted the presence of such a record. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 524-29 (2004). But as the Court has noted in its Commerce Clause cases, legislative findings and testimony can be helpful in determining whether a statute meets constitutional requirements, but they are not requirements in their own right. *See United States v. Morrison*, 529 U.S. 598, 612, 614 (2000). Especially where Congress acts prophylactically under Section Five, prohibiting some subset of constitutionally-permissible conduct in order to get at constitutionally forbidden conduct, a record of past state conduct can help a court assess the relative proportions of those two sorts of conduct.

But this Court made clear in *United States v. Georgia*, 546 U.S. 151 (2006), that if Congress is not acting prophylactically, it need not show that targeted conduct is frequent in order to prohibit it. *See id.* at

158-59. If past constitutional violations were an independent prerequisite for valid Section Five legislation, then the plaintiff in *Georgia* could not have succeeded simply by proving that his own constitutional rights were violated.

At least since *McCulloch v. Maryland* 17 U.S. 316 (1819), this Court has eschewed the sort of "necessity" requirement adopted by the Fourth Circuit. This Court should clarify and reaffirm that Section Five imposes no such requirement.

C. The Music Modernization Act of 2018 Confirms Congressional Intent to Hold States Accountable for Infringement.

Even today, Congress intends to hold States accountable for copyright infringement. Congress passed the Orrin G. Hatch–Bob Goodlatte Music Modernization Act on October 11, 2018—after the Fourth Circuit's decision. The Act extends copyright protections to sound recordings fixed before February 15, 1972. 17 U.S.C. §1401(a)(1). "Anyone" who infringes such works may be held liable for damages and fees. 17 U.S.C. §1401(a)(1). Lest there be doubt about the enactment's reach, Congress specified that

> the term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in the official capacity of the officer or employee, as applicable.

17 U.S.C. §1401(a)(3). The Act continues:

> Any State, and any instrumentality, officer, or employee described in subsection (a)(3), shall be subject to the provisions of this

> section in the same manner and to the same extent as any nongovernmental entity.

17 U.S.C. §1401(k).

These provisions reflect a clear disagreement between Congress and the circuit courts regarding the scope of authority to abrogate state sovereign immunity. Congress believes it has such authority, whereas the Fourth Circuit says it does not. These are compelling circumstances to grant review.

D. State Copyright Infringement Is a Problem that Should be Addressed Immediately.

Petitioners presented compelling evidence showing that state infringement of copyrights is a widespread problem, including by citing a study prepared for *Amicus Curiae* Bynum in connection with his lawsuit against Texas A&M University's Athletic Department. *See* Pet. State infringement occurs in widely varying contexts, including, for example, unauthorized publishing of copyrighted photos to promote university programs, reproducing copyrighted class materials, publishing a researcher's health care model, and in Bynum's case, publishing a book on the Internet after deliberately removing his name.

Bynum shared an advance copy of one of his books about E. King Gill, the student whose actions inspired Texas A&M's 12th Man tradition, to give A&M a chance to fact-check the work before it was published. A&M reproduced Bynum's work, making it available for free on the Internet. A&M's actions destroyed all value to Bynum in that work. Now, A&M pleads immunity to avoid accountability.

Sovereign immunity should not be a license to steal. Allowing States to avoid liability for copyright violations has wide-ranging ramifications. Can States reproduce software programs without paying Apple or Microsoft? Can States copy and resell books at the university book store to earn profits that rightfully belong to others? State law provides no answer to these dilemmas, because federal copyright laws create a uniform system that preempts state law. 17 U.S.C. §301.

Copyrights play a vital role in encouraging creativity and freedom of expression. This Court should not allow States to trample on the important rights and incentives granted to authors by Congress under the authority conferred in the Constitution.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

ERNEST A. YOUNG
3208 Fox Terrace Dr.
Apex, N.C. 27502
(919) 360-7718
young@law.duke.edu

W. SCOTT HASTINGS
Counsel of Record
LOCKE LORD LLP
2200 Ross Avenue
Suite 2800
Dallas, Texas 75201
(214) 740-8000
shastings@lockelord.com

Counsel for Amici Curiae

February 7, 2019