No. 18-877

IN THE

Supreme Court of the United States

FREDERICK L. ALLEN and
NAUTILUS PRODUCTIONS, LLC,

Petitioners,

v.

ROY A. COOPER, III,
as Governor of North Carolina, *et al.*,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

BRIEF OF PUBLIC LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Congress validly abrogated state sovereign immunity via the Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990) ("CRCA"), in providing remedies for authors of original expression whose federal copyrights are infringed by States.

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INTEREST OF AMICI CURIAE

Amici are scholars of constitutional law, federal jurisdiction, and civil rights law who have taught and written about the Eleventh Amendment and state sovereign immunity for many years. We present this brief in an effort to make our scholarship and experience useful to the Court.[1]

Samuel Bagenstos is the Frank G. Millard Professor of Law at the University of Michigan, where he teaches and writes about constitutional law and civil rights. Professor Bagenstos successfully briefed and argued *United States v. Georgia*, 546 U.S. 151 (2006) in this Court.

Neil S. Siegel is the David W. Ichel Professor of Law and Professor of Political Science at Duke University, where he teaches and writes about constitutional law and federal jurisdiction.

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.

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[1] All parties have consented to the filing of this brief. Pursuant to Rule 37.6, *Amici* state 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

This brief suggests a path for resolving this important case that is faithful to the Constitution's text and history, minimizes disruption to this Court's state sovereign immunity jurisprudence, and maximizes the chance for consensus on the Court. The key is this Court's unanimous decision, authored by Justice Antonin Scalia, in *United States v. Georgia*, 546 U.S. 151 (2006). *Georgia* held that federal statutes abrogating state sovereign immunity are always valid when invoked by a plaintiff who can establish not only a statutory violation but also a constitutional one—whether or not the statute would also be valid if prophylactically applied to state conduct that is not unconstitutional. This is the narrowest form of abrogation under Section 5 of the Fourteenth Amendment. It implements the special concern for constitutional rights demonstrated by the Framers of both the original Constitution and the Eleventh and Fourteenth Amendments. And it follows the teaching of unanimous Courts in both *Georgia* and *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), which recognized Congress's powers to enforce those rights through damages remedies even against nonconsenting states.

In presenting this argument, *amici* do not wish to undermine or disparage the arguments pressed by Petitioners and other *amici* that Congress's enumerated power to protect copyrights entails a waiver of state immunities in the plan of the Convention. *Amici* agree that copyright is a strong candidate for such a waiver under this Court's decision in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006). But that argument has been

ably presented by Petitioners and others, and *amici* believe they can more usefully assist the Court by offering an alternative ground. Petitioners have compellingly alleged that North Carolina's conduct violated *both* the Copyright Act and the Fourteenth Amendment's Due Process Clause. Under *Georgia*, that is enough to decide this appeal.

But whatever this Court does, it should not extend the reach of its decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). *Seminole*'s holding—that Congress generally may not abrogate state immunity when acting pursuant to its Article I powers—was unfaithful to the text of Article III or the Eleventh Amendment, and it overlooked crucial elements of the relevant history. This case does not require consideration whether *Seminole* should be overruled, because the CRCA satisfies both *Katz*'s conditions for waiver and the criteria for abrogation under Section 5. But this Court should not extend *Seminole* by applying it to an important federal statute, narrowing *Katz*'s waiver doctrine, or restricting the scope of permissible abrogation under Section 5.

ARGUMENT

I. This Court's decision in *Seminole Tribe* should not be extended.

In *Seminole Tribe v. Florida*, this Court held that Congress generally cannot abrogate the sovereign immunity of the states when it acts pursuant to its Article I powers. 517 U.S. at 72-73. *Amici* believe that this holding rested on an incorrect reading of the relevant text and history. Whether or not the costs of

that decision overcome the presumption of *stare decisis*, however, is a difficult question that this Court need not consider in order to resolve this case. We canvass *Seminole*'s missteps in order to underscore the importance of not extending its holding.

A. *Seminole*'s holding did not rest on the constitutional text.

Article III extends the federal courts' jurisdiction to "all cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2. This language generally authorizes federal courts to hear federal statutory claims. Article III says nothing about sovereign immunity; it neither creates it nor overrides it, if it can be derived from some other source. The only textual source for a constitutional doctrine of state sovereign immunity is the Eleventh Amendment.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Most scholars have read this language to prohibit federal courts from hearing suits against states only when jurisdiction rests on diversity of citizenship; effectively, the amendment repeals the Citizen-State Diversity Clauses of Article III when the state is an unwilling defendant.[2] And this Court has

[2] *See, e.g.*, William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an*

unanimously agreed with that reading. The *Seminole* majority acknowledged that "the text of the Amendment would appear to restrict only the Article III diversity jurisdiction," 517 U.S. at 54, and the dissenters affirmed that "[t]he history and structure of the Eleventh Amendment convincingly show that it reaches only to suits subject to federal jurisdiction exclusively under the Citizen–State Diversity Clauses," *id.* at 110 (Souter, J., dissenting). Writing for the majority in *Alden v. Maine*, 527 U.S. 706 (1999), Justice Kennedy candidly acknowledged that the phrase "Eleventh Amendment immunity" is "something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment," *id.* at 713.

Affirmative Grant of Jurisdiction Rather than a Prohibition against Jurisdiction, 35 STAN. L. REV. 1033 (1982); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L. J. 1 (1988). The most significant scholarly disagreement about the text concerns whether it bars all cases in which diversity is present, or only those in which diversity is the sole basis of jurisdiction. *Compare* Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989) (arguing that the "plain meaning" forbids jurisdiction over even federal question cases if the plaintiff is an out-of-stater), *with* William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U CHI. L. REV. 1261 (1989) (defending the diversity reading). That difference is irrelevant to this case because Petitioners are citizens of North Carolina.

The state sovereign immunity doctrine has existed apart from the constitutional text at least since *Hans v. Louisiana*, 134 U.S. 1 (1890). In *Monaco v. Mississippi*, 292 U.S. 313 (1934), for instance, this Court said that "[m]anifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting States. Behind the words of the constitutional provisions are postulates which limit and control," *id.* at 321. But until *Seminole Tribe*, those penumbral "postulates" had never been allowed to do what only a *constitutional* principle can do: trump the clear mandate of a duly-enacted federal statute that explicitly overrode state sovereign immunity.

Seminole's reach beyond the Eleventh Amendment's text is particularly troubling given that text's highly specific nature. As John Manning has documented, "the Eleventh Amendment appears to have offered a carefully circumscribed answer to the larger question of how much sovereign immunity states should possess against the exercise of Article III jurisdiction."[3] Because the amendment process is designed to allow electoral minorities to force compromise, Dean Manning points out, interpreters "must be sensitive to the possibility that the Amendment's precise enumeration of exceptions to the grant of Article III power carries a negative

[3] John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L. J. 1663, 1748 (2004).

implication, the product of an apparent decision to go so far and no farther in defining the desired exceptions to federal jurisdiction."[4] Hence, courts "must not readjust the Amendment's precise terms to capture their apparent background purpose."[5] State sovereign immunity, in other words, should have *constitutional* weight only in those cases falling within the Eleventh Amendment's text.[6]

B. *Seminole*'s reasoning was inconsistent with the founding generation's treatment of common law doctrines.

If the constitutional principle of state sovereign immunity cannot rest on the Eleventh Amendment, then it must come from somewhere else. The most plausible "somewhere else" is the common law. Justice Scalia argued in *Union Gas* that "the doctrine of sovereign immunity . . . was part of the understood

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[4] *Id.* at 1750.

[5] *Id.*

[6] One scholar has suggested that broad notions of state sovereign immunity can rest on the meaning of "state" as it appears throughout the constitutional text. *See* Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 821 (1999). But the text doesn't do any actual work in this interpretation, *see* Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1624-26 (2000), and it is far from clear that immunity was part of the "linguistic" meaning of "state" in the late eighteenth century, *see* Steven E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1872 (2012).

background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 31-32 (1989) (Scalia, J., concurring in part and dissenting in part). This argument has been taken up more recently by Professors William Baude and Steven Sachs, who see state sovereign immunity as a "constitutional backdrop"—a survival of the English common law that the Constitution did not abrogate and that Congress lacks power to change.[7] Because these scholars offer the most conceptually clear defense of an extra-textual principle of state immunity, we consider their view in some detail.

Amici agree that the common law forms a legal "backdrop" to the Constitution that generally continues in effect unless and until it is modified by positive law. Strong "clear statement" rules, of the sort that restrain *all* abrogation of state immunity, *see Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985), make sense on this ground.[8] Likewise, it makes sense to hold that no state has power to alter *another* state's preexisting immunities. *See Franchise*

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[7] *See* William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 8-9 (2017); Sachs, *supra*, at 1868-75.

[8] *See, e.g.*, David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 936-37 (1992) (defending the canon disfavoring broad constructions of statutes in derogation of the common law); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEXAS L. REV. 1, 123-27 (2004) (arguing that "clear statement" rules offer strong protection for state autonomy).

Tax Board of California v. Hyatt, 139 S. Ct. 1485 (2019). But *Seminole*'s further step—which makes these common law rules impervious even to a clear statutory override—is insupportable. Neither Justice Scalia in *Union Gas* nor Professors Baude and Sachs have addressed the care with which the founding generation considered precisely how—and to what extent—the American legal systems should absorb common law norms.

It was the *states*, not the national government, that generally "received" the common law.[9] Each state did so through a positive act—usually state constitutional provisions, but sometimes state statutes or state court decisions.[10] Moreover, as Justice Story noted, early Americans "brought with them and adopted only that portion [of the English common law] which was applicable to their situation." *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 144 (1829). These reception measures generally made clear that common law principles thus adopted remained subject to legislative alteration.[11]

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[9] *See, e.g.*, Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791 (1951).

[10] *See id.* at 798-800.

[11] *See, e.g.*, N.J. Const. art. XXII (1776) ("[T]he common law of England . . . shall remain in force, until [it] shall be altered by a future law."); *Seminole*, 517 U.S. at 162 (Souter, J., dissenting) (collecting early provisions); Hall, *supra*, 4 VAND. L. REV. at 798-89; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 299-300 (1969).

In this, of course, the common law received by the states was just like the common law of the mother country, whose doctrine of parliamentary sovereignty made *every* common law principle subject to legislative alteration.[12] But subordination of common law principles to legislation proved central to the debate about receiving the common law into *federal* law. Some critics of the proposed Constitution, like George Mason, complained that it failed to secure "the enjoyment of the benefit of the common law."[13] Federalists replied that to do so would effectively destroy the notion of limited and enumerated powers, as the common law extended to all subjects.[14] Even worse, Federalists contended, "a constitutional reception of the common law would leave it 'immutable,' incapable of legislative revision."[15] Instead, they constitutionalized particular common law rights, like trial by jury or the writ of *habeas corpus*, while eschewing a general reception.[16]

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[12] *See, e.g.*, THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 336-37 (5th ed. 1956).

[13] George Mason, *Objections to This Constitution of Government*, in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 637 (Max Farrand ed. 1911). *See* Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1256-57 (1985).

[14] *See* Jay, *Part Two*, *supra*, at 1259 (quoting Madison to the effect that a general reception of the common law "would have broken in upon the legal Code of every State").

[15] *Id.* at 1258-59 (quoting Edmund Randolph).

[16] *See* Harry W. Jones, *The Common Law in the United States: English Themes and American Variations*, in

Later, the debate over federal reception of the common law resurfaced in relation to claims by the Adams administration that a general body of federal common law supported the validity of the Alien and Sedition Acts.[17] James Madison's critique of that argument rejected any general notion of federal common law—in particular, because if such a common law were part of the Constitution, it would be immune from legislative alteration:

> [T]he consequence of admitting the common law as the law of the United States, on the authority of the individual States, is as obvious as it would be fatal. As this law relates to every subject of legislation, and would be paramount to the Constitutions and laws of the States, the admission of it would overwhelm the residuary sovereignty of the States, and by one constructive operation new model the whole political fabric of the country.[18]

Each of these episodes—the state reception statutes, the constitutional ratification debates, and the Alien

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POLITICAL SEPARATION AND LEGAL CONTINUITY 123-24 (Harry Jones ed. 1976).

[17] *See* Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1077-83 (1985).

[18] *Report on the Alien and Sedition Acts*, in James Madison, WRITINGS 608, 640 (Jack Rakove ed. 1999) (1800); *see also id.* at 639 ("If . . . the common law is established by the Constitution, it follows that no part of the law can be altered by the legislature."); Jay, *Part One*, *supra*, at 1090-91.

and Sedition Act controversy—make clear that incorporation of common law principles into American law did not simply go without saying. Early Americans were careful to receive only so much of the common law as was useful in their particular states' circumstances, to receive it almost entirely as state law rather than federal law, and to ensure that common law principles would be susceptible to legislative override.[19]

Without addressing this history, Professors Sachs and Baude assert that the Constitution denied Congress power to alter the common law principle of sovereign immunity. They ground this limitation in the Necessary and Proper Clause, suggesting that "abrogating sovereign immunity is one of the 'great and important' or 'great substantive and independent'

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[19] In *Seminole*, the majority opinion sought to ground state sovereign immunity in "the jurisprudence in all civilized nations," rather than in the common law of England. 514 U.S. at 69. The jurisprudence on which *Seminole* relied made no such distinction, although it used both terms. *See Hans*, 134 U.S. at 15 (emphasizing that a suit against a states by its own citizen was "not known . . . at the common law"). In any event, where the Constitution does incorporate a broader international jurisprudence—in the Admiralty Clause, for example—that jurisprudence has always been subject to legislative alteration. *See, e.g.*, *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (Marshall, C.J.) (observing that "the Court is bound by the law of nations" until "an act be passed" by Congress). In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714-28 (2004), for example, this Court treated the extent to which the "law of nations" would be cognizable by American courts as pervasively subject to congressional choice.

powers that falls outside of the implied powers of Article I."[20] Yet each scholar presents this claim as an invitation to further inquiry—not as a historical demonstration.[21]

But striking down an act of Congress requires more. The Framers' insistence on legislative control over the common law, as well as their concern that adopting the common law might perpetuate monarchical principles inappropriate for a republic,[22] undermine any argument that abrogation is an "improper" power. Moreover, as we discuss in the next section, that argument is also inconsistent with the Framers' theory of state sovereignty.

A final problem is that Congress's power to enforce the Fourteenth Amendment through "appropriate" legislation, U.S. Const. amend. XIV, § 5, is generally equated with its "necessary and proper" authority

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[20] Baude, *supra*, 103 VA. L. REV. at 15; *see also* Sachs, *supra*, 80 GEO. WASH. L. REV. at 1874-75.

[21] *See* Baude, *supra*, at 15 (characterizing this rationale as "plausible"); Sachs, *supra*, at 1874 (stating that it "might be" true).

[22] *See, e.g.*, Madison, *Alien and Sedition Acts*, *supra*, at 639 (worrying that "an indefinite admission of the common law . . . might draw after it the various prerogatives making part of the unwritten law of England"); *see also Letter from James Madison to George Washington* (Oct. 18, 1787), in WRITINGS, *supra*, at 140, 141 (noting with approval that "every State has made great inroads & with great propriety on this *monarchical* code") (emphasis in original).

under Article I.[23] Adopting the scholars' theory that abrogation is inherently "improper"—which this Court has never done—would thus call into question this Court's unanimous and unbroken line of cases holding that Congress may abrogate state sovereign immunity when enforcing the Reconstruction Amendments. *See, e.g.*, *Fitzpatrick*, 427 U.S. at 456 ("We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.").

C. *Seminole*'s reasoning was inconsistent with the founding generation's view of state sovereignty.

The doctrine of sovereign immunity applies straightforwardly in a legal system with one unitary sovereign. But as Justice Kennedy observed, "[t]he Framers split the atom of sovereignty." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). In the Federalists' political theory, ultimate sovereignty "resides in the PEOPLE, as the fountain of government."[24] Accordingly, the

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[23] *See, e.g.*, *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 178 & n. 153 (1997).

[24] 1 PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-1788, at 302 (John Bach McMaster & Frederick D. Stone eds., 1888) (quoting James Wilson); *see generally* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425, 1435-37 (1987).

sovereign People "can distribute one portion of power to the more contracted circle called State governments; they can furnish another portion to the government of the United States."[25] Each sovereign's prerogatives were limited by this allocation. Hence, Chief Justice Marshall described the nation and the states as "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819).[26]

From this perspective, the Eleventh Amendment's repudiation of *Chisholm* makes sense. *Chisholm* involved a claim for payment of a debt grounded in state law.[27] 2 U.S. (2 Dall.) at 430. Under the Federalists' political theory, Georgia was sovereign as to that law, and the *Chisholm* majority never satisfactorily explained why a state should not be treated as sovereign with respect to a claim under its own law.[28] But as Justice Iredell's dissent pointed out, the right answer might be different in a federal case "relat[ing] to the execution of the . . . authorities of the general Government (which it must be admitted are full and discretionary, within the restrictions of the Constitution itself)." 2 U.S. (2 Dall.) at 432. In that

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[25] 1 PENNSYLVANIA, *supra*, at 302 (quoting Wilson).

[26] *See also Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 435 (1793) (Iredell, J., dissenting) ("The United States are sovereign as to all the powers of Government actually surrendered; Each State in the Union is sovereign as to all the powers reserved.").

[27] *See* Amar, *supra*, at 1472.

[28] *See id.* at 1469-73.

sort of case, "sovereignty has . . . been . . . delegated to the United States . . . wherein the separate sovereignties of the States are blended in one common mass of supremacy." *Id.* at 435. Both the Federalists' political theory and Justice Iredell's application of it in *Chisholm* thus support Professor Akhil Amar's conclusion that "[w]here governments are acting within the bounds of their delegated 'sovereign' power, they may partake of sovereign immunity; where not, not."[29]

Respect for federalism, in this analysis, suggests that Congress may lack power to subject states to damages suits under *state* law. It also suggests that courts should not displace traditional state law immunities, including sovereign immunity, without a clear statement of Congress's intent. *See Gregory v. Ashcroft*, 501 U.S. 452 (1991) (presumption against altering traditional federal balance); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (recognizing interpretive presumption against displacement of state law). And other aspects of the Framers' federal plan—including the sovereign equality of states, *see Hyatt*, 139 S. Ct. at 1493-94—explain why one state may not displace another state's immunity. But when Congress speaks clearly, and acts within its enumerated powers, *it* exercises the People's sovereign power. The Copyright Act plainly falls within Congress's sphere, and so the Framers' conception of sovereignty requires state immunity to yield.

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[29] Amar, *supra*, at 1490-91, n. 261.

D. This Court can resolve this case without considering whether *Seminole* should be overruled.

Because *Seminole*'s holding was inconsistent with the constitutional text and the founding generation's views about sovereignty and the common law, it should not be extended to bar individual remedies under another important federal statute. Overruling that decision, however, would raise difficult and unnecessary questions of *stare decisis*. *Seminole* has stood for nearly a quarter century, and an extensive jurisprudence has grown up around it. *Amici* believe that this case can be a vehicle for refining *Seminole*'s impact without repudiating its central holding.

While the Court's decisions under *Seminole* have remained bitterly divided, this Court has unanimously embraced the proposition that Congress may abrogate state sovereign immunity pursuant to Section 5 of the Fourteenth Amendment. *See Fitzpatrick*, 427 U.S. at 455; *United States v. Georgia*, 546 U.S. 151 (2006). In *Georgia*, in particular, this Court unanimously held that an abrogation statute is valid as applied to particular cases in which the plaintiff can establish an actual constitutional violation. That principle resolves this case. And by insisting on a constitutional as well as a statutory violation, *Georgia* effectively redresses the most serious violations of national sovereignty while retaining significant safeguards against unwarranted impositions on state governments.

The Fourth Circuit's opinion below also narrowed the scope of Section 5 abrogation by imposing an additional and unwarranted clear statement

requirement and by demanding a pattern of past constitutional violations as a predicate for congressional legislation. These new doctrines make prophylactic abrogation under Section 5 extremely difficult. If this Court chooses to address prophylactic abrogation, it should reject these doctrinal innovations.

II. Congress validly abrogated North Carolina's sovereign immunity in the CRCA.

This Court has unanimously agreed that Congress may abrogate state sovereign immunity when it acts pursuant to Section 5 of the Fourteenth Amendment. Such abrogation can happen in two ways: First, abrogation statutes may have a prophylactic effect, subjecting states to liability in all cases where they violate the terms of the statute, so long as that statute's terms are "congruent and proportional to the targeted violation" of the Constitution. *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 374 (2001). Second, even abrogation statutes that do not meet this standard may be enforced when the plaintiff can establish not only a statutory violation but an actual constitutional violation as well. *Georgia*, 546 U.S. at 158-59. The latter route provides the most expeditious way to resolve the present case. But the CRCA also meets this Court's "congruence and proportionality" standard for prophylactic legislation, properly construed.

A. North Carolina is subject to damages liability in this case under this Court's holding in *United States v. Georgia*.

In *United States v. Georgia*, a disabled inmate of the Georgia state prison system challenged his conditions of confinement by suing the state Department of Corrections and several individual officers under Title II of the Americans with Disabilities Act and the Eighth Amendment. *See* 546 U.S. at 154-55.[30] The District Court dismissed the claims against the individual officers as unduly vague and all claims against the state defendants as barred by sovereign immunity. The Eleventh Circuit affirmed as to state immunity, but reversed as to the officers, holding that the plaintiff should be allowed to develop his claims under the Eighth Amendment. *Id.* at 155-56. This Court granted *certiorari* on the immunity issue only and reversed in a unanimous opinion by Justice Scalia. *Id.* at 157-59.

Justice Scalia explained this result by drawing a sharp distinction between two different sorts of abrogation theories:

> While the Members of this Court have disagreed regarding the scope of Congress's "prophylactic" enforcement powers under § 5

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[30] Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Congress explicitly abrogated the states' immunity. *See id.* § 12202.

> of the Fourteenth Amendment . . . no one doubts that § 5 grants Congress the power to "enforce . . . the provisions" of the Amendment by creating private remedies against the States for *actual* violations of those provisions. . . . This enforcement power includes the power to abrogate state sovereign immunity by authorizing private suits for damages against the States.

546 U.S. at 158-59. The Court characterized all of its previous Section 5 abrogation cases as involving prophylactic theories, under which the plaintiffs had alleged only a violation of the statute. *Id.* at 157-58. It is not clear whether the plaintiff's ADA Title II claim could have prevailed on such a theory. This Court had upheld prophylactic abrogation under Title II only "as it applies to the class of cases implicating the accessibility of judicial services," *Tennessee v. Lane*, 541 U.S. 509, 531 (2004), and it had struck down the ADA's abrogation with respect to the general employment discrimination provisions of Title I, *see Garrett*, 531 U.S. at 368. Nonetheless, because the plaintiff in *Georgia* had alleged a violation of not only Title II but also the Constitution itself, he was entitled to go forward. "[I]nsofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment," this Court explained, "Title II validly abrogates state sovereign immunity." 546 U.S. at 159.

This Court has not elaborated on this as-applied form of abrogation since *Georgia.* But the courts of appeals have read *Georgia* to uphold abrogation legislation, like the CRCA, whenever the plaintiff can

establish an actual constitutional violation: "If the State's conduct violated both [the statute] and the Fourteenth Amendment, [the statute] validly abrogates state sovereign immunity." *Hale v. King*, 642 F.3d 492, 498 (5th Cir. 2011). On the other hand, "[i]f the State's conduct violated [the statute] but did not violate the Fourteenth Amendment, the court must then determine 'whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid'" as prophylactic legislation under the congruence and proportionality test. *Id.* (quoting *Georgia*, 546 U.S. at 159). The upshot is that "if a plaintiff alleges a statutory violation that is also an actual constitutional violation, the court need not examine whether that statute could validly prohibit facially constitutional conduct under the *City of Boerne* test." *National Association of Boards of Pharmacy v. Board of Regents of the University System of Georgia*, No. 3:07-CV-084 (CDL) 2008 WL 1805439, at *7 (M.D. Ga. 2008), *aff'd in part, vacated in part on other grounds,* 633 F.3d 1297 (11th Cir. 2011).

The straightforward "as-applied" test from *Georgia* handily decides the present appeal. Petitioners have alleged not only that North Carolina violated the Copyright Act, but also that this infringement actually violated the Constitution by depriving them of their property without due process of law. No one disputes that the copyrights in question count as "property" within the meaning of the Due Process Clause. And although this Court noted in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), that not all intellectual property infringements amount to constitutional violations, Petitioners' claims here are

not vulnerable to the same difficulties. First, Petitioners have alleged that the infringement was intentional rather than merely negligent. *See* Brief for Petitioner at 8-9. *Compare Florida Prepaid*, 527 U.S. at 645 (noting that "a state actor's negligent act that causes unintended injury to a person's property does not 'deprive' that person of property within the meaning of the Due Process Clause"). And second, Petitioners have alleged that state law affords them no remedy. *Compare id.* at 643 (emphasizing that "a deprivation of property without due process" occurs "only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent"). Indeed, on the extraordinary facts presented here, the state legislature went so far as to specifically bar any remedy for the alleged infringement. *See* Brief for Petitioners at 13 (discussing "Blackbeard's Law," H.B. 184, N.C. Gen. Stat. § 121-25(b)).

This Court should stop there. The CRCA is constitutional as applied to this case, and this Court need not consider whether it sweeps too broadly in other circumstances. *See, e.g.*, *United States v. Raines*, 362 U.S. 17, 24-25 (1960) (refusing to consider whether Congress had legislated beyond its Fifteenth Amendment authority because "if the complaint here called for an application of the statute clearly constitutional under the Fifteenth Amendment, that should have been an end to the question of constitutionality"). This Court can wait for another day to decide whether the CRCA is also valid prophylactic legislation, as well as whether the Copyright Clause amounts to a waiver in the "Plan of

the Convention" under *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006).

Georgia's reasoning strikes a sensible balance between Congress's concern for statutory enforcement and the legitimate values of governmental autonomy and solvency that sovereign immunity protects. A plaintiff's ability to establish not only a statutory violation but a constitutional one as well is not a perfect proxy for the severity of the violation, but it does provide a decent filter. And certainly *Georgia* provides no basis for broad abrogations in the areas of contract or tort law that might threaten the states' financial viability—the key historical concern of sovereign immunity law.[31] *Georgia* is not only the narrowest available ground for decision here, but also the one that sensibly balances the legitimate concerns on each side of the immunity debate.

B. Congress's prophylactic statutory abrogation of state sovereign immunity in the CRCA should be upheld.

This Court may also resolve this case as an instance of prophylactic abrogation designed to prevent or remedy deprivations of federal intellectual property rights without due process of law. In this case, the Fourth Circuit made two innovations that

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[31] *See* 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) (arguing that the core purpose of state sovereign immunity is to ward off existential threats to state solvency like the Revolutionary war debts in *Chisholm* or the Reconstruction bonds in *Hans*).

undermined this Court's Section 5 abrogation jurisprudence. First, the court of appeals required that Congress must not only speak clearly with respect to its intent to abrogate the states' immunity, but also that it must explicitly specify the correct constitutional power when doing so. Second, the Fourth Circuit required that Congress must have considered a sufficiently extensive "pattern" of past constitutional violations, whether or not such violations exist outside the legislative record or have developed since Congress acted. Both these holdings were error, and both undermine the viability of Section 5 abrogation.

1. Congress need not explicitly invoke Section 5 in order to abrogate state immunities under the Fourteenth Amendment.

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." 895 F.3d at 351. 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*, 473 U.S. at 242. The Fourth Circuit transformed this stringent requirement into a *double* clear statement rule: Congress must now not only make its intent to

abrogate the States' immunity unmistakably clear (which all admit Congress *did* in the CRCA), but it must also clearly specify the particular enumerated power upon which it relies to do so. Even if one generally favors clear statement rules,[32] this double one goes too far.

The Court plainly rejected this sort of reasoning in *EEOC v. Wyoming*, 460 U.S. 226 (1983):

> 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," for "[t]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."

Id. (citing *Fullilove v. Klutznick*, 448 U.S. 448, 476–478 (1980) (plurality opinion), and quoting *Woods v. Miller*, 333 US. 13, 144 (1948)). Likewise, this Court demanded no such "clear statement" of reliance on the Section Five power in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); rather, it determined simply that Congress had clearly stated its intent to subject the States to damages liability under the Age Discrimination in Employment Act, *see id.* at 73-78,

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[32] *See, e.g.*, Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1364-66 (2001).

and then went on to assess whether that statute could pass *City of Boerne*'s "congruence and proportionality" test, *see id.* at 80-91. This Court applied no double clear statement rule of the sort fashioned by the Fourth Circuit.[33]

In the CRCA's case, it is easy to understand why Congress did not invoke Section Five of the Fourteenth Amendment: Under the law as it stood when the CRCA was enacted, Congress did not have to rely on that power. Prior to this Court's decision in *Atascadero*, 473 U.S. at 242, the Copyright Act had generally been understood to render states liable for copyright infringements.[34] Congress enacted the CRCA in 1990 to provide the explicit statement that *Atascadero* demanded. *See* H.R. Rep. 101-282(I) (Oct. 13, 1989). But this Court had held the year before that Congress may abrogate the States' immunity pursuant to its ordinary Article I powers. *See 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 *Seminole* in 1996,

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[33] This Court did say that Congress should explicitly invoke its Section Five powers in *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.

[34] *See* Intellectual Property Protection Restoration Act of 2003: Hearing on H.R. 2344 Before the Subcomm. on Courts, the Internet, and Intellectual Property, 108th Cong. 90-91 (2003) (testimony of Paul Bender).

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 legislative history invoking a blunderbuss-shot of constitutional authorities for courts to sort out later. Instead, this Court should return to the settled rule that "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods*, 333 U.S. at 144.

2. Congress need not show a pattern of past violations at the time that it legislates.

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.[35] Finding that "the record before Congress contained at most a dozen incidents of copyright infringement by States that could be said to have violated the Fourteenth Amendment," the court of appeals concluded that "[t]his evidence plainly falls short of establishing the 'widespread and persisting deprivation of constitutional rights' that is required to warrant prophylactic legislation under § 5." 895 F.3d at 353 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997)). To make matters worse, the Fourth Circuit disregarded evidence relied upon by the district court that such violations have radically increased in the years since Congress enacted the CRCA. *See id.* at 353-54. *Amici* agree with Petitioners that, because there is a very large record of unconstitutional state deprivations of copyright interests, the CRCA handily vaults any "pattern" hurdle. *See* Brief for Petitioners at 46-53. But Section Five imposes no such requirement,[36] and this case affords this Court a valuable opportunity to clarify that point.

No other enumerated power of Congress 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

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[35] *See also Chavez v. Arte Publico Press*, 204 F.3d 601, 605-06 (5th Cir. 2000).

[36] *See, e.g.*, Ernest A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 TEXAS L. REV. 1551, 1578-81 (2003).

harm the interstate economy. If Congress wished to set safety standards for driverless cars, for example, it might be prudent to wait until some such cars had been introduced, but nothing in the Constitution would foreclose it from regulating wholly prospectively.

So, too, with the Section 5 power. In *Boerne*, this Court made clear that Section 5 confers authority to "remedy or *prevent* unconstitutional actions." 521 U.S. at 519 (emphasis added). If Congress wished to prevent states from adopting new genetic screening technologies in hiring state employees, it could do so under the Section 5 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 5.

To be sure, a legislative record remains relevant for some purposes. 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 5 legislation it has noted the presence of such a record, *see, e.g.*, *Lane*, 541 U.S. at 524-29. Especially where Congress acts prophylactically under Section 5, 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 classes of conduct. But as this 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).

Moreover, *Georgia* made clear that where Congress need not rely on its ability to act prophylactically—in that case, where actually unconstitutional conduct is at issue—there is no requirement that Congress show such conduct to be frequent in order to prohibit it. *See* 546 U.S. at 158-59 (upholding abrogation in cases of actual constitutional violations without considering whether past violations had occurred). If past constitutional violations were an independent prerequisite for valid Section Five legislation, then the plaintiff in *Georgia* could not have succeeded simply by providing that his own constitutional rights had been violated.

At least since *McCulloch v. Maryland*, this Court has eschewed the sort of "necessity" requirement adopted by the Fourth Circuit here. Rather, this Court has "accord[ed] substantial deference to the predictive judgments of Congress" in determining what problems warrant legislative solutions and how those solutions should be framed. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195 (1997). Courts generally evaluate only whether the substance of federal legislation falls within the scope of an enumerated power—*not* whether events in the world have rendered that legislation necessary. A court's view that legislation responds to no pressing current

circumstance is only a hair's breadth away from a view that the law is simply bad policy—and neither is a sound basis for declaring the law unconstitutional. *See, e.g.*, *Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n*, 313 U.S. 236, 246 (1941) ("We are not concerned . . . with the wisdom, need, or appropriateness of the legislation."). In any event, Congress could surely conclude that some unconstitutional conduct is so egregious—a resurgence of lynching, for example—that it should legislate to prevent it in advance even if the conduct has not yet materialized.

Finally, even if Section 5 legislation depends on establishing a pattern of state violations, this Court should reject the Fourth Circuit's holding that after-enactment violations do not count. See 895 F.3d at 353. The District Court, in upholding the CRCA's abrogation provision, had relied on extensive evidence of state copyright infringements that occurred after the CRCA's enactment. This stands to reason. The CRCA clarified what had been the prior understanding that the Copyright Act abrogated state sovereign immunity.[37] But it is hardly surprising that state violations proliferated after *Florida Prepaid* held in the analogous patent context that states could violate federal intellectual property rights without fear of monetary sanction. *See* Brief for Petitioners at 44-45. Critically, the Fifth Circuit extended that ruling to copyrights just a year later. *See Chavez*, 204 F.3d at 607-08. One should expect state copyright

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[37] *See* Testimony of Paul Bender, Hearing on H.R. 2344, *supra*.

violations to multiply further if this Court affirms the Fourth Circuit. But it makes little sense to disable Congress from deterring such violations until the problem has festered for a sufficient period of time. The question is whether the law is constitutional *now*, not when enacted.

As we have already suggested, the benefit of a record of violations is to assist the Court in determining whether Section 5 legislation is congruent and proportional—that is, whether most statutory violations are likely to also be constitutional ones. But it should make no difference whether that evidence is generated by Congress itself through hearings at the time of enactment, or whether it is submitted by the parties to litigation seeking to enforce the law in question. Congress is not an administrative agency whose work product is to stand or fall based on whether it considered the right kinds of evidence before acting.[38] Rather, this Court reviews legislation simply to determine whether its substance falls within the bounds of a constitutionally-enumerated power.

The post-CRCA record of state copyright infringements, ably collected in Petitioners' brief, documents Congress's foresight in moving to abrogate state sovereign immunity for such violations in 1990.

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[38] *Cf.* A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 329 (2001). To be clear, *amici* believe that such "on the record" review would be inappropriate, but do not read cases like *Florida Prepaid* to require it.

That Congress was ahead of events in this instance surely does not render the act unconstitutional. This Court should either uphold the CRCA's constitutionality or remand to the court of appeals for reconsideration in light of the post-enactment evidence of state infringements.

Conclusion

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

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