No. _____

In The
Supreme Court of the United States

CANADA HOCKEY, L.L.C., doing business as EPIC SPORTS; MICHAEL J. BYNUM,

Petitioners,

v.

TEXAS A&M UNIVERSITY ATHLETIC DEPARTMENT; ALAN CANNON; LANE STEPHENSON, In His Individual Capacity,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

RALPH OMAN
2207 Garrity Road
Saint Leonard, MD 20685

ERNEST A. YOUNG
Counsel of Record
3208 Fox Terrace Dr.
Apex, NC 27502
(919) 360-7718
young@law.duke.edu

Counsel for Petitioners

June 15, 2022

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

After this Court's decision in *Allen v. Cooper*, 140 S. Ct. 994 (2020), damages remedies for copyright infringements by state governments depend on either showing an actual constitutional violation (as well as a statutory one) under *United States v. Georgia*, 546 U.S. 151 (2006), or—perhaps—asserting a free-standing takings claim under the Fifth and Fourteenth Amendments. The Fifth Circuit's categorical rejection of both these avenues in this case raises three questions:

1. Can copyright infringement constitute an actual constitutional violation on a takings theory or, as the Fifth Circuit held, is infringement never a taking?

2. Is a hypothetical state remedy that state courts have never recognized sufficiently "clear and certain," *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 587 (1995), to prevent an actual due process violation?

3. Does state sovereign immunity bar takings claims altogether, notwithstanding this Court's holding in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), that the Takings Clause mandates a compensatory remedy in federal court?

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioners are Canada Hockey, L.L.C., d/b/a Epic Sports, and Michael J. Bynum. No parent corporation or publicly held company owns more than 10% of Canada Hockey, L.L.C.

Respondent is Texas A&M University.

RELATED CASES

- *Canada Hockey, L.L.C. d/b/a Epic Sports, et al. v. Texas A&M University Athletic Dept.*, *et al.*, Cause No. 4:17-cv-181, in the United States District Court for the Southern District of Texas. Order granting motion to dismiss entered as to all but Brad Marquardt on Sept. 4, 2020. Dismissed defendants were severed into new docket, Case No. 4:20-CV-3121, and final judgment entered under Rule 54(b). *See* App. 59-60.
- *Canada Hockey, L.L.C. d/b/a Epic Sports and Michael J. Bynum v. Texas A&M University Athletic Dept.*, No. 20-20503, in the United States Court of Appeals for the Fifth Circuit. Order denying rehearing, Feb. 14, 2022.
- *Canada Hockey, L.L.C. d/b/a Epic Sports and Michael J. Bynum v. Brad Marquardt*, No. 20-20530, in the United States Court of Appeals for the Fifth Circuit. Dismissed for lack of jurisdiction, Sept. 8, 2021.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit on Petition for Rehearing is reproduced at App. 1-29. The Fifth Circuit's original order is reproduced at App. 30-56. The district court's opinion and order is reported at 484 F.Supp.3d 448 and reproduced at App. 57-107.

JURISDICTION

The Fifth Circuit denied rehearing on February 14, 2022. On May 4, 2022, Justice Alito extended the time for filing a petition for a writ of *certiorari* to and including June 15, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. art. I, § 8: "The Congress shall have power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

U.S. CONST. amend. V: "nor shall private property be taken for public use, without just compensation."

U.S. CONST. amend. XI: "The 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. XIV, § 1: "nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

U.S. CONST. amend. XIV, § 5: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Copyright Remedy Clarification Act of 1990, Pub. L. No. 101-553, 104 Stat. 2749, codified at 17 U.S.C. § 511:

> (a) In General.—
>
> Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity, for a violation of any of the exclusive rights of a copyright owner provided by sections 106 through 122, for importing copies of phonorecords in violation of section 602, or for any other violation under this title.
>
> (b) Remedies.—
>
> In a suit described in subsection (a) for a violation described in that subsection, remedies (including remedies both at law and in equity)

> are available for the violation to the same extent as such remedies are available for such a violation in a suit against any public or private entity other than a State, instrumentality of a State, or officer or employee of a State acting in his or her official capacity. Such remedies include impounding and disposition of infringing articles under section 503, actual damages and profits and statutory damages under section 504, costs and attorney's fees under section 505, and the remedies provided in section 510.

STATEMENT OF THE CASE

A. Legal Framework

Enacted in response to concerns about copyright infringements by state government entities, the Copyright Remedy Clarification Act of 1990 ("CRCA"), Pub. L. No. 101-553, 104 Stat. 2749, abrogated the States' sovereign immunity from suit for copyright infringement. The CRCA provides that "[a]ny State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person . . . for a violation of any of the exclusive rights of a copyright owner" or for "any other violation under" federal copyright law. 17 U.S.C. § 511(a); *see* 17 U.S.C. § 501(a). It also provides that in suits against States "remedies . . .

are available . . . to the same extent as such remedies are available for such a violation in a suit against any public or private entity other than a State." 17 U.S.C. § 511(b).

This Court has recognized two distinct ways in which Congress, acting pursuant to Section 5 of the Fourteenth Amendment, may abrogate state sovereign immunity. First, Congress may abrogate sovereign immunity prophylactically for any violation of a particular federal statute, even as to conduct that "is not itself unconstitutional," if the abrogation is sufficiently tailored to "remedy or prevent" conduct that infringes the Fourteenth Amendment's substantive prohibitions. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 638-39 (1999). There must be "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id*. at 639.

Second, under *United States v. Georgia*, 546 U.S. 151 (2006), a statutory abrogation of state sovereign immunity is valid in any case in which the same conduct alleged to violate the federal statute is also alleged to violate the Fourteenth Amendment itself. *See Georgia*, 546 U.S. at 159 (Congress has the undoubted power to "creat[e] private remedies against the States for *actual* violations" of the Fourteenth Amendment). Critically, a plaintiff invoking "case-by-case" abrogation may sue for actual constitutional violations without regard to whether a statute would pass muster as a prophylactic abrogation of immunity. *Id.* at 158-59.

In *Allen v. Cooper*, 140 S. Ct. 994 (2020), the Supreme Court explained that copyrights "are a form of property" under the Fourteenth Amendment and that an "intentional, or at least reckless" copyright violation may violate due process rights. *Id.* at 1004-05. But the Supreme Court ruled that the CRCA failed the "congruence and proportionality" test and therefore could not be considered valid prophylactic legislation that stripped the States of sovereign immunity for each and every copyright violation. *See id*. *Allen* did not resolve any claim of case-by-case abrogation.

B. Factual Background[1]

Petitioner Michael Bynum has written and edited over 100 sports-related books, including books on famous Texas sports teams and players. Complaint ¶¶ 16-17. Based on his research, Bynum became fascinated with the story of the "12th Man" of the Texas A&M University ("TAMU") football team. *Id.* ¶ 21. According to the story, in 1922 a man named E. King Gill was a "squad player" for that team—*i.e.*, a player who helps the members of the team practice but does not play in games. *Id.* ¶ 21. During one high-stakes game in which Gill was in the audience, member after member of the TAMU team suffered injuries that forced them to the sidelines. Gill came down from the bleachers and suited up—ready to step in at a

[1] The facts set forth here are alleged in plaintiffs' First Amended Complaint ("Complaint"), Dkt 15. "Dkt" refers to the district court docket in Case 4:17-cv-00181.

moment's notice. *Id.* When the TAMU "Aggies" won the game in an extraordinary upset, Gill was the only man left on the team's bench. Complaint Ex. C, at 22. His willingness to play has served as a symbol of unity and loyalty for generations of TAMU students. *Id.* at ¶ 21.

Bynum set out to develop a book that would tell E. King Gill's full story. Complaint ¶ 24. After conducting substantial background research, Bynum commissioned Whit Canning, a well-known sportswriter, to review Bynum's research and draft a biography of Gill on a work-for-hire basis. *Id.* ¶¶ 19, 24, 31. Over the next decade and a half, Bynum devoted over 1,500 hours to researching, writing, and editing the book, intending the Biography to be its cornerstone. *Id.* ¶¶ 24, 26. He planned to publish the book in the fall of 2014, to coincide with the 75th anniversary of TAMU's 1939 championship season. *Id*. ¶ 32.[2]

In 2000 and 2001, Bynum visited the TAMU Athletic Department and met with Brad Marquardt, the Associate Director of Media Relations, and Alan Cannon, an Assistant Director for Media Relations. Complaint ¶ 25. Bynum informed them of his work developing the 12th Man book and asked them to help confirm some facts about Gill's tenure at TAMU. *Id*. In June 2010, Bynum emailed Marquardt seeking photographs for

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[2] By agreement with Bynum, Epic Sports (the publishing imprint of Petitioner Canada Hockey, L.L.C.) owns the exclusive rights to publish the book and the Biography. Complaint ¶ 71. The book containing the Biography is registered with the U.S. Copyright Office and has been assigned U.S. Copyright Registration Nos. TXu002020474 and TXu002028522. *Id.* ¶ 70.

the book. *Id.* ¶¶ 25, 28. He attached a PDF of the full book, specifying that it was only for Marquardt's "review" and "not in final form yet." Complaint Ex. C. The cover of the draft indicated that it was "[e]dited by Mike Bynum," and page 6 included the label "Copyright © 2010 by Epic Sports" and the admonition that "[n]o part of this work covered by the copyright hereon may be reproduced or used in any form or by any means . . . without the permission of the publisher." *Id.*; *see* 17 U.S.C. § 1202(c). The Biography, titled "An A&M Legend Comes to Life," began on page 9 and stated that it was "by Whit Canning." Complaint Ex. C.

TAMU has registered "12th Man" as a trademark, Complaint ¶ 22, and in January 2014, the Athletic Department sought to solidify control over the trademark in order to raise millions of dollars. The Department has aggressively policed its intellectual property, including by filing trademark lawsuits against professional sports teams that have attempted to capitalize on some version of the 12th Man legend. *Id.* ¶ 22. The Department's 2014 effort was spurred by a dispute with the NFL's Seattle Seahawks, who have a fan base that calls itself the "12th Man." Accordingly, the Department directed its staff, including Marquardt and Cannon, to locate background information on Gill. *Id.* ¶ 39.

Marquardt had in his office the PDF that Bynum had emailed. Marquardt directed his secretary to retype the Biography and to remove any reference to Bynum or to Epic Sports' copyright information. Complaint ¶¶ 47-48. Marquardt rewrote the PDF's byline

to read "by Whit Canning, special to Texas A&M Athletics"—a term of art that falsely indicated that Canning was paid to write the Biography exclusively for the Department and that the Department owned the resulting work. Complaint ¶ 45; *id.* Ex. H. To better support TAMU's trademark, Marquardt changed the Biography's title from "An A&M Legend Comes to Life" to "The Original 12th Man." *Id.* ¶¶ 45-48.

Over the next 72 hours, the Department disseminated the full Biography to hundreds of thousands of recipients. It posted the Biography on the Department's website, which received approximately 10,000 unique visitors and 50,000 page views a day. Complaint ¶ 41. The Department's Twitter account, which had approximately 145,000 followers, tweeted a link to the Biography on the website. *Id.* Shortly thereafter, the University's Twitter account, with approximately 160,000 followers, also linked to—and quoted from—the Biography. *Id.* ¶ 54. And the manager of the University's Twitter account, Lane Stephenson, sent a preview of and a prominent link to the Biography to 77,000 subscribers of the "TAMU Times" e-newsletter. *Id.* ¶¶ 56, 77. He also placed the preview and link on the front page of e-newsletter's website. *Id*. As the Department intended, the Biography was then widely forwarded, copied, shared on fan sites, blogged about, and reported on and linked to by various news organizations. *Id.* ¶¶ 41, 55, 60-61, Ex. I.

Bynum discovered these events two days after the Department had posted the Biography. Complaint ¶ 40. He emailed Marquardt and Cannon, explaining

that "Whit Canning wrote" the Biography for Bynum in 1997; it had "never been cleared for publication with anyone"; and Canning "did not write this story for TAMU or give them permission to publish" it. Complaint Ex. N.

Marquardt responded that the Biography "was an important part of our strategic plan to show Texas A&M is the true owner of 'the 12th Man.'" *Id.* ¶ 58 & Ex. N. He acknowledged that he did not have permission to publish or reproduce the Biography. *Id.* And, although he admitted that he had asked his secretary to retype the Biography, he did not explain why he changed the byline on the article or why he removed the copyright management information and any reference to Bynum. *Id.*

The Department ultimately removed the Biography from its website. But the Biography continued to be widely available on the internet. Complaint ¶ 61; Ex. I. Not surprisingly, handing the copyrighted Biography to hundreds of thousands of Aggie fans destroyed the possibility of a successful print run of Bynum's book, since his potential purchasers already had free access to a key portion of the book's contents. Complaint ¶ 5. The book remains unpublished to this day. *Id.*

C. Proceedings Below

On January 19, 2017, Petitioners Michael Bynum and Canada Hockey, L.L.C. filed suit against the Department, Marquardt, Cannon, and Stephenson. The

operative complaint (filed April 17, 2017) included claims for copyright infringement, as well as for violations of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1202 *et seq.*, the Fifth and Fourteenth Amendments of the U.S. Constitution, and the Takings Clause of the Texas Constitution. Complaint ¶¶ 67-120.

Defendants moved to dismiss all Petitioners' claims. Dkt. No. 34. The district court granted the motions to dismiss as to all defendants except Marquardt. *See* Dkt. No. 96. Plaintiffs moved for reconsideration, and the court stayed the case pending this Court's resolution of *Allen v. Cooper*. *See* Dkt. Nos. 102, 111. After that decision, the parties submitted additional briefing. The court ultimately denied the motions for reconsideration, denied plaintiffs' motion to file a further amended complaint, and entered final judgment under Federal Rule of Civil Procedure 54(b) as to all defendants but Marquardt. *See* App. 59-60.[3]

The district court first concluded that the Department lacked jural authority and could not be sued. Although TAMU could normally be substituted as a defendant under Federal Rule of Civil Procedure 17, the court concluded that TAMU was entitled to sovereign immunity as an arm of the State of Texas. Dkt. No. 96, at 12-17. The court accepted that plaintiffs had satisfied all the requirements for case-by-case

[3] The court *sua sponte* severed those defendants from the original docket, opened a new docket, and immediately entered the Rule 54(b) judgment in that new docket. *See* Case No. 4:20-CV-3121, Dkt. No. 2.

abrogation under *Georgia* and the CRCA, but it limited *Georgia* to its facts. *Id.*; *see* App. 66-73. The court also concluded that TAMU had sovereign immunity in federal court as to plaintiffs' takings claim, even though Texas's courts are closed to such a claim. Dkt. No. 96, at 19; App. 74-79.

Petitioners appealed. On September 8, 2021, the Fifth Circuit affirmed. That court rejected Petitioners' argument that TAMU is not an arm of the state with respect to its athletic department, which Texas law bars from receiving public funds. App. 38-45. And the court rejected both actual constitutional violations that Petitioners alleged under *Georgia*. It held that copyrights are not protected property for Takings Clause purposes. App. 51-52. With respect to due process, the court held that although the Texas Supreme Court had *rejected* takings claims under both state and federal law based on infringement of a copyright, the possibility that that court might recognize a different takings theory in some future case was sufficient to constitute an adequate state remedy. App. 49-50. Finally, the court rejected Petitioners' free-standing takings claim as well on a similar ground—that is, so long as the state courts might be open to a hypothetical state takings claim, sovereign immunity bars any federal takings claim in federal court. App. 52-53.

Petitioners moved for rehearing, and on February 14, 2022, the Fifth Circuit vacated its original opinion and substituted a new one. App. 1-2. The only significant change, however, was to omit the statement that copyrights are not protected property and instead

assert—based on the same circuit authority as in the original opinion—that copyright infringements are trespasses and therefore not takings. App. 23. The court of appeals then denied Petitioners' petition for rehearing and affirmed the district court. App. 28-29.

REASONS FOR GRANTING THE WRIT

The great Julie Andrews, playing the young nun Maria in *The Sound of Music*, famously said, "When the Lord closes a door, somewhere He opens a window." *The Sound of Music* (Robert Wise, dir. 1965). In *Allen v. Cooper*, 140 S. Ct. 994 (2020), this Court closed the door of prophylactic abrogation of state immunity for copyright claims under the CRCA. Yet the Court remained concerned that copyright holders should have *some* remedy for egregious state violations. Justices Breyer and Kavanaugh both questioned counsel for North Carolina about "rampant . . . states ripping off copyright holders." Tr. of Oral Arg., No. 18-877, *Allen v. Cooper*, at 36-39 (Nov. 5, 2019). The State's answer was to invoke the case-by-case abrogation theory of *United States v. Georgia*, 546 U.S. 151 (2006). "[T]he beauty of this Court's *Georgia* decision," counsel said, is that "whenever a plaintiff can reasonably allege that there has been intentional copyright infringement and there are not adequate remedies, then, under this Court's *Georgia* decision, they can bring a direct constitutional claim. We don't dispute that." *Id.* at 39-40; *see also id.* at 41 (Justice Breyer: "That would cure my problem to

a considerable degree."). Because the plaintiff had not preserved the *Georgia* issue, *Allen* did not consider it.

In this case, however, the Fifth Circuit slammed *Georgia*'s window and nailed it shut. Copyright holders seeking to establish an actual constitutional violation to proceed under *Georgia* and the CRCA have to rely on either the Due Process or Takings Clauses. Yet no plaintiff, to Petitioners' knowledge, has successfully done so. The Fifth Circuit's decision provides a roadmap for ensuring that that never changes, even in egregious cases.

Three issues are critical—and certworthy. First, can a copyright plaintiff establish case-by-case abrogation based on an unconstitutional taking? The Fifth Circuit said no, because copyright infringements can never be takings. Second, when does an adequate state remedy prevent a copyright plaintiff from establishing case-by-case abrogation on a due process theory? The Fifth Circuit held that the *possibility* that a state court might recognize some sort of state takings theory suffices, even though no such remedy currently exists in Texas. Third, if statutory abrogation fails, can a plaintiff proceed directly against a state entity on the ground that the Takings Clause mandates a compensatory remedy? *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987). The Fifth Circuit said no, again based on the hypothetical possibility that a state takings claim might someday be available in state court.

The Fifth Circuit's holdings on each of these questions are inconsistent with decisions of this Court and in tension with the positions of other circuits. But the essential functions of this Court consist in maintaining not only "the uniformity" but also the "*supremacy* of federal law." Leonard Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157, 201 (1960) (emphasis added). Each of the Fifth Circuit's holdings in this case weakened federal intellectual property protection for copyrights, and each encouraged states to substitute their own uncertain and potentially self-serving state law remedies for the federal CRCA when state governments infringe.

If *Georgia*'s window is to be reopened, then this is the case to do it. TAMU's copyright violation was flagrant, damaging, and largely undisputed. Texas's legal position—and the Fifth Circuit's—is that states simply can steal copyrighted material with impunity. As state copyright violations continue to proliferate nationwide, that warrants this Court's intervention.

I. The Fifth Circuit held the CRCA unconstitutional as applied to this case.

This Court granted *certiorari* in *Allen* "[b]ecause the Court of Appeals held a federal statute invalid." 140 S. Ct. at 1000. The statute in question was the CRCA, which abrogated state governments' sovereign immunity and subjected them to private damages suits when they infringe federal copyrights. *Allen* held the

CRCA unconstitutional insofar as it sought to abrogate state immunity prophylactically—that is, *whenever* a state violates the provisions of federal copyright law. *Id.* at 1007.

But this Court's unanimous opinion in *Georgia* made clear that federal statutes may also abrogate sovereign immunity case by case. As Justice Scalia wrote in *Georgia*, "no one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the [Fourteenth] Amendment by creating private remedies against the States for *actual* violations of those provisions." 546 U.S. at 158. Because a plaintiff invoking case-by-case abrogation under *Georgia* must prove unconstitutional state action in his own case, there is no need to show *general* congruence and proportionality between the abrogating statute and the underlying constitutional provision it seeks to enforce. A statute may, in other words, fail to satisfy the standard for prophylactic abrogation and yet provide a perfectly viable vehicle for case-by-case abrogation for plaintiffs whose statutory claims involve actual violations of Fourteenth Amendment rights.

Petitioner has alleged that TAMU's copyright violations entail actual constitutional violations of the Due Process and Takings Clauses. By rejecting Petitioner's argument for abrogation under *Georgia*, the Fifth Circuit held the CRCA unconstitutional as applied to Petitioner's case. As in *Allen*, a court of appeals' refusal to give effect to a federal statute on constitutional grounds is a well-established and sufficient reason to grant *certiorari* in this case.

But the problem is not simply what the Fifth Circuit did in this particular case. No circuit court, to Petitioners' knowledge, has recognized a successful instance of case-by-case abrogation of state immunity for copyright infringement under *Georgia* and the CRCA. This case presents an ideal vehicle for establishing that *Georgia*'s window must remain open in cases of egregious infringement.

II. The Fifth Circuit contradicted this Court's holdings—and created tension with other circuits—by eliminating Takings Clause protection for copyrights.

The Court of Appeals found that Petitioners had "failed to plausibly allege a taking," App. 22, that could support case-by-case abrogation under *Georgia*. The initial opinion straightforwardly held that "copyrights are not a form of property protected by the Takings Clause." App. 52. Nearly six months later, the Court of Appeals revised its opinion, omitting this assertion but reaffirming circuit precedent that "infringement of copyright . . . constitutes a tort," not a taking. App. 23 (quoting *Porter v. United States*, 473 F.2d 1329, 1337 (5th Cir. 1973)). This holding relied upon precisely the same quotation from *Porter* that supported the earlier conclusion that copyrights are simply not protected property, and it amounts to the same thing. Whether copyrights are unprotected property or infringement is not a taking, the upshot is that the Court of Appeals negated Congress's decision to confer full property-law protection on copyrights, contravened this Court's

precedents stating that the Takings Clause protects intellectual property, and created a conflict with at least three other circuits that have recognized Takings Clause protection for copyrights.

A. The Fifth Circuit effectively eliminated Takings Clause protection for copyrights by holding that copyright infringement cannot effect a taking.

The Court of Appeals' decision held categorically that "infringement is not a 'taking' as the term is constitutionally understood. Rather, it has always been held that infringement of copyright, whether common law . . . or statutory . . . constitutes a tort." App. 23 (quoting *Porter*, 473 F.2d at 1337). Although the court commented that "the direct infringement was the public display of the book for four total days, and the indirect infringement likewise stems from these four days," App. 23-24, the court did not explain why this limited duration would vitiate Petitioner's claim that disseminating his work to the entire target audience of Petitioner's book vaporized the work's value. Complaint ¶¶ 5, 41, 54. In any event, the Court of Appeals did not qualify the language it had just quoted from *Porter* that infringement by publication "is not a 'taking' as the term is constitutionally understood" or that copyright "always" "constitutes a tort" rather than a taking. App. 23.

One can only wonder what it would take, in the Fifth Circuit, to constitute a taking of a copyright, if

ordinary infringing behavior—the unauthorized publication of an unpublished copyrighted work—does not suffice. Here, Petitioner alleges not only that TAMU published his work by tweeting or emailing it to nearly 400,000 alumni, but also that TAMU altered the work by removing any reference to Bynum or his company and falsely stating that it had been written "special to Texas A&M Athletics." App. 4. If it is not a taking to publicly assert the state's *ownership* of a copyrighted work, then the Fifth Circuit's rule amounts to a categorical bar to takings claims based on copyright infringement. And that is how *Porter* has been understood in subsequent decisions. *See*, *e.g.*, *United States v. Smith*, 686 F.2d 234, 243 n.17 (5th Cir. 1982) (citing *Porter* for the broad proposition that "copyright infringement is . . . [not] the equivalent of 'taking' in the constitutional sense").

B. The Fifth Circuit's ruling conflicts with this Court and other circuits that have recognized that the Takings Clause protects intellectual property rights.

The Fifth Circuit's exemption of copyrights from Takings Clause protection is inconsistent with a considerable body of precedent, both new and old. *Allen* unanimously held that "[c]opyrights are a form of property" protected by the Fourteenth Amendment, and it treated copyrights as analogous to patents, *see id.* 140 S. Ct. at 1004, 1005-06, which the Court has found to be protected in the same manner as real property. *See Horne v. Dept. of Agriculture*, 576 U.S. 350, 359-60

(2015).[4] *Horne* relied on the longstanding protection of patents, "'which cannot be appropriated or used by the government itself, without just compensation,'" as support for the broader proposition that the Takings Clause protects personal property. *Id.* at 359 (quoting *James v. Campbell*, 104 U.S. 356, 358 (1882)).[5] Most important, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002-04 (1984), held that the Takings Clause protects intangible property interests in trade secrets notwithstanding that trade secret misappropriation had long been viewed as a tort. *See id.* at 1001-02 (relying on the Restatement of Torts definition of a trade secret).[6]

Monsanto makes clear that the mere fact that an intrusion on property rights would be actionable under tort law does not mean that that intrusion might not also be a taking if undertaken by a government actor. Likewise, this Court held in *James* that the Takings Clause's protection meant that a patent "cannot be appropriated or used by the government itself." 104 U.S.

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[4] *See also Amicus Curiae* Prof. Adam Mossoff's Brief supporting Plaintiffs-Appellants in *Canada Hockey, L.L.C. v. Texas A&M University Athletic Dept.*, No. 20-20503, 5th Circuit (Jan. 27, 2021) ("There is no textual basis in the Due Process or Takings Clauses to discriminate as a matter of constitutional law between the "property" secured in a patent or copyright.").

[5] *See also Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) (citing cases establishing that patents are "property for purposes of the Due Process Clause or the Takings Clause").

[6] Likewise, this Court has said that patent infringement "is essentially a tort, and implies invasion of some right of the patentee." *Carbice Corp. of America v. American Patents Dev. Corp.*, 283 U.S. 27, 33 (1931).

at 358. It may be that some infringements do not rise to the level of a taking, just as some infringements are not unconstitutional deprivations under the Due Process Clause. *See Allen*, 140 S. Ct. at 1005 (defining "the scope of unconstitutional infringement . . . as intentional conduct for which there is no adequate state remedy"). But infringement cannot fail to be a taking simply because it is also a form of trespass,[7] or because—as the Fifth Circuit suggested—it took place over a limited time. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987) (recognizing an obligation to compensate for temporary takings). The Fifth Circuit's holding thus allows state governments to nullify federal statutory protection for an extremely important class of property, so long as the State expropriates that property for its own use.

As the Fifth Circuit seemed to recognize, App. 22 n.8, its ruling here brought it into tension with several other circuit courts of appeal that have said that copyrights are protected under the Takings Clause. The Second Circuit held in *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983), for example, that "[a]n interest in a copyright is a property right protected by the due process and just compensation clauses of the Constitution." That court thus concluded that, if applied retroactively, an amendment to the Copyright Act's

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[7] Neither Respondent nor the Fifth Circuit suggested that a trespass action in state court was available in this case, nor is a post-deprivation remedy a defense to a takings claim. *See Knick v. Township of Scott*, 139 S. Ct. 2162, 2171 (2019).

work-for-hire provisions "could be viewed as an unconstitutional taking." *Id.* Similarly, in *CCC Info. Servs., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 73-74 (2d Cir. 1994), the Second Circuit held that copyright protected a data compilation concerning used vehicles, notwithstanding that the legislature had adopted it as a valuation standard. "[A] rule that the adoption of such a reference by a state legislature or administrative body deprived the copyright owner of its property," the court said, "would raise very substantial problems under the Takings Clause of the Constitution." *Id.* at 74.

The Ninth Circuit adopted the reasoning of *CCC Info. Servs.* in *Practice Mgt. Info. Corp. v. American Medical Ass'n*, 121 F.3d 516, 520 (9th Cir. 1997). Finally, the First Circuit has suggested that if state remedies do not afford just compensation for copyright infringement, "the Takings Clause of the federal Constitution might at that point enable [owners] to pursue a damage remedy in federal court." *Lane v. First Nat'l Bank of Boston*, 871 F.2d 166, 174 (1st Cir. 1989). All told, the Fifth Circuit's ruling creates serious tension with the views of the First, Second, and Ninth Circuits.

III. The Fifth Circuit wrongly held that procedural due process claims can be defeated by hypothetical post-deprivation remedies never recognized by the state courts.

Petitioners also alleged a second actual constitutional violation, that TAMU's copyright infringement

deprived Petitioners of their property without due process of law. App. 20. *Allen* obliged Petitioners to show that (1) the deprivation was intentional and (2) the state provided no adequate post-deprivation remedies. *See* 140 S. Ct. at 1004. The Court of Appeals conceded that "Appellants sufficiently allege that the infringement was intentional—Marquardt directed his secretary to retype the Gill Biography, remove any copyright information, and change its title and byline to indicate that TAMU owned the work, and then shared it with his colleagues for approval and publication." App. 20. But the court concluded that "meaningful post-deprivation state remedies are available to redress the injury." *Id.* "Though no tort remedies are available under Texas law, Appellants have a viable takings claim against TAMU for copyright infringement under the Texas Constitution." App. 20-21.

Under *Parratt v. Taylor*, 451 U.S. 527, 538-41 (1981), a procedural due process claim can be defeated by showing that state law provides an adequate post-deprivation remedy. To satisfy due process, however, a post-deprivation remedy must be "clear and certain." *Nat'l Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 587 (1995).[8] In *Parratt*, for example, this Court emphasized that Nebraska had a

[8] *See also McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 32-33 (1990). *National Private Truck* and *McKesson* were taxation cases, not cases under *Parratt*. But if there is any difference, the standard for remedies under *Parratt* would surely be *higher*, because "the States are afforded great flexibility in satisfying the requirements of due process in the field of taxation." *Nat'l Private Truck*, 515 U.S. at 587.

specific statutory procedure for tort claims by prisoners; that procedure, moreover, "was in existence at the time of the loss here in question but respondent did not use it." 451 U.S. at 543. And although that procedure lacked a jury trial and certain other procedural features, it "could have fully compensated the respondent for the property loss he suffered." *Id.* at 544.

In this case, by contrast, the Court of Appeals ignored the position of the state government, which consistently maintained that a takings remedy is *not* available under Texas law for copyright infringement. *See*, *e.g.*, Brief on the Merits for Respondent, *Jim Olive Photography v. University of Houston System*, No. 19-0605, Supreme Court of Texas (Sept. 25, 2020), at 36-39. Instead, the Fifth Circuit relied on a recent decision by the Texas Supreme Court that *rejected* takings claims for copyright infringement under both the United States and Texas constitutions. *See Jim Olive Photography v. Univ. of Houston*, 624 S.W.3d 764, 777 (Tex. 2021) ("*Olive*"). The Fifth Circuit found an adequate post-deprivation remedy because *Olive* "nevertheless left the door open for a copyright owner to bring a regulatory takings claim against the State for infringement." App. 21. But *Olive* did not say that the result would have been different if Olive had pled a regulatory takings claim, and it cited no state authorities supporting such a theory. All the court said was that "[w]e express no view regarding whether a government's exercise of rights in violation of [the copyright]

statute could rise to the level of a regulatory taking." 624 S.W.3d at 775 n.10.[9]

If *Olive* is taken to authorize a "clear and certain" remedy, then those words have lost all meaning. Speculations about what previously unrecognized remedies *might* be available under state law cannot satisfy Due Process. *Parratt* would become a trap for the unwary, unsophisticated, or simply unlucky, as litigants must guess as to which state law remedies might become available and structure their claims accordingly. It is, of course, too late for Petitioners to pursue a Takings remedy under the Texas constitution. A requirement that federal plaintiffs guess correctly about what remedies a state court might someday recognize—at the

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[9] Texas law is unlikely to provide a remedy where federal takings law, as the Fifth Circuit held, does not. Although the Fifth Circuit asserted that the Texas Takings Clause is "[m]ore expansive than the federal Takings Clause," App. 21, the *Olive* majority emphasized that "[a]lthough our state takings provision is worded differently, we have described it as 'comparable' to the Fifth Amendment's Just Compensation Clause" and "Texas 'case law on takings under the Texas Constitution is consistent with federal jurisprudence.' " 624 S.W.3d at 771 (quoting *Hallco Tex., Inc. v. McMullen Cty.*, 221 S.W.3d 50, 56 (Tex. 2006), and *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 477 (Tex. 2021)). Mr. Olive alleged claims under both the federal and state constitutions, and the Texas Supreme Court majority drew no distinction between them. *See* 624 S.W.3d at 771.

The Fifth Circuit also cited Justice Busby's *Olive* concurrence, which suggested a different theory under the Texas Constitution's provisions governing property "applied to public use" or "damaged for public use." *Id.* at 780 (Busby, J., concurring) (citing Texas Const., art. I, § 17). Critically, Justice Busby said only that "it is possible" that copyright holders might have viable claims under these provisions "in some circumstances." *Id.* at 782.

hazard of losing their federal claims—is the antithesis of due process of law.

That is why decisions rejecting due process claims on the basis of state post-deprivation remedies generally, as in *Parratt* itself, involve uncontested or well-established remedies. *See*, *e.g.*, *Elsmere Park Club, L.P. v. Town of Elsmere*, 542 F.3d 412 (3d Cir. 2008) (where availability of remedy under local law was disputed, conducting detailed analysis of local ordinances to determine that the relief claimed was actually available to plaintiffs).[10] Petitioners have found no decisions rejecting a due process claim on the basis of a state-law remedy that no court has affirmatively recognized to be available. The Fifth Circuit's decision thus contradicts this Court's precedents in *Parratt* and *National Private Truck*, as well as the great weight of circuit practice under those opinions. Worse, because one can always speculate that *some* state remedy may be

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[10] *See also*, *e.g.*, *San Geronimo Caribe Project, Inc. v. Acevedo-Vila*, 687 F.3d 465 (1st Cir. 2012) (finding post-deprivation remedies adequate where "[i]n fact, [the plaintiff] did receive prompt post-deprivation process" from the Puerto Rico courts "in related actions"); *Copeland v. Machulis*, 57 F.3d 476 (6th Cir. 1995) (citing multiple Michigan statutory procedures affording relief for a prisoner's grievance against prison officials); *McKinney v. Pate*, 20 F.3d 1550, 1563-64 (11th Cir. 1994) (en banc) (applying *Parratt* to bar due process claim only after determining that "Florida courts indeed to have the power to review employment termination cases," that "the scope of the [their] review encompasses the claim McKinney brought in federal court," and that the state remedy could "remedy McKinney's loss"); *Easter House v. Felder*, 910 F.2d 1387 (7th Cir. 1990) (en banc) (identifying three Illinois common law remedies available to plaintiffs and citing state decisions recognizing those remedies).

available, the Fifth Circuit's decision effectively nullifies due process protection against state deprivations of federal intellectual property rights.

IV. The Fifth Circuit's holding that state immunity bars federal takings claims contradicts this Court's takings jurisprudence and worsens confusion among the circuits.

Only two provisions in the Constitution specify a particular remedy when the government violates the law. The Suspension Clause preserves the ancient writ of *habeas corpus*, U.S. CONST. art. I, § 9, cl. 2, and the Fifth Amendment requires "just compensation" when private property is "taken for public use." *Id.* amend. V. This Court thus said in *First English* that the Constitution "of its own force . . . furnish[es] a basis for a court to award money damages against the government," notwithstanding "principles of sovereign immunity." 482 U.S. at 316 n.9.[11] Nonetheless, every circuit to consider the issue has held that state sovereign immunity bars takings claims against state

[11] *Cf. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (considering takings claim against state regulatory agency without mentioning sovereign immunity). Leading commentators have likewise interpreted the Fifth Amendment as overriding state immunity. *See*, *e.g.*, Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 981 (2000); Richard H. Fallon, Jr., & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1779 & n.244 (1991); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L. J. 1, 115 (1988).

governments. In the present case, the Fifth Circuit adhered to its holding in *Bay Point Properties, Inc. v. Mississippi Transportation Comm'n*, 937 F.3d 454, 457 (5th Cir. 2019), concluding that "[a] state is entitled to sovereign immunity from a federal takings claim." App. 24.

The circuits imposing state sovereign immunity as a bar to takings claims have split into two groups. Older decisions in the First, Fifth, and Seventh Circuits reject takings claims without any inquiry into whether the state provides a takings remedy in its own courts.[12] More recent decisions in the Fourth, Sixth, and Tenth Circuits have held that state immunity from a takings claim in *federal* court depends on whether the state courts are open to hear such a claim.[13] The

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[12] *See John G. & Marie Stella Kenedy Mem'l Found. v. Mauro*, 21 F.3d 667, 674 (5th Cir. 1994) (concluding that "the Foundation's Fifth Amendment inverse condemnation claim brought directly against the state of Texas is also barred by the Eleventh Amendment"); *Citadel Corp. v. P.R. Highway Auth.*, 695 F.2d 31, 33 n.4 (1st Cir. 1982) ("Even if the constitution is read to require compensation in an inverse condemnation case, the Eleventh Amendment should prevent a federal court from awarding it."); *Garrett v. Illinois*, 612 F.2d 1038, 1040 (7th Cir. 1980) ("Even though the Fifth Amendment alone may support a cause of action for damages against the United States, the Eleventh Amendment stands as an express bar to federal power when a similar action is brought against one of the states.").

[13] *See Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1214 (10th Cir. 2019) (barring the plaintiff's claim only after ascertaining that the Utah courts were open to takings claims); *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014) ("[T]he Eleventh Amendment bars Fifth Amendment taking claims against States in federal court where the State's courts remain open to adjudicate such claims."); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 527-28

Fifth Circuit seems to have moved into this camp. *Bay Point* noted that Mississippi courts were open to the plaintiff's takings claims and cited the Tenth Circuit's decision in *Williams*. *See* 937 F.3d at 455, 457. In the present case, the Fifth Circuit cited *Williams* again and said that "[b]ecause we have concluded that Appellants can pursue a claim under the Texas Takings Clause, state sovereign immunity bars the federal takings claim here." App. 24.

The circuits' divergent approaches create confusion in their own right, and neither approach is consistent with this Court's reasoning in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019). In all six of these circuits, *Knick* is a dead letter whenever the State, rather than a local government, takes private property. This Court should grant *certiorari* to resolve the confusion and establish that the Fifth Amendment requires a compensatory remedy in federal court for takings by state governments, whether or not a remedy may be available in state court.[14]

But even if this Court accepts the proposition that a state court remedy can substitute for a takings claim

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(6th Cir. 2004) ("[H]ad DLX brought a federal [takings] claim with its state claim in state court, the Kentucky courts would have had to hear that federal claim . . . but this court is powerless to hear it.").

[14] Petitioners did not press this argument in the Fifth Circuit because the question was settled in *Bay Point*, but they expressly preserved the right to raise it upon review in this Court. *See* Appellants' Brief, No. 20-20503, 5th Circuit (Jan. 20, 2021), at 37 n.5.

in federal court, the Fifth Circuit broke with the Fourth, Sixth, and Tenth Circuits in the present case by abandoning the requirement that such a state remedy must be "clear and certain." At a minimum, this Court should grant *certiorari* to resolve that conflict and bring the exception for state court remedies in line with this Court's due process precedents.

A. Those circuits imposing state sovereign immunity as a flat bar to federal takings claims violate the Fifth Amendment as interpreted in *Knick*.

This Court's decision in *Knick* overruled the doctrine of *Williamson Cty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), which held that a federal takings claim is not ripe in federal court until the plaintiff has first failed to obtain a remedy in state court. *See* 139 S. Ct. at 2170. *Knick* was not a sovereign immunity case, because it involved a municipality without sovereign immunity. But *Knick*'s reasoning fatally undermines the case for barring federal takings claims on state sovereign immunity grounds by holding that the Fifth Amendment, of its own force, mandates a compensatory remedy.

Knick considered not only the timing of a takings violation but the nature of the just compensation requirement itself. The Chief Justice's majority opinion embraced *First English*, which had "reaffirm[ed] that 'in the event of a taking, the compensation remedy is required by the Constitution,'" and "reject[ed] the view

that 'the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government.'" 139 S. Ct. at 2172 (quoting *First English*, 482 U.S. at 316 & n.9). If compensation is required when a state government takes, then it cannot be constitutional for a state to interpose its sovereign immunity.

This Court has stressed that "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Alden v. Maine*, 527 U.S. 706, 713 (1999). But to the extent that the Fifth Amendment, made applicable to the States by the Fourteenth, mandates a compensatory remedy for takings, that requirement necessarily qualifies the States' preexisting immunity. *Knick*'s reaffirmation of that mandate makes the First, Seventh, and early Fifth Circuits' position barring takings claims against states untenable.

B. Those circuits allowing state takings remedies to substitute for a federal remedy violate *Knick*'s insistence that federal takings plaintiffs can proceed directly to federal court.

The Fourth, Sixth, and Tenth Circuits' position (apparently now embraced by the Fifth) is that state sovereign immunity bars a federal takings plaintiff from federal court only if the state courts are not open

to hear their takings claim. This position derives from this Court's illegal tax cases, which hold that state sovereign immunity may generally bar tax refund claims in federal court, but in that event "*state* courts must hear suits to recover taxes unlawfully exacted, the 'sovereign immunity [that] States traditionally enjoy in their own courts notwithstanding.'" *Hutto*, 773 F.3d at 552 (quoting *Reich v. Collins*, 513 U.S. 106, 110 (1994)). Functionally speaking, this doctrine operates like *Williamson County*: Federal takings plaintiffs must first go to state court, and only if they find those courts closed can they (possibly) proceed in federal court.

This Court's decision in *Knick*, of course, rejected the notion that federal takings plaintiffs must go to state court first. The *Knick* Court relied on three key arguments: (1) that "[t]he Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner," 139 S. Ct. at 2170; (2) that *Williamson County* created a "preclusion trap" in which a plaintiff "cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court," *id.* at 2167; and (3) that the Fifth Amendment and the federal civil rights statutes "guarantee[ ] 'a federal forum for claims of unconstitutional treatment at the hands of state officials, and the settled rule is that exhaustion of state remedies is *not* a prerequisite to an action under [42 U.S.C.] § 1983,'" *id.* (quoting *Heck v. Humphrey*, 512 U.S. 477, 480 (1994)). It is highly unlikely that *Knick* would have come out differently if it had involved a

state government defendant rather than a locality, for three reasons that parallel *Knick*'s points of emphasis.

First, the constitutional violation here, as in *Knick*, occurred without regard to the state's failure to provide a remedy. As the Chief Justice explained, "[t]he fact that the State has provided a property owner with a procedure that may subsequently result in just compensation cannot deprive the owner of his Fifth Amendment right to compensation under the Constitution, leaving only the state law right." 139 S. Ct. at 2171. *Knick* makes clear, moreover, that "the analogy from the due process context to the takings context is strained." *Id.* at 2174. As cases like *Parratt* make clear, the state's failure to provide a remedy is often part and parcel of the due process violation. But *Knick* insists that state remedies are irrelevant to whether a takings violation has occurred. *Id.* at 2170. The Takings Clause thus requires a compensatory remedy without regard to what remedies state law provides.

Second**,** to the extent that *Hutto* and similar cases envision plaintiffs trying their state takings remedies then returning to federal court if none prove available, plaintiffs might encounter the same "preclusion trap" to which *Knick* objected. *See* 139 S. Ct. at 2167. Requiring federal plaintiffs to sue in state court to avoid sovereign immunity, like *Williamson County*'s ripeness rule, "hand[s] authority over federal takings claims to state courts." *Id.* at 2170 (quoting *San Remo Hotel, L.P. v. City and Cty. of San Francisco*, 545 U.S. 323, 350 (2005) (Rehnquist, C.J., concurring in the judgment)).

Third, transferring responsibility for federal takings litigation to the states flies in the face not only of the federal civil rights statutes but also the underlying Fourteenth Amendment that they enforce. As *Knick* emphasized, the Supreme Court has consistently rejected interpretations of federal rights and remedies that would leave those rights at the mercy of the state courts. *See* 139 S. Ct. at 2172. That principle extends not only to § 1983 cases but to Fourteenth Amendment rights generally. *See*, *e.g.*, *McNeese v. Bd. of Ed. for Community Unit Sch. Dist. 187*, 373 U.S. 668 (1963) (where plaintiffs assert the "depriv[ation] of rights protected by the Fourteenth Amendment . . . [s]uch claims are entitled to be adjudicated in the federal courts"); *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913) (rejecting interpretation of the Fourteenth Amendment's state action requirement that would have given state courts the first say as to federal rights claims).[15]

The Fourth, Fifth, Sixth, and Tenth Circuit rule interposing state sovereign immunity to bar federal takings claims from federal court thus cannot survive *Knick*. Even post-*Knick*, however, those circuits have rejected requests to reconsider their positions on the ground that *Knick* simply did not concern state

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[15] *See also Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982) ("The Civil Rights Act of 1871, along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era.").

sovereign immunity.[16] Those circuits are unlikely to come into line with this Court's precedent unless this Court intervenes.

C. Even if *Knick* does not control, the Fifth Circuit's holding creates confusion as to the certainty of a state-court remedy necessary for a state to assert immunity against a federal takings claim.

As discussed, the Fourth, Fifth, Sixth, and Tenth Circuits' approach to state immunities in takings cases rests on an analogy to this Court's unlawful tax cases. Unsurprisingly, courts applying this approach have adopted the same "'clear and certain remedy'" requirement of *McKesson*, *National Private Truck*, and similar tax cases discussed earlier. *Zito v. North Carolina Coastal Res. Comm'n*, 8 F.4th 281, 285-86 (4th Cir. 2021) (quoting *Reich v. Collins*, 513 U.S. 106, 108-09 (1994)). For the reasons discussed in Part III, *supra*, no such remedy existed in the present case. The Texas Supreme Court's decision in *Olive* rejected the only intellectual property takings claim that it has considered, and the Fifth Circuit was able to cite to no state authority other than statements from *Olive* about the issues that the court was *not* deciding. That is no "clear and certain remedy."

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[16] *See*, *e.g.*, *Ladd v. Marchbanks*, 971 F.3d 574, 579 (6th Cir. 2020); *Bay Point*, 937 F.3d at 456; *Williams*, 928 F.3d at 1214.

By holding that no pre-existing or proven state takings remedy is necessary to exclude a federal takings plaintiff from federal court, the Fifth Circuit necessarily departed from the course adopted in the Fourth, Sixth, and Tenth Circuit. In each of those circuits, federal courts have upheld sovereign immunity *only* after ascertaining that a state court remedy actually exists. In *Williams*, for instance, the Tenth Circuit ordered additional briefing to determine whether the Utah courts were open before holding the state immune in federal court. *See* 928 F.3d at 1213. In *Zito*, the Fourth Circuit engaged in an extensive analysis of North Carolina statutes and constitutional provisions to ensure that a compensatory remedy would be available to the plaintiffs. *See* 8 F.4th at 288-90. Finally, the Sixth Circuit took a somewhat different tack in *DLX*, holding that the state courts would have been constitutionally obligated, under *Reich*, to hear the plaintiff's federal takings claim notwithstanding any obstacles that state law might ordinarily impose. *See* 381 F.3d at 527-28. The common thread, however, is that each circuit determined that a state court remedy was definitely already in existence; none engaged in speculation about what state courts *might* do or what claims they might recognize in the future. The Fifth Circuit's holding that speculation about remedies the state courts might one day recognize suffices thus not only contravenes this Court's "clear and certain" requirement from *McKesson* and *National Private Truck*, but also adds to an already confusing welter of differing approaches in the circuits.

V. Barring any means to vindicate the CRCA under *Georgia* leaves copyright holders at the mercy of state infringers.

Georgia only works if copyright holders can allege constitutional violations when someone steals their intellectual property. Their only real options are the Takings Clause and procedural due process. But the Fifth Circuit slammed both options shut. Without those claims, *Georgia*'s safety valve becomes a dead letter. And states can infringe copyrights with impunity.

States are already seizing their chance. Texas has consistently maintained that sovereign immunity means it could steal Petitioner's book. After *Allen*, the U.S. Copyright Office studied state copyright infringements and what state and federal remedies really exist. *See* U.S. Copyright Office, *Copyright and State Sovereign Immunity—A Report of the Register of Copyrights* (Aug. 2021).[17] It concluded state infringements have increased "substantially" since Congress enacted the CRCA and that "sovereign immunity itself hampers the development of a more conclusive evidentiary record, as it often prevents claims from being brought or assessed on the merits." *Id.* at 2-3. The study cited outrageous examples of states blatantly infringing news articles, music, computer programs, photographs and video, books, and other material—including one

[17] That study surveyed 657 copyright owners and analyzed 167 state copyright infringement cases, which the American Intellectual Property Law Association and Petitioner here identified. *See id.* at 26-37; *see also* Copyright Alliance & Chamber of Commerce Amicus Br. 10-18, *Allen v. Cooper*.

instance of a state retirement system republishing approximately 53,000 news articles over an eight-year period. *See id.* at 37-51.

Without damages claims against state violators, copyright holders have no adequate remedy. Injunctions are prospective only, may be easily circumvented by the State, and likely do not justify the cost of a suit. *See* U.S. Copyright Office, *A Report of the Register of Copyrights* 6, 15 (June 1988), *available at* http://files.eric.ed.gov/fulltext/ED306963.pdf. In this case, by the time Petitioners discovered what the Department had done, the Internet was irretrievably saturated with free copies of plaintiffs' work. And state-law claims seeking copyright protection are no comfort either; among other issues, federal copyright law usually preempts them. *See* 17 U.S.C. § 301, 28 U.S.C. § 1338.

Copyright is a $1.29 trillion industry. *See* U.S. Patent & Trademark Office, *Intellectual Property and the U.S. Economy* 3 (2019). Protecting it matters. That is why takings claims and case-by-case abrogation under *Georgia* and the CRCA are so important: they provide a meaningful remedy for the most egregious instances of infringement—including, of course, what the Department did to Petitioners here. The Fifth Circuit's approach would allow States to take, use, and profit from others' intellectual property with impunity. That, in turn, would seriously harm the creators of copyrighted works, discourage the creation of new works, and generally undermine the copyright system. And it

offends the bedrock principle that, in a democracy, the state may not steal from its citizens.

CONCLUSION

The petition for a writ of *certiorari* to the U.S. Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

RALPH OMAN
2207 Garrity Road
Saint Leonard, MD 20685

ERNEST A. YOUNG
Counsel of Record
3208 Fox Terrace Dr.
Apex, NC 27502
(919) 360-7718
young@law.duke.edu

Counsel for Petitioners

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