

No. 21-1603

In the Supreme Court of the United States

CANADA HOCKEY, L.L.C., DBA EPIC SPORTS, ET AL.,
PETITIONERS

v.

TEXAS A&M UNIVERSITY ATHLETIC DEPARTMENT, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In *Allen v. Cooper*, 140 S. Ct. 994 (2020), this Court held that the Copyright Remedy Clarification Act of 1990 (CRCA) does not validly abrogate state sovereign immunity for copyright infringement claims. Here, petitioners seek damages for a state university’s alleged infringement on the theory that, even after *Allen*, the CRCA abrogates immunity for claims based on conduct that violates the Fourteenth Amendment under the reasoning of *United States v. Georgia*, 546 U.S. 151 (2006). In the alternative, petitioners seek damages via a federal takings claim. In an unpublished, non-precedential decision, the court of appeals held that sovereign immunity bars petitioners’ claims. The questions presented are:

1. Whether, assuming the CRCA validly abrogates state sovereign immunity for a violation of the Takings Clause, the court of appeals correctly held that petitioners failed to allege such a violation because, “in these circumstances,” their copyright infringement allegations did not “amount[] to a taking.”
2. Whether, assuming the CRCA validly abrogates state sovereign immunity for a violation of the Due Process Clause, the court of appeals correctly held that petitioners failed to allege such a violation because Texas law affords them an adequate post-deprivation remedy for copyright infringement.
3. Whether the court of appeals correctly applied uniform circuit precedent in holding that state sovereign immunity bars a federal takings claim notwithstanding *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), which did not address sovereign immunity.

TABLE OF CONTENTS

	Page
Questions Presented	I
Table of Contents	II
Table of Authorities	III
Introduction	1
Statement	2
Reasons for Denying the Petition	10
I. Petitioners' Complaint About the Fact-Bound Application of Settled Legal Rules Does Not Merit This Court's Review.	10
II. To Reach the First Two Questions Presented Would Require the Court To Decide a Substantial Antecedent Question Not Addressed Below.	12
III. None of the Individual Questions Presented Is Certworthy.	14
A. The first question is not squarely presented and implicates no conflict with decisions from this Court or any federal circuit court.	14
B. The second question is not squarely presented and implicates no conflict with decisions from this Court or any federal circuit court.	21
C. Petitioners do not even claim a circuit split on the third question—which this Court has recently and repeatedly declined to review.	26
Conclusion	31

III

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>Albright v. Oliver</i> , 510 U.S. 266 (1994)	24
<i>Allen v. Cooper</i> , 140 S. Ct. 994 (2020)I, 1, 3, 6, 7, 10, 11, 13, 14, 18, 22	
<i>Allen v. Cooper</i> , 555 F. Supp. 3d 226 (E.D.N.C. 2021), <i>appeal filed</i> , No. 21-2040 (4th Cir. Sept. 22, 2021)	14
<i>Am. Shooting Ctr., Inc. v. Secfor Int’l</i> , No. 13cv1847 BTM (JMA), 2016 WL 3952130 (S.D. Cal. July 22, 2016).....	13
<i>Bay Point Props., Inc. v. Miss. Transp.</i> <i>Comm’n</i> , 937 F.3d 454 (5th Cir. 2019), <i>cert. denied</i> , 140 S. Ct. 2566 (2020)	9, 27, 28
<i>Bowen v. Gilliard</i> , 483 U.S. 587 (1987)	18
<i>Cal. Bldg. Indus. Ass’n v. City of San Jose</i> , 577 U.S. 1179 (2016)	14
<i>Campinha-Bacote v. Regents of the Univ.</i> <i>of Mich.</i> , No. 1:15-cv-330, 2016 WL 223408 (S.D. Ohio Jan. 19, 2016).....	13
<i>CCC Info. Servs., Inc. v. Maclean Hunter</i> <i>Mkt. Reps., Inc.</i> , 44 F.3d 61 (2d Cir. 1994).....	21

IV

Cases—Continued:	Page(s)
<i>Cedar Point Nursery v. Hassid</i> , 141 S. Ct. 2063 (2021)	8, 15, 20
<i>Chi., B. & Q. R. Co. v. City of Chicago</i> , 166 U.S. 226 (1897)	13
<i>Christy, Inc. v. United States</i> , 141 Fed. Cl. 641 (2019), <i>aff'd</i> , 971 F.3d 1332 (Fed. Cir. 2020), <i>cert. denied</i> , 141 S. Ct. 1393 (2021)	19
<i>Copeland v. Machulis</i> , 57 F.3d 476 (6th Cir. 1995)	26
<i>Dowling v. United States</i> , 473 U.S. 207 (1985)	20
<i>Easter House v. Felder</i> , 910 F.2d 1387 (7th Cir. 1990)	26
<i>Elsmere Park Club, L.P. v. Town of Elsmere</i> , 542 F.3d 412 (3d Cir. 2008).....	26
<i>First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles</i> , 482 U.S. 304 (1987)	19, 20
<i>Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank</i> , 527 U.S. 627 (1999)	12
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970)	18
<i>Gomez-Perez v. Potter</i> , 553 U.S. 474 (2008)	29
<i>Horne v. Dep't of Agric.</i> , 576 U.S. 350 (2015)	18-19

Cases—Continued:	Page(s)
<i>James v. Campbell</i> , 104 U.S. 356 (1881)	18, 19
<i>Jim Olive Photography v. Univ. of Hous. Sys.</i> , 624 S.W.3d 764 (Tex. 2021), <i>cert. denied</i> , 142 S. Ct. 1361 (2022)	8, 24, 25
<i>Knick v. Township of Scott</i> , 139 S. Ct. 2162 (2019)	I, 2, 13, 27, 28, 29, 30
<i>Ladd v. Marchbanks</i> , 971 F.3d 574 (6th Cir. 2020), <i>cert denied</i> , 141 S. Ct. 1390 (2021)	28
<i>Lane v. First Nat’l Bank of Boston</i> , 871 F.2d 166 (1st Cir. 1989)	21
<i>McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco</i> , 496 U.S. 18 (1990)	22
<i>McKinney v. Pate</i> , 20 F.3d 1550 (11th Cir. 1994)	26
<i>Me. Cmty. Health Options v. United States</i> , 140 S. Ct. 1308 (2020)	29
<i>Nat’l Ass’n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.</i> , 633 F.3d 1297 (11th Cir. 2011)	12, 13
<i>Nat’l Priv. Truck Council, Inc. v. Okla. Tax Comm’n</i> , 515 U.S. 582 (1995)	22, 25
<i>Newsweek, Inc. v. Fla. Dep’t of Revenue</i> , 522 U.S. 442 (1998)	22

VI

Cases—Continued:	Page(s)
<i>Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC</i> , 138 S. Ct. 1365 (2018)	19
<i>Parratt v. Taylor</i> , 451 U.S. 527 (1981)	22, 25
<i>Pavlock v. Holcomb</i> , 35 F.4th 581 (7th Cir. 2022)	28
<i>Pennhurst State Sch. & Hosp. v. Halderman</i> , 465 U.S. 89 (1984)	9
<i>Plumley v. Austin</i> , 574 U.S. 1127 (2015)	11
<i>Porter v. United States</i> , 473 F.2d 1329 (5th Cir. 1973)	16
<i>Portsmouth Harbor Land & Hotel Co. v. United States</i> , 260 U.S. 327 (1922)	15, 20
<i>Prac. Mgmt. Info. Corp. v. AMA</i> , 121 F.3d 516 (9th Cir. 1997)	21
<i>Reich v. Collins</i> , 513 U.S. 106 (1994)	22
<i>Roth v. Pritkin</i> , 710 F.2d 934 (2d Cir. 1983)	21
<i>Ruckelshaus v. Monsanto Co.</i> , 467 U.S. 986 (1984)	19
<i>Salazar-Limon v. City of Houston</i> , 137 S. Ct. 1277 (2017)	11
<i>San Geronimo Caribe Project, Inc. v. Acevedo-Vila</i> , 687 F.3d 465 (1st Cir. 2012)	26

VII

Cases—Continued:	Page(s)
<i>Skatemoore, Inc. v. Whitmer</i> , 40 F.4th 727 (6th Cir. 2022).....	31
<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984)	15, 20
<i>Texas v. Holland</i> , 221 S.W.3d 639 (Tex. 2007).....	8
<i>United States v. Georgia</i> , 546 U.S. 151 (2006)	I, 1, 3, 6, 7, 10, 11, 12, 13
<i>Will v. Mich. Dep’t of State Police</i> , 491 U.S. 58 (1989)	30
<i>Williams v. Utah Dep’t of Corr.</i> , 928 F.3d 1209 (10th Cir. 2019)	9, 28, 31
<i>Wrotten v. New York</i> , 560 U.S. 959 (2010)	14
<i>Zito v. N.C. Coastal Res. Comm’n</i> , 8 F.4th 281 (4th Cir.), <i>cert denied</i> , 142 S. Ct. 465 (2021)	28, 31
 Constitutional Provisions, Statutes, and Rules:	
U.S. Const. amend XIV	
§ 1	3, 12
§ 5	30
Tex. Const. art. I, § 17.....	7-8, 23, 25
17 U.S.C.	
§ 106.....	12
§ 511.....	13
§ 511(a)	3
§ 511(b)	3
28 U.S.C. § 1498(b)	13
Fed. R. Civ. P. 54(b)	6
5th Cir. R. 47.5	7, 11

VIII

Other Authorities:

Copyright Remedy Clarification Act of 1990, Pub. L. No. 101-553, 104 Stat. 2749	1
Thomas F. Cotter, <i>Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?</i> , 50 Fla. L. Rev. 529 (1998).....	18
Camilla A. Hrdy & Ben Picozzi, <i>The AIA Is Not a Taking: A Response to Dolin & Manta</i> , 72 Wash. & Lee L. Rev. 472 (2016).....	19

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INTRODUCTION

Two years ago, this Court held that the Copyright Remedy Clarification Act of 1990, Pub. L. No. 101-553, 104 Stat. 2749 (CRCA), does not validly abrogate States' sovereign immunity from suits for copyright infringement. *Allen v. Cooper*, 140 S. Ct. 994 (2020). That foreclosed petitioners' pending CRCA claims against the state university in this case, so they proposed a work-around. They urged that, under *United States v. Georgia*, 546 U.S. 151 (2006), the CRCA still abrogates immunity for *their* claims because they are based on conduct that also violates the Fourteenth Amendment. The lower courts rejected those arguments. In an unpublished opinion, the Fifth Circuit held that even if *Georgia* offers a path around *Allen*—an assumption subject to serious

doubt—petitioners could not use it because they did not allege actual Fourteenth Amendment violations.

In so holding, the court of appeals did not make sweeping rulings about constitutional protection for intellectual property and due-process standards that clash with decisions from this Court and other circuits, as petitioners contend. Rather, the court correctly concluded that there was no taking on these facts and no due-process violation under this state law. Those fact-bound determinations—which are not even precedential in the Fifth Circuit—do not merit this Court’s attention. Nor does petitioners’ insistence that the Fifth Circuit’s holding that state sovereign immunity bars their Takings Clause claim is inconsistent with *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019). As petitioners concede—and every circuit to consider the question has found—*Knick* did not address sovereign immunity. The petition should be denied.

STATEMENT

1. In the CRCA, Congress attempted to abrogate States’ sovereign immunity from suits for copyright infringement:

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 . . . or for any other violation under this title.

17 U.S.C. § 511(a). The CRCA further subjected States to the same remedies that would be available against anyone else, including actual and statutory damages. *Id.* § 511(b).

In *Allen v. Cooper*, the Court held that this attempted abrogation was invalid. 140 S. Ct. at 1001-07. Among other reasons, it could not be justified as an exercise of Congress’s power to enforce the protections of the Fourteenth Amendment. *Id.* at 1003-07. That was so because the CRCA is not designed “to redress or prevent unconstitutional conduct”; rather, it simply “provide[s] a uniform remedy for statutory infringement.” *Id.* at 1007 (citation and quotation marks omitted). And that “indiscriminate scope” could not be salvaged as a permissible approach to deter Fourteenth Amendment violations under the Court’s “congruence and proportionality” test. *Id.* (citations and quotation marks omitted). The CRCA flunked that test because the evidence of copyright infringement by States that involved constitutional harm was “exceedingly slight.” *Id.*

At oral argument in *Allen*, North Carolina’s counsel suggested that a State could still be sued under the CRCA in some circumstances under the reasoning of *United States v. Georgia*. Transcript of Oral Argument at 39-40, *Allen*, 140 S. Ct. 994 (No. 18-877). In *Georgia*, the Court held that a statutory abrogation of immunity is valid as applied to a particular claim insofar as the “same conduct” that violated the statute “independently violated the provisions of § 1 of the Fourteenth Amendment.” 546 U.S. at 157. But the petitioner in *Allen* did not preserve a *Georgia* argument, *see* Transcript, *supra*, at 31-32, and the Court’s opinion did not mention *Georgia*.

2. For the jurisdictional challenges at issue here, the courts below accepted as true the following factual allegations from petitioners' pleadings. Pet. App. 2.

Petitioner Michael J. Bynum is a writer and owner of a publishing company, petitioner Canada Hockey L.L.C. d/b/a Epic Sports. *Id.* While working on a book about Texas A&M University's football program, he learned of the University's "12th Man" tradition. *Id.* That tradition arose from a 1922 football game in which squad player E. King Gill changed into uniform and stood on the sideline, ready to enter the game in case his injured team ran out of players. *Id.* at 2-3. Bynum hired another writer, Whit Canning, to draft a short biography of Gill, which Bynum planned to use as his book's first chapter. *Id.* at 4.

While researching the book, Bynum consulted personnel in the University's Athletic Department, including Brad Marquardt and his supervisor, Alan Cannon. *Id.* at 3. In 2010, Bynum asked Marquardt for help finding photographs for the book and sent him a draft of the book for that purpose. *Id.* at 4. The draft contained Bynum's name and copyright information. *Id.* The Gill biography was the opening chapter of the draft book. *Id.*

In 2014, the Department asked its staff to find information on Gill to promote the 12th Man story and support fundraising. *Id.* Marquardt allegedly directed his secretary to retype the Gill biography that Bynum sent in 2010, remove references to Bynum or Epic Sports, revise the byline to read "by Whit Canning, special to Texas A&M Athletics," and change the title. *Id.* at 4. He then allegedly gave the retyped biography to Cannon and Lane Stephenson, the University's media director. *Id.* at 4-5. The Department published the biography's contents as an article on its website. *Id.* at 5. The Department and the University tweeted links to the article on

Twitter. *Id.* The article was also featured in the University’s e-newsletter. *Id.*

Three days later, Bynum emailed Marquardt and Cannon requesting removal of the article from the website. *Id.* Later that day, Marquardt responded that the article had been removed and apologized for the “mix-up.” *Id.* He explained that he had found a paper copy of the biography in his office but “had no recollection of its origin,” so he asked his secretary to “key it in for [him].” Dkt 15, Ex. N at 2.¹ He added that he later provided the retyped version to a colleague who was looking for information on the 12th Man. *Id.* Marquardt asked Bynum if the Department could repost the biography as an excerpt to his forthcoming book. *Id.* Bynum said he was willing to work with Marquardt on that idea, but he ultimately decided against it. *Id.* ¶ 59, Ex. N at 1.

Petitioners allege that the brief posting and promotion of the article led to fans forwarding e-mail versions of the article and reposting it in online forums. Dkt 15 ¶ 60. That allegedly “destroyed” the market for the entire book, which remains unpublished. *Id.* ¶¶ 5, 60.

3. In 2017, petitioners sued the Department, Marquardt, Cannon, and Stephenson. Pet. App. 57. They asserted several claims, including direct copyright infringement under the CRCA and takings claims under the United States and Texas constitutions. *Id.* at 115.

The defendants moved to dismiss all claims based on sovereign and qualified immunity or for failure to state a claim. *Id.* The district court granted the motions as to all defendants except Marquardt. *Id.* at 150. Petitioners moved for reconsideration. *Id.* at 58. The court stayed

¹ Respondents adopt petitioners’ convention of referring to their First Amended Complaint as “Dkt 15” from the district court’s docket. Pet. 5 n.1.

proceedings on the motion pending this Court's decision in *Allen v. Cooper*. *Id.* After that decision, the court declined to reconsider the dismissal of the copyright claims but ordered additional briefing on the takings claims. *Id.* at 58-59. Petitioners then filed a second motion for reconsideration, which was denied. *Id.* at 59.

In denying the second motion, the district court reaffirmed its earlier rulings. It held that the Department is not a distinct legal entity with the capacity to be sued, *id.* at 62, 123-25, but that substituting the University as a defendant would be pointless because sovereign immunity bars the claims against it, *id.* at 62-63, 125-26. Specifically, the court rejected petitioners' argument that, after *Allen*, the CRCA still abrogates immunity for their claims under the reasoning of *United States v. Georgia* because they alleged infringing conduct that also violates the Fourteenth Amendment (an uncompensated taking and deprivation of property without due process). *Id.* at 65-74. And the court held that, under controlling precedent, immunity bars claims under the federal and Texas Takings Clauses against a state entity in federal court. *Id.* at 74-82. Finally, the court reiterated that Cannon and Stephenson were entitled to qualified immunity and, regardless, petitioners failed to state plausible claims against them. *Id.* at 96-99, 144-50.

The court severed the Department, Cannon, and Stephenson from the case and entered a final judgment in their favor under Federal Rule of Civil Procedure 54(b). *Id.* at 59-60. The copyright claims against Marquardt remain pending for trial. *Id.* at 107.

4. Petitioners appealed. *Id.* at 7. In its initial opinion, the Fifth Circuit affirmed. *Id.* at 31. Petitioners filed a petition for rehearing en banc, which was denied with no reported poll or dissent. *Id.* at 2. At the same time, the

court withdrew its initial opinion and issued a substitute opinion, again affirming the district court's judgment. *Id.* Like the withdrawn initial opinion, the substitute opinion is unpublished and therefore not Fifth Circuit precedent. *Id.* at 1 n.* (citing 5th Cir. R. 47.5).

a. In the substitute opinion, the court first examined the Department's capacity to be sued. *Id.* at 9. Applying the Fifth Circuit's "arm of the state" test, the court concluded that the Department is part of Texas A&M University, a state entity, and as such enjoys state sovereign immunity. *Id.* at 9-16.

b. The court then addressed petitioners' argument that, under *Georgia*, the CRCA validly abrogates sovereign immunity for their claims because the alleged infringement independently violated the Fourteenth Amendment. *Id.* at 16-19. The court held that it "need not decide" whether a CRCA claim fits within *Georgia*'s as-applied abrogation framework because, "even assuming it does," petitioners failed to allege conduct by the University that violates the Fourteenth Amendment. *Id.* at 20.

First, the court explained that to state a due-process violation there must be an "intentional" deprivation of property for which there are no "adequate post-deprivation state remedies." *Id.* (citing *Allen*, 140 S. Ct. at 1004). Here, the court found petitioners had sufficiently alleged intentional conduct. *Id.* But the claim failed because petitioners had a meaningful state remedy via a takings claim under the Texas Constitution. *Id.* at 20-21. The court noted that Texas's Takings Clause is textually "[m]ore expansive" than its federal analogue, providing that "[n]o person's property shall be taken, *damaged*, or destroyed for or *applied to* public use without adequate compensation being made." *Id.* at 21 (quoting Tex.

Const. art. I, § 17) (emphases added). Moreover, the court noted, “[t]he Clause itself waives sovereign immunity for a valid takings claim brought in state court.” *Id.* (citing *Texas v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007)). That remedy, the court added, was not rendered inadequate by the Texas Supreme Court’s recent decision in *Jim Olive Photography v. University of Houston System*, 624 S.W.3d 764 (Tex. 2021), *cert. denied*, 142 S. Ct. 1361 (2022), where the court held that a state university’s single act of copyright infringement did not constitute a “*per se* taking”—*i.e.*, a physical appropriation of property that categorically requires compensation—but never addressed whether that act was any other form of taking. Pet. App. 21.

Second, the court rejected petitioners’ federal taking theory around *Allen. Id.* at 22. At the outset, the court observed that, unlike with the Due Process Clause, this Court has not addressed whether copyrights are a property interest protected by the Takings Clause. *Id.* But again, the court determined that it “need not decide this issue” because petitioners had not plausibly alleged a taking in any event. *Id.*

To reach that conclusion, the court relied on this Court’s recent reaffirmation of the “‘basic distinction’ [that] exists between ‘individual torts’ and ‘appropriations of a property right.’” *Id.* (quoting *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2078 (2021)). That distinction, the court explained, does not describe two mutually exclusive categories; rather, it reflects “the principle that not all torts (*i.e.*, infringements) rise to the level of a taking.” *Id.* at 23. Here, the court found that petitioners “have failed to meet their burden that the purported infringement amounts to a constitutional taking.” *Id.* It reasoned that the alleged infringement did

not “rise to th[at] level” because the University publicly displayed the Gill biography for only four days and did not continue or repeat that act. *Id.* at 23-24. So, the court concluded that “in these circumstances” the CRCA claim based on a federal taking fails. *Id.* at 24.

c. Finally, the court rejected petitioners’ alternative argument that state sovereign immunity is abrogated for their takings claims brought directly under the United States and Texas constitutions. *Id.* at 24-25.

On the federal takings claim, the court adhered to recent Fifth Circuit precedent confirming that state sovereign immunity bars such claims. *Id.* at 24 (citing *Bay Point Props., Inc. v. Miss. Transp. Comm’n*, 937 F.3d 454, 457 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2566 (2020)). The court acknowledged the Tenth Circuit’s proviso that this bar exists only “as long as a remedy is available in state court.” *Id.* (quoting *Williams v. Utah Dep’t of Corr.*, 928 F.3d 1209, 1213 (10th Cir. 2019)). But that qualifier did not help petitioners because—as the court had just concluded—they could pursue a state takings claim in state court. *Id.*

On the state takings claim, the court cited the settled rule that sovereign immunity bars state-law claims against a State in federal court. *Id.* at 24-25 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 119-21 (1984)). And the immunity waiver in Texas’s Takings Clause did not overcome that bar, the court added, because it applies only in state court. *Id.* at 25.²

² The court also affirmed the dismissal of the claims against Cannon and Stephenson. Pet. App. 25-27. Petitioners do not seek review of those rulings.

REASONS FOR DENYING THE PETITION**I. Petitioners' Complaint About the Fact-Bound Application of Settled Legal Rules Does Not Merit This Court's Review.**

Petitioners' primary argument (*e.g.*, at 15) for certiorari review is that the court of appeals "held the CRCA unconstitutional as applied to [their] case." But by the time the court ruled, this Court had *already* set the boundaries of the constitutional and unconstitutional applications of the CRCA. All the court of appeals did was apply this Court's rule to the particular factual allegations in petitioners' pleadings. Its resulting unpublished decision is unworthy of review.

When the court of appeals decided this case, the Court's decisions in *Allen* and *Georgia* already covered the waterfront on the constitutionality of the CRCA's potential applications. Again, in *Allen* the Court held that the CRCA generally does not constitutionally abrogate state sovereign immunity for claims under that statute. 140 S. Ct. at 1001-07. Petitioners proposed that, under *Georgia*, the CRCA may still constitutionally abrogate immunity for a subset of claims: those based on conduct that violates both the statute and the Fourteenth Amendment. Pet. App. 17-19. The court of appeals assumed without deciding that petitioners were right, *id.* at 20, and it correctly recited *Georgia's* holding, *id.* at 17-18. But petitioners' claims failed under *Georgia*, the court concluded, because they did not allege actual violations of the Fourteenth Amendment. *Id.* at 20-24. That left petitioners' claims in the class already covered by *Allen*—*i.e.*, claims against a State to which the CRCA does not constitutionally apply.

At bottom, then, petitioners are not complaining that the court of appeals "held the CRCA unconstitutional . . .

[a]s in *Allen*.” Pet. 15. Instead, they are complaining that the court misapplied takings and due-process precedent to these facts in rejecting their *Georgia* argument, leaving them subject to *Allen*’s pre-existing holding on the CRCA’s constitutionality. That sort of complaint does not merit review. Sup. Ct. R. 10; *see also Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in the denial of certiorari) (“[W]e rarely grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case.”).

Moreover, this case is a poor vehicle to address a purported misapplication of settled law because the decision below is unpublished and, therefore, not precedent in the Fifth Circuit. Pet. App. 1 n.*. The Court typically does not review unpublished, non-precedential decisions because they do not reflect a circuit’s definitive position on an issue. *See Plumley v. Austin*, 574 U.S. 1127, 1131-32 (2015) (Thomas, J., dissenting from the denial of certiorari) (noting that an unpublished opinion “lacks precedential force,” which “preserves [a circuit’s] ability to change course in the future”). That is the case here. By rule, the panel’s decision cannot preclude a party from prevailing on a CRCA claim under *Georgia* in the future. 5th Cir. R. 47.5. Nor is the decision grounded in any Fifth Circuit precedent that would have the same effect: the panel rejected petitioners’ as-applied abrogation arguments because it found no takings violation “in these circumstances” and no due-process violation based on its review of Texas law. Pet. App. 21, 24. Because another Fifth Circuit panel may yet decide these issues differently, the Court should deny review.

II. To Reach the First Two Questions Presented Would Require the Court To Decide a Substantial Antecedent Question Not Addressed Below.

This case is a poor vehicle to decide the CRCA-related questions for a second reason. To reach those questions, the Court would first have to resolve an antecedent question not addressed below: whether a CRCA claim fits within *Georgia*'s as-applied abrogation framework in the first place.

As-applied abrogation under *Georgia* requires that the “same conduct” that violated the abrogating statute also “independently violated the provisions of § 1 of the Fourteenth Amendment.” 546 U.S. at 157. The court of appeals “assum[ed]” that a CRCA violation could meet that requirement, proceeded to analyze whether petitioners had alleged actual takings and procedural-due-process violations, and concluded that they had not. Pet. App. 20. The first and second questions presented challenge those conclusions. Pet. i. So those questions, too, rest on the assumption that the “same conduct” that violates the CRCA may also “independently violate” the Fourteenth Amendment. *See id.* at 15 (asserting that the alleged “copyright violations entail actual constitutional violations of the Due Process and Takings Clauses”).

That assumption is suspect. As the Eleventh Circuit has explained, a CRCA violation arguably does not align with a Fourteenth Amendment violation. *Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1316 n.32 (11th Cir. 2011) (*NAPB*). “[O]ne infringes a copyright by copying or distributing a work.” *Id.* (citing 17 U.S.C. § 106). But “infringement . . . does not by itself violate the Constitution.” *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 643 (1999) (analyzing patent infringement).

A due-process violation requires the additional element of “fail[ing] to offer an adequate remedy for an infringement.” *Allen*, 140 S. Ct. at 1004. That extra element is not part of a CRCA violation, for “no amount of process absent the owner’s consent avoids liability under the statute.” *NAPB*, 633 F.3d at 1316 n.32. The upshot is that the conduct that violates the CRCA “is not identical” to conduct that violates procedural due process and is “thus arguably not covered by *Georgia*.” *Id.*

The same would be true for an alleged violation of the Fifth Amendment’s “just compensation” requirement, which is incorporated against the States through the Fourteenth Amendment’s Due Process Clause. *Chi., B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 235 (1897). Such a claim requires the added element of failing to pay just compensation. *Knick*, 139 S. Ct. at 2170. As with due process, that extra element is not part of a CRCA violation. Unlike the United States, a State cannot avoid statutory liability by compensating a copyright owner for an infringing use. *Compare* 28 U.S.C. § 1498(b), *with* 17 U.S.C. § 511.

The Eleventh Circuit ultimately did not resolve this issue because, like the court in this case, it found that the plaintiff had not shown an actual constitutional violation anyway. *NAPB*, 633 F.3d at 1316 n.32. No other circuit court has addressed this question. But at least two district courts have adopted the Eleventh Circuit’s reasoning and held that a CRCA claim cannot support as-applied abrogation under *Georgia* because a due-process violation depends on additional conduct. *Am. Shooting Ctr., Inc. v. Secfor Int’l*, No. 13cv1847 BTM (JMA), 2016 WL 3952130, at *3-4 (S.D. Cal. July 22, 2016); *Campinha-Bacote v. Regents of the Univ. of Mich.*, No. 1:15-cv-330, 2016 WL 223408, at *4-5 (S.D. Ohio Jan. 19,

2016). In contrast, another district court—on remand from *Allen*—has held that a CRCA claim can support as-applied abrogation on a takings theory. *Allen v. Cooper*, 555 F. Supp. 3d 226, 243 (E.D.N.C. 2021), *appeal filed*, No. 21-2040 (4th Cir. Sept. 22, 2021).

This unresolved and underdeveloped issue stands in the way of deciding the first and second questions presented. If the CRCA cannot abrogate sovereign immunity on an as-applied basis under *Georgia* because the “same conduct” that violates the statute cannot “independently violate” the Fourteenth Amendment, then whether the Fifth Circuit was right that petitioners failed to allege takings and due-process violations does not matter. Because granting the petition “would require [the Court] to resolve th[at] threshold question,” *Wrotten v. New York*, 560 U.S. 959, 959 (2010) (statement of Sotomayor, J., respecting denial of certiorari), and the answer “might preclude [the Court] from reaching” the first two questions presented, *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 577 U.S. 1179, 1179 (2016) (Thomas, J., concurring in denial of certiorari), this case is a poor vehicle for review.

III. None of the Individual Questions Presented Is Certworthy.

A. The first question is not squarely presented and implicates no conflict with decisions from this Court or any federal circuit court.

Beyond these vehicle problems, petitioners’ first question is fatally flawed because it is not even presented by this case. It asks whether copyright infringement can “constitute an actual constitutional violation on a takings theory or, as the Fifth Circuit held, is infringement never a taking?” Pet. i. That question rests on a false premise: the Fifth Circuit did *not* hold that infringement can

never be a taking. Once petitioners' inaccurate rendering of the decision below is set aside, their asserted conflicts with decisions of this Court and other circuits disappear as well.

1. Petitioners' argument regarding the first question presented presumes (at 17) that the Fifth Circuit held "categorically" that copyright infringement can never be a taking. It did not. Instead, the court held that petitioners did not "meet their burden" to show that the alleged infringement "amounts to" a taking "in these circumstances," Pet. App. 23-24—hardly a "categorical" statement.

Nor does the court's reasoning reflect any categorical treatment. The court relied on this Court's recent explication of the "basic distinction" between a tortious trespass and a taking. *Id.* at 22 (quoting *Cedar Point*, 141 S. Ct. at 2078). That distinction was relevant because copyright infringement is a statutory tort in which the infringer "trespasses into [the owner's] exclusive domain." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984). But the court did not treat that distinction as a bright line. It reasoned that although "not all torts (*i.e.*, infringements) rise to the level of a taking," some may be "sufficient" in degree to effect one. Pet. App. 23 (quoting *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329-30 (1922)). Here, the court found that petitioners' allegations fell short because the University displayed the Gill biography for only four days and did not continue or repeat that act. *Id.* at 23-24. Those facts would have been irrelevant if, as petitioners contend, the court were announcing a categorical rule that infringement is "never" a taking.

2. Petitioners nonetheless make three attempts to paint the decision below as holding categorically that

copyright infringement cannot be a taking. They are wrong.

First, petitioners reach back (at 16) to the court of appeals' withdrawn initial opinion, which had held that "copyrights are not a form of property protected by the Takings Clause." Pet. App. 52. They claim that the substitute opinion's holding "amounts to the same thing." It does not. The substitute opinion explicitly stated that the court did "not decide" whether the Takings Clause protects copyrights and then analyzed petitioners' takings argument assuming that copyrights *are* protected. Pet. App. 22. And the court then concluded that petitioners' infringement allegations did not "amount[] to" a taking "in these circumstances." *Id.* at 23-24. Even if that holding were precedential, it would not foreclose a different plaintiff from establishing a taking in a separate copyright case on another record. That petitioners are even relying on a *withdrawn* opinion to make their case for certiorari review shows how strained that effort is.

Second, petitioners emphasize (at 16-18) the court of appeals' citation to its prior decision in *Porter v. United States*, which stated generally that copyright infringement "is not a 'taking' as the term is constitutionally understood." 473 F.2d 1329, 1337 (5th Cir. 1973). Although petitioners correctly characterize *Porter's* statement as "broad," they incorrectly assert that the court below "did not qualify" that statement and understood it to impose a "categorical bar." Pet. 17-18. The court described *Porter* as "illuminat[ing] the principle that *not all torts (i.e., infringements)* rise to the level of a taking," implying that some infringements do. Pet. App. 23 (emphasis added). And the court concluded that, "[l]ike *Porter*, [petitioners] have failed to *meet their burden* that the purported infringement *amounts to* a constitutional taking"

because of the fleeting nature of the infringement. *Id.* (emphases added). That comparison treats *Porter* as an example of infringement that did not “rise to the level of a taking,” *id.*, not a rule that infringement can *never* be a taking. Petitioners’ true dispute may be with *Porter*’s “broad” language, *see* Pet. 18, but this case would be a poor vehicle to take it up because this panel read *Porter* more narrowly and did so in a non-precedential decision.

Third, petitioners argue (at 18) that the decision below at least “amounts to a categorical bar” because if their allegations do not meet the takings threshold, no infringement will. Of course, the decision below poses *no* bar to *any* future takings claim based on copyright infringement because it is not precedent. Pet. App. 1 n.*. And even petitioners concede (at 20) that “[i]t may be that some infringements do not rise to the level of a taking,” which is exactly what the court held here. Pet. App. 22-24.

3. Petitioners distort the decision below because doing so is the only way to contend (at 18-20) that the court of appeals’ “exemption of copyrights from Takings Clause protection” is “inconsistent” with this Court’s cases. These asserted conflicts all fall apart at their premise because, as just shown, the decision below did *not* “exempt” copyrights from Takings Clause protection. *See* Part III.A.1-2, *supra*.

Regardless, petitioners do not present a genuine conflict with the Court’s precedent that recognizes due-process protection for copyrights or that suggests there can be takings of other types of intellectual property. None of the five allegedly conflicting cases involves applying the Takings Clause to copyrights. Instead, petitioners rely entirely on inapposite decisions and dicta.

First, start with *Allen*, the only copyright case petitioners cite. There the Court said that copyrights are “a form of property” for purposes of the Fourteenth Amendment’s Due Process Clause. 140 S. Ct. at 1004; *but see id.* at 1008 (Thomas, J., concurring in part and concurring in the judgment) (stating that this issue remains open). But “property” under the Due Process Clause is not necessarily “private property” protected by the Takings Clause. For example, although the Court has held that the Due Process Clause protects welfare benefits, it has also held that the Takings Clause does *not* protect the same benefits. *Compare Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970) (due process), *with Bowen v. Gilliard*, 483 U.S. 587, 604-05 (1987) (taking). So, even if the court below had “exempted” copyright from Takings Clause protection—which it did not—*Allen* would present no conflict for review.

Second, petitioners rely (at 19-20) on the 140-year-old aside in *James v. Campbell*, 104 U.S. 356, 358 (1881), that a patent “cannot be appropriated or used by the government itself, without just compensation.” This language is dicta, divorced from the Court’s holding that the government was not liable for infringement because the claimed patents were either invalid or unused. *Id.* at 382–83; *see also* Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?*, 50 Fla. L. Rev. 529, 543 (1998) (explaining that *James*’s statement about takings is “only dicta”).

Third, petitioners observe that the Court has since cited the *James* dicta for the general point that the Takings Clause protects both personal and real property. Pet. 19 (citing *Horne v. Dep’t of Agric.*, 576 U.S. 350 (2015)). But *Horne*, which involved raisins “physically segregated” and “transferred” to the government, 576

U.S. at 361, had no occasion to consider whether the government’s infringing use of a patented invention is a taking. *Horne’s* quotation of the *James* dicta is itself dicta and thus presents no genuine conflict. Camilla A. Hrdy & Ben Picozzi, *The AIA Is Not a Taking: A Response to Dolin & Manta*, 72 Wash. & Lee L. Rev. 472, 476 (2016) (explaining that *Horne’s* and *James’s* references to patent takings are dicta).³

Fourth, petitioners claim (at 19) that the decision below is at odds with *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). They reason (at 19-20) that the Court held in *Monsanto* that there could be a taking of a trade secret “notwithstanding that trade secret misappropriation had long been viewed as a tort,” whereas the court here purportedly found no taking *because* infringement is a tort. That is wrong—again, the court below did not treat torts and takings as mutually exclusive. Instead, it reasoned that “not all torts (*i.e.*, infringements) rise to the level of a taking” and, “in these circumstances,” the alleged infringement was one tortious act that did not. Pet. App. 23-24. That analysis does not conflict with *Monsanto*.

Finally, there is no conflict with *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), which holds that “temporary takings” are compensable. Petitioners contend (at 20) that a conflict exists because the decision below cites

³ For the same reason, petitioners misplace reliance (at 19 n.5) on *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, 138 S. Ct. 1365, 1379 (2018) (citing *James*). There, “the issue of whether patents were property for Takings Clause purposes . . . was not before the [C]ourt.” *Christy, Inc. v. United States*, 141 Fed. Cl. 641, 659 (2019), *aff’d*, 971 F.3d 1332 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 1393 (2021).

the four-day duration of the alleged infringement as grounds for finding no taking. But *First English* held that a temporary taking that “den[ies] a landowner all use of his property” requires compensation. 482 U.S. at 318. Copyright infringement does not deny the copyright owner all use of his property. Rather, as the Court has explained, infringement “trespasses into [the owner’s] exclusive domain,” *Sony Corp.*, 464 U.S. at 433, but it is not a “conversion” of the owner’s property rights, *Dowling v. United States*, 473 U.S. 207, 217 (1985). So, the court below appropriately looked to this Court’s discussion of the distinction between trespass and takings in *Cedar Point*. Pet. App. 22-23. That distinction, the Court explained, turns on factors such as “the duration of the invasion” and whether there was “a continuance” of invasive acts “in sufficient number and for a sufficient time.” *Cedar Point*, 141 S. Ct. at 2078 (quoting *Portsmouth*, 260 U.S. at 329-30). Petitioners may disagree with the court of appeals’ application of those factors to their allegations, but such a fact-bound dispute is again unworthy of review. *See* Sup. Ct. R. 10.

4. Petitioners are similarly mistaken (at 20-21) that the decision below creates “tension” between the Fifth Circuit and other circuits “that have said that copyrights are protected under the Takings Clause.” The decision below is not Fifth Circuit precedent, so it cannot cause a circuit conflict. Pet. App. 1 n.*. And, regardless, the asserted tension rests on the same flawed premise: the court of appeals expressly did “not decide” whether the Takings Clause protects copyrights and it assumed copyrights are so protected for purposes of petitioners’ argument. Pet. App. 22. So, to the extent other circuits have indicated that the Takings Clause protects copyrights, those decisions present no conflict.

Moreover, the court of appeals was right to note that other circuits have, at most, “suggested” that the Takings Clause protects copyrights. *Id.* at 22 n.8. The First Circuit has said in dicta that the Takings Clause “might” enable a copyright owner to seek damages from a State for infringement. *Lane v. First Nat’l Bank of Boston*, 871 F.2d 166, 174 (1st Cir. 1989). And the Second Circuit explicitly flagged as dicta its comment that the Takings Clause protects copyrights. *Roth v. Pritkin*, 710 F.2d 934, 939 (2d Cir. 1983) (stating “we note, *en passant*” that applying the Copyright Act retroactively to undo an existing copyright “could be viewed as an unconstitutional taking”). That court and the Ninth Circuit later opined that *if* a State’s reference to a copyrighted work as a legal standard were deemed not just to infringe but to place the work in the public domain—contrary to what they held—that “would raise very substantial problems under the Takings Clause.” *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reps., Inc.*, 44 F.3d 61, 73-74 (2d Cir. 1994); *Prac. Mgmt. Info. Corp. v. AMA*, 121 F.3d 516, 520 (9th Cir. 1997) (quoting *CCC*).

This is not the stuff of a circuit conflict. That is likely why petitioners label it as “tension” and not the “conflict” this Court looks for in considering a certiorari petition. *Compare* Pet. 20-21, *with* Sup. Ct. R. 10(a). Review of the first question should be denied.

B. The second question is not squarely presented and implicates no conflict with decisions from this Court or any federal circuit court.

Like petitioners’ first question presented, the second question is also faulty because it is not presented here. It asks whether a “hypothetical” state remedy is sufficiently “clear and certain” to prevent a due-process violation. Pet. i. That question contains two false premises:

(1) this Court’s due-process precedent does *not* require that post-deprivation remedies be “clear and certain,” and (2) the state remedy that the court below found sufficient is *not* “hypothetical.” Correcting those misstatements of law also shows that the claimed conflicts with decisions of this Court and other circuits are illusory.

1. Petitioners’ argument regarding the second question presumes (at 22) that the University’s alleged copyright infringement violates due process unless Texas law provides a “clear and certain” remedy for the infringement. That is not the correct standard.

Under *Parratt v. Taylor*, a random and unauthorized deprivation of property does not violate the Due Process Clause “if the State provides a postdeprivation remedy.” 451 U.S. 527, 538 (1981). That remedy must offer “some meaningful means by which to assess the propriety of the State’s action at some time after the initial taking.” *Id.* at 539. So, as the Court explained in *Allen*, a State’s copyright infringement cannot violate due process unless the State also “fails to offer an *adequate* remedy for an infringement.” 140 S. Ct. at 1004 (emphasis added).

Petitioners wrongly contend that a remedy is not “adequate” for due process purposes unless it is “clear and certain.” Pet. 22 (quoting *Nat’l Priv. Truck Council, Inc. v. Okla. Tax Comm’n*, 515 U.S. 582, 587 (1995)). The Court has never applied that standard outside the context of a claim to recoup “taxes collected in violation of federal law.” *Reich v. Collins*, 513 U.S. 106, 108 (1994).⁴ It does not apply here.

⁴ See also *Newsweek, Inc. v. Fla. Dep’t of Revenue*, 522 U.S. 442, 444 (1998) (per curiam); *Nat’l Priv. Truck*, 515 U.S. at 587; *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 32-33 (1990).

Petitioners try to dodge that problem (at 22 n.8) by arguing that the standard should be even higher in non-tax cases due to the flexibility afforded States in taxation matters. If that were so, presumably the Court would have announced such a standard by now. It has not. Because the second question is predicated on an incorrect legal standard, review should be denied.

2. The second question also presumes that the state-law remedy that the court of appeals held to be adequate is “hypothetical.” Pet. i. That premise, too, is incorrect.

a. The court below held that petitioners had an adequate remedy in the form of a takings claim under the Texas Constitution. Pet. App. 20-21. That remedy was adequate, the court reasoned, because (1) Texas’s Takings Clause waives sovereign immunity for claims brought under it in state court; and (2) that Clause is “[m]ore expansive” than its federal counterpart in that it requires compensation not only for property “taken” for public use, but also for property “damaged” for or “applied to” public use. *Id.* at 21 (quoting Tex. Const. art. I, § 17).

That remedy is not “hypothetical”; it is right there in the constitutional text. And petitioners’ argument that it is hypothetical rings hollow because they sought that very remedy *in this case*. They brought a distinct claim under Texas’s Takings Clause alleging that the infringement was a “damaging” of their property “without adequate compensation” in violation of that Clause. Dkt. 15 ¶ 112. So, they apparently viewed this remedy as real enough to include in their complaint. The only problem is that they sought it in the wrong court. Pet. App. 24-25 (noting that neither the Clause nor the supplemental-jurisdiction statute abrogates immunity for a state takings claim in federal court). That misstep and petitioners’

admission (at 24) that it is now “too late” to pursue that claim “does not affect the adequacy of the remedy under *Parratt*.” *Albright v. Oliver*, 510 U.S. 266, 285 (1994) (Kennedy, J., concurring in the judgment).

b. Petitioners nonetheless contend (at 23-24) that this constitutional language is nothing more than a hypothetical remedy for two reasons. Their arguments are unavailing.

First, they complain (at 23) that the court below “ignored the position of the state government” that Texas takings law does not cover copyright infringement. But they are referencing a *state university’s litigation argument* that the Takings Clauses do not protect copyrights. Pet. 23 (citing Brief on the Merits for Respondent 36-39, *Olive*, 624 S.W.3d 764 (No. 19-0605)). Not only does that litigation argument lack the force of state law, but petitioners also ignore that the Texas Supreme Court declined to consider it and—like the Fifth Circuit below—assumed that copyrights are property for takings purposes. *Olive*, 624 S.W.3d at 770.

Second, petitioners assert (at 23-24) that the court below “relied” on the Texas Supreme Court’s *Olive* decision and “found” it to provide an adequate remedy, which they say was error because *Olive* “rejected” a takings claim for copyright infringement and offered only “[s]peculations” about other takings remedies. Not so. The court of appeals “relied” on Texas’s Takings Clause and “found” an adequate remedy *there*. Pet. App. 20-21. The court discussed *Olive* only to note that its narrow holding did not render that remedy inadequate. *Id.* at 21. Specifically, the court explained, *Olive* held only that a “single act of copyright infringement” “did not constitute a *per se* taking” and it did not address the “[m]ore expansive” aspects of Texas’s Takings Clause relied on here.

Id. (citing *Olive*, 624 S.W.3d at 782 (Busby, J., concurring) (noting that “Olive has alleged no claim under the ‘damaged’ or ‘applied’ prongs of the Texas Takings Clause”)).

3. Stripped of its invalid premises, the second question presented implicates no conflict with decisions of this Court or other circuits.

a. Petitioners first claim (at 25) that the decision below contradicts this Court’s precedent in *National Truck* and *Parratt*. It does not. As discussed above, *National Truck*’s “clear and certain” standard for tax cases does not apply here. See Part III.B.1, *supra*. Nor is there any conflict with *Parratt*. There the court found sufficient a state statutory remedy that, although “respondent did not use it,” “was in existence at the time of the loss” and “could have fully compensated [him] for the property loss.” 451 U.S. at 543, 544. Here, petitioners acknowledged that a state constitutional remedy for their loss existed because they included it in their pleadings. Dkt. 15 ¶ 112. But they, too, did not use it because they brought it in the wrong court. Pet. App. 24-25. And they have never argued that the “adequate compensation” available under Texas’s Takings Clause could not have “fully compensated” them for their property loss. Tex. Const. art. I, § 17.

b. There is no genuine conflict with other circuit courts’ decisions, either. The decision below is not Fifth Circuit precedent, Pet. App. 1 n.*, and its due-process ruling does not apply any Fifth Circuit precedent that petitioners are challenging, so it cannot support a circuit conflict. Also, none of the purportedly conflicting decisions that petitioners cite uses the *National Truck* “clear and certain” standard on which the second question is based.

In the end, the conflict in “circuit practice” posited by petitioners (at 25) is instead just a reflection of the different facts and local laws at issue in their cited cases. Petitioners primarily claim (at 25) a conflict with *Elsmere Park Club, L.P. v. Town of Elsmere*, 542 F.3d 412 (3d Cir. 2008), because that court conducted a “detailed analysis” of local law to determine whether relief was “actually available.” But what made that level of inquiry necessary was a complex set of city building codes that the court had to parse just “[t]o understand” the remedy. *Id.* at 420-23. That effort was not needed for a single clause in the Texas Constitution. Otherwise, all petitioners have done (at 25) is cherry-pick a few cases in which courts applied *Parratt* to the facts presented and found that the plaintiff had already obtained state relief,⁵ multiple state remedies could apply,⁶ or there was caselaw discussing a remedy.⁷ Nothing suggests that those courts would have found inadequate a remedy for property damaged for public use that is spelled out in a state constitution. There is thus no circuit conflict regarding the second question presented for the Court to resolve.

C. Petitioners do not even claim a circuit split on the third question—which this Court has recently and repeatedly declined to review.

Finally, petitioners’ third question does not present an issue worthy of review. It asks whether the uniform circuit rule that sovereign immunity bars federal takings

⁵ *San Geronimo Caribe Project, Inc. v. Acevedo-Vila*, 687 F.3d 465 (1st Cir. 2012) (en banc).

⁶ *Copeland v. Machulis*, 57 F.3d 476 (6th Cir. 1995) (per curiam); *Easter House v. Felder*, 910 F.2d 1387 (7th Cir. 1990) (en banc).

⁷ *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc); *Easter House*, 910 F.2d 1387.

claims against States remains valid after *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019). Pet. i. Petitioners concede (at 26-27, 33-34) that there is no circuit conflict on this question and they admit (at 29) that the Fifth Circuit’s alleged conflict with *Knick* is with its “reasoning,” not its holding. That is likely why the Court has repeatedly denied review of this exact question. Petitioners try to bolster the case for review with two secondary circuit conflicts, but one is irrelevant and the other is not genuine.

1. In the decision below, the panel relied on Fifth Circuit precedent in holding that state sovereign immunity barred petitioners’ Fifth Amendment takings claim. Pet. App. 24 (citing *Bay Point Props.*, 937 F.3d at 457). Petitioners concede that this ruling presents no circuit conflict: “every circuit to consider the issue has held that state sovereign immunity bars takings claims against state governments.” Pet. 26-27.

Notwithstanding that concession, petitioners argue (at 28-34) that the Court should grant review because “all” of these circuit decisions clash with *Knick*. There this Court held that “a property owner has a Fifth Amendment entitlement to compensation as soon as the government takes his property without paying for it” and need not “pursue state procedures for obtaining compensation before bringing a federal suit.” 139 S. Ct. at 2170, 2173. In petitioners’ view (at 29), that decision “undermines the case for barring federal takings claims on state sovereign immunity grounds.” But because *Knick* involved a suit against a town, it was—as petitioners admit (at 29)—“not a sovereign immunity case.” As such, it does not conflict with the Fifth Circuit’s holding that sovereign immunity bars petitioners’ takings claim.

Indeed, no circuit has yet understood *Knick* to be the game changer that petitioners claim it is. As petitioners again concede (at 33-34), every circuit that has addressed whether sovereign immunity bars takings claims against States in light of *Knick* has concluded that it does—including the Fifth Circuit in the case relied on by the panel below. *Zito v. N.C. Coastal Res. Comm’n*, 8 F.4th 281, 286-88 (4th Cir.), *cert denied*, 142 S. Ct. 465 (2021); *Ladd v. Marchbanks*, 971 F.3d 574, 578-80 (6th Cir. 2020), *cert denied*, 141 S. Ct. 1390 (2021); *Bay Point Props.*, 937 F.3d at 456-57; *Williams*, 928 F.3d at 1214; *see also Pavlock v. Holcomb*, 35 F.4th 581, 589 (7th Cir. 2022) (agreeing with these circuits in dicta). So, even post-*Knick*, there is still no circuit conflict.

That likely explains why the Court has denied certiorari review of this very question three times since *Knick* was decided. Petition for Writ of Certiorari i, *Zito*, 142 S. Ct. 465 (No. 21-542) (“Whether the Fourteenth Amendment’s incorporation of the ‘self-executing’ Just Compensation Clause abrogates state sovereign immunity from federal takings claims?”); Petition for Writ of Certiorari ii, *Ladd*, 141 S. Ct. 1390 (No. 20-912) (“Whether this Court’s decision in *Knick* . . . permits Ohio citizens to maintain a federal cause of action against the State for an uncompensated physical taking.”); Petition for Writ of Certiorari i, *Bay Point Props.*, 140 S. Ct. 2566 (No. 19-798) (“Whether the ‘self-executing’ Just Compensation Clause abrogates a State’s Eleventh Amendment immunity, allowing a property owner to sue the State for a taking of property.”). The question has become no more certworthy since these petitions were denied.

If anything, because *Knick* was decided only three years ago, and only four circuits have directly addressed its impact on the immunity bar to federal takings claims,

the Court should allow this issue to percolate to see if a circuit conflict actually emerges. For now, though, the Court should once again deny review of this question.

2. In any event, there is a good reason why the circuit courts have not altered their approach and the Court has not granted review. Contrary to petitioners' theory (at 29), *Knick* did not undermine the sovereign immunity bar to federal takings claims against States.

While petitioners are correct (at 29) that *Knick* described the substantive nature of the Fifth Amendment right to compensation and when it arises, *Knick* did not address the “analytically distinct” question of whether the plaintiff had a private cause of action to enforce that right. *Gomez-Perez v. Potter*, 553 U.S. 474, 483 (2008). It did not need to: the plaintiff indisputably had a cause of action under section 1983 against the municipal defendant in that case. *Knick*, 139 S. Ct. at 2168. But that does not mean the Court did away with the distinct requirement of a cause of action that, in the case of a sovereign entity, overcomes immunity. To the contrary, the Court reaffirmed that plaintiffs must vindicate the Fifth Amendment right to compensation against the United States through a claim under the Tucker Act, which waives that sovereign's immunity. *Id.* at 2174; *see also Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1328 n.12 (2020) (“Although there is no express cause of action under the Takings Clause, aggrieved owners can sue [the federal government] through the Tucker Act under our case law.”). It follows that *Knick* did not overwrite States' sovereign immunity for takings claims, either.

Indeed, *Knick* explained that, by removing the requirement to litigate takings claims first in state court, the Court was simply “restoring takings claims” to the

same “status” as “the other protections in the Bill of Rights.” 139 S. Ct. at 2170. That status includes the limitation that sovereign immunity bars a damages suit against a State for a deprivation of those rights “unless the State has waived its immunity” or “Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity.” *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 66 (1989). Nothing in *Knick* evinced an intent to elevate the Takings Clause *above* other constitutional rights by implying a cause of action that overcomes state sovereign immunity.

3. Finally, petitioners try to amplify their case for review of the third question by arguing that it implicates two additional circuit conflicts. Those efforts fail.

First, petitioners note (at 27) that, while all circuits to address the issue have held that state sovereign immunity bars federal takings claims, they diverge on whether that bar remains when a state takings remedy is unavailable. But that conflict is irrelevant here because, as petitioners concede (at 28), the court below followed the rule that more favors petitioners. The court first considered whether Texas law affords petitioners a remedy and, finding that it does, held that sovereign immunity bars their federal takings claim. Pet. App. 24. Had this case arisen in a circuit where immunity bars a federal takings claim regardless of available state remedies, the outcome would have been the same. If the Court wants to address this conflict, it should wait for a case where it matters.

Second, petitioners claim (at 34-35) that, among those jurisdictions that bar a federal takings claim only when there is an available state remedy, the court below broke with the Fourth, Sixth, and Tenth Circuits by not requiring that the state remedy be “clear and certain.” That

asserted conflict falters on several fronts. As already noted, this non-precedential decision cannot create a circuit conflict. Pet. App. 1 n.*. And, regardless, other circuits have *not* adopted the “clear and certain” standard to assess state remedies in this context, either. *See* Part III.B.1, *supra*. The Sixth and Tenth Circuits require only that “a remedy is available in state court.” *Skatmore, Inc. v. Whitmer*, 40 F.4th 727, 734 (6th Cir. 2022); *Williams*, 928 F.3d at 1213. The Fourth Circuit has said that the state remedy must be “reasonable, certain, and adequate.” *Zito*, 8 F.4th at 288. But even under that test, the Fourth Circuit held it was sufficient that the state constitution “provides an independent cause of action for plaintiffs to seek damages for a takings claim.” *Id.* at 289. That is exactly what the court of appeals held here, so there is no conflict for the Court to resolve. Pet. App. 20-21, 24; *see also* Part III.B.2, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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