No. 21-1603

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF

Patents and copyrights have become some of the most significant forms of property in the American economy. And state governments are increasingly exploiting their sovereign immunity to violate those rights with impunity. This case is one example; a comprehensive report by the Register of Copyrights last year found many more.[1] But in the face of these concerns, Texas does not equivocate: it rejects any remedy for victims whose intellectual property is blatantly stolen—which even Texas cannot deny happened here. Unlike North Carolina in *Allen v. Cooper*, 140 S. Ct. 994 (2020), Texas leaves no escape hatch under *United States v. Georgia*, 546 U.S. 151 (2006), for states' particularly egregious intellectual property violations. Rather, Texas denies that *Georgia* covers claims under the Copyright Remedy Clarification Act (CRCA). Brief in Opposition (BIO) at 12-13. Nor does Texas recognize a Takings remedy. It casts doubt on whether the Takings Clause protects copyrights at all and denies that any federal remedy exists for takings by state governments. *Id.* at 17-19, 29-30.

A brief bristling with aggressive and controversial legal positions mixes oddly with the other theme of Texas A&M University's (TAMU) opposition, which is that this case is unimportant because it involves only the fact-bound application of settled standards and, in any event, the Fifth Circuit's opinion was unpublished. BIO at 10-11. Unpublished

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[1] U.S. Copyright Office, *Copyright and State Sovereign Immunity—A Report of the Register of Copyrights* (Aug. 2021).

or not, the Court of Appeals decided significant and important questions concerning *Georgia*'s availability to mitigate state sovereign immunity in intellectual property cases and the availability of takings remedies. Regardless of its designation, this case is already attracting attention from industry;[2] it is already being cited for its significant resolution of important legal questions.[3] The Fifth Circuit's decision's very existence undermines federal copyright protection from state predation. Unless this Court intervenes, that decision will only encourage more state piracy.

I. NO "SUBSTANTIAL ANTECEDENT QUESTION" BLOCKS REVIEW IN THIS CASE.

The Fifth Circuit said that "[w]e need not decide whether *Georgia* extends to copyright infringement cases, because even assuming it does, Appellants fail to allege that TAMU's conduct

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[2] *See, e.g.*, Andrew Karpan, *Texas A&M's '12th Man' Copyright Saga Kicked to High Court*, Law360.com, June 16, 2022; Steve Brachmann, *Epic Sports Petitions Fifth Circuit for Rehearing En Banc in Texas A&M's '12th Man' Copyright/Takings Clause Case*, IPWatchdog.com, Sept. 28, 2021; David Newhoff, *Fifth Circuit Delivers Maddening Opinions in Bynum Copyright Suit*, illusionofmore.com, Sept. 16, 2021; Blake Brittain, *Texas A&M Escapes Copyright Claims at 5th Circuit Over 12th Man Story*, Reuters, Sept. 9, 2021.

[3] *See, e.g.*, William F. Patry, 6 *Patry on Copyright* §§ 21:91, 21.88.18 (Sept. 2022); John Mills, Donald Reiley, Robert Highley, & Peter Rosenberg, 2 *Patent Law Fundamentals* § 6:128 (Aug. 2022); Raymond T. Nimmer, *Law of Computer Technology* § 1.138 (June 2022) (discussing this case as one of three key decisions exploring the availability of CRCA relief under *Georgia*).

constitutes an actual violation of the Fourteenth Amendment." App. 20. TAMU now argues that the issues the Court of Appeals decided—what counts as an "actual violation" of the Due Process and Takings Clauses—are unreviewable because the Court reserved judgment about *Georgia*'s scope. BIO at 12-14. This is a makeweight argument.

First, the antecedent question is insubstantial. Nothing in *Georgia* suggests that case-by-case abrogation is confined to particular federal statutes or that the elements of those statutes must match the underlying constitutional violations.[4] If, as TAMU suggests, an actual constitutional violation could not support abrogation under *Georgia* unless each element of that violation were also required by the statute, then the statute would necessarily be *congruent* to the constitutional violation and case-by-

[4] The only case TAMU cites for this theory, *Nat'l Ass'n of Bds. of Pharm. v. Bd. of Regents of the Univ. Sys. of Georgia*, 633 F.3d 1297 (11th Cir. 2011), simply noted, in a footnote, that, in *Georgia*, the constitutional and statutory violations involved "identical conduct." *Id.* at 1316 n.32. That is true in this case too. The Eleventh Circuit did *not* use the "extra element" language that TAMU presses, nor did it explain why *Georgia* should be limited that way. Rather, it decided the case exactly as the Fifth Circuit did here—by addressing whether plaintiffs had alleged an actual constitutional violation.

case and prophylactic abrogation would collapse into the same theory.[5]

Second, the District Court in this case *did* hold that *Georgia* did not apply to Petitioners' CRCA claims. App. 68-70. That issue is fairly included in Petitioners' questions presented concerning whether they have adequately alleged actual constitutional violations under *Georgia*. The Fifth Circuit's reliance on a different ground would not prevent this Court from considering *Georgia*'s scope, if it wishes.

Third, this Court is also free to decide the issues that the Court of Appeals addressed while reserving any question about *Georgia*'s scope. TAMU does not argue that the latter question is jurisdictional. Petitioners' questions concerning the scope of takings protection for copyrights and the certainty of state remedies necessary to defeat a procedural due process claims remain certworthy in their own right. Indeed, they have significance beyond state sovereign immunity cases because they respectively apply to all takings claims involving copyrights and to all procedural due process claims.

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[5] Moreover, the "extra element" TAMU invokes—a failure to provide a state remedy or just compensation—requires no further factual proof, just a distinct legal judgment whether state law adequately redresses the intrusion on the plaintiff's rights. That was true in *Georgia*, as the plaintiff's Eighth Amendment claim necessarily implicated a different legal standard than his Americans with Disabilities Act claim.

II. THE FIFTH CIRCUIT RULED THAT COPYRIGHT INFRINGEMENT IS NOT A TAKING AS A MATTER OF LAW, IN CONFLICT WITH THIS COURT AND OTHER CIRCUITS.

The Court of Appeals applied Fifth Circuit law 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 v. United States*, 473 F.2d 1329, 1337 (5th Cir. 1973)). *Porter*'s language is categorical; it treats takings and torts as mutually exclusive, either-or categories. Nor did the Fifth Circuit's opinion in *this* case qualify *Porter*, as TAMU suggests. BIO at 16-17. Nothing in the opinion says that, and an unpublished opinion cannot modify circuit precedent. *Porter* is binding precedent undermining constitutional protection for federal intellectual property rights. It makes no sense for TAMU to say, *id.* at 17, that this case is a poor vehicle to reject *Porter* simply because the Fifth Circuit's opinion was unpublished. The only question is whether this case presents the question whether the Takings Clause protects copyrights—which it plainly does.

Although the Court of Appeals mentioned that the infringement lasted for four days, it did not purport to limit *Porter*'s categorical language (nor could it have). As TAMU acknowledges, BIO at 20, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), requires compensation for temporary takings that destroy a property's value. Crucially, Petitioners allege TAMU's blatant infringement made Mr.

Bynum's book unpublishable. *Id.* ¶ 5. Approximately 40,000 people viewed TAMU's website where Bynum's chapter was posted in those four days, TAMU tweeted the work to approximately 300,000 people, and TAMU also emailed a preview and link of the chapter to 77,000 subscribers of an e-newsletter. *See* Complaint ¶¶ 41, 54, 56, 77.

Had the Fifth Circuit rejected those claims as not comprising a taking, it would have had to overturn the District Court's finding "that those allegations plausibly state a claim for damages under the Takings Clause."[6] App. 100. The Fifth Circuit said nothing of the kind. The only plausible reading is that the Fifth Circuit relied on *Porter*'s categorical rule that copyright infringements are not takings.

As detailed in the Petition, that invocation of *Porter* conflicts with this Court's repeated statements affirming takings protection for intellectual property rights and with similar statements and holdings by other circuits. TAMU dismisses all these cases as dictum, equivocal, or inapplicable to copyrights. BIO at 18-19. That simply underscores present uncertainty as to constitutional protection for intellectual property. Such uncertainty undermines both the value of these rights as well as the incentive for others and inventors to create. This Court should resolve these uncertainties and establish uniform constitutional protection for copyright.

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[6] The District Court held that sovereign immunity blocked jurisdiction nonetheless. App. 101.

III. THE FIFTH CIRCUIT REJECTED PETITIONERS' DUE PROCESS CLAIM BASED ON A WHOLLY HYPOTHETICAL STATE REMEDY, CONFLICTING WITH THIS COURT AND OTHER CIRCUITS.

TAMU denies that states must provide a "clear and certain" remedy to satisfy procedural due process, BIO at 22-23; *see National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 587 (1995). That denial is legal error and highlights why this Court must clarify what remedies infringement victims have. The "clear and certain" standard stems from cases in which states collect taxes in violation of federal law, relying on a post-deprivation remedy to prevent any violation of the Due Process Clause. *See Reich v. Collins,* 513 U.S. 106, 108 (1994). TAMU offers no explanation for why the "clear and certain" standard for a post-deprivation remedy should vary from one procedural due process context to another; any difference between the present context and the invalid tax cases surely cuts in the opposite direction. Petition at 22 n.8. It is no answer to say that "presumably the Court would have announced such a standard by now," BIO at 23, as TAMU identifies no *other* standard applicable to non-tax procedural due process claims.

TAMU did convince the Fifth Circuit that no "clear and certain" remedy was required because the Court of Appeals rejected Petitioners' due process claim based entirely on a hypothetical remedy never recognized by any state court. TAMU invokes the Court of Appeals' assertion that the Texas state constitution's Takings Clause is "more expansive" than the federal one, App. 21, but that ignores the

Texas Supreme Court's own statements explaining that "[a]lthough our state takings provision is worded differently," it is "comparable" to the federal one and "Texas case law on takings under the Texas Constitution is consistent with federal jurisprudence." *Jim Olive Photography v. Univ. of Houston Sys.*, 624 S.W.3d 764, 771 (Tex. 2021). Indeed, *Olive* seemed to follow in the footsteps of the Fifth Circuit's rule in *Porter*, holding that a state entity's appropriation and use of the plaintiff's intellectual property for its own purposes did not amount to a taking of that property. *Id.* at 776-77.

It is true, as TAMU argues, that *Olive* addressed only a "*per se* taking" theory and did not rule out a "regulatory taking" or other theory. But it is hard to see how a *regulatory* taking theory—traditionally more difficult to establish—would be better for Petitioners, given that TAMU simply *used* their intellectual property and passed it off as its own, rather than regulating Petitioners' own use.[7] In any event, *Olive* remains the only state case considering a takings claim based on copyright infringement, and it rejected that claim. Neither the Fifth Circuit nor

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[7] TAMU's invocation of the 'damaged' or 'applied' prongs of the Texas Takings Clause, BIO at 25—which a concurrence in *Olive* said could "possibl[y]" require compensation in "some circumstances" for violation of copyright, 624 S.W.3d at 782 (Busby, J., concurring)—simply underscores the tenuous nature of the proposed state remedy.

TAMU points to any other state authority suggesting a remedy available to Petitioners.[8]

TAMU makes much of Petitioners' attempt to assert a state takings claim, BIO at 23-24. But Petitioners pleaded that claim long before *Olive* rejected it. And although TAMU tries to discount the State's own "litigation argument" that the state constitution does *not* protect copyrights from takings, BIO at 24, presumably the State Attorney General's Office would not take that position unless it was at least a colorable interpretation of state law. As TAMU rightly points out, that position *remains* open after *Olive*. *Id*. That reinforces Petitioners' bottom line: in Texas, any state takings remedy for copyright infringement remains highly speculative and dependent on many open legal questions. That is not the "clear and certain" remedy required by due process.

Nor is this a case about *how* well-established a state remedy must be to satisfy due process. This case resides at the far end of the continuum; it cleanly presents the question whether an adequate state post-deprivation remedy must exist now or merely *could* be recognized in the future. TAMU correctly notes that the cases in this Court and other circuits that

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[8] TAMU argues that the state remedy "is not 'hypothetical'; it is right there in the constitutional text." BIO at 23. That argument is flatly inconsistent with TAMU's denial that the Fifth Amendment's "just compensation" clause—also "right there in the constitutional text"—creates any remedy for takings by state governments. *See* BIO at 29. And the question is not whether the state constitution protects property—it does—but whether state law would recognize copyrights as protected or infringement as a taking of that property. *Olive* casts doubt on both propositions.

Petitioners invoke do not *say* that they are setting a floor of remedial certainty. BIO at 26. But TAMU—tellingly—has not presented a single case recognizing as sufficient for due process a remedy that had never been successfully invoked in the past. Whether speculative hypotheticals suffice is a certworthy question.

IV. THE THIRD QUESTION—WHETHER STATE IMMUNITY FOR TAKINGS CONFLICTS WITH *KNICK*—IS WORTHY OF REVIEW.

This Court's decision in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), did not simply hold that federal takings plaintiffs need not go first to state court; rather, it clarified that federal takings violations fundamentally stem from the Fifth Amendment's textual requirement of a compensatory remedy. *Id.* at 2171-72. *Knick* was, as TAMU insists, not a sovereign immunity case, BIO at 27; it involved a municipality, lacking sovereign immunity, not a state. But neither TAMU nor the Fifth Circuit can explain how sovereign immunity can co-exist with a constitutional mandate that states pay compensation when they take.

TAMU offers the radical answer that federal law simply provides no remedy when states—as opposed to municipalities—take property without compensation. *See* BIO at 29. TAMU cites no authority for that proposition, and it would have barred jurisdiction in at least one landmark takings case. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). That view would unsettle property rights across the board and invite

opportunistic behavior by state entities. It ignores, however, the unique nature of the Takings Clause.

Contra-TAMU, *Knick* did not say that it was "simply 'restoring takings claims' to the *same* 'status' as 'the other protections in the Bill of Rights.'" BIO at 29-30 (quoting 139 S. Ct. at 2170) (emphasis added). The Court said it was "restoring takings claims *to the full-fledged constitutional status* the Framers envisioned." 139 S. Ct. at 2170 (emphasis added). *Knick* made takings claims the same as other Bill of Rights claims by eliminating any state-court exhaustion requirement, *see id.* at 2169-70, but takings claims remain unique as the only substantive right for which the Constitution mandates a particular remedy. A 'full-fledged' vindication of takings rights thus requires that sovereign immunity give way, as this Court acknowledged in *First English*, 482 U.S. at 316 n.9.

Moreover, as the Petition explains, the circuit courts have effectively turned sovereign immunity into the same sort of state-court-first requirement that *Knick* rejected by barring federal takings claims if state law provides a remedy. Petition at 31-33. Even if this Court views that regime as permissible, Petitioners have identified a certworthy question concerning whether immunity persists when state remedies are hypothetical rather than already established and available.[9] A significant conflict among the lower courts exists for the same reasons just identified concerning the adequacy of state post-deprivation remedies in due process cases. The Fifth

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[9] To Petitioners' knowledge, none of the post-*Knick* cert petitions that this Court has denied raised *that* question.

Circuit held here that a purely hypothetical state remedy sufficed, conflicting with every other circuit to have considered state remedies in immunity cases. Petition at 34-35. At a minimum, this Court should intervene to address that question.

TAMU's fallback argument is simply to note that several cert petitions have challenged state immunity in takings cases post-*Knick*, and this Court has denied them all. BIO at 28. Percolation is often helpful, but the circuits are falling into line on this question rather than debating it. And as Texas's radical arguments here demonstrate, states are more and more emboldened to expropriate property with impunity. This case squarely presents the question whether the Takings Clause mandates a compensatory remedy notwithstanding state immunity, and this Court should buttress the certainty of property rights by answering it.

CONCLUSION

The petition for *certiorari* should be granted.

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