

**No. 20-20503**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE FIFTH CIRCUIT**

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Canada Hockey, L.L.C., doing business as Epic Sports; Michael J.  
Bynum,

*Plaintiffs-Appellants*

v.

Texas A&M University Athletic Department; Alan Cannon; Lane  
Stephenson, in his individual capacity,

*Defendants-Appellees*

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On Appeal from the United States District Court  
for the Southern District of Texas  
Case Nos. 4:17-CV-181, 4:20-CV-3121

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**Plaintiffs-Appellants' Opening Brief**

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**CERTIFICATE OF INTERESTED PERSONS**

No. 20-20503 (5th Cir.)

Canada Hockey, L.L.C., doing business as Epic Sports; Michael J. Bynum,

*Plaintiffs-Appellants*

v.

Texas A&M University Athletic Department; Alan Cannon; Lane  
Stephenson, in his individual capacity,

*Defendants-Appellees*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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American Insurance Group, Inc. (insurer that, based on information provided  
to plaintiffs, may be liable for part or all of a judgment against some or all of the  
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Respectfully submitted,

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## STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-appellants Canada Hockey, L.L.C. (doing business as Epic Sports) and Michael J. Bynum respectfully request oral argument. This appeal involves complex and highly significant questions regarding sovereign immunity, including whether, under *United States v. Georgia*, 546 U.S. 151 (2006), the Copyright Remedies Clarification Act (“CRCA”), which authorizes suit against a State for violations of the Copyright Act, *see* 17 U.S.C. § 511, is valid as applied to conduct that violates the Fourteenth Amendment. The district court agreed that the allegations of egregious copyright infringement in this case, taken as true, would amount to a violation of plaintiffs’ rights under the Fourteenth Amendment. Nevertheless, the court held that *Georgia*’s rule for abrogation of state sovereign immunity applies only to the particular statute at issue in that case, the Americans with Disabilities Act (“ADA”). That ruling incorrectly narrows the scope of a binding Supreme Court decision, is irreconcilable with decisions from the Eighth, Ninth, and Eleventh Circuits, and prevents plaintiffs from having any adequate remedy against the State for serious copyright infringement that violates their constitutional rights. Moreover, the district court’s decision is erroneous in other critical respects. Oral argument will significantly aid the Court in assessing the issues in this important case.

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## **STATEMENT OF JURISDICTION**

On March 29, 2019, the district court dismissed all claims against defendants the Department, the 12th Man Foundation (the “Foundation”), Alan Cannon, and Lane Stephenson (collectively, “the defendants”), leaving only claims against defendant Brad Marquardt pending. ROA.1861. On September 4, 2020, the court entered final judgment in favor of the dismissed defendants under Federal Rule of Civil Procedure 54(b). ROA.5540; ROA.6. On September 25, 2020, plaintiffs filed a timely notice of appeal. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Whether the district court erred in ruling that sovereign immunity bars plaintiffs’ copyright claims against the Texas A&M University Athletic Department (the “Department”) notwithstanding the unanimous holding in *United States v. Georgia*, 546 U.S. 151 (2006), that congressional abrogation of state sovereign immunity for a federal statutory violation is valid as applied to conduct that violates both the relevant federal statute and the Fourteenth Amendment.

2. Whether the district court erred in ruling that sovereign immunity bars plaintiffs’ federal Takings Clause claim, even though the district court agreed that plaintiffs have no remedy in state court for the State’s taking of their copyright without just compensation.



3. Whether the district court erred in concluding that, if Texas A&M University (“TAMU”) were substituted as a defendant because the Department could not be sued on its own, TAMU would be an “arm of the state” entitled to sovereign immunity, even though the Department is functionally independent and legally barred from receiving or expending state funds.

4. Whether the district court erred in dismissing plaintiffs’ copyright claims against individual defendants Alan Cannon and Lane Stephenson on the ground that plaintiffs had not sufficiently pled the elements of such claims or overcome defendants’ qualified immunity.

## **INTRODUCTION**

The complaint in this case alleges that the Department intentionally and egregiously infringed plaintiffs’ copyright in a biography of the legendary TAMU “12th Man.” That infringement—which involved removing plaintiffs’ copyright information and then disseminating the copyrighted work to hundreds of thousands of people—completely destroyed the copyright’s value.

The district court dismissed plaintiffs’ copyright and takings claims against the Department (and refused to substitute TAMU as a defendant in the Department’s place) on state sovereign-immunity grounds. That was legal error. Congress validly abrogated state sovereign immunity to copyright claims where, as here, a plaintiff adequately alleges that the infringement violated not only the federal copyright

statute but also the Fourteenth Amendment’s property-right protections. State sovereign immunity is not applicable to a federal takings claim brought in federal court where, as here, no alternative forum is open to hear that claim and afford the injured plaintiff just compensation. And the sovereign-immunity defense is not available where, as here, the entity through which the State acted is not an “arm of the state” because that entity is barred by law from receiving any money from the State and operates with total financial independence.

This Court should reverse the district court’s contrary decision. That decision is wrong as a matter of law under the precedent of the Supreme Court and this Court. And the decision, if left in place, would have grave negative consequences—among them, encouraging States to flout federal law by simply appropriating others’ intellectual property.

### **STATEMENT OF THE CASE**

1. The Copyright Clause of Article I of the U.S. Constitution calls for Congress “[t]o 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. art. I, § 8, cl. 8. Under the federal copyright statute, “[a]nyone who violates any of the exclusive rights of [a] copyright owner” is “an infringer” and is subject to “an action for any infringement,” 17 U.S.C. § 501(a)-(b), in which the copyright holder can obtain injunctive relief as well as

actual or statutory damages and, in some cases, costs and attorneys' fees, *see* 17 U.S.C. §§ 502-505. Those provisions provide incentives for creation of copyrightable materials and thereby serve to "enrich[ ] the general public through access to creative works." *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1986 (2016) (citation omitted).

In the late 1980s, Congress determined that States were infringing copyrights, sometimes in a serious and intentional manner, and then asserting sovereign immunity to successfully shield themselves from monetary liability. *See generally Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985). A 1988 report from the U.S. Register of Copyrights identified numerous instances of such copyright infringement by the States. *See* U.S. Copyright Office, *Copyright Liability of States and the Eleventh Amendment* 5-17, 91-97 (June 1988) ("Register's Report"), available at <http://files.eric.ed.gov/fulltext/ED306963.pdf>.

In the Copyright Remedy Clarification Act of 1990 ("CRCA"), Congress 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), 511(b).

Section 5 of the Fourteenth Amendment empowers Congress to strip the States of sovereign immunity for federal statutory violations, so long as certain conditions apply. First, under *United States v. Georgia*, 546 U.S. 151 (2006) (Scalia, J.), a congressional abrogation of state sovereign immunity for a federal statutory violation is valid in any case in which the same conduct alleged to violate the federal statute is also adequately alleged to violate the Fourteenth Amendment itself. *See Georgia*, 546 U.S. at 159. That is because Congress has the undoubted power to “creat[e] private remedies against the States for *actual* violations” of the Fourteenth Amendment. *Id.* at 158.

Second, 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 violates the Fourteenth Amendment’s substantive prohibitions. *City of Boerne v. Flores*, 521 U.S. 507, 518, 519-20 (1997) (emphasis added). Such tailoring exists if there is “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *Id.* at 520; *see Georgia*, 546 U.S. at 158 (discussing Congress’s “‘prophylactic’ enforcement power[]”).

Last year, 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 in which they might engage. *See id.* at 1007. This Court had previously reached the same conclusion in *Chavez v. Arte Publico Press*, 204 F.3d 601, 603 (5th Cir. 2000).

Neither *Allen* nor *Chavez*, however, addressed the other situation in which Congress has the power to abrogate state sovereign immunity as to claims under a federal statute: where a party in a particular case alleges that a federal statutory violation committed by a State also amounts to “an *actual* violation[]” of the Fourteenth Amendment. *Georgia*, 546 U.S. at 159.

2. The facts set forth here are alleged in plaintiffs’ First Amended Complaint (“complaint”), ROA.314-348. At the pleading stage, those facts must be taken “as true and view[ed] . . . in the light most favorable to the plaintiff[s].” *Whitley v. Hanna*, 726 F.3d 631, 637 (5th Cir. 2013).

a. Plaintiff Michael J. Bynum has written and edited over 100 sports-related books, including books on famous Texas sports teams and players. ROA.319, ¶¶ 16-

17. Bynum has written biographies celebrating the history of Texas college football and authored a best-selling coffee table book chronicling the greatest moments in Texas high school football. ROA.319, ¶ 17. Bynum’s works have consistently been very successful; many of his books have sold over 50,000 copies. ROA.319-320, ¶ 18.

As a result of his sports-related research, Bynum became fascinated with the story of the “12th Man” of the TAMU football team. ROA.320-321, ¶ 21. According to the story, in 1922 a man named E. King Gill was a “squad player” for that team—a player who helps the members of the team practice, but does not himself play in games. *Id.* During one high-stakes game in which Gill was sitting 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 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. ROA.370. His willingness to play has long served as a symbol of TAMU unity. ROA.321, ¶ 22.

Bynum set out to develop a book that would tell E. King Gill’s full story. ROA.321-322, ¶ 24. After conducting substantial background research, Bynum commissioned Whit Canning, a well-known sportswriter for the *Fort Worth Star-Telegram*, to review Bynum’s research and draft a biography of Gill (the

“Biography”) on a work-for-hire basis. ROA.320, 321-322, 326, ¶¶ 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. ROA.321-322, 323, ¶¶ 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. ROA.326-327, ¶ 32.<sup>1</sup>

b. While working on the 12th Man book, Bynum interacted frequently with members of the Department. For instance, in 2000 and 2001, Bynum visited the Department and met with Brad Marquardt, the Associate Director of Media Relations, and Alan Cannon, then an Assistant Director for Media Relations. ROA.322, ¶ 25. Bynum informed them of his work developing the book and asked them to confirm some facts about Gill’s tenure at TAMU. *Id.*; see ROA.327, ¶ 33.

In June 2010, Bynum emailed Marquardt seeking photographs for the book. ROA.322, 323-324, ¶¶ 25, 28. To bolster the request, he attached a PDF of a fully designed draft of the book, specifying that he had provided it only for Marquardt’s “review” and that it was “not in final form yet.” ROA.354. The cover of the draft book indicated that it was “[e]dited by Mike Bynum,” and page 6 included copyright

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<sup>1</sup> Pursuant to agreement with Bynum, Epic Sports (the publishing imprint of plaintiff-appellant Canada Hockey LLC) owns exclusive rights to publish the book and the Biography. ROA.338, ¶ 71. The book containing the Biography has been assigned U.S. Copyright Registration Nos. TXu002020474 and TXu002028522. ROA.338, ¶ 70.

management information—specifically, 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, bearing the title “An A&M Legend Comes to Life,” began on page 9 and stated that it was “by Whit Canning.” ROA.363.

c. The Department engages in extensive efforts to raise funds because it is barred by Texas law from receiving any public tax dollars. *See, e.g.*, Tex. Const. art. VII, §§ 17(f), 18(d); *see also* ROA.317, 321, ¶¶ 9, 22 (non-profit Foundation raised almost \$400 million for the Department from July 2010 through June 2014). As part of those efforts, the Department has aggressively policed use of the term “12th Man,” including against professional sports teams. ROA.321, ¶ 22; *see id.* (TAMU registered “12th Man” as trademark in 1990).

In January 2014, the Department made a push to raise millions of dollars and solidify control over the 12th Man trademark. Accordingly, the Department directed its staff, including Marquardt and Cannon, to locate background information on Gill. ROA.327-28, ¶¶ 34, 38-39.

Marquardt had in his office the PDF of Bynum’s book that Bynum had sent by email. Marquardt directed his secretary to retype the Biography and to remove any reference to Bynum or to Epic Sports’ copyright information. ROA.331, ¶¶ 47-



48. Marquardt also rewrote the byline on the Biography 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. ROA.330, ¶ 45; ROA.512. Finally, to better support TAMU’s trademark, Marquardt changed the title of the Biography from “An A&M Legend Comes to Life” to “The Original 12th Man.” ROA.330-331, ¶¶ 45-48.

Marquardt provided the retyped Biography to Cannon, his supervisor (who was by that time Associate Director of Media Relations), as well as to others in the Department. ROA.317-318, 331, ¶¶ 10-11, 49. Cannon approved the Biography for distribution and for display on the Department’s website. ROA.338, ¶ 76; ROA.352.

In the next 72 hours, the Department disseminated the Biography to hundreds of thousands of people. The Biography was available on the Department’s website, which (at the time) received approximately 10,000 unique visitors and 50,000 page views a day. ROA.329-330, ¶ 41. The Department’s official Twitter account, which (at the time) had approximately 145,000 followers, tweeted a link to the Biography on the website. *Id.* Shortly thereafter, the University’s official Twitter account, which (at the time) had approximately 160,000 followers, also linked to—and quoted from—the Biography. ROA.333, ¶ 54. And the manager of the University’s Twitter account, Lane Stephenson, sent a preview of and a prominently featured link

to the Biography directly to the 77,000 subscribers who received the “TAMU Times” e-newsletter. ROA.333-334, 338, ¶¶ 56, 77. He also placed the preview and link on the front page of the e-newsletter’s website. *Id.* Just as the Department had intended, the Biography was then widely forwarded, copied, shared, blogged about, and reported on and linked to by news organizations. ROA.329-330, 333, 336, 516-524, ¶¶ 41, 55, 60-61.

Bynum discovered those events two days after the Department had posted the Biography. ROA.328-329, ¶ 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. ROA.544.

Marquardt emailed back. ROA.335, ¶ 58; ROA.542-543. He stated that the Biography “was an important part of our strategic plan to show Texas A&M is the true owner of ‘the 12th Man.’” ROA.543. 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 or why he removed the copyright management information and any reference to Bynum. *Id.*

The Department ultimately removed the Biography from its website. But, as a result of the Department’s actions, the Biography continued to be available on the

internet and otherwise distributed widely. ROA.336, ¶ 61; ROA.516. And, not surprisingly, simply 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. ROA.316, ¶ 5. The book remains unpublished to this day. *Id.*

3. On January 19, 2017, plaintiffs Michael Bynum and Canada Hockey LLC (collectively, “plaintiffs”) brought suit, and on April 17, 2017, they filed the operative complaint. As relevant here, plaintiffs asserted six claims: (1) direct copyright infringement (against the Department, Marquardt, Cannon, and Stephenson); (2) contributory copyright infringement (against all four of those defendants); (3) vicarious copyright infringement (against the Department); (4) violation of the Digital Millennium Copyright Act, 17 U.S.C. § 1202 *et seq.* (against Marquardt and the Department); (5) violation of the Fifth and Fourteenth Amendments of the U.S. Constitution (against the Department); and (6) violation of the Takings Clause of the Texas Constitution (against the Department). ROA.337-345, ¶¶ 67-120.<sup>2</sup>

Defendants moved to dismiss those claims. ROA.591. The Department moved pursuant to Federal Rule of Civil Procedure 12(b)(1), while the individual

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<sup>2</sup> The complaint also asserted claims against the Foundation, which is no longer a defendant in this case or a party to this appeal.

defendants moved pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court dismissed all defendants except for Marquardt. *See* ROA.1861. Plaintiffs moved for reconsideration, and the court stayed the case pending the Supreme Court's resolution of *Allen v. Cooper*, 140 S. Ct. 994 (2020). *See* ROA.1921, 1993. After the decision in *Allen*, 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 Rule 54(b) as to all defendants but Marquardt. *See* ROA.5540.

As to the copyright and takings claims against the Department, the district court concluded that the Department lacked jural authority and could not be sued. The court explained that normally TAMU could simply be substituted as a defendant under Federal Rule of Civil Procedure 17—but the court concluded that TAMU was entitled to sovereign immunity as an arm of Texas. ROA.1872-1877. The court rejected the argument that in the CRCA Congress had validly abrogated state sovereign immunity as to the copyright claims in this case. The court accepted that plaintiffs had satisfied all of the requirements for abrogation set forth in the Supreme Court's decision in *Georgia*, but limited that decision to its facts. *Id.*; *see* ROA.5549-5552. The court also concluded that TAMU had sovereign immunity in federal court as to plaintiffs' federal takings claim, even though the court determined that Texas's courts are closed to such a claim. ROA.1879; ROA.5571-5572.

As to the individual defendants (other than Marquardt), the district court dismissed the copyright claims against them as insufficiently pled and barred by qualified immunity. The court ruled that “absent particularized facts as to” those defendants’ “actual or constructive knowledge of the alleged direct infringement,” they could not “be held liable.” ROA.1891.

### **SUMMARY OF ARGUMENT**

I. A. The district court erred as a matter of law in dismissing plaintiffs’ copyright claims against the Department (and TAMU as a substituted defendant) on sovereign-immunity grounds. In the CRCA, Congress clearly expressed its intent to abrogate state sovereign immunity for copyright claims. And under *United States v. Georgia*, 546 U.S. 151 (2006), that abrogation is valid as applied in any case in which the conduct alleged violates not only the federal copyright law statute but also the Fourteenth Amendment.

The district court correctly concluded that plaintiffs adequately alleged that the Department’s copyright infringement constituted both a taking of plaintiffs’ property without just compensation and a deprivation of their property without due process of law. But the court erroneously limited *Georgia* to its facts, thus departing from decisions of the Eighth, Ninth, and Eleventh Circuits. The court also mistakenly concluded that *Allen v. Cooper*, 140 S. Ct. 994 (2020), and *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000)—neither of which discusses the

argument accepted in *Georgia*—somehow foreclose application of *Georgia* to the CRCA. That reasoning cannot be squared with *Georgia* itself. Moreover, by depriving injured copyright holders of monetary relief against States that engage in egregious copyright infringement, it would have devastating consequences for the copyright system and for the creation of new works that the system is designed to encourage.

B. The district court’s dismissal on sovereign-immunity grounds of plaintiffs’ claim for violation of the federal Takings Clause is likewise legally erroneous. As the Tenth Circuit has explained, a “Fifth Amendment Takings Clause” claim is “barred by Eleventh Amendment immunity . . . *as long as a remedy is available in state court.*” *Williams v. Utah Dep’t of Corr.*, 928 F.3d 1209, 1213 (10th Cir. 2019) (emphasis added). Here, plaintiffs have no remedy available in Texas’s courts for the Department’s taking. Accordingly, Texas cannot invoke sovereign immunity in federal court and thereby prevent plaintiffs from having any forum to pursue just compensation for the State’s taking of their copyright.

C. The district court further erred in ruling that TAMU (if substituted for the Department as a defendant) would be an arm of the state entitled to sovereign immunity as to *any* of plaintiffs’ claims. This Court employs a six-factor test to determine whether a given “entity” should be cloaked with the State’s sovereign immunity. *Hudson v. City of New Orleans*, 174 F.3d 677, 681 (5th Cir. 1999). The

district court assumed that if the Department lacked jural authority (that is, authority to sue and be sued under state law) then the Department could not be the relevant “entity” for purposes of that test. But this Court has repeatedly applied the arm-of-the-state test to an entity that lacks jural authority, and it is appropriate to do so when the substituted defendant can have acted only through such an entity. Such a rule allows this Court to focus the arm-of-the-state inquiry on the factor “most important” to the Eleventh Amendment analysis: whether an entity receives funds from the state treasury. *Id.* at 682 (citation omitted). Here, the Department was responsible for the alleged copyright infringement—and the Department may not receive *any* money from the state treasury, under rules of separation for Texas university athletic departments that are enshrined in Texas law. Accordingly, TAMU, when acting through the Department, is not entitled to sovereign immunity.

II. Finally, the district court erred in dismissing plaintiffs’ copyright claims against individual defendants Alan Cannon and Lane Stephenson. In ruling that plaintiffs did not adequately allege that those defendants had “actual or constructive knowledge of the alleged direct infringement,” ROA.1891, the court failed to accept all well-pleaded facts as true, to view those facts in the light most favorable to the plaintiffs, and to make reasonable inferences in plaintiffs’ favor.

## STANDARD OF REVIEW

This Court reviews de novo the district court’s dismissal of plaintiffs’ claims against the Department under Rule 12(b)(1) and the district court’s conclusion that such claims would be futile if asserted against TAMU as a substituted party. *See Griener v. United States*, 900 F.3d 700, 703 (5th Cir. 2018). In conducting that review, this Court “take[s] the well-pled factual allegations of the complaint as true,” views “them in the light most favorable to the plaintiff[s],” *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008), and draws “reasonable inferences” in plaintiffs’ favor, *Franklin v. Regions Bank*, 976 F.3d 443, 447 (5th Cir. 2020).

This Court reviews de novo the district court’s dismissal of plaintiffs’ claims against the individual defendants under Rule 12(b)(6). *Anderson v. Valdez*, 845 F.3d 580, 589 (5th Cir. 2016). Even where that dismissal implicates a defense of qualified immunity, this Court “accept[s] all well-pleaded facts as true and view[s] those facts in the light most favorable to the plaintiffs.” *Id.* at 589 (citation omitted).

## ARGUMENT

### **I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS’ CLAIMS AGAINST THE DEPARTMENT**

#### **A. The CRCA Validly Abrogates Sovereign Immunity Here Because Plaintiffs Have Alleged Copyright Claims Based On Conduct That Violates The Fourteenth Amendment**

Under the principles set forth in the Supreme Court’s decision in *United States v. Georgia*, 546 U.S. 151 (2006) (Scalia, J.), the CRCA validly abrogates state



sovereign immunity as to claims under federal copyright law in every case in which the state conduct alleged to violate the Copyright Act also amounts to a violation of the Fourteenth Amendment. That ensures that some effective remedy exists for egregious copyright infringement by the States, which is a serious and growing problem and which otherwise could continue with complete impunity. The district court agreed that in this case plaintiffs had alleged conduct by the Department that violates not only the Copyright Act but also the Fourteenth Amendment—on both due process and takings grounds. Based on a misreading of *Georgia* and of the Supreme Court’s recent decision in *Allen v. Cooper*, 140 S. Ct. 994 (2020), however, the district court ruled that the State retains sovereign immunity here as to plaintiffs’ copyright claims. That decision was erroneous as a matter of law. This Court should reverse the district court and permit plaintiffs’ copyright claims against the Department to proceed.<sup>3</sup>

**1. The Supreme Court’s Decision In *Georgia* Dictates The Conclusion That The CRCA Abrogates State Sovereign Immunity In This Case**

a. In *Georgia*, a unanimous Supreme Court held that Congress has the power to validly abrogate state sovereign immunity as to any federal statutory violation, so

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<sup>3</sup> Plaintiffs brought claims against the Department; the district court noted that it would have substituted TAMU as the defendant but for the district court’s understanding that TAMU had sovereign immunity. *See* p. 13, *supra*. For simplicity’s sake, this brief refers to claims against the Department rather than to claims against the Department with TAMU substituted as a defendant.

long as the conduct that is alleged to violate the statute in a specific case would also amount to a violation of the Fourteenth Amendment itself. *See Georgia*, 546 U.S. at 159.

As the Supreme Court explained, Section 5 of the Fourteenth Amendment gives Congress the power to abrogate state sovereign immunity in certain circumstances. *See Georgia*, 546 U.S. at 158. The Fourteenth Amendment protects against deprivation of “property without due process of law,” U.S. Const. amend. XIV, § 1, and also incorporates the prohibitions set forth in the Fifth Amendment’s Takings Clause, *see Penn Central Transp. Co. v. New York*, 438 U.S. 104, 122 (1978). Section 5 provides that “Congress shall have power to enforce, by appropriate legislation, the provisions of” the Amendment. U.S. Const. amend. XIV, § 5.

*Georgia* considered the validity of an abrogation of state sovereign immunity found in the ADA, which provides that “[a] State shall not be immune under the [E]leventh [A]mendment to the Constitution of the United States from an action in” a “Federal or State court of competent jurisdiction for a violation of” the ADA. 42 U.S.C. § 12202. That provision, the Supreme Court ruled, validly abrogated sovereign immunity as to the plaintiff in the particular case before the Court. *Georgia*, 546 U.S. at 159. The Court explained that Section 5 “grants Congress the power to ‘enforce . . . the provisions’ of the [Fourteenth] Amendment by creating

private remedies against the States for *actual* violations of” that Amendment’s “provisions.” *Id.* at 158. And the Court determined that the plaintiff’s “claims for money damages against the State under Title II” of the ADA “were evidently based, at least in large part, on conduct that independently violated the provisions of § 1 of the Fourteenth Amendment.” *Id.* at 157.

In that analysis, the Court used the fact that the alleged conduct violated the Fourteenth Amendment not as a basis for allowing plaintiff to proceed with a constitutional claim, but rather as a basis for permitting plaintiff’s ADA claim to proceed despite the State’s assertion of sovereign immunity. In other words, because “th[e] same conduct” that allegedly violated the ADA also violated the Constitution, the statutory abrogation of state sovereign immunity set forth in the ADA was “valid[]” in plaintiff’s particular case, and state sovereign immunity could be no bar to his ADA claims. *Id.* at 157, 159.

The Supreme Court noted the possibility that a provision like Section 12202 may be valid under a different mode of analysis. Congress’s Section 5 authority also extends, the Court noted, to enactment of a “prophylactic” measure, *Georgia*, 546 U.S. at 158—*i.e.*, one that strips a State’s immunity as to any possible violation of the ADA, even if the conduct alleged to be an ADA violation in the particular case at issue “is not itself unconstitutional.” *City of Boerne*, 521 U.S. at 518. But for statutory abrogation to be broadly valid in that way, there must be “a congruence

and proportionality” between preventing or remedying constitutional violations and a wide-ranging abrogation of immunity, *id.* at 520—and that issue raises difficult questions about the “scope of Congress’s ‘prophylactic’ enforcement power[],” *Georgia*, 546 U.S. at 158 (citation omitted). Ultimately, the Court in *Georgia* did not need to decide that issue, because the case before it could be resolved by looking only to Congress’s undisputed power to abrogate immunity as to a narrower slice of ADA cases.

b. The Supreme Court’s binding decision in *Georgia* dictates the outcome of the sovereign immunity analysis in this case. No sovereign immunity exists as to plaintiffs’ copyright claims against the Department (or TAMU, as a substitute defendant). Congress has unambiguously abrogated that immunity in the CRCA—and that abrogation is valid in this particular case because the very conduct that plaintiffs allege to be a violation of the Copyright Act is also a violation of the Fourteenth Amendment.

The district court correctly held that plaintiffs plausibly alleged that the Department’s infringement of their copyright constituted both a taking of their property without just compensation and a deprivation of their property without due process of law—both clear violations of the Fourteenth Amendment. *See* ROA.5570-5571. The alleged copyright violation here was not *de minimis*; it was not accidental or in good faith; and it was not the stray act of an educational program

or an underfunded public service. Rather, the Department—an entity that makes hundreds of millions of dollars a year, in part by vigorously defending its intellectual property—intentionally copied a clearly copyrighted work that it knew belonged to plaintiffs, purposefully removed the notation of copyright protection, and changed the byline to suggest that someone other than plaintiffs owned the work. ROA.330-331, ¶¶ 45-49. Then the Department distributed plaintiffs’ copyrighted work to *hundreds of thousands of people* who constituted the specific audience that would likely have interest in that work. *See* ROA.337, ¶ 63. The Department did so in advance of plaintiffs’ planned publication, thus destroying the entire market that might otherwise have purchased the work from plaintiffs. *See id.*

As the district court concluded, those allegations plausibly show that the conduct claimed to violate the Copyright Act also violates the Fourteenth Amendment. The allegations demonstrate a violation of the Takings Clause, since “[c]opyrights are a form of property,” *Allen*, 140 S. Ct. at 1004, and the Department’s intentional acts “appropriat[ed]” plaintiffs’ copyrighted work for the department’s use, *Horne v. Dep’t of Agric.*, 576 U.S. 350, 364 (2015), and had a devastating “economic impact” on the value of the copyright, *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (citation omitted); *see Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162, 2170 (2019). And plaintiffs’ allegations also state a claim that the state conduct at issue violated plaintiffs’ due process rights, by intentionally

infringing their copyright without providing any “adequate remedy for an infringement” in any state forum. *Allen*, 140 S. Ct. at 1004; *see* ROA.5572 (“Texas state courts have deprived [plaintiffs] of the ability to pursue” a claim for a taking in state court).

As in *Georgia*, then, Congress’s abrogation of state sovereign immunity is valid in this case because plaintiffs have alleged that the federal statutory violation also constitutes an “*actual* violation[] of” the Fourteenth Amendment. *Georgia*, 546 U.S. at 158. To be sure, the Supreme Court has recently held that the CRCA is not a valid *prophylactic* abrogation of state sovereign immunity. *See Allen*, 140 S. Ct. at 1007; p. 6, *supra*. But the validity of the CRCA’s abrogation of immunity as to plaintiffs’ claims does not turn on that analysis. Rather, *Georgia*’s “as-applied” approach to abrogation, *Guttman v. Khalsa*, 669 F.3d 1101, 1117 (10th Cir. 2012), inescapably dictates that the CRCA strips the State of any immunity to the copyright claims asserted in this case.

## **2. The District Court Erroneously Refused To Apply The Straightforward Analysis Set Forth In *Georgia***

Notwithstanding *Georgia*’s clear dictates, the district court upheld the State’s assertion of sovereign immunity as to plaintiffs’ copyright claims. First, the court concluded that *Georgia* applies only to Title II of the ADA, asserting that the ADA creates “a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment” but that the CRCA somehow does

not. ROA.5549-5550 (quoting *Georgia*, 546 U.S. at 159). Second, the district court concluded that the Supreme Court’s decision in *Allen* and this Court’s decision in *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000), foreclose plaintiffs’ argument. Both conclusions are manifestly incorrect.

a. The district court’s conclusion that *Georgia* applies only with respect to Title II of the ADA rests on a fundamental misunderstanding of that decision.

Contrary to the district court’s apparent view, the Supreme Court did not suggest in *Georgia* that the ADA *specially* or *uniquely* creates a narrow cause of action for conduct that violates the Fourteenth Amendment. To the contrary, there is no dispute that the ADA is worded broadly to abrogate state sovereign immunity as to any “violation of” Title II; its text does not speak any more narrowly than that, and certainly does not expressly authorize suit against the States only for actual violations of the Constitution. 42 U.S.C. § 12202; *see Georgia*, 546 U.S. at 160 n.\* (concurring opinion of Stevens and Ginsburg, JJ.) (observing that “Title II prohibits a somewhat broader swath of conduct than the Constitution itself forbids”). The CRCA’s abrogation of sovereign immunity is worded in the same broad way that the ADA’s abrogation is worded, indicating Congress’s intent to abrogate sovereign immunity to the maximum extent that is constitutionally permissible. *See* 17 U.S.C. § 511(a) (State shall not be immune “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).

Thus, *Georgia* makes clear that what triggers as-applied abrogation of sovereign immunity is the substance of a particular plaintiff’s claims—not some specific language in Congress’s statutory expression of its intent to abrogate. *See Georgia*, 546 U.S. at 157-58. A broad statutory abrogation of sovereign immunity, such as the one in the ADA and the one in the CRCA, is valid as to a plaintiff who alleges that a violation of the relevant statute amounts to an actual violation of the Fourteenth Amendment. *See id.* If a plaintiff fails to allege an actual violation of the Fourteenth Amendment, then the abrogation is valid only if the plaintiff can establish that Congress’s enactment satisfies the entirely distinct test for *prophylactically* stripping the States of their immunity defense to suit: congruence and proportionality.

Indeed, in citing previous cases in which the Supreme Court had applied the congruence-and-proportionality analysis, the Court explained that the plaintiff in *Georgia* “differ[ed] from the claimants” in those previous cases because his “claims for money damages against the State” were based on “conduct that independently violated” the Fourteenth Amendment—not because of anything special about the language of the ADA. *Georgia*, 546 U.S. at 157-58. And, critically, the Court made that observation specifically as to *Florida Prepaid Postsecondary Education*



*Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), which involved a patent immunity-abrogation statute modeled closely on the CRCA, *see Allen*, 140 S. Ct. at 999 & n.1; *Georgia*, 546 U.S. at 158. If it was the failure to allege a constitutional violation in *Florida Prepaid* that served as a barrier to the kind of as-applied analysis set forth in *Georgia*, rather than anything about the language of the patent abrogation statute, then the language of the CRCA cannot serve as any barrier to application of *Georgia* in this case.

Decisions of other courts of appeals decisively confirm that *Georgia* has application beyond Title II of the ADA. Most notably, in *National Association of Boards of Pharmacy v. Board of Regents of the University System of Georgia*, 633 F.3d 1297 (11th Cir. 2011), the Eleventh Circuit rejected the argument that *Georgia* “does not apply to the CRCA,” stating that “[w]e see no such limitation in *Georgia*.” *Id.* at 1316 n.31. The Eleventh Circuit ultimately concluded that the plaintiff had not alleged a constitutional violation, as the State in that case provided several avenues through which the plaintiff could receive monetary compensation for the State’s taking of its copyright. *See id.* at 1319. But had plaintiff adequately made that allegation, the Eleventh Circuit would plainly have found the CRCA’s abrogation of immunity valid in that case.

Other circuits have applied *Georgia* to statutes outside the ADA Title II context as well. For instance, in *Alaska v. EEOC*, 564 F.3d 1062 (9th Cir. 2009) (en

banc), the Ninth Circuit considered the validity of a provision of the Government Employee Rights Act of 1991 (“GERA”) permitting employees to sue state employers for labor violations under Title VII. *Id.* at 1066. Citing *Georgia*, the en banc court explained that it would “consider first whether [plaintiffs] allege actual violations of the Fourteenth Amendment by the State of Alaska. If they do, we needn’t decide whether GERA is valid prophylactic legislation.” *Id.* at 1068; *see id.* at 1067. The court concluded that the plaintiffs had alleged that the Title VII violations also constituted violations of the Equal Protection Clause and the First Amendment and, on that basis, permitted the plaintiffs’ statutory claims against the State to proceed, notwithstanding the State’s assertion of sovereign immunity. *Id.* at 1071; *see Lors v. Dean*, 746 F.3d 857, 864, 869 (8th Cir. 2014) (agreeing that “the *Georgia* framework applies” to determine whether there is “a valid abrogation of sovereign immunity” as to “Title V of the ADA”).

b. The district court’s other basis for refusing to apply *Georgia* to the CRCA was that the Supreme Court’s decision in *Allen* and this Court’s decision in *Chavez* somehow forbade it. That, too, is error.

*Allen* involves only an analysis of whether the CRCA is a valid prophylactic abrogation of States’ immunity from copyright claims. *See Allen*, 140 S. Ct. at 1007 (CRCA “fail[s] our ‘congruence and proportionality’ test” because the “legislative record” is insufficient). Accordingly, *Allen* never once cites *Georgia*, let alone

applies its analysis. That is not surprising given that the copyright claimant in that case never made the *Georgia* argument in the lower courts or in its opening brief to the Supreme Court. See *Allen* Oral Arg. Tr. 31-32, 40, available at [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/18-877\\_k5gm.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-877_k5gm.pdf). Accordingly, *Allen* cannot be read to overturn or displace *Georgia* in any way. See *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) (Supreme Court “does not normally overturn, or so dramatically limit, earlier authority *sub silentio*”).

Moreover, nothing about *Allen*’s holding that the CRCA is not a valid prophylactic abrogation of state sovereign immunity as to all copyright claims, regardless of whether they involve any allegation of unconstitutional conduct, predetermines the outcome of the *Georgia* analysis as applied to a copyright claim in a future case. The *Georgia* analysis is, by its very nature, case- and claim-specific; it turns on the particular nature of the violation that a particular plaintiff has alleged. *Georgia*, 546 U.S. at 159 (courts should ask on “claim-by-claim basis” whether conduct alleged “violate[d] the Fourteenth Amendment”). Just as the outcome of the *Georgia* analysis cannot control whether a particular statutory abrogation satisfies the congruence and proportionality test, see *id.*, the outcome of the congruence and proportionality test cannot control whether the as-applied *Georgia* test can be satisfied. The two inquiries are simply distinct from one another.

Although the statements of Supreme Court Justices at oral argument of course do not make law, the discussion of *Georgia* that occurred at the oral argument in *Allen* helps cement the conclusion that *Allen* did not foreclose application of *Georgia* to the CRCA, as the district court thought. The State of North Carolina referred to *Georgia* at that argument in response to questions from the Justices about the potential for rampant state copyright infringement. *Allen* Oral Arg. Tr. 6, 39-40. The State conceded that even if the Court held that the CRCA was not a valid prophylactic abrogation of state immunity, *Georgia* would nevertheless apply to the CRCA, thus providing a remedy for situations in which the State had infringed a copyright so egregiously as to violate the Constitution. *Id.* at 39-40; *see id.* at 41 (Justice Breyer stating that State’s concession on *Georgia* addressed the “problem to a considerable degree”).

This Court’s decision in *Chavez* does not foreclose plaintiffs’ *Georgia* argument either. Like the Supreme Court in *Allen*, this Court in *Chavez* held only that the CRCA is not “proper remedial legislation” as a prophylactic matter. *Chavez*, 204 F.3d at 605, 607 (citing *City of Boerne*, 117 S. Ct. at 2164). And, like *Allen*, *Chavez* does not address whether the CRCA validly abrogates sovereign immunity on an as-applied basis when a plaintiff alleges a copyright violation that amounts to an actual violation of the Fourteenth Amendment. Of course, *Chavez* predated *Georgia*, and therefore could not cite it. But, in any event, it does not appear that

the plaintiff in *Chavez* could in fact have alleged that her claimed copyright violation amounted to a Fourteenth Amendment violation, *see Chavez v. Arte Publico Press*, No. 93-2881, 1998 WL 785299, at \*6 (5th Cir. as revised Oct. 1, 1998)—and so the issue of whether the CRCA may be valid as applied in a particular case simply could not have arisen there.

### **3. Foreclosing Application Of *Georgia* To The CRCA Would Have Highly Damaging Consequences**

By cutting off the only post-*Allen* avenue for bringing damages claims against infringing States for violation of federal copyright law, the district court's approach would allow States to take, use, and profit from others' intellectual property with virtually complete impunity. That, in turn, would seriously harm the creators of copyrighted works, discourage the creation of new works, and generally undermine the copyright system as a whole.

This case vividly illustrates the problem of state copyright infringement. But this case is very far from an isolated one. State universities have every incentive to show their students copyrighted movies, play copyrighted songs at sports games, make copies of copyrighted textbooks and distribute them, and so on—and they do, in fact, engage in all of those activities, all of which constitute violations of the copyright laws. *See* 17 U.S.C. § 106. Other state actors—prisons, hospitals, and so on—engage in similar violations. The private university or private hospital down the road plainly would be subject to serious liability for those activities, including

statutory copyright damages that can add up quickly. *See id.* §§ 502-505. But States have often escaped damages liability through sovereign-immunity arguments, and have thereby been emboldened to infringe ever more aggressively and more often.

In the Supreme Court proceedings in *Allen*, numerous parties presented evidence of grave copyright abuses by States over time. *See, e.g.*, Copyright Alliance & Chamber of Commerce Amicus Br. 10-18, *Allen v. Cooper*. And in this case, plaintiffs presented to the district court a list of over 170 copyright suits filed against states between 2000 and 2019—strong evidence of the rapid escalation of state infringement. ROA.1940-1954. Moreover, Ralph Oman, who served as Register of U.S. Copyrights from 1985 to 1994, submitted an amicus brief to the district court explaining how the combination of the “digital revolution” and the availability of “new technolog[y]” have “made unlawful copying” by States “fast, easy, and cheap.” ROA.3049. As Mr. Oman noted, such technology has led, for example, to rampant “use of pirated software by State universities”; “systematic[] reproduc[tion]” by California of “tens of thousands of copyright-protected” articles “without authorization or payment”; and systematic appropriation of copyrighted photographs by “State government tourist agencies.” ROA.3051. An ongoing study by the U.S. Copyright Office is currently collecting many similar examples. *See* <https://www.copyright.gov/policy/state-sovereign-immunity/>.

Without the ability to bring a federal copyright claim for damages against state violators, copyright holders are left without any adequate remedy. A claim for an injunction is usually of little solace, because it is prospective only, may be easily circumvented by the State, and likely does not justify the cost of a suit. *See, e.g.,* Register’s Report 6, 15. In this case, for instance, no injunction could have made any difference; by the time plaintiffs discovered what the Department had done, the internet was irretrievably saturated with free copies of plaintiffs’ work. And state-law claims are no comfort either; among other problems, state claims relating to copyright issues are generally preempted by federal law. *See* 17 U.S.C. § 301, 28 U.S.C. § 1338.

Some effective remedy is therefore required in at least some cases—and that is what the *Georgia* analysis supplies. *See Allen* Oral Arg. Tr. 39-40. To be clear, not all instances of copyright infringement by States amount to actual violations of the Constitution. A holding that *Georgia* applies to the CRCA thus will not authorize any and all suits against States for copyright infringement. But such a holding will ensure a meaningful remedy for the most egregious instances of infringement—including, of course, what the Department did to the plaintiffs here.

**B. Plaintiffs’ Claim For Violation Of The U.S. Constitution’s Takings Clause Is Not Barred By Sovereign Immunity**

In addition to incorrectly dismissing plaintiffs’ copyright claims, the district court erred in dismissing on sovereign-immunity grounds plaintiffs’ independent

claim against the Department (or TAMU, as a substituted defendant) for violation of the federal Takings Clause. Where, as here, a State fails to provide a remedy in its own courts for a federal Takings Clause claim, state sovereign immunity can be no bar to a plaintiff's assertion of that claim in federal court. Rather, the federal court must open its doors. The district court erred as a matter of law in ruling otherwise.

The Takings Clause of the U.S. Constitution provides that “private property” shall not “be taken for public use, without just compensation.” U.S. Const. amend. V. Interpreting that text, “[t]he Supreme Court has long recognized that the just compensation clause of the Fifth Amendment is self-executing”—that is, that “the right to recover just compensation” is “guaranteed by the Constitution.” *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 953-954 (9th Cir. 2008) (quoting *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987)) (internal quotation marks omitted).

As a general matter, a State may nevertheless invoke sovereign immunity to bar a takings claim against it in federal court. This Court recently so held, *see Bay Point Properties, Inc. v. Mississippi Transportation Comm’n*, 937 F.3d 454, 457 (5th Cir. 2019) (citing *Williams*, 928 F.3d at 1214), and other courts of appeals have reached the same conclusion, *see, e.g., Ladd v. Marchbanks*, 971 F.3d 574, 579 (6th Cir. 2020); *Williams*, 928 F.3d at 1214.



But the sovereign-immunity analysis changes if a State closes its *own* courts' doors to a federal takings claim against the State. In such a case, granting the State sovereign immunity in federal court would eliminate *any* forum for a plaintiff's constitutionally guaranteed claim to "just compensation." Accordingly, the State's right to assert sovereign immunity in federal court to bar a takings claim is a qualified one: "Fifth Amendment Takings Clause" claims are "barred by Eleventh Amendment immunity . . . *as long as a remedy is available in state court.*" *Williams*, 928 F.3d at 1213-14 (10th Cir. 2019) (emphasis added); *cf. Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 551-52 (4th Cir. 2014) (declining to decide whether "Eleventh Amendment would ban a takings claim in federal court if the State courts were to refuse to hear such a claim"); *Seven Up Pete Venture*, 523 F.3d at 956 & n.8.

The district court acknowledged that principle. The court also concluded that the Texas state courts are closed to plaintiffs' takings claim. *See* ROA.5572. That is because Texas law does not waive sovereign immunity for copyright infringement claims and because Texas courts hold that "copyright infringement by a state actor" does not "present[] a viable takings claim." *University of Houston Sys. v. Jim Olive Photography*, 580 S.W.3d 360, 366, 377 (Tex. App. 2019), *review granted* (Jan. 15, 2021). The district court thus observed that if "the exception to sovereign immunity implied by the circuit courts cited above . . . truly exists," it "applies in this case." ROA.5572. Nevertheless, the court dismissed plaintiffs' federal takings claim,

holding that, if indeed the state courts are closed, the appropriate remedy is for a federal court to “require the state to ‘open’ its courts”—not for the State’s sovereign immunity to yield so that the federal court can hear the claim. *Id.*

That was error. In the event that a State’s courts close their doors to a takings claim against the State—a claim that, under the U.S. Constitution, *must* be available in at least one forum—the appropriate remedy is for the federal court to allow the claim to proceed notwithstanding general principles of state sovereign immunity, not for a federal court to “require” the state court to “open.”

The Tenth Circuit’s decision in *Williams*—on which this Circuit expressly relied in *Bay Point* for its analysis of the Takings Clause, *see Bay Point*, 937 F.3d at 457 (citing *Williams*, 928 F.3d at 1214))—is instructive on that point. The only logical conclusion to draw from the Tenth Circuit’s reasoning is that, if there were *no* “remedy . . . available in state court,” then the “Eleventh Amendment” would *not* bar the claim in federal court. *Williams*, 928 F.3d at 1213 (emphasis added). *Williams* analyzed extensively whether “Utah state courts would be available to adjudicate [the plaintiff’s] federal takings claim” and concluded that the takings claim at issue “may be brought in Utah state court.” *Id.* at 1213. Had that not been so, the Tenth Circuit’s statement of its rule of decision would have required the case to proceed in federal court.

That conclusion is correct. As between opening a federal court’s own doors to a takings claim against the State and *requiring* that a state court hear such a claim, the former constitutes the far lesser intrusion on state sovereignty. In *Alden v. Maine*, 527 U.S. 706 (1999), the Supreme Court made clear, with respect to Congress’s powers, that “authoriz[ing] private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum.” *Id.* at 749. The Court explained that “[a] power to press a State’s own courts into federal service . . . is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State.” *Id.*; *cf. Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1477 (2018). Such commandeering is even more problematic when it comes from a federal *court* rather than from Congress—a body in which the States are politically represented.<sup>4</sup>

Just as allowing plaintiffs’ federal takings claim to proceed in a federal forum best protects principles of federalism and state sovereignty, so too does it best align

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<sup>4</sup> In one limited circumstance, the Supreme Court has required a State to open its courts for a postdeprivation remedy for taxes collected in violation of federal law. *See Reich v. Collins*, 513 U.S. 106, 108 (1994). The State had engaged in a bait and switch, holding out a post-payment refund remedy to induce a taxpayer to pay but then eliminating that option and replacing it with a pre-payment remedy the taxpayer was too late to use. *See id.* Nothing similar explains the unavailability of a state forum for the Takings Claim here.

with the contours of the federal takings right itself, by encouraging adjudication of that right in federal court. The Supreme Court’s recent decision in *Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162 (2019), is illustrative. *Knick* did not involve sovereign immunity, but it did involve a fundamental question relevant to the Takings Clause—whether that provision requires a plaintiff to bring a takings claim in a state forum and be denied relief *before* bringing that claim in a federal court. 139 S. Ct. at 2179. Speaking in terms that often referred not just to “municipalities,” but also to “states,” the Supreme Court rejected such a requirement, affirming the importance of a federal forum for protecting the property rights vindicated by the *federal* Takings Clause. *See id.* at 2171.

This Court has already held that *Knick* did not *eliminate* sovereign immunity over all takings claims in federal court. *See Bay Point*, 937 F.3d at 457.<sup>5</sup> But *Bay Point* did not address the appropriate remedy if a plaintiff has no state forum for his Takings Clause claim. *See id.* at 455-56 (state courts in Utah could provide remedy). *Knick*’s clear rejection of any requirement that a plaintiff first pursue a takings claim in state court demonstrates, at a minimum, that opening a federal forum is more

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<sup>5</sup> Plaintiffs respectfully preserve for en banc or Supreme Court review the argument that *Bay Point* was wrongly decided in light of *Knick*, which endorses the principle 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.” *First English*, 482 U.S. at 316 n.9; *see Knick*, 139 S. Ct. at 2172.

consistent with the Takings Clause and the rights that it protects than is requiring a State to make changes in the way that state courts operate and the kind of claims that they are willing to entertain.

In taking the opposite approach, the district court cited a court of appeals decision that emphasized that state courts must remain open to federal takings claims. *See* ROA.5572 (citing *DLX, Inc. v. Kentucky*, 381 F.3d 511, 527-28 (6th Cir. 2004)). But that decision is distinguishable. In *DLX*, the Sixth Circuit did not confront a situation in which a federal takings claim simply could not be brought in state court. Although the Sixth Circuit mused that “where the Constitution requires a particular remedy,” including “through the Takings Clause,” the “state is required to provide that remedy in its own courts,” the Sixth Circuit did not definitively indicate what should happen to a claim in federal court if the State has simply refused to do so. *DLX*, 381 F.3d at 528.

*DLX* thus does not dispel the conclusion that in this case the district court got the analysis wrong. Where it is clear, as here, that state court provides no recourse, the federal court’s doors must open to a claim of a violation of the Constitution’s Takings Clause, even if the state might otherwise be entitled to sovereign immunity as to that claim. The alternative would do what the Constitution prohibits: allow a State to take property without providing “just compensation.”

**C. The District Court Erred In Ruling That TAMU, If Substituted For The Department As A Defendant In This Case, Is An Arm Of The State Cloaked With Sovereign Immunity**

If this Court rules that sovereign immunity must be abrogated as to plaintiffs' copyright and federal takings claims against the Department (or against TAMU as a substituted defendant), then the Court need proceed no further in order to reject the district court's dismissal of those claims. But, in any event, those claims—as well as plaintiffs' additional claims against the Department—should proceed on the ground that the State does not have any sovereign immunity here in the first place. That is because, even if the Department lacks jural authority (*i.e.*, the capacity to sue and be sued), and TAMU must be substituted in for the Department as the proper defendant, TAMU cannot be considered an arm of the state for sovereign-immunity purposes when TAMU is acting through the Department.

**1. Even If TAMU Must Be Substituted As The Defendant, The Department Is The Proper “Entity” For Purposes Of Applying The Arm-Of-The-State Test**

The district court ruled that the Department lacks jural authority. The court then stated that although ordinarily TAMU could simply be substituted in the Department's place, *see* Fed. R. Civ. P. 17, here that substitution would be futile because TAMU would have sovereign immunity as an arm of the state. ROA.1872-1873. In so concluding, the district court assumed that in this case the relevant “entity” for purposes of the arm-of-the-state analysis—which asks whether a given

“entity” is effectively an alter ego of the state, *Hudson*, 174 F.3d at 681—is TAMU itself, not the Department.

That is incorrect. Even after the substitution that the district court contemplated, the question of TAMU’s sovereign immunity for purposes of this case—where any actions nominally taken by TAMU would in fact have been carried out by the Department—must be determined by examining whether the *Department* is an arm of the state. If the Department is not an arm of the state under that analysis, then TAMU’s substitution makes no difference as to the sovereign-immunity question: TAMU lacks sovereign immunity as to plaintiffs’ claims that the Department violated copyright and takings law.

a. This Court employs a six-factor test to determine whether a given “entity” should be treated as an alter ego of the State and cloaked with the State’s sovereign immunity. Those factors are “(1) [w]hether the state statutes and case law view the agency as an arm of the state; (2) [t]he source of the entity’s funding; (3) [t]he entity’s degree of local autonomy; (4) [w]hether the entity is concerned primarily with local as opposed to statewide problems; (5) [w]hether the entity has the authority to sue and be sued in its own name; and (6) [w]hether the entity has the right to hold and use property.” *Hudson*, 174 F.3d at 681.

Because “an important goal of the Eleventh Amendment is the protection of state treasuries,” the “most important” factor is the source of the entity’s funding.

*Hudson*, 174 F.3d at 682 (citation omitted).<sup>6</sup> And the last two factors, including whether an “entity has the authority to sue and be sued in its own name,” are relatively unimportant and are typically dealt with “in a fairly brief fashion.” *Id.* at 681-82.

b. The district court’s assumption that the arm-of-the-state test cannot be applied to an entity that lacks jural authority is incorrect. The fact that jural authority is just one of six factors in the test, and indeed one of the least important ones, necessarily means that the “entity” to which the arm-of-the-state analysis should be applied may *not* actually possess jural authority. And the arm-of-the-state test cannot turn decisively on jural authority, because state law cannot be dispositive of the Eleventh Amendment inquiry. Jural authority is “determined by the law of the state,” *Darby v. Pasadena Police Dep’t*, 939 F.2d 311, 313 (5th Cir. 1991) (citation omitted), but “federal law ultimately controls the scope of” the “Eleventh Amendment analysis,” *Hudson*, 174 F.3d at 685. If the arm-of-the-state test could never be applied to an entity that lacks jural authority, then a state could cloak any entity with sovereign immunity by refusing to grant it a “separate and distinct corporate” existence, *Darby*, 939 F.2d, at 313 (citation omitted)—even where factors

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<sup>6</sup> Indeed, state sovereign-immunity doctrine developed for the purpose of protecting state treasuries. See Ernest A. Young, *Its Hour Come Round at Last? State Sovereign Immunity and the Great State Debt Crisis of the Early Twenty-First Century*, 35 Harv. J.L. & Pub. Pol’y 593, 596 (2012).



more important to the federal-law inquiry, including the entity's source of funding, counsel against barring a plaintiff's claim for monetary relief.

As this Court's decisions demonstrate, that is not the law. In *Hudson*, a plaintiff brought suit against a Louisiana district attorney's office, which lacks jural authority. *Hudson*, 174 F.3d at 685. This Court agreed that, under state law, the district attorney's office is a "state office" and the district attorney a "state officer." *Id.* at 684. Nevertheless, this Court treated the district attorney's office itself as the relevant entity for the Eleventh Amendment arm-of-the-state analysis, *see id.*, and made clear that state law's treatment of the office as an "extension of the state," *id.* at 684, was not dispositive of "federal law" and the "scope of [the] Eleventh Amendment," *id.* at 685. Moreover, the Court reversed the district court's ruling that the claim was barred by sovereign immunity, "[m]ost importantly" because Louisiana law distinguished the district attorney's office from the State for purposes of *the state treasury*, by excluding "district attorneys from indemnification." *Id.* at 687-88.

The Court took the same approach in *Sissom v. University of Texas High School*, 927 F.3d 343 (5th Cir. 2019) (per curiam). In that case, the plaintiff sued a high school program created by the University of Texas ("UT High School"). UT High School was a "department within the University of Texas at Austin," and the University was, itself, "inarguably a state agency." *Id.* at 348 (citation omitted).

Nevertheless, when defendants moved to dismiss on the basis of sovereign immunity, this Court applied the arm-of-the-state analysis not to the University, but rather to UT High School itself. *See id.* at 347 (“[W]e must determine whether UT High School is an arm of the state entitled to sovereign immunity or a local government body not entitled to sovereign immunity.”); *id.* at 348 (ruling that UT High School was indeed an arm of the state because it was funded by the University). The Court did so even though it concluded that UT High School likely lacked jural authority. *See id.* at 349.

In *Skelton v. Camp*, 234 F.3d 292 (5th Cir. 2000), this Court again applied the arm-of-the-state factors to an entity that could not itself be sued. The plaintiff in *Skelton*, who was the mayor of a municipality, sued aldermen of the municipality for their actions on behalf of a “removal court”—an entity formed specifically to remove the plaintiff from his post. *Id.* at 294-95, 297. The alderman asserted that they were acting only on behalf of the “removal court,” and this Court applied the arm-of-the-state factors to that entity, even though the entity undisputedly lacked jural authority. *See id.* at 298. The Court concluded that the removal court was not an arm of the state, because it received no state funding, and that the aldermen therefore could not claim sovereign immunity. *See id.*; *see also, e.g., Flores v. Cameron Cnty., Tex.*, 92 F.3d 258, 264-68 (5th Cir. 1996).

c. Those cases indicate that the arm-of-the-state test must be applied to the entity that committed the purported misconduct, regardless of whether that entity lacks jural authority.

To be sure, a defendant that lacks jural authority may be swapped out as a party and replaced by a related entity that possesses jural authority of its own. *See* Fed. R. Civ. P. 17; *Hudson*, 174 F.3d at 685. But that does not mean that the new, substituted entity is the proper subject of the arm-of-the-state inquiry. It is clear that the substituted defendant can have acted only through the original entity—the one that committed the purported misconduct. And if the entity that took the challenged action would not be entitled to sovereign immunity under the arm-of-the-state test, neither is the entity that acted through it.

That rule allows the Court to focus the arm-of-the-state inquiry on factors that are important to federal law and the “scope of [the] Eleventh Amendment.” *Hudson*, 174 3d. at 685. It thus serves the same purpose as the somewhat different approach to the question taken by some other courts of appeals, which assess whether an entity is an arm of the state “in light of the particular function in which the [entity] was engaged when taking the actions out of which liability is asserted to arise.” *Walker*

*v. Jefferson County Bd. of Educ.*, 771 F.3d 748, 757 (11th Cir. 2014) (citation omitted).<sup>7</sup>

Here, the rule requires consideration of the Department as the “entity” in question. That remains true even if TAMU must be substituted as the defendant.

## **2. The Department Is Not An Arm Of The State**

The district court failed to recognize that the Department is the proper entity for the arm-of-the-state analysis, even if TAMU is substituted in as the defendant in this case. The district court therefore did not apply the six-factor test to the Department (although the court did opine that the Department would likely not be an arm of the state under that test, *see* ROA.1872). Thus, this Court may simply vacate the district court’s ruling and remand for the court to apply that test to the Department in the first instance. *See, e.g., Randle v. Lockwood*, 666 F. App’x 333, 336-37 (5th Cir. 2016).

Should this Court decide to itself apply the arm-of-the-state factors to the Department, however, there is no question that the Department is not an arm of the state. As noted above, the “*most important*” factor in applying that test is the entity’s

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<sup>7</sup> This Court’s decision in *United States Oil Recovery Site v. Railroad Commission of Texas*, 898 F.3d 497 (5th Cir. 2018), does not reject the rule plaintiffs rely on here. That decision rebuffed an argument that some state functions do not trigger sovereign immunity because they are proprietary. *See id.* at 502. It did not address the argument that the financial structure of an entity, rather than its function, dictates the outcome of the arm-of-the-state test.

“source of funding.” *Hudson*, 174 F.3d at 686-87 (citation omitted). Under longstanding Texas law, the Department cannot receive any money from Texas or its taxpayers. *See* Tex. Const. art. VII, §§ 17(f), 18(d); ROA.1872; ROA.1642; General Appropriations Act, Art. III, Special Provisions Relating Only to State Agencies of Higher Education § 9 (Sept. 30, 2015) (“[N]o educational and general funds appropriated may be used for the operation of intercollegiate athletics.”). The Department acknowledged as much to the district court. ROA.1642.

The Department instead relies wholly on outside funding. In fiscal year 2016, for example, the Department brought in almost \$200 million in revenue—specifically, over \$47 million in ticket sales, \$75 million in contributions, \$28 million in proceeds from the sale of media rights, and \$17 million in royalties, licensing fees, advertisements, and sponsorships. ROA.971. The Department received \$0 dollars from “direct state or other government support,” “direct institutional support” (*i.e.*, “direct funds provided by [TAMU] to athletics”), or “indirect institutional support.” ROA.806; *see* ROA.741. The football program was the Department’s biggest money-maker, generating over \$41 million in ticket sales, \$32 million in contributions, and \$11 million in sale of media rights alone in that single year. ROA.971.

The Department is thus plainly a profit-making entity with a budget distinct from that of the State. Texas’s sovereign immunity therefore cannot be invoked to

defeat an infringement suit based on that entity's actions. *See Hudson*, 174 F.3d at 688; *Skelton*, 234 F.3d at 298; *cf. Sissom*, 927 F.3d at 348.

The other, less important factors in the multifactor inquiry also indicate that the Department is not an arm of the state. As to “[w]hether the state statutes and case law view the agency as an arm of the state,” *Hudson*, 174 F.3d at 681, although this Court has previously ruled that TAMU is an arm of the state in contexts not involving the Department, *see, e.g., United States Oil Recovery Site*, 898 F.3d at 501-502, plaintiffs are aware of no case that concludes that the Department, or TAMU acting through the Department, is an arm of the state. And “state statutes” require separation between the Department and the State as to the most significant aspect of the Eleventh Amendment inquiry—finances. Tex. Const. art. VII, §§ 17(f), 18(d).

The Department's “degree of local autonomy,” *Hudson*, 174 F.3d at 681, likewise indicates that the Department is not an arm of the state. In many ways, the Department is not even an arm of the University. The Department has a separate, independently audited budget. *See* ROA.973, 994. The Department has its own “Policies & Procedures Manual”; TAMU's separate policies and procedures manual contains an empty row for the Department. *Compare* ROA.998, with <https://rules-saps.tamu.edu/rules-saps-library/#section-13-header>, and ROA.919. The Department has its own Business Office and Marketing, IT, and Compliance

Departments, as well its own executives, including a CFO and a Marketing Director; TAMU has its own separate departments and personnel that serve those roles. *Compare* <https://12thman.com/staff-directory>, *with, e.g.,* <https://marcomm.tamu.edu/>, *and* <https://orec.tamu.edu/erm-compliance/compliance-program/>. And Department personnel—including the football team’s head coach—appear on the Department’s own website, but do not appear in TAMU’s faculty and staff directory. *Compare* <https://12thman.com/>, *with* <https://www.tamu.edu/faculty-staff/directory.html>.

The Department is also “concerned primarily with local as opposed to statewide problems.” *Hudson*, 174 F.3d at 681. The Department is focused solely on its own athletes, alumni, and fans, not on any matters of concern to the State as a whole. *See, e.g., Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 321-322 (5th Cir. 2001).

Finally, even assuming that the Department lacks the “authority to sue and be sued” and “the right to hold and use property,” *Hudson*, 174 F.3d at 681, those factors do not change the conclusion that the Department is not an arm of the state. *See Flores*, 92 F.3d at 264-65, 267 (declining to address those two factors where the other factors indicated that the entity at issue was not an arm of the state). Regardless, it is not clear that the Department does lack those things. The Department’s director averred below that the Department “has no separate corporate

existence.” ROA.737. He further narrowly averred that the Department does not “own or purchase *real* property.” *Id.* (emphasis added). But it is abundantly clear that the Department has and uses a good deal of personal property, including large sums consisting of many millions of dollars in yearly revenue. ROA.994.

In short, even assuming that the Department lacks jural authority, it is separate from TAMU in numerous respects significant to sovereign immunity. Because the Department is the proper entity for an arm-of-the-state analysis, even assuming that TAMU is substituted in place of the Department as a defendant, for purposes of this case TAMU—acting through the Department—is not entitled to sovereign immunity. That reflects Texas’s autonomous choice to create a rigorous financial separation between state universities and their athletic operations—one that is enshrined in the state constitution and state statutes, is unique among the 50 states, and is entitled to respect.

## **II. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS’ CLAIMS AGAINST DEFENDANTS ALAN CANNON AND LANE STEPHENSON**

The district court also erred as a matter of law in dismissing plaintiffs’ claims for (1) direct copyright infringement against Cannon and (2) contributory copyright infringement against Cannon and Stephenson. This Court should reverse that dismissal and reinstate those claims.



To allege direct copyright infringement, a plaintiff must allege violation of “any of the exclusive rights of the copyright owner,” *BWP Media USA, Inc. v. T & S Software Assocs., Inc.*, 852 F.3d 436, 439 (5th Cir. 2017), which include the rights to “reproduce,” “display,” and “distribute” the work, 17 U.S.C. § 106. To allege contributory copyright infringement, a plaintiff must allege that the defendant, “with knowledge of the infringing activity, induce[d], cause[d] or materially contribute[d] to infringing conduct of another.” *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 790 (5th Cir. 1999) (citation omitted); *Suncoast Post-Tension, Ltd. v. Scoppa*, 2014 WL 12596472, at \*4 (S.D. Tex. July 17, 2014) (contributory infringement does not require “actual knowledge”). And to overcome an official’s qualified immunity at the motion-to-dismiss stage, a plaintiff must allege that the official engaged in “objectively unreasonable [conduct] in light of clearly established law at the time of the conduct.” *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008) (citation omitted).

1. The district court dismissed the direct infringement claim against Cannon on two grounds, both erroneous. First, the district court ruled that the complaint failed to adequately allege that Cannon “cop[ied]” the Biography. ROA.1888. But the complaint alleged that “Cannon approved the distribution and display of the infringing copy of the Gill Biography on the A&M Athletic Department Website, where it was publicly displayed from at least January 19, 2014 through January 22,

2014.” ROA.338, ¶ 76. That is an allegation that Cannon copied the work: “placing” copyrighted material “on the Internet” constitutes copying of that material. *Veeck v. S. Bldg. Code Cong. Int’l Inc.*, 241 F.3d 398, 403 (5th Cir. 2001), *rev’d on other grounds*, 293 F.3d 791 (5th Cir. 2002) (en banc); *see BWP Media*, 852 F.3d at 439 (direct liability imposed for “using or authorizing the use of the copyrighted work” (citation omitted)). In any event, a defendant can violate a copyright owner’s exclusive rights without copying, *see BWP Media*, 852 F.3d at 439, as by “display[ing] the copyrighted work publicly” or “distribut[ing]” the work to the public. 17 U.S.C. § 106(3), (5). The complaint clearly alleges that Cannon did those things. *See, e.g., Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160 (9th Cir. 2007); *Leader’s Inst., LLC v. Jackson*, 2017 WL 5629514, at \*10 (N.D. Tex. Nov. 22, 2017).

Second, the district court ruled that Cannon was entitled to qualified immunity from the direct infringement claim on the ground that he could not have acted objectively unreasonably in approving the posting of the Biography “where Plaintiffs have failed to plead facts indicating that Cannon had any knowledge that the work he was approving violated any law or copyright.” ROA.1887. But, “drawing all reasonable inferences” in plaintiffs’ favor, *Franklin*, 976 F.3d at 447; *see Anderson*, 845 F.3d at 589, the complaint does plead just such facts. The complaint alleges that Cannon is a media professional, with extensive experience

“handling media relations” and knowledge of copyright issues. ROA.318, ¶ 11; ROA.526-529. It alleges that Cannon had interacted with plaintiff Bynum and was aware of Bynum’s 12th Man book, as well as that Cannon supervised and worked closely with Marquardt. ROA.317-318, 322, 328, 331, ¶¶ 10, 25, 39, 49. And, critically, it alleges that Marquardt’s version of the Biography contained a statement that would have raised the suspicions of any reasonable professional in Cannon’s situation: that the material was “by Whit Canning, special to Texas A&M Athletics.” ROA.328, 330, ¶¶ 39, 45. That term of art indicated that the article was written *exclusively* for the Department, ROA.330, ¶ 45, but Cannon had no basis for believing that the Department had entered into an agreement commissioning that material—and, of course, no such agreement existed. Moreover, Cannon never contacted Canning, a well-known local sportswriter, to inquire about the Biography’s provenance. ROA.330, ¶ 45, ROA.542. Under those circumstances, it is reasonable to infer that Cannon acted with knowledge of a copyright violation. ROA.338, ¶ 77 (alleging Cannon acted “knowingly”); *see, e.g., Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 768-769 (2011) (willful blindness establishes knowledge).

2. The district court’s dismissal of the contributory infringement claim against Cannon on qualified-immunity grounds rested on essentially the same mistake: the erroneous conclusion that “Plaintiffs have not alleged facts indicating

that Cannon knew (or had reason to know) about the underlying infringement.” ROA.1888-1889. For all of the reasons set forth above, plaintiffs did allege sufficient facts indicating Cannon’s knowledge of infringement.

Similarly, as to Stephenson, the district court’s dismissal of the contributory infringement claim hinged on the conclusion that the complaint did not sufficiently allege that Stephenson “knew or should have known about the alleged direct infringement.” ROA.1891; *see* ROA.1890. That conclusion is wrong as to Stephenson as well. The complaint alleges that Stephenson, who sent previews of and links to the Biography to tens of thousands of recipients via the TAMU Times e-newsletter and website, ROA.333-334, 338, ¶¶ 56, 77, also was a sophisticated media professional. ROA.318, ¶ 12. He too received from Marquardt an article with a suspicious byline—and yet made no effort to verify whether any agreement existed between the Department and Canning. ROA.331, ¶ 49. For purposes of a motion to dismiss, those allegations are sufficient to raise the reasonable inference that he acted with the same level of knowledge that his colleagues possessed.

3. The district court’s failure to adequately draw reasonable inferences in favor of plaintiffs may perhaps be explained by a reference the court made to an outdated standard for assessing a qualified-immunity defense at the motion-to-dismiss stage. In discussing the claim against Stephenson, the court stated that qualified immunity must apply “absent *particularized* facts as to” Stephenson’s

knowledge of infringement. ROA.1891. That statement invokes a “heightened-pleading requirement,” previously applied by some courts in this Circuit, under which a plaintiff must allege “particularized facts which, if proved, would defeat a qualified immunity defense.” *Rose v. Sherman*, 2015 WL 13261882, at \*2 (N.D. Tex. Apr. 16, 2015) (quoting *Brown v. Glossip*, 878 F.2d 871, 874 (5th Cir. 1989)), *aff’d*, 676 F. App’x 258 (5th Cir. 2017). But this Court has more recently rejected any such requirement, making clear that at the Rule 12(b)(6) stage no “heightened pleading standard” for defeating qualified immunity applies. *Anderson*, 845 F.3d at 589-590. Under the proper standard, which incorporates reasonable inferences in a plaintiff’s favor, the district court’s error in dismissing the individual defendants is clear.

4. For all of those reasons, the operative complaint sufficiently alleges the claims discussed above against Cannon and Stephenson. But should this Court disagree, it should remand to give plaintiffs an opportunity to file their proposed Second Amended Complaint, which supplements the relevant allegations, ROA.2532, but which the district court denied leave to file, ROA.5560-5570. Although the court said that amendment would be futile, *see id.*, that view was plainly colored by the errors in the court’s analysis identified above.

## CONCLUSION

The district court's dismissal of plaintiffs' claims against the Department for copyright and constitutional violations, against Cannon for direct and contributory copyright infringement, and against Stephenson for contributory copyright infringement should be reversed, and the case should be remanded for further proceedings.

Date: January 20, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on January 20, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

Dated: January 20, 2021

/s/ Elaine J. Goldenberg  
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DATED: January 20, 2021

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