

TABLE OF CONTENTS

TABLE OF CONTENTS ii

INDEX OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT.....2

A. The Athletic Department Is Not Entitled to Immunity Regardless of Whether It Is
a Separate Legal Entity or Part of Texas A&M University2

B. The States Waived Immunity in the Plan of the Convention.....5

C. Sovereign Immunity Does Not Bar Plaintiffs’ Claims Seeking to Remedy Actual
Constitutional Violations under the Takings Clause and Due Process Clause9

D. Congress Validly Abrogated State Sovereign Immunity to Enforce the Privileges
and Immunities Clause of the Fourteenth Amendment 10

E. *Meyers v. Texas* Does Not Apply 11

F. The Individual Defendants Are Not Entitled to Qualified Immunity..... 12

CONCLUSION..... 14

CERTIFICATE OF SERVICE 16

INDEX OF AUTHORITIES

	Page(s)
CASES	
<i>Agence France Presse v. Morel</i> , 769 F.Supp.2d 295 (S.D.N.Y. 2011).....	13
<i>Carter v. City of Philadelphia</i> , 181 F.3d 339 (3d Cir. 1993)	2
<i>Central Virginia Community College v. Katz</i> , 546 U.S. 356 (2006).	5, 8
<i>Chavez v. Arte Publico Press</i> , 204 F.3d 601 (5th Cir. 2000)	1, 5, 10, 11
<i>Chavez v. Arte Publico Press</i> , 59 F.3d 539 (5th Cir. 1995), <i>overruled on other grounds</i> , 204 F.3d 601 (5th Cir. 2000).....	5
<i>Chicago, Burlington, & Quincy R.R. Co. v. City of Chicago</i> , 166 U.S. 266 (1897)	9
<i>Darby v. Pasadena Police Dept.</i> , 939 F.2d 311 (5th Cir. 1991)	4, 5
<i>Doe v. Lawrence Livermore Nat. Lab.</i> , 65 F.3d 771 (9th Cir. 1995), <i>rev'd on other grounds</i> , <i>Regents of Univ. of Cal.</i> <i>v. Doe</i> , 519 U.S. 425 (1996)	2
<i>Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank</i> , 527 U.S. 627 (1999).....	8
<i>Goldstein v. California</i> , 412 U.S. 546 (1973)	6
<i>Hale v. King</i> , 642 F.3d 492 (5th Cir. 2011)	9
<i>Haywood v. Drown</i> , 556 U.S. 729 (2009)	12
<i>Interplan Architects, Inc. v. C.L. Thomas, Inc.</i> , No. 4:08-cv-3181, 2009 WL 6443117 (S.D. Tex. Nov. 13, 2009) (Ellison, J.)	13
<i>Issaenko v. Univ. of Minn.</i> , 57 F. Supp. 3d 985 (D. Minn. 2014)	11

<i>ITSI TV Prods., Inc. v. Agricultural Ass’ns</i> , 3 F.3d 1289 (9th Cir. 1993)	2, 3
<i>Lapides v. Board of Regents of Univ. Sys. of Ga.</i> , 535 U.S. 613 (2012)	11
<i>Lenoir v. U.T. Physicans</i> , 491 S.W.3d 68 (Tex. App.—Houston [1st Dist.] 2016, pet. denied)	4
<i>Meyers v. Texas</i> , 410 F.3d 236 (5th Cir. 2005)	11, 12
<i>Murphy v. Millennium Radio Group LLC</i> , 650 F.3d 295 (3d Cir. 2011)	12
<i>National Association of Boards of Pharmacy v. Board of Regents of Univ. Sys. of Ga.</i> , 633 F.3d 1297 (11th Cir. 2011).....	7, 8, 9, 10
<i>Richard Anderson Photography v. Brown</i> , 852 F.2d 114 (4th Cir. 1988)	12
<i>Rodriguez v. Tex. Comm’n on the Arts</i> , 199 F.3d 279 (5th Cir. 2000)	1
<i>Seminole Tribe of Florida v. Florida</i> , 517 U.S. 44 (1996)	8
<i>Titus v. Sullivan</i> , 4 F.3d 590 (8th Cir. 1993)	4
<i>United States v. Georgia</i> , 546 U.S. 151 (2006)	9, 10
<i>United States v. Hassan</i> , 83 F.3d 693 (5th Cir. 1996)	11
<i>United States v. L.A. Tucker Truck Lines, Inc.</i> , 344 U.S. 33 (1952)	8
<i>Walker v. Jefferson County Bd. of Educ.</i> , 771 F.3d 748 (11th Cir. 2014)	2
<i>Webster v. Fall</i> , 266 U.S. 507 (1925)	8
CONSTITUTIONS, STATUTES, AND RULES	
U.S. Const. art. I, § 8, cl. 8	5, 6

U.S. Const. amend. V2
 U.S. Const. amend. XIV9, 10
 17 U.S.C. § 501(a)9
 17 U.S.C. § 511.....9
 17 U.S.C. § 1202(c)13
 FED. R. CIV. P. 12(b)(1).....4
 Tex. Const. art. VII, § 8(d).....3
 Tex. Const. art I, § 17.....2

OTHER AUTHORITIES

*Copyright Enactments: Laws Passed in the United States Since 1783 Relating to
 Copyright, COPYRIGHT OFFICE BULLETIN NO. 3 (1963).....7*
 Donner, Irah, *The Copyright Clause of the U.S. Constitution: Why Did the
 Framers Include It With Unanimous Approval*, 36 AM. J. L. HIST. No. 3, 361-
 62 (July 1992)6, 7
 The Federalist No. 45 (James Madison).....6
 Jones, Beryl R., *Copyrights and State Liability*, 76 IOWA L. REV. 701 (1991)6
 Moss, Richard, NOAH WEBSTER (1984).....7
 6A Wright, Charles Alan et. al, FEDERAL PRACTICE AND PROCEDURE § 1559
 (April 2018 update)4

INTRODUCTION

There is a widespread problem of states infringing copyrights. *See* Resp. Ex. E. Here, the Texas A&M University Athletic Department (the “Athletic Department”), and its representatives Brad Marquardt (“Marquardt”), Alan Cannon (“Cannon”), and Lane Stephenson (“Stephenson”) (collectively the “Individual Defendants”), infringed Plaintiffs’ copyrighted work, removed Plaintiffs’ names from it, published it and sent it to approximately 400,000 people, never identified Plaintiffs as the copyright owner or source of the work, and now refuse to pay Plaintiffs compensation for the damage they have caused. Defendants have shown no remorse or concern over their actions, nor do they deny that state infringement of copyrights is a significant problem nationwide. Defendants’ response essentially is: “Tough luck, we have immunity.”

There are many reasons why Defendants are wrong, as will be explained below. But Defendants’ Reply may be most notable for what it does not say. On issue after issue, Defendants ignore Plaintiffs’ authorities and arguments, claiming that this case requires a simple application of *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000), and *Rodriguez v. Tex. Comm’n on the Arts*, 199 F.3d 279 (5th Cir. 2000). But *Chavez* and *Rodriguez* do not control any of the issues presented in this brief.

Moreover, *Chavez* and *Rodriguez* were decided under the belief that state infringement of copyrights was a rare phenomenon. *See Chavez*, 204 F.3d at 605-06. History has proven that assumption wrong. This case arrives at the crest of a long, well documented, and ongoing wave of 154 state infringements post-*Chavez*, as detailed in Ex. E to Plaintiffs’ Response. Defendants offer no rebuttal to this record.

This case presents important issues of constitutional law that are issues of first impression in the Fifth Circuit and exert far-reaching implications for owners of intellectual property rights.

Not only did Defendants violate the Copyright Act and the Digital Millennium Copyright Act (“DMCA”), they also violated the Fifth Amendment to the U.S. Constitution and Article I, Section 17 of the Texas Constitution. Sovereign immunity, governmental immunity, and qualified immunity cannot save Defendants from liability for their unlawful actions.

ARGUMENT

A. THE ATHLETIC DEPARTMENT IS NOT ENTITLED TO IMMUNITY REGARDLESS OF WHETHER IT IS A SEPARATE LEGAL ENTITY OR PART OF TEXAS A&M UNIVERSITY

Defendants’ basic position is that even though the Athletic Department’s operations are functionally separate from the University—and indeed the University is prohibited by law from spending public University funds on athletics—the Athletic Department nonetheless enjoys the University’s general sovereign immunity because it is not separately incorporated. The Athletic Department’s view is mistaken. Even if an entity is an “arm of the state” entitled to immunity for some purposes, it does not automatically follow that it has immunity for all purposes. *See Walker v. Jefferson County Bd. of Educ.*, 771 F.3d 748, 757 (11th Cir. 2014); *Carter v. City of Philadelphia*, 181 F.3d 339, 351-52 (3d Cir. 1993); *see also Doe v. Lawrence Livermore Nat. Lab.*, 65 F.3d 771, 775 (9th Cir. 1995) (applying the function-by-function approach to immunity in the context of a state university), *rev’d on other grounds, Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 428 n.2 (1996). As the Eleventh Circuit aptly explains, “[w]hether [an entity] is an ‘arm of the [s]tate’ must be assessed in light of the particular function in which the [entity] was engaged when taking actions out of which liability is asserted to arise.” *Walker*, 771 F.3d at 757. The Athletic Department does not contend otherwise.

The Athletic Department ignores *ITSI TV Productions, Inc. v. Agricultural Associations*, 3 F.3d 1289 (9th Cir. 1993), a closely analogous case. In *ITSI TV*, the Ninth Circuit correctly recognized that the California State Fair and Exposition (“Cal. Expo”) was not an “arm of the

state” entitled to immunity against a copyright infringement claim even though Cal. Expo was a state-created entity whose funds were held in the state treasury. *Id.* at 1293. Immunity did not apply because Cal. Expo generated all of its own revenues, could not draw funds from the state, and was not engaged in a central governmental function—it ran state fairs. *Id.*

Here, the Athletic Department generates its own revenues, does not receive funding from the State, *see* TEX. CONST. art. VII, § 8(d), and is not engaged in a central governmental function. It is a self-sustaining, for-profit enterprise that competes against both private and public universities in athletics. The Athletic Department should be required to play by the same rules that apply to all of its competitors in the NCAA. It is not entitled to immunities that would enable it to compete unfairly by stealing the copyrights and trademarks of others and profiting from that stolen property without repercussions.

Plaintiffs have already demonstrated that the Athletic Department operates as a commercial enterprise that is a “de facto profit-making subsidiary of the University, capable of being sued apart from the University.” *See* Pl. Resp. at 6-11. The Athletic Department concedes a critical point: “With respect to finances, it is true that state-appropriated money may not be used to fund intercollegiate athletics programs at Texas A&M University, or indeed any other state university.” A&M Reply at 9. But, the Athletic Department ignores the other points Plaintiffs raised, including that the Athletic Department generates enormous revenues, is set up and run like a free-standing business, is subject to its own audits,¹ has its own website, has its own policies and procedures (and is not governed by the traditional A&M University rules),² and

¹ The Athletic Department provided the Court with excerpts from its Price Waterhouse Coopers audit reports as part of its argument. *See* A&M Reply at 7 (referencing Dkt. No. 67-1, Ex. F). Plaintiffs already provided more complete copies of those audit reports, showing that the reports focus on the performance of the Athletic Department, and not the University as a whole. *See* Dkt. No. 62-1, Ex. B.

² Plaintiffs provided the Court with a copy of the table of contents for the Athletic Department’s detailed policies and procedures manual. *See* Dkt. No. 62-1, Ex. C. By contrast, the Athletic Department cites to two general policy

counts among its constituent parts a profit-making LLC venture. Pl. Resp. at 6-11. Instead, the Athletic Department's reply simply points to the obvious—that there is a connection between the Athletic Department and the University. A&M Reply at 5-9. Plaintiffs do not deny that the Athletic Department and the University are related. But none of the Athletic Department's evidence or arguments rebuts the point that the Athletic Department functions as a profit-making subsidiary of the University, which means that it may be sued as a stand-alone entity.³

If the Court agrees with Plaintiffs and properly concludes that the Athletic Department may be sued directly, the Athletic Department is not entitled to immunity for the same reasons U.T. Physicians was not entitled to immunity in *Lenoir v. U.T. Physicians*, 491 S.W.3d 68, 77-82 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).⁴ Conversely, if the Court agrees with the Athletic Department—that it is part of the University and can only be sued along with the University—the proper result would be to substitute Texas A&M University in place of the Athletic Department, similar to what the Fifth Circuit ordered in *Darby v. Pasadena Police Dept.*, 939 F.2d 311, 315 (5th Cir. 1991). *See also* 6A Charles Alan Wright, et. al, FEDERAL PRACTICE AND PROCEDURE § 1559 (April 2018 update) (recognizing that issues regarding a party's capacity to be sued are not jurisdictional defects). Given that Texas A&M University has been on notice of this lawsuit from the beginning, and is represented by the same counsel

statements from the University that, collectively, are just four pages long. *See* A&M Reply at 2 (referencing Dkt. No. 67-1, Ex. B).

³ At least part of the Athletic Department's Response is based on documents that Defendants did not submit in the record, and which is not available from another publicly-referenced source. *See* A&M Reply at 8 (referencing alleged "rules and policies governing the operations of the Athletic Department"). This Court should strike such unsupported references and not consider those materials in connection with the motion to dismiss. Although the Court may consider the allegations in Plaintiffs' pleadings and properly supported evidence in connection with a Rule 12(b)(1) motion, there is no authority that enables the Court to base a decision on self-serving yet unsupported assertions of fact by the moving party. *See Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993) (recognizing the Rule 12(b)(1) requires the submission of competent evidence).

⁴ Similar to U.T. Physicians, the Athletic Department has been set up as its own, financially independent entity, with its own structure, officers, policies, procedures, and business objectives. *See* Pl. Resp. at 6-11. Having created that separate structure and financial independence, the Athletic Department should not be able to try to claim it is just part of the University to avoid being held accountable for its actions.

currently before the Court who has responded to discovery purportedly on behalf of Texas A&M University, there is no prejudice associated with substituting parties if it is necessary to do so. *Darby*, 939 F.2d at 315. Regardless of which entity is named as the defendant, there is no sovereign immunity from suit.

B. THE STATES WAIVED IMMUNITY IN THE PLAN OF THE CONVENTION

The Athletic Department is also barred from asserting immunity against Plaintiffs' copyright claims because states waived their immunity from such claims by ratifying the United States Constitution, known in constitutional law as the "Plan of the Convention." *Central Virginia Community College v. Katz* was a watershed case because it was the first time a majority of the Supreme Court recognized that states waived some of their immunity from suits involving private parties in the Plan of the Convention. 546 U.S. 356, 373 (2006). The Court relied on the history and the text of the Bankruptcy Clause to hold that the states waived immunity in bankruptcy proceedings. 546 U.S. at 377-79. Prior to *Katz*, and without addressing the history or text of the Copyright Clause, the Fifth Circuit refused to apply the Plan of the Convention theory of waiver to copyright claims because that theory had never received a majority vote in the Supreme Court, except for cases between sister states or cases filed by the United States. *See Chavez v. Arte Publico Press*, 59 F.3d 539, 542-45 (5th Cir. 1995), *overruled on other grounds*, 204 F.3d 601 (5th Cir. 2000). *Katz* shows that the reasoning from *Chavez*—that the Supreme Court "closed the door on the 'plan of the convention' theory of non-express waiver"—no longer holds true. *See Chavez*, 59 F.3d at 543.

There is ample historical evidence that when the states ratified the new 1787 United States Constitution they waived their immunity from copyright claims in the Plan of the Convention. *See Resp.* at 18-21. Similar to the Bankruptcy Clause, the Copyright Clause of the Constitution was adopted to address the problems encountered under the Articles of

Confederation with state-by-state enforcement of conduct that had a national reach. *See* The Federalist No. 45 (James Madison); Irah Donner, *The Copyright Clause of the U.S. Constitution: Why Did the Framers Include It With Unanimous Approval*, 36 AM. J. L. HIST. No. 3, 361-62, 370-74 (July 1992). In that era, it was impractical for an author to travel the states to try to obtain protection for a work, and virtually impossible to achieve uniform protection. *Id.* at 374. Although 12 of the 13 states had adopted their own copyright laws, each law applied only within its state. *Id.* In some states, the laws did not even take effect because they were conditioned on all other states adopting similar laws (which Delaware never did). *Id.* The Framers wanted “a uniform national system of copyright law which would supplant a patchwork system of local state control,” thereby preventing individual states from withholding protection. *See* Beryl R. Jones, *Copyrights and State Liability*, 76 IOWA L. REV. 701, 723 (1991) (“The framers envisioned a uniform national system in which state regulatory powers would be subservient.”). “The framers envisioned that monetary damages in private citizen suits would be an important element in the establishment of this superior federal authority.” *Id.*

The Copyright Clause grants Congress the authority to enact laws to secure to authors “the exclusive Right to their respective Writings.” U.S. Const. art. I, § 8, cl. 8. The States agreed to this Clause without any reservations from Congressional authority. “When Congress grants an exclusive right or monopoly, its effects are pervasive; no citizen or State may escape its reach.” *See Goldstein v. California*, 412 U.S. 546, 560 (1973). By adopting this provision, the States waived a portion of their sovereign immunity; otherwise, Congress would not have been granted the authority to create “exclusive” rights. Copyright protections are not exclusive to the author if a state and its subsidiaries may freely use the work without liability for infringement. Recognition of the Plan of the Convention theory in copyright cases is necessary to enforce the

plain language of the Constitution and to give it the meaning intended by the Framers.

Noah Webster's story reinforces this point. Webster has been described as "the father of American copyright legislation." Donner, 36 AM. J. L. HIST. No. 3 at 372 (quoting R. Moss, NOAH WEBSTER 7 (1984)). Webster wrote a school textbook on the English language in 1782, and literally went from state to state advocating for copyright protections of literary works, including his own textbook. *Id.* at 370-75. Twelve states ultimately adopted copyright laws, none of which purport to exempt the state or its state officials from their reach. *See Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright*, COPYRIGHT OFFICE BULLETIN NO. 3 (1963).⁵ At the time of the Constitutional Convention, "[t]he frustrations of Webster in his travels to obtain copyrights was well known throughout the states." Donner, 36 AM. J. L. HIST. No. 3 at 374. Webster's efforts and experiences influenced the Framers when they adopted the Copyright Clause. *Id.* at 371-72. Given that schools and state entities were primary consumers of textbooks like Noah Webster's, the Framers must have intended the "exclusive" protection provided for under the Copyright Clause to protect against infringement by those state actors, too. It makes no sense that the Framers intended to address the national problem of copyright protection identified by Webster, only to leave Webster's particular factual situation involving school texts unprotected against potential state infringers.

The Athletic Department does not directly address *Katz*, the text of the Copyright Clause, or the history surrounding its adoption. Instead, the Athletic Department focuses entirely upon the Eleventh Circuit's decision in *National Association of Boards of Pharmacy v. Board of Regents of Univ. Sys. of Ga.*, 633 F.3d 1297 (11th Cir. 2011) ("*NABP*"). In *NABP*, the Eleventh Circuit limited the application of *Katz* to bankruptcy cases without even addressing the similar history of the Copyright Clause. *Id.* at 1314-15. In doing so, the Eleventh Circuit also

⁵ Available at: <https://babel.hathitrust.org/cgi/pt?id=uc1.b4027452;view=1up;seq=5>.

demonstrated a fundamental misunderstanding of the Plan of the Convention theory, treating it as a question of whether “Congress may abrogate state sovereign immunity under the Bankruptcy Clause of Article I.” *Id.* at 1314. But it is not a question of abrogation. The Supreme Court has made clear that, under the Plan of the Convention theory, the states *already waived* their immunity when the Constitution was ratified:

The relevant question is not whether Congress has “abrogated” States immunity in proceedings to recover preferential transfers. ... [T]he relevant “abrogation” is the one effected as part of the Convention, not by statute.

Katz, 546 U.S. at 379. This is a significant distinction because neither *Seminole Tribe* nor *Florida Prepaid*—two of the cases primarily relied upon by the Athletic Department—addressed application of the Plan of the Convention theory.

The Supreme Court recognizes that its decisions set precedent on the matters actually decided by the Court, not on issues that might be lurking in the background of a case. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (issue not “raised in briefs or argument nor discussed in the opinion of the Court” cannot be taken as “a binding precedent on th[e] point”); *Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not considered as having been so decided as to constitute precedents”). Although *Seminole Tribe*⁶ and *Florida Prepaid*⁷ discuss the scope of Congress’s authority to abrogate sovereign immunity by exercising its Article I powers, those cases are *not precedent* on the issue that was not addressed—whether

⁶ In *Seminole Tribe*, Justice Stevens expressed a concern in dissent that the Court’s reasoning would extend state sovereign immunity to bankruptcy, copyright, and antitrust cases. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 77 n.1 (1996) (Stevens, J., dissenting). The Majority responded in footnote 16 by suggesting that there was no historical basis for enforcing those laws against the states. *Id.* at 72 n.16. But when faced with a case actually presenting the issue of the scope of immunity in bankruptcy cases, the Court found there was no immunity, even rejecting parts of *Seminole Tribe* as *dicta*. *See Katz*, 546 U.S. at 363. The same result should follow under the Copyright Act, given its similar historical history.

⁷ In *Florida Prepaid*, the Court devoted just two sentences of its opinion to the scope of Congress’s Article I authority to abrogate immunity in patent infringement cases because the parties did not contest that issue. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 636 (1999).

immunity had already been waived in the Plan of the Convention. This Court should apply *Katz* and hold that the states, in ratifying the Constitution, waived their immunity in copyright cases.

C. SOVEREIGN IMMUNITY DOES NOT BAR PLAINTIFFS' CLAIMS SEEKING TO REMEDY ACTUAL CONSTITUTIONAL VIOLATIONS UNDER THE TAKINGS CLAUSE AND DUE PROCESS CLAUSE

The Athletic Department recognizes that Congress may abrogate state sovereign immunity for federal claims when the conduct at issue rises to the level of a constitutional violation. *See* A&M Reply at 13-14 (citing *United States v. Georgia*, 546 U.S. 151 (2006)). Congress abrogated immunity for copyright claims under 17 U.S.C. §§ 501(a) & 511. “If the State’s conduct violated both [the statute] and the Fourteenth Amendment, [the statute] validly abrogates state sovereign immunity.” *Hale v. King*, 642 F.3d 492, 498 (5th Cir. 2011).

After acknowledging the correct standard, the Athletic Department ignores Plaintiffs’ claim that Defendants took Plaintiffs’ copyrighted work in violation of the Fifth Amendment’s Takings Clause, which applies to the states under the Fourteenth Amendment. *See Chicago, Burlington, & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 266, 241 (1897). Plaintiffs have alleged an actual constitutional violation based on Defendants taking Plaintiffs’ copyrighted work, removing Plaintiffs’ names from it, and then distributing it for free and without authorization to Plaintiffs’ target audience. The constitutional violation arises directly from Defendants’ conduct that also violates the Copyright Act and the DMCA. Accordingly, the Athletic Department’s sovereign immunity is abrogated. *See* 17 U.S.C. §§501(a) & 511; *Hale*, 642 F.3d at 498.

Instead of addressing Plaintiffs’ takings claim, Defendants rely on the Eleventh Circuit’s decision in *NABP* and attack whether Plaintiffs have pleaded a valid Due Process Clause violation. *NABP* unequivocally recognizes congressional authority to abrogate state sovereign immunity to remedy actual constitutional violations, including under the Due Process Clause.

633 F.3d at 1315, 1319. The *NABP* Court refused to recognize a pre-deprivation due process violation based on random and unauthorized acts of state officials, but it concluded that a due process claim may exist if the state fails to provide adequate post-deprivation remedies. *Id.* at 1317-19. The present case is different than *NABP* because there was nothing random about the Defendants' conduct—it was part of a coordinated plan with the 12th Man Foundation to promote the 12th Man brand. Moreover, as demonstrated by Plaintiffs' extensive list of 154 cases involving state action to infringe copyrights, *see* Resp. Ex. E, it is not accurate to call this a matter involving an “unforeseeable tort.” *See* A&M Reply at 13. Regardless, Defendants have provided no post-deprivation remedies to address Plaintiffs' loss. Accordingly, Plaintiffs have pleaded an actual violation of the Due Process Clause.

One actual constitutional violation is all that it takes to invoke the rule of *United States v. Georgia*. Plaintiffs have alleged two such violations. Either one is sufficient to support the abrogation of immunity on Plaintiffs' copyright claims against the Athletic Department.

D. CONGRESS VALIDLY ABROGATED STATE SOVEREIGN IMMUNITY TO ENFORCE THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT

Plaintiffs have already explained how Congress validly abrogated state sovereign immunity to enforce the Privileges and Immunities Clause with respect to the copyright laws. *See* Resp. at 27-31. The Athletic Department does not contest whether a copyright is covered by the Privileges and Immunities Clause. Instead, the Athletic Department assumes the Fifth Circuit foreclosed review of this issue in *Chavez*. A&M Reply at 15-16. It did not. The Fifth Circuit did not address the merits of the issue because Ms. Chavez did not timely raise her Privileges and Immunities Clause arguments. *See Chavez*, 204 F.3d at 608. Thus, the Fifth Circuit refused to let Chavez “develop” her new legal theory on appeal, recognizing that “[l]itigation must run its course at some point.” *Id.* This holding is a straightforward application

of the rule that parties must raise issues in the trial court to preserve the issues for review on appeal. *See United States v. Hassan*, 83 F.3d 693, 696 (5th Cir. 1996). Accordingly, the question of whether the waiver of sovereign immunity may be upheld under the Privileges and Immunities Clause is an open issue in the Fifth Circuit.

The Athletic Department has cited only one case that addressed whether the waiver of immunity for copyright claims may be upheld based on the Privileges and Immunities Clause—*Issaenko v. Univ. of Minn.*, 57 F. Supp. 3d 985 (D. Minn. 2014). The *Issaenko* Court’s legal reasoning is set forth in a single paragraph that does not even cite case authority to support its position. *Id.* at 1010. Instead, the *Issaenko* Court assumed that *Chavez* and the “proportionality and congruence test” for cases addressing immunity waivers under the Due Process Clause applied to the Privileges and Immunities Clause as well. *Id.* Plaintiffs have already explained why this assumption is wrong in their Response. *See Resp.* at 30-31.

E. *MEYERS V. TEXAS* DOES NOT APPLY

Defendants complain that Plaintiffs fail to address *Meyers v. Texas*, 410 F.3d 236 (5th Cir. 2005) in Plaintiffs’ response to the motion to dismiss, but there is a simple reason why this case was not cited. It has zero relevance to this case. *Meyers* addressed the scope of the state’s waiver of immunity based on its decision to remove a case to federal court. The Fifth Circuit held that removal waived the state’s immunity from suit. *Id.* at 240-52 (applying *Lapides v. Board of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2012)). The Court then addressed a second question—whether the removal also waived the state’s immunity from liability under state law. *Id.* at 252-55. The Fifth Circuit held that a state has the right to define the scope of its immunities, including to draw a distinction between immunity from suit and immunity from liability, for purposes of determining the scope of a waiver of immunity. *Id.*

Defendants correctly quote the Fifth Circuit as writing: “Rather than require that the states adhere to a prescribed plan, the Court’s decisions envision a Constitution that affords the states discretion to waive or vary the nature and elements of their sovereign immunity.” *Id.* But in the very next sentence (not quoted by Defendants), the Fifth Circuit explained: “Consequently, courts must look to the law of the particular state in determining whether it has established *a separate immunity* against liability *for purposes of waiver.*” *Id.* (emphasis added).

Meyers v. Texas is about waiver of immunities through removal. There is nothing in that case addressing the authority of a state to exempt itself or its employees from otherwise applicable federal law. Defendants’ reading of *Meyers* would place that decision squarely in conflict with the Supremacy Clause, *Haywood v. Drown*, 556 U.S. 729, 736-37 (2009), and *Richard Anderson Photography v. Brown*, 852 F.2d 114 (4th Cir. 1988).

F. THE INDIVIDUAL DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

It is a well-known fact that the copyright laws prohibit individuals from taking another’s work, re-typing it, removing the owner’s name, and then publicly distributing it without authorization. Defendants have cited no authority that would exonerate them from their wrongdoing. Defendants do not even attempt to dispute that the Copyright Act is clearly established federal law for purposes of the qualified immunity analysis. They also cite no authority that would grant them immunity under a newer statute such as the DMCA that imposes additional penalties for conduct that has been prohibited by federal law for decades. There is no real dispute that the laws at issue are clearly established.

Nevertheless, Defendants try to avoid liability under the DMCA by claiming its application to printed works is not clearly established. This is nonsense. The DMCA’s plain language prohibits removing, altering, or falsifying “copyright management information” “in connection with copies or phonorecords of a work or performance or displays of a work,

including in digital format.” 17 U.S.C. § 1202(c) (emphasis added). The Third Circuit and many district courts have held that this language is clear and unambiguous in its application to all types of works. *See, e.g., Murphy v. Millennium Radio Group LLC*, 650 F.3d 295, 302 (3d Cir. 2011); *Interplan Architects, Inc. v. C.L. Thomas, Inc.*, No. 4:08-cv-3181, 2009 WL 6443117, at *4 (S.D. Tex. Nov. 13, 2009) (Ellison, J.); *Agence France Presse v. Morel*, 769 F. Supp.2d 295, 305-06 (S.D.N.Y. 2011). The existence of two outlier decisions (one of which was expressly overruled by the Third Circuit in 2011) cannot create a qualified immunity defense to an unambiguous statutory prohibition. But even if the DMCA were limited to cases involving the internet (as Defendants allege), this case still falls within the DMCA because the Defendants used the internet to distribute their unauthorized copies of Plaintiffs’ work, without including the copyright management information that would identify Plaintiffs as the source of the work and owner of its copyright.

Plaintiffs also allege sufficient facts to show that Defendants’ conduct was objectively unreasonable. Before Marquardt had his secretary retype the work at issue, Marquardt knew that the work came from Mr. Bynum and Epic Sports. Am. Compl. at ¶¶ 28-30. The work that he had his assistant re-type even had a copyright notice on it. *Id.* at ¶ 30. Canon is alleged to be the person responsible for the content on the Athletic Department’s website, where the infringing work was displayed, and “who approved the distribution and display of the infringing copy of the Gill Biography on the A&M Athletic Department Website.” *Id.* at ¶¶ 11, 76. Stephenson “was responsible for featuring the infringing copy of the Gill Biography in the TAMU Times e-newsletter and on the homepage of the TAMU Times website,” as well as making a promotional tweet directing people to the infringing page. *Id.* at ¶¶ 12, 20, 77, 85. The Individual Defendants

are not being sued under a respondeat superior theory, *see* A&M Reply at 21; they are being sued for their own conduct for which they do not have qualified immunity.

CONCLUSION

Defendants' motion to dismiss should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on May 21, 2018, the foregoing document was electronically submitted with the Clerk of Court for the United States District Court, Southern District of Texas, using the electronic case filing system of the Court, and served on the attorneys of record via same.

W. Scott Hastings

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