

No. 20-20503

United States Court of Appeals for the Fifth Circuit

MICHAEL J. BYNUM; CANADA HOCKEY LLC

Plaintiffs – Appellants,

v.

TEXAS A&M UNIVERSITY ATHLETIC DEPARTMENT; BRAD MARQUARDT; ALAN
CANNON; LANE STEPHENSON

Defendants – Appellees.

On Appeal from the United States District Court, Southern District of Texas,
No. 4:17-Cv-181, Honorable Andrew S. Hanen, Presiding

**MOTION OF ASSOCIATION OF AMERICAN PUBLISHERS
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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CERTIFICATE OF INTERESTED PERSONS

Case 20-20503

The undersigned counsel of record certifies that all of the interested persons and entities described in the fourth sentence of Fifth Circuit Rule 28.2.1 who have an interest in the outcome of this case are listed in the Certificate of Interested Persons contained in the brief of Plaintiffs-Appellants.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a)(2) and Fifth Circuit Rule 29(a)(3), the Association of American Publishers, Inc. (“AAP”) respectfully moves for leave to file the accompanying Brief as an *amicus curiae* in support of Plaintiff-Appellants. Plaintiff-Appellants consent to the filing of this brief. Defendants-Appellees refused to consent to the filing without first reviewing the amicus brief itself, thus necessitating this Motion.

AAP states the following in support of this Motion:

1. AAP is the national trade association for book, journal, and education publishers in the United States. AAP’s members include major commercial book publishers of fiction and nonfiction; education publishers; small, specialized, and independent publishers; and nonprofit publishers such as university presses and scholarly research societies. Collectively, they are the nation’s leading publishers of creative expression, professional content, and learning solutions.

2. AAP members have a direct and compelling interest in the efficacy, administration, and enforcement of federal copyright laws, including the Copyright Remedy Clarification Act of 1990 (CRCA), 17

U.S.C. 511(a). In order to defend the rights afforded it by the Copyright Clause, U.S. Const. Art. I, § 8, cl. 8, AAP routinely files briefs of *amicus curiae* throughout state and federal courts explaining the legal implications and practical effects of the Court's ruling on copyright matters with respect to the publishing industry. See, e.g. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 587, n.27 (2013) (citing AAP *amicus curiae* brief regarding publishing practice and strategy); see also, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 541 (1985) (listing AAP as *amicus curiae*); *Random House, Inc. v. Rosetta Books LLC*, 283 F.3d 490, 491 (2d Cir. 2002) (same). *Amicus curiae* is a consistent voice advising the courts in their search for a copyright jurisprudence that properly balances issues concerning the First Amendment, Federalism, and the Copyright Act's fundamental animating principle of economically incentivizing creative endeavor.

3. The proposed brief of *amicus curiae* will aid the Court's consideration of this case by showing that exempting state actors from infringement liability could destabilize the fundamental cost-benefit calculus underlying U.S. copyright law. It further explains how the central issue in this case—whether sovereign immunity is validly

abrogated where plaintiffs allege copyright infringement that also violates the Fourteenth Amendment—is governed by *United States v. Georgia*, 546 U.S. 151 (2006). As such, the brief of proposed *amicus curiae* is both relevant and desirable. See Fed. R. App. P. 29(a)(3)(b). The proposed brief is relevant because it focuses on the central issue before the Court—Eleventh Amendment state sovereign immunity for copyright infringement and its collateral effects—and the brief is desirable because of *amicus*’s experience and long-term interest in copyright jurisprudence, particularly when it is of constitutional magnitude.

WHEREFORE, AAP respectfully requests that this Court enter an Order granting leave to file the Brief of *Amicus Curiae* that accompanies this Motion.

January 27, 2021

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CERTIFICATE OF COMPLIANCE

1. The undersigned counsel of record certifies, pursuant to Fed. R. App. P. 32(g), that this brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(7)(b) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) it does not exceed 5,200 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook font in 14 point size.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 2021, the foregoing Motion of Association of American Publishers for Leave to File Brief as *Amicus Curiae* In Support of Plaintiffs-Appellants was electronically filed with the Clerk of the Court by using the CM/ECF system.

/s/ Zachary D. Tripp

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INTEREST OF *AMICUS CURIAE*¹

The Association of American Publishers, Inc. (“AAP”) is the national trade association for book, journal, and education publishers in the United States. AAP’s members include major commercial book publishers of fiction and nonfiction; education publishers; small, specialized, and independent publishers; and nonprofit publishers such as university presses and scholarly research societies. Collectively, they are the nation’s leading publishers of creative expression, professional content, and learning solutions. AAP’s members have a direct and compelling interest in the efficacy, administration, and enforcement of federal copyright laws, including the Copyright Remedy Clarification Act of 1990 (CRCA), 17 U.S.C. 511(a).

The availability of a damages remedy for infringement by state actors is particularly important to AAP and its members because state actors play a major role in the publishing ecosystem and the availability of damages is

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *amicus curiae*, its members, or counsel, contributed money intended to fund preparation or submission of this brief.

critical to maintaining the essential balance struck by the copyright laws. The lack of a damages remedy in this important context is exacerbated in modern times by the swiftness with which bad actors can copy, distribute and devalue copyrighted works, leaving publishers without any meaningful recourse even in the most egregious or intentional circumstances. This fact stands in direct contradiction to the constitutional purpose of copyright law, and jeopardizes the vital incentives to create, distribute and otherwise license proprietary content.

SUMMARY OF ARGUMENT

1. “By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985). But the District Court’s ruling in this case rewrites this basic equation of copyright law by foreclosing any damages remedy when state actors violate copyrights, no matter how egregious the violation. Unchecked state infringement would, as numerous courts have recognized, diminish the incentive to invest in and publish both new and existing works. If this Court were to affirm the District Court and allow state actors to violate copyrights without fear of financial liability, it would greatly

reduce the viability of the Copyright Act for publishers, and it would undermine its essential purpose: to “promote the progress of science and useful arts.” U.S. Const. Art. I, § 8, cl. 8.

2. The CRCA validly abrogates state sovereign immunity for suits alleging actual violations of the Fourteenth Amendment. The Supreme Court in *United States v. Georgia*, 546 U.S. 151 (2006), unanimously recognized that, under Section 5 of the Fourteenth Amendment, Congress may abrogate state sovereign immunity to provide redress for actual violations of the rights guaranteed by the Amendment. Otherwise, States could run roughshod over federally-protected constitutional rights without fear of facing private liability to compensate victims for the harms their actions caused. To be sure, difficult questions arise about the reach of Congress’s power to abrogate state sovereign immunity prophylactically to protect against the *possibility* of constitutional violations. That was the issue in *Allen v. Cooper*, 140 S. Ct. 994 (2020), in which the Supreme Court held that the CRCA’s prophylactic reach was too broad. But *Allen* did not limit whether the CRCA may apply to remedy *actual* violations of the Fourteenth Amendment, like those alleged in this case. That question is governed by *Georgia* and its answer is simple: “Congress can permit suits

against States for actual violations of the rights guaranteed in Section 1” of the Fourteenth Amendment. *Id.* at 1004. That binding principle resolves this case and squarely establishes that the CRCA’s protections must apply.

ARGUMENT

- I. The District Court’s ruling would undermine the basic premise of copyright law and significantly harm the publishing industry.**
 - A. Allowing unchecked state copyright infringement would violate the basic tenet of copyright law promising copyright owners valuable exclusive rights and meaningful remedies for infringement.**

The essential purpose of copyright, as set forth in the U.S. Constitution, is to “promote the progress of science and useful arts.” U.S. Const. Art. I, § 8, cl. 8. To that end, the Copyright Act affords authors and their assignees or licensees a suite of exclusive rights, including the rights to reproduce and distribute a creative work. 17 U.S.C. 106(1), (3). And if a copyright is infringed, the owner is entitled to actual or statutory damages. 17 U.S.C. 504(a).

These rights are designed “to secure a fair return for an ‘author’s’ creative labor” with the “ultimate aim [of using] this incentive[] to stimulate artistic creativity for the general public good.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). The calculus is simple: by giving

copyright owners or licensees control over the disposition of their works, copyright law requires those who would copy or distribute those works (or, for that matter, those who would publicly perform, publicly display, or seek to make derivative works) to obtain permission from the copyright owner or, conversely, to face the full consequences of liability, including actual or statutory damages. See *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003) (“[C]opyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge.” (citation omitted; emphasis removed)).

As the Supreme Court has recognized, Congress has broad latitude to enact a Copyright Act that, in its judgment, meets the overall objectives of the Framers in promoting the public interest, including, for example, by incentivizing not only authorship but also lawful publication and dissemination. See, e.g., *Golan v. Holder*, 565 U.S. 302, 326 n.27 (2012) (“[L]egislation furthering the dissemination of literary property has long been thought a legitimate way to ‘promote the Progress of Science’”). “By establishing a marketable right to the use of one’s expression,” the Court has explained, “copyright supplies the economic incentive to create and

disseminate ideas,” as both “author[s] and publisher[s] [will] invest[] extensive resources [to] . . . release [works] to the public.” *Harper & Row*, 471 U.S. at 557–58.

The District Court’s ruling in this case, however, rewrites this basic equation of copyright law. As a result, it threatens to seriously harm the publishing industry and other industries that are victims of infringement by or under the auspices of state institutions, many of which are sophisticated enterprises with considerable access to both content and technology. Here, Plaintiffs have alleged copyright infringement of the most brazen sort. ROA.5542–5543. Michael Bynum, a sports writer, alleges that an article of his that he had intended to serve as the first chapter of his book on the “12th Man,” a sports legend, was deliberately infringed in its entirety by the Texas A&M University (TAMU) Athletic Department. *Ibid.* Bynum alleges that several TAMU employees copied the article by retyping it, and alleges further that employees illegally removed Bynum’s copyright information, falsely claimed that the article was commissioned by the TAMU Athletic Department, and distributed the article without a license to several hundred thousand recipients as part of a massive fundraising campaign. *Id.* at 1862–66. As a result, Bynum’s copyright in the article—

the intellectual property right that not only protects works of original authorship but also provides essential incentives for publishers to invest in them and make them available—was drained of its value.

The District Court correctly recognized that Bynum’s constitutional rights were violated. ROA.5546, 5552, 5563, 5570–5571. But it nonetheless held that state sovereign immunity protects TAMU—and any other state actor—from ever paying damages for its infringements, no matter how egregious or harmful to the copyright owner’s rights, and no matter how violative of Congress’s clear intention to promote the public interest by affording to copyright owners the statutory protections and related economic incentives they rely upon to create, distribute and otherwise license proprietary content through a rich variety of formats and business models. Allowing the District Court’s ruling to stand would mean that no state actor could be held to account for unauthorized reproduction and/or distribution of published works. This immunity would apply not only in the egregious violation of a singular valuable work, as in the case at hand, but also as to the infringements of multiple works, or, unbelievably, acts of mass infringement, such as uploading copies of books, articles, or educational content for the world to take.

Courts have cautioned against this very risk. In upholding liability for a commercial copyshop that sold compilations of academic works without permission, the Sixth Circuit warned that “[i]f copyshops across the nation” could freely photocopy course-packs, publishers’ “revenue stream would shrivel and the potential value of the copyrighted works of scholarship . . . would be diminished accordingly.” *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1387 (6th Cir. 1996) (en banc). Diminishing the value of publishers’ works through unchecked state infringement would, in turn, have a “deleterious effect upon the incentive to publish.” *Id.* at 1389.

Recent cases have shown that fears that state immunity from copyright liability would have this effect are far from hypothetical. For example, in *Nettleman v. FAU Board of Trustees*, 228 F. Supp. 3d 1303 (S.D. Fla. 2017), a professor at Florida Atlantic University who had copyrighted and licensed a package of teaching materials refused to allow the chair of his department to use the materials free of charge. *Id.* at 1306. Rather than paying the professor to use the works, the chair *simply used them anyway*, apparently banking on immunity from liability to enable him

effectively to use those materials free of charge, thus depriving the owner of the primary value of his work. *Ibid.*

The Texas Supreme Court recently granted review in a similar case. See *Univ. of Houston Sys. v. Jim Olive Photography*, 580 S.W.3d 360, 363 (Tex. App. 2019), *review granted* (Jan. 15, 2021). There, the plaintiff alleges that the University of Houston, a state university, downloaded copyrighted pictures from his website, removed all copyright and attribution information, and posted the images on the University’s own website in order to promote its business school.²

Finally—though this is hardly the last example of state-actor infringement—in *Cambridge University v. Patton*, three publishing houses challenged a Georgia State University policy that some professors used to distribute course materials without a license, even when licenses were

² It is notable that the state culprits in *Jim Olive Photography* (a business school) and in this case (an athletic department) are state organs with substantial independent money-making potential and that compete directly with non-state actors. Sovereign immunity from copyright liability for such actors operates as an unfair subsidy to state participants in these markets. See, e.g., Knight Commission on Intercollegiate Athletics, *College Athletics Financial Information Database* (explaining that, in 2018, Texas A&M’s athletics revenue was \$212.4 million, with expenses of \$165.8 million), <http://cafidatabase.knightcommission.org/fbs/sec>. See also Appellant Br. at 39-49 (arguing that TAMU is not an “arm of the state” under this Court’s precedent and therefore lacks immunity).

readily available. 769 F.3d 1232, 1236–42 (11th Cir. 2014). Among other defenses, the state defendants claimed sovereign immunity from copyright infringement, in effect arguing that even if the use of the course materials was entirely indefensible under ordinary principles of copyright law, the state actors nonetheless should not have to pay damages for their actions. *Id.* Although the Eleventh Circuit had no occasion to address the sovereign immunity issue, Judge Vinson, in his concurring opinion, recognized the risk of exempting state actors from copyright damages liability: “Neither churches, charities, nor colleges get a free ride in copyright[.] . . . [The state’s] use of Plaintiffs’ copyright protected works without compensation was, in a word, unfair.” *Id.* at 1288–91 (Vinson, J., concurring). Quoting the Sixth Circuit’s concern that if “copyshops across the nation” could copy academic material without permission, publishers’ “revenue stream would shrivel and the potential value of the copyrighted works of scholarship . . . would be diminished accordingly,” Judge Vinson concluded that “[o]ne could substitute ‘universities’ for ‘copyshops’ . . . and would have to reach the same conclusion.” *Id.* at 1291 (quoting *Princeton Univ. Press*, 99 F.3d at 1387).

Data collected by the Copyright Alliance (whose members include a large swath of the copyright economy, including publishing houses, motion picture companies, record labels, and software companies, as well as small creative businesses and individual authors) further confirms that these are far from isolated cases. Beyond merely identifying a large number of instances of state copyright infringement—which is alone cause for concern—a majority of survey respondents (48 of 84) specifically identified state universities and institutions of higher learning as the leading culprits of such infringement. See Copyright Alliance, Comment Letter on Sovereign Immunity Study: Notice and Request for Public Comment (June 3, 2020), <https://beta.regulations.gov/comment/COLC-2020-0009-0028>. And this infringement has only become more common over time. See *ibid.*

To be sure, state actors could choose to compensate publishers, authors, and other copyright owners *voluntarily in the face of infringement*, even without a legal mandate to so. For example, state educational institutions could voluntarily offer monetary redress, or states could waive their sovereign immunity for federal infringement suits.

But a system where the plaintiff is left at the mercy of the defendant's self-correction and value judgment is no substitute for the intended

operation of the Copyright Act and the availability of a damages remedy. Moreover, significant damage could occur even if many or most state actors abided by copyright law, because a single bad actor could cause considerable and irreversible harm to the value of a copyrighted work. And if that single state actor's conduct is coupled with the amplifying power of the internet, the result could effectively make an otherwise highly valuable copyrighted work free or cheap for all. Nor is it out of the question that a single state actor could effectively destroy the economic value of thousands if not millions of books with one mass act, thereby unilaterally eliminating their exclusive rights to determine the timing, formats, and markets by which to make them available to the public.

While the District Court's opinion may preserve the availability of injunctive relief against the offending state actor, such relief is forward-looking only and therefore not nearly sufficient or satisfying. Rather, once a work is actually infringed, the cat would already be out of the bag and there would be no way for individual rightsholders to recoup the value that had already been lost. For example, if a state university chose to post or facilitate the posting and/or downloading of all of the fiction and nonfiction on the New York Times Best Sellers List (or myriad textbooks or academic

journals) on their state.gov website, the publishers would be deprived of the most valuable promise of the Copyright Act—the right to enforce one’s exclusive rights, and to recover the damages suffered and/or necessary to deter others from infringing. See 17 U.S.C. 504(a). Regrettably, under the District Court’s ruling, the defendant state actor could simply invoke its immunity, despite Congress’s unambiguous attempt to take it away under the CRCA. This equation is not in the public interest and it is not remotely the one that the Framers had in mind when they empowered Congress to enact an effective copyright system.

B. The District Court’s ruling would be particularly disruptive to the publishing industry.

The District Court’s ruling is particularly problematic because state actors—including schools, universities, and research institutions—play an important role in the publishing landscape.

For one thing, state institutions are significant consumers of all manner of published materials, including physical and digital instructional materials as well as the countless works of fiction and nonfiction that fill school and university libraries and course syllabi. The magnitude of the impact of the District Court’s decision is impossible to quantify with absolute precision, but it is surely massive: in 2019, the total revenue of the

publishing industry was \$25.93 billion, with over \$16 billion coming from trade sales and over \$7 billion from pre-K through higher education instructional materials, segments for which state institutions are important consumers. *See* AAP StatShot Annual Report (July 31, 2020), <https://publishers.org/news/aap-statshot-annual-report-book-publishing-revenues-up-slightly-to-25-93-billion-in-2019/>.

Moreover, state institutions' involvement in publishing markets is broader than their role as direct consumers. They not only purchase or license works for their own collections; they also influence the purchasing decisions of their students by encouraging them to purchase or license particular textbooks, works of literature, or other rich content for their studies, through a wide variety of formats and business models. Published works are as varied as the publishers and authors that produce them, and these works form a key part of the American education system and meaningfully contribute to its success.

Yet under the District Court's sweeping interpretation of state sovereign immunity, a state university or public school would face no damages liability whatsoever for even the most intentional and blatant copyright infringement or inducement—with disruptive results on the

publishing landscape that cannot begin to be undone by injunctive relief alone. For example, a state university professor or other employee could email a file containing a full textbook (or any other work of fiction or nonfiction) to every student who registers for a course, or post the textbook on the department's website, free of charge, or play an active role in directing students to pirate sites, while remaining fully immune from damages liability. Indeed, the state university could even sell pirated or knock-off textbooks—or any books for that matter—at discounted rates, driving down the value of the works while usurping for itself the proceeds of the labor of authors and publishers. The same would be true in a wide variety of other contexts in which state entities or their employees might choose to reproduce and distribute copyrighted works in equally brazen fashion if they were immune from liability for their actual infringements.

Simply put, by eroding publishers' ability to recover damages and in turn their incentives to publish and distribute copyrighted works, the District Court's decision risks undermining the many social benefits that publishers' dissemination of knowledge and creative work provides—the very benefits that were on the Framers' minds when they enacted the Copyright Clause of the Constitution, and the very benefits that Congress

has sought to promote through the federal copyright laws since enacting the very first Copyright Act in 1790.

II. The CRCA validly holds states to account for actual violations of the rights guaranteed by the Fourteenth Amendment.

A. TAMU is liable for damages under *United States v. Georgia*.

Section 5 of the Fourteenth Amendment gives Congress the “power to enforce, by appropriate legislation, the provisions of this article.” U.S. Const. Amend. XIV, § 5. And Section 1 of the Amendment prohibits States from, among other things, “depriv[ing] any person of life, liberty, or property, without due process of law.” *Id.*, § 1. Pursuant to its Section 5 power, Congress may strip states of their sovereign immunity under the Eleventh Amendment and subject them to suit for damages in federal court. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

In two separate lines of cases, the Supreme Court has specified the contours of Congress’s Section 5 power. First, the Court has been unequivocal that Congress has the power to abrogate state sovereign immunity to remedy actual violations of the Fourteenth Amendment. The Court unanimously recognized this form of abrogation in *United States v. Georgia*, 546 U.S. 151 (2006). And this variety of abrogation applies in this

case, as TAMU actually violated Bynum’s constitutional rights. The second (and more contentious) sort of abrogation—which is not relevant here—involves Congress’s authority to prophylactically abrogate state sovereign immunity with statutes that hold states liable for conduct in the neighborhood of a constitutional violation, thus covering both conduct that actually violates the constitution and conduct that does not. See, *e.g.*, *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (requiring that the scope of such prophylactic abrogation must be “congruent and proportional” to the targeted Constitutional violation).

In his opinion for a unanimous Court in *Georgia*, Justice Scalia drew a sharp line between these two species of abrogation: “While the Members of this Court have disagreed regarding the scope of Congress’s ‘prophylactic’ enforcement powers under § 5 of the Fourteenth Amendment, no one doubts that § 5 grants Congress the power to ‘enforce . . . the provisions’ of the Amendment by creating private remedies against the States for *actual* violations of those conditions.” *Georgia*, 546 U.S. at 158 (citation omitted).

This distinction was central in *Georgia*, and it is dispositive here. In *Georgia*, a disabled inmate of the Georgia state prison system sued the state Department of Corrections, as well as several individual officers, for money

damages under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, and the Eighth Amendment. In addition to alleging a statutory violation, the inmate’s damages claims were “based, at least in large part, on conduct that independently violated the provisions of § 1 of the Fourteenth Amendment.” *Id.* at 157. The Supreme Court accordingly found no need to consider whether Congress’s abrogation was adequate as to conduct that might not violate the Constitution—that is, prophylactically—because the inmate’s Fourteenth Amendment rights actually had been violated. Accordingly, the Court put aside its prophylactic abrogation precedent and straightforwardly and unanimously held that “[i]nsofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.” *Id.* at 159.

Cut “Title II” and paste in “CRCA” and *Georgia* decides this case. The CRCA unambiguously provides that states and their officers “shall not be immune” from copyright infringement suits in federal court. 17 U.S.C. 511(a); *Allen*, 140 S. Ct. at 1001 (“No one here disputes that Congress used clear enough language to abrogate the States’ immunity from copyright infringement suits.”). The District Court held that Bynum is validly suing

TAMU under that provision for damages for copyright infringement that violated his Fourteenth Amendment rights, as he adequately pleaded a violation of both the Due Process and Takings Clauses (which are made applicable to TAMU and other state actors by virtue of Section 1 of the Fourteenth Amendment). See ROA.5546, 5552, 5563, 5570–5571; see also *Allen*, 140 S. Ct. at 1004 (“Copyrights are a form of property.”). Thus, under *Georgia*, “[i]nsofar as [the CRCA] creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment,” like the conduct Bynum alleges here, “[the CRCA] validly abrogates state sovereign immunity.” *Georgia*, 546 U.S. at 159. That should have been the end of the analysis.

B. Courts apply *Georgia*’s framework to diverse statutory schemes, including the CRCA.

Multiple Courts of Appeals have applied *Georgia*’s holding that Congress may validly abrogate state sovereign immunity to provide a remedy for actual constitutional violations to statutory schemes other than Title II of the ADA, including the Eleventh Circuit, which applied *Georgia* to the CRCA. And no Court of Appeals has held that *Georgia* must be limited only to Title II, meaning that upholding the District Court’s decision would create a lopsided circuit split.

In *National Association of Boards of Pharmacy v. Board of Regents of the University System of Georgia*, 633 F.3d 1297 (11th Cir. 2011) (“*NAPB*”), the Eleventh Circuit applied *Georgia* to the CRCA. There, a nonprofit corporation that licensed and regulated pharmacists sued a University of Georgia professor and state-university officials for copyright infringement for the use without permission of multiple-choice test questions from one of the nonprofit’s licensing examinations. *Id.* at 1301–02. The Eleventh Circuit, citing *Georgia*, described the “two ways by which Congress may rely upon its § 5 power to abrogate the States’ sovereign immunity,” and explained that “[e]ven though the CRCA deals on its face only with copyright infringement, *Congress’s abrogation of the States’ sovereign immunity in the CRCA is valid if the copyright infringement also violated [the nonprofit’s] constitutional rights.*” *Id.* at 1315 (emphasis added). In so holding, the Eleventh Circuit rejected the state-actors’ “argu[ment] that *United States v. Georgia* does not apply to the CRCA because the CRCA is a narrowly targeted statute focused on the enforcement of a single constitutional right,” explaining that “[w]e see no such limitation in *Georgia*.” *Id.* at 1316 n.31.

The nonprofit in *NAPB* lost the case, but only because its “complaint failed to allege a due process violation and consequently did not allege a damages claim that may be brought under the CRCA pursuant to *Georgia*.” *Id.* at 1319. Here, however, the District Court had already determined that Bynum adequately pleaded a due process violation, yet the Court nonetheless barred Bynum’s suit from proceeding. See ROA.5563, 5570–5571. This was contrary to the Eleventh Circuit’s decision in *NAPB*.

Two other cases from the Eighth and Ninth Circuits likewise hold that *Georgia*’s analysis applies to statutory schemes other than Title II of the ADA—holding that, so long as a party has alleged a statutory violation that is also a constitutional violation, state sovereign immunity is not a defense. First, in *Alaska v. EEOC*, 564 F.3d 1062 (9th Cir. 2009), the *en banc* Ninth Circuit similarly determined that *Georgia*’s reasoning applied equally to the Government Employee Rights Act of 1991 (GERA). The Court first recognized the “two ways” that Congress may abrogate state sovereign immunity, citing *Georgia* for the proposition that “Congress may prohibit and provide a remedy for conduct that actually violates the [Fourteenth] Amendment.” *Id.* at 1067. It then went on to “consider whether [the plaintiffs] allege actual violations of the Fourteenth Amendment” because

“if they do, we needn’t decide whether GERA is valid prophylactic legislation.” *Id.* at 1068. Because the plaintiffs there had indeed “allege[d] actual violations of the Fourteenth Amendment,” the Ninth Circuit concluded that “GERA has validly abrogated [state] sovereign immunity with respect to these claims”—and it was as simple as that. *Id.* at 1071.

Second, in *Lors v. Dean*, 746 F.3d 857 (8th Cir. 2014), the Eighth Circuit considered claims brought by a South Dakota state employee against the state under Titles I and V of the ADA, alleging unlawful retaliation in response to a prior discrimination suit. *Id.* at 859. The Eighth Circuit, on rehearing granted specifically to consider whether *Georgia* applied to those statutory provisions, explained that “both parties agree that the *Georgia* framework applies to the present case to determine, if necessary, whether *Title V* of the ADA was a valid abrogation of sovereign immunity.” *Id.* at 864. The Court concluded: “We agree.” *Ibid.* Again, where a statute—whatever the statute—abrogates sovereign immunity for actual constitutional violations, the abrogation is valid under *Georgia*.

Other cases, including from this Circuit, describe *Georgia*’s test using language that offers no logical limitation to Title II. “A court must determine,” this Court has explained, “on a claim-by-claim basis: (1) which

aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.” *Block v. Tex. Bd. of Law Examiners*, 952 F.3d 613, 617 (5th Cir. 2020) (quoting *Georgia*, 546 U.S. at 159); see also, e.g., *Bowers v. Nat’l Collegiate Athletic Ass’n*, 475 F.3d 524, 553 (3d Cir. 2007) (applying the same test). While these cases speak in terms of Title II of the ADA, nothing in their reasoning is so limited. Rather, this description of *Georgia*’s framework implies that if an alleged statutory violation also violates the Fourteenth Amendment, the inquiry ends there. Only if no actual constitutional violation is alleged should questions about the validity of any prophylactic abrogation come into play.

Taken together, these cases make clear that where (as here) a plaintiff seeks damages from a state for conduct that actually violates the Constitution under a statute whose text abrogates state sovereign immunity for that suit, *Georgia* requires no further inquiry and holds that Congress’s abrogation of sovereign immunity is valid.

C. *Allen v. Cooper* is not to the contrary.

The Supreme Court’s recent decision in *Allen v. Cooper*, falls in the second, prophylactic strand of the Court’s abrogation doctrine. *Allen* addressed whether the CRCA had validly prophylactically abrogated sovereign immunity by authorizing “suits against States for ‘a somewhat broader swath of conduct,’” than “actual violations of the rights guaranteed in Section 1” of the Fourteenth Amendment “including acts constitutional in themselves.” 140 S. Ct. at 1004. The Court left no room for doubt as to the question it was addressing: “Here, a critical question is how far, and for what reasons, Congress has *gone beyond redressing actual constitutional violations.*” *Ibid.* (emphasis added). And, relying on *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 647 (1999), which had held that Congress lacked an adequate basis on which to prophylactically abrogate sovereign immunity for patent infringement, the Court held that the same was true for the CRCA’s prophylactic abrogation in the copyright context. See *Allen*, 140 S. Ct. at 1001, 1007 (“*Florida Prepaid* all but rewrote our decision today.”).

Allen did not address the statute’s validity as applied to suits alleging *actual violations* of the Fourteenth Amendment—that is, the situation in

Georgia and here. To the contrary, the Court reiterated (albeit without citing *Georgia*) that “Congress can permit suits against States for actual violations of the rights guaranteed in Section 1.” *Id.* at 1004. The Court had no need to elaborate on the issue, however, because the plaintiff failed to raise the argument³ and the state defendant agreed that, if the alleged infringement actually violated the Fourteenth Amendment, the CRCA’s abrogation would validly apply. See Br. for Respondent at 56, *Allen v. Cooper*, 140 S. Ct. 994 (2020) (No. 18-877) (“[T]he Act is indisputably valid insofar as it authorizes lawsuits against conduct that actually violates the Due Process Clause.”); see also Tr. of Oral Arg. at 39:21–40:2 (conceding the point). That means that the CRCA is—as least as one state sees it and the Supreme Court found no reason to question—“indisputably valid” as it applies in this case to Bynum’s claim for damages for actual violations of his constitutional rights.

³ At oral argument, multiple Justices noted (and the plaintiff’s counsel admitted) that the plaintiff in *Allen* had failed to raise any argument under *Georgia*. See, e.g., Transcript of Oral Argument at 31:6–8, *Allen v. Cooper*, 140 S. Ct. 994 (2020) (No. 18-877) (“Tr. of Oral Arg.”) (“JUSTICE ALITO: But I didn’t understand you to be making an argument under U.S. versus Georgia.”); *id.* at 31:25–32:4 (“JUSTICE GINSBURG: But you didn’t make below . . . at least I didn’t see an argument based on U.S. v. Georgia. [COUNSEL]: We didn’t, I think, cite U.S. v. Georgia.”).

Confirming that *Georgia* rather than *Allen* governs this case, the opinion and oral argument in *Allen* reflected the Supreme Court’s concern for the harmful consequences of unchecked state infringement—that is, without the backstop of *Georgia* allowing remedy for actual constitutional violations. The Court’s opinion in *Allen* concluded with an invitation for Congress to tailor the CRCA’s prophylactic abrogation to better fit with the Court’s precedent, explaining that Congress may implement a “proportionate response” to threatened constitutional violations to “bring digital Blackbeards to justice.” *Allen*, 140 S. Ct. at 1007. But the CRCA is already valid as applied to constitutional violations, under *Georgia*, so there is no need for any further action before holding infringers liable for constitutional violations.

Multiple Justices worried at oral argument about the harmful effects if there were a complete lack of liability for state infringement. Justice Breyer invoked a troubling hypothetical involving a world with state immunity from copyright-infringement liability, where it would be a “wonderful money-raising thing” for a state “to do with its own website, charging \$5 or something, [for] Rocky, Marvel, whatever, Spider-Man, and perhaps Groundhog Day.” Tr. of Oral Arg. at 36:18–23. Justice Kavanaugh

similarly raised concern that “it could be rampant, states ripping off copyright holders,” which he found difficult to “square with the exclusive [copyright] right.” *Id.* at 39:6–9. The state’s counsel quickly explained that this is exactly where *Georgia* comes in: “[T]o the extent that the Georgia issue is relevant here[,] it’s to the fact that it relieves many of these concerns.” *Id.* at 40:3–7. Justice Breyer responded to confirm that “under the Fourteenth Amendment, this statute is valid insofar as [the state] deliberately takes property from people,” *id.* at 40:20–23, explaining that such an approach “would cure my problem to a considerable degree,” *id.* at 41:7–8.

Thus in *Allen*, where the Supreme Court held that the CRCA’s prophylactic abrogation of sovereign immunity was too broad to be sustained based on the record of constitutional violations Congress had considered, the Justices took comfort in the fact that states would still be liable under *Georgia* for the most egregious copyright infringement—namely, infringement that actually violated rights protected by the Fourteenth Amendment. And with good reason, as entirely unchecked infringement would create all of the problems described above. See *supra* at 9–18. Because *Georgia* and not *Allen* governs this case, and because the

consequences of letting the District Court's decision stand would risk disruption to the book publishing industry and the creative economy more broadly, this Court should reverse.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the District Court and remand for further proceedings.

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