No. 20-20503

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHAEL J. BYNUM and CANADA HOCKEY LLC d/b/a EPIC SPORTS,

Appellants,

v.

TEXAS A&M UNIVERSITY ATHLETIC DEPARTMENT, ALAN CANNON, and LANE STEPHENSON,

Appellees.

On Appeal from the United States District Court
For the Southern District of Texas, Houston Division

BRIEF OF THE COPYRIGHT ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Amicus curiae, pursuant to 5th Cir. Rule 29.2, adopts the list of interested persons identified in Plaintiffs-Appellants' opening brief filed with the Court on January 20, 2021, and further identifies the following people and entities as having an interest in the outcome of this appeal:

Cowan, DeBaets, Abrahams & Sheppard LLP (counsel for *amicus curiae*)

Gates, Sara (counsel for *amicus curiae*)

Sholder, Scott J. (counsel for *amicus curiae*)

The Copyright Alliance (*amicus curiae*)

Wolff, Nancy E. (counsel for *amicus curiae*)

The Copyright Alliance, pursuant to Fed. R. App. P. 26.1, states that it is a non-profit 501(c)(6) organization and does not have a parent corporation.

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STATEMENT OF INTEREST[1]

The Copyright Alliance is dedicated to promoting and protecting the ability of creative professionals to earn a living from their creativity. It is a nonprofit, nonpartisan 501(c)(4) public interest and educational organization. It represents the copyright interests of over 1.8 million individual creators and over 13,000 organizations across the entire spectrum of creative industries, including graphic and visual artists, photographers, writers, musical composers and recording artists, journalists, documentarians and filmmakers, and software developers, as well as the small and large businesses that support them.

The Copyright Alliance's members rely heavily on copyright law to protect their work and provide them with the financial ability to be able to continue to create for the public good. As such, the Copyright Alliance and its members have a strong interest in the proper application of copyright law, including obtaining redress against state entities who have committed acts of infringement that violate the U.S. Constitution. *Amicus curiae* submits this brief with its accompanying motion for leave to file the brief, in support of Appellants, pursuant to Fed. R. App. P. 29(a) and 5th Cir. R. 29.1.

[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.

SUMMARY OF ARGUMENT

Where there is a right, there must be a remedy. *See Marbury v. Madison*, 5 U.S. 137, 147 (1803). This fundamental principle of law is all the more important where constitutional rights have been purposely violated, as is the case here. The record before the Court tells the story of an egregious case of copyright infringement by Texas A&M University's Athletic Department (the "Department"), whereby the Department intentionally removed Appellants' copyright management information, altered the byline, and disseminated this altered version of Appellants' copyrighted work to hundreds of thousands of people without authorization, passing it off as the Department's own work, and thereby usurping all the economic value and destroying Appellant's market for a print run of the book. *See* Plaintiffs-Appellants' Opening Brief at 6–11, *Bynum v. Tex. A&M Univ. Athletic Dep't*, No. 20-20503 (5th Cir. Jan. 20, 2021). As the district court concluded, the intentional conduct constituted both a taking of Appellants' property without just compensation and a deprivation of their property without due process of law. *See* Order at 31–32, *Bynum v. Tex. A&M Univ. Athletic Dep't*, No. 4:17-cv-00181 (S.D. Tex. Sept. 4, 2020), ECF No. 178 [hereinafter Reconsideration Order]. Yet, the district court dismissed Appellants' claims on sovereign immunity grounds under the Eleventh Amendment, barring Appellants from any forum by which they can vindicate their constitutional rights.

This was legal error with dire consequences for those who rely on copyright protection for their livelihoods.

Copyright owners like Appellants need a substantive remedy to hold state actors accountable for their intentional infringements. More than 30 years ago, the U.S. Copyright Office and Congress examined the growing problem of copyright infringements by states and state actors, culminating in the passage of the Copyright Remedy Clarification Act of 1990 ("CRCA"), which amended the Copyright Act to specifically name, and therefore impose liability on, state actors for their infringements. Despite the clear congressional mandate, state actors, emboldened by subsequent decisions that have thrown the entire validity of the CRCA into doubt, have hidden behind the cloak of immunity, resulting in a substantial increase in *repeated* and *intentional* state infringements. According to a nationwide survey conducted by the Copyright Alliance, in response to a Copyright Office study on the extent of state infringement, copyright owners have experienced thousands of infringements by state actors, with the majority responding that they had been victims of repeated infringements. *See* Copyright Alliance, *Comments of the Copyright Alliance* at 7 (Sept. 2020), https://copyrightalliance.org/wp-content/uploads/2020/09/Copyright-Alliance-Comments-Sovereign-Immunity-Study-No.-2020-9.pdf (describing "countless," "at least a dozen," "thousands," and "infinitely many" infringements by state actors).

State universities, including athletic departments, have shown themselves to be some of the most egregious infringers among state actors. Indeed, as some respondents to the Copyright Alliance's survey reported, when the copyright owners confronted certain universities regarding the infringements, the universities refused to license music they used or take down infringing videos they posted without authorization, citing state sovereign immunity. *See Comments of the Copyright Alliance* at 10. Creators are left with little recourse, especially following the U.S. Supreme Court's March 2020 decision in *Allen v. Cooper*, which curtailed the general ability of copyright owners to enforce their rights against state actors in federal courts. The result is that states and state actors are able to freely infringe copyrights without any meaningful accountability, and in many instances commit violations of copyright owners' constitutional rights. This behavior exemplifies a troubling double standard given that state actors receive all of the benefits of copyright protection for their own works, and, even worse, threatens to subvert the purpose of copyright enshrined in the U.S. Constitution.

However, the Supreme Court left open an avenue for relief for the types of intentional state infringements that, as in this case, also present constitutional violations. Notably, in *Allen*, the Court did not address its 2006 decision in *United*

States v. Georgia,[2] which created a framework for evaluating the validity of a sovereign immunity abrogation statute, such as the CRCA, as it may be applied to particular instances where the plaintiff can establish an actual violation of the Fourteenth Amendment, as Appellants have done in this case. *See generally Allen v. Cooper*, 140 S. Ct. 994 (2020); *United States v. Georgia*, 546 U.S. 151 (2006). The *Georgia* framework, which does not run afoul of either the Supreme Court's or this Circuit's precedent, is not only applicable but necessary for the Court to apply in this case, where Appellants have alleged constitutional violations. The district court committed legal error by declining to apply *Georgia* and permit Appellants access to the courts in order to vindicate their constitutional rights. This Court should reverse the district court's dismissal of Appellants' claims and remand the case to the district court for adjudication of Appellants' statutory claims given the constitutional underpinnings.

[2] The Court did address *Georgia* during oral argument, as counsel for both parties agreed that "whenever a plaintiff can reasonably allege that there has been intentional copyright infringement and there are not adequate remedies, then under [the] Court's Georgia decision, they can bring a direct constitutional claim." Oral Argument Transcript at 31–32, 39–40, *Allen v. Cooper*, 140 S. Ct. 994 (2020), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-877_k5gm.pdf.

ARGUMENT

I. A SUBSTANTIVE REMEDY IS NEEDED TO ADDRESS INTENTIONAL VIOLATIONS BY STATE ACTORS

A. The District Court Committed Legal Error by Closing the Courthouse Door on Constitutional Violations

Before this Court is the question of whether the district court erred in ruling that state sovereign immunity, under the Eleventh Amendment, bars Appellants' claims. This Court should answer in the affirmative. In barring Appellants from seeking relief for violations of their constitutional rights, the district court denied Appellants one of the highest and most essential privileges under the Fourteenth Amendment: access to the courts. *See Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907) ("In an organized society [the right to sue and defend in the courts] is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens."); *see also Tennessee v. Lane*, 541 U.S. 509, 523 (2004) (emphasizing that "the right of access to the courts" is protected by the Due Process Clause of the Fourteenth Amendment").

While the Eleventh Amendment was intended to preserve certain aspects of state sovereignty and protect state coffers by preventing states from being dragged into court without their consent, it was not intended to prevent litigants like

Appellants from seeking vindication of their constitutional rights or to let state actors run roughshod over the constitutional rights of American creators. *See* Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity?*, 106 Yale L.J. 1683, 1726 (1997). Nor does the Eleventh Amendment relieve states of their binding obligation to follow the U.S. Constitution and federal laws. *Alden v. Maine*, 527 U.S. 706, 754–55 (1999) ("The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law.").

Notably, the district court found two independent constitutional violations committed by Appellees: an unconstitutional taking under the Fifth Amendment, incorporated through the Fourteenth Amendment, and a due process violation under the Fourteenth Amendment. *See* Reconsideration Order at 31–32. Despite these constitutional claims, the district court nonetheless dismissed Appellants' claims on sovereign immunity grounds, asserting that it was obligated to follow binding precedent. *Id.* at 18. In doing so, the district court betrayed fundamental principles of law by curtailing Appellants' ability to seek vindication for violations of their constitutional rights. As recognized by the Supreme Court more than a century ago, where there is a right, there must be a remedy. *See Marbury*, 5 U.S. at 147.

Denial of any remedy here results in an erosion of Appellants' constitutional rights and effectively releases state actors such as the Department of their obligation

to abide by the Constitution and federal laws. The district court committed legal error in reaching this result, especially where the precedent the court was bound to follow—the Supreme Court's decision in *Allen*—left open an avenue for relief.

B. *United States v. Georgia* Provides a Framework by Which This Court May Consider Appellants' Claims

Even though it was discussed during oral argument (*see supra* n.2), the *Allen* Court did not address or even cite its 2006 opinion in *United States v. Georgia*, in which the Court considered whether a statute may validly abrogate state sovereign immunity on an as-applied basis when the plaintiff alleges an actual violation of the Fourteenth Amendment. *See generally Allen*, 140 S. Ct. 994; *Georgia*, 546 U.S. at 158–59; *see also Tennessee*, 541 U.S. at 530–31 ("[T]he question presented in this case is not whether Congress can validly subject the States to private suits for money damages . . . but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts."). The statute in question before the *Georgia* Court was Title II of the Americans with Disability Act of 1990 ("ADA"); however, the Court's logic may easily be extended to other abrogation statutes. As Justice Scalia explained:

> 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 provisions. . . . This enforcement power includes the power to abrogate

> state sovereign immunity by authorizing private suits for damages against the States.

Georgia, 546 U.S. at 158–59 (internal citations omitted). The Court's conclusion rings true here: where a statute "creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, [the statute] validly abrogates state sovereign immunity." *Id.* at 159.

Indeed, this Court has previously interpreted the *Georgia* decision to create the following three-part framework for district courts to consider abrogation of state sovereign immunity on a case-by-case basis: (1) which aspects of the state's alleged conduct violated the statute, (2) to what extent such misconduct also violated the Fourteenth Amendment, and (3) insofar as such misconduct violated the statute but did not violate the Fourteenth Amendment, whether Congress' purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid. *See Block v. Texas Bd. of Law Examiners*, 952 F.3d 613, 617 (5th Cir. 2020). Although the Fifth Circuit has only had the occasion to apply the framework to Title II claims,[3] other

[3] Notably, however, this Circuit has cited the *Georgia* decision to support broad propositions regarding abrogation of sovereign immunity in non-Title II cases. *See, e.g.*, *Rosas v. Univ. of Texas at San Antonio*, 793 F. App'x 267, 271 (5th Cir. 2019) ("Congress may abrogate state sovereign immunity for conduct that actually violates the Fourteenth Amendment." (citing *Georgia*, 546 U.S. at 158–59)); *Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 593 (5th Cir. 2006) ("When Congress enacts appropriate legislation, such as § 1983, pursuant to its enforcement power under § 5, it may properly assert authority over the States that is otherwise unauthorized by the Constitution." (citing *Alden*, 527 U.S. at 756, and *Georgia*, 546 U.S. 151)).

circuits have extended the *Georgia* Court's logic beyond Title II of the ADA, including to the CRCA. *See, e.g.*, *Lors v. Dean*, 746 F.3d 857, 863–64 (8th Cir. 2014) (Title V of the ADA); *Nat'l Ass'n of Boards of Pharmacy v. Bd. of Regents of the Univ. Sys. of Georgia*, 633 F.3d 1297, 1315–19 (11th Cir. 2011) (CRCA); *Alaska v. EEOC*, 564 F.3d 1062, 1066–68 (9th Cir. 2009) (*en banc*) (Government Employee Rights Act of 1991). For example, the Eleventh Circuit has applied the *Georgia* framework to the CRCA, concluding that "even 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 plaintiff's] constitutional rights." *See Nat'l Ass'n of Boards of Pharmacy*, 633 F.3d at 1315–16.

While the application of *Georgia* in the context of a copyright case is a novel question for this Court, this case presents a model scenario by which this Court may apply that case's framework. Notably, the district court below found two independent constitutional violations committed by Appellees: an unconstitutional taking under the Fifth Amendment, incorporated through the Fourteenth Amendment, and a due process violation under the Fourteenth Amendment. *See* Reconsideration Order at 31–32; Opening Brief at 21–23 (discussing both constitutional violations). Paired with Appellants' allegations of Appellees' violations of the Copyright Act, these two constitutional violations present a

situation in which Appellants have pleaded statutory and constitutional violations to satisfy the first two prongs of the *Georgia* framework, mooting consideration of the third prong.

The record before the Court necessitates application of the *Georgia* framework, which the Court may apply without running afoul of either Supreme Court or Fifth Circuit precedent. In *Allen*, while the Supreme Court did not directly address *Georgia*, the Court did recognize that copyright is property protected by the Fourteenth Amendment from intentional state deprivation without due process. *See* 140 S. Ct. at 1004. So, as the Court noted, where a state infringement is intentional, and a state actor fails to offer an adequate remedy for an infringement, as is the case here, the Fourteenth Amendment prohibits the state's act of deprivation. *See id.* The Fifth Circuit's decision in *Chavez v. Arte Publico Press* also does not foreclose the opportunity to apply *Georgia*, as the case was decided in 2000, pre-*Georgia*, and only concerned whether CRCA was proper *remedial* legislation, rather than whether state sovereign immunity would abate in a particular case where a specific constitutional violation is established. *See* 204 F.3d 601, 607 (5th Cir. 2000).

In refusing to apply *Georgia*, to permit Appellants to seek relief for violations of their constitutional rights, the district court committed legal error. The Court should correct this error and reverse and remand the case to the district court.

C. Intentional Copyright Infringements by State Actors Are a Grave and Growing Problem

It is important that this Court apply the *Georgia* framework in this particular case to permit copyright litigants like Appellants to seek relief for *intentional* copyright infringements by state actors, which create constitutional violations. When the Copyright Office first undertook an extensive study of copyright infringements by state actors in the late 1980s, it identified a host of examples of infringements—from unauthorized public performances of motion pictures by state correctional institutions, to state departments copying educational materials and offering them for sale—but did not detail the full extent of state infringements or examine how many state infringements also presented instances of constitutional violations. *See* Register of Copyrights, *Copyright Liability of States and the Eleventh Amendment* at 7–8 (June 1988) [hereinafter Copyright Office Report], https://www.copyright.gov/reports/copyright-liability-of-states-1988.pdf. Since then, copyright infringement cases against state actors have steadily increased with no likelihood of decreasing. *Compare* Copyright Office Report at 90–97 (describing nine court cases brought against states between 1962 and 1987), *and* U.S. General Accounting Office, *Intellectual Property: State Immunity in Infringement Actions* at 7, 9–10 (Sept. 2001) [hereinafter GAO Report], https://www.gao.gov/assets/240/232603.pdf (identifying 58 lawsuits alleging infringement or unauthorized use of intellectual property, including trademark and patents, by state entities between

1985 and 2001), *with* Exhibit A to Plaintiffs' Motion for Reconsideration, *Bynum v. Tex. A&M Univ. Athletic Dep't*, No. 4:17-cv-00181 (S.D. Tex. July 26, 2019), ECF No. 102-1 [hereinafter Copyright Case List] (listing 173 copyright cases filed against state actors since 2000).

Emboldened by decisions that assailed the validity of the CRCA in the late 1990s and early 2000s, across the board, state actors showed an unwillingness to waive their Eleventh Amendment immunity, using it as a shield to avoid liability—and, oftentimes, to avoid litigation altogether. *See* GAO Report at 7–8, 15 (noting that states have no incentive to waive immunity); Michael Landau, *State Sovereign Immunity and Intellectual Property Revisited*, 22 Fordham Intell. Prop. Media & Ent. L.J. 513, 553 (2012). Congress revisited the problem of state infringements in 2002, hearing testimony regarding the imbalance created by the recent court decisions, which exemplified the growing problem of state actors infringing with impunity. *See generally Hearing on Sovereign Immunity and the Protection of Intellectual Property Before the Senate Judiciary Comm.*, 107th Cong., 2d Sess. 91 (2002) [hereinafter *Hearing on Sovereign Immunity*]. But state actors at the time were not infringing on the same scale as they are today, where technological advances and numerous social media platforms enable them to copy and distribute copyrighted works with ease. For example, in this case, after removing the copyright management information and altering the byline, Appellees were able to quickly and

easily distribute Appellants' copyrighted work to hundreds of thousands of people through the Department's website, social media, and e-newsletter. *See* Opening Brief at 6–11.

Since 2000, copyright plaintiffs have brought more than 170 cases against state actors for infringements, with most cases occurring in the past ten years. *See* Copyright Case List. However, this figure vastly underrepresents the extent of state infringements for at least two reasons. First, the sum does not consider the unfathomable number of infringements that are unreported either because copyright owners do not have the means to proceed against the state, or because they do not think they will be successful if they do. Second, the figure does not consider the untold number of infringements that go undetected because copyright owners and creators do not have the financial means or resources to search for infringing uses, whether by searching for infringements themselves or by employing intellectual property searching and monitoring firms or software.

Recognizing the need for further examination of state infringements, and in response to Congress' explicit request, the Copyright Office commenced a second study on state sovereign immunity, issuing a notice of inquiry in June 2020. U.S. Copyright Office, *Sovereign Immunity Study: Notice and Request for Public Comment*, 85 Fed. Reg. 34,252 (June 3, 2020), https://www.federalregister.gov/documents/2020/06/03/2020-12019/sovereign-immunity-study-notice-and-request-

for-public-comment. While the Copyright Office has yet to release its final report, the comments and materials submitted in response to the notice of inquiry illustrate how extensive state infringements have become. *See generally Sovereign Immunity Study*, Regulations.gov, https://beta.regulations.gov/document/COLC-2020-0009-0001/comment (last visited Jan. 25, 2021). Notably, the Copyright Alliance undertook a nationwide public survey in connection with the upcoming Copyright Office study, soliciting feedback from copyright owners about their experiences with copyright infringement by state actors. *See Comments of the Copyright Alliance* at 6.

The survey responses from 115 respondents "revealed that creators and copyright owners have encountered thousands of instances of infringement by state entities, resulting in lost revenue of countless millions of dollars." *Id.* at 7. While 29 percent of respondents only reported one case of an infringement by a state actor, 71 percent of participants reported two or more instances of infringement. *See id.* The survey also identified a steady increase in infringements since the mid-to-late 1990s, as reported infringements increased yearly through the 2000s and 2010s, with the most instances of infringement reported in 2019 (accounting for 40 percent of the responses). *Id.* at 8–9 (providing a chart showing the reported infringements by year). Respondents to the survey reported that state actors infringed a variety of works from "photographs" (40 responses) and "books/poems/blogs/articles" (31

responses), to "audio/sound recordings" (13 responses) and "movie/tv shows/videos" (12 responses). *Id.* at 7–8.

While there are no definitive statistical analyses to show the breadth of state infringements or how many of these infringements support constitutional violations (and such certainty is effectively impossible given the likely volume of unreported and undetected infringements, as noted above), the Copyright Alliance's survey evidence submitted to the Copyright Office in response to its notice of inquiry supports the conclusion that *repeated* infringements by state actors are a widespread problem that has grown considerably over the past 20 years and has shown no sign of letting up—in fact, just the opposite.

This problem will continue to grow following the Supreme Court's March 2020 decision in *Allen*, which held that Congress lacked the authority to *prophylactically* abrogate state sovereign immunity in the CRCA, as state actors will no doubt feel even more empowered to continue to infringe copyrights with impunity, relying on their Eleventh Amendment shield. However, as explained above, courts may still consider whether copyright litigants have alleged constitutional violations—such as the types of intentional taking of property without just compensation and a deprivation of property without due process of law, established before the district court below—and allow cases to proceed against state infringers. State actors must know that purposeful and calculated infringing activity

can subject them to liability to ensure the integrity of our copyright system and the value of copyrights to their creators.

D. State Universities, Including Athletic Departments, Are Some of the Most Egregious Infringers

Appellees' conduct exemplifies an increasing trend among state universities to use copyrighted works without asking permission or paying a license fee. Of the 173 copyright cases brought against state actors identified before the district court, at least 84 cases were brought against state universities or higher educational institutions. *See* Copyright Case List.[4] Fifty-seven percent of respondents to the Copyright Alliance survey also identified state universities or institutions of higher learning as the state entities responsible for the reported infringements. *See Comments of the Copyright Alliance* at 8; *see also id.* at 26–27. And previously, ahead of the 2002 congressional hearings, the Software & Information Industry Association, a trade association that represents more than 800 high-tech companies and is a member of the Copyright Alliance, undertook a six-year review of infringements involving state actors. *See Hearing on Sovereign Immunity* at 91–92.

[4] Separately, at least 35 cases were brought against other public educational institutions or school districts. *See* Copyright Case List. The district court considered these cases cited by the Appellants, but not for the proposition that they are proffered for here—namely, that the sheer number of copyright cases filed against state entities, including state universities, evinces a pattern of potential constitutional violations by state actors. *See Allen*, 140 S. Ct. at 1004 (recognizing that copyright is property protected by the Fourteenth Amendment).

Of the 77 matters, approximately 50 percent implicated institutions of higher learning. *Id.* at 92.

The evidence is clear that state universities, including university athletic departments, have shown themselves to be some of the most egregious infringers, taking photographs, written materials, music, videos, and other content without regard for copyright owners' rights. *Comments of the Copyright Alliance* at 10. Yet, as the district court pointed out, when faced with a complaint or cease-and-desist letter, these state actors most often hide behind the cloak of sovereign immunity and refuse to compensate the copyright owner for the infringing use. *See* Order at 16, *Bynum v. Tex. A&M Univ. Athletic Dep't*, No. 4:17-cv-00181 (S.D. Tex. Mar. 29, 2019), ECF No. 96 [hereinafter MTD Order] (surveying copyright cases against state actors and determining that less than five percent of courts allowed the case to proceed against the state entities despite the Eleventh Amendment). Absent a substantive remedy, and should this Court further erode the abrogation doctrine in the copyright context, state actors like Appellees will be even more emboldened to usurp the works of creators and use the same for their own benefit, often to a commercial end, such as in promotion of the university or departments or in connection with fundraising programs, all to the financial harm of the copyright owner. *See Comments of the Copyright Alliance* at 10. Importantly, in addition to financial harm, unchecked sovereign immunity robs copyright owners of control

over their works and the attribution rights guaranteed to them by copyright law. Courts should not turn a blind eye to these types of intentional infringements, whereby infringers take property without just compensation, and oftentimes without due process of law.

II. ALLOWING STATE ACTORS, SUCH AS STATE UNIVERSITIES, TO INFRINGE WITH IMPUNITY UPSETS THE BALANCE OF COPYRIGHT

This current state of affairs, whereby state actors—universities in particular—shrouded in Eleventh Amendment immunity infringe without consequence, upsets the balance of copyright by allowing one group to receive all the benefits of copyright without paying any of the costs. As Senator Patrick J. Leahy of Vermont pointed out in his opening remarks during the 2002 Senate Judiciary Committee hearing on sovereign immunity and the protection of intellectual property:

> If we truly believe in fairness, we cannot tolerate a situation in which some participants in the intellectual property system get legal protection, but are told they do not have to adhere to the law themselves. They can get the benefits with none of the obligations. If we truly believe in the free market, we cannot tolerate a situation where one class of market participants have to play by the rules and others do not.

Hearing on Sovereign Immunity at 2. The vast disparity in rights that would be perpetuated by affirming the district court's ruling here is laid bare in three ways.

First, the uneven playing field fostered by unchecked sovereign immunity is even more apparent when immune state educational institutions are compared to private universities, which may be only a few miles down the road from their public

counterparts but are not entitled to the protection of sovereign immunity. *See* MTD Order at 17; *Comments of the Copyright Alliance* at 17. While both private and state universities may have vast financial resources, and well-funded athletic departments so that they essentially operate like corporations,[5] only state universities are elevated above the law and permitted to infringe without consequence. This double standard is inherently unfair to non-state actors who are not permitted to intentionally infringe while hiding behind the shield of immunity.

Second, compared to other state actors, state universities are some of the largest holders of copyright registrations, receiving the benefits of registration and the ability to enforce their rights against other users, yet with the expectation that they may do so without concern for others enforcing rights against them. *See Comments of the Copyright Alliance* at 15–16 (summarizing the results of searches of Copyright Office registration records showing state actors in Texas, New York, and California owned thousands of works); GAO Report at 44–45 (identifying 32,319 copyright registrations in the names of state institutions of higher education from January 1, 1978 through December 31, 1999). Like other copyright owners and commercial entities, state universities are able to commission or create their own works, register the works with the Copyright Office, and license and enforce their

[5] As the district court heard, the Texas A&M University "Athletic Department operates on annual revenues of nearly $200 million dollars, none of which comes from the State or other public dollars." MTD Order at 11 (citing ECF No. 62 at 8).

copyrights. However, unlike other copyright holders, state universities are also able to freely use the creative expression of others without paying any of the costs that every other creator has to bear when faced with an alleged unlicensed use or substantially similar creation.

Finally—and most importantly to the Copyright Alliance and its members—under this regime, state actors will continue to do what is in their economic best interests and contrary to the interests of private authors and creators, as there is no incentive for states entities to seek authorization or licenses when they can use copyrighted works for free without facing liability. In doing so, states will be devaluing copyright, as the value of copyright depends upon a copyright owner's ability to enforce his or her rights and secure a fair return for his or her labors before the work passes on to the public. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("[T]he limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."); *Washingtonian Pub. Co. v. Pearson*, 306 U.S. 30, 39 (1939) (noting that a copyright's "value depend[s] upon the possibility of enforcement").

In addition to devaluing copyright, depriving creators of a fair return for their creative work may also have the unintended effect of discouraging certain individual

creators from creating for the public good. For example, in connection with its response to the Copyright Office's notice of inquiry, the Copyright Alliance reached out to more than 100 plaintiffs who have brought copyright infringement claims against state entities and conducted interviews with individual creators whose stories provide insights into the particular harms caused by state infringements. *See Comments of the Copyright Alliance* at 17. One such creator, Dr. Keith Bell, who is a leading expert on swimming psychology, has authored 11 books and dozens of articles, and has coached the University of Texas swim team, described a pattern of pervasive infringement by both universities and public school districts. *Id.* at 18–19. Because state actors could take Dr. Bell's intellectual property and use it without meaningful consequences, Dr. Bell decided to stop writing altogether. *Id.* at 19. Other copyright owners interviewed also described a significant impediment on their ability to create—namely, they were spending their time and resources attempting to litigate copyright cases against state actors (who were claiming sovereign immunity) rather than creating for the public good. *See id.* at 23–24, 25–26.

Ultimately, permitting one group to infringe with impunity will upset the balance of the copyright ecosystem as a whole by working against the very purpose of copyright protection as set forth in the Constitution: to grant creators exclusive rights in their works for a limited time so that they may receive a fair return on their labors. *See* U.S. Const. art. I, § 8, cl. 8; *Harper & Row Publishers, Inc. v. Nation*

Enters., 471 U.S. 539, 546 (1985) ("The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors."); *Twentieth Century Music. Corp. v. Aiken*, 422 U.S. 151, 155–56 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."). Unbridled sovereign immunity from infringement for state entities shifts the balance of copyright so that it is not creators or the public that benefit, as intended, but only state actors, who are able to receive the ultimate advantage by participating in the copyright system, while also free-riding off the efforts of others. State entities who act like private commercial entities and receive all the advantages of copyright law should not be permitted to shirk all accountability under the very system that protects their creative works against the infringement of others. This one-sided protection for state actors sets a bad example for all participants in the copyright system, telling them that copyright law can be flouted and ignored for financial benefit (for some, with no consequences), undermining the value of copyright for all. Copyright law, and the Constitution, do not countenance such a result.

CONCLUSION

For the reasons set forth above, the Copyright Alliance, as *amicus curiae*, respectfully requests that the Court reverse the district court's dismissal of the copyright claims against Appellees and remand to the district court.

Dated: January 27, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2021, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

/s/ Nancy E. Wolff
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7) because this brief contains 5,539 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by Microsoft® Word 2020, the word processing software used to prepare this brief.

This brief 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 this brief has been prepared in a proportionally spaced typeface using Microsoft® Word 2020, Times New Roman, 14 point.

/s/ Nancy E. Wolff
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Dated: January 27, 2021