No. 18-877

IN THE
Supreme Court of the United States

FREDERICK L. ALLEN AND
NAUTILUS PRODUCTIONS, LLC,
Petitioners,

v.

ROY A. COOPER, III,
AS GOVERNOR OF NORTH CAROLINA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., AND THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS, JOINED BY THE NORTH AMERICAN NATURE PHOTOGRAPHY ASSOCIATION, GRAPHIC ARTISTS GUILD, PROFESSIONAL PHOTOGRAPHERS OF AMERICA, AMERICAN PHOTOGRAPHIC ARTISTS, AND THE DIGITAL MEDIA LICENSING ASSOCIATION

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INTEREST OF *AMICI CURIAE*

This Brief is filed in accordance with Supreme Court Rule 37.3(a). Both parties have filed blanket consent letters stating that they consent to the filing of *amicus curiae* briefs in support of either party.[1]

The American Society of Media Photographers, Inc. (ASMP) is a 501(c)(6) non-profit trade association representing thousands of members who create and own substantial numbers of copyrighted photographs. ASMP's members envision, design, produce, and sell their photography in the commercial market to a wide range of entities, from multinational corporations to local mom-and-pop stores. In its seventy-five-year history, ASMP has been committed to protecting the rights of photographers and promoting the craft of photography.

National Press Photographers Association (NPPA) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing, and distribution. NPPA's members include video and still photographers, editors, students, and representatives of businesses that serve the visual journalism community. Since its founding in 1946, the NPPA has been the *Voice of Visual Journalists*, vigorously promoting the constitutional and intellectual property rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

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[1] In accordance with this Court's Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae*, their members, or their counsel have made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

The North American Nature Photography Association (NANPA) is a 501(c)(6) non-profit organization founded in 1994. NANPA promotes responsible nature photography as an artistic medium for the documentation, celebration, and protection of our natural world. NANPA is a critical advocate for the rights of nature photographers on a wide range of issues, from intellectual property to public land access.

Graphic Artists Guild, Inc. (GAG) has advocated on behalf of graphic designers, illustrators, animators, cartoonists, comic artists, web designers, and production artists for fifty years. GAG educates graphic artists on best practices through webinars, Guild e-news, resource articles, and meetups. The *Graphic Artists Guild Handbook: Pricing & Ethical Guidelines* has raised industry standards and provides graphic artists and their clients guidance on best practices and pricing standards.

American Photographic Artists (APA) American Photographic Artists is a not-for-profit trade association of professional photographers and copyright owners. APA members have a strong interest in the issues presented by this case because their businesses and livelihoods depend upon the broadly defined subject matter that is protected under the Copyright Act.

Professional Photographers of America (PPA) is the world's oldest and largest association representing professional photographers. Founded in 1868, PPA strives to provide its members with the artistic knowledge and entrepreneurial skills necessary to foster their success in the photographic industry. In addition to providing support to its members, PPA is also dedicated to preserving the intellectual-property rights of photographers, videographers, and other visual artists.

Digital Media Licensing Association, Inc. (DMLA) (formerly known as the Picture Archive Council of America, Inc.) is a not-for-profit trade association that represents the interests of entities who license still and motion images to editorial and commercial users. Founded in 1951, DMLA's membership currently includes over 100 image libraries worldwide that are engaged in licensing millions of images, illustrations, film clips, and other content on behalf of thousands of individual creators. Members include large general libraries, as well as smaller specialty libraries, all of which support and provide livelihoods to individual visual artists. Over the years, DMLA has developed licensing standards, promoted ethical business practices, and actively advocated for copyright protection on behalf of its members. In addition, DMLA educates and informs its members on issues including technology, tools, and changes in the marketplace.

SUMMARY OF ARGUMENTS

Harmful Impact on the Creative Economy — Invalidating the Copyright Remedy Clarification Act (CRCA) would severely disrupt the nation's trillion-dollar creative economy and threaten the livelihoods of millions of American workers and businesses, including the members of *amici*, who depend on copyright law to protect their works. Relying on cases like the Fourth Circuit opinion below, state actors freely and willfully infringe copyrights with virtually no fear of facing enforcement actions. And knowing that such enforcement actions would be fruitless under the current controlling authorities, copyright holders—most of whom are small businesses and individuals with limited resources—are forced to sit back and watch as state actors steal their works. Such infringement (i) deprives copyright holders of royalties; (ii) prevents

them from offering clients exclusive licenses (if a state can freely infringe, then a license can be exclusive in name only); (iii) devalues the copyrighted works and the domestic and international markets for such works; (iv) discourages potential clients from entering into license agreements; and (v) impedes the diffusion of knowledge that the constitutional grant of exclusive rights for creative works was intended to promote.

The Fourth Circuit's opinion, therefore, is contrary to the law (as set forth in Petitioners' brief), a violation of U.S. treaty obligations, and damaging to the nation's powerful creative economy and the millions of copyright holders who drive that economy.

First Amendment — This Court has long recognized the close connection between copyrights and the First Amendment, understanding that "the Framers intended copyright itself to be the engine of free expression." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985). It is also well settled that the First Amendment right to free speech includes the right *not* to speak and that states cannot compel speech. When Congress enacted the CRCA, it gave copyright holders not only the ability to enforce their copyrights against infringing state actors, but also the ability to prevent states from forcing them to speak against their will. Invalidating the CRCA would therefore not only deprive copyright holders of their ability to enforce their copyrights against state actors, but it would also allow states to present and promote the states' messages—e.g., messages regarding same-sex marriage, abortion rights, or gun control—using copyrighted works against the wishes of copyright holders who may disagree with those messages, thus causing a chilling effect on their First Amendment rights.

The Fourth Circuit's opinion should be overturned for this reason as well.

ARGUMENTS

I. Copyright infringement by state actors shocks the conscience and harms individual creators and small businesses that comprise the creative industry in the United States.

The depth and breadth of the creative community in this country cannot be overstated. Painters, sculptors, photographers, graphic designers, illustrators, musicians, screenwriters, poets, choreographers—the list could go on and on—act as both an economic engine and a cultural touchstone in society. Videographers and photographers like Frederick Allen are not the only ones harmed by the Fourth Circuit's ruling. A wide range of individual creators and small businesses also rely on the Copyright Act to protect their works from infringement, including infringement by state actors. Indeed, the success and sustainability of the creative enterprise depends on the principles of copyright first articulated in the Constitution and later codified in long-standing and well-settled law. U.S. Const. art. I § 8; 17 U.S.C. § 101 et seq. The efforts, skills, and importance of the creative community to this country should not be squandered based on a misunderstanding of this Court's precedent.

A. Copyright protection provides necessary support for the nation's creative economy.

In 2018, the International Intellectual Property Alliance studied the impact of "core copyright industries"—i.e., businesses whose "primary purpose is

to create, produce, distribute, or exhibit copyright materials"—on the economy, and determined that they contributed more than $1.3 trillion dollars to the GDP of the United States.[2] Such businesses are, in fact, the engine of innovation in the United States, and they rely on the Copyright Act to protect their creations. That same year, for example, the Copyright Office registered 560,013 claims covering more than 757,400 works.[3] The number of registrations only begins to tell the story of the number of creators and works in the country. In 2018, our organizations surveyed visual artists, asking how often they register, and 69% said "not at all."[4]

Further, the number of people employed by core copyright industries is a significant portion of the national workforce. In 2017, nearly 5.7 million American workers were employed in the creative economy, accounting for 4.54% of total private employment in the United States.[5] Importantly, many of those workers are either self-employed, like Mr. Allen, or work for small businesses. This is especially true in the photography,

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[2] Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2018 Report* 3 (2018), *available at* https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf.

[3] *Annual Report of the Register of Copyrights: Fiscal Year 2018*, United States Copyright Office, 2 (2019), *available at* https://www.copyright. gov/reports/annual/2018/ar2018.pdf.

[4] *See* Q11, *Survey of Visual Creators and Related Professionals Regarding the Copyright Office NPRM 2018 Proposed Fee Increases*, Appendix B to Coalition of Visual Artists- Comments in Response to U.S. Copyright Office NPRM re Copyright Office Fees at 62, *available at* https://www.regulations.gov/document?D=COLC-2018-0005-0160.

[5] Siwek, *Copyright Industries in the U.S. Economy: The 2018 Report* 3.

graphic arts, and video industries, where individual creators and small businesses are the norm, not the exception.[6] According to the Bureau of Labor Statistics, over 206,000 individuals and small businesses are classified as photographers or videographers in the United States, and over 277,000 are classified as graphic designers or fine artists.[7] These are real creators who regularly face real cases of infringement.

Because they have little bargaining power and much to lose, the challenge of protecting their works and livelihoods against infringers is always difficult. But it is insurmountable when the infringer is a state actor that claims sovereign immunity.

B. Copyright infringement by state actors disrupts the market.

Creators like Mr. Allen and the members of *amici* rely on national and international licensing markets to profit from their copyrighted works. When those markets are subverted—e.g., when states actors are

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[6] *Occupational Outlook Handbook,* Photographers, Bureau of Labor Statistics, U.S. Department of Labor (June 18, 2019), https://www.bls.gov/ooh/media-and-communication/photographers.htm.

[7] *Id.*; *Occupational Outlook Handbook*, Film and Video Editors and Camera Operators, Bureau of Labor Statistics, U.S. Department of Labor (Apr. 16, 2019), https://www.bls.gov/ooh/media-and-communication/film-and-video-editors-and-camera-operators.htm; *Occupational Outlook Handbook*, Graphic Designers, Bureau of Labor Statistics, U.S. Department of Labor (Apr. 17, 2019), https://www.bls.gov/ooh/arts-and-design/graphic-designers.htm; *Occupational Outlook Handbook*, Fine Artists, Including Painters, Sculptors, and Illustrators, Bureau of Labor Statistics, U.S. Department of Labor (Mar. 29, 2019), https://www.bls.gov/oes/current/oes271013.htm.

allowed to freely infringe—the value of the copyrighted works is irreparably harmed.[8]

The dynamics of visual-media licensing are complex. Royalty-free licenses under which the licensee pays a flat fee for the non-exclusive right to use images for a wide variety of purposes are a small part of the image licensing market.[9] The majority of visual creators license their works on a "rights-managed" basis. In rights-managed licensing, clients of visual-media professionals get the exclusive right to use images in specific ways, in specific locations, and for specific durations.[10] A licensee, for example, may have the exclusive right, for one year, to use a photograph in billboard advertisements along highways in Mississippi. Most clients who want to use visual works want the competitive advantage of such exclusivity so that their market presence is unique.[11]

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[8] *See* Nancy E. Wolff, *Enforcing Copyright: Dissecting the Infringement Case*, *in* Prof'l Bus. Practices in Photography 70, 78 (7th ed., 2008).

[9] *What are Royalty Free Images? Best Guides to use Royalty Free Photos!,* Stock Photo Guides (Jun. 16, 2016), https://www.stockphotoguides.com/use/royalty-free/what-are-royalty-free-images.

[10] *See, e.g.*, *Rights-Managed Images, Excellence, Exclusivity and Control*, Getty Images, https://www.gettyimages.com/creative-images/rightsmanaged (last viewed May 8, 2019); Susan Carr, *Understanding Licensing – The Key to Being a Professional Photographer*, *in* Prof'l Bus. Practices in Photography 3 (7th ed., 2008).

[11] Because exclusivity carries the most value to clients, exclusive licenses constitute the most lucrative licensing market for visual creators. For example, graphic artists surveyed on organizational identity design report that for logo design alone, fees range from $25,000–$75,000 for a national/global client. Similarly, illustrators report flat fees of $1,800–$5,000 for cover editorial

But if the competitor is an infringing state actor that claims sovereign immunity from copyright infringement, the licensee has no remedy, and its license is exclusive in name only. In such a case, both licensor and licensee are harmed. The licensee does not receive the exclusivity it paid for, and the licensor's financial and contractual efforts, as well as its reputation, are damaged.[12] In addition, the licensor risks losing future business because potential clients are much less likely to pay for the "exclusive" right to use images that are being used freely by a competitor, especially if that competitor is an infringing state that is free from liability.[13] Thus, the Fourth Circuit's approach would allow state actors to effectively destroy the creator's

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illustration for major publications, and sales of the original artwork at an additional 100-300% of that flat fee. *Graphic Artists Guild Handbook: Pricing & Ethical Guidelines*, *Comparative Fees for Graphic Design* 156, and *Comparative Fees for Editorial Illustration* 256 (15th ed. 2018).

[12] *See* Copyright Alternative in Small Claims Enforcement Act of 2017, H.R. 3945: Hearing Before the House Comm. On the Judiciary, 115th Cong. (2018) (Statement of Jenna Close, Commercial Photographer), *available at* https://www.youtube.com/watch?v=GuiQUasmxno. *See also*, *Former National Board Chair Close Urges House Judiciary Committee to Enact CASE Act, American Society of Media Photographers* (Sept. 27, 2018), https://www.asmp.org/advocacy/former-asmp-national-board-chair-close-urges-house-judiciary-committee-to-enact-case-act/; Jenna Close, *Advocacy is a Verb: My Testimony on The Hill*, American Society of Media Photographers (Oct. 17, 2018), *available at* https://www.asmp.org/advocacy/advocacy-is-a-verb-my-testimony-on-the-hill/.

[13] *See Royalty Free or Rights Managed? Best Comparative Guide*, Stock Photo Guides (July 16, 2016), https://www.stockphotoguides.com/use/royalty-free/royalty-free-or-rights-managed ("[royalty-free images] are also often in use by different people, companies and brands at the same time").

licensing market for any image the state actor appropriates.

Further, infringers have an unfair advantage over businesses that pay to license images. Of course, a business will have greater profits if it steals the images it uses than if it pays for them—the lower the costs, the higher the profits. Under the Fourth Circuit's ruling, states have such an unfair advantage as a matter of law.

C. Invalidating the CRCA would create a royalty-free compulsory licensing system for states that violate the Berne Convention.

A system that does not require states to license copyrighted works would effectively create a royalty-free, common-law, compulsory licensing system for government use of visual and written works. Compulsory licensing for these works exists in other countries through reprographic rights organizations (RROs) that establish set fees for government entities.[14] Individual

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[14] *See, e.g.*, *Digital Business Models*, International Federation of Reproduction Rights Organizations 8–12 (2010), *available at* http://www.ifrro.org/sites/default/files/ifrro_brochure_web.pdf (outlining the general terms of various collective licensing systems for digital uses of copyright works in certain countries); John-Willy Rudolph, Executive Director, Norwegian Reproduction Rights Organization (KOPINOR), *The Establishment and the Role of a Reproduction Rights Organization*, World International Property Organization National Seminar on Copyright and Related Rights for Lawyers and Judges (Apr. 27, 28, 2005), *available at* https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=47561 (outlining the relationship between the obligations of the Berne Convention and RROs); *Individual Author Distributions, Frequently Asked Questions*, Author's Coalition of America, LLC (2019), http://www.authorscoalition.org/individual_author_distributions/faq.html.

U.S. authors have collectively been paid millions of dollars from the fees collected by foreign RROs.[15] These same creators would earn nothing from a system that would exist in the U.S. if the CRCA is invalidated.

In addition, holding that state actors may freely infringe the works of foreign authors with impunity would violate the Berne Convention for the Protection of Literary and Artistic Works. Parties to the convention are required to recognize the exclusive reproduction rights of copyright holders from other parties to the convention. *See* Berne Convention for the Protection of Literary and Artistic Works, art. 9, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended on Sept. 28, 1979, S. Treaty Doc. No. 99-27 (1986).[16] But if states are immune from liability for infringement, they cannot be held liable for infringing foreign copyrights, which would clearly violate Berne. *Id*.; *Golan v. Holder*, 565 U.S. 302, 308 (2012) (each country must afford the minimum level of protection specified by Berne). Thus, in addition to protecting U.S. authors, the CRCA—passed after Congress enacted the Berne Convention Implementation Act of 1988—properly promotes the constitutional goal of diffusing knowledge through adherence to Berne. *See Golan v. Holder*, 565 at 327 (holding that § 514 "falls comfortably within Congress' authority under the Copyright

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[15] *See, e.g.*, *Individual Author Distributions*, Authors Coalition of America, LLC (July 29, 2019), http://www.authorscoalition.org/ ("To date, ACA has paid out over $2.75 million in reprographic royalties to individual American creators.").

[16] Exceptions such are RROs are only allowed in "special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." *See Berne Convention, art. 9.*

Clause. Congress rationally could have concluded that adherence to Berne 'promotes the diffusion of knowledge.'").

In short, the United States does not have a collective licensing system for visual or written works, and it is not appropriate for the courts to circumvent federal law and congressional authority by creating a *free* collective licensing system that inures solely to the benefit of state governments and violates international obligations. *See Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) ("It is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives.").

D. Recent cases illustrate the struggles photographers face when attempting to exercise their constitutional rights against infringing state actors.

Courts that have dismissed copyright cases based on sovereign immunity have opined that there may be a state-law solution in the form of a takings claim that could provide a remedy for a state's infringement. *See, e.g.*, *Chavez v. Arte Publico Press*, 204 F.3d 601, 607 (5th Cir. 2000) (holding that the CRCA record did not reflect that "it considered the adequacy of state remedies that might have provided the required due process of law"); *Romero v. Cal. Dept. of Transp.*, No. CV 08-8047 PSG (FFMx), 2009 WL 650629, at *4 (C.D. Cal. Mar. 12, 2009) (listing takings claims as "other possible remedies in state courts"). Similarly, in 2000, the Register of Copyrights testified that "an action for the uncompensated taking of private property" might

be a viable claim against infringing states, but noted that this was an untested theory.[17]

More recently, however, several attempts to resolve state infringements through takings claims have failed. Photographer Jim Olive, for example, sued the University of Houston asserting a claim under both state and federal takings law after the University used his photographs without permission to promote the school. The First Court of Appeals of Texas rejected his claims, holding that "a governmental unit's copyright infringement is not a taking." *Univ. of Houston Sys. v. Jim Olive Photography*, No. 01-18-00534-CV, 2019 WL 2426301, at *1 (Tex. App.—Houston [1st Dist.] June 11, 2019, no pet. h.). Likewise, in 2005, a North Carolina federal district court held that a Fifth Amendment takings claim was barred by sovereign immunity. *See Hairston v. N. Car. Agric. & Tech. State Univ.*, No. 1:04 CV 1203, 2005 WL 2136923, at *7, *9 (M.D.N.C. Aug. 5, 2005) (citing cases holding that the Eleventh Amendment bars Fifth Amendment takings claims). The circular track that these cases run alongside the sovereign immunity cases represents a gross injustice.

Further, many infringements are not reflected in court records, either because states have asserted sovereign immunity at the settlement stage or attorneys have declined to take infringement cases against state actors precisely because of that presumptive

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[17] Marybeth Peters, Register of Copyrights, State Sovereign Immunity and Protection of Intellectual Property: Address Before the U.S. Senate Comm. on the Judiciary, Subcomm. on Intell. Prop., 109th Cong. (July 27, 2000), *available at* https://www.copyright.gov/docs/regstat72700.html.

shield.[18] Mr. Allen and all those similarly situated face a hopeless choice: allow their works to be infringed and their rights violated, or attempt to fight back knowing that recent rulings have made it nearly impossible to hold state actors liable for such infringements.

This is not just a speculative concern. Countless cases have been summarily dismissed in both federal and state courts due to an incorrect interpretation of the CRCA and exercise of sovereign immunity. *Amici* NPPA and ASMP have repeatedly heard from their members who are frustrated by non-responsive state actors and who realize it is fruitless to pursue their claims. In addition, for every settlement attempt that is rebuffed, there are still more infringements that do not even get to the settlement stage. Within the industry, attorneys who have expertise in representing photographers tell us that they rarely take cases where they know sovereign immunity can be asserted, given that an infringement claim against a state actor is most likely a dead-end cause of action.

The reality facing our members demonstrates how right Congress was about the future of copyright without the CRCA. And while courts speculate about whether the number of cases cited in the legislative history of the CRCA was enough to show a widespread pattern of infringement by state actors,[19] we wonder: how many would be enough? For each infringement by

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[18] *See* Brief of The Copyright Alliance as Amicus Curiae Supporting Appellees at 7, *Allen v. Cooper*, No. 17-1522 (4th Cir. Oct. 20, 2017), ECF No. 44-1. ("In total, Getty Images has been able to negotiate a settlement payment in only two cases in which state entities claimed they would be immune from a damages suit under the Eleventh Amendment.").

[19] *See Allen v. Cooper*, 895 F.3d 337, 352 (4th Cir. 2018); *Chavez v. Arte Publico Press*, 204 F.3d at 606.

a state, creators are robbed of their licensing fees. The losses to creators continue to grow. If the CRCA were invalidated, the damage to the creative industry would be incalculable and devastating.

E. The Fourth Circuit wrongly assumed that copyright infringement is typically a negligent act.

The Fourth Circuit opinion implies that a state's infringement might not violate due process because it could be a "negligent act," believing that the CRCA record had "few" examples of "intentional" infringements. *Allen*, 895 F.3d at 352.[20] Similarly, the Fifth Circuit, in holding that the CRCA is unconstitutional, relied on its conclusion that "most copyright infringement by states is unintentional," and "[the States] would want [immunity] only as a shield for the State treasury from the occasional error or misunderstanding or innocent infringement." *Chavez*, 204 F.3d at 607. It is inconsistent with modern copyright law, however, to assert that infringers are absolved of fault because they "did not know" they were infringing. The Fourth Circuit itself has summarily disposed of the notion of "merely negligent" infringement in cases of intentional copying, holding that even when an infringer believes that an image is freely available, that belief is not reasonable given that "all contemporary photographs are presumptively under copyright." *Brammer v. Violent Hues Prods., LLC*, No. 18-1763, 2019 WL 1867833, at *6 (4th Cir. 2019). The *Brammer* court further noted that "[a]s a basic matter, copyright infringement is a strict liability offense, in which a violation does not

[20] Given the record in this case, it cannot be credibly claimed that Respondents were unaware of the copyright in Mr. Allen's work, which makes their infringement willful, not negligent.

require a culpable state of mind." *Id.* at *5. Notably, the economic harm to creators and their clients occurs regardless of whether an infringement is willful.

Indeed, courts consider infringing conduct willful if a defendant "has recklessly disregarded the [copyright], or upon a showing that the defendant knew or should have known it infringed upon a copyrighted work." *Lance v. Freddie Records, Inc*., 986 F.2d 1419 (5th Cir. 1993) (per curiam); *see also Island Software & Computer Serv., Inc. v. Microsoft Corp*., 413 F.3d 257, 263 (2d Cir. 2005) (holding infringement is willful when "the defendant's actions were the result of 'reckless disregard' for, or 'willful blindness' to, the copyright holder's rights"). The circuits generally agree that "a party may act recklessly by refusing, as a matter of policy, to even investigate or attempt to determine whether particular [works] are subject to copyright protections." *Unicolors, Inc. v. Urban Outfitters, Inc*., 853 F.3d 980, 992 (9th Cir. 2017); *Friedman v. Live Nation Merch., Inc.*, 833 F.3d 1180, 1186 (9th Cir. 2016) (failing to explicitly inquire or seek information about the copyright status of a work amounts to "recklessness or willful disregard, and thus willfulness."); *BMG Rights Mgmt. (US) LLC v. Cox Commc'n Inc*., 881 F.3d 293, 312 (4th Cir. 2018) ("copyright infringement is willful if the defendant recklessly disregards a copyright holder's rights"). And knowledge that a use is infringing "need not be proven directly but may be inferred from the defendant's conduct." *N.A.S. Imp., Corp. v. Chenson Enters., Inc*., 968 F.2d 250, 252 (2d Cir. 1992). Thus, contrary to the Fourth and Fifth Circuits' position that infringing state entities are merely "negligent," the failure to exercise due diligence or investigate the copyright status of a work supports a finding of willfulness. *Id*.

II. Copyright infringement is forced speech that violates the First Amendment.

A. Copyright protections are inextricably intertwined with the First Amendment.

The question whether copyright infringement by a state is unconstitutional is fundamentally different from the same question presented in the trademark and patent context because copyright is so closely linked to the First Amendment. Indeed, "the Framers intended copyright itself to be the engine of free expression." *Harper & Row Publishers*, 471 U.S. 539, 558 (1985). And this Court has repeatedly drawn connections between the free expression of ideas and the economic incentive supplied by copyright. *See id.* ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."); *Eldred*, 537 U.S. at 219 (same); *Golan v. Holder*, 565 U.S. 302, 326 (same). The *Eldred* Court further held that "patents and copyrights do not entail the same exchange" and discouraged interpreting the constitutionality of the Copyright Act through the same lens used to interpret patent law. *Eldred*, 537 U.S. at 190.

Even before *Harper & Row* was decided in 1985, this Court recognized that "the fortunes of the law of copyright have always been closely connected with freedom of expression" and that copyright law seeks to balance "the interest of the writer in the control and exploitation of his intellectual property, the related interest of the publisher, and the competing interest of society in the untrammeled dissemination of ideas." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 n.12 (1984) (quoting *Foreword* to Benjamin Kaplan, *An Unhurried View of Copyright* vii-viii (1967)). This Court has also held that the reward

provided by copyright "is the best way to advance public welfare through the talents of authors and inventors in Science and useful Arts," *Mazer v. Stein*, 347 U.S. 201, 219 (1954), and that the public good is served by the incentive of copyright, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

The close connection between copyright and the First Amendment cannot be ignored.

B. The CRCA provides a remedy for violation of the First Amendment's guarantee of the freedom *not* to speak.

Photography, videography, and other visual arts are unquestionably protected First Amendment speech. *See Regan v. Time, Inc.*, 468 U.S. 641, 646 (1984) (finding that a statute banning the use of images of currency based on the purpose of the use was an unconstitutional content-based restriction); *Jacobellis v. Ohio*, 378 U.S. 184, 187 (1964) ("Motion pictures are within the ambit of the constitutional guarantees of freedom of speech and of the press."); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003) ("The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures."); *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) ("[P]aintings, photographs, prints and sculptures . . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection.").

It is also well-settled that the government cannot *compel* speech; the First Amendment protects creators' rights to decide what to say and where their works are

published. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463–64 (2018) ("We have held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) and *Harper & Row*, 471 U.S. at 559)); *Riley v. Nat'l Fed'n of Blind of N. C., Inc.*, 487 U.S. 781, 796–797 (1988) ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." (emphasis in original)); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256–57 (1974) (holding newspaper editors and publishers cannot not be compelled "to publish that which reason tells them should not be published").[21]

Therefore, when the University of North Carolina (UNC) repeatedly infringed the copyright in a photograph of four civil rights activists in Greensboro, it forced that photographer to speak the message associated with UNC's chosen use—in that case, promotion of UNC's football program. *See Hairston*, 2005 WL 2136923, at *2. When the Memphis Convention & Visitors Bureau made a professional photograph of a Memphis-area landmark "available to the general public for use in e-cards and virtual postcards" on various commercial sites, it forced the photographer to

[21] *See also*, *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1243 (11th Cir. 1999) ("The decision to air the interview of one person but not another is at heart an editorial decision."); *Baltimore Sun Co. v. State*, 340 Md. 437, 453 (1995) ("[A] judicial order conditioning access to a juvenile proceeding upon the required publication of specific material is unconstitutional to the same extent as an order conditioning access upon a restraint from publication."); *Passaic Daily News v. N.L.R.B.*, 736 F.2d 1543, 1558 (D.C. Cir. 1984) ("[G]overnmental coercion [to publish a column] gives rise to a confrontation with the First Amendment.").

speak the message of the Bureau.[22] And when the North Carolina Department of Natural and Cultural Resources published Mr. Allen's work without his consent, it not only infringed his copyright, it also violated his inextricably intertwined First Amendment rights. *See Miami Herald Publ'g Co.*, 418 U.S. at 258 (holding that a "compulsion to publish" is inconsistent with the First Amendment).

Simply put, invalidating the CRCA would clear the way for states to present and promote their messages by using copyrighted works against the wishes of the journalists and artists who created them. A state that opposes same-sex marriage, for example, could use the images of a wedding photographer to promote its position.[23] Or a state—also not accountable under defamation law—could use a stock photo of a woman to promote its HIV health campaign, regardless of the HIV-status of the woman or restrictions attached to

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[22] Conversely, at least two copyright cases dismissed under the sovereign-immunity defense involved the state's destruction of works by a government entity—resulting in the government silencing speech. *See, e.g.*, *Romero*, 2009 WL 650629, at *1 (state destroyed a mural in violation of the Visual Artists Rights Act or VARA, 17 U.S.C. § 106A); *De Romero v. Inst. of Puerto Rican Culture*, 466 F. Supp. 2d 410, 412 (D.P.R. 2006) (sculpture destroyed in violation of VARA).

[23] *See*, *e.g.*, *Hill v. Pub. Advocate of the United States*, 35 F. Supp. 3d 1347, 1352 (D. Colo. 2014) (declining to dismiss copyright infringement lawsuit in which a photo of a same-sex married couple was used without permission in a campaign mailer maligning the marriage); *SPLC Sues Anti-gay Hate Group Over Defilement of Couple's Engagement Photo*, Southern Poverty Law Center (September 26, 2012), http://www.splcenter.org/get-informed/news/splc-sues-anti-gay-hate-group-over-defilement-of-couple-s-engagement-photo.

the stock photo.[24] Each infringing use of imagery, if committed by a state actor, would amount to unconstitutional forced speech. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (holding that "compelling individuals to speak a particular message, [] alter[s] the content of their speech" and violates their First Amendment rights).

In the journalism context, NPPA members and their employers eschew infringement by government for ethical reasons and have used copyright to protect their impartiality and uphold NPPA's Code of Ethics as well as other journalism ethical codes.[25] The ethics and impartiality of a journalist is essential to the public trust required of a journalist-reader relationship. Thus, even those photographers who consider themselves neutral observers use their copyright as a tool to serve as guardians, protecting the reputations of the subjects, and are often the only line of defense against unauthorized uses that could injure the subject.[26]

Under the rule against compelled speech, "the speaker has the right to tailor the speech, [which] applies not

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[24] *See, e.g.*, Matt Reynolds, *Nude Model Says Daily Mail Defamed Her*, Courthouse News Service (Sept. 13, 2013), https://www.courthousenews.com/Nude-Model-Says-Daily-Mail-Defamed-Her/ (a news organization's unauthorized use of a woman's photo with an HIV story implied that she had HIV, when the story was not about her and she denied being HIV-positive).

[25] *See Code of Ethics*, National Press Photographers Association, https://nppa.org/code-ethics; *see also SPJ Code of Ethics*, https://www.spj.org/ethicscode.asp ("Avoid conflicts of interest, real or perceived.").

[26] *See* Jessica Silbey, *Control over Contemporary Photography: A Tangle of Copyright, Right of Publicity, and the First Amendment*, 42 Colum. J.L. & Arts 351, 357–59 (2019).

only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. at 573 (1995). Importantly, this rule applies not only to news organizations and other professional publishers. The protection against compelled speech applies to businesses, both large and small, as well as individuals. And it applies regardless of the level of sophistication of their expression. *Id.; Wooley v. Maynard,* 430 U.S. at 717 (1977) (state cannot require citizens to display state motto on their license plates).

Yet the Fourth Circuit decision below would allow states to communicate their own approved messages through the misappropriation of copyrighted works. And it would provide them with limitless use of images for the purpose of promoting those messages—even when the messages relate to government policies, programs, or enterprises that the photographer or artist disagrees with.

This Court has repeatedly confirmed that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 638 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997). When Congress enacted the CRCA, it not only had the record before it, it had in its collective conscious the constitutional weight of the value of copyright, the importance of copyright law to our international obligations, and the nexus between copyright and free expression. The CRCA provides a valid, efficient, and effective means

for protecting the First Amendment rights of copyright holders whose speech is unconstitutionally compelled when states infringe their works.

CONCLUSION

For the reasons set forth above, *amici* join Petitioners in respectfully requesting that the Court reverse the Fourth Circuit's opinion and hold that the CRCA is valid.

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