FILED
19-0605
10/2/2019 4:47 PM
tex-37333574
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 19-0605

IN THE SUPREME COURT OF TEXAS

JIM OLIVE PHOTOGRAPHY, D/B/A PHOTOLIVE, INC.,
Petitioner,

v.

UNIVERSITY OF HOUSTON SYSTEM
Respondent.

On Petition for Review from the
First Court of Appeals at Houston, Texas
Cause No. 01-18-00534-cv

Amicus Brief of the National Press Photographers Association and the American Society of Media Photographers, joined by the North American Nature Photography Association, American Photographic Artists, Digital Media Licensing Association, Inc., Professional Photographers of America, and Graphic Artists Guild, Inc., in Support of the Petition for Review

Alicia Wagner Calzada, *Deputy General Counsel, Lead Counsel*
State Bar No. 24076296
ALICIA WAGNER CALZADA, PLLC
305 E. Ramsey Rd, suite 305
San Antonio, TX 78216
Te: 210-825-1449
alicia@calzadalegal.com
Mickey H. Osterreicher, *General Counsel*
Counsel for Amicus National Press Photographers Association

Thomas B. Maddrey, *General Counsel*
State Bar No. 24092740
MADDREY PLLC
901 Main St., Ste. 6530
Dallas, TX 75206
Tel: (214) 702-9862
tbm@maddreypllc.com
Counsel for Amicus American Society of Media Photographers, Inc.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Treaties

Constitutional Provisions

Briefs

IDENTITY OF PARTIES AND COUNSEL

Petitioner: Jim Olive Photography d/b/a Photolive, Inc.

Counsel for Petitioner:

Owen J. McGovern
State Bar No. 24092804
omcgovern@beckredden.com
David M. Gunn
State Bar No. 08621600
dgunn@beckredden.com
Joe W. Redden
State Bar No. 16660600
jredden@beckredden.com
BECK REDDEN LLP
1221 McKinney, Suite 4500
Houston, TX 77010
(713) 951-3700
(713) 951-3720 (Fax)

Respondents: University of Houston System

Counsel for Respondents:

Kyle D. Hawkins
State Bar No. 24094710
kyle.hawkins@oag.texas.gov
Office of the Texas Attorney General
Solicitor General Division
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700
(512) 474-2697 (Fax)

STATEMENT OF INTEREST OF AMICI

Pursuant to Texas Rules of Appellate Procedure 11(b) and (c), the brief is being tendered on behalf of the National Press Photographers Association, the American Society of Media Photographers, The North American Nature Photography Association, American Photographic Artists, Digital Media Licensing Association, Graphic Artists Guild, Inc. and Professional Photographers of America. The National Press Photographers Association and the American Society of Media Photographers paid for the preparation of the brief.

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.

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, ranging 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.

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.

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.

American Photographic Artists (APA) 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.

ISSUES PRESENTED, STATEMENT OF JURISDICTION, STATEMENT OF THE CASE, & STATEMENT OF FACTS

Amici adopt the Issues Presented, Statement of Jurisdiction, the Statement of the Case, and the Statement of Facts in the Brief of Petitioner.

SUMMARY OF THE ARGUMENT

This case presents an opportunity for this Court to end lawless behavior by state entities and address a significant sector of the economy by ending unrestricted copyright infringement by the state. Allowing such infringement to continue without a remedy would severely disrupt a creative economy worth billions of dollars in Texas—and trillions of dollars nationally—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. In the face of a lack of clarity on sovereign immunity, state actors have begun to freely and willfully infringe copyrights with virtual impunity. In Texas, the only currently available remedy against such lawlessness is a takings claim—something asserted as a proper remedy by Congress and courts alike.

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. If there is no remedy for image theft under copyright law or the takings clause, then states will be free to use copyrighted work against the wishes of the copyright owner and will use the voice of the copyright holder to present and promote the states' message- a violation of the First Amendment right to *not* speak.

ARGUMENT

This case will have a lasting impact on the creative industry. As the appeals court noted, "No Texas case appears to have addressed whether a copyright is property for purposes of the takings clause and whether copyright infringement by a state actor is a taking." *Univ. of Houston Sys. v. Jim Olive Photography*, 01-18-00534-CV, 2019 WL 2426301 at *5 (Tex. App.–Houston [1st Dist.] June 11, 2019, pet. filed). The significance of this question "presents a question of law that is important to the jurisprudence of the state" such that the Petition for Review should be granted in this case. *See* Tex. Gov't Code § 22.001.

Recognizing the gross injustice of unfettered copyright infringement by states, Congress passed the Copyright Remedy and Clarification Act (CRCA) in 1990. Unfortunately, the Fifth Circuit Court of Appeals held the CRCA to be unconstitutional in *Chavez v. Arte Publico Press* and restored sovereign immunity to states in our circuit. 204 F.3d 601, 607 (5th Cir. 2000). As a direct result, Texas creators currently have no remedy under the federal law for copyright infringement by state actors. However, a similar case was granted certiorari and is set to be argued before the U.S. Supreme Court in November. *Allen v. Cooper*, 139 S. Ct. 2664, 204 L. Ed. 2d 1068 (2019). The importance of this issue was clear to the U.S. Supreme Court, and we expect an answer to the question of whether the CRCA is valid.

In the face of uncertainty over the CRCA, the U.S. Copyright Office and

multiple federal judges have opined that if copyright claims against state actors are unavailable, a takings claim such as this one would be the appropriate remedy. *See, e.g.*, *Chavez* 204 F.3d at 607 *Romero v. Cal. Dept. of Transp.*, CV 08-8047PSG (FFMX), 2009 WL 650629, at *4. The holding below that this takings claim is not viable flies in the face of authority, threatens the livelihood of hundreds of thousands of Texans, and puts into play a devastating impact on Texans' First Amendment rights against compelled speech.

It would be wholly inappropriate, under both the Fifth Amendment Due Process clause, Article I, Section 17 of the Texas Constitution and Article I section 8 of the U.S. Constitution for states to have the ability to "pirate[] the entirety of [Jim Olive's] work" with impunity as the opinion below endorses. *Univ. of Houston Sys.*, 2019 WL 2426301 at *12.

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

The depth and breadth of the creative community in the state of Texas cannot be overstated. Photographers, graphic designers, writers, painters, sculptors, illustrators, musicians, movie makers, screenwriters, poets, choreographers—the list could go on and on—act as both an economic engine and a cultural touchstone in our society. Photographers like Jim Olive are not the only ones harmed by state infringement. Businesses tangentially related to core-copyright industries, as well as

businesses who properly license copyrighted work, also rely on the ability of copyright holders 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 state and nation should not be usurped by greedy state actors.

II. Copyright protection provides necessary support for both Texas and 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.[1] 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.[2] The number of registrations only begins to tell the story of the

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

[2] *Annual Report of the Register of Copyrights: Fiscal Year 2018*, UNITED STATES COPYRIGHT OFFICE, 2 (2019), https://www.copyright.gov/reports/annual/2018/ar2018.pdf.

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."[3] One of the reasons that few creators register their works is the overall frustration they feel due to the inability to protect their copyright. State-sponsored infringement is a contributing factor to this dynamic.

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.[4] Importantly, many of those workers are either self-employed, like Jim Olive, or work for small businesses. This is especially true in the photography, graphic arts, and video industries, where individual creators and small businesses are the norm, not the exception.[5] 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

---

[3] *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, https://www.regulations.gov/document?D=COLC-2018-0005-0160.

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

[5] 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.

as graphic designers or fine artists.[6]

Closer to home, Texas is home to 123,000 citizens who are photographers, graphic designers, writers songwriters, or music publishers, and these Texans are all vulnerable to infringements.[7] The state as a whole contributes more than $151 billion to the U.S. GDP from copyright dependent industries such as visual art, music, television, software, and radio.[8] Copyright is an engine of the nation's creative economy, and Texans are critical to keeping this engine powered. 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 immunity from copyright and takings law.

A. Unchecked copyright infringement by state actors damages the copyright in the underlying works.

When it analyzed the importance of copyright's "right to exclude," the court below supposed that the "use" by the state in this case had no impact on the

---

[6] *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.

[7] Copyright Facts for Texas, COPYRIGHT ALLIANCE, https://copyrightalliance.org/wp-content/uploads/2018/07/Texas.pdf (last visited Sept. 29, 2019).

[8] *Id.*

copyright, opining that the use was "nonrivalrous." *Univ. of Houston Sys.*, 2019 WL 2426301 at *11. But the court misconstrued the fact that unfettered, unauthorized "use" of a copyrighted work has a devastating impact on the value of a work that amounts to a taking.

Creators like Mr. Olive and the members of *amici* rely on national and international licensing markets to benefit from their copyrighted works. When those markets are subverted—e.g., when states actors are allowed to freely infringe—the value of the copyrighted works is irreparably harmed.[9]

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 just a small part of the image licensing market.[10] The majority of visual creators license their works on a "rights-managed" basis. Under rights-managed licensing, clients of visual-media professionals receive the exclusive right to use images in specific ways, in specific locations, and for specific durations.[11] A licensee, for example, may have the exclusive right, for one year, to

---

[9] *See* Nancy E. Wolff, *Enforcing Copyright: Dissecting the Infringement Case*, PROF'L BUS. PRACTICES IN PHOTOGRAPHY 70, 78 (7th ed., 2008).

[10] *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.

[11] *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*, PROF'L BUS.

use a photograph in billboard advertisements. Most clients who want to use visual works want the competitive advantage of such exclusivity so that their market presence is unique.[12] But if an infringing state actor claims protection from suit under sovereign immunity and the takings clause, an exclusive 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.[13] 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 freely misappropriated by a

PRACTICES IN PHOTOGRAPHY 3 (7th ed., 2008).

[12] 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 illustration for major publications, and sales of the original artwork at an additional 100-300% of that flat fee. *Comparative Fees for Graphic Design* 156, and *Comparative Fees for Editorial Illustration* 256, GRAPHIC ARTISTS GUILD HANDBOOK: PRICING & ETHICAL GUIDELINES (15th ed. 2018).

[13] *See Copyright Alternative in Small Claims Enforcement Act of 2017*, YOUTUBE.COM, https://www.youtube.com/watch?v=GuiQUasmxno (last visited Sept. 29, 2019) (H.R. 3945: Hearing Before the House Comm. on the Judiciary, 115th Cong. (2018) (Statement of Jenna Close, Commercial Photographer)); *See also*, *Former National Board Chair Close Urges House Judiciary Committee to Enact CASE Act, American Society of Media Photographers*, 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), https://www.asmp.org/advocacy/advocacy-is-a-verb-my-testimony-on-the-hill/.

competitor, especially if that competitor is a liability-proof state actor.[14] Thus, the First Court of Appeal's approach would allow state actors to effectively destroy the creator's licensing market for any image the state actor takes.

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 First Court's ruling, states have such an unfair advantage as a matter of law.

B. The unfettered state use permitted under the First Court of Appeals' decision would create a royalty-free compulsory licensing system for states that violates 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.[15] Individual U.S. authors have collectively

---

[14] *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").

[15] *See, e.g.*, *Digital Business Models*, INTERNATIONAL FEDERATION OF REPRODUCTION RIGHTS ORGANIZATIONS 8–12 (2010), http://www.ifrro.org/sites/default/files/ifrro_brochure_web.pdf; 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),

been paid millions of dollars from the fees collected by foreign RROs.[16] These same creators would earn nothing from a system that would exist in the U.S. if there is no remedy for state infringement.

In addition, if citizens of the state of Texas cannot recover for state-sponsored copyright infringement, state actors can also freely infringe the works of foreign authors with impunity which 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).[17] If the state of Texas is immune from infringing Jim Olive's copyright under the lower court's theory, they also cannot be

---

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.

[16] *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.").

[17] Exceptions such are RROs are only allowed when it "does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." *See Berne Convention for the Protection of Literary and Artistic Works (Paris Text 1971), Article 9*, CORNELL UNIVERSITY LAW SCHOOL: LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/treaties/berne/9.html (last visited Sept. 29, 2019).

held liable for infringing foreign copyrights, which would clearly violate Berne. *Id*.; *Golan v. Holder*, 565 U.S. 302, 308 (2012).

There is no collective licensing system in the United States, and it is not appropriate for the courts to circumvent federal law and congressional authority by creating a *free* collective licensing system that benefits state entities 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.").

C. Courts that have invalidated the CRCA have suggested that takings claims are the appropriate remedy.

Across the nation, and here in the federal Fifth Circuit, courts that dismissed copyright cases based on sovereign immunity 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* 204 F.3d at 607; *Romero v. Cal. Dept. of Transp.*, CV 08-8047PSG(FFMX), 2009 WL 650629, at *4 (C.D. Cal. Mar. 12, 2009) (listing takings claims as "other possible remedies in state courts"). Additionally, the Register of Copyrights has testified that a takings claim might be a viable claim against infringing states.[18]

[18] 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.*, COPYRIGHT.GOV (July 27, 2000),

The countless state infringement cases that have been dismissed under the sovereign immunity / CRCA invalidity theory are just the tip of the injustice iceberg. Many state infringements are not reflected in court records: states assert sovereign immunity at the settlement stage and attorneys decline to take infringement cases against state actors because of that presumptive shield.[19] Olive and those similarly situated face a hopeless choice: allow their works to be infringed, or attempt to fight back, knowing that it is nearly impossible to hold state actors liable for such infringements.

This is not just a speculative concern. Countless cases have been summarily dismissed under the theory of sovereign immunity. *Amici* NPPA and ASMP have repeatedly heard from members who are frustrated by non-responsive state actors and who realize it is fruitless to pursue their claims. For every settlement attempt that is rebuffed, there are infringements that never get to the settlement stage. Within the industry, attorneys who represent photographers tell us that they rarely take cases where sovereign immunity can be asserted because an infringement claim against a state actor is usually a dead-end cause of action.

---

https://www.copyright.gov/docs/regstat72700.html.

[19] *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.").

If the U.S. Supreme Court holds that a takings claim is the sole remedy against state infringers, and a takings claim is unavailable in Texas, the damage to the creative industry would be incalculable, and devastating.

III. Allowing unchecked copyright infringement by state actors would permit forced speech that violates the First Amendment.

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

Copyright is so closely linked to the First Amendment that "the Framers intended copyright itself to be the engine of free expression." *Harper & Row Publishers, Inc. v. National Enterprises*, 471 U.S. 539, 558 (1985). The U.S. Supreme 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 v. Ashcroft*, 537 U.S. 186, 212 (same); *Golan v. Holder*, 565 U.S. 302, 326 (2012) (same).

Even before *Harper & Row*, the Supreme 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). 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 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 University violated Jim Olive's First Amendment 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) (applying First Amendment analysis to images); *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."). 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").[20]

When the University infringed Jim Olive's copyright, it also forced him to speak the message associated with the University's use—in this case, endorsement of the Bauer College of Business.[21] With this, it violated his 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). The same is true of other state infringement cases such as when the University of North Carolina (UNC) repeatedly infringed the copyright in a photograph of four civil rights activists in Greensboro, and therefore forced that photographer to speak the message associated with UNC's chosen use—in that case, promotion of UNC's football program and when the North Carolina Department of Natural and Cultural Resources published Frederick Allen's work without his consent, it too compelled speech on the part of Allen. *See Hairston*

---

[20] S*ee 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.").

[21] Amici find it horribly ironic that a business school would infringe copyright when it should be teaching its students about the financial risk associated with such infringements.

v. N. Carolina Agr. & Tech. State Univ., No. 1:04 CV 1203, 2005 WL 2136923, at *2 (M.D.N.C. Aug. 5, 2005); *see also Allen v. Cooper*, 895 F.3d 337, 344 (4th Cir. 2018), cert. granted, 139 S. Ct. 2664, 204 L. Ed. 2d 1068 (2019).

Simply put, the twin holdings of the First Court of Appeals in the instant case and the Fifth Circuit in *Chavez*, that state actors are immune from copyright infringement liability under either the takings clause or the doctrine of sovereign immunity, clears the way for states to present and promote their messages by using copyrighted works against the wishes of the journalists, photographers, and artists who created them. *Chavez*, 204 F.3d at 607. A state that opposes same-sex marriage, for example, could use the images of a wedding photographer to promote its position.[22] 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) ("compelling individuals to speak a particular message, [] alter[s] the content of their speech" and violates their First Amendment rights).

Additionally, in the journalism context, NPPA members and their employers

[22] *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 political campaign mailer discussing "family values"); *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.

eschew infringement by government actors 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.[23] The ethics and fairness of a journalist are essential to the public trust required of a journalist-reader relationship. Thus, even those photojournalists who consider themselves neutral observers use their copyright as a mechanism to serve as guardians, protecting the reputations of the subjects, and are often the only line of defense against unauthorized uses that could injure a subject.[24]

Under the rule against compelled speech, "the speaker has the right to tailor the speech, [which] applies not 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. 557, 573 (1995). Importantly, the rule against forced speech does not only apply to news organizations and other professional publishers. It applies to businesses, both large and small, as well as individuals, and regardless of the level of sophistication of their expression. *Id.; Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (state cannot require citizens to display state motto on their license plates).

---

[23] *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.").

[24] *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).

Yet the decision below would allow states to communicate their own approved messages through the misappropriation of copyrighted works. 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 or wishes to remain neutral about.

Given the current unavailability of the Copyright Act against state-sponsored infringement, the takings clauses of the U.S. and Texas constitutions provide a critical avenue 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 Petitioner in respectfully requesting that the Court reverse the judgment of the Court of Appeals and deny the University's plea to the jurisdiction.

Respectfully submitted,

/s/ *Alicia Calzada*
Alicia Calzada
State Bar No. 24076296
ALICIA WAGNER CALZADA, PLLC
alicia@calzadalegal.com
305 E. Ramsey Rd, suite 305
San Antonio, TX 78216
Tel: 210-825-1449
Mickey H. Osterreicher
lawyer@nppa.org
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION
120 Hooper Street

Athens, GA 30602
Telephone: (716) 983-7800
Counsel for Amicus National Press Photographers Association

/s/ Thomas B. Maddrey
State Bar No. 24092740
MADDREY PLLC
901 Main St., Ste. 6530
Dallas, TX 75206
Tel: (214) 702-9862
tbm@maddreypllc.com

Counsel for Amicus American Society of Media Photographers, Inc.

Dated: October 2, 2019

CERTIFICATE OF COMPLIANCE

1. This brief contains 4437 words, excluding the portions of the brief exempted by Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure.
2. This brief complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word software in Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes.

/s/ Alicia Calzada
Alicia Calzada

CERTIFICATE OF SERVICE

I certify that on this 2nd of October 2019, I caused a true and correct copy of the foregoing amicus brief to be served via efiling to the following counsel of record:

Owen J. McGovern
omcgovern@beckredden.com

David M. Gunn
dgunn@beckredden.com

Joe W. Redden
jredden@beckredden.com

Beck Redden LLP
1221 McKinney, Suite 4500
Houston, TX 77010
Tel: (713) 951-3700

Attorneys for Petitioner

Kyle D. Hawkins
kyle.hawkins@oag.texas.gov

Office of the Texas Attorney General
Solicitor General Division
P.O. Box 12548 (MC 059)
Austin, TX 78711-2548
Tel: (512) 936-1700

Attorney for Respondent

/s/ Alicia Calzada
Alicia Calzada