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 *AMICUS CURIAE* DOW JONES & COMPANY, INC. IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Congress validly abrogated state sovereign immunity via the Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990) ("CRCA"), in providing remedies for authors of original expression whose federal copyrights are infringed by States.

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CORPORATE DISCLOSURE STATEMENT

News Corporation, a publicly held company, is the indirect parent corporation of Dow Jones & Company, Inc. ("Dow Jones") (a private, non-governmental party), and Ruby Newco LLC, a subsidiary of News Corporation and a non-publicly held company, is the direct parent of Dow Jones. No publicly held company owns 10% or more Dow Jones stock.

INTEREST OF AMICUS CURIAE[1]

Dow Jones is a news publisher. Its publications include *The Wall Street Journal*, one of America's leading newspapers; *Barron's*, the world's premier investing publication; MarketWatch, a pioneer of online business news and market data; and Dow Jones Newswires, the leading real-time news service for financial news and information. Like other media entities, Dow Jones has had to address the seismic changes in the news business wrought by the Internet, which benefits the public by affording widespread and instantaneous delivery of information but also poses enormous challenges for the businesses that expend resources to create, collect, and communicate that information. Such efforts are uniquely vulnerable to misappropriation by those who would reproduce the work product of journalists and other content originators without paying the costs of origination—an existential threat to publishers. Dow Jones is utterly reliant on the efficacy of copyright law to stay in business.

As explained below, Dow Jones and much of the news industry in the United States have been the victim of rampant copyright infringement by a state agency against which Dow Jones would

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus curiae* and its counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties granting blanket consent to the filing of amicus briefs have been filed with the Clerk of the Court.

have had no copyright remedy were federal courts to refuse to give effect to the Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990) ("CRCA"). Dow Jones has an abiding interest in the protection of its intellectual property and, therefore, in the issue raised in this case: whether copyright proprietors can sue States and their instrumentalities for infringement of their copyrights.

SUMMARY OF ARGUMENT

Refusing to give effect to the abrogation of state immunity in the CRCA misapplies this Court's precedents and defies the will of Congress to place state-sponsored institutions on equal footing with all other copyright infringers. Shielding states from liability for copyright infringement allows state actors to expropriate copyrightable content with virtual impunity. And because 11th Amendment immunity does not distinguish between governmental and commercial functions, protection from copyright liability opens the door for state-backed entities essentially to go into business for profit through the unauthorized exploitation of copyrighted material—whether as distributors, aggregators, or even purported authors of plagiarized material. Dow Jones's recent experience with massive infringement by a state agency exemplifies this concern. Granting such a large swath of institutions immunity from copyright enforcement contravenes the purpose of copyright law: the encouragement of intellectual creativity for the ultimate benefit of the public. That goal is undermined if any state agency can

simply use creative material without compensating the creators.

FACTUAL BACKGROUND: DOW JONES'S EXPERIENCE AS A VICTIM OF STATE-SPONSORED COPYRIGHT INFRINGEMENT

Dow Jones was a principal victim of what must stand as the most egregious exemplar of copyright infringement by a state. In June 2017, a blogger active in the financial news arena posted an article[2] revealing that the California Public Employees' Retirement System (CalPERS), a California state agency that administers the nation's largest pension fund, was maintaining a publicly accessible website that featured daily postings of articles from, among others, Dow Jones's premier publications, including *The Wall Street Journal*, *Barron's*, MarketWatch, and Dow Jones Newswires. Dow Jones had never authorized this activity. The sheer number of Dow Jones articles copied from an inception date in 2009 through June 2017 was staggering: approximately 9,000 full-text articles from *The Wall Street Journal*, 257 from *Barron's*, and over 560 items from other Dow Jones publications. Among the pirated pieces were numerous articles taken from Dow Jones Newswires, a high-value suite of news services for financial and other business professionals featuring breaking, exclusive, and often market-

[2] Yves Smith, "CalPERS Internal News Site Ignores Unfavorable Stories, Steals Copyrighted Material," Naked Capitalism (June 9, 2017), https://www.nakedcapitalism.com/2017/06/calpers-internal-news-site-ignores-unfavorable-stories-steals-copyrighted-material.html.

moving news. All of this material is assembled at enormous cost by Dow Jones's global network of journalists but, in our digital age, reproducible with a few keystrokes.

CalPERS disseminated more of Dow Jones's copyrighted reports than it did those of any other publisher, but Dow Jones was not the only victim. Among the republished full text articles found on the CalPERS website were approximately 6,700 articles taken from *The New York Times*, 5,400 from the *Los Angeles Times*, over 3,100 from *The Sacramento Bee*, and over 1,500 from *The Washington Post*. All told, CalPERS had reproduced some 53,000 separate articles from approximately 4,500 publishers over an eight-year span—including articles from essentially every major daily newspaper, business periodical, and cable news network. Dow Jones later learned that CalPERS had also compiled these selected articles into a daily email that it sent to approximately 200 senior executives and other recipients, both within and outside of CalPERS, who could then forward the content at will to anyone they chose. By doing so, CalPERS created a curated daily newsfeed to serve the needs of those on its distribution list for business and financial news of potential importance to CalPERS and pensions generally—a natural audience for Dow Jones's publications. In doing so, CalPERS competed directly with Dow Jones (and with the many other news originators whose output it misappropriated) to serve that demand, and diverted substantial paying business from the authorized publications.

The economic value of the Dow Jones copyrighted content misappropriated by the State of California is enormous. Dow Jones's stock-in-trade is its intellectual property, and it has extensive experience in licensing the distribution of its original works through a wide range of media. Most apposite here, Dow Jones maintains a website (www.djreprints.com) through which members of the public can purchase a license to do exactly what CalPERS did: reprint articles from *The Wall Street Journal* and Dow Jones's other publications on websites, in emails, and in other media. At the time Dow Jones learned of the ongoing CalPERS infringements, the Dow Jones reprint price schedule stipulated a fee of $360 for the right to reproduce a single full-text *Journal* article in a one-time email to 200 recipients and a fee of $1,900 to display a single full-text *Journal* article on a publicly accessible website for one year. Considering that CalPERS had displayed over 9,000 such articles, most of them for multiple years, and originated a daily email containing a compilation of such full-text articles for years, the value of what it took easily measured well into eight figures. Moreover, Dow Jones had registered its copyrights in the great bulk of the infringed works within three months of publication, and therefore would be entitled to elect statutory damages, which are at least $750 for infringement of each work, and may be as high as $150,000 per work for willful infringement or $30,000 without a finding of willfulness. *See* 17 U.S.C. §§ 412, 504(c). Under that regime, federal courts regularly assess damages at anywhere from two to five times the

commercial rates at which the works are licensed as a disincentive to infringement,[3] which ultimately affects the value of settlements that copyright holders are able to reach with infringers in negotiations seeking to avoid litigation. Indeed, Dow Jones announced a recent settlement in which private companies settled claims that they infringed Dow Jones's copyrights in its articles for $7,000 per work infringed.[4] Even factoring in issues such as potential application of the statute of limitations[5] and the possibility of volume

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[3] *See, e.g.*, *Yurman Design, Inc. v. PAJ Inc.*, 262 F.3d 101, 113-14 (2d Cir. 2001); *Michael Grecco Prods. v. Function(X) Inc.*, No. 18-cv-386, 2019 U.S. Dist. LEXIS 41738, at *10 (S.D.N.Y. Mar. 11, 2019) ("[C]ourts often apply a multiplier to the lost licensing fee amount . . . in order to arrive at a final damages award."); *Realsongs v. 3A N. Park Ave. Rest. Corp.*, 749 F. Supp. 2d 81, 87 (E.D.N.Y. 2010) (collecting cases). Statutory damages are afforded under the Copyright Act in recognition of the difficulty of proving actual damages in many cases. *See* 4 Melville B. Nimmer and David Nimmer, Nimmer on Copyright § 14.04[F][1][a] (2019).

[4] *See*, Press Release, Dow Jones & Company, Dow Jones Receives More Than $1.5 Million in Recent Copyright-Infringement Settlements (July 23, 2019), *available at* https://www.dowjones.com/press-room/dow-jones-receives-more-than-1-5-million-in-recent-copyright-infringement-settlements/

[5] The "discovery rule" starts the running of the three-year copyright limitations period when the infringement was or should have been discovered, *see generally Petrella v. MGM*, 572 U.S. 663, 670 n.4 (2014), and thus in the view of several courts enables the plaintiffs to reach back to the beginning of the infringement to collect damages so long as the action is commenced within three years of discovery. *See, e.g., Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 707

discounts affecting the benchmark licensing rates, the scope of the infringement in which CalPERS engaged would ordinarily have resulted in a copyright-infringement liability to Dow Jones easily in or exceeding eight figures, and much more in the aggregate to the thousands of other news publishers it victimized.

CalPERS, however, asserted that sovereign immunity wholly exempted it from *any* liability to Dow Jones for the infringement in which it engaged.[6] And because of the body of case law refusing to give effect to the statutory abrogation in the CRCA of state immunity, Dow Jones was left with a severely emasculated claim against CalPERS, ultimately securing a low-seven-figure settlement.[7]

(9th Cir. 2004). Because the CalPERS website that displayed the infringing content was configured to be undetectable through conventional web searching, Dow Jones was unaware of the site until 2017 and, of course, had no way of knowing that CalPERS was also republishing its content in emails to a select group of recipients.

[6] Courts have agreed that CalPERS partakes of California's 11th Amendment immunity. *See, e.g, Arya v. CalPERS,* 943 F. Supp. 2d 1062, 1072 (E.D. Cal. 2013).

[7] Press Release, Dow Jones & Company, Dow Jones to Receive $3.4 Million from State Agency That Misused Articles (July 23, 2018), *available at* https://www.dowjones.com/press-room/dow-jones-to-receive-3-4-million-from-state-agency-that-misused-articles. Because it appeared that the agency had extracted the infringing articles from Factiva, a news database service owned by Dow Jones, in violation of its subscription agreement with Dow Jones, Dow Jones fortuitously had a separate potential claim against CalPERS in California state court

The settlement left Dow Jones less than whole for reasons beyond the dollar amount. Essential to any proprietor of intellectual property is the ability to control the uses made of its works of authorship: to refuse to license as well as to license. For example, while Dow Jones has a wide network of agreements with third parties to distribute or display *some* Dow Jones content on *certain* media, those arrangements are always the result of negotiation and tailored to both parties' business strategy. Dow Jones, for example, may wish to reserve certain markets for direct distribution only, or to withhold its works from particular platforms and uses. The exclusive rights conferred by copyright enable any publisher to control the uses of its writings. Here, Dow Jones was stripped of those rights, and no retrospective money settlement can restore the exclusivity and control that is the hallmark of intellectual property.

It has been publicly reported that *The New York Times* and *Los Angeles Times* also settled their copyright-infringement claims against CalPERS for sums in the low to middle six figures.[8] Dow Jones is not aware that any of the

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for breach of contract, albeit with a less robust and less certain model for recovery of damages.

[8] *See* Yves Smith, CalPERS Pays $3.4 Million to Dow Jones to Settle Massive Copyright Infringement That We Exposed, Naked Capitalism (July 26, 2018), https://www.nakedcapitalism.com/2018/07/calpers-pays-3-4-million-dow-jones-settle-massive-copyright-infringement-exposed.html (posting links to copies of settlement agreements in which CalPERS agreed to pay $150,000 to resolve *The New York Times*'s copyright-infringement

other several thousand publishers whose works were misappropriated by CalPERS has received any compensation from CalPERS.

In short, the CalPERS episode stands as validation of the worried prediction of many industry participants set forth in Register Oman's report for the Copyright Office that animated Congress to enact the CRCA: absent legislative relief, copyright proprietors were at risk of rampant and uncontrollable infringement by State actors: "Copyright owners have demonstrated that they will suffer immediate harm if they are unable to sue infringing states in federal court for money damages."[9]

ARGUMENT

Petitioners' brief amply demonstrates the error of those courts that have refused to give effect to the abrogation of state immunity embodied in the CRCA by misapplication of this Court's precedents. This Court should reverse the result below and restore the will of Congress in making States and their instrumentalities liable for copyright infringement.

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claims and $445,000 to resolve the *Los Angeles Times*'s claims).

[9] U.S. Copyright Office, *Copyright Liability of States and the Eleventh Amendment: A Report of the Register of Copyrights* 6 (June 1988) [hereinafter "*Register's Report*"], at 103, *available at* http://files.eric.ed.gov/fulltext/ED306963.pdf; *see id.* at 6 ("The major concern of copyright owners appears to be widespread, uncontrollable copying of their works without remuneration: 19 parties worried that with immunity from damages, states would acquire copies of their works and ceaselessly duplicate them").

As the Dow Jones experience demonstrates, the continued acquiescence in the copyright field to state immunity under the 11th Amendment in derogation of the will of Congress has substantial and pernicious real-world effects. What happened to Dow Jones and numerous other journalistic endeavors at the hands of CalPERS is *precisely* the kind of rampant infringement that Register Oman reported on, and Congress relied on, in enacting the Copyright Remedy Clarification Act.[10]

Worse, the current state of the law affirmatively incentivizes state actors to free ride on all manner of copyrightable content secure in the knowledge that there is no effective remedy for their misappropriations. While we cannot know the motivations of those at CalPERS who decided it was a good idea to curate a daily collection of the most important and best reported business news for their favored audience, copyright infringement normally does not happen by accident. Absent action by this Court, there is little reason for any state actor not to go into the news business, duplicate any desired amount of copyright-protected material, and republish it to as many people as it chooses, for profit if it wishes. Indeed, it could go into the photography business—as the facts of the

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[10] *See* Brief for Petitioners, *Allen v. Cooper*, No. 18-877 (Aug. 6, 2019) at 49-52; *see also* Brief of Ralph Oman as Amicus Curiae Supporting Petitioner, *Allen v. Cooper*, No. 18-877 (Feb. 7, 2019); Brief of David Nimmer, et al. as Amici Curiae Supporting Petitioner, *Allen v. Cooper*, No. 18-877 (Feb. 7, 2019); Brief of Recording Industry Association of America as Amicus Curiae Supporting Petitioner, *Allen v. Cooper*, No. 18-877 (Feb. 7, 2019).

present case reveal—or any other field of endeavor that relies on copyright protection for its very existence. Other cases that have arisen subsequent to the enactment of the CRCA demonstrate the reality of this problem. For example, in one case, a state university offered a test preparation class based on copyrighted material used without permission from the test publisher. *See Nat'l Ass'n of Bds. Of Pharm. v. Regents*, 633 F.3d 1297, 1301-02 (11th Cir. 2011). In another, a state university's research center produced an economic impact study for a community development organization by plagiarizing a portion of a private firm's copyrighted version of an earlier study. *Mktg. Info. Masters, Inc. v. Bd. of Trs. of the Cal. State Univ. Sys.*, 552 F. Supp. 2d 1088, 1091 (S.D. Cal. 2008). The latter case is particularly egregious because the client organization had refused to pay the original firm for the follow-up study that was then supplied, in plagiarized form, by the state-affiliated entity. *Id.*

These perverse results in which state entities effectively enter into competition with private publishers flow in large part from the understanding that 11th Amendment protection, where it exists, is not limited to governmental functions but includes even activities normally considered commercial in nature. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 n.4 (1999) (rejecting suggestion of the dissent that state sovereign immunity be limited to non-commercial state activities: "The text of the Eleventh Amendment, of course, makes no distinction between commercial and non-commercial state

activities."). There is, thus, little to stop a state agency, were it of a mind to do so, from republishing for profit the entirety of a daily newspaper, broadcast channel, website, motion picture or any other work of authorship as its own and at a fraction of the cost of the originator, who has to foot the bill for the collection and creation of the content. That is not a viable model for the stimulation of intellectual creation for public benefit which, after all, is the recognized purpose of the Copyright Clause of the Constitution and federal statutory copyright law. *E.g., Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1986 (2016); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994); *Harper & Row Publishers, Inc., v. Nation Enters.,* 471 U.S. 539, 558 (1985); *Mazer v. Stein*, 347 U.S. 201, 219 (1954). At minimum, it will cause publishers to raise prices paid by the general public for their works to subsidize the free riding by state actors.

What makes this result particularly problematic in a case like that of CalPERS is that *both* Congress and the state legislature have given every indication that infringing conduct by state agencies generally should be subject to remedy. California law purports to recognize the obligation of its state agencies to respect copyright, *see Register's Report* App. C at CRS-5 (citing 65 Op. Att'y Gen. Cal. 106 (1982) and 71 Op. Att'y Gen. Cal. 16 (1988). California also has provided broadly for waiver of statutory immunity. California statutory law provides that "[a] public entity may sue and be sued," Cal. Gov't Code § 945, and renders a public entity "liable for injury proximately caused by an act or

omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." Cal. Gov't Code § 815.2(a). While California, like most states, has thus provided generally for suit against its agents, that waiver has been held to permit suit only in state, not federal, court. *Riggle v. California*, 577 F.2d 579, 585-86 (9th Cir. 1978); *Boyd v. Office of Risk Ins. Mgmt.*, 471 F. App'x 594, 594 (9th Cir. 2012) (citing *Riggle*, 577 F.2d at 585-86). Because the exclusive forum for copyright infringement actions is federal, *see* 28 U.S.C. § 1338(a), unless this Court gives effect to CRCA, there is no forum in which copyright infringement against the state can be prosecuted.

The potential for recovery for acts of state-sponsored infringement using other legal theories is both ephemeral and at best in tension with the constitutional and congressional policy to provide a unified and exclusive federal remedy to protect works of authorship. *See* 17 U.S.C. § 301 (preemption of state laws in the nature of copyright); 28 U.S.C. § 1338(a) (exclusive federal jurisdiction for copyright infringement actions). Most alternative remedies in the nature of copyright that may exist as a matter of state law will be preempted by section 301. At least one commentator has proposed resorting to the law of inverse condemnation to seek compensation for a taking of intangible property. *See* Eugene Volokh, "Sovereign Immunity and Intellectual Property," 73 S. Cal. L. Rev. 1161, 1163 & n. 5 (1999-2000). But the only reported case on the

subject rejected this approach, leaving publishers with one less available means to seek redress against state copyright infringers. *See Univ. of Houston Sys. v. Jim Olive Photography*, No. 01-18-00534-cv, 2019 Tex. App. LEXIS 4746, at *29 (Texas App. June 11, 2019).

CONCLUSION

The Court should reverse the judgment of the court of appeals and give effect to the congressional abrogation of State sovereign immunity embodies in CRCA.

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Respectfully submitted,

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