NO. 21-242

In the Supreme Court of the United States

DESIRE, LLC, PETITIONER,

V.

MANNA TEXTILES, INC., ET AL., RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC., CALIFORNIA SOCIETY OF ENTERTAINMENT LAWYERS, AND NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, JOINED BY THREE OTHER CREATOR RIGHTS ORGANIZATIONS IN SUPPORT OF PETITIONER

THOMAS B. MADDREY
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS
FOUR EMBARCADERO CENTER
SAN FRANCISCO, CA 94111

BRENT BLAKELY
BLAKELY LAW GROUP
1334 PARKVIEW, SUITE 280
MANHATTAN BEACH, CA 90266

STEVEN T. LOWE
COUNSEL OF RECORD
CALIFORNIA SOCIETY OF ENTERTAINMENT LAWYERS
8383 WILSHIRE BLVD., SUITE 1038
BEVERLY HILLS, CA 90211
(310) 477-5811
STEVEN@LOWELAW.COM

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

Constitutions

Statutes

Rules

Miscellaneous

INTEREST OF *AMICI CURIAE*[1]

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. These members all envision, design, produce, sell, and license their photography in the commercial market to entitles as varied as multinational corporations to local mom and pop stores, and every group in between. In its seventy-six-year history, ASMP has been committed to protecting the rights of photographers and promoting the craft of photography.

CALIFORNIA SOCIETY OF ENTERTAINMENT LAWYERS (CSEL) is an organization consisting of California attorneys who seek to protect and defend the rights of creative professionals in the entertainment industry. CSEL strives to provide support to screenwriters, authors, and other creative professionals who are at risk of having their rights egregiously stripped away. CSEL is committed to advocating on behalf of creators, whose claims are so often not sufficiently funded, in a "dog eat dog" industry. *Montz v. Pilgrim Films & TV, Inc.*, 649

[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 by blanket consent.

F.3d 975, 981 (9th Cir. 2011) (citing Woody Allen, CRIMES AND MISDEMEANORS (Orion Pictures 1989)) ("It's worse than dog eat dog. It's dog-doesn't-return-other-dog's-phone-calls.").

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.

GRAPHIC ARTISTS GUILD, INC. (GAG) is a 501(c)(6) non-profit trade association which 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.

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.

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.

SUMMARY OF ARGUMENT

Amici represent individual creators and small businesses that are the lifeblood of creative authorship and output in this country. Each of them faces daily and sustained threat of infringement by bad actors out to thwart the principals that underpin the concept of copyright law. On their side they find few protections, chief of which is the opportunity to bring their claims and elect statutory damages, hoping to hold responsible those who have stolen their works of authorship.

The Court should grant the Petition because: (1) the holding incorporates detrimental changes to fundamental principles of copyright law and judicial economy; and, (2) the decision would result in removing the support and aims of statutory damages, particularly in light of the current climate of copyright infringement.

The Copyright Act allows creators to elect "at any time before final judgment," to recover actual damages or statutory damages. 17 U.S.C. § 504. Furthermore, if the creator elects to seek statutory damages, such damages can be awarded for all infringements, "with respect to any one work, which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally." *Id.* The conclusion is: any group of defendants in any given infringement case, who are not held to be jointly and severally liable with one another, would each be liable for infringement and owe an award of statutory damages to the plaintiff.

Those are the facts that are presented here.

Photographers, artists, designers, illustrators, and all creators would be adversely and immediately impacted by a holding that precludes them from seeking the statutory damage awards that would serve the aims of the Copyright Act and provide the compensation they have been deprived of. Such a holding would place the principles of Copyright law which promote the deterrent and punitive purposes of statutory damages in shifting sands. Equally important, the Ninth Circuit's suggestion that plaintiffs may get multiple awards if they were to file a suit against *each* individual defendant in order to get multiple statutory damages awards stands in opposition to longstanding practices promoting judicial economy.

Given these concerns regarding the Ninth Circuit's holding in both law and policy, *amici* respectfully request the Petition be granted.

ARGUMENT

I. THE EXTREME REDUCTION OF A STATUTORY DAMAGES AWARD GOES AGAINST THE PRINCIPLES OF COPYRIGHT AND JUDICIAL ECONOMY.

a. There are Both Deterrent and Punitive Purposes of Copyright Law Through the Award of Statutory Damages.

As argued in the Petition, even if one were to follow the rationale of the Ninth Circuit that Section 504(c)(1) of the Copyright Act is ambiguous, such an interpretation should be rejected. Interpreting the Act in such a way significantly limits claims by future creators against infringers. Not only is the concern for astronomical results in statutory damages awards unfounded but limiting the award of statutory damages in the way the Ninth Circuit does here goes directly against the punitive and deterrent function of statutory damages awards under the Copyright Act. It would limit one of the only avenues of recourse that creators have.

The Ninth Circuit's finding that "[p]ermitting multiple awards of statutory damages here would frustrate the purposes of the Copyright Act" is misguided. *Desire, LLC v. Manna Textiles, Inc.*, 2021 WL 345583, at *15 (9th Cir. 2021). The Ninth Circuit correctly states that the purpose of statutory damages is to serve the dual purpose to compensate the copyright holder and deter infringement. *Id.* (citing *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545, 1554 (9th Cir. 1989)). The reasoning the Ninth Circuit uses to justify limiting

Desire's damages award to only one award undercuts this rationale and hurts those creators the statute is precisely designed to benefit. Statutory damages are an essential tool to compensate the creator, particularly when actual damages are difficult to calculate or are not enough to compensate the creator for a violation of the creator's intellectual property rights. But they are also designed to deter infringement and make it more costly to infringe than to obtain a proper license; the exact mechanism by which many creators sustain their livelihood.

Statutory damages are not just designed to compensate the infringed creator. While this may have been the intention of the 1909 Act, the 1976 Copyright Act explicitly allows for creators to elect which type of remedy they wish to seek in any given action for infringement. 17 U.S.C. § 504. The modern view is that "statutory damages are even more clearly designed to discourage wrongful conduct and may be imposed to sanction and vindicate the statutory policy against copyright infringement." *Energy Intelligence Grp., Inc. v. Kayne Anderson Capital Advisors, L.P.*, 948 F.3d 261, 273 (5th Cir. 2020) (citing *F. W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 233, 73 S. Ct. 222, 225, 97 L. Ed. 276 (1952)).

As the Ninth Circuit held, the "Copyright Act's statutory damages provision is designed to discourage wrongful conduct." *Nintendo of Am., Inc. v. Dragon Pac. Int'l*, 40 F.3d 1007, 1011 (9th Cir. 1994). Other Circuits also follow this reasoning, finding "statutory damages do not only approximate a copyright owner's consequential damages, *but also*

serve an independent deterrent purpose." *Energy Intelligence Grp.,* 948 F.3d at 273.

Instead of following the prior reasoning set by itself, the U.S. Supreme Court, and other circuit courts, the Ninth Circuit in this case rationalized a finding for one statutory damages award by suggesting that multiple awards would lead to astronomical results and would compensate the creator in a way that would lead to "massive disproportionate damages compared to actual damages." *Desire*, 2021 WL 345583 at *13. This conclusion stops short of acknowledging—and achieving—the dual purpose of statutory damages. As stated above, the option to seek statutory damages or actual damages is just that, an option. To hold otherwise would veer from the goals that would allow the creator the choice to choose statutory damages, prevent and limit access to the courts for small creators, and lead to a conclusion that in fact conflicts with copyright law principles rather than harmonizes with them.

b. The Ninth Circuit's Finding Does Not Promote Judicial Economy.

In all aspects of litigation, concerns over judicial efficiency are imperative and should be given significant weight. *See*, *Nat'l Prod., Inc. v. Wireless Accessory Sols., LLC*, No. C15-2024JLR, 2018 WL 1709494, at *6 (W.D. Wash. Apr. 9, 2018). Under Federal Rule of Civil Procedure 20(a) and 18(a), the joinder of defendants in any given action requires: (1) the right to relief to be asserted against each defendant that relates to or arises out of the same transaction or occurrence or series thereof; and, (2) a

question of law or fact that is common to all the parties involved. *Desert Empire Bank v. Insurance Co. of North America*, 623 F.2d 1371, 1375 (9th Cir. 1980); *Diaz v. Allstate Ins. Group*, 185 F.R.D. 581 (C.D. Cal. 1998) (citing Fed. R. Civ. P. 20; Fed. R. Civ. P. 18).

These principles providing for the utmost importance of judicial economy were not given enough weight by the Ninth Circuit in this case. In fact, it was acknowledged and then disregarded when the Ninth Circuit stated "we are mindful of the fact that under the approach we adopt today, a plaintiff might achieve the result Desire seeks by suing separate infringers in separate actions, arguably frustrating the purposes of the Act." *Desire*, 2021 WL 345583 at *15. With this, the Ninth Circuit endorsed multiple duplicative litigation as "preferable" to the alternative of plaintiff Desire receiving an award of multiple statutory damages. The judicial inefficiency that would result from this fear of an unjust amount in statutory damages, where there are safeguards in place to prevent such results, should be reconsidered. As the concurrence by Judge Wardlaw points out, such a suggestion by the Ninth Circuit will make it "commonplace for plaintiffs to bring a separate lawsuit against each defendant, maximizing the number of statutory damages awards available while peppering the courts with individual cases that would be more efficiently tried together." *Id.* at *23. If a court joins those cases for economy purposes, under what rubric would the number of statutory damage awards then be calculated?

Not only does the Ninth Circuit's suggestion to bring a lawsuit against each defendant undercut judicial economy, but it also ignores the position of the creator in any given infringement suit. It is already difficult for some creators, such as photographers, musicians, and other individual artists, to bring a suit to protect their copyrights in federal court. Given the often-unaffordable filing fees and attorney retainers for a *single* suit alleging infringement against multiple defendants, it is unrealistic for the Ninth Circuit to expect that such plaintiffs would even be able to bring multiple suits against each and every defendant. This will only further constrain individual creators' ability to enforce their intellectual property rights, which argues directly against the fundamental copyright principles established in the U.S. Constitution to encourage creativity and innovation. U.S. Const. art. I, § 8, cl. 8.

In fact, Congress is well aware of these struggles and the bar that the cost of filing copyright suits presents to individual creators. This is one of the reasons why the Copyright Alternative in Small-Claims Enforcement Act (the "CASE Act") was recently signed into law. The Act was established to "streamline this process" in hopes of reducing the cost of infringement litigation and make it easier and more efficient for creators to enforce their copyright, without the high costs of current litigation.[2] The CASE Act is an acknowledgement

[2] Keith Kupferschmid and Terrica Carrington, *The CASE Act: You Have Questions. We Have the Answers*, May 13, 2019,

that "federal litigation is so expensive" and "many professional creators and small businesses simply cannot afford to defend their rights when someone infringes their copyrighted works." *Id.* The Ninth Circuit's holding that creates the *exact opposite* effect for future copyright litigation suits not only goes against principles of judicial economy, but against the recognition of the principles that underpin the latest addition to the corpus of copyright law -- the CASE Act.

---

https://copyrightalliance.org/the-case-act-you-have-questions-we-have-the-answers/.

CONCLUSION

For the reasons set forth above, *amici* join Petitioners in respectfully requesting that the Court grant the petition for a writ of certiorari.

RESPECTFULLY SUBMITTED,

STEVEN T. LOWE
COUNSEL OF RECORD
CALIFORNIA SOCIETY OF ENTERTAINMENT LAWYERS
8383 WILSHIRE BLVD.,
SUITE 1038
BEVERLY HILLS, CA 90211
(310) 477-5811
STEVEN@LOWELAW.COM

THOMAS B. MADDREY
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS
FOUR EMBARCADERO CENTER
SAN FRANCISCO, CA 94111

BRENT BLAKELY
BLAKELY LAW GROUP
1334 PARKVIEW
SUITE 280
MANHATTAN BEACH, CA 90266

COUNSEL FOR AMICI CURIAE

AUGUST 23, 2021