No. 18-728

IN THE

Supreme Court of the United States

JACOBUS RENTMEESTER,

Petitioner,

v.

NIKE, INC.,

Respondent.

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

BRIEF FOR THE AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC. AND THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

THOMAS B. MADDREY
General Counsel
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC.
901 Main St., Ste. 6530
Dallas, TX 75206
(214) 702-9862
tbm@maddreypllc.com
Counsel for Amicus American Society of Media Photographers, Inc.

MICKEY H. OSTERREICHER
General Counsel
Counsel of Record
ALICIA W. CALZADA
General Counsel
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION
120 Hooper Street
Athens, GA 30602
(716) 983-7800
lawyer@nppa.org
Counsel for Amicus National Press Photographers Association

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INTEREST OF AMICUS CURIAE

The American Society of Media Photographers, Inc. ("ASMP") is a 26 U.S.C. § 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, and sell their photography in the commercial market to entities as varied as multinational corporations to local mom and pop stores, and every group in between. In its seventy-five-year history, ASMP has been committed to protecting the rights of photographers and promoting the craft of photography.[1]

National Press Photographers Association ("NPPA") is a 26 U.S.C. § 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing, and distribution. NPPA's members include television 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.

SUMMARY OF ARGUMENT

Photographs are more complex than simply a collection of disparate elements freezing a moment in time and space. It is the photographer's expertise, creative

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[1] *Pursuant to this Court's Rule 37.6, counsel for amici curiae certifies 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, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.*

skill, and craft that turn these carefully composed elements from individual objects into an enduring photograph. The "selection and arrangement" of these elements are not simply independent, randomly placed objects within a frame; rather, the creativity that transforms this composition begins even before the photographer lifts a camera to their eye, extends through the decisive moment the shutter is clicked, and then continues through the editing (and sometimes) printing process. In many cases, each element is precisely chosen to be in the photograph for the visual harmony, balance, and composition it creates. In other situations, it is the use of tools and techniques honed over years of practice that help bring the photograph to life. Sometimes it is the intentional breaking of photographic rules that make a photograph iconic. In the end, it is the mind, heart, and eye of the photographer that creates something new and original from the observed objects.

Copyright has long been viewed as a means of promoting the authorship of original works for the public good, by encouraging the creations of those works. *New York Times Co. v. Tasini,* 533 U.S. 483, 519-20 (2001). Further, since 1884 photographs have been determined by this Court to be entitled to copyright protection. *Burrow-Giles Lithographic Co. v. Sarony,* 111 U.S. 53, 58 (1884).

The Ninth Circuit's opinion serves to strip away these rights for photographs exclusively by likening them to "factual works" built upon unprotectable elements which would result in undermining the purpose of the Copyright Clause of the Constitution and judicially denying the creativity and originality inherent in the works of millions of photographers.

While many photography infringement cases involve the wholesale misappropriation of a photograph, this case is different. And because this case involves a sports photograph, it might be assumed that the original photograph is nothing more than a skillfully captured image of an event that unfolded in front of the photographer. But the record that the entire scene—down to which hand the ball is in—was created and designed by the original photographer. That scene was then intentionally replicated by Respondent for the purpose of recreating the original photograph. This infringement is complicated by the fact that over the past few decades, the pose in the photograph at the center of this case became iconic and instantly and distinctly associated with the subject. This could lead to the conclusion that this pose is the natural state of the subject of the photo, and that this is a dispute between two photographers who just happened to capture the same natural pose. It is not. Each material element in the original photograph was explicitly choreographed. Therefore, this case is about whether copyright protects a professional photographer—who uses the medium of photography to create an expressive work—from another person's complete and intentional copying of that expressive work.

What makes the issue at the center of this case so nuanced is the fact that photographers often create similar works, whether because they are standing next to each other and capture the same moment unfolding before them, because they are using photography to create *scenes a faire*, or because they are simply depicting a scene in nature. Those are, and should always be, distinguishable from direct, intentional copying of the expression of an idea. But just as a written work of fiction is protected from direct

copying of the combination of plot, characters, and events that make a novel unique, or a musical work with distinctive, notes, lyrics, or melody; so should a photograph be protected from direct copying of the many visual elements that are created in the mind of the photographer and then fixed in a tangible medium.

This is a delicate balance, and the photography industry is adversely served by doubt and confusion in this area of the law. While artists frequently draw inspiration from each other, protection is still needed from wholesale duplication of the expression of their inspiration. By granting cert, this Court can provide photographers—and their audience—more explicit guidance on both sides of the camera. That guidance is critical for photographers who invest their hearts and minds into their work. Leaving this area of law jumbled and confused with conflicting opinions would chill the creation of new works and give the green light to infringers the world over. These creators need clarity.

ARGUMENT

I. THE DECISION BELOW HARMS CREATORS OF PHOTOGRAPHS.

The proliferation of photography in recent years, and the ease with which technology has enabled good photography from even the most average operator can result in a misconception that great photography requires little effort. In fact, even when a professional photograph is created quickly, it is a product of extensive skill, experience, and creative talent. In that way, photographers are no different than other authors whose work is protected by copyright. Why did Nike choose to recreate Mr. Rentmeester's photograph, instead of coming up with their own unique

concept from which to build their ad campaign and create their iconic logo? The answer lies in the extensive creative effort that went into the original photo. Quite simply, the elements that made the Rentmeester photograph valuable enough for Nike to copy are the same material elements that were copied in the Nike photo and the same material elements that made the duplicate image marketable.

In industries other than photography, creative elements, and the selection and arrangement of those elements, are protected much more fiercely than the Ninth Circuit offered to Mr. Rentmeester. For example, a toy company's plush tree frog (coqui) was protected against a competitor who copied the stitching pattern, color combination, pose, dimensions and flag position. *Coquico, Inc. v. Rodriguez-Miranda*, 562 F.3d 62, 69 (1st Cir. 2009). In *Coquico*, the First Circuit held that "substantial similarity does not mean absolute identicality." *Id.* at 70. The Second Circuit has a similar approach, and has extended this protection to photography, holding, for example, that "inventive efforts in posing the [subject] for the photograph, taking the picture, and printing [the work] suffices to meet the original work of art criteria." *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992). Thus, a photograph of a couple holding puppies could not be legally copied by a sculptor even though the infringing sculpture differed in many elements such as facial expressions of the main subject, a completely different backdrop and the color of the sculpture, with the court noting that "substantial similarity does not require literally identical copying of every detail." *Id*. If the Ninth Circuit ruling is allowed to stand, photographers will be stripped of their ability to protect the creative expression of their work from anything other than wholesale lifting.

A. The history of copyright law supports broad protections of photographic works.

Copyright law is built on the fundamental principal that "encouragement of individual efforts by personal gain is the best way to advance public welfare through the talents of authors and inventors". *Mazer v. Stein*, 347 U.S. 201 (1954). *See Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). Additionally, in *Twentieth Century Music Corporation v. Aiken,* the Court held that "[t]he immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor'. But the ultimate goal is, by this incentive, to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

This balance between incentivizing creative works to be made and ultimate benefit to the public good has long been the central goal of copyright legislation. The current framework of the Copyright Act of 1976 changed significant portions of copyright law from the previous Copyright Act of 1909. Some of these changes inured to the benefit of individual creators, some to the idea of promoting access to those creations. Authors and creators saw an increase in the duration of copyright protection from a maximum term of 56 years to the life of the author plus fifty years (later amended to the life of the author plus 70 years in most cases). 17 U.S.C. § 302. But this and other changes to the law that benefited creators' protections were balanced by changes that more directly benefited public access, such as the first codification of "fair use," as a defense to infringement actions. *Id.* at § 107. It is the balance

that benefits both the public and creators, and it is the balance that is in danger of being upended here.

The weighing of the benefit to the public in relation to copyright protection of photographs is not a new conundrum. While professional photographers are drawn to the industry by a variety of motives, few can continue without the "incentive to create" that copyright provides. That incentive is simple—when a photographer (or other author) creates a work that has value, the photographer is entitled to reap the benefits of that value. Those benefits are available only because the photographer has the exclusive right to authorize reproductions, derivative works, and public displays of their works. 17 U.S.C. § 106. Without these exclusive rights, everyone makes a profit from the image except the photographer.

One can imagine that if Mr. Rentmeester was faced with the knowledge that he would not be able to protect and profit from his creative work, he would not have created the image in the first place. The world would have been deprived of an iconic image that has animated the minds and souls of millions of people across the globe. More directly, Nike would have been deprived of an image that has come to define the company, an image whose value to that company is practically immeasurable. In that way, the purpose of the copyright clause applies directly to this case. The public good, in a very literal sense, would have been less robust, less fulfilled, and weakened. It is inconsistent with copyright law and the constitutional purpose of the Copyright Act that Nike should reap such an enormous benefit from a creative work, without permission, and the creator should be left with a right without a remedy. Creations such as Mr. Rentmeester's must continue to be protected.

B. Depriving photographers of these rights would be detrimental to the nation.

The importance of protecting the right of photographers to reap the economic benefit conferred by the exclusive rights enumerated under the Copyright Act should not be underestimated. As of May 2017, the U.S. Department of Labor Bureau of Labor Statistics estimated that there were 49,320 professional photographers in the United States.[2] Two of the main subgroups comprising this number are commercial photographers and visual journalists, groups whose members derive their income often in the exact way Mr. Rentmeester did here – conceiving, creating, and licensing their images.

To these photographers, their images are more than their craft, passion, and art; they are their livelihood. If, as the Ninth Circuit court held here, those works can be re-created and re-photographed by others who have chosen not to properly obtain a license for those works; and where minor variations in such "re-creations" defeat the "substantial similarity" requirement, then photographers, photographs, and the photography industry as a whole, are in danger of losing the very protections that allow for the creation of these works. "It is hard to imagine that freelance visual journalists would continue to seek out and capture difficult to achieve pictures if they could not expect to collect any licensing fees. This is exactly the situation that copyright is meant to protect—where unrestricted use would likely dry up the source." *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 189 (D. Mass. 2007).

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[2] Occupational Employment and Wages, May 2017, *27-4021 Photographers*, BUREAU OF LABOR STATISTICS, https://www.bls.gov/oes/current/oes274021.htm (Last Visited December 28, 2018).

The circuit split has resulted in photographers being unable to rely on protection from this kind of copyright infringement. Already, the members of the organizations that *amici* represent have to battle each day with images stolen and infringed upon by all manner of individuals and companies. To see their efforts be discarded as the Ninth Circuit so cavalierly did here, strikes a blow to fairness and reason. If the goals of the courts and legislatures that have recognized the importance of copyright protection are to be upheld at all, these decisions that target and demean both photographers and photography as an art and must be reversed.

While photography is a relatively nascent art form, it has gone through monumental changes in the last 180 years. From the first image affixed to metal plates, to color photographs, to the rise and ubiquitous nature of digital images, no comparable creative outlet has so quickly tested the flexibility of copyright law. In this case, however, the circuits are not split over whether innovation is still protected, they are split over the nature of the photograph, its importance and meaning. All photographers pictures to capture and express emotion, whether the subject is the love of a family member or the iconic flight of Michael Jordan. These images begin the same way all creative endeavors do; in the mind. But it is the outlet and transformation of those ideas into tangible expressions of artistry that connect with viewers now and into the future. That is what Mr. Rentmeester created here, and that is what was stolen; no less than the core of the creative outlet that copyright law has sought to protect since the founding of this country.

II. PHOTOGRAPHS ARE INHERENTLY CREATIVE AND ARTISTIC WORKS.

A photograph is a two-dimensional visual representation of a three-dimensional world, and as such, a viewer must rely on their eyes in the evaluation of a photograph. But just as a manuscript evokes in the reader both depth and sense of the subject being written about, a photograph often delivers a more visceral impact upon the mind as it removes one additional layer between the message and reality. Copyright law protects the "expression of ideas," and there may be no truer expression of an idea than a photograph. *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822-23 (9th Cir. 2002).

A. Photography has battled the perception of being an inferior art since its inception.

When we think of "art," few would exclude photographs from that category. In fact, there is hardly an art museum that doesn't display photographic works either in their permanent collection or as part of rotating exhibitions. This, however, has not always been the case. For many decades, there was raging debate about whether photography was indeed a creative art. Part of this challenge is that when compared to the other arts (painting, sculpture, music, and writing to name just a few) photography is a recent development, accomplished using a mechanical (or digital) device. Many scholars point to the earliest known image as being created by Joseph Nicéphore Niépce in approximately 1826 or 1827.[3] Prior to that,

[3] This photograph can be seen at the Harry Ransom Center at the University of Texas at Austin. https://www.hrc.utexas.edu/exhibitions/permanent/firstphotograph/.

while images could be viewed on some substrate, there was no way to fix them in a tangible form.[4]

In the intervening years since that first photograph was created, the art of photography has truly changed the world. For example, the work of Matthew Brady during the Civil War brought the horrors of battle to the public in a way that had never been seen before;[5] Ansel Adams composed a symphony of light and shadow while documenting our National Parks;[6] and the documentary work of Jacob Riis brought to light the squalor of the tenements in New York.[7]

Photographs are created with tools such as cameras and lights; just as paintings are made with brushes and paint, and sculptures with chisels and stone. That photographers utilized new technologies of chemistry and film in the 1800's, or pixels and computers more recently, in no way diminishes the creative composition, direction, and influence of the photographer. In the 135 years since this Court first held that the Copyright Act protects photographs, the principle of photographs being entitled to copyright protection is unquestionable.

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[4] *See* 98 J. Pat. & Trademark Off. Soc'y 406 Elliot Brown, Ben Hattenbach, Ian Washburn, *From Camera Obscura to Camera Futura How Patents Shaped Two Centuries of Photographic Innovation and Competition*, 98 J. Pat. & Trademark Off. Soc'y 406 (2016).

[5] *Biography, Matthew Brady*, AMERICAN BATTLEFIELD TRUST, https://www.battlefields.org/learn/biographies/mathew-brady (Last Visited December 28, 2018).

[6] *Ansel Adams*, NATIONAL PARK SERVICE, https://www.nps.gov/people/ansel-adams.htm (Last Visited December 28, 2018).

[7] *Jacob Riis*, INTERNATIONAL CENTER FOR PHOTOGRAPHY, https://www.icp.org/browse/archive/constituents/jacob-riis?all/all/all/all/0 (Last Visited December 28, 2018).

Yet such caselaw does little good for the public, the creator, and the purpose and concept of copyright when a court holds that a photograph is not protected from the *intentional* copying of the combined selection and arrangement of the unique elements in a photograph (which should have the broadest level of protection). Even though the Ninth Circuit is correct that "none of those elements [that comprise the final image] is subject to copyright protection when viewed in isolation," it is well-settled that a work having "much in common" with a work which has been intentionally copied is entitled to broad protection. *Rentmeester v. Nike, Inc.,* 883 F.3d 1111, 1127 (9th Cir. 2018); *id.* at 1119.

Photographers the world over would be distressed to hear that their creations were being likened in any way to a factual compilation such as a phone book. This framework presumes that the individual elements in a photograph are divorced from the creativity of the photographer. It equates a phone book—a functional tool that merely arranges pre-existing and unchanged phone numbers—with a work of art in which the artist has carefully created each foundational element.

Due to these elements, "factual" as applied to photographs is not an appropriate measure of protectability. *Amicus* NPPA, whose members are visual journalists that communicate facts to society daily, requires its members to agree to a "Code of Ethics" that is the industry standard for visual journalists.[8] As part

[8] *See Code of Ethics*, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, https://nppa.org/nppa-code-ethics (Last Visited December 29, 2018).

of this Code, photojournalists are mandated to "[b]e accurate" and "maintain the integrity of the photographic images' content and context."[9] In other words, it is their *duty and responsibility* to remain factual. Despite this, few would argue that the work of these visual journalists is not creative or worthy of the highest levels of protection.

A photograph is an expression of a moment in time, a moment that must be carefully planned so that many creative elements come together at the "decisive moment"[10] when the photographer presses the shutter. Photographs are imbued with no less creativity, depth, and meaning than any other art form, and as such should be entitled to the full protection of copyright law. To hold otherwise strikes a blow at the heart of the photographer's craft and livelihood.

In this matter, the petitioner/photographer Mr. Rentmeester did not "select" Mr. Jordan's pose, in the same manner as would a compiler of phone numbers select what numbers to include in a phone book. The

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[9] *Id.*

[10] John Suler, *The Psychology of the "Decisive Moment"*, PHOTOGRAPHIC PSYCHOLOGY: IMAGE AND PSYCHE http://truecenterpublishing.com/photopsy/decisive_moment.htm (Last Visited December 28, 2018) (Bresson, *a founder of modern photojournalism, proposed one of the most fascinating and highly debated concepts in the history of photography: "the decisive moment." This moment occurs when the visual and psychological elements of people in a real life scene spontaneously and briefly come together in perfect resonance to express the essence of that situation. Some people believe that the unique purpose of photography, as compared to other visual arts, is to capture this fleeting, quintessential, and holistic instant in the flow of life. For this reason, many photographers often mention the decisive moment, or similar ideas about capturing the essence of a transitory moment, when they describe their work).*

artist here *created* Mr. Jordan's pose, and he created the tangible expression of that pose in the photograph. Why did Nike license Mr. Rentmeester's photo of Michael Jordan and then commission another photographer to replicate that photo? As is usually the case with an infringement, the answer lies in the extensive creative effort that went into Mr. Rentmeester's photograph, qualities which entitle it to copyright protection. At each step in creating the original image, Mr. Rentmeester displayed his creativity, skill, talent, and originality; and while the Ninth Circuit chose to undermine those choices, it is precisely the reason Nike chose this image to copy.

Creative elements expressed in a tangible work of art are precisely what copyright law protects. *Burrow-Giles*, 111 U.S. at 53. But instead of recognizing the way that the creative elements of a photograph came together to create a tangible expressive work, the Ninth Circuit majority opinion made the mistake of dissecting, and then dismissing, the individual expressive elements in photographs as unworthy of any protection whatsoever. This holding amounts to a judicial interpretation of what "art" is and treats photography in an entirely different way than other, more long-lived and conventional mediums of expression. As Justice Holmes noted near the beginning of the last century,

> "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

That the Ninth Circuit's decision was positioned as a natural result of copyright jurisprudence further shows why the circuit split on these issues needs be addressed. Just as no court would determine that a painting is entitled to lesser protections because it is simply a collection of individual, unprotectable brush strokes of color, neither should a photograph be dismembered and disrespected in the same way.

B. The court below improperly analyzed "substantial similarity."

This case turns on the Ninth's Circuit's examination of whether the creative, protectable elements of Mr. Rentmeester's photograph—a work entitled to "broad protection"—were unlawfully misappropriated by a work that was "substantially similar." As the Ninth Circuit admitted, it "do[es] not have a well-defined standard for assessing when similarity in selection and arrangement becomes 'substantial,'" *Rentmeester,* 883 F.3d at 1121. The court adopted the standard that "the two photos' selection and arrangement of elements must be similar enough that the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them." *Id*. Unfortunately, the Ninth Circuit did not follow that standard. Instead the appeals court outlined various clearly creative and unique elements in Mr. Rentmeester's and Nike's photographs—the grand jeté pose, the setting, the angle—and then dismissed each element based on minor differences. It is not surprising that substantial similarity wasn't found when the elements were examined in isolation. The result would have been different had the court considered the "selection and arrangement" of the creative and unique elements together as a whole, or examined the works based on whether an ordinary

observer would consider the works similar and overlook the disparities. And the methodology carried out below in this case would never be applied to an infringed novel, infringed painting, or other work of authorship.

"Substantial similarity" has been noted as "one of the most difficult questions in copyright law." 4 Melvin B. Nimmer & David Nimmer, Nimmer on Copyright § 13.03[A] (Matthew Bender, Rev. Ed.). To be sure, there are cases where copyright infringement is clear-cut, and substantial similarity is without question, such as a section of writing copied word for word or a photograph that is lifted directly from its source. The difficulty arises when there is an "inexact-copy infringement" as described by the Second Circuit. *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 133 (2d Cir. 2003). This matter by its very nature cannot be given a bright-line rule. It is valuable, however, to examine the distinction courts have made between a copy of an "idea" and the copy of the "expression of the idea." *See Mazer v. Stein*, 347 U.S. 201 (1954); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960). No one can protect an idea, but the expression of that idea *is* protectable.

If one discards the premise that a photograph is more than the sum of its creative parts, as the Ninth Circuit did in this matter, then it becomes quite easy to dismiss reproductions and derivative works as simply a copy of an idea, and therefore permissible. This dismissal would result in a world where every photograph could be co-opted and, with *any* change, determined to be a non-infringing work. Such a standard appears only to apply to photographs—as courts would likely never favor an infringement of a

Harry Potter novel where the characters, places and plot merely had minor variations when examined independently. Here, the court became as granular as relying upon the angle of Mr. Jordan's bent limbs, while then opining upon how that shift in angle evinces a change in perceived "propulsion." *Rentmeester*, 883 F3d at 1121-22.

Ultimately, the Ninth Circuit held that Respondent "borrowed only the general idea or concept embodied in the photo." *Rentmeester*, 883 F3d at 1121. Stepping back, however, and viewing the works as a whole, it is clear to almost any viewer that the images are "substantially similar." The tangible expression of the idea by Mr. Rentmeester is exactly what was stolen. The "ordinary observer" test set out by the court is easily fulfilled. *Id*. Only when deconstructing the image beyond recognition and then disregarding the value of the results could a court determine that this test was not met. The creative genesis and original expressive work was created by Mr. Rentmeester; the copy of that expression was replicated by Nike. Any other determinations defy not only the law, but a common-sense viewing. This iconic image, which has lasted in the public mind for decades, would never have existed but for the expression of ideas that Mr. Rentmeester fixed in a tangible form with his photograph.

C. It is the work as a whole that is protectable.

The Copyright Act protects "original works of authorship fixed in any tangible medium of expression . . ." 17 U.S.C. § 102(a). For decades, the trend in copyright jurisprudence was towards acknowledging the inherent originality and creativity in the works. However, as shown by the photograph created by Petitioner in this matter, the act of pressing the

shutter is simply one step in the process. It is the step that "fixes" the image in that "tangible medium of expression." To get to that point, the photographer must make a host of decisions, some conscious and others subconscious, that result in the final image. The more experienced the photographer, the more akin these decisions are to instinct—but that doesn't mean they are any less creative. It is these choices, akin to choosing the colors in a painting or the type of stone in a statute that imbue the photograph with originality.

The overt decisions the photographer makes can easily be grasped; these include the "subject matter, pose, lighting, camera angle, depth of field, and the like . . ." all of which were noted by the Ninth Circuit. *Rentmeester,* 883 F.3d at 1119. Left out of this equation are myriad other discreet choices; where to stand, time of day, the exact moment the shutter is pressed to capture peak action, and many others. For a photographer like Mr. Rentmeester, these choices are integral to the resulting image. Some of the choices may seem automatic, in the same way one may not constantly think about breathing, but are no less important for one's existence. Further, for the viewer, these choices are equally as important. A change in these fundamental elements creates a work that evokes different emotion, different message and meaning. The Ninth Circuit discards these elements as "unprotectable" when "viewed in isolation." *Rentmeester,* 883 F3d at 1119. This is where the court erred. The elements must not be viewed in isolation any more than the choice and selection of words, characters, and plot themes in a book would be examined in isolation rather than being examined as a whole. Similarly in the law, the analysis depends more on the "totality of the circumstances" involving a

qualitative assessment of all relevant factors rather than on a rigid quantitative analysis based merely upon each disparate element, which are truly the building blocks of photographs – just as are the letters in the words, the brushstrokes in a painting, or the notes in a song.

Less noticeable, but equally important, are the more philosophical elements, none of which the Ninth Circuit considered. Susan Sontag wrote in her seminal work "On Photography" that photographs "alter and enlarge our notion of what is worth looking at and what we have a right to observe." Susan Sontag, On Photography, 1 (1977). In many ways, Sontag cuts to the heart of the defining characteristic that makes photographs original and creative; that of the photographer's initial choice as to where to point the camera. By lifting the camera to the eye and pointing it in a certain direction, a photographer has specifically chosen to exclude all else from the frame. This choice can be readily translated to features of photographs such as *composition* and *balance*, words and ideas long noted in the other mimetic arts. Yet searching deeper, the photographer has made, by the act of simply pointing the camera, affirmative choices as to what is vital for the viewer to see: what is important and what is not. This "bias" on the part of the photographer, inherent in the genesis of every image, is a repudiation of photography as simply a mechanical, factual recording of a scene. The photograph stands as a frozen moment, meant to evoke in the viewer what all art is designed to evoke; emotion and connection. All of these elements combine to create the embodiment of the vision of the photographer.

CONCLUSION

Amici respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS B. MADDREY
General Counsel
AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS, INC.
901 Main St., Ste. 6530
Dallas, TX 75206
(214) 702-9862
tbm@maddreypllc.com
Counsel for Amicus American Society of Media Photographers, Inc.

MICKEY H. OSTERREICHER
General Counsel
Counsel of Record
ALICIA W. CALZADA
General Counsel
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION
120 Hooper Street
Athens, GA 30602
(716) 983-7800
lawyer@nppa.org
Counsel for Amicus National Press Photographers Association

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