No. 18-728

In the Supreme Court of the United States

JACOBUS RENTMEESTER,
Petitioner,

v.

NIKE, INC.,
Respondent.

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

BRIEF OF AMICUS CURIAE DIGITAL JUSTICE FOUNDATION IN SUPPORT OF PETITIONER

Andrew Grimm
DIGITAL JUSTICE FOUNDATION
15287 Pepperwood Drive
Omaha, NE 68154
(531) 210-2381

Gregory Keenan
DIGITAL JUSTICE FOUNDATION
81 Stewart Street
Floral Park, NY 11001
(516) 633-2633

J. Carl Cecere
Counsel of Record
CECERE PC
6035 McCommas Blvd.
Dallas, TX 75206
(469) 600-9455
ccecere@cecerepc.com
Counsel for Amicus Curiae

January 7, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

Other Authorities—continued:

Other Authorities—continued:

In the Supreme Court of the United States

No. 18-728

JACOBUS RENTMEESTER,

Petitioner,

v.

NIKE, INC.,

Respondents.

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

BRIEF OF AMICUS CURIAE DIGITAL JUSTICE FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE[1]

The Digital Justice Foundation is a nonprofit corporation dedicated to preserving individual rights in digital spaces. The Foundation has particular interest in the impact of the internet and digital technologies on civil liberties, privacy, and intellectual property. And it has particular concern for underrepresented users, artists, creators, and innovators.

[1] Counsel for all parties received notice of amicus curiae's intent to file this brief 10 days before its due date. All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than the amicus, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

All this affords the Foundation particular insight into the impact that the Ninth Circuit's decision in this case is likely to have on copyright law, and the ways that decision will threaten photographers of all stripes—particularly those that practice their art through digital means.

INTRODUCTION AND SUMMARY OF ARGUMENT

The trouble with photography results from the subtlety of its potential for artistic expression. The crystalline quality of a photograph can fool us into thinking what is depicted really *is* unmediated reality—as if the tableau it depicts simply occurred in nature by happenstance, rather than being assembled by the photographer. A photo's capacity for freezing moments in time also tricks us into missing the choreography that often goes into its creation—in which every gesture, every garment fold, is a step in a dance playing out in still-life before our very eyes. The camera's felicitous ease of use also tends to make us mistake its artistic creations for cheating—as if art must be *hard* to really be art. Time has only magnified photography's seductive and misleading qualities, with technological wizardry that makes it impossible to tell what is real and what has been constructed, sometimes pixel by pixel. Never has it been easier to overlook the artistry of the photographer.

The Ninth Circuit's decision in this case makes this mistake multiple times. In refusing to recognize copyright protection for a photograph's elements beyond their selection and arrangement in a completed photo, the court relegates photographs to a mere "factual compilations," protectable only in the artistry of the final product, rather than the methods and techniques that contributed to that final product. Pet. App. 10a.

The lower court likewise overlooked the creative potential of the photographer's lens when it worried that extending copyright protection to anything more than the ultimate arrangement of elements in Rentmeester's photograph risked granting him a "monopoly" on the very "*idea*" of Michael Jordan dunking a basketball in a "grand jeté" ballet pose, *id.* 14a—or the "idea[s]" embodied in photography's more technical elements, such as a "highly original lighting technique" or a "novel camera angle," removing them from the public domain, *id.* 9a.

This charge would never be levied against any other medium. No one would claim that affording copyright protection to Bob Fosse's dance creations would intrude into the realm of mere "ideas." Nor, for that matter, would anyone claim that the Mona Lisa was a mere compilation of facts, such that Da Vinci had no right to his particular depiction of his eponymous subject or her enigmatic smile. Photography's capacity for expression meets, if not exceeds, the creative potential in these other mediums, especially given the infinitely varied creative options available to today's digital photographer. The Ninth Circuit's refusal to recognize this reality thus reflects bias, not careful consideration.

It is essential that the Court take this case to reinforce photography's proper place within the constellation of artistic creation, and to lay to rest this kind of baseless bias against photography once and for all. This Court's review will also prove vital to create a rule of copyright durable enough for the digital age. The century's worth of developments in photography that have occurred since the Court last addressed copyright protection in photography have brought about a profusion of creative innovators in photography's technical elements—and a host of equally proficient copiers capable of stealing those individual

elements. Allowing copyright to go in the Ninth Circuit's direction would prove inadequate to protect these technical creators who currently dominate the field of photography—and the even more innovative creators following in their wake. Accordingly, this Court should accept the petition both to protect today's creators in the photographic medium, and tomorrow's as well.

ARGUMENT

I. Technological developments now permit photography to meet, even exceed, other mediums' artistic potential.

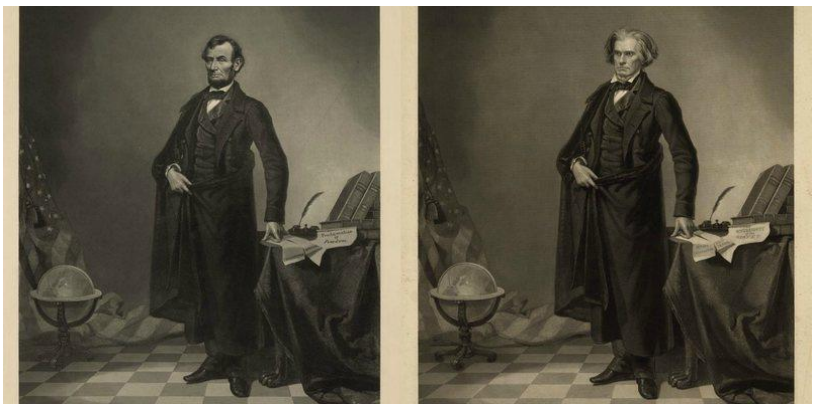
A. Debates over photography's artistic merits have been staples of coffee-house conversations since the medium was first invented. On one side have been aesthetes who have wondered whether photography's ease of use, its widespread popularity, and its perceived capacity for capturing unmediated reality somehow diminished its creative potential.[2]

B. On the other side have been the photographers themselves. And from the very beginning, they confounded these critiques. From the mid-nineteenth century on, photographers demonstrated—and enlarged—photography's artistic potential. They innovated through

---

[2] See, e.g., Justin Hughes, *The Photographer's Copyright—Photograph as Art, Photograph as Database*, 25 Harv. J.L. & Tech. 327, 356 (2012) (questioning the artistic merit of photography when "it allows people untalented in drawing or painting to create visual images they might otherwise imagine but be unable to create"); Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. Pitt. L. Rev. 385, 419 (2004) (noting that in photography's early period, few artists "considered photography to be within the realm of art").

their work in front of the camera—in the selection, and arrangement, and treatment of the image they were creating. They innovated in the darkroom too, through techniques like airbrushing, multiple negatives, and photomontage. Hughes, *supra* note 2, at 367. Indeed, one popular image of Abraham Lincoln actually depicts his head grafted onto the more imposing body of vice-president and senator John Calhoun[3]:



Even techniques that began as mistakes, like blurring and multiple exposures, soon became methods of expression—facilitating photographers' efforts to "depart from literal recording" and enter the realm of the creative.[4]

C. In this debate over photography's merits, copyright law has consistently sided with the photographers. Congress officially gave its stamp of approval to the photographic arts in 1865, when it officially made photographs copyrightable. Act of March 3, 1865, 38th Cong.,

---

[3] *A Brief History of Photo Fakery*, N.Y. Times (Aug. 23, 2009), <https://nyti.ms/2QrUc0D>.

[4] Edward Weston, *Seeing Photographically*, 9 Complete Photographer 3200 (1943), *reprinted in Photographers on Photography* 173 (Nathan Lyons ed., 1966).

2d Sess., § 86, 16 Stat. 198 (providing for copyright of a "photograph or negative thereof"). And the Court has consistently policed copyright's boundaries in a manner that has left room for protection of the photographic art form. The Court rejected the argument that a prospective artists' "sweat of the brow" effort in any way contributed to the originality of his expression—thus debunking any notion that the camera's ease of use ought to make its creations any less worthy. *Feist Pubs., Inc.* v. *Rural Tel. Serv. Co.*, 499 U.S. 340, 359-60 (1991). The Court likewise made clear over a century ago in *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U.S. 53, 59-60 (1884) that photographs are not mere "factual compilations," clarifying that copyright protection extends to all of the artistic judgments in a photograph—not merely the end product itself. In Sarony's famous picture of Oscar Wilde at issue in that case, these protected judgments included not only the photographer's "posing" of Wilde, the arrangement of his costume, draperies, and accessories, and his expression, but also the photo's more technical elements—"arranging and disposing the light and shade." *Id.* at 60.

D. These creative innovations of *Burrow-Giles*' day were a dinosaur age compared to today's craft. Back then, the photographic art was conducted with nothing but light, shadow, lens, and reactive paper. Today, photographers have moved way beyond the odd "original lighting technique" or "novel camera angle." Pet. App. 9a. And the art has been transformed by the fact that the computer has virtually displaced the darkroom, and photographers can change virtually every element in a photo—long "after the shutter has clicked."[5] A photographer can add

[5] Alison C. Storella, Note, *It's Selfie-Evidence: Spectrums of Alienability and Copyrighted Content on Social Media*, 94 B.U. L. Rev. 2045, 2052 (2014).

people or objects to a photo, or add filters to change the coloring or other qualities of the finished product. More complex computer algorithms allow photographers to enhance the quality of a photo beyond what appeared in the original. Blurry photographs can be made clear.[6] Light can be added to a photo to reveal details that were obscured in the original.[7] Indeed, with Google's Night Sight, everyday photographers can change night into day:

More astounding still, some photographers have pioneered efforts allowing them to move the camera's point of view depicted in a photo from one position to another—*after* the photo has been taken.[8] And some cameras do not even do not need a picture at all. They are able to "generate an image out of nothing" but data.[9] In short, today

---

[6] T.M. Cannon & B.R. Hunt, *Image Processing by Computer*, 245 Scientific American 214, 214 (1981).

[7] Vlad Savov, *Google Gives the Pixel Camera Superhuman Night Vision*, The Verge (Nov. 14, 2018), <https://bit.ly/2Q0EpcE>.

[8] Brian Hayes, *Computational Photography*, 96 American Scientist 94, 97-98 (2008).

[9] Antonia Bardis, *Digital Photography and the Question of Realism*, 3 Journal of Visual Art Practice 209, 211 (2004).

photographers could arrange the same tableau that Sarony created in his famous photo of Wilde, down to the folds of Wilde's gown, without having access to any photo of Wilde—or indeed, any photos at all.

Photographers have taken the freedoms facilitated by these technological advances in fantastical, wonderous new directions. Some artists, like Tom Bamberger, create images that never existed, and cannot exist outside the computer-facilitated photographic medium. Bamberger takes a single image and then uses a computer to extend that image into a seemingly endless horizontal landscape:

Other photographers deliberately challenge the viewer's ability to discern fact and fiction. Take Cindy Sherman, who famously composes photographs where she assumes various characters—even a corpse or an abused woman—thereby forcing the viewer to decide whether the photo *actually* depicts a person who has been abused, or actually is dead.[10] Sherman started out as a realistic *painter* aiming at perfect reproduction, but found photography to be "much quicker."[11] Sherman's art challenges the assumption that photographs depict things

[10] David La Rocca, *The False Pretender: Deleuze, Sherman, and the Status of Simulacra*, 69 Journal of Aesthetics and Art Criticism 321, 321-22 (2011).

[11] Vicki Goldberg, *Portrait of a Photographer as a Young Artist*, N.Y. Times, at 2 (Oct. 23, 1983).

that have actually happened or persons that actually existed. Here, for example, she takes the guise of an aging high-society woman:

Other photographers use technology to blur the line between photography and other genres like painting. Applying a filter, a photographer can make a photo appear as though it has the brushstrokes of a painting[12]:

[12] Kristen Radden, *5 Painterly Apps to Turn Your iPhone Photos Into Paintings*, iPhone Photography School (Dec. 9, 2014) <https://bit.ly/2sdGdS8>.

And some artists, like the world-famous Gerhart Richter, take that blurring in the other direction. Much of Richter's work involves projecting a photograph onto a screen and then painting a near replica of it—sometimes adding "blurs" with adjustments to the paint.[13] He claims this is an attempt to "paint like a camera."[14] On other works, Richter painted *over* existing photographs, further challenging the meaningfulness of any line between painting and photography:

Indeed, so intertwined are painting and photography in Richter's mind that he does not even consider himself a

---

[13] Sony Devabhaktuni, *Overlooking Overpainting,* Architectural Association Files 16, 17 (2010); see also Rosemary Hawker, *Idiom Post-medium: Richter Painting Photography*, 32 Oxford Art Journal 263, 265 (2009).

[14] Susan Laxton, *As Photography: Mechanicity, Contingency, and Other-Determination in Gerhard Richter's Overpainted Snapshots*, 38 Critical Inquiry 776, 787 (2012).

painter. He says instead: "I am practicing photography by other means." Laxton, *supra* note 14, at 787.

These few examples demonstrate why many critics believe the pendulum has swung completely in the other direction. Once painting occupied the privileged position in the art world, with the aesthetes questioning whether photography could ever match its artistic potential. But now it is photography, not painting, that has become "the privileged object of art theory."[15] Accordingly, the photographer has proven capable of meeting, if not exceeding, the creative capabilities of the painter, enjoying the complete freedom "to depict whatever he or she can imagine."[16]

E. As photographs thus have the same creative potential as paintings, they ought to enjoy painting's copyright protection. Just as paintings cannot be reduced to a "composition of unprotectable colors," *Enter. Mgmt. Ltd.* v. *Warrick*, 717 F.3d 1112, 1119 (10th Cir. 2013), Rentmeester's photographs too cannot be reduced to mere "compilation" of unprotectible facts.

That protection extends even to the highly creative and original pose that Rentmeester made Jordan assume. There is no doubt that Congress believed the positioning of bodies in space could have sufficient originality to be copyrightable. It said so specifically, by giving copyright protection to "pantomime and choreographic works." 17 U.S.C. § 102(a)(4). Congress was thus able to distinguish

---

[15] Diarmuid Costello & Margaret Iversen, *Photography Between Art History and Philosophy*, 38 Critical Inquiry 679, 680 (2012).

[16] Barbara Savedoff, *Escaping Reality: Digital Imagery and the Resources of Photography*, 55 Journal of Aesthetics & Art Criticism 201, 210 (1997).

between unprotectible "facts" and "ideas" from protectible poses. And it does not matter that the "dance" of the subject's pose in a photograph is captured in still life. Choreography is protected only when it is "fixed' to a "tangible medium" such as a photograph. *Id.* § 101. That is, it *must* be reduced to a photo—or some other medium—to receive copyright protection.

Congress's evident logic checks out: Granting Rentmeester a copyright in Jordan dunking a basketball in a grand jeté does not actually grant him a "monopoly" on any idea—Jordan remains free to use the same moves in his repertoire as he could before Rentmeester took his picture, just as other photographers remain free to choreograph their subjects in as many poses as the mind can fathom and the human form can assume.

By these same lights, granting copyright in the technical details of a photograph's creation confers no monopoly—because the photographer cannot claim ownership of the techniques, but only in the visual depiction of the photographer's expression. The message is clear: as DaVinci would have been entitled to claim his Mona Lisa, and Fosse would be able to claim his dances, Rentmeester can claim Jordan dunking via grand-jeté. And the similarly innovative artists of the technical aspects of photography can claim similarly robust protection.

F. That does not mean, however, that every element in every photograph will constitute protectible expression beyond its selection and arrangement. Where the photographer is uninvolved in creating an element—where he leaves his subject, or the technical details of the photo, as he finds them—then the scope of protection does not extend to that element, and the photographer's copyright is properly more limited.

But everything that the photographer does deliberately to create expression, before, during, and after the picture is taken, enjoys protection. That includes the photograph's composition, and also the lighting, filters, lenses, camera, film, perspective, aperture setting, shutter speed, and processing techniques he decides to apply to it. When the photographer has made these choices, he has not simply taken his facts as he finds them. He has *created* those facts, so they do not result from happenstance, but "owe their origin to an act of authorship." See *Feist*, 499 U.S. at 347. And accordingly, all of those deliberately created elements should enjoy copyright protection.

II. Technological developments also compound the consequences of failing to protect individual photographic elements.

Allowing the Ninth Circuit's stunted view of photographic copyrights to stand will not only enshrine an improper bias against photography into law—it will have real consequences for all photographers, ultimately diminishing the value of every photograph to its owner. This is not merely because "inevitably," the "copyright in a factual compilation is thin." *Feist*, 499 U.S. at 349. It is also because leaving the "elements" in a photograph unprotected will lay artists bare to the most common types of copyright theft. Just as technological advances have facilitated expression in photography, these same technologies have also facilitated new ways of copying that would effortlessly skirt the Ninth Circuit's limited protections of photographic copyrights.

A. Gone are the days when a person who sought to copy a photograph had to obtain the physical negative or make do with a grainy copy clipped from a newspaper or magazine. These days, high-quality copies are just a

mouse-click away, and come in virtually limitless supply. Over 3.5 trillion photos have been taken, a proliferation of ready-available images that has been facilitated en masse by the creation of camera phones.[17] That has led to a dizzying array of photos that appear online. On Facebook alone, within just a few years of the camera phone's introduction, there were more than twenty billion photos. *Id.* at 1719.

B. Things are made considerably worse by the existence of editing tools that enable any would-be copier to manipulate a photo in boundlessly variable ways—the same tools that facilitate photographer's creation of their own new works. The result is that photos are copied, chopped, and manipulated in infinite variety by people who have never even met the photo's true owner, much less obtained their permission. Once, such photo-editing software cost thousands of dollars, available only to trained specialists.[18] Today, it is included with many smartphones or downloadable for a small fee.

C. As the Ninth Circuit applied the substantial similarity test, the mere cropping of a photo becomes enough to avoid infringement, an act accomplished easily on any number of devices in a matter of seconds. If the elements of a photograph are only protectible in combination, leaving people "free to borrow any of the individual elements featured in a copyrighted photograph, 'so long as the competing work does not feature the same selection and arrangement' of those elements," Pet. App. 11 (quoting *Feist*, 499 U.S. at 349), then anyone could remove a single

---

[17] Elizabeth Porter, *Taking Images Seriously*, 114 Colum. L. Rev. 1687, 1699 (2014).

[18] Katie Hafner, *The Camera Never Lies, But the Software Can*, N.Y. Times, at 1 (March 11, 2004) <https://nyti.ms/2H06aPl>.

element from any photograph and then claim ownership in the resulting derivative anew. If that test were applied to other mediums, a person could simply lift the Mona Lisa's smile right off her face, or remove a chapter from *The Great Gatsby*, and avoid infringement. And the original creator would receive nothing. That would not do for these other mediums. And it will not do for photography.

Technology's expansion of copying potential provides a compelling reason to reinforce copyright protections for photographers in the digital age, and not to give in to the historical bias against photography.

III. Technological developments also reduce the risk that upholding photography's equal artistic capacities might lead to overprotection.

It is at least possible, however, that the Ninth Circuit's evident bias against photography is not the product of some irrational prejudice against the medium. It might be rooted instead in legitimate, albeit misplaced, concerns about over-protection. After all, it is at least worth asking whether, with so many photos being taken and shared online, the sheer tonnage of copyrighted material might make infringement ubiquitous and unavoidable, turning every photograph maker into an unwitting photograph stealer.

A. There is some evidence that the Ninth Circuit had these sorts of concerns in mind: The chief source the court relied upon for its stunted view of copyright in photographs itself raised such concerns about over-protection. Hughes, *supra* note 2, at 330 (warning that the "suite of problems for copyright will only worsen as we enter a period in which our daily lives are ubiquitously recorded in photography and videography").

B. Yet if it was concern about over-protection that drove the Ninth Circuit to its stunted view of photography, that move was an unnecessary one, because there are several reasons why such fears are unfounded. For one thing, this same critic who warns against the dangers of over-protection also suggests at least one reason why over-protection is unlikely to occur: Many of the most abundant photos will be surveillance photos, satellite images, and nearly disposable snapshots—and the protections available for these types of photos will be far lower than for the more creative photos taken by professional photographers. *Id.* at 375-76.

For another, the doctrines delimiting the "traditional contours of copyright protection" are already more than adequate to accommodate today's influx of taking and sharing photographs without resulting in over-protection. *Eldred* v. *Ashcroft*, 537 U.S. 186, 221 (2003). The availability of these doctrines meant there was no need for the Ninth Circuit to denigrate the artistry of photography, or to collapse the realm between "facts" and "ideas" in photography to avoid over-protection risk.

1. Foremost among these are the closely-intertwined doctrines of "scène à faire" and "merger." The former declines copyright protection when there are only extremely limited ways to express a common idea—so the "common idea is only capable of expression in more or less stereotyped form." 4 *Nimmer on Copyright* § 13.03 (2018). The latter declines to extend copyright protection when function dictates that expression occur in only one way—keeping "functionally—and factually—dictated expression free for competitors to use." Paul Goldstein, *Goldstein on Copyright* § 2.3.2 at 2:44 (3d ed. 2017). Thus, for example, the popularity of camera phones and social media will certainly mean that many more families will

take and share virtually identical photographs in front of the Statue of Liberty. Yet copyright would not give the first person to take this clichéd photo any right to prevent everyone else from taking it simply because she was first through the door to take part in the cliché. The limiting doctrines of "scène à faire" and "merger" exist "[p]recisely to avoid such absurd results." See 4 *Nimmer on Copyright* § 13.03.

2. The defense of fair use, 17 U.S.C. § 107, is another method of preventing over-protection. It avoids "rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). Accordingly, even as more and more popstars share their exploits via photos posted on Instagram, and their fans go on to imitate the photos in those own posts, those fans will have a defense against copyright infringement. The fans' imitation does not interfere with the popstar's commercial exploitation of its work—indeed, it might facilitate it. And thus that imitation is simply fair use.

3. The basic nature of copyright infringement is still another protective bulwark against over-protection in the digital age. A copyright is not a patent that is infringed whenever it is used. Rather, copyright infringement requires actual copying—the observation of the original and rendering it in substantially similar form. If the work is independently created, there will be no copyright infringement. As Judge Hand once remarked, "if by some magic a man who had never known it were to compose anew Keats's *Ode on a Grecian Urn*, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's." *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d

Cir. 1936), *aff'd*, 309 U.S. 390 (1940). Even if *Ode to a Grecian Urn* were still under copyright protection, Keats could not win a copyright-infringement lawsuit without proving that *his* words, not another's, were copied.

What is true for the words a poet writes is equally true for the images a photographer creates. And that means the millions of people taking and sharing their photos on social media will likely operate as a hedge *against* overprotection. With millions, even billions, of virtually identical photos online, it will be virtually impossible to prove that any one photograph was a copy of any other. Unless the putative owner can point out that the alleged copier's photo captured provably unique aspects of the original, it will be virtually impossible to prove that the alleged copy was not independently generated—or was not actually copied from another in the sea of similar photographs. In other words, the profusion of online photography might actually make infringement actions *less* common for the wealth of photography that exists online, by making the process of actually proving infringement more difficult. And that will actually leave photographers *freer* to make their own creative works, even as the proliferation of potentially copyrighted works increases exponentially.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Andrew Grimm
DIGITAL JUSTICE FOUNDATION
15287 Pepperwood Drive
Omaha, NE 68154
(531) 210-2381

Gregory Keenan
DIGITAL JUSTICE FOUNDATION
81 Stewart Street
Floral Park, NY 11001
(516) 633-2633

J. Carl Cecere
Counsel of Record
CECERE PC
6035 McCommas Blvd.
Dallas, TX 75206
(469) 600-9455
ccecere@cecerepc.com

Counsel for Amicus Curiae

January 7, 2019