No. 18-___

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 States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is copyright protection for a photograph limited solely to the photographer's "selection and arrangement" of unprotected elements, as the Ninth Circuit held below, or does it also cover elements of the photograph that express original, creative judgments by the photographer, as the First, Second, and Eleventh Circuits have held?

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INTRODUCTION

The image is iconic. Left arm outstretched, his hand gripping a basketball and his legs gracefully splayed, Michael Jordan soars upward in sheer defiance of gravity, arcing toward a hoop and backboard. There's no basketball court in sight. No teams, no fans, no referees. The sport's greatest player—illuminated by powerful spotlights and wearing his famous jersey—will dunk this ball alone. The eye is drawn to Jordan by a dark base at the bottom of the photo, which contrasts with his flight through a gentle sunset. The message is clear: Michael Jordan is an indomitable force of basketball whose power transcends any surrounding.

This photograph is perhaps unequaled in its ability to express the thrill of witnessing an exceptional athletic feat, while also grabbing the attention and fascination of the viewer. In 1984, Jacobus Rentmeester conceived, directed, and shot this famous photograph of Jordan for *LIFE Magazine*. Among other innovations, Rentmeester

created a never-before-used pose—inspired by ballet—to generate Jordan's appearance of weightlessness and power. This creative photographic composition has since won many awards. Last year, *TIME Magazine* ranked it among the 100 most influential images of all time.

When Nike later entered into a partnership with Jordan and sought a suitably memorable image to anchor its new campaign, it chose Rentmeester's photo. After soliciting a transparency of the photo from Rentmeester under a license expressly limited to "slide presentation only, no layouts or any other duplication," Nike broke its promise. It secretly commissioned its own version of the photo, which copies virtually every original element expressed in the Rentmeester photo:

After Rentmeester challenged Nike's use of his original work, Nike paid him for a license permitting use of its derivative image for "2 years" in "North America only." But then Nike again broke its word, and has since used the photo in countless commercial settings worldwide.

Rentmeester later brought this copyright infringement action. In the opinion below, a divided panel of the

U.S. Court of Appeals for the Ninth Circuit held at the pleading stage that the protected elements of the two photos are not substantially similar as a matter of law. Its decision articulates a novel, restrictive, and deeply flawed theory of copyright protection for photographs—one that treats photography as a second-class art and denigrates photographers' artistic judgments.

According to the Ninth Circuit, the individual elements of a photo are categorically unprotectable under copyright law, no matter how much originality went into staging the tableau, creating the image, or inventing compositional techniques. Like a phonebook, photo-graphs are protected only in their selection and arrangement of unprotected facts—and are thus entitled to markedly thinner protection than any other art form.

This holding creates a clear split with decisions of the First, Second, and Eleventh Circuits. It is in tension with decisions by the Third and Tenth Circuits authored by then-Judges Alito and Gorsuch. And it evokes a historical denial of the artistry involved in carefully-staged photographs that was long ago rejected by this Court. The instability it creates in copyright protection will foster uncertainty, chill creativity, and reward piracy. Only this Court's intervention can set the law aright.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 883 F.3d 1111 (9th Cir. 2018). App. 1a. The Ninth Circuit's order denying rehearing and rehearing en banc is not reported. App. 27a. The district court order granting Nike's motion to dismiss is available at No. 3:15-cv-113, 2015 WL 3766546 (D. Or. June 15, 2015). App. 28a.

JURISDICTION

The Ninth Circuit filed its opinion on February 27, 2018, and denied a petition for rehearing and rehearing en banc on July 6, 2018. On October 3, 2018, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including December 3, 2018. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Art. I, § 8 of the United States Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries."

17 U.S.C. § 102(a) provides that "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include . . . pictorial, graphic, and sculptural works."

17 U.S.C. § 102(b) provides that "in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery . . ."

17 U.S.C. § 106(2) provides that "the owner of copyright . . . has the exclusive rights to . . . prepare derivative works based upon the copyrighted work."

STATEMENT

I. Protecting photographs under copyright law

Since photographs first arrived on the scene, jurists have debated whether they involve genuine creativity and thus merit copyright protection. Even as courts and commentators have developed a more refined appreciation of the creative judgments essential to photography, some judges have persisted in treating it as a second-class art form. The decision below, which compared photographs to phonebooks, rests upon that pejorative view of photography's capacity for artistry.

A. The early years of photography

"Skepticism about the degree of authorship required for creating a photograph . . . has existed since the dawn of the medium." Eva E. Subotnik, *Originality Proxies: Toward a Theory of Copyright and Creativity*, 76 Brook. L. Rev. 1487, 1507 (2011). Indeed, when photography first emerged in the 1830s, many observers maintained "that the photographer was not a creator, but an operator of a machine: it was the machine's interaction with nature that was the source of the final photographic image." Justin Hughes, *The Photographer's Copyright—Photograph as Art, Photograph As Database*, 25 Harv. J.L. & Tech. 339, 343 (2012).

On this view, photography is solely a matter of light and science. Through mechanical processes and without any need for human imagination, it produces an objective image of the world. *See* Susan Sontag, *On Photography* 4 (1977) ("Photographed images do not seem to be statements about the world so much as pieces of it, miniatures of reality that anyone can make or acquire."). Louis Daguerre thus described his daguerreotype invention "as not merely an instrument which serves to draw Nature,"

but as one that "gives her the power to reproduce herself." *Id.* Similarly, the English inventor William Henry Fox Talbot heralded an age in which "nature draws itself without the aid of an artist's pencil." *Some Account of the Art of Photogenic Drawing, or the Process by Which Natural Objects May Be Made to Delineate Themselves Without the Aid of the Artist's Pencil*, Royal Soc'y of London (Jan. 31, 1839). On this side of the Atlantic, Edgar Allen Poe remarked that the new technology offered "truth itself in the supremeness of its perfection." *The Daguerreotype*, Alexander's Weekly Messenger (Jan. 15, 1840).

The most hostile descriptions of photography often came from artists—some of whom felt threatened. When Paul Delaroche first saw a daguerreotype in 1839, he is said to have cried, "From today painting is dead!" Tom Ang, *Photography: The Definitive Visual History* (2014). Many artists disparaged photography's mechanical quality and apparent objectivity. "Unlike a painter whose every brushstroke is mediated through her mental vision, critics cast a photographer as a mere technician relegated to clicking a shutter button." Terry S. Kogan, *The Enigma of Photography, Depiction, and Copyright Originality*, 25 Fordham Intell. Prop. Media & Ent. L.J. 869, 871–72 (2015).

John Ruskin thus warned that photography "implied the substitution of vulgar verisimilitude for higher truths." Mary Warner Marien, *Photography and Its Critics: A Cultural History, 1839-1900* 3 (1997). Charles Baudelaire deemed photography a mere "servant of art and science, like printing and stenography," which failed to transcend "external reality." Naomi Rosenblum, *A World History of Photography* 209 (4th ed. 2008). To the

influential French art critic Charles Blanc, "because photography copies everything and explains nothing, it is blind to the realm of the spirit." *Id.* at 210.

These early attacks on photography's artistic merit reflected broader trends in art and society. The rise of impressionism had already sparked debate over the importance of realism. *See* Ang, *Photography*, at 37. Some critics worried that the popularization of photographic images would degrade social imagination. *See* Kogan, *The Enigma of Photography*, at 883. These anxieties were occasionally linked to fears regarding the commercialization and mass production of art. *See* Rosenblum, *A World History of Photography*, at 210.

Even in this era, though, some prescient commentators "realized that camera images were or could be as significant as handmade works of art." *Id.* at 209. The writer Louis Figuier observed: "The lens is an instrument like the pencil and the brush, and photography is a process like engraving and drawing, for what makes an artist is not the process but the feeling." *Id.* at 213.

By the 1850s, some fine art galleries had begun displaying photographs—launching a battle over classification that centered on photography's artistic merits. Over the following decades, these debates assumed added legal importance with the expansion of commercial photography and the rise of photographers who resented piracy of their work. *See SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 306 (S.D.N.Y. 2000).

B. The origins of protection for photography

Against this contested background, it is no surprise that "early case law on copyright protection for photographs evidenced conflict [over] whether photographs

can qualify as works of authorship." 1 *Nimmer on Copyright* § 2A.08[E][2]. In the view of one federal court, "the only force that contributes to the formation of the image is the chemical force of light, operating on a surface made sensitive to its power." *Wood v. Abbott*, 30 F. Cas. 424, 425 (C.C. S.D.N.Y. 1866) (No. 17,938).

Congress, however, disagreed. During the final year of the Civil War—whose horrors had been movingly documented by Matthew Brady—Congress passed the Act of March 3, 1865, 38th Cong., 2d Sess., 16 Stat. 198. This bill made clear that photographs were copyrightable. *Id.* ("[The Act's provisions] shall extend to and include photographs and the negatives thereof . . .").

But that was not the end of the matter. In 1882, Oscar Wilde toured America during the production of Gilbert & Sullivan's operetta "Patience," which satirized Wilde's "aesthetics" movement. Upon his arrival, Wilde sought out the famed portraitist Napoleon Sarony for a series of publicity photographs. Sarony then registered his images with the Copyright Office. Nonetheless, Burrow-Giles, an unscrupulous lithography firm, copied one of Sarony's photos and sold over 85,000 prints.

When Sarony sued, Burrow-Giles invoked the Copyright Clause. As Judge Pauley has recounted, it "asserted that 'writings' under the Constitution were limited to literary productions and that photographs did not involve authorship since they were the result of a mechanical process." *SHL Imaging*, 117 F. Supp. 2d at 308. In this respect, "the contest in the Burrow-Giles case [was] representative of the debate that raged over whether

photography was an art or a science in the late nineteenth century." Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. Pitt. L. Rev. 385, 416 (2004).

This Court rejected Burrow-Giles's position. It first held that the Constitution does not confine Congress's copyright power to written texts, noting that "maps, charts, designs, engravings, etchings, cuts, and other prints" had always been protected. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884).

The Court then rejected Burrow-Giles's claim that "a photograph . . . involves no originality of thought or any novelty in the intellectual operation connected with its visible reproduction in shape of a picture." *Id.* at 59. While suggesting that this may be true of certain "ordinary" photographs, the Court recognized that Sarony's portrait was an original work of art, the "product of plaintiff's intellectual invention." *Id.* at 59–60. To support that conclusion, the Court observed that this was a "useful, new, harmonious, characteristic, and graceful picture." *Id.* at 60. Further, creating the photograph had involved "posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, [and] suggesting and evoking the desired expression." *Id.*

Burrow-Giles thus held that where "a photograph reflects the photographer's decisions regarding pose, positioning, background, lighting, shading, and the like, those elements can be said to 'owe their origins' to the photographer, making the photograph copyrightable, at least to that extent." *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1264 (10th Cir. 2008)

(Gorsuch, J.). In the debate over photography's status as art or science, *Burrow-Giles* recognized that some photos express the highest artistry.

C. Consensus and conflict since *Burrow-Giles*

Since *Burrow-Giles*, courts have largely agreed on the importance of protecting photographs in copyright law, even as they have diverged in their understanding of what makes photography creative. This difference of opinion largely tracks the conflict described above. Jurists with a narrow view of copyright protection for photography tend to describe it as an inferior art form, emphasizing its mechanical nature and depiction of external reality. Those with the view expressed in *Burrow-Giles*, in contrast, highlight the range of creative judgments available to any photographer—especially those who stage the scene they are capturing and employ unusual techniques to express it.

To start with consensus, critics have evolved over the past century toward a richer appreciation of photography's artistic nature. *E.g.*, Sontag, *On Photography* 7 ("[P]hotographs are as much an interpretation of the world as paintings and drawings are."). Courts, too, have more consistently acknowledged copyright law's protections for photographs. *See* 2 *Patry on Copyright* § 3:118. Although photographers cannot copyright their underlying subject matter—nobody is entitled to copyright a mountain or human face—courts agree that the original judgments that photographers make in composing images are protectable.

This understanding of the law rests not only on *Burrow-Giles*, but also on Justice Holmes's opinion in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). There, this Court affirmed that photographs

"drawn from [] life" are protected in their original contribution and depiction, since "the opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face." *Id.* at 249. Reflecting a capacious view of photography's artistic nature, the Court added that a photograph "is the personal reaction of an individual upon nature," and "personality always contains something unique." *Id.* at 250.

From this account of photography, many courts have drawn the lesson that "no photograph, however simple, can be unaffected by the personal influence of the author." *Jewelers' Circular Pub. Co. v. Keystone Pub. Co.*, 274 F. 932, 934 (S.D.N.Y. 1921) (Hand, J.). Put differently, courts have recognized that photography always involves creative judgments. And because any work possessing "at least some minimal degree of creativity" will "qualify for copyright protection," *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991), photographs fall within copyright's domain.

But agreement among courts extends no further than this narrow premise. As we describe in greater detail below, courts and commentators still struggle to identify "a common set of protectable elements" in photographs. *SHL Imaging*, 117 F. Supp. 2d at 310. In many ways, this struggle reflects the continuing vitality of a "19th century prejudice against the creation of works by mechanical means"—a prejudice "rooted in unfounded suspicion that photographic equipment restricts creativity." *Id.*; *see also* 2 *Patry on Copyright* § 3:118 ("Protection for photographs has been hampered by superficial examination of the wide range of creative options available to photographers.").

II. Factual Background

If any image is entitled to robust copyright protection, it is Rentmeester's canonical photograph of Michael Jordan soaring through the air. That is confirmed by a review of Rentmeester's background, an accounting of how he came to stage and create this photograph, and a survey of Nike's interactions with Rentmeester.

A. Rentmeester's photographic artistry

Before he was a photographer, Jacobus Rentmeester was an athlete, competing as an oarsman for the Kingdom of the Netherlands in the 1960 Olympic Games. He then moved to the United States, where he was a staff photographer for *LIFE Magazine* from 1966 to 1972, and thereafter worked as a freelance photographer. Rentmeester created some of the most memorable images of the twentieth century. For example, Rentmeester covered the Vietnam War (where he was wounded by a sniper's shot to his hand). His 1967 photograph of an American tank commander became the first color photograph to win the World Press Photo of the Year award, photojournalism's highest honor:

Rentmeester's photograph of the hostage crisis at the 1972 Munich Olympics became the defining image of that event:

That same year, Rentmeester won first prize in the World Press Photo Sports Category for the following photograph of Olympic swimmer Mark Spitz:

Rentmeester's photographs were featured on the covers of major magazines at least sixty-seven times. For example:

Throughout his career, Rentmeester has been especially well-known for photographing top athletes in original, surprising, and iconic ways—a talent aided by his own early accomplishments as an athlete. This year, in recognition of his genius for photographing athletes, Rentmeester was honored with the prestigious Lucie Award for lifetime achievement in sports photography.

B. Rentmeester staged and created a unique portrait of Michael Jordan for *LIFE Magazine*.

When the Summer Olympics returned to the United States in 1984, *LIFE Magazine* asked Rentmeester to create a portfolio of those who represent our nation's best. This photo essay included a portrait of Jordan, then a student at the University of North Carolina.

The Rentmeester photo is highly staged and manifests significant creativity and technical skill. Over the initial objections of UNC staff, Rentmeester insisted on an outdoor location, away from a basketball arena. This allowed Rentmeester to depict an isolated Jordan surrounded by an expanse of clear sky. Rentmeester then assiduously eliminated visual distractions—going so far as to direct his assistants to borrow a lawnmower to cut the grass as low as possible.

Rentmeester deliberately orchestrated many other visual elements. To start, he omitted any indication of basketball aside from a hoop, backboard, and pole. Rentmeester selected the location for the basketball pole and directed his assistants in digging the hole, erecting the poll, and assembling the hoop and backboard.

Having staged the scene in an unusual and original manner, Rentmeester posed Jordan in a specific, artificial way that was inspired by Rentmeester's experience one year earlier photographing Mikhail Baryshnikov at the American Ballet Theatre. This novel pose was a departure for the up-and-coming basketball star, and required a creative variance from ballet: Jordan could not appear to be performing a standard ballet leap. Instead, Rentmeester posed Jordan so as to trick the viewer into thinking that Jordan was performing a gravity-defying dunk. To that end, Rentmeester asked Jordan to jump with his body open and facing the

camera, his left leg forward, and his left hand extended while holding the perched basketball. The pose was not reflective of Jordan's natural jump. Among other things, Jordan normally dunked with his right hand. The unusual nature of the pose required Jordan to practice several times in response to Rentmeester's direction.

Several other creative elements of the Rentmeester photo also reflect artistic judgment. First, the photo presents a sharp silhouette of Jordan's full figure against a contrasting solid background. Rentmeester achieved this effect by using a fast shutter speed synchronized with a powerful set of carefully-arranged outdoor strobe lights.

Second, the photo expresses Jordan's full figure at the apex of his vertical leap. Rentmeester was able to create this impression by hitting the shutter-release button at a precise moment in Jordan's arc—namely, the moment when his limbs were the most outstretched and he reached the maximum extent of vertical height.

Third, the photo maintains a deep depth of field. Simply stated, the depth of field in a photograph is the distance within the image that appears in focus. A photographer varies the depth of field by choosing the lens, varying the aperture size (the F-stop number), and varying the focal distance. By employing an atypically deep depth of field, Rentmeester rendered all visual elements in focus, dramatizing Jordan's dunk.

Finally, Rentmeester made creative choices in setting the scene and distributing visual elements. For example, Rentmeester arranged the basketball hoop on the right side of the image, with Jordan to the left of it. This was a creative, non-obvious decision. Jordan is right-handed and typically dunks with his right hand. Thus, the vast majority of photographs of Jordan dunking display the

hoop on the left side of the image with Jordan on the right. But Rentmeester did the opposite, which permitted Jordan's extended left arm to hold up the basketball without crossing in front of Jordan's face.

Together, these creative judgments reflected artistry and original vision. None of them was required by the conventions of the genre; indeed, many of them defied it. And none of them is necessary to expressing the idea of a basketball player soaring through the air to dunk a ball; the originality in expressing that familiar idea is why the photograph has won so many awards, and it is why Nike reached out to Rentmeester to obtain a copy of the film. The Rentmeester photo is truly a work of art.

C. Nike's Creative Director sees the photo, steals its original elements, pays Rentmeester when discovered, and then breaks that deal.

At approximately the same time that *LIFE Magazine* published the Rentmeester photo, Nike and Jordan entered into their well-known endorsement relationship. Nike searched for an image that it could use to launch its marketing campaign. Peter Moore, Nike's Creative Director, led the effort and found what he sought in the Rentmeester photo. Moore contacted Rentmeester and asked for color transparencies of the original film. Rentmeester agreed to lend them to Nike with the following conditions:

> *2 color transparencies "Michael Jordan" for slide presentation only, no layouts or any other duplication*

Moore violated the limited license with Rentmeester almost immediately. He did so by giving the Rentmeester photo to another photographer and instructing him to create an unauthorized derivative work, this time

with Jordan wearing Nike shoes (the Rentmeester photo has him in Converse shoes):

Having copied nearly every original element of the Rentmeester photo—including all of the elements listed over the prior three pages—Nike then used the derivative photograph on posters and billboards. Rentmeester saw the Nike photo and complained to Nike. (This petition refers to these photos as the "Rentmeester photo" and the "Nike photo.")

At that time, Nike all but admitted that the Nike photo was an unauthorized derivative work. It therefore entered into a second limited license with Rentmeester, permitting the following limited use of the Nike photo:

> *Usage of image "Michael Jordan" Poster and Billboard, 2 years - - - - for North America only.*
>
> *(all other usage rights reserved)*

Yet again, however, Nike ignored the limited terms of its license, reproducing the Nike photo in a wide variety

of forms continuously through the present. In so doing, it has repeatedly violated Rentmeester's copyright.[1]

III. Proceedings below

A. The district court

Rentmeester filed his complaint in 2015, alleging, among other things, that Nike infringed his copyright in the Rentmeester photo by creating and reproducing the Nike photo. Nike then moved to dismiss, arguing that Rentmeester "cannot claim copyright over the 'idea' of Jordan dunking a basketball."

The district court granted Nike's motion to dismiss. It began by noting that "ideas—even very creative ideas—are not granted copyright protection." App. 34a. "Rather, it is the expression of the idea that is protected." *Id.* The district court then asserted, with little analysis and in defiance of Rentmeester's own allegations, that the "idea" expressed in the photograph is "Michael Jordan in a gravity-defying dunk, in a pose inspired by ballet's grand-jeté." App. 36a. Having defined the photograph's "idea" in a manner that incorporated key expressive judgments, the district court then concluded that the image merited little more than "thin

[1] After Rentmeester's difficult experience with Nike in first complaining about the infringing Nike photo, he concluded that he would not be able to alter Nike's behavior further without litigation. But Rentmeester's livelihood was commercial photography, and he did not want to put that at risk by filing a copyright lawsuit against one of the world's most important advertisers. Rentmeester felt he had no choice but to wait until after retiring from commercial photography to file this case. His lawsuit seeks damages within the three-year statute of limitations period (January 22, 2012 to the present). *See Petrella v. MGM, Inc.*, 134 S. Ct. 1962, 1970 (2014). Nike raised no statute-of-limitations or laches defenses.

protection," since there were few ways to express its idea and thus little creativity involved in doing so. App. 37a.

Applying this test, the district court first filtered out as unprotectable "the basketball hoop, the basketball, a man jumping, Mr. Jordan's skin color, and his clothing." App. 39a. It then rejected any protection over the ways in which Rentmeester had selected and arranged the visual elements of his picture. App. 39a–40a. Next, it held that copyright law protects Jordan's pose, but concluded that the Nike Photograph did not infringe because it was not "virtually identical." App. 41a. Finally, guided by its belief that the Rentmeester photograph involved little originality and merited only weak copyright protection, the district court dismissed all other similarities. App. 41a–42a.

B. The court of appeals

On appeal, a divided panel of the Ninth Circuit affirmed. The majority first acknowledged that Rentmeester had properly alleged ownership of a valid copyright and the opportunity to copy his original work. *See* App. 6a–7a. It therefore turned to the question whether he had shown that the works are "substantially similar." App. 8a. Consistent with the approach taken by the other circuits, the majority announced its intent to "filter out the unprotectable elements of the plaintiff's work," so that it could compare the "protectable elements that remain . . . to corresponding elements of the defendant's work." *Id.* (quotation marks omitted).

Just a few paragraphs later, however, the majority asserted that virtually *nothing* in a photograph is protectable—regardless of the creativity involved:

> To be sure, photos can be broken down into objective elements that reflect the various

> creative choices the photographer made in composing the image—choices related to subject matter, pose, lighting, camera angle, depth of field, and the like. But none of those elements is subject to copyright protection when viewed in isolation.

App. 9a (citation omitted). To support this assertion, the majority reasoned that nobody can copyright a particular lighting technique, camera angle, or pose. *See id.* No matter how original the direction and creation of the subject matter for a particular photograph, "a subsequent photographer is free to take her own photo of the same subject, again so long as the resulting image is not substantially similar to the earlier photograph." *Id.* Accordingly, the majority held, copyright law does not protect the individual expressive elements in an image; rather, it protects only the "selection and arrangement of the photo's otherwise unprotected elements." App. 10a.

As the majority noted, this rule "liken[s]" photographs to "factual compilations"—such as phonebooks—which are protected only in their arrangement of unprotected materials. *Id.*; *see also* App. 11a ("The individual elements that comprise a photograph can be viewed in the same way, as the equivalent of unprotectable 'facts' that anyone may use to create new works.").

Applying this rule, the majority determined that Rentmeester's "selection and arrangement" of elements "produced an image entitled to the broadest protection a photograph can receive." App. 13a. But given the majority's conclusion that the individual elements themselves are unprotected, even this protection proved anemic. In a section of its opinion that Judge Owens's dissent aptly described as a "compelling motion for

summary judgment or closing argument to a jury," App. 23a, the majority strained to find differences in the photos while downplaying or dismissing all similarities. App. 12a–16a. Ultimately, the panel held—on the pleadings alone—that the Rentmeester and Nike photos are not substantially similar because "the details" of the former are not "replicated" in the latter. App. 14a.

Dissenting, Judge Owens agreed with the majority's view of the law but disagreed with its application of that rule. App. 23a–26a. "Where no discovery has taken place," he wrote, "we should not say that, as a matter of law, the Nike photo could never be substantially similar to the Rentmeester photo." App. 23a. This is especially true given that "the Nike photo . . . has much in common with the broadly protected Rentmeester photo." App. 24a (citation omitted). "For example, in addition to the similarity of both photos capturing Michael Jordan doing a grand-jeté pose while holding a basketball, both photos are taken from a similar angle, have a silhouette aspect of Jordan against a contrasting solid background, and contain an outdoor setting with no indication of basketball apart from an isolated hoop and backboard." *Id.*[2]

Over a dissent by Judge Owens, the panel subsequently denied panel hearing. The Ninth Circuit denied Rentmeester's petition for rehearing en banc.

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[2] Rentmeester also alleged that Nike's famous Jumpman logo violated his copyright. The panel affirmed dismissal of this claim, relying on its exceptionally narrow view of which elements in Rentmeester's photo are protectable. If the Court grants this petition and reverses, it should also vacate the Ninth Circuit's holding on the Jumpman logo and remand for consideration of that claim under the correct legal standard.

REASONS FOR GRANTING THE PETITION

In holding that the individual elements of a photograph are categorically unprotectable in copyright law, even when the photographer staged an original tableau, the Ninth Circuit split from the First, Second, and Eleventh Circuits, and brought its law into tension with the Third and Tenth Circuits. Its holding, moreover, denigrates photography as an art form and conflicts with this Court's precedent. Left uncorrected, the Ninth Circuit's erroneous rule of law will stand as an obstacle to uniform application of the Copyright Act. It will sow confusion, reward piracy, and stifle creativity.

I. The decision below creates a circuit split.

Although courts recognize that photographs can be protected, they have badly fractured in describing which elements of a photograph are protectable. As Judge Pauley has observed, "there is no uniform test to determine the copyrightability of photographs." *SHL Imaging*, 117 F. Supp. 2d at 309; *see also Bryant v. Gordon*, 483 F. Supp. 2d 605, 615 (N.D. Ill. 2007) ("In some cases, the contrived positioning of a subject has been protected, but in other cases, poses have not been considered to be copyrightable[.]").

Leading commentators agree with this view. *See, e.g.*, 1 *Nimmer on Copyright* § 2A.08[E][1] ("[T]he challenge is to locate the source of the originality in the expressive content of the photograph in order to determine the scope and contours of protection. It is in this realm that confusion and disagreement among courts and scholars continues to arise."); 2 *The Law of Copyright* § 14:28 ("It is hard to say there is any overwhelming consistency in this area."); Rebecca Tushnet, *Worth A Thousand Words: The Images of Copyright*, 125 Harv. L. Rev. 683,

687 (2012) (noting "persistent difficulties in assessing copyrightability and infringement for visual works").

Of course, it is one thing to dispute *which* creative elements of a photograph are protectable; it is quite another to hold that *none* are. But that is what happened here. The Ninth Circuit now treats photographs as glorified phonebooks, shielded from piracy only in their selection and arrangement of bare facts. *See* App. 11a (describing "the individual elements that comprise a photograph . . . as the equivalent of unprotectable 'facts' that anyone may use to create new works").

Further, as evidenced by its analysis, the Ninth Circuit does not believe that originality in the selection and arrangement of a photograph's elements can *ever* receive much protection. Even for an image "entitled to the broadest protection a photograph can receive," the Ninth Circuit found no infringement because "the details" of one photo were not "replicated" in another. App. 13a–14a. That is thin protection in all but name.

This requirement of near-virtual identity is not how a highly original painting, book, or screenplay would be analyzed. Photographs are now held to a *de facto* requirement of super-substantial similarity—a requirement that follows directly from the Ninth Circuit's view that photography is a lesser art form, one confined to clever organization of facts rather than artistry in its component elements. *See Feist*, 499 U.S. at 349 (observing that, "inevitably," the "copyright in a factual compilation is thin"). The Ninth Circuit did not explain by how much the upper limit of protection for photographs falls short of that for other art forms, but fall short it clearly does. This is confirmed by the Ninth Circuit's explicit embrace of a controversial law review article whose conclusion is that "copyright protects far fewer photo-

graphs than is commonly understood and, as with the thin copyright of a database, offers less protection to those photographs that are copyrighted." Hughes, *The Photographer's Copyright*, 25 Harv. J.L. & Tech. at 342; *see also* App. 10a (citing this article to support the claim that "photographs can be likened to factual compilations").

The Ninth Circuit's approach renders it an outlier. As we explain below, the First, Second, and Eleventh Circuits have all held that original elements of a photograph are protected. Further, in an opinion by then-Judge Alito, the Third Circuit described the originality of staged photographic portraits in far more robust and protectable terms than did the Ninth Circuit below. *See Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 284 (3d Cir. 2004) (en banc) (describing the Oscar Wilde portrait in *Burrow-Giles* as "indisputably a work of art," and emphasizing that "[a] photographic portrait . . . does not simply convey information about a few objective characteristics of the subject but may also convey more complex and indeterminate ideas"). And in an opinion by then-Judge Gorsuch, the Tenth Circuit has described the individual "elements" of a photograph reflecting artistic judgment as the basis for copyright protection (and thus as plainly protectable): "[T]o the extent a photograph reflects the photographer's decisions regarding pose, positioning, background, lighting, shading, and the like, *those elements* can be said to 'owe their origins' to the photographer, making the photograph copyrightable, at least to that extent." *Meshworks*, 528 F.3d at 1264 (emphasis added).

None of these opinions can be squared with the Ninth Circuit's analysis. In any other circuit, Rentmeester's artistic judgment concerning elements such as "subject

matter, pose, lighting, camera angle, depth of field, and the like" would be treated as protected for purposes of substantial similarity analysis. App. 9a. So would his creativity in staging and directing the tableau. Here, these elements were given no weight individually and little weight in combination. That created a clear split.

A. The First Circuit

In *Harney v. Sony Pictures Television, Inc.*, 704 F.3d 173 (1st Cir. 2013), the First Circuit defined the protectable elements of a photograph in a manner directly at odds with the Ninth Circuit's decision below.

Harney involved two photographs. The first was taken in April 2007, when freelancer Donald Harney "snapped a photograph . . . of a blond girl in a pink coat riding piggyback on her father's shoulders as they emerged from a Palm Sunday service in the Beacon Hill section of Boston." *Id.* at 176. When it was subsequently revealed that the father was a German citizen who had abducted his daughter, Harney's photo was used by the FBI in a "Wanted" poster. *Id.* And when Sony Pictures Television, Inc. created a made-for-TV movie about the abduction, it commissioned a photo similar to Harney's, prompting him to sue for infringement. *Id.*

Like many others to address these issues, the First Circuit opened its analysis by acknowledging that "courts and commentators have noted that copyright concepts developed for written works imperfectly fit the visual arts, including photography." *Id.* at 180 n.7.

The First Circuit then drew an important distinction. For "subject matter that the photographer did not create"—whether "a person, a building, a landscape or something else"—it might make sense to treat that subject as either an "idea" or a "fact," neither of which is "entitled to copyright protection." *Id.* at 181. In such

cases, creativity arises from "the photographer's selection of, *inter alia*, lighting, timing, positioning, angle, and focus." *Id.* at 180 (citation omitted). However, the court then emphasized, "[a]dditional factors are relevant *when the photographer does not simply take her subject 'as is,'* but arranges or otherwise creates the content by, for example, posing her subjects or suggesting facial expressions." *Id.* at 180–81 (emphasis added).

In *Harney*, because "neither the subject matter of the earlier work nor its arrangement" were attributable to the photographer, the court took a more limited view of the image's protectable elements. *Id.* at 182. Specifically, it focused on the "selection" of elements, as the Ninth Circuit did here. *Id.* at 181. But *Harney* made clear that it would *not* apply such analysis to a case exactly like Rentmeester's—one where the photographer had staged, directed, and then taken a photo, making artistic judgments about his subject along the way. *See id.* at 182. In such a case, *Harney* held, copyright law requires a more dynamic measure of protection for originality.

Further, even while ruling against Harney, the First Circuit displayed a considerably more robust vision of copyright protection for his spontaneous snapshot than the Ninth Circuit extended to the staged Rentmeester photo of Jordan. In describing the Harney photo's protectable elements, the First Circuit wrote:

> [T]he framing of Gerhartsreiter and Reigh against the background of the church and blue sky, with each holding a symbol of Palm Sunday, creates a distinctive, original image. Harney's creativity is further reflected in the tones of the Photo: the bright colors alongside the prominent shadows. Finally, the placement of the father and

> daughter in the center of the frame, with only parts of their bodies depicted, is composition both notable and protectible.

Id. at 186. Both in describing the basis and scope of copyright protection for staged photographic portraits, and in protecting the original elements of spontaneous shots, the First Circuit takes a far broader view of photographers' artistry than does the Ninth Circuit.

B. The Second Circuit

So does the Second Circuit—which, apart from the Ninth Circuit, is the main appellate court in which copyright disputes over photographs are litigated.

1. Rogers v. Koons

The leading case in the Second Circuit is *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992). In 1980, photographer Art Rogers was asked to photograph a couple and their eight German Shepherd puppies. *Id.* at 304. As in Rentmeester's case, "[s]ubstantial creative effort went into both the composition and production" of the photo: "At the photo session, and later in his lab, Rogers drew on his years of artistic development. He selected the light, the location, the bench on which the [couple was] seated and the arrangement of the small dogs. He also made creative judgments concerning technical matters with his camera and the use of natural light." *Id.* The result was a photo aptly entitled, "Puppies." *Id.*

In the late 1980s, the famous and controversial artist Jeff Koons embarked on a 20-sculpture project for his "Banality Show." *Id.* After seeing "Puppies" on a postcard at a tourist shop, he decided that this photograph was part of the mass culture, "resting in the collective sub-consciousness of people." *Id.* at 305. Koons

therefore decided to "copy" the photograph—though not in any standard sense of the term. *Id.* Instructing his artisans to follow many aspects of the two-dimensional black-and-white photograph, he oversaw the creation of a three-dimensional, colorful sculpture. *See id.* This sculpture was produced and then displayed without any of the photograph's background elements. *See id.*

Rogers v. Koons

Art Rogers - "Puppies"

Jeff Koons - "String of Puppies"

In an opinion irreconcilable with the Ninth Circuit's decision here, the Second Circuit held that Koons had infringed Rogers's copyright in the photograph.

This split begins with the Second Circuit's description of the original, protectable elements of a photograph: "Elements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved." *Id.* at 307 (citing *Burrow Giles*, 111 U.S. at 60). Emphasizing Rogers's "inventive efforts in posing the group for the photograph, taking the picture, and printing 'Puppies,'" the court held that he had created an "original work of art." *Id.*

The Second Circuit then held that Koons's infringement of Rogers's work was so clear as to require summary judgment in Rogers's favor. *See id.* It first noted that Koons had stressed "copying the very details of the photograph that embodied plaintiff's original contribution—*the poses*, *the shading*, *the expressions*." *Id.* (emphasis added). This analysis treated as protectable a number of individual, expressive elements of the Rogers photograph that the Ninth Circuit held below are categorically unprotectable in photographs. Nowhere did the Second Circuit declare these elements to be unprotectable facts whose "selection and arrangement" were original; it treated Rogers's carefully-staged pose, directed facial expressions, and creative use of light as protectable elements *themselves*.

The Second Circuit then emphasized that copyright does not protect "the idea of a couple with eight small puppies seated on a bench." *Id.* at 308. Rather, it is "Rogers' *expression* of this idea—as caught in the placement, in the particular light, and in the expressions of the subjects—that gives the photograph its charming and unique character, that is to say, makes it original and copyrightable." *Id.* Yet again, the Second Circuit treated

as protectable Rogers's artistic judgment in directing and then capturing in film the particular placement, lighting, and expressions of his subject matter. Because Koons had "incorporated" the "composition, the poses, and the expressions," his work infringed Rogers's copyright. *Id.*

Unlike the Ninth Circuit, which demanded near-total identity between two photographs, the Second Circuit then warned that "no copier may defend the act of plagiarism by pointing out how much of the copy he has not pirated." *Id.* Thus, although Koons had created a three-dimensional color sculpture out of a flat black-and-white photo, and had added "flowers in the hair of the couple" and "bulbous noses [to] the puppies," he had infringed the copyright by echoing the protectable, original elements of Rogers's photo. *Id.*

In *Koons*, the Second Circuit held as a matter of law that a colorful sculpture with obvious differences from a black-and-white photo infringed that photo's copyright because it pirated key protectable elements—mainly those the photographer had posed and directed. Here, the Ninth Circuit held as a matter of law that two strikingly similar photos involved no violation because photos inherently receive reduced protection. This case would most definitely come out differently under *Koons*.

2. Leibovitz v. Paramount Pictures Corp.

Six years after *Koons*, the Second Circuit adhered to its broader view of copyright protections for photographs in *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 110 (2d Cir. 1998). The famous portrait photographer Annie Leibovitz had photographed the pregnant actress Demi Moore in a striking pose, which Paramount had

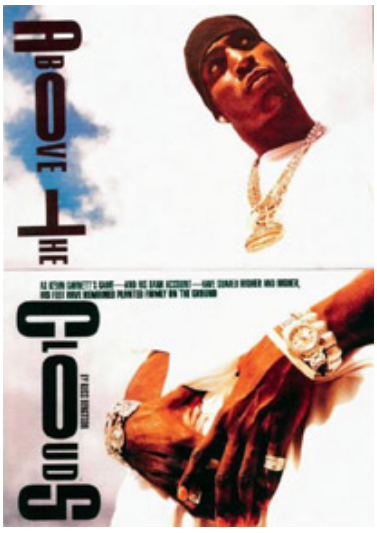
parodied in a promotional poster for a movie, *Naked Gun 33 1/3: The Final Insult*. *See id.* at 111. Leibovitz sued and the Second Circuit upheld Paramount's fair-use defense against infringement. *Id.*

However, in the course of describing "the amount and substantiality of the portion used," the Second Circuit had to identify "the protected elements of the original." *Id.* at 115. Rejecting protection for "the appearance in her photograph of the body of a nude, pregnant female," the court held nonetheless that "Leibovitz is entitled to protection for such artistic elements as the particular lighting, the resulting skin tone of the subject, and the camera angle that she selected." *Id.* at 115–16. As explained above, none of these elements are protectable under the Ninth Circuit's reasoning.

3. Mannion v. Coors Brewing Company

The depth of the disagreement between the Second Circuit and the Ninth Circuit is confirmed by *Mannion*

v. Coors Brewing Co., 377 F. Supp. 2d 444 (S.D.N.Y. 2005). There, applying Second Circuit precedent, Judge Kaplan denied summary judgment, holding that a billboard advertising Coors Light beer might well have infringed photographer Jonathan Mannion's copyright in a staged photograph of basketball star Kevin Garnett. *See id.* at 447.



Judge Kaplan opened with a detailed survey of efforts to identify protectable elements of photographs, citing

Koons to emphasize the heightened protection afforded to a photographer who has staged and directed his subject. *See id.* at 450–61. Judge Kaplan then identified protected elements of the Garnett photo, including original "composition," "angle," and "lighting," as well as the photographer's direction to wear specific jewelry and clothing in a particular way. *See id.* at 462–63. Observing that many of these protectable elements also appeared in Coors's billboard photo of the very same basketball star, Judge Kaplan denied summary judgment.

As a review of the photos confirms, if *Mannion* is right, the decision below is wrong. By correctly identifying the protected elements of a photograph—and doing so consistent with *Koons* and *Leibovitz*—Judge Kaplan recognized that an artfully staged photograph of a basketball star can be infringed even by a company's marketing photograph that varies in its details.

C. The Eleventh Circuit

In *Leigh v. Warner Bros.*, 212 F.3d 1210 (11th Cir. 2000), photographer Jack Leigh sued Warner Brothers for infringing his "now-famous photograph of the Bird Girl statue in Savannah's Bonaventure Cemetery that appears on the cover of the best-selling novel *Midnight in the Garden of Good and Evil*." *Id.* at 1212. The Eleventh Circuit rejected this claim as to certain film sequences but reversed a grant of summary judgment against Leigh with respect to his claim that several movie posters infringed his copyright. *See id.*

The Eleventh Circuit first identified the "elements of artistic craft protected by Leigh's copyright as the selection of lighting, shading, timing, angle, and film." *Id.* at 1215 (citation omitted). Its use of the word "selection"

varies from the Ninth Circuit opinion below: *Leigh* treats the individual elements as protectable, rather than treating them as unprotectable facts arranged creatively.

This is clear in its account of why a jury should decide whether Warner Brothers's promotional posters violated Leigh's copyright:

> Although it may be easy to identify differences between the Warner Brothers still shots and Leigh's photograph, however, the Warner Brothers images also have much in common with the elements protected by Leigh's copyright. All of the photographs are taken from a low position, angled up slightly at the Bird Girl so that the contents of the bowls in her hands remain hidden. Hanging Spanish moss borders the tops of all the photographs except the soundtrack cover. The statue is close to centered in all of the pictures except one newspaper advertisement for the movie, which places the Bird Girl in the left third of the frame. Light shines down and envelopes the statue in all of the images, leaving the surrounding cemetery in relative darkness. All of the photographs are monochromatic . . .

Id. at 1216. Thus, notwithstanding "significant differences between the pictures," the Eleventh Circuit treated the apparent piracy of several protected elements as sufficient to deny summary judgment. *Id.* It did so even though the similarities between protected elements there were *less* striking than those in this case.

It is thus clear that this case would come out differently under the Eleventh Circuit's view of the law.

II. The decision below is incorrect and offers an ideal vehicle to address a vitally important issue.

A. This issue is exceptionally important.

As of 2015, consumers took "more than one trillion digital photos" per year, and "the growth in the number of photos taken each year [had become] exponential." Stephen Heyman, *Photos, Photos Everywhere*, N.Y. Times (July 29, 2015). The rapid proliferation of photography among Americans—and the increased ease of pirating protected content online—has dramatically escalated the importance of clarifying the proper application of copyright law to photography.

So, too, has the persistence of conflicts over "professional images, which traditionally have involved a more sophisticated web of economic stimuli and authorial decision making than the average snapshot." Subotnik, *Originality Proxies*, 76 Brook. L. Rev. at 1493. To this day, "court dockets bustle with copyright litigation in which the defendant argues that the plaintiff's photograph lacks originality." *Id.* at 1489.

Absent this Court's intervention, the Ninth Circuit's novel rule will drastically reduce the protection that photographs enjoy under copyright law. This will create an incentive for forum shopping. And for those who make their living in photography, it will stifle creativity, inflict confusion, and invite higher levels of piracy.

B. This case is an excellent vehicle.

The Ninth Circuit addressed only a single element of Rentmeester's copyright claim: substantial similarity. Its

holding about the law applicable to copyright protection for photographs is cleanly presented here.

There can be little doubt that the Ninth Circuit's novel legal rule was outcome determinative. The panel concluded that the Rentmeester photograph is "entitled to the broadest protection a photograph can receive." App. 13a. But even under its novel rule, which guts photographs of nearly all protection, the panel *still* split 2-1. If a court were to properly identify the protectable elements of Rentmeester's photo and afford them the full protection to which they are legally entitled—as the other circuits do—it would inevitably follow that Nike infringed Rentmeester's copyright (or so a jury could conclude). It is difficult to imagine a better vehicle for testing the divergence among the circuits on this issue.

C. The decision below is wrong.

"Any copyrightable work can be sliced into elements unworthy of copyright protection. Books could be reduced to a collection of non-copyrightable words. Music could be distilled into a series of non-copyrightable rhythmic tones. A painting could be viewed as a composition of unprotectable colors." *Enter. Mgmt. Ltd., Inc. v. Warrick*, 717 F.3d 1112, 1119 (10th Cir. 2013). Yet courts have not limited the protection of literature, music, painting, or any other medium of artistic expression to merely "selection and arrangement," as the panel majority did here for photographs. Rather, courts have recognized that artists make original choices in creating works and that those artistic judgments are protectable.

This Court made clear in *Burrow-Giles* that photography is no exception to the general rule. Rather, it held that a carefully-staged portrait was an original work of art, the "product of plaintiff's intellectual invention." 111 U.S. at 60. And in describing what made the photograph-

ic portrait at issue a masterpiece, the Court emphasized Sarony's role in orchestrating the scene, selecting and arranging Wilde's clothing, "arranging and disposing the light and shade," and "suggesting and evoking the desired expression." *Id.* Under *Burrow-Giles*, the same "intellectual invention" that entitles a photograph to protection in the first place also provides protection for the photograph's expression of the original elements within it, just as the expressions of the observable features in an illustration, novel, play, motion picture, or song are protected. Yet nearly every single element that *Burrow-Giles* (properly) identified as protectable would not be protected under the Ninth Circuit's opinion.

Ultimately, the decision below treats even highly-original, carefully-staged elements in a photograph as the equivalent of phonenumbers—a pile of preexisting, unchanged facts that can be elevated into creativity only through clever selection and arrangement. This analogy collapses upon scrutiny. The photograph at issue here is not comprised of off-the-rack elements that Rentmeester smartly rejiggered. Instead, Rentmeester *created* many of his photo's most original elements by directing and posing his subject, artificially manipulating the lighting and landscape, and employing a variety of skillful compositional techniques (bearing on the angle, lens, depth of field, and more). This is precisely the kind of creativity that copyright protects in many fields of artistic production and that it protects here as expressed in the Rentmeester photo.[3]

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[3] *See* 1 *Nimmer on Copyright* § 2A.08[E][3][a][i] ("[W]hen the author of the photograph creates original subject matter (*e.g.*, a sculpture, or distinctly posing individuals) that is then incorporated into the photograph, copyright protection for the photograph

Applying the proper measure of copyright protection to Rentmeester's photo confirms that the Ninth Circuit erred. This case does not involve a cliché shot of a basketball player. The Rentmeester photo is an original work of art that expresses Michael Jordan's elegance and athletic ability in a striking way that grabbed Nike's attention—and the world's. These expressive elements were meticulously created by Rentmeester, and then meticulously pirated by Nike. Indeed, nearly every original element in Rentmeester's photo also appears in Nike's; the differences are minor or involve unprotected elements. It is thus beyond doubt that Nike's photo is substantially similar to Rentmeester's with respect to its use of protectable elements. At the very least, since reasonable minds could disagree, this question cannot be resolved in Nike's favor at the pleading stage.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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actually may—in principle—allow the photographer to prevent others from reproducing that subject matter.").

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