

No. 18-728

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IN THE

**Supreme Court of the United  
States**

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JACOBUS RENTMEESTER,

*Petitioner,*

v.

NIKE, INC.,

*Respondent.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT**

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**BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

It is a fundamental tenet of copyright law that *ideas* are not protected; rather an author can only protect his or her *expression* of an idea. Courts routinely and consistently apply this bedrock legal principle—just as the Ninth Circuit did here—in reviewing claims of infringement of creative works, including but not limited to photographs. The question presented is, where a photographer uses an idea or concept similar to another’s, but expresses that idea or concept differently, including by featuring a different pose, background, coloring, attire, composition, and mood, can the copyright-holder state a claim for infringement?

**CORPORATE DISCLOSURE STATEMENT**

Respondent in this Court, defendant-appellee below, is Nike, Inc. (“Nike”). It has no parent company, and no publicly held company owns 10% or more of its stock.

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## INTRODUCTION

In the decision below, the Ninth Circuit applied settled principles of copyright law to affirm the district court's finding that Petitioner's copyright infringement claims fail as a matter of law. At the heart of the Ninth Circuit's decision is the most basic tenet of copyright law: *ideas* are not copyrightable. The Ninth Circuit's decision is entirely consistent with this Court's precedents, as well as the precedents of other circuits addressing the divide between an (unprotectable) idea and (protectable) expression. The decision reflects the court of appeals' careful and well-reasoned review of the particular facts of this case to ensure that in evaluating whether works are "substantially similar," the focus remains on the specific *expression* of ideas and not the similarity of unprotectable ideas, which are free for all to use.

Specifically, this case involves three works, which were created *more than 30 years ago*: (1) Petitioner's 1984 photograph of Michael Jordan in U.S. Olympic uniform, taken on a grassy knoll at the University of North Carolina, with Mr. Jordan in a pose inspired by ballet's *grand jeté*, and appearing off-center and small, far from and below the basketball hoop ("Rentmeester Photo"); (2) Nike's photograph of Mr. Jordan in red and black clothing (for the Chicago Bulls) and Nike shoes, against the Chicago skyline, in a different pose, and centered directly on Mr. Jordan who is close to and above the hoop ("Nike Photo"); and (3) the iconic logo for Nike's Air Jordan line

(“Jumpman Logo”), which features the black silhouette of Mr. Jordan’s figure from the Nike Photo, and which the Petition ignores, but for a passing reference in a footnote. Both the district court and the Ninth Circuit found as a matter of law that the Nike Photo and the Jumpman Logo (collectively, “Nike Works”) were not substantially similar to the Rentmeester Photo, and thus dismissed Petitioner’s claims under Federal Rule of Civil Procedure 12(b)(6).

Unhappy with the dismissal, Petitioner limits his argument to the Nike Photo (not the Jumpman Logo) and attempts to manufacture a circuit split, arguing that the Ninth Circuit’s decision “denigrated” photographs by limiting their protection. That is not true. The Ninth Circuit’s opinion *explicitly* afforded the Rentmeester Photo the “broadest protection,” recognizing that photography is a creative and protected art form. The Ninth Circuit applied the same, well-established copyright doctrines as have regularly been applied to all types of creative works under the Copyright Act of 1976 (and predecessor statutes) for decades. Indeed, the very cases Petitioner claims indicate a circuit split are, in fact, consistent with the Ninth Circuit’s approach. At bottom, this case simply presents the application of settled law to the particular works at issue. That does not warrant this Court’s review.

In arguing that the Ninth Circuit’s decision was wrong, Petitioner effectively requests *special* treatment for photographs, beyond what this Court

has afforded other creative works—whereby all questions of infringement would have to go to a jury, with no room for courts to decide that alleged infringement falls on the idea side of the idea/expression divide. Taken to its logical conclusion, Petitioner seeks a monopoly on all pictures of Mr. Jordan (or perhaps anyone) striking a variant of a *grand jeté* pose with a basketball in hand. Such an approach would be unprecedented. It is inconsistent with settled law, would impair personal liberty, and would chill free speech and expression—particularly in an era of ubiquitous imagery. The result would be to grant some photographers unprecedented, broad rights under copyright law, to the great detriment of other artists.

Further, the Ninth Circuit’s finding that each of the Nike Works is not substantially similar to the Rentmeester Photo as a matter of law is correct, and fully consistent with the analysis of all other circuits. The court’s comparison of the Rentmeester Photo and the Nike Photo confirm that the only similarities relate to unprotectable ideas or concepts, not expression. Petitioner includes no argument regarding the Jumpman Logo, which the Ninth Circuit unanimously found could not be substantially similar to the Rentmeester Photo as a matter of law as the logo is simply a black silhouette of Mr. Jordan’s figure in the Nike Photo (not the Rentmeester Photo). Petitioner’s attempt to bootstrap the Jumpman Logo onto his grievances about the Ninth Circuit’s treatment of the Nike Photo should be rejected.

In short, nothing about this case warrants further review. The Petition should be denied.

## COUNTERSTATEMENT OF THE CASE

### A. Petitioner's Allegations

Petitioner alleges that he created the Rentmeester Photo in 1984, and it was published in *LIFE Magazine*. ER-69, 75.<sup>1</sup> The photo was taken at the University of North Carolina, when Mr. Jordan was a student there preparing for the Olympics. ER-73. In the Complaint, Petitioner alleged that his “conce[ption]”—*i.e.*, idea—was to “depic[t] [Mr. Jordan] in a way to express his tremendous athletic ability” and have him “leap through the sky and appear to soar elegantly.” ER-73–74. Part of this idea was to have him in a “pose, inspired by a ballet technique known as a ‘grand jeté,’” and “to make it appear that Mr. Jordan was in the process of a dunk[.]” *Id.* Similarly, in one of his briefs below, Petitioner stated that his “*idea* was to tell the story of gravity-defying flight, athletic ability, and elegance” and to depict Mr. Jordan doing a “gravity-defying dunk” “inspire[ed]” by ballet’s “grand jeté.” ER-589–92 (emphasis added); *see also* ER-32–33.

As seen below, the Rentmeester Photo showed Mr. Jordan as a small figure wearing U.S. Olympic team

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<sup>1</sup> The Excerpts of Record filed below with the court of appeals is indicated as “ER.”

apparel and Converse shoes, on an isolated hill, with the sun looming large in the background, and the hoop “*beyond the ability of anyone to dunk on* (even someone as athletic as [Mr.] Jordan)[.]” App.2a, 15a (emphasis added).



ER-75, 217–18.

Petitioner alleges that Nike had access to the Rentmeester Photo and in late 1984 or early 1985, Nike commissioned a different photographer, Chuck Kuhn, to photograph Mr. Jordan after he had joined the Chicago Bulls. ER-77, App.3a. As shown below, the Nike Photo is centered on Mr. Jordan, wearing the distinctive red and black of the Chicago Bulls and Nike shoes, soaring above the Chicago skyline, without any foreground or the sun, and about to dunk a basketball on a hoop that “*appears to be easily*



*within [Mr.] Jordan's reach.” App.2a, 3a, 15a (emphasis added).*



ER-70, 76, 77.

Petitioner further alleges that in 1987, Nike began using the Jumpman Logo (depicted below) for its Air Jordan shoes. ER-78, 80–81. Petitioner admits that the Jumpman Logo is based on Mr. Jordan's silhouette in the Nike Photo, *not* the Rentmeester Photo. Case No. 15-35509, Dkt. Entry 5-1 at 13.



Based on these allegations, Petitioner asserted claims against Nike for copyright infringement and violation of the Digital Millennium Copyright Act (“DMCA”). ER-85–88.

### **B. Proceedings Below**

Petitioner served his Complaint in the United States District Court for the District of Oregon on January 23, 2015, *thirty years* after becoming aware of the Nike Works. ER-71–72. Nike moved to dismiss under Rule 12(b)(6) on that ground that Petitioner could not state an infringement claim because, as a matter of law, the Nike Works are not “substantially similar” to the Rentmeester Photo. ER-103–52. Nike also asserted additional grounds for dismissal of the DMCA claim, which are not relevant here. ER-142–46. After oral argument, the district court granted Nike’s motion. Applying the Ninth Circuit’s test for

policing the legal boundary between ideas and expression, the court found that neither the Nike Photo, nor the Jumpman Logo, were substantially similar to the Rentmeester Photo, and thus there could be no copyright infringement or DMCA violation. App.28a–43a.

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed. App.1a–26a. The panel unanimously found that Petitioner could not state a claim with respect to the Jumpman Logo. In addition, the majority found that the Nike Photo also did not infringe as a matter of law.

The Ninth Circuit began its analysis with the foundational principle that *ideas*, rather than *expression* are not protectable. App.5a; *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991). By its terms, the Copyright Act does not prohibit the copying of “any idea,” App.5a (quoting 17 U.S.C. § 102(b)), and a “defendant incurs no liability if he copies only the ‘ideas’ or ‘concepts’ used in the plaintiff’s work,” *id.* Rather, the defendant “must also copy enough of the plaintiff’s *expression* of those ideas or concepts to render the two works ‘substantially similar.’” *Id.* (quoting *Mattel, Inc. v. MGA Entm’t, Inc.*, 616 F.3d 904, 913–14 (9th Cir. 2010)). Applying these settled principles, the Ninth Circuit concluded that, “[w]hile the photos embody a similar idea or concept, they express it in different ways,” and thus there was no infringement. App.15a.

Specifically, although the court of appeals found the Rentmeester Photo was “highly original” and

subject to “the broadest [level of] protection,” App.2a, 13a, it observed that, “[j]ust as [Petitioner] made a series of creative choices” for the Rentmeester Photo, “so too Nike’s photographer made his own distinct choices in that regard. Those choices produced an image that differs from [Petitioner’s] photo in more than just minor details.” App.13a–14a. Although the photographs shared some generally similar ideas or concepts, the Ninth Circuit found that Petitioner “cannot prohibit other photographers from taking their own photos of Jordan in a leaping, *grand jeté*-inspired pose.” App.14a. Beyond sharing unprotected “conceptual similarities,” App.7a, the court concluded no reasonable jury could find the *specific expression* was the same, based on the protectable aspects of the particular photographs.

For example, the court noted the differences in the pose and positioning of Mr. Jordan’s limbs, which conveyed a different sense of “propulsion” (forward versus upward), App.14a–15a, as well as the “stark” differences in setting (an outdoor setting with a grassy knoll in the foreground, versus the Chicago skyline), App.15a–16a. Likewise, the court observed the images and placement of the basketball hoops convey different messages: In the Rentmeester Photo, “the hoop is positioned at a height that appears beyond the ability of anyone to dunk on (even someone as athletic as Jordan),” and is “whimsical rather than realistic.” App.15a. “The hoop in the Nike photo, by contrast, appears to be easily within Jordan’s reach.” *Id.* These differences in “express[ion],” *id.*, and more, led the Ninth Circuit to find the Nike Photo not substantially

similar to the Rentmeester Photo, as a matter of law. App.17a.

The court additionally found that the Jumpman Logo, which “is merely a solid black silhouette of Jordan’s figure as it appears in the Nike photo” was not substantially similar as it “differs materially” from the Rentmeester Photo, including Mr. Jordan’s pose therein. *Id.*

Judge Owens concurred in part and dissented in part. He “agree[d] with most of the majority’s analysis and with its holding that Rentmeester cannot prevail on his Jumpman logo copyright infringement claim.” App.23a. Citing cases from a variety of courts, Judge Owens agreed that the silhouette of a pose “in isolation” taken from a different photograph (not clipped or traced from Rentmeester’s photograph) could not be protected, “even if Rentmeester encouraged Jordan to strike it” in the first place. App.25a. “To hold otherwise would mean that a photographer would own a broad copyright over photos of human movements, including facial expressions”—a “radical change in our intellectual property laws.” App.25a–26a. With respect to the Nike Photo, Judge Owens agreed that the majority “correctly...set[] out the law of copyright as applied to photographs, and...recogniz[ed] that Rentmeester’s photo is entitled to ‘broad’ copyright protection.” App.23a. Nonetheless, he simply disagreed with the *application* of that law to the specific facts presented. *Id.*; Pet.23 (“Judge Owens agreed with the majority’s view of the law but disagreed with its application of that rule.”).

Rentmeester petitioned for rehearing and rehearing *en banc*, which was denied without opinion. App.27a. Only Judge Owens (from the original panel) voted to grant the petition. Judges Berzon and Watford voted to deny the petition, and no judge on the Ninth Circuit requested a vote on whether to rehear the matter *en banc*. *Id.*

### REASONS FOR DENYING THE PETITION

This case does not remotely warrant certiorari. In arguing to the contrary, Petitioner repeatedly mischaracterizes the Ninth Circuit’s opinion as “denigrat[ing]” and treating photography as a “second-class art” form, Pet.3, 5, 24, and attempts to manufacture a split from isolated phrases in other cases. But stripping away Petitioner’s rhetoric, this case merely presents the routine application of the settled principle—enshrined in the Copyright Act itself—that *ideas* are not protectable, only expression is. Every court agrees on that bedrock principle, and every court applies a legal test similar to the one used by the Ninth Circuit here in assessing which side of the line an accused work falls on. Indeed, there was no disagreement below on what the law is or should be—not a single judge on the entire Ninth Circuit disagreed on that, as Petitioner concedes. Pet.23. The only disagreement, and only with respect to the Nike Photo, not the Jumpman Logo, was with the *application* of settled law to the specific facts and circumstances here. That is exactly what this Court does not review.

In any event, every premise of the petition is false: Far from treating photographs as second-rate works, the Ninth Circuit applied the same principles used for every other original work. Indeed, the panel unanimously agreed the Rentmeester Photo is “entitled to the broadest protection a photograph can receive.” App.13a; *see* App.7a. Rentmeester spends much of the Petition discussing 19th-century cases addressing whether photographs were copyrightable at all. No one disputes that. Petitioner’s argument would take *ideas* out of the public domain, by making it all but impossible for courts to police the idea/expression divide without requiring a costly and burdensome jury trial. That would chill subsequent artists from making their own unique, expressive works using similar ideas or concepts. Petitioner thus invites this Court to depart from decades of well-settled copyright law to announce a new and *sui generis* standard for photographs.

Moreover, Petitioner’s attempt to create a circuit split only proves the opposite. The cases on which he relies all reflect the same idea/expression dichotomy applied for decades under black-letter copyright law. Some of those works were found infringing (or possibly so) and some were not. Some involved a jury trial, others did not. But all applied the same principles. None found—as Petitioner repeatedly and misleadingly suggests—that isolated elements of a photograph, such as “subject matter, pose, lighting, camera angle, depth of field, and the like” are protectable *in isolation*. Pet.22 (quoting App.9a). To the contrary, the very passages Petitioner quotes

show that in those cases, as here, what mattered was the expressive combination of elements. Pet.29, 31, 33, 35. At bottom, there is no division in the law; rather, the determination of whether a work has only borrowed an idea, rather than expression, requires a case-by-case analysis of the specific works at issue.

In this case, the Ninth Circuit correctly found that the Nike Photo and the Jumpman Logo are not substantially similar to the Rentmeester Photo. With respect to the Nike Photo, the only similarities relate to unprotected ideas, which Nike's photographer expressed differently. The Jumpman Logo is even more dissimilar to the Rentmeester Photo as it is a black silhouette of Mr. Jordan's figure in the Nike Photo, and thus has almost nothing in common with Petitioner's photograph. For that to be infringing would, as Judge Owens wrote, work a "radical change" in copyright law. Further, Petitioner's minimal reference to the Jumpman Logo in a footnote is not enough to preserve for review the Ninth Circuit's unanimous finding that the logo is not substantially similar to the Rentmeester Photo.

**I. THERE IS NO DISPUTED LEGAL ISSUE BECAUSE THE NINTH CIRCUIT APPLIED BLACK-LETTER LAW THAT IDEAS, FACTS, AND CONCEPTS ARE NOT COPYRIGHTABLE**

This Court has long held that the "most fundamental axiom of copyright law is that '[n]o author may copyright his ideas or the facts he



narrates.” *Feist*, 499 U.S. at 344–45 (quoting *Harper & Row Publ’rs, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985)). The “idea-expression dichotomy” forms one of the “traditional contours” of copyright protection. *Golan v. Holder*, 565 U.S. 302, 328 (2012); see *New York Times Co. v. U.S.*, 403 U.S. 713, 726 n.\* (1971) (Brennan, J., concurring) (“[T]he copyright laws, of course, protect only the form of expression and not the ideas expressed.”). The doctrine holds that “every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.” *Golan*, 565 U.S. at 328 (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003)).

These principles have been enshrined in this Court’s jurisprudence for at least 140 years. See *Baker v. Selden*, 101 U.S. 99 (1879). As this Court wrote in 1899: “The right thus secured by the copyright act is not a right to the use of certain words...nor is it the right to ideas alone... But the right is to that *arrangement of words* which the author has selected to *express his ideas*[,]” *Holmes v. Hurst*, 174 U.S. 82, 86 (1899) (emphasis added). That doctrine is codified in the Copyright Act itself, which states that “[i]n 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, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b). On the other side of this legal divide, it is the “author’s expression alone [that] gains copyright protection.” *Golan*, 565 U.S. at 328; see also *Harper & Row*, 471

U.S. at 547 (“The copyright is limited to those aspects of the work—termed ‘expression’—that display the stamp of the author’s originality.”); *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258, 1262 (10th Cir. 2008) (Gorsuch, J.) (“[O]nly original expressions are protected[.]”).

Courts, thus, must police the legal line between unprotected ideas and protectable expression. Doing so is critical to preserving freedom of expression, freedom of thought, and personal liberty. Whereas a patent confers a right to exclude, a copyright permits others immediately to “make full use of any fact or idea she acquires” from the work. *Eldred*, 537 U.S. at 217; *see also Mazer v. Stein*, 347 U.S. 201, 217 (1954) (“Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself.”). Accordingly, the idea/expression dichotomy is part of the “built-in First Amendment accommodations” in copyright law, *Eldred*, 537 U.S. at 219, as “copyright supplies the economic incentive to create *and disseminate* ideas,” *Harper & Row*, 471 U.S. at 558 (emphasis added).

This case simply involves the context-specific application of that fundamental principle to the works at issue. The substantial similarity test reflected in this Court’s opinion in *Feist*, and applied in all of the circuits as a matter of law (including on 12(b)(6)

motions<sup>2</sup>), implements the idea/expression dichotomy. *See, e.g., Feist*, 499 U.S. at 361 (“Not all copying...is infringement”; rather, infringement requires showing “copying of constituent elements of the work that are original,” *i.e.*, substantial similarity as to protected elements); *MGA*, 616 F.3d at 913; *Laureyssens v. Idea Grp., Inc.*, 964 F.2d 131, 141–42 (2d Cir. 1992); App.5a–6a. In particular, all circuits recognize that in comparing works for substantial similarity, courts must distinguish between protected versus unprotected elements, and focus on the former. *See, e.g., Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1101 (7th Cir. 2017) (“When considering substantial similarity, it is essential to focus on protectable expression.”); *Nola Space Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 550 (5th Cir. 2015) (“[W]here the copyrighted work contains unprotectable elements, the first step is to distinguish between protectable and unprotectable elements of the copyrighted work.”); *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 101 (2d Cir. 2014); *Blehm v. Jacobs*, 702 F.3d 1193, 1202 (10th Cir. 2012); *Funky*

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<sup>2</sup> It is well-established that courts may compare works on a motion to dismiss, and find them not substantially similar as a matter of law. Circuit courts have affirmed such findings in connection with a variety of works. *See, e.g., Peters v. West*, 692 F.3d 629, 636 (7th Cir. 2012) (affirming dismissal of complaint for lack of substantial similarity); *Peter F. Gaito Architecture, LLC v. Simon Dev. Corp.*, 602 F.3d 57, 65 (2d Cir. 2010) (same); *Nelson v. PRN Prods., Inc.*, 873 F.2d 1141, 1143–44 (8th Cir. 1989) (same); *Christianson v. West Publ’g Co.*, 149 F.2d 202, 203 (9th Cir. 1945) (same).

*Films, Inc. v. Time Warner Entm't Co.*, 462 F.3d 1072, 1077 (9th Cir. 2006). That same rule and analysis “applies to all works of authorship,” including photographs. *Feist*, 499 U.S. at 350; *see also Baker*, 101 U.S. at 102 (“The same distinction [between ideas and expression] may be predicated of every other art[.]”).

The Ninth Circuit faithfully applied those principles here. App.8a (noting “the court must ‘filter out’ unprotectable elements of the plaintiff’s work—primarily ideas and concepts”). The court identified the components of the Rentmeester Photo that were and were not protectable and concluded as a matter of law that the protectable aspects were not substantially similar to the Nike Works. Petitioner’s arguments to the contrary would erode the idea/expression line and provide no basis for review.

#### **A. The “Ideas” Embodied In The Rentmeester Photo Are Not Protected**

As an initial matter, applying precedent, the Ninth Circuit determined that depicting “Michael Jordan in a leaping pose inspired by ballet’s *grand jeté*” was a general “idea” or “concept,” to which “Rentmeester’s copyright does not confer a monopoly[.]” App.14a. Accordingly, “Rentmeester cannot prohibit others from taking *their own* photos of Jordan in a leaping, *grand jeté*-inspired pose.” *Id.* That is not controversial—indeed, that is exactly what Petitioner said. Petitioner alleged that his “conce[ption]”—*i.e.*, his *idea*—was to “depict[] [Mr. Jordan] in a way to

express his tremendous athletic ability” with Mr. Jordan “leap[ing] through the sky and appear[ing] to soar elegantly.” ER-73–74. Below, Petitioner further admitted that his “idea was to tell the story of gravity-defying flight, athletic ability, and elegance” and to depict Mr. Jordan doing a “gravity-defying dunk” “inspir[ed]” by the “grand jeté.” ER-589–92; *see also* ER-32–33 (district court oral argument).

Petitioner now claims, without support, that the idea was only “of a basketball player soaring through the air to dunk a ball.” Pet.18. Such a broad formulation would allow Petitioner to remove from the public domain the idea of Mr. Jordan (and perhaps all others) leaping with a basketball in a manner inspired by ballet’s *grand jeté*.

Indeed, courts approach “ideas” in the same manner the Ninth Circuit did here, by defining them in such a way that describes the subject matter of the work. For example, in *Ale House Mgmt., Inc. v. Raleigh Ale House, Inc.*, the Fourth Circuit defined the “concept” or idea as a bar room floor plan “using an island or peninsula-shaped bar to bisect a seating area which has booths on one side and stool seating on another.” 205 F.3d 137, 143 (4th Cir. 2000). It did not more broadly define the idea as a bar room floor plan with seating area near a bar. Likewise, the Second Circuit in *Mattel, Inc. v. Azrak-Hamway Int’l, Inc.* defined the idea as a “superhuman muscleman [action figure] crouching in what since Neanderthal times has been a traditional fighting pose”—not simply a muscleman action figure. 724 F.2d 357, 360 (2d Cir.

1983) (per curiam). *See also, e.g., Murray Hill Publ'ns, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 325 (6th Cir. 2004) (idea of Christmas narrative featuring unhelpful toy store clerks, intrusive neighbors, and stolen toys not protected); *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. 1992) (“idea” of a photograph was “a couple with eight small puppies seated on a bench”).

### **B. The Subject Matter Of The Rentmeester Photo Is Not Protected**

Petitioner attempts to evade the idea/expression dichotomy by arguing that the Ninth Circuit is an outlier in concluding that the subject matter of a photograph is not protectable. Pet.22, 28 32, 39, n.3. Yet, earlier in the Petition, Rentmeester concedes that “photographers cannot copyright their underlying subject matter.” Pet.11. Petitioner was right the first time.

The fact that the underlying subject matter—akin to an idea—is not protectable as a matter of copyright law is consistent with countless other cases. As Justice Oliver Wendell Holmes famously put it: “Others are free to copy the original.” *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903). In other words, an artist is free to “try their hand on [a portrait or photograph of] the same face[.]” *Id.*; *see also Jewelers’ Circular Pub. Co. v. Keystone Pub. Co.*, 274 F. 932, 935 (S.D.N.Y. 1921) (Hand, J.) (“The defendant was as much bound to make an independent picture of the object itself as he would

have been obliged to make an independent verbal description.”). Accordingly, as the Third Circuit observed: “Since copyrights do not protect thematic concepts, the fact that the same subject matter may be present in two paintings does not prove copying or infringement. Indeed, an artist is free to consult the same source for another original painting.” *Franklin Mint Corp. v. Nat’l Wildlife Art Exch., Inc.*, 575 F.2d 62, 65 (3d Cir. 1978). *See also MGA*, 616 F.3d at 917 (“MGA’s Bratz dolls can’t be considered substantially similar to Bryant’s preliminary sketches simply because the dolls and sketches depict young, stylish girls with big heads and an attitude.”).

Courts have consistently applied these principles to photographs, too. As one court explained: “Indeed, the subject matter of the photograph is not copyrightable. No photographer may obtain an exclusive copyright in images of a particular object.” *Sahuc v. Tucker*, 300 F. Supp. 2d 461, 465 n.4 (E.D. La. 2004), *aff’d*, 166 Fed. App’x 157 (5th Cir. 2006); *see also Harney v. Sony Pictures Television, Inc.*, 704 F.3d 173, 185 (1st Cir. 2013) (“[A]rtists may not copyright the ‘reality of [their] subject matter.’”) (quoting *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1214 (2d Cir. 2000)). Petitioner advocates for an exception for so-called staged photographs, Pet.3, 16, 24, 26, 28, but nothing in principle or precedent supports such a deviation. In fact, that would be inconsistent with this Court’s holdings in *Bleistein* and *Feist*, which make clear that the subject matter of a work, like any other idea, is not protected.

**C. Petitioner Does Not Own Mr. Jordan Striking A Pose (Much Less A Silhouetted Image) Inspired By The *Grand Jeté***

Relatedly, a photographer cannot monopolize a person's pose in a photograph, and thereby prevent others from capturing a similar pose using different expressive elements. Petitioner admitted this at oral argument before the district court, agreeing that "the pose itself is not anything for which you can seek copyright protection." ER-27. Similarly, the Ninth Circuit found that although the Rentmeester Photo and the Nike Photo "both capture Michael Jordan in a leaping pose inspired by ballet's *grand jeté*," "Rentmeester's copyright does not confer a monopoly on that general 'idea' or concept"; he cannot prohibit other photographers from taking their own photos of Jordan in a leaping, *grand jeté*-inspired pose." App.14a. Rather, it necessarily follows from the idea/expression dichotomy that Petitioner is only "entitled to prevent others from copying the details of that pose *as expressed* in the photo he took." *Id.*

The Ninth Circuit agreed unanimously on this point. In his separate opinion, Judge Owens explained that "Rentmeester cannot cite any cases to suggest that Jordan's pose, in isolation, enjoys anything more than the thinnest of copyright protection." App.25a. As he put it, "[t]o hold otherwise would mean that a photographer would own a broad copyright over photos of human movements, including facial expressions. I cannot find any



authority in our cases or the relevant copyright statutes that would permit such a radical change in our intellectual property laws.” App.25a–26a. In fact, in the Jumpman Logo, nothing intrinsically identifies the silhouetted figure as Mr. Jordan.

The Ninth Circuit’s decision is, once again, fully consistent with relevant authority. In a case involving photographs of choreography, the Second Circuit observed that “[s]ocial dance steps and simple routines are not copyrightable...[including] the second position of classical ballet.” *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 161 (2d Cir. 1986) (quoting U.S. Copyright Office, Compendium of U.S. Copyright Practices (“Compendium”) § 450.03(a) (2d ed. 1984)). Indeed, the Copyright Office will not register “[i]ndividual movements or dance steps,” or “short dance routines...*even if the routine is novel or distinctive.*” Compendium § 805.5(A) (3d ed. 2014) (emphasis added). Other courts have made clear that the staged pose in a photograph is not itself protectable. *See Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 115–16 (2d Cir. 1988) (photographer could not protect pose of Demi Moore); *Straus v. DVC Worldwide, Inc.*, 484 F. Supp. 2d 620, 638 (S.D. Tex. 2007) (“The idea of taking a portrait of Arnold Palmer is not protectable. Nor is the general pose in which he sits for the portrait.”); *Reece v. Island Treasures Art Gallery, Inc.*, 468 F. Supp. 2d 1197, 1206 n.14 (D. Haw. 2006) (“[I]n cases involving photographs, a plaintiff’s copyrights cannot monopolize the various poses used, and can protect only [p]laintiff’s particular photographic expression of

those poses and not the underlying ideas therefor.”) (internal quotations omitted); *Bill Diodato Photography, LLC v. Kate Spade, LLC*, 388 F. Supp. 2d 382, 393 (S.D.N.Y. 2005) (quoting same language as *Reece*, which originally came from *Kisch v. Ammirali & Puris Inc.*, 657 F. Supp. 380, 382 (S.D.N.Y. 1987), which quoted in part *Int’l Biotical Corp. v. Assoc. Mills, Inc.*, 239 F. Supp. 511, 514 (N.D. Ill. 1964)).

Petitioner’s argument that the “positioning of a subject” is protectable in isolation is unsupported. Pet.24. Petitioner cites only *Bryant v. Gordon*, which stated in passing that, “[i]n some cases, the contrived positioning of a subject has been protected, but in other cases, poses have not been considered to be copyrightable[.]” 483 F. Supp. 2d 605, 615 (N.D. Ill. 2007) (citation omitted). *Bryant*, in turn, cites only *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884), upon which Petitioner heavily relies. But *Burrow-Giles* said nothing of the sort. It addressed the preliminary question—irrelevant here—of whether a photograph was *copyrightable* at all, such that a lithographic duplicate (the equivalent of a modern-day photocopy) could infringe. The case did not address which elements of the photograph of Oscar Wilde were relevant to determining substantial similarity.

Petitioner’s citations to *Meshwerks*, 528 F.3d 1258, and *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276 (3d Cir. 2004) (Alito, J.), are misplaced for the same reason—those cases addressed the standard for

copyrightability, ultimately finding the works not protectable *at all*. Nothing in those decisions is “in tension” with the decision here. Pet.3, 24. Rather, they too applied the time-tested principle that “ideas may not be copyrighted.” *Southco*, 390 F.3d at 282; *see also Meshwerks*, 528 F.3d at 1262–63 (“[C]opyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.”) (quoting *Feist*, 499 U.S. at 349–50).

Here, in contrast to *Burrow-Giles*, there is no dispute that the Rentmeester Photo is copyrightable; nor is the Nike Photo (much less the Jumpman Logo) a lithographic copy or photocopy of the Rentmeester Photo. Rather, the Nike Photo uses different expressive elements in depicting Mr. Jordan, including a different pose, clothing, background, mood, and positioning of Mr. Jordan and the basketball hoop, as reflected in the Ninth Circuit’s opinion and as discussed below in Section III. App.13a–17a.

## **II. THERE IS NO CIRCUIT SPLIT WARRANTING THIS COURT’S REVIEW AS PETITIONER’S CITED CASES APPLIED THE SAME BLACK-LETTER LAW**

Unhappy with the Ninth Circuit’s context-specific conclusion that the Nike Works are not substantially similar to the Rentmeester Photo, Petitioner attempts to manufacture a circuit split. Yet, each of the

decisions Petitioner cites shows that each circuit recognizes the same fundamental tenets of copyright law, and applies them to the unique facts of each case.

Petitioner takes issue with the Ninth Circuit's statement that, like any other copyrighted work, "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. Petitioner asserts that this correct statement of the law somehow created a circuit split by "holding individual elements of a photograph are categorically unprotectable in copyright law." Pet.24. Not so. As an initial matter, that overstates the Ninth Circuit's holding, *see* App.11a n.2, but regardless, every court to consider the issue has found it is the *combination of elements* that renders photographs protectable.

Petitioner does not cite a single case holding that an isolated element of a photograph is protectable. That is unsurprising. Were that the law, then virtually no photograph today, including the Rentmeester Photo itself, could escape being an infringement of some earlier photograph that used one or more of those techniques. That would stifle free expression. The Ninth Circuit's explanation of what a photographer (like any other author) can protect also is entirely consistent with other circuits. As the Second Circuit explained, "[e]very kind of work at

some level is a compilation, an arrangement of uncopyrightable ‘common elements.’” *Zalewski*, 754 F.3d at 103 (quoting *Interinvest Constr., Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914, 919 (11th Cir. 2008)). Thus, “[n]o individual word is copyrightable, but the arrangement of words into a book is. No color is copyrightable, but the arrangement of colors on canvas is. Likewise, doors and walls are not copyrightable, but their arrangement in a building is.” *Id.* Similarly, the First Circuit explained that “[i]t is axiomatic that copyright denies protection to ‘fragmentary words and phrases[.]’” *CMM Cable Rep, Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1519 (1st Cir. 1996) (quoting 1 Nimmer on Copyright § 2.01[B]). And with respect to video games, “individual graphic elements of each screen are not copyrightable.” *Atari Games Corp. v. Oman*, 979 F.2d 242, 305 (D.C. Cir. 1992) (R.B. Ginsburg, J.). In other words, no author (including photographers) can monopolize the individual building blocks that combine to make a work protected by copyright. *See, e.g., Zalewski*, 754 F.3d at 103–04; *Peters*, 692 F.3d at 636; *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 721 (2d Cir. 1992) (“[N]on-protectable technical expression remains in the public domain for others to freely use as building blocks in their own work.”); *N. Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1034 (9th Cir. 1992) (copyright law “reward[s] creativity without inhibiting the free use of the ideas that are the building blocks of creativity”).

What is protectable—in photographs and other works alike—is the selection and arrangement of elements. App.10a. Nothing about that reasoning is “novel,” nor has this Court (or others) limited its application to factual compilations. Pet.3. As this Court explained in *Holmes*, copyright protects the “*arrangement* of words which the author has selected to express his ideas.” 174 U.S. at 86. *Feist* made the same point. 499 U.S. at 348 (holding “choices as to selection and arrangement” may be protected). Courts across the circuits have applied that rule to creative works generally, not only photographs. For instance, the Ninth Circuit has recognized in the context of literary and visual art works that while “unprotectible elements should not be considered” in comparing works for substantial similarity, “infringement can[] be based on original selection and arrangement of unprotected elements.” *Cavalier v. Random House, Inc.*, 297 F.3d 815, 826 (9th Cir. 2002). The same doctrine applies to musical compositions, *Skidmore v. Led Zeppelin*, 905 F.3d 1116, 1126 (9th Cir. 2018); derivative works and jewelry designs, *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 109 (2d Cir. 2001); sculptures, *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003); computer games, *Atari Games*, 979 F.2d at 245; and graphical user interfaces, *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1444 (9th Cir. 1994).

Indeed, even the cases Petitioner cites reflect that it is the *combination* of elements (*i.e.*, the selection and arrangement) that are protected in photographs. See *Burrow-Giles*, 111 U.S. at 60 (listing elements

that combined to make photograph copyrightable). As noted in one of Petitioner’s cited cases, “[t]he elements that *combine* to satisfy *Feist*’s minimal ‘spark of creativity’ standard will necessarily vary depending on the photographer’s creative choices.” *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 310 (S.D.N.Y. 2000) (emphasis added); *id.* at 311 (noting that the “totality” of “precise” elements makes a photograph original). Thus, in *Harney*, the First Circuit found that defendant’s photograph “does not recreate the *original combination*” of unprotected elements in plaintiff’s photograph. 704 F.3d at 186 (emphasis added). Using virtually the same words as the Ninth Circuit here, it found that it was the combination of “the photographer’s selection of, *inter alia*, lighting, timing, positioning, angle, *and* focus,” never suggesting any element in isolation could be protectable. *Id.* at 180 (emphasis added). In so holding, the court relied on *Feist* and its statement that copyright “encourages others to build freely upon the ideas and information conveyed by a work.” *Id.* at 188 (quoting *Feist*, 499 U.S. at 349–50). The court also found that the “impression of similarity” between the photos was “due largely to the piggyback pose” in both works, which could not make them substantially similar because the pose was not protectable. *Id.* at 187. Also like the works here, the court noted that the photographs featured different “background, lighting, and [other] detail[.]” *Id.* at 188. Nothing about that decision is inconsistent with the Ninth Circuit’s decision here—quite the opposite.

Similarly, in *Rogers v. Koons*, the Second Circuit found protectable, as a whole, the plaintiff photographer's selection and arrangement of elements. 960 F.2d at 304. The court affirmed the finding of infringement because Koons's sculpture used "identical expression." *Id.* at 307–08. In fact, the "very details of the photograph" were copied. *Id.* at 307. On these facts, the court found that Koons went beyond using the same "*idea* presented by the photo," but rather used "the identical expression of the idea" by faithfully replicating plaintiff's selection and arrangement of elements. *Id.* at 307–08. Again, nothing in that decision suggests that any individual element was protectable—it was the copying of the *combination* of elements that infringed. In very different circumstances, the Ninth Circuit properly concluded here that the Rentmeester Photo and the Nike Photo may "embody a similar idea or concept, [but] they express it in different ways." App.15a; see also App.14a ("Nike's photographer did not copy the details...as expressed in Rentmeester's photo; he borrowed only the general idea or concept embodied in the photo."). Although the conclusions are different, as they should be (given the differences in the works), the legal principles applied are the same.

Petitioner also points to *Leibovitz v. Paramount Pictures Corp.*, but that decision is irrelevant as it dealt with the distinct issue of fair use. 137 F.3d at 109. There, defendant used a digitally altered copy of plaintiff's photograph of a nude and pregnant Demi Moore, in a particular pose, for its parodic movie poster. *Id.* at 111. In finding that the poster was a



parody and fair use, the Second Circuit recognized that the pose in isolation could not be protected, but rather “[o]nly the photographer’s particular expression of such a [nude, pregnant female] body is entitled to protection.” *Id.* at 116. While the court recognized 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.* (emphasis added), the court did not suggest such elements were protectable in isolation as opposed to in combination. After all, a photographer cannot use copyright law to exclude others from using a specific “camera angle.” *See Peters*, 692 F.3d at 636 (noting that “a photographer cannot claim copyright in the use of a particular aperture and exposure setting on a given lens,” just as “no poet can claim copyright protection in the form of a sonnet or a limerick”).<sup>3</sup> Rather, like the Ninth Circuit here, the court recognized that while elements such as the pose were not protected, the selection and arrangement, or combination, of individual elements was protected.

Far from supporting Petitioner’s request for review, the decision in *Mannion v. Coors Brewing Co.*,

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<sup>3</sup> Similarly, in *Meshwerks*, then-Judge Gorsuch, in analogizing computer models to photographs, discussed *Feist* at length and noted that “in the case of photographs...authors are entitled to copyright protection only for the ‘incremental contribution’ represented by their interpretation or expression of the objects of their attention.” 528 F.3d at 1264 (quoting *SHL Imaging*, 117 F. Supp. 2d at 311).

377 F. Supp. 2d 444 (S.D.N.Y. 2005), illustrates that there is no split in approach. The district court recognized that “the relevant comparison is between the protectible elements in the [plaintiff’s photograph] and the [defendant’s work], but that those elements *are not to be viewed in isolation.*” *Id.* at 462 (emphasis added). The court also focused on the combination of elements, noting that “[w]hat makes plaintiff’s photographs original is the *totality* of the precise lighting selection, angle of the camera, lens and filter selection.” *Id.* at 450 n.37 (quoting *SHL Imaging*, 117 F. Supp. 2d at 311). On the facts of *Mannion*, the district court denied the competing motions for summary judgment. *Id.* at 463. Unlike the *Rentmeester Photo* and the *Nike Works*, the photographs in *Mannion* shared numerous detailed similarities, which ultimately could lead to a finding of substantial similarity, including the same clothing, jewelry, composition, background, angle and lighting. *Id.* at 462–63. This stands in marked contrast to the works at issue here, where the photographs featured different compositions, backgrounds, clothing, moods, poses, and other elements.

Finally, the Eleventh Circuit’s decision in *Leigh v. Warner Bros., Inc.* also shows the same well-settled principles applied to a different set of facts. 212 F.3d 1210. Plaintiff claimed that his iconic photo of a statue in a cemetery that was used for the cover of a novel was infringed by video images and photographs for defendant’s film version of the novel. Like the Ninth Circuit here, *Leigh* recognized that the plaintiff could not monopolize the subject matter of his

photograph, or any of his ideas. *Id.* at 1214 (“Leigh may have been the first to think of the statue of evocative of the novel’s mood and as an appropriate symbol of the book’s themes, but the copyright law protects only original expression, not ideas.”). Highlighting that a court may come to a different conclusion based on the particular works at issue, the Eleventh Circuit found that the defendant’s film sequences of the same statue in plaintiff’s photograph was not substantially similar as a matter of law because the “film sequences have nothing substantial in common with Leigh’s photograph except the statue itself.” *Id.* at 1215–16. On the other hand, the court found that defendant’s photographs could be substantially similar because they used the same selection and arrangement of elements, as they depicted the same statue, in the same cemetery, using the same background elements, lighting, and colors, unlike the works at issue here. *Id.* at 1216. That opinion in no way requires the conclusion that the Nike Photo, much less the Jumpman Logo, is substantially similar to the Rentmeester Photo.

In sum, Petitioner’s cases refute the claim of a circuit split, instead reflecting that courts routinely apply the same law to differing circumstances.

### **III. THE DECISION BELOW CORRECTLY TREATS PHOTOGRAPHS LIKE ALL OTHER COPYRIGHTABLE WORKS AND FOUND THE NIKE WORKS NON-INFRINGEMENT**

The Petition mischaracterizes the decision below, painting it as “denigrat[ing]” and refusing to protect photographs. Pet.3, 24. Quite the opposite. The Ninth Circuit expressly found that the Rentmeester Photo is “highly original” and “undoubtedly entitled to broad, rather than thin protection.” App.4a, 15a. As the court noted, the Rentmeester Photo “obviously qualifies as an ‘original work of authorship,’ given the creative choices Rentmeester made in composing it.” App.7a. Rather, the only issue in Nike’s motion to dismiss, and throughout the life of Petitioner’s appeals, has been whether the Nike Works are substantially similar to the Rentmeester Photo. App.7a–8a. Applying the well-settled principles of the idea/expression dichotomy and substantial similarity, the Ninth Circuit properly concluded that neither the Nike Photo nor the Jumpman Logo could infringe as a matter of law.

#### **A. The Ninth Circuit Correctly Found That The Nike Photo Is Not Substantially Similar To The Rentmeester Photo**

As to the Nike Photo, the Ninth Circuit found that “[j]ust as Rentmeester made a series of creative choices in the selection and arrangement of the

elements in his photograph, so too Nike’s photographer made his own distinct choices in that regard.” App.13a–14a. Contrary to Rentmeester’s assertion that the court gave “no weight individually” to the elements of the Rentmeester Photo, Pet.27, it discussed at length and carefully compared the various elements of the photographs, including the “subject matter,” “pose,” “unusual outdoor setting,” “angle,” and the “arrangement of the elements” within the works. App.14a–16a. Rather than requiring “near-virtual identity,” the Ninth Circuit explicitly compared the works for substantial similarity, and nowhere even mentioned the “virtual identity” standard. *E.g.*, App.8a.

In considering each element, as well as the elements as a whole, the Ninth Circuit considered whether the Nike Photo and the Rentmeester Photo merely shared an unprotectable “idea or concept,” or whether the Nike Photo misappropriated the creative “expression” of Rentmeester’s work. App.14a. With respect to the “subject matter” of the photographs, the Ninth Circuit found that the works merely shared the same “general ‘idea’ or ‘concept’”—“Michael Jordan in a leaping pose inspired by ballet’s *grand jeté*.” *Id.* While another photographer cannot copy the *expression* of that idea as shown in the Rentmeester Photo, Rentmeester “cannot prohibit other photographers from taking *their own* photos of Jordan in a leaping, *grand jeté*-inspired pose,” which is what Nike did. *Id.* (emphasis added).

The Ninth Circuit also compared the poses depicted in the Rentmeester Photo and the Nike Photo, finding that “Nike’s photographer did not copy the details of the pose *as expressed* in Rentmeester’s photo; he borrowed only the general idea or concept embodied in the photo.” *Id.* (emphasis added). The poses differed significantly:

The position of each of [Jordan’s] limbs in the two photos is different . . . and those differences in detail are significant because, among other things, they affect the visual impact of the images. In Rentmeester’s photo, Jordan’s bent limbs combine with the background and foreground elements to convey mainly a sense of horizontal (forward) propulsion, while in the Nike photo Jordan’s completely straight limbs combine with the other elements to convey mainly a sense of vertical propulsion.

App.14a–15a.

Similarly, the district court further noted that in the Rentmeester Photo, Mr. Jordan’s “legs are apart like a scissor split, nearly creating a straight line,” which is more akin to a traditional *grand-jeté*. App.41a. “In contrast, in the Nike Photo, Mr. Jordan’s legs are positioned in the stance of someone who has jumped vertically and spread his legs wide in a straddle position, creating a ‘V’ as opposed to a straight line.” *Id.* Thus, while Mr. Jordan may have performed a *grand-jeté* in the Rentmeester Photo, in the Nike Photo he performed a different move. This

is also shown by the placement of Mr. Jordan's feet. In the Rentmeester Photo, the right side of his back foot is visible, but in the Nike Photo, the left side and top of his back foot is visible. The sole of Mr. Jordan's left foot also appears in the Rentmeester Photo, but not in the Nike Photo. Given the significant differences, the Ninth Circuit found that "[w]hile the photos embody a similar idea or concept, they express it in different ways." App.15a.

Similarly, the settings of the Rentmeester Photo and the Nike Photo were only similar "at the conceptual level," but with "stark differences" as to "how that concept is expressed" in each photo. *Id.* The Rentmeester Photo is "shot on a grassy knoll with a whimsically out-of-place basketball hoop jutting up from a pole planted in the ground." *Id.* In contrast, there is no grassy knoll, and in fact "no foreground element at all" in the Nike Photo. *Id.* Likewise, the Ninth Circuit found that:

The positioning of the basketball hoops is also materially different in the two photos. In Rentmeester's photo, the hoop is positioned at a height that appears beyond the ability of anyone to dunk (even someone as athletic as Jordan), which further contributes to the whimsical rather than realistic nature of the depiction. The hoop in the Nike

photo, by contrast, appears to be easily within Jordan's reach.<sup>4</sup>

*Id.* That conveys a very different message.

As to the angle of the photographs, the Ninth Circuit found that “photographers have long used similar camera angles to capture subjects silhouetted against the sky,” but that the photos “differ as to [their respective] details in material respects.” App.15a–16a. Whereas the Rentmeester Photo features “a cloudless blue sky,” in the Nike Photo, Mr. Jordan is soaring above “the Chicago skyline,” which is “silhouetted against the orange and purple hues of late dusk or early dawn.” App.16a. There were numerous other expressive differences as well, such as the sun that “looms large” in the Rentmeester Photo, which “does not appear at all” in the Nike Photo. *Id.*

The court further found “the arrangement” of the elements in each photo “materially different.” *Id.* For instance, whereas in the Rentmeester Photo Mr. Jordan “appears as a relatively small figure within the frame,” in the Nike Photo, he “dominates the

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<sup>4</sup> Despite Petitioner's argument, depicting Mr. Jordan “at the apex of his vertical leap” is not independently protected as that flows directly from the idea of depicting a basketball dunk. *See Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620, 627–28 (9th Cir. 2010) (no protection for elements that are “scenes-a-faire that flow naturally from the works' shared unprotected premise”).



frame.” *Id.* Similarly, the different positioning of the basketball hoops within the frames of each photograph reinforces this distinct emphasis, with the hoop in the Nike Photo “highlighting Jordan’s dominant, central position.” *Id.* These attributes, again, express a different message.

Ultimately, the Ninth Circuit’s conclusion that “Nike’s photographer made choices regarding selection and arrangement that produced an image *unmistakably different* from Rentmeester’s photo in material details—disparities that no ordinary observer of the two works would be disposed to overlook”—is wholly supported in the law. *Id.* The court recognized that to conclude otherwise “would withdraw ideas or concepts from the ‘stock of materials’ available to other artists, thereby thwarting copyright’s ‘fundamental objective’ of ‘foster[ing] creativity.’” App.17a (citations omitted). That would be contrary to the constitutional precepts of copyright law, which is to promote the progress of science and the useful arts by “encourag[ing] others to build freely upon the ideas and information conveyed by a work.” *Feist*, 499, U.S. at 349–50. As the Ninth Circuit held, “[t]hat is all Nike’s photographer did here.” *Id.*

**B. The Ninth Circuit Correctly Found That The Jumpman Logo Is Not Substantially Similar To The Rentmeester Photo**

The Petition utterly ignores the Ninth Circuit's unanimous decision that the Jumpman Logo is not substantially similar to the Rentmeester Photo, relegating it to a footnote. Pet.23 n.2. In so doing, Petitioner attempts to bootstrap a remand for the Ninth Circuit's unanimous decision that the Jumpman Logo is not substantially similar onto the separate issue of substantial similarity of the Nike Photo. Petitioner's failure to address the Jumpman Logo in the Petition is reason enough to deny review of the Ninth Circuit's finding on the Jumpman Logo. Moreover, Petitioner's attempt to claim infringement by the silhouetted logo in isolation, which does not even intrinsically depict Mr. Jordan, illustrates the extreme overbreadth of Petitioner's position.

The Ninth Circuit's decision with respect to the Jumpman Logo is also imminently correct. As the court concluded, "[t]he logo is merely a solid black silhouette of Jordan's figure as it appears in the Nike photo, which, as we have said, differs materially from the way Jordan's figure appears in Rentmeester's photo." App.17a. Thus, the court found the Jumpman Logo "even less similar to Rentmeester's photo than the Nike photo itself." *Id.* In his separate opinion, Judge Owens agreed that the pose in the Rentmeester Photo "cannot receive the broad protection that Rentmeester claims, even if Rentmeester encouraged

Jordan to strike it,” and that the pose in the Nike Works was not substantially similar. App.25a. As discussed above, to allow Petitioner to claim copyright protection that would reach a silhouetted figure in a different pose, isolated from all other context in his photograph would work a revolution in copyright law.

### CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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