

No. - ____

IN THE
Supreme Court of the United States

SHOSH YONAY AND YUVAL YONAY,
Petitioners,

v.

PARAMOUNT PICTURES CORPORATION,
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

To prove copyright infringement, a plaintiff must show that the accused work appropriates original expression from the asserted work. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). In deciding that issue, courts ask whether the two works are “substantially similar.”

In the decision below, the Ninth Circuit applied its two-step approach to substantial similarity. At the first step (the “extrinsic” test), the court breaks the copyrighted work into the protected aspects of its components—such as characters, plot, and themes—and compares each to the corresponding component of the allegedly infringing work. App., *infra*, 7a-8a. Only if the court itself finds those individual elements “substantially similar” under that threshold inquiry can the case proceed to the second step (the “intrinsic” test), where a factfinder assesses the works’ similarity from “the standpoint of the ordinary reasonable observer.” *Id.* at 7a. The Fourth and Eighth Circuits employ a similar approach.

The Second, Third, Fifth, Seventh, and D.C. Circuits reject that component-by-component dissection. They instead compare the works as a whole, asking (in a single step) whether an “‘ordinary observer’” would perceive them “as coming from one creative source.” *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1003-1004 (2d Cir. 1995).

The question presented is:

Whether courts may decide for themselves that a copyrighted work and an allegedly infringing work are not substantially similar—granting judgment for the defendant—without considering how an ordinary observer would perceive the works as a whole.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Shosh Yonay and Yuval Yonay were the plaintiffs in the district court and the appellants in the court of appeals.

Respondent Paramount Pictures Corporation (stock ticker: PSKY) was the defendant in the district court and the appellee in the court of appeals.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Shosh Yonay et al. v. Paramount Pictures Corporation*, No. 24-2897 (9th Cir.), judgment entered on January 2, 2026; and
- *Shosh Yonay et al. v. Paramount Pictures Corporation*, No. 2:22-cv-03846-PA-GJS (C.D. Cal.), judgment entered on April 5, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Shosh Yonay and Yuval Yonay respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-24a) is reported at 163 F.4th 685. The district court's opinion and order granting respondent's motion for summary judgment (App., *infra*, 25a-45a) is unreported but available at 2024 WL 2107721.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on January 2, 2026, App., *infra*, 1a, and denied rehearing and rehearing en banc on February 12, 2026, *id.* at 46a. On May 5, 2026, Justice Kagan extended the time to file the

petition to and including July 10, 2026. 25A1217. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions, including U.S. Constitution Article I, § 8, clause 8, and 17 U.S.C. §§ 102, 106, 203, and 501, are set forth in the appendix to this petition. App., *infra*, 83a-90a.

PRELIMINARY STATEMENT

In 1983, Ehud Yonay published a story in *California Magazine* about an elite training school for naval aviators. Titled “Top Guns,” the story captured the public’s imagination—and Paramount’s. Paramount rushed to purchase the exclusive rights to turn “Top Guns” into *Top Gun*, the 1986 blockbuster movie starring Tom Cruise and Val Kilmer.

Paramount’s rights terminated in 2020. Yet the studio went on to produce a sequel—2022’s *Top Gun: Maverick*—without crediting Yonay (by then deceased) or compensating his heirs (petitioners Shosh and Yuval Yonay). Like *Top Gun*, *Maverick* draws heavily on Yonay’s “Top Guns” story. Yet the Ninth Circuit affirmed the district court’s grant of summary judgment for Paramount on the Yonays’ copyright-infringement claim. That decision presents an entrenched and openly acknowledged circuit conflict on an issue of fundamental importance to copyright law: the proper test for comparing an allegedly infringing work to the original.

To establish copyright infringement, copyright holders must show “copying of constituent elements of the work that are original” to the author. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). That excludes bare “‘facts,’” “‘ideas,’” or “‘materials in the public domain.’” *Id.* at 349-350. But it includes any aspect of the work reflecting even a “minimal degree of creativity”—

including the creative “selection and arrangement” of otherwise unprotectable elements. *Id.* at 362.

The Ninth Circuit in this case applied its distinctive two-step approach to copyright infringement. At the first step, the court applies a threshold “extrinsic test.” Under that test, the court must dissect the asserted copyrighted work into its component parts (*e.g.*, its “‘plot, themes, dialogue, [and] mood’”); filter out any unprotectable elements; and compare what remains of each component one-by-one to the corresponding components of the accused work. App., *infra*, 7a-8a. If—and *only* if—the court determines that those individual components are “substantially similar,” the case proceeds to the second step of the analysis. *Id.* at 8a. At that second step, the “intrinsic test,” a factfinder assesses the works’ overall similarity from “‘the standpoint of the ordinary reasonable observer.’” *Id.* at 7a. The Fourth and Eighth Circuits largely follow the same approach.

The Second, Third, Fifth, Seventh, and D.C. Circuits, however, take a different approach. Those circuits reject the notion that courts “are required to dissect” works “into their separate components, and compare only those elements which are in themselves copyrightable.” *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1003 (2d Cir. 1995). Rather, they compare—in a single step—the “‘total concept and feel’” of the asserted and accused works to determine whether an “‘ordinary observer’” would perceive their protectable elements “as coming from one creative source.” *Id.* at 1003-1004; see *Tanksley v. Daniels*, 902 F.3d 165, 175 (3d Cir. 2018); *Peel & Co. v. The Rug Mkt.*, 238 F.3d 391, 398 (5th Cir. 2001); *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 614 (7th Cir. 1982); *Atkins v. Fischer*, 331 F.3d 988, 993-994 (D.C. Cir. 2003).

That circuit split has enormous consequences for copyright holders and for the copyright-intensive industries that contribute \$2 trillion to the Nation’s economy.¹ The Second and Ninth Circuits—homes to the publishing and entertainment industries—have the most copyright-heavy dockets in the Nation. Yet copyright holders get different treatment in each.

The Ninth Circuit’s atextual “extrinsic test” invites courts to “lose the forest for the trees by balkanizing a unified copyrighted work” and comparing each of its components “in isolation.” 3 William F. Patry, *Patry on Copyright* §9.73 (2026 ed.). By contrast, the Second Circuit’s holistic test recognizes that protectable expression may be “apparent only when numerous aesthetic decisions embodied in” a work “are considered in relation to one another.” *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134 (2d Cir. 2003).

Copyright holders’ Seventh Amendment rights receive differing treatment as well. Copyright infringement cases have been tried to juries since the Founding. See *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 350, 352 (1998). Although juries should ordinarily decide whether two works are substantially similar—employing the perspective of “an ordinary observer”—the Ninth Circuit does not consider the ordinary observer’s perspective when deciding, at summary judgment, whether the case will go to the jury. See *Cavalier v. Random House, Inc.*, 297 F.3d 815, 824 (9th Cir. 2002). In the Ninth Circuit, the ordinary observer is relevant (if at all) *only* if the case survives the threshold “extrinsic” test and the court sends

¹ Jessica Dutra & Robert Stoner, Int’l Intell. Prop. Alliance, *Copyright Industries in the U.S. Economy: 2024 Report*, at 5 (Feb. 2025), https://www.iipa.org/files/uploads/2025/02/IIPA-Copyright-Industries-in-the-U.S.-Economy-Report-2024_ONLINE_FINAL.pdf.

the case to a factfinder to apply the “intrinsic test.” App., *infra*, 7a. As a result, most cases are resolved without *ever* considering the ordinary observer’s perspective—and thus without the benefit of the jury determination guaranteed by the Seventh Amendment.

This case illustrates the problem. The decision below never made it past the first step of the Ninth Circuit’s two-step approach. The court of appeals acknowledged that the story “Top Guns” contains “much original, protected expression.” App., *infra*, 8a-9a. After dissecting the work into its component parts, however, the court concluded that petitioners could not “show meaningful similarities in any of those” individual components. *Id.* at 8a. The court of appeals accordingly affirmed the district court’s grant of summary judgment without ever stopping to consider whether an ordinary observer would—or a jury could—find the creative elements of the asserted and accused works similar *as a whole*. Review is warranted.

STATEMENT

This case concerns the legal standard for the most fundamental element of a copyright-infringement claim—substantial similarity.

I. LEGAL FRAMEWORK

From the time of this Nation’s Founding—and long before—copyright law has given authors exclusive rights in their works. U.S. Const. art. 1 § 8, cl. 8; see *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 349-350 (1998) (discussing pre-Framing common-law and statutory copyright protection).

A. Today, copyright protection extends to “original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). That includes “literary works,” § 102(a)(1), and “motion pictures,” § 102(a)(6),

whether fictional or nonfictional, see *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985).

A copyright grants its holder the “exclusive” right to “reproduce the copyrighted work,” “prepare derivative works,” “distribute copies” of the work to the public, or “perform” or “display” the work publicly. § 106. “Anyone who violates any of the[se] exclusive rights” is “an infringer.” § 501(a).

B. That “a work is copyrighted,” however, “does not mean that every element of the work may be protected.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991). Infringement requires “copying of constituent elements of the work that are *original*”—that is, those elements “independently created by the author” and embodying “at least some minimal degree of creativity.” *Id.* at 345, 361 (emphasis added). This “originality requirement is not particularly stringent.” *Id.* at 358. Although it forbids an author from copyrighting “‘his ideas or the facts he narrates,’” it protects both the author’s “original written expression” and his original “selection and arrangement” of both protectable and unprotectable material. *Id.* at 345, 349.

Proof of copyright infringement thus includes at least two distinct steps. First, the plaintiff must prove the defendant “copied from plaintiff’s work as a purely factual matter.” 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13D.02 (2025). Second, the plaintiff must establish that any copying that has been proved is “actionable as a matter of law.” *Ibid.* In general, that requires a showing of “substantial similarity between the plaintiff’s and defendant’s works.” *Id.* § 13D.10[A], [B][3].

II. FACTUAL BACKGROUND

In 1983, Ehud Yonay published “Top Guns”—a story about the Navy’s elite fighter-aircraft training program—in *California Magazine*. App., *infra*, 2a. This case arises from Paramount’s film adaptations of Yonay’s story, one authorized and the other not. (Mild spoilers ahead.)

A. Yonay’s 1983 “Top Guns” Story

“Top Guns” (reproduced in the petition appendix, App., *infra*, 48a-82a) focuses on two lieutenants, callsigns “Yogi” and “Possum.” Although the story is nonfiction, it is written in the “New Journalism” style, “‘where writers use extensive imagery and subjective expression to present facts with the colorful voice of fiction.’” *Id.* at 2a.

Yogi’s and Possum’s distinct personalities are immediately apparent in Yonay’s telling. Yogi “wanted to fly ever since he was twelve.” App., *infra*, 59a. He has “the gangly good looks of a John Travolta” and an intense love for flying. *Id.* at 51a. Yogi “sits up front” as the jet’s “pilot.” *Id.* at 50a. Possum, the radar-intercept officer, sits behind. *Ibid.* Unlike Yogi, who is single, Possum married his high-school sweetheart. *Id.* at 60a. And unlike Yogi, with his movie-star looks, Possum is “more the Ryan O’Neal type, with brown hair and a mustache.” *Id.* at 51a. Yogi and Possum met “while learning to fly F-14s” at the Navy Fighter Weapons School at Miramar, California. *Id.* at 60a. They share a singular bond. Possum would “spend more hours of [his] married years with Yogi than with [his wife].” *Id.* at 65a.

B. Paramount Buys the Rights to “Top Guns” and Turns It Into a Blockbuster Film

Soon after *California Magazine* published “Top Guns,” Paramount snatched up exclusive film rights to the story in exchange for a “fixed sum” and a promise to credit

Yonay in any film based on his work. App., *infra*, 3a. What “grabbed” the studio, *Top Gun*’s producer recalled, “was the colorful incidents, anecdotes, and characters” Yonay had captured. Dist. Ct. Dkt. 62-40, at 3.

Paramount adapted those “colorful incidents, anecdotes, and characters” for the silver screen in 1986’s *Top Gun*. The film’s lead characters, Maverick and Goose, strongly resembled Yonay’s descriptions of Yogi and Possum: Maverick, single, with his dark hair and movie-star good looks; and Goose, married to his high-school sweetheart, with wavy light brown hair and a mustache. Dist. Ct. Dkt. 62-1 ¶¶78-79. Maverick and Goose also share Yogi’s and Possum’s close bond, their love for flying, and their drive to be the best. *Id.* ¶¶80-83. Paramount credited Yonay in *Top Gun*’s closing credits. *Id.* ¶22.

C. Paramount’s Unlicensed Sequel, *Top Gun: Maverick*

Ehud Yonay died in 2012. In 2020, the copyright in “Top Guns” vested in petitioners (his widow, Shosh Yonay, and his son, Yuval Yonay). App., *infra*, 4a. The Yonays terminated Paramount’s rights under 17 U.S.C. § 203(a)(3), which allows an author’s statutory heirs to terminate copyright grants made by the author. *Ibid.* Two years later, Paramount released *Top Gun: Maverick*, a sequel to *Top Gun*. *Ibid.* *Maverick* naturally exploited elements of *Top Gun* and Yonay’s underlying work. But Paramount made no attempt to relicense Yonay’s story.

1. As a sequel, *Maverick* naturally incorporated *Top Gun*’s extensive appropriation of Yonay’s story. But it also took directly from “Top Guns,” often paralleling the story’s description of events. For example, “Top Guns” tells the story of a pilot who took down three MiGs in one day and became the first official Top Gun ace after passing the five-kill line. Dist. Ct. Dkt. 62-1 ¶104. In *Top Gun*,

Maverick shoots down three MiGs in one day; and in *Maverick*, he shoots down two more jets, putting him past the five-kill line and making him the first Top Gun ace. *Id.* ¶105.

Maverick's plot also echoes the events of "Top Guns." A key event in Yonay's story, establishing its irreverent cowboy mood, is the arrival of an admiral who sets out to "restore discipline and naval decorum to the fighter community." App., *infra*, 72a. Likewise, in *Maverick*, the admiral leading the Top Gun program makes clear that irreverent hotshots like Maverick have no place in his Navy. Dist. Ct. Dkt. 62-1 ¶113. In "Top Guns," that departure comes to an end when "a fighter pilot's pilot" takes charge. App., *infra*, 72a. The program undergoes a similar transformation in *Maverick*, when Maverick is asked to fill the Top Gun instructor post. Dist. Ct. Dkt. 62-1 ¶115.

In another example, "Top Guns" portrays Yogi's encounter with a Russian aircraft with playful cheekiness. Dist. Ct. Dkt. 62-1 ¶209. While Yogi and Possum escorted the enemy aircraft away, "Yogi edged up so close that he could look over and see the Russians in their cockpit, staring at him and snapping pictures." App., *infra*, 66a. Yogi "waved the way one does" when having their picture taken, "but the Russians didn't wave back." *Ibid.* In *Top Gun*, Maverick flies close to a Russian plane, takes a snapshot, and waves. Dist. Ct. Dkt. 62-1 ¶210. And in *Maverick*, when flying close to a plane he is escorting away, Maverick "smiles and waves, but the enemy pilot does not wave back." *Ibid.*

2. Other examples abound. Both "Top Guns" and *Maverick* feature idiosyncratic vignettes involving a brass bell at the club where the pilots spend time relaxing. Whenever someone breaks one of the club rules, the bell is rung and "the transgressor picks up the tab for every-

body's drinks," as Maverick does in the *Maverick* film. App., *infra*, 68a; Dist. Ct. Dkt. 62-1 ¶¶199-200. Both works have the same detail of 200 push-ups, emphasizing the pilots' strength and masculinity. App., *infra*, 55a; Dist. Ct. Dkt. 62-1 ¶¶185-186. And both feature the same breathtaking aerial maneuvers. "Top Guns" highlights Yogi learning the "'vertical egg,' in which two planes chase each other in ever-widening vertical loops." App., *infra*, 67a. *Maverick* contains "an intense aerial combat training scene" in which "two planes 'chas[e] each other in ever-widening vertical loops.'" Dist. Ct. Dkt. 62-1 ¶180. "Top Guns" describes "the game of 'thumping,'" where one pilot "shoots under" another from behind and "go[es] into a sharp climb right in front of his nose." App., *infra*, 66a-67a. *Maverick* pulls this exact same stunt in the *Maverick* film. Dist. Ct. Dkt. 62-1 ¶175. And both the story and the film prominently feature a "back-to-back" maneuver, where a pilot flies upside down in close parallel to another jet. *Id.* ¶¶183-184; App., *infra*, 63a.

The magazine story and *Maverick* also share higher-level similarities. Both, for instance, are set at a naval base near the sea—even though the real-life base moved to landlocked Nevada in 1996. Dist. Ct. Dkt. 62-1 ¶¶94-95. Both frame that world with the same 1950s, post-war nostalgia: Yonay describes the darkened base as "an old *From Here to Eternity* set," App., *infra*, 55a, while *Maverick* features a vintage P-51 Mustang and a sing-along to "Great Balls of Fire" at the pilots' bar. Dist. Ct. Dkt. 62-1 ¶198; Dist. Ct. Dkt. 53-2. And both use their many shared elements to tell a story about fighter pilots in love with the sheer intensity of high-speed flight, using their unique skills and grit to defend the country. Dist. Ct. Dkt. 62-1 ¶¶146-147, 172-173. "Top Guns" created a scene,

a feel, a setting, and characters. *Top Gun* and *Maverick* reused them.

III. PROCEEDINGS BELOW

In June 2022, shortly after *Maverick*'s release, the Yonays filed a complaint against Paramount in the Central District of California for copyright infringement and breach of contract. App., *infra*, 27a.

A. District Court Proceedings

The parties cross-moved for summary judgment, App., *infra*, 25a, disputing only the element of “substantial similarity,” *id.* at 35a. The district court applied the Ninth Circuit’s two-step approach to “substantial similarity.” *Ibid.* At the first step—the threshold “extrinsic test”—a court breaks down the asserted and accused works into their literary components. *Ibid.* It then “‘distinguish[es] between protectable and unprotectable elements’” of those components and asks “‘whether the protect[a]ble elements’” that remain “‘are substantially similar.’” *Ibid.* At the second step, which “‘is exclusively the province of the jury,’” the factfinder “‘examines an ordinary person’s subjective impressions of the similarities between the two works.’” *Ibid.*

The district court thus broke the works down into their component parts—their “plots, sequences of events, and pacing,” “themes,” “moods,” “dialogue,” “characters,” and “settings.” App., *infra*, 37a-41a. It then analyzed each component, one-by-one, “‘filtering’” out supposedly “unprotectable elements.” *Id.* at 35a. Under that purportedly “objective” comparison, the district court concluded *Maverick* was “not substantially similar” to Yonay’s story. *Id.* at 42a.

The district court also rejected the Yonays’ argument that Paramount infringed by copying the story’s overall

“selection and arrangement” of protected and unprotected elements. App., *infra*, 42a. The court recognized that substantial similarity may be based on “‘a combination of elements, even if those elements are individually unprotected.’” *Ibid*. But it concluded that, because the “Top Guns” story and *Maverick* did not share the “*same* combination of unprotected elements,” it could not find substantial similarity. *Ibid*.

The district court did not address the Yonays’ argument that the same elements formed the “dramatic center” of both works. Dkt. Ct. Dkt. 78, at 21. Indeed, the district court did not analyze the works’ expressive similarities at all. It instead focused on the differences between the works. App., *infra*, 43a (identifying dissimilar “facts about the technical aspects of the F-14 jet aircraft and the history of Top Gun”).²

B. Ninth Circuit’s Decision

The Ninth Circuit affirmed. App., *infra*, 1a-24a. The court of appeals recognized that “Top Guns” “contains much original, protected expression.” *Id.* at 8a-9a. But it concluded that the Yonays had not shown that *Maverick* was “substantially similar.”

1. The Ninth Circuit started and ended its analysis with that court’s threshold “extrinsic test.” App., *infra*, 7a. Under that test, the court explained, a court must dissect the asserted work into various “categories,” including “the plot, themes, dialogue, mood, setting, pace, char-

² The parties also moved to strike each others’ infringement experts. App., *infra*, 25a-26a. The district court excluded the Yonays’ expert (though not Paramount’s) because, in the court’s view, his testimony was unhelpful under the extrinsic test. *Id.* at 30a-31a. The district court entered summary judgment on petitioners’ breach-of-contract claim based on its conclusion *Maverick* “does not infringe” the copyright in “Top Guns.” *Id.* at 44a.

acters, and sequence of events.’” *Id.* at 7a-8a. After “filter[ing] out and disregard[ing]” any “non-protectible elements,” the court considers whether a comparison of the remaining, protectable “elements in those categories reveals substantial similarity” as a matter of law. *Ibid.*

The Ninth Circuit concluded that the Yonays failed to show substantial similarity under the extrinsic test. The court went through each “category” of expression separately. App., *infra*, 8a-14a. For each, the court started by highlighting the works’ *dissimilarities*. For example, it distinguished the “nonlinear” plot in “Top Guns” from the “traditional plot with exposition, climax, and denouement” in *Maverick* and emphasized that “many significant plot elements” in *Maverick* were absent from “Top Guns.” *Id.* at 9a-10a. The court did the same for the characters, dialogue, and setting. *Id.* at 11a (“[n]o character described in ‘Top Guns’ appears in *Maverick*”), 12a (“none of the dialogue in ‘Top Guns’ appears in *Maverick*,” with one exception), 13a (“in *Maverick*, no one compares the Navy base to a movie set or a desert town”). And, for each category, it brushed off the works’ many similarities as “involv[ing] only unprotected ideas” and “facts about pilot training.” *Id.* at 11a, 14a. The court never considered whether an ordinary observer watching *Maverick* and reading “Top Guns” would find the creative elements of the works substantially similar *as a whole*.

2. The Ninth Circuit applied the same dissection analysis to the Yonays’ selection-and-arrangement argument. The court acknowledged that the selection and arrangement of unprotected elements can “itself be a protectable element.” App., *infra*, 14a-15a. But it insisted that the Yonays identify a “‘pattern, synthesis, or design’” *independent* of the work’s underlying elements “that is both ‘particular’ and ‘coherent.’” *Id.* at 16a. “[S]imilari-

ties” in the works’ “elements alone,” the court declared, “cannot demonstrate unlawful appropriation,” “no matter their quantity or importance to the work.” *Ibid.* Looking at the asserted “pattern” in isolation, the court again disparaged the numerous similarities as based on “unprotectable facts” and “abstract ideas.” *Id.* at 17a.³

3. The Yonays petitioned for rehearing en banc, urging the Ninth Circuit to replace its two-part extrinsic-intrinsic test with the ordinary-observer standard applied by other circuits. Reh’g. Pet. 6-10. The court denied the petition. App., *infra*, 45a.

REASONS FOR GRANTING THE PETITION

This case exemplifies the Ninth Circuit’s test for evaluating “substantial similarity” in copyright cases—and the conflict between that approach and the test employed by other circuits. In holding that Paramount’s *Top Gun* sequel, *Maverick*, lacked sufficient similarity to the “Top Guns” story that undisputedly inspired the original *Top Gun* film, the Ninth Circuit employed a balkanized, element-by-element approach. It broke the works down into their individual components, parsing each into discrete elements like plot, characters, and dialogue. It then compared those components, one-by-one, in isolation. And it undertook that dissection without ever considering how ordinary observers would perceive the similarities between the works *as a whole*.

That piecemeal approach is the hallmark of the Ninth Circuit’s “extrinsic test”—the only part of the Ninth

³ The court of appeals affirmed the district court’s exclusion of the Yonays’ expert on the ground that his opinion was unhelpful under the extrinsic test, App., *infra*, 19a-20a, and the grant of summary judgment on their breach-of-contract claim because “*Maverick* did not infringe the copyright in ‘Top Guns,’” *id.* at 22a-24a.

Circuit’s two-part analysis that court applies at summary judgment. But it conflicts sharply with the approach taken by the Second, Third, Fifth, Seventh, and D.C. Circuits. Those circuits do not parse and compare individual elements; they compare asserted and accused works as a whole from the perspective of “the ordinary observer.” *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960). That assessment asks whether, considering the “works’ ‘total concept and feel,’” an ordinary person would “perceive them as coming from one creative source.” *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1003-1004 (2d Cir. 1995).

That conflict—on an issue at the heart of virtually every copyright-infringement case—is entrenched and openly acknowledged. It is also untenable. Authors get different federal copyright protection depending on the happenstance of where their cases arise. By deferring any holistic assessment of the works until after summary judgment, the Ninth Circuit conditions a copyright holder’s Seventh Amendment jury-trial right on persuading a *court* that individual fragments of two works are similar, without reference to how jurors would perceive the works’ similarities as a whole. And because the Ninth Circuit treats the “extrinsic” test as implicating purely legal questions, it reviews compliance with that test *de novo*—even after a jury has *already found* infringement. See *Gray v. Hudson*, 28 F.4th 87, 97 (9th Cir. 2022).

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED ON THE TEST FOR SUBSTANTIAL SIMILARITY

The decision below exacerbates an openly acknowledged circuit conflict on the proper approach for assessing the similarity between asserted and accused works.

A. The Second, Third, Fifth, Seventh, and D.C. Circuits Compare Works as a Whole from the Perspective of an Ordinary Observer

The Second, Third, Fifth, Seventh, and D.C. Circuits assess substantial similarity using the holistic “ordinary observer” test.

1. Since Learned Hand’s seminal decision in *Peter Pan Fabrics*, 274 F.2d at 489, the Second Circuit has used the “ordinary observer” test to evaluate whether two works are substantially similar. Under that test, courts examine the asserted and accused “works’ ‘total concept and feel’” and ask “whether ‘an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.’” *Knitwaves*, 71 F.3d at 1003 (brackets omitted).

Where a work contains both protectable and unprotectable elements, the court begins by “extract[ing] the unprotectible elements” and “ask[ing] whether the *protectible elements, standing alone*, are substantially similar.” *Knitwaves*, 71 F.3d at 1002. That filtration process does *not*, however, require courts to “dissect” works “into their separate components, and compare only those elements which are in themselves copyrightable.” *Id.* at 1003; accord *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 66 (2d Cir. 2010). To the contrary, the Second Circuit has warned that such a fragmented approach risks overlooking “properties” of the works “that are apparent only when numerous aesthetic decisions embodied in the plaintiff’s work” are “considered in relation to one another.” *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 134 (2d Cir. 2003). Thus, a court “must analyze the two works closely to figure out in what respects, if any, they are similar, and then determine whether these similarities are due to

protected aesthetic expressions original to the allegedly infringed work, or whether the similarity is” instead based on something “that is free for the taking.” *Id.* at 134-135.

The Second Circuit’s decision in *Knitwaves*—a leading case on substantial similarity—exemplifies that approach. 71 F.3d at 1002. In that case, the defendant conceded it had copied the plaintiff’s sweater design. *Ibid.* But it argued it had “altered [its] designs enough so that its sweaters [were] not ‘substantially similar.’” *Ibid.* The district court ruled for the plaintiff. *Id.* at 1001. On appeal, the defendant urged that the district court “should have ‘extracted the unprotectible elements’” of the designs and “compared *only* the sweaters’ distinctive elements.” *Id.* at 1003 (emphasis added). “Viewed without their common background elements,” the defendant argued, “the sweaters’ designs appear substantially *dis*-similar, as distinctions among their details * * * become apparent.” *Ibid.*

The Second Circuit rejected that argument. Taken “to its logical conclusion,” such an approach could lead to the conclusion that “‘there can be no originality in a painting because all colors of paint have been used somewhere in the past.’” *Knitwaves*, 71 F.3d at 1003. Considering the designs’ “‘total concept and feel,’” the Second Circuit concluded that “[a]n observer viewing” the asserted and accused sweaters “side by side cannot help but perceive them as coming from one creative source.” *Id.* at 1004. The court acknowledged there were numerous differences between the sweaters. *Ibid.* But those “differences in detail” did “little to lessen a viewer’s overwhelming impression” that the defendant’s sweaters were “appropriations of the [plaintiff’s] sweaters.” *Ibid.* The Second Circuit thus affirmed the infringement judgment in the plaintiff’s favor. *Id.* at 1005.

2. The Third Circuit follows that same “‘ordinary observer’” approach. *Tanksley v. Daniels*, 902 F.3d 165, 174 (3d Cir. 2018) (quoting *Peter Pan Fabrics*, 274 F.2d at 489). For example, in *Kay Berry, Inc. v. Taylor Gifts, Inc.*, the Third Circuit held that a plaintiff raised a triable question over whether the defendant had infringed the “specific combination of elements” that gave the asserted work “its unique look.” 421 F.3d 199, 207-209 (3d Cir. 2005); see *Nicassio v. Viacom Int’l, Inc.*, 776 F. App’x 761, 766 (3d Cir. 2019) (no liability where defendant’s book did not copy “overall ‘concept and feel’” of plaintiff’s book). That analysis rejects a “divide-and-conquer approach.” *Silvertop Assocs. Inc. v. Kangaroo Mfg. Inc.*, 931 F.3d 215, 221 (3d Cir. 2019). For copyright purposes, a work is “the *sum* of” its protectable “parts,” or “the *combination*” of protectable “elements.” *Ibid.* (emphasis added).

3. The Fifth Circuit also applies the “ordinary observer or audience test.” *Peel & Co. v. The Rug Mkt.*, 238 F.3d 391, 398 (5th Cir. 2001). It thus requires “‘a side-by-side comparison’” between the asserted work and the alleged “‘copy to determine whether a layman would view the two works as ‘substantially similar.’”” *Id.* at 395; accord *Nola Spice Designs, L.L.C. v. Hayden Enters., Inc.*, 783 F.3d 527, 550 (5th Cir. 2015); see *Positive Black Talk Inc. v. Cash Money Recs., Inc.*, 394 F.3d 357, 373 (5th Cir. 2004) (upholding instruction directing jury to consider whether two works’ “‘intended audience[s] would find the[ir] total concept and feel * * * to be substantially similar’”), abrogated on other grounds by *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010). The proper approach, the Fifth Circuit has emphasized, focuses on the works’ “expression of ideas,” *Positive Black Talk*, 394 F.3d at 373—a methodology incompatible with a “dissected form

of analysis,” *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 387 (5th Cir. 1984).

4. Seventh Circuit law is to the same effect. It, too, employs the “‘ordinary observer’” test. *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 614 (7th Cir. 1982) (citing *Peter Pan Fabrics*, 274 F.2d at 489). And it, too, generally rejects “dissection of the subject matter into copyrighted and unprotected elements * * * in favor of examining the ‘total concept and feel’ of the copyrighted work.” *Roulo v. Russ Berrie & Co.*, 886 F.2d 931, 939 (7th Cir. 1989). The Seventh Circuit thus has rebuffed the argument that substantial similarity requires “subtract[ing]” each unprotectable “element” and comparing only “whatever leftover components are creative.” *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910, 917 (7th Cir. 2007). Such an approach is mistaken, that court has explained, because it ignores that a work’s “combination” of unprotectable elements, along with its independently protectable features, can itself be “creative.” *Ibid.*; see *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 510 (7th Cir. 1994) (focusing on works’ “overall look and character” to assess similarity in “overall artistic expression”).

5. The D.C. Circuit applies the “ordinary observer” test as well, asking whether “‘an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.’” *Atkins v. Fischer*, 331 F.3d 988, 993 (D.C. Cir. 2003). That analysis eschews “dissect[ing] separate components and dissimilarities,” looking instead “at the ‘total concept and feel’ of the [works].” *Id.* at 993-994 (quoting *Knitwaves*, 71 F.3d at 1004). “Put another way, ‘the touchstone of the analysis is the *overall* similarities rather than the minute differences between the two works.’” *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1296 (D.C. Cir. 2002) (emphasis

added; brackets omitted). Thus, in *Sturdza*, the D.C. Circuit criticized the district court for “comparing the ways in which” two architects “express[ed] *individual* concepts” without considering the “‘*overall* look and feel” of the buildings they designed. *Id.* at 1299 (emphasis added). Applying a holistic review, the court concluded that the accused work “express[ed] and combin[ed]” its various elements “in ways quite similar to” the asserted work’s “expression and combination of these elements.” *Ibid.*

B. The Ninth Circuit, Joined by the Fourth and Eighth Circuits, Has Adopted a Conflicting Approach that Requires Works To Be Dissected and Compared Piecemeal

The Ninth Circuit has adopted a conflicting, two-part “extrinsic”–“intrinsic” approach. Rather than assess the overall look and feel of the asserted and accused works, the Ninth Circuit starts by dissecting each work into its component parts and comparing each part in isolation. Absent similarity under that dissective approach, there can be no liability. The Fourth and Eighth Circuits have followed suit.

1. The first step in the Ninth Circuit’s approach—the threshold “extrinsic test”—is “an objective comparison of *specific* expressive elements.” *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002) (emphasis added). It “‘requires breaking the works down into their *constituent elements*, and comparing *those elements*’” for “‘substantial similarity.’” *Gray v. Hudson*, 28 F.4th 87, 96 (9th Cir. 2022) (ellipsis omitted; emphasis added). For literary or cinematic works, it requires breaking down the works’ “‘plot, themes, dialogue, mood, setting, pace, characters, and sequence of events.’” *Cavalier*, 297 F.3d at 822; accord App., *infra*, 7a-8a. The works are then com-

pared, one component at a time, filtering out any unprotectable elements along the way. *E.g.*, App., *infra*, 8a-14a.

The Fourth and Eighth Circuits follow the Ninth Circuit’s two-step approach. In the Fourth Circuit, a court starts with an “‘extrinsic inquiry’” that looks to “specific and ‘external criteria’ of substantial similarity between the original elements (*and only the original elements*) of a protected work and an alleged copy.” *Copeland v. Bieber*, 789 F.3d 484, 489 (4th Cir. 2015) (emphasis added). That comparison requires “‘analytic dissection,’ separating out those parts of the work that are original and protected from those that are not.” *Ibid.* The Fourth Circuit reserves assessment of the works’ “‘total concept and feel’” for the intrinsic test. *Ibid.* The Eighth Circuit also starts with an extrinsic test. That test does not “depend upon the trier of fact,” but instead upon “objective criteria.” *Nelson v. PRN Prods., Inc.*, 873 F.2d 1141, 1143 (8th Cir. 1989). It is not until the intrinsic step that the court asks “whether the ordinary, reasonable observer would find the works, taken as a whole, to be substantially similar,” without “analytic dissection, or ‘filtering.’” *Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958, 966 (8th Cir. 2005).

Those approaches directly conflict with the holistic “ordinary observer” test adopted by other circuits. Courts adopting that test have expressly rejected such a “divide-and-conquer approach,” *Silvertop*, 931 F.3d at 221, or “dissected” analysis, *Apple Barrel*, 730 F.2d at 387. Rather than require “dissection of the subject matter into copy-righted and unprotected elements” for seriatim comparison, they “examin[e] the ‘total concept and feel’ of the copyrighted work” from the start. *Roulo*, 886 F.2d at 939; see *Atkins*, 331 F.3d at 993-94 (same). That makes perfect sense. A work is “the sum of” its protectable “parts,” or

“the combination” of protectable “elements.” *Silvertop*, 931 F.3d at 221. By ignoring that principle, the Ninth Circuit’s atextual, element-by-element approach overlooks “properties” of the works “that are apparent only when numerous aesthetic decisions embodied in the plaintiff’s work” are “considered in relation to one another.” *Tufenkian*, 338 F.3d at 134.⁴

2. The decision below illustrates the problem with the dissective approach adopted by the Fourth, Eighth, and Ninth Circuits. The Ninth Circuit broke down “Top Guns” into the various “categories of elements described in [its] cases: plot, sequence of events, characters, dialogue, themes, mood, setting, and pace.” App., *infra*, 8a. It then worked its way through each of those components, filtering out purportedly unprotectable elements and comparing what little was left, element-by-element, in isolation. The court thus dismissed as mere “facts,” *id.* at 17a, that both the story and the film depict pilots carousing at a bar (brass bell, club rules, and all, pp. 9-10, *supra*). It rejected as “abstract ideas” both works’ dramatic juxtapositions of light-hearted camaraderie with “‘gut-wrenching climbs, dives and dogfights.’” App., *infra*, 17a. It brushed aside that Maverick himself derives from a character developed in “Top Guns.” And it did that all without considering how these scenes, themes, and characters fit *together*. Such “‘analytic dissection’” is standard fare in the Ninth Circuit. *Corbello v. Valli*, 974 F.3d 965, 974 (9th Cir. 2020) (emphasis omitted). But it

⁴ The Sixth and Eleventh Circuits have also indicated that dissection is appropriate. *Stromback v. New Line Cinema*, 384 F.3d 283, 294-295 (6th Cir. 2004) (rejecting “side-by-side comparison” for a “two-part test”); *Herzog v. Castle Rock Ent.*, 193 F.3d 1241, 1257 (11th Cir. 1999); but see *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1224 n.5 (11th Cir. 2008) (criticizing *Herzog* as “an anomaly”).

cannot be reconciled with the holistic, side-by-side comparison of the full works required by other circuits.

It is no answer that the *second* step of the Ninth Circuit’s test looks to how “the ordinary, reasonable person” would perceive “the total concept and feel of the works.” *Williams v. Gaye*, 895 F.3d 1106, 1119 (9th Cir. 2018). A plaintiff in the Ninth Circuit cannot reach that step without first establishing substantial similarity to a court’s satisfaction at the threshold under the balkanized, element-by-element “extrinsic” test. App., *infra*, 7a-8a.

3. The Ninth Circuit applies its rigid dissective approach even to claims based on a work’s selection and arrangement of otherwise unprotectable elements. Although “copyright protection may extend only to those components of a work that are original to the author,” this Court has recognized that the way an author chooses and arranges unprotectable elements—like facts—can *itself* be creative, and thus protectable. *Feist*, 499 U.S. at 348. A work thus may be “protectible as a ‘combination of unprotectable elements.’” *Gray*, 28 F.4th at 101. Even in such cases, however, the Ninth Circuit applies its dissective approach. Instead of examining the author’s selection and arrangement as a whole, the court insists that the copyright holder identify “the *particular* way in which the artistic elements form a coherent pattern, synthesis, or design,” and then asks whether the allegedly infringing work shares the same pattern. App., *infra*, 14a.

Applying that framework, the decision below rejected the Yonays’ argument that *Maverick* had copied the creative selection and arrangement of facts in “Top Guns.” “[S]imilarities” in two works’ “elements” alone, the court held, “cannot demonstrate unlawful appropriation”—“*no matter their quantity or importance to the work*”—without a *separate* showing that the works “share a

‘pattern, synthesis, or design’ that is both ‘particular’ and ‘coherent.’” App., *infra*, 16a (emphasis added). Thus, the Ninth Circuit assessed the identified patterns in isolation from their constituent elements. Having stripped the patterns of their content, the court easily dismissed them as “abstract ideas,” *id.* at 17a, without considering that a viewer might find the *overall* look and feel of the two works substantially similar—precisely because *Maverick* incorporated Yonay’s creative choices.

The Ninth Circuit’s rigid demand for an identifiable pattern stands in sharp contrast to the Second Circuit’s approach. That court has admonished that the substantial similarity analysis “is not *simply* a matter of ascertaining similarity between components viewed in isolation.” *Tufenkian*, 338 F.3d at 134. Such a dissection analysis, the Second Circuit recognizes, overlooks that a defendant may infringe “by parroting properties” of a work “that are apparent only when numerous aesthetic decisions embodied” in that work—including “the excerpting, modifying, and arranging of public domain” elements *and* the use of “wholly new” expressions—“are considered in relation to one another.” *Tufenkian*, 338 F.3d at 134; see also *Sturdza*, 281 F.3d at 1296 (comparing “‘overall’” similarity of protected and unprotected elements).

C. The Conflict is Widespread and Openly Acknowledged

The Ninth Circuit itself has recognized the conflict between its approach and the Second Circuit’s, explaining that the “substantial similarity test” applied in the Second Circuit, unlike its own test, “does not differentiate between extrinsic and intrinsic analysis.” *Swirsky v. Carey*, 376 F.3d 841, 849 n.16 (9th Cir. 2004). The Fourth Circuit, too, has noted the distinction. In *Charles W. Ross Builder, Inc. v. Olsen Fine Home Building, LLC*, the

court vacated a grant of summary judgment because “the district court [had] elected to apply the Second Circuit’s” test instead of the Fourth Circuit’s approach—which, like the Ninth Circuit’s, uses a “two-part test requiring that a court consider both the ‘extrinsic’ and ‘intrinsic’ similarity of the works in question.” 496 F. App’x 314, 318-319 (4th Cir. 2012); see also *id.* at 319 n.4 (noting that the Eighth and Ninth Circuits “have employed the same, or a similar, articulation of the substantial similarity test”). And the Sixth Circuit has expressly called out the “alternative” tests employed by the Second and Ninth Circuits. *Murray Hill Publ’ns, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 317 (6th Cir. 2004).

Commentators, too, have recognized the “long-standing circuit split” between the Second Circuit’s “‘ordinary-observer’” test and the Ninth Circuit’s “bifurcated similarity analysis.” Kevin J. Hickey, *Reframing Similarity Analysis in Copyright*, 93 Wash. U. L. Rev. 681, 683 (2016); see *id.* at 692 (noting that Fourth and Eighth Circuits have “adopted” the Ninth Circuit’s approach); Daryl Lim, *Saving Substantial Similarity*, 73 Fla. L. Rev. 591, 611 (2021) (similarly noting the “substantial difference between the Second and Ninth Circuit tests” and the Fourth and Eighth Circuits’ adoption of the Ninth Circuit’s approach).

The test for the central issue in copyright-infringement cases—substantial similarity—should not vary with the happenstance of where the case arises. Nor should outcomes. Review is warranted.

II. THE ISSUE IS IMPORTANT AND RECURRING

A. The Split Affects an Enormous and Increasing Number of Cases

Infringement is at issue in almost every copyright case. And the two circuits that hear the most of those cases—the Second and Ninth—are on opposite sides of the split. Thirty-seven percent of all infringement cases from 1996 to 2018 were filed in federal district courts in California and New York.⁵ One study concluded that about a third of all copyright appeals addressing substantial similarity from 1978 to 2020 were heard in the Ninth Circuit, while about a quarter were heard in the Second Circuit. See Clark D. Asay, *An Empirical Study of Copyright’s Substantial Similarity Test*, 13 U.C. Irvine L. Rev. 35, 57 (2022).

A more consequential split is hard to imagine. In 2025 alone, more than 8,000 copyright cases were filed in the district courts.⁶ That represents a “threefold increase” in cases over the last decade. Lim, *supra*, at 596. In the face of such an increase, “[i]t is not too much to ask that copyright law have a coherent approach to copyright infringement. But substantial similarity, copyright law’s core infringement inquiry, is a mess.” Hickey, *supra*, at 682.

B. The Ninth Circuit’s Approach Burdens Copyright Holders’ Seventh Amendment Rights

The issue is critically important. It implicates not only substantive copyright law, but also the Seventh Amend-

⁵ United States Courts, *Just the Facts: Intellectual Property Cases—Patent, Copyright, and Trademark* (Feb. 13, 2020), <https://www.uscourts.gov/data-news/judiciary-news/2020/02/13/just-facts-intellectual-property-cases-patent-copyright-and-trademark>.

⁶ United States Courts, *Table C-2—U.S. District Courts—Civil Federal Judicial Caseload Statistics* (last visited July 10, 2026), <https://www.uscourts.gov/data-news/data-tables/2025/12/31/statistical-tables-federal-judiciary/c-2>.

ment jury-trial guarantee—a right “‘of such importance’” that “‘any seeming curtailment’” has “‘always been and ‘should be scrutinized with the utmost care.’” *SEC v. Jarkesy*, 603 U.S. 109, 121 (2024).

1. Copyright-infringement actions for damages fall in the heartland of the Seventh Amendment’s protections. Such cases have been “consistently tried to juries” since “before adoption of the Constitution.” *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 350, 352 (1998).

For nearly as long, this Court has recognized there is no institution better suited to applying an ordinary-person standard than the jury. “[W]hen the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decisionmaker that ought to provide the fact-intensive answer.” *Hana Fin., Inc. v. Hana Bank*, 574 U.S. 418, 422 (2015). Indeed, for more than two centuries, it has been an article of faith that “twelve men know more of the common affairs of life than does one man, [and] that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.” *Sioux City & P.R. Co. v. Stout*, 84 U.S. 657, 664 (1873); see *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794) (Jay, C.J., charging the jury in an original action that “it is presumed, that juries are the best judges of facts”).

2. In circuits that apply the ordinary-observer test at all stages of a copyright-infringement case, that long-settled right to jury determinations is well protected. Thus, the Second Circuit has “frequently said that because substantial similarity is a fact-intensive question, it is generally an issue reserved for a jury.” *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 102 n.12 (2d Cir. 2014). Other courts on the same side of the split agree. See *Positive Black Talk*, 394 F.3d at 374 (“[W]hether two works are substantially similar is a question for the jury itself to

determine by examining the actual works in question.”); *Tanksley*, 902 F.3d at 171 (substantial similarity “‘usually an extremely close question of fact’”); *Sturdza*, 281 F.3d at 1296 (same); 3 *Patry on Copyright* §9:86 (substantial similarity “a classic question of fact that is routinely submitted to a jury”).

By contrast, the Ninth Circuit does not even *consider* an ordinary observer’s perspective at summary judgment. At that stage, “*only* the extrinsic test is important.” *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994) (emphasis added). That approach produces a perverse result: a plaintiff must show that a reasonable *jury* could find substantial similarity without reference to how jurors would be instructed to decide that issue—*i.e.*, by considering the work from the perspective of an ordinary observer.

The Ninth Circuit’s disregard for the jury’s role persists even where a plaintiff survives summary judgment and *wins* at trial. Although the Ninth Circuit has acknowledged that courts “‘must be reluctant to reverse’ a jury’s finding that two works are *intrinsically* similar,” it has held that “the extrinsic test requires us *as a court* to ensure that whatever objective similarities the evidence establishes between two works are legally sufficient to serve as the basis of a copyright infringement claim *regardless of the jury’s views*.” *Gray*, 28 F.4th at 97 (emphasis added). The court has accordingly *rejected* the argument that it must “defer to [a] jury’s determination” of substantial similarity, reversing verdicts based on a *de novo* application of that court’s threshold “extrinsic” test. *Id.* at 96-97 (reversing verdict); see *Corbello*, 974 F.3d at 972 (reversing verdict in part). That arbitrarily burdens copyright holders’ Seventh Amendment rights in one of the Nation’s most important copyright forums.

C. The Ninth Circuit’s Test Unfairly Advantages Infringers

The Ninth Circuit’s approach also tips the scale against copyright holders, procedurally and substantively.

1. As Judges Johnstone and Wardlaw recently explained, the Ninth Circuit’s awkward two-part test “stack[s] the procedural deck against plaintiffs on questions of substantial similarity.” *Sedlik v. Von Drachenberg*, 163 F.4th 667, 682 (9th Cir. 2026) (Johnstone, J., joined by Wardlaw, J., concurring), reh’g en banc granted, 177 F.4th 964 (9th Cir. 2026). “Because courts may decide the extrinsic test as a matter of law, defendants often dispose of cases at summary judgment by showing a lack of extrinsic similarity.” *Id.* at 682-683. Plaintiffs, on the other hand, can *never* prevail at summary judgment because they must *also* satisfy the intrinsic test, which the Ninth Circuit commits exclusively to the finder of fact. See *ibid.*

Copyright holders are also disadvantaged when *they* seek relief on appeal. Because the intrinsic part of the two-part analysis is “‘uniquely suited for determination by the trier of fact,’” the Ninth Circuit has held it “will not second-guess” a jury’s verdict “based on an application of the intrinsic test.” *Sedlik*, 163 F.4th at 675-676; accord *Gray*, 28 F.4th at 97. The result is that, “while defendants may appeal infringement verdicts under the extrinsic test, plaintiffs have no meaningful way to seek review of unfavorable judgments.” *Sedlik*, 163 F.4th at 682 (Johnstone, J., joined by Wardlaw, J., concurring).

2. The Ninth Circuit’s extrinsic test substantively disfavors copyright holders, too. As one scholar has noted, “dissecting the copyrighted work and then only comparing the ‘golden nuggets’ to the allegedly infringing work may sometimes result in courts finding no infringement when defendants have, in fact, copied a substantial portion of pro-

tectable material resulting from how an author put together otherwise unprotectable elements.” Asay, *supra*, at 48.

This case illustrates the problem. A work that concededly contains “much original, protected expression,” App., *infra*, 8a-9a, received *no* protection—even for “those aspects” of the work that clearly “display[ed] the stamp of the author’s originality,” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985). Indeed, the decision below raises doubts about whether works of creative nonfiction can *ever* obtain meaningful protection. By contrast, “[c]ourts that apply an ordinary observer test are more likely to find infringement using a broad ‘look and feel’ test.” Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. Copyright Soc’y 719, 739 (2010).⁷

Congress enacted a uniform copyright law for the entire Nation. An author in Hollywood should not have a lesser right to have her case heard by a jury—and to have that jury’s decision respected—than authors in New York, Chicago, or Austin.

⁷ The Ninth Circuit’s grant of rehearing en banc in *Sedlik* does not undermine the issue’s importance. The petitioner there has urged a still-different approach that departs from all circuits, and that, as a result, would expand rather than reduce the conflict. *Sedlik v. Von Drachenberg*, No. 24-3367, Dkt. 100.1, at 10, 13, 18 (9th Cir.) (urging court to “discard” the intrinsic test’s inquiry into “‘total concept and feel,’” in favor of “an objective, one-step test that articulates the protectible elements to be compared”). And even if the Ninth Circuit were to bring itself into line with the Second Circuit, the Fourth and Eighth Circuits would continue to apply the same misguided rule. See p. 21, *supra*. At the very least, this Court should hold the petition pending any decision in *Sedlik*.

III. THIS CASE IS AN EXCELLENT VEHICLE

This case was resolved as a matter of law at summary judgment without reaching the “intrinsic” portion of the Ninth Circuit’s test. The propriety of the Ninth Circuit’s threshold “extrinsic” test, which was dispositive below, is thus squarely presented. The arguments were pressed and passed upon. App., *infra*, 8a-18a. And the circuit conflict was expressly raised in the Yonays’ petition for en banc rehearing. See Reh’g. Pet. 4, 6-10.

Indeed, as this case comes to the Court, the *only* issue is the Ninth Circuit’s substantial-similarity ruling. Paramount never challenged the copyrightability of “Top Guns.” Nor did it dispute factual copying. See App., *infra*, 6a. The substantial-similarity issue here, moreover, does not implicate the different tests applicable to specialized works, such as computer programs, 4 *Nimmer on Copyright* § 13D.37[B][2] (describing the commonly used abstraction/filtration/comparison test), or works with “thin” copyrights, see App., *infra*, 18a (noting the different standard “where ‘there’s only a narrow range of’ possible expression”). Instead, it involves a classic infringement scenario: an unauthorized cinematic adaptation of an admittedly creative literary work.

The issue is also outcome-determinative. The Ninth Circuit’s dissective approach led it to disregard the obvious and substantial similarities in the works’ overall look and feel—similarities so obvious that Paramount credited Yonay in the original *Top Gun* for inspiring the film’s story. App., *infra*, 3a. Had the court of appeals applied the ordinary-observer test used by the plurality of circuits, it would not have “los[t] sight of the forest for the trees,”

Atari, 672 F.2d at 618, and would have remanded this case for trial.⁸

IV. THE DECISION BELOW IS WRONG

The decision below does not merely exacerbate a longstanding circuit conflict. It is also wrong. By disposing of this case based on a piecemeal analysis of the works' component parts, the Ninth Circuit violated the text and spirit of the Copyright Act. "Copyright protection subsists," after all, "in original *works* of authorship." 17 U.S.C. § 102(a) (emphasis added). The Act forbids copying of "the copyrighted *work*." § 106(1) (emphasis added). The relevant frame of reference is thus *the work*, not frame-by-frame comparisons of chopped-up bits of the work.

To be sure, the Constitution limits the scope of protection accorded to facts, ideas, and items otherwise in the public domain. See *Feist*, 499 U.S. at 349-350. That limitation requires careful attention to ensure that the similarity between the asserted and accused works does not rest solely on uncopyrightable material. But copyright "subsists in *complete* works, and this holistic focus on the 'work' extends to infringement analysis." Lim, *supra*, at 646 (emphasis added).

Rather than enforce the Yonays' rights in "Top Guns" as a *work*, the decision below broke the story down into disparate fragments that would be unrecognizable to ordinary readers or the moviegoing public. Having stripped those fragments of their expressive context, the Ninth Circuit easily dismissed each in isolation as unprotectable

⁸ The exclusion of petitioners' expert and the court of appeals' ruling on petitioner's breach-of-contract claim likewise rested on the Ninth Circuit's extrinsic test. App., *infra*, 19a-20a, 22a-24a; n.3, *supra*. If this Court rejects that test, the courts below will need to address those issues anew on remand.

ideas or facts. But that is not how anyone would understand the *Top Gun* story or films. The vivid narrative that drove Paramount to purchase exclusive film rights to “Top Guns” was more than a grab-bag of facts and ideas. It was an original, expressive work. And, as any ordinary observer can see, it was as much the basis of *Maverick* as it was of the original *Top Gun*.

The Ninth Circuit exacerbated its error by focusing on *differences* between the various components it examined, rather than looking for *similarities*. As Learned Hand observed some sixty years ago, an “ordinary observer, unless he set out to detect the disparities” between two works, may “be disposed to overlook them, and regard their aesthetic appeal as the same.” *Peter Pan Fabrics*, 274 F.2d at 489. The Ninth Circuit’s “overemphasis on different features that are uncopyrightable departs from how real-world consumers perceive the work” and “results in works being found non-infringing due to differences that would have been irrelevant to a real-world observer.” Lim, *supra*, at 646.

Other circuits recognize that copyrighted works are more than a series of isolated bits and pieces—they include the relationships among the work’s components taken together as a whole. See, e.g., *Tufenkian*, 338 F.3d at 134. But the Ninth Circuit is about each component standing alone. See App., *infra*, 8a-18a. That cannot be right. Appropriating an author’s original and expressive combination of literary elements is the very essence of infringement.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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