

No. 21-869

IN THE
Supreme Court of the United States

THE ANDY WARHOL FOUNDATION FOR
THE VISUAL ARTS, INC.,

Petitioner,

v.

LYNN GOLDSMITH, ET AL.

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

**BRIEF FOR THE ROBERT RAUSCHENBERG
FOUNDATION, ROY LICHTENSTEIN
FOUNDATION, JOAN MITCHELL FOUNDATION,
BROOKLYN MUSEUM, AND COLLEGE ART
ASSOCIATION AS *AMICI CURIAE* SUPPORTING
PETITIONER**

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INTEREST OF THE AMICI CURIAE¹

The Robert Rauschenberg Foundation, Roy Lichtenstein Foundation, and Joan Mitchell Foundation are artist foundations that advance the visual arts in a broad range of media, subjects, styles, materials, and techniques.

The Brooklyn Museum not only owns but regularly presents to the public numerous works dependent on the reuse and transformation of existing imagery, as in its 2010 exhibition *Andy Warhol: The Last Decade*, and its 2021-2022 exhibition *Andy Warhol: Revelation*.

The College Art Association (CAA) is a broad-based visual arts membership organization, with over 6,500 individual artists, art historians, students, museum curators, and publishers, as well as university art and art history departments, museums, libraries, and professional and commercial organizations. It publishes two preeminent academic visual arts journals, *The Art Bulletin* and *Art Journal*. Given its long-standing interests in intellectual property and fair use, CAA developed and issued its *Code of Best Practices in Fair Use for the Visual Arts* (2015), which reflects a common understanding of visual arts professionals regarding fair use best practices.

Amici believe that a vibrant artistic culture is essential to the flourishing of a democratic society, and that significant new art emerges through dialogue with existing art. Accordingly, a number of *amici* submitted their views as *amici curiae* at prior stages of this case

¹ All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the brief's preparation or submission.

or in other important copyright and fair-use cases. *See, e.g., Google LLC v. Oracle Am. Inc.*, 141 S. Ct. 1183 (2021); *Cariou v. Prince*, No. 08-cv-11327, 2013 WL 8180422 (S.D.N.Y. filed Oct. 22, 2013).

Amici have a unique interest in the question presented. The heritage of artistic innovation they represent has flourished in part because of the careful balance copyright law has traditionally struck between “protect[ing] copyrighted material and ... allow[ing] others to build upon it.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994). As this Court has explained, the statutory fair-use defense maintains that balance by allowing a new work to draw from an older one when the result is transformative. *Id.* *Amici* write to explain the importance of reaffirming that traditional understanding of the fair-use defense here, and of elaborating on the contours of that defense in the visual-arts context.

SUMMARY OF THE ARGUMENT

“[N]o artist of any art[] has his complete meaning alone.” T.S. Eliot, *Tradition and the Individual Talent*, *The Egoist*, Dec. 1919, at 72. All creative work builds on the foundation of existing culture. The most significant art is often both profoundly original and obviously indebted to what came before it.

Amici’s works illustrate the principle. Take Robert Rauschenberg’s “Combines.” In those pieces, Rauschenberg integrated quotidian objects (newspaper clippings, taxidermied animals, *etc.*) into traditional painted canvases. The artist explained that his technique “transformed these images sympathetically ... as ingredients in the compositions which are dependent on reportage of current events and elements in our own en-

vironment, hopefully to give the work the possibility of being reconsidered and viewed in a totally new context.” Gay Morris, *When Artists Use Photographs: Is It Fair Use, Legitimate Transformation or Rip-Off?*, 80 ARTnews 102, 104 (1981).

So too with Andy Warhol’s Prince Series. Warhol took a preexisting image—a photograph of the musician Prince by plaintiff Lynn Goldsmith—and made something new and strange from it. Using his distinctive silkscreen technique, the artist transformed an essentially conventional portrait of a shy individual into a larger-than-life icon of consumer culture.

Traditionally, this kind of creative appropriation of existing work has been protected by the Copyright Act’s fair-use provision. See 17 U.S.C. § 107. This Court has read that provision to shield from infringement liability even the direct copying of preexisting work when the new work “transform[s]” the original by “add[ing] something new and important.” *Google*, 141 S. Ct. at 1203. The paradigmatic example of a fair use is a change that imbues the new work “with a further purpose or different character, altering the first with new expression, meaning, or message.” *Campbell*, 510 U.S. at 579. By permitting the reuse of existing work(s) when the result is transformative, the fair-use defense advances the “creative ‘progress’ that is the basic constitutional objective of copyright itself.” *Google*, 141 S. Ct. at 1203 (quoting U.S. Const. art. I, § 8, cl. 8). Warhol, like the artists whose legacies *amici* represent, relied on these fair-use principles to create works that changed the history of modern art, just as other artists have, in turn, relied on these fair-use principles to create new works that draw from (sometimes virtually replicating) Warhol’s creations.

The Second Circuit nevertheless cast this tradition and the principles underlying it aside. The court of appeals held that the Prince Series could not be transformative as a matter of law, because Goldsmith’s photograph was the “recognizable foundation” of Warhol’s images—even though the panel acknowledged that Warhol’s silkscreens “give a different impression” than Goldsmith’s photograph. Pet. App. 26a. The panel reached this conclusion by engaging in a side-by-side comparison of reproductions, reversing the trial court’s conclusion based on undisputed facts that Warhol had “transformed Goldsmith’s work ‘into something new and different.’” Pet. App. 79a (citation omitted). And it did so without even *considering* whether contextual evidence beyond the reproductions of the works included in the parties’ briefs might bear on the transformation inquiry. Instead, the panel simply substituted its own, uninformed artistic assessment. In doing so, the panel committed the very error it accused the district court of committing—it premised its decision on its own “subjective evaluation of the underlying artistic message of the works rather than an objective assessment of their purpose and character.” Pet. App. 2a.

History, this Court’s precedents, and the Copyright Act’s purpose all require a different approach. For centuries, artists have engaged in the kind of creative use and reuse of other artists’ works that Warhol practiced. Mindful of that tradition, copyright law has always afforded space for artists to borrow from an existing work and transform it. Accordingly, while resemblance is certainly part of the fair-use analysis—*i.e.*, factfinders must make a comparison for the sake of determining differences, and a fair-use defense is unnecessary where there is no substantial similarity to begin with—this Court has never suggested that the fair-use analysis

ends with the question of resemblance. Instead, it has always required a context-sensitive inquiry focused on whether the new work is transformative notwithstanding its similarities to another work. That inquiry should, when helpful, include consideration of contextual evidence such as opinion testimony from those in the intended audience for the work—this could include other artists, collectors, museum-goers, critics, and curators. By contrast, adopting the Second Circuit’s acontextual side-by-side approach would subvert the Copyright Act’s purpose and the First Amendment protections within the fair-use defense, and severely chill artistic practice and education—even if the side-by-side approach could, as the court of appeals erroneously suggested, logically be limited to commercial reproductions.

This Court should reverse and hold that the Prince Series is a fair use of Goldsmith’s photograph.

ARGUMENT

I. Throughout history, artists have used existing work to make original art.

“In truth, in literature, in science and in art, there are, and can be, few, if any, things” that “are strictly new and original throughout.” *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (Story, J.). For that reason, “[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, [t]o promote the Progress of Science and useful Arts.” *Campbell*, 510 U.S. at 575 (quoting U. S. Const., art. I, § 8, cl. 8). This case illustrates the fundamental principle that creative progress—the value copyright is

ultimately meant to advance—depends on transformative use of existing work.

The principle has an ancient pedigree. Roman sculptors imitated their Greek precursors, sometimes to create sculptures “purely Roman in their conception,” sometimes to form “pastiche[s] of more than one Greek original,” sometimes to make “exact copies.” Dept. of Greek and Roman Art, Metropolitan Museum of Art, *Roman Copies of Greek Statues* (Oct. 2002), https://www.metmuseum.org/toah/hd/rogr/hd_rogr.htm. In East Asia, “[t]ransmitting and reproducing [or] copying from a model” has been a principle of Chinese painting for at least 1,700 years. Paul R. Goldin, *Two Notes on Xie He’s [] “Six Criteria” [], Aided by Digital Database*, 104 *T’oung Pao* 496, 497 (2018) (Chinese characters omitted). And during the Italian Renaissance, painters and commentators recognized that the making of new art depended on “the imitation of the most accomplished artists.” Giorgio Vasari, 1 *Lives of the Artists* 31 (George Bull trans., reprt. 1987).

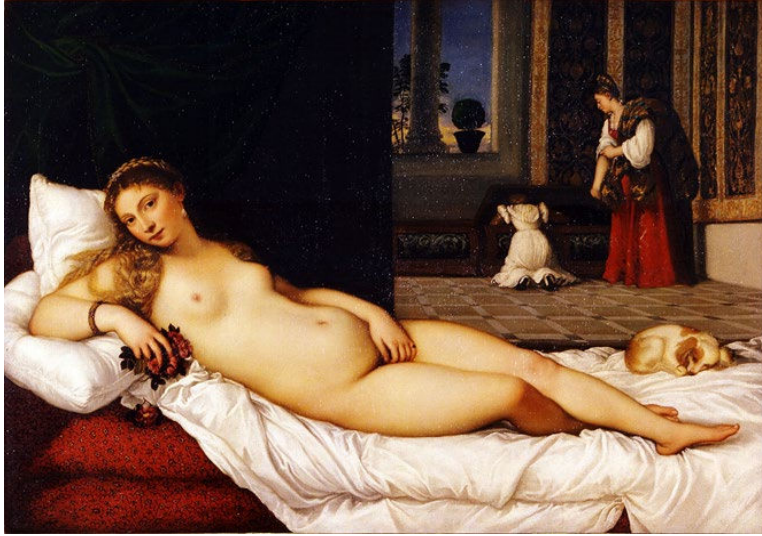
Accordingly, an unbroken tradition of artistic practice teaches that the use and reuse of existing imagery—the very technique condemned by the court of appeals as virtually a *per se* copyright violation—are part of art’s lifeblood. And not just in workaday practice or fledgling student efforts, but also in the revolutionary moments of art history.

1. Édouard Manet's *Olympia* is one example:



Édouard Manet, *Olympia* (1863)

The painting is now considered a foundational work of artistic modernism, but it created a furor at the Paris Salon of 1865. See *Édouard Manet (1832–1883)*, Metropolitan Museum of Art, https://www.metmuseum.org/toah/hd/mane/hd_mane.htm. The scandal was due not just to the painting's radically original sexual frankness, but also to its treatment of tradition. Manet's picture is at once part of a long tradition of imitation and an audacious burlesque of that tradition. *Olympia* references another famous nude of art history, the Renaissance master Titian's *Venus of Urbino*:



Titian, *Venus of Urbino* (ca. 1534)

The *Venus of Urbino* was in turn an outstanding example of Renaissance *imitatio*, or the creation of an original work from an existing model. See *supra*, p. 6. For Titian, the model was the *Sleeping Venus* of Giorgione, a master with whom Titian trained:



Giorgione, *Sleeping Venus* (ca. 1510)

Even that breakthrough painting, perhaps the first reclining nude in Renaissance art, had its own model—scholars have connected it to a fifteenth-century wood-cut illustration by Francesco Colonna:



Francesco Colonna, *Nymph Discovered by a Satyr*
(1433-1527)²

Anyone familiar with these Renaissance masterpieces would recognize Manet's references to them in structure and detail. That resemblance makes *Olympia*'s departure from its sources all the more powerful. In place of the coy classical nudes of his Renaissance precursors, Manet confronts viewers with the worldly, hardened gaze of a confident, contemporary Parisian prostitute, and depicts her Black servant offering a tribute of flowers. The revolutionary shock of the painting depends on how traditional imagery remains the painting's recognizable foundation, even as that imagery is transformed and wrenched into the present.

² See *Attributed to Francesco Colonna*, Morgan Library & Museum, <https://www.themorgan.org/exhibitions/online/Renaissance-Venice/Attributed-Francesco-Colonna>.

2. Manet's unsentimental rejoinder to the Renaissance nude has itself inspired transformative responses. These began in Manet's lifetime, and included homages by Paul Cézanne, Manet's nineteenth-century contemporary. In his *Une Moderne Olympia* (*A Modern Olympia*), for example, Cézanne borrows the basic tableau of *Olympia*. Cézanne transforms the scene by rendering it in the frenzied brushwork characteristic of his early style, and by driving home the subject of prostitution (and the viewer's complicity in it) by inserting a lounging, admiring male patron in a frock coat, looking as if he had just stepped off the street and into the boudoir (or the artist's studio):



Paul Cézanne, *Une Moderne Olympia* (1873-1874)

Manet's painting continues to generate transformative artworks today. For example, in 2017, Mickalene Thomas took *Olympia's* format and worked another

change on it, “oust[ing] the white European woman from the bed where she often lounges, attended by a black maidservant,” and installing the Black servant as the powerful object of desire at the center of the picture:



Mickalene Thomas, *A Little Taste Outside of Love* (2007), <https://www.brooklynmuseum.org/open-collection/objects/5044>.

Another contemporary artist, Yasumasa Morimura, has also made art out of imitating *Olympia*. In his 2018 work *Une Moderne Olympia* (which references Cézanne’s response to Manet, *see supra*, pp. 9-10), Morimura himself poses for the two roles in Manet’s composition. The way he does so transforms both figures: Manet’s prostitute becomes a kind of male geisha, and the original Black maid in *Olympia* morphs into a gender-bending figure—a mash-up of Cézanne’s male client and the Black maid, clad in top-hat, evening gloves, and the Black maid’s pink smock:



Yasumasa Morimura, *Une Moderne Olympia* (2018)

And by explicitly placing himself into a rendition of Manet's famous painting, Morimura—who knew that Manet was influenced by Japanese art³—was inserting himself into the history of Western art, and critiquing the way Japanese culture went largely unacknowledged in that history.

The artistic tradition traced above—from Titian to Manet to Morimura and beyond—involves the creation of original new work through borrowing from older work. The tradition shows that *visual resemblance is not in itself a sign of artistic unoriginality*; to the contrary, imitation and appropriation characterize some of the most innovative works in the history of art. Judges have always interpreted copyright law in light of this kind of historical tradition. *See supra*, p. 5; *Emerson*, 8

³ Molly Tresadern, *When East Inspired West: the Extraordinary Influence of Japanese Art*, ArtUK (June 14, 2017), <https://artuk.org/discover/stories/when-east-inspired-west-the-extraordinary-influence-of-japanese-art>.

F. Cas. at 619; *Campbell*, 510 U.S. at 575.

3. The Prince Series is part of this tradition of transformative use.

The Prince Series had its genesis in Goldsmith’s black-and-white photograph of Prince, which was then provided to Warhol as an “artist reference” by Vanity Fair in commissioning him to create something of his own from it. Pet. App. 2a. Warhol meaningfully altered that reference work in a manner fully consistent with his characteristic “repetitions, distortions, camouflages, incongruous colors, and endless recyclings” of imagery—techniques Warhol used not to replicate but to “destabliz[e] the image.”⁴

As even the Second Circuit recognized (*e.g.*, Pet. App. 24a), the resulting series has obvious and meaningful aesthetic differences from the original photograph. Goldsmith’s photograph had captured Prince as shy and unconfident—“not a comfortable person” and a “vulnerable human being,” Pet. App. 10a—portraying him in stark black-and-white, in his everyday clothes, his face finely etched in the light, warily regarding the viewer. Warhol approaches the material entirely differently. He removed Prince’s upper body (thereby also removing his off-stage clothing), blew up and flattened the musician’s facial details, and transferred the image to a silkscreen drenched in billboard-bright color. The resulting silkscreens transfigure the original photograph, turning an essentially private, psychologizing individual portrait into an ironic emblem of celebrity culture, a postmodern answer to religious iconography.

⁴ See Donna De Salvo, *Andy Warhol: From A to B and Back Again* 32 (2018).

See Pet. Br. at 18-20.

Like Manet's reformulation of existing Renaissance nude imagery or Cézanne's of Manet, Warhol's use of Goldsmith's photograph *depends on* visual resemblance to its original to produce new meaning. Indeed, that a traditional photographic portrait of Prince was the "recognizable foundation," Pet. App. 26a, of Warhol's portrait is essential to understanding the transformative nature of his work, taking it out of the realm of portraiture and forging an icon—someone who was magnetic and desirable to all.

4. Warhol's own transformations of existing imagery have in turn been transformed by others, which itself demonstrates how art progresses.

For example, contemporary artist Deborah Kass, "one of the most consistently innovative and productive artists of the post-Pop era,"⁵ interpolated her own face into Warhol's silkscreen of Elizabeth Taylor:



Left: Andy Warhol,
Liz

Right: Deborah Kass,
Red Deb

⁵ *Red Deb*, Smithsonian, Nat'l Portrait Gallery, https://www.si.edu/object/red-deb%3Anpg_C_NPG.2013.75.1 (*Red Deb*).

The resemblance to the original Warhol is both striking and purposeful. Kass's "subtle shifts change the meaning" of Warhol's original work to reflect themes that Kass intended to focus on—"her gender, Jewishness, and sexuality." *Red Deb, supra*. By "repurposing Warhol's style," Kass was able to "challenge[] the male-dominated artworld." *Id.* By selecting Elizabeth Taylor as the personality to inhibit, she was able to "play[] on the actress's WASP background and conversion to Judaism." *Id.* And by retaining the "heavy makeup" used in Warhol's original, she was able to "impl[y] an ironic, hypergirlish reference to her lesbianism." *Id.*

Other transformative responses to Warhol are even more difficult to distinguish from their original. Indeed, some are superficially indistinguishable from the original Warhol—but again, deliberately and meaningfully so. One artist, Elaine Sturtevant, created *Warhol's Flowers*—"an exact replication" of Warhol's *Flowers* series—which "allowed [Sturtevant's] audiences to experience the disorienting feeling of viewing an 'authentic' Warhol, but one created under the aegis of another," and allowed Sturtevant to "make a feminist statement while also ruminating upon the concepts of originality, copyright, and artistic ownership." Tori Campbell, *Appropriation! When Art (very closely) Inspires Other Art*, Artland, <https://magazine.artland.com/appropriation-when-art-very-closely-inspires-other-art/>.



Elaine Sturtevant, *Warhol's Flowers* (1965)

* * *

To be sure, the mere fact that one is an artist does not give her carte blanche to copy the creative works of others or immunize her from infringement liability in all instances. The fair-use defense requires a careful consideration of whether one artist's use of another work is indeed transformative. *See infra*, Part III. But part of that analysis must include careful consideration of the nature of creative use and reuse at work—a historical practice critical to creative progress that spans many centuries, media, and genres. Copyright law has always been read in harmony with the history of creative progress. This Court should follow that path here and construe the fair-use defense so that it gives breathing room for creative appropriation in the arts. Failing to do so would lead to perverse results and undermine this Court's own precedents.

II. Under this Court’s precedents, Warhol’s creative use of Goldsmith is a fair use.

Rather than attempt to examine whether the Prince Series and Goldsmith’s photograph embodied different meanings and messages—the core question underlying the transformation inquiry—the Second Circuit effectively *foreclosed* that examination, holding that it would be unsuitable for resolution by a lay judicial eye. Pet. App. 23a. Of course, judges should not attempt to impose their own *subjective view* of the meaning and message of pieces of art in a fair-use cases. Nor do they need to—in fair-use cases, as in all cases, the adversarial process provides factfinders with *evidence* from which they can make an *objective determination* about transformation. See *infra*, Part III. But rather than examine—or instruct the district court on remand to examine—such evidence, the Second Circuit replaced a context-sensitive inquiry with a side-by-side visual comparison of the Prince Series and Goldsmith’s photograph. That mode of analysis—which would end the inquiry where the analysis typically begins, at the question of resemblance—cannot be reconciled with this established law.

1. Consider first the copyright principles animating the Court’s precedents. As this Court has explained, “[t]he limited scope of the copyright holder’s statutory monopoly ... reflects a balance of competing claims upon the public interest.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). The “immediate effect” of the balance “is to secure a fair return for an ‘author’s’ creative labor,” but the “ultimate aim is, by this incentive, to stimulate artistic creativity for the general public.” *Id.* Thus, “[t]he primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote

the Progress of Science and useful Arts.” *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) (quoting U.S. Const., art. I § 8, cl. 8).

In some circumstances, the copyright holder may try to use its monopoly to block the creation of original new work, risking a direct conflict with copyright’s ultimate goal of spurring creativity. The fair-use defense helps resolve the conflict in favor of copyright’s fundamental aim, by permitting appropriation of copyrighted expression when it is “transformative,” meaning when it “adds something new, with a further purpose or different character, altering the first with a new expression, meaning, or message.” *Campbell*, 510 U.S. at 579. In doing so, fair use also acts as a “built-in First Amendment accommodation[],” ensuring that copyright protection does not unduly restrain new expression. *Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003). The upshot is that the fair-use defense honors an overriding statutory and constitutional commitment: advancing creative expression for the public good.

This Court’s fair-use precedents have enforced that commitment, and have consistently held that appropriation of existing work is a fair use when the result is transformative.

In *Campbell*, for example, the Court held that 2 Live Crew’s rap “Pretty Woman,” which parodies Roy Orbison’s rock ballad “O, Pretty Woman,” was transformative, even though 2 Live Crew’s rap took from “the heart of the [Orbison] original.” 510 U.S. at 587 (internal quotation marks omitted). The superficial resemblance to Orbison’s ballad did not undermine the rap’s transformative character. Indeed, as with the artistic examples discussed in Part I, *supra*, the resemblance was essential to the transformation—after all, 2 Live

Crew “need[ed] to mimic [Orbison’s] original to make its point.” *Id.* at 580-81. In that respect, the rap was “like other comment or criticism” protected by the fair-use doctrine. *Id.* at 579. The court of appeals, in holding otherwise, had erred “by confining” its analysis “to one relevant fact, the commercial nature of the use,” and “giving” that one fact “virtually dispositive weight.” *Id.* at 583-84.

Campbell teaches that fair use turns on much more than how much a new work takes from the old, and how much the former resembles the latter. A court must ask whether the resemblance has a novel expressive function. Where a reasonable observer can discern a new meaning—as when a reviewing essay quotes from the work under review, or when a parody skewers its target’s style—the work is transformative, not merely derivative.

Google reinforces these principles. There, this Court held that the fair-use doctrine applied, because, although Google “copied portions of [Oracle’s application programming interface (“API”) packages] precisely,” it used that exactly copied material “to create [a] new product[]”: “a highly creative and innovative tool for a smartphone environment.” 141 S. Ct. at 1203. The Court reasoned that, “[t]o the extent that Google used parts of the [Oracle API] to create a new platform that could be readily used by programmers, its use was consistent with that creative ‘progress’ that is the basic constitutional objective of copyright itself.” *Id.*

2. A straightforward application of the Court’s precedents compels the conclusion that Warhol’s use of Goldsmith’s photograph was a fair use.

Warhol used Goldsmith’s photograph and “add[ed] something new, ... altering” the photograph “with a new expression, meaning, or message.” *Campbell*, 510 U.S. at 579. As already described, *see supra*, p. 13, Warhol started from Goldsmith’s photograph, but changed his source by every conceivable aesthetic measure—medium (from photograph to silkscreen), scale (blowing up part of the photograph’s image), line (altering the angle of the face and adding additional outlines and shading), and color (from black-and-white to billboard-bright). The result is a fundamentally different work: a larger-than-life, confident pop-culture icon in place of a portrait of an apprehensive and reserved young man.

That kind of creative reuse is just as transformative as 2 Live Crew’s rap parody of Orbison’s ballad in *Campbell* or Google’s use of Oracle’s code as a building block for its own product. As in those cases, while Warhol used Goldsmith’s photograph, he did so to “to create [a] new” work. *Google*, 141 S. Ct. at 1203. Warhol’s transformative use is also “consistent with that creative ‘progress’ that is the basic constitutional objective of copyright itself,” because it enriches the public with new expression. *Id.*

In fact, the fit with precedent is so close that this Court has already expressly anticipated the answer to the question presented here. In *Google*, the Court analogized from copying code to copying images, and observed that “[a]n artistic painting might, for example, fall within the scope of fair use even though it precisely replicates a copyrighted advertising logo to make a comment about consumerism.” *Id.* (citations and quotation marks omitted). That is a barely disguised reference to Warhol, the artist famous for his silkscreens of

Campbell's Soup cans and life-sized replicas of Brillo boxes:



Andy Warhol, *Campbell's Soup Cans* (1962)



Andy Warhol, *Brillo Boxes* (1964)

This Court has therefore recognized that artistic use and reuse of a copyrighted work can plainly be transformative where the new artistic work changes the message and meaning of the original—from the mundane and commercial into an artistic commentary on consumer culture. That is precisely what Warhol did with the Prince Series—transforming realistic portrai-

ture into a commentary on pop culture and the role of celebrity iconography in that culture. The Second Circuit all but ignored that analysis in *Google*—reasoning only that it was irrelevant because Warhol’s and Goldsmith’s works both had a general “artistic purpose[.]” Pet. App. 24a n.5. The Court cited nothing for the absurd proposition that the fair-use defense applies only to works that exist in completely different genres—advertising and art, for example. And such a proposition is contrary to *Google* itself, as both Google’s and Oracle’s works fell within the same species of works: computer programming.

4. The Second Circuit’s decision more broadly misunderstands, if not distorts, the fair-use inquiry.

Focusing myopically on “one relevant fact,” the court of appeals short-circuited the fair-use analysis. *Campbell*, 510 U.S. at 583. The panel acknowledged that the Prince silkscreens “give a different impression” than Goldsmith’s photograph, but then held that that it could not be a fair use as a matter of law, solely because a judicial side-by-side comparison of images in the briefs revealed the obvious fact that Goldsmith’s photograph “remain[ed] the recognizable foundation” of Warhol’s silkscreens. Pet. App. 26a.

But as already explained, *see supra*, pp. 4-5, 18-19, resemblance is where the fair-use inquiry is supposed to *begin*—comparison for the purpose of determining whether a fair-use defense may even be necessary, and for evaluating differences—not where it finishes. *E.g.*, 4 Nimmer on Copyright § 13.03. A rule providing that substantial similarity categorically bars fair use would nullify the statutory defense. The focus of the analysis should be on what the court of appeals wrongly brushed aside at the outset—the meaning and message of the

works. Pet. App. 22a-23a. A change in meaning would be virtually conclusive evidence of a transformative fair use under this Court’s precedents, but under the Second Circuit’s analysis, meaning is irrelevant.

The panel was also wrong to suggest a line separating presumptively non-transformative “works of art that draw from numerous sources,” on the one hand, from presumptively non-transformative “works that simply alter or recast a single work with a new aesthetic,” on the other. Pet. App. 22a. The distinction does not bear scrutiny. It is easy to imagine a derivative work with multiple sources: a novel that tells together the story of several different *Star Wars* films, say. There is, of course, no need to hypothesize about transformative works that appropriate from a single source. This Court has already examined examples in *Campbell* and *Google*. See *supra*, pp. 18-19. And as already explained, there is a continuous history of the practice by artists. See Part I, *supra*. Simply put, there is no correlation between the number of sources used by a new work and the work’s transformativeness.

In short, the fundamental interests of copyright law and the logic of this Court’s cases require holding the Prince Series is a fair use of Goldsmith’s photograph. The Second Circuit’s conclusion to the contrary cannot be reconciled with established law, history, or tradition and should be rejected.

III. Reaffirming the centrality of context to the fair-use analysis will provide needed guidance to lower courts.

As this case illustrates, a court’s failure to consider appropriate contextual evidence of message and meaning can lead to the erroneous rejection of advances in

creative activity. And yet this Court has already recognized that, with questions of fair use, “context is everything.” *Campbell*, 510 U.S. at 589. Reaffirmation of that principle will be of great benefit not only to courts engaged in a fair-use analysis, but also to the myriad participants in our cultural landscape who must predict what kinds of use and reuse are lawful so as not to risk wasting personal and judicial resources. Those persons include practicing artists and students aspiring to the same career; curators and collectors who foster new works; and members of the general public who rely on creators, galleries, and museums to enhance our lives by providing access to the new and untested.

There are of course a number of possible procedural settings in which disputes over fair use might arise and be addressed fairly and efficiently, *so long as* factfinders are allowed the full range of their ordinary evidentiary tools. To be sure, sometimes the works at issue carry enough context with them that a side-by-side comparison alone reveals transformation. In *Campbell*, for example, this Court was readily able to discern the parodic function of 2 Live Crew’s song by measuring its lyrics and composition against Orbison’s original. *Id.* at 583. But sometimes the task is more difficult. The works under review may have a highly specialized character, as with the software code in *Google*. In that case, the Court emphasized evidence presented to the jury that “reuse” of certain types of code “is common in the industry” and that copying of code to create new technology furthers the innovation interests at the heart of copyright. 141 S. Ct. at 1204. This contextual evidence “convince[d]” the Court “that the ‘purpose and character’ of Google’s copying was transformative.” *Id.*

The same flexible, context-sensitive approach should apply to cases involving the visual arts, like this one. Again, in some cases transformation will be obvious on the face of the works. But not always. With modern and contemporary art, new works may well closely resemble a prior work, as here, or they may even be nearly identical, as in Sturtevant's work, *Warhol's Flowers*, see *supra*, pp. 15-16. The inquiry in those types of cases cannot end with a mere side-by-side comparison of reproductions, the method the Second Circuit employed. Instead, the court will need both to examine and weigh contextual evidence—*e.g.*, artists' own statements and opinion testimony from members of the relevant audience.

1. The first step should always be to compare the works to discern their differences. Ideally, this should happen with the works in their original format rather than through reproduction (as the latter often obscures details of scale and material significant to a work's expression).

Sometimes, as in *Campbell*, transformation can “reasonably be perceived” through the comparison alone. 510 U.S. at 582-83. This can also be the case with the artistic reuse of prior imagery, something clear in well-known examples of modern and contemporary art. One does not need a degree in art history to perceive the sharp change in expression between Francis Bacon's *Study After Velázquez's Portrait of Pope Innocent X* and its source:



Left: Diego Velázquez,
Portrait of Pope Innocent X (c. 1650)

Right: Francis Bacon,
*Study After Velázquez's
Portrait of Pope
Innocent X* (1953)

A lay viewer could immediately perceive at least one form of “new expression, meaning, or message” in Bacon’s transformation of Velázquez’s study of power into a study of dread.

Even where a new work exactly copies an older one, direct comparison may still reveal transformation. Another Second Circuit case, *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015), provides an apt illustration. There, Google scanned, indexed, and made searchable more than 20 million books to create the Google Books database. *Id.* at 208-09. A user can perform a text search in the Google Books database, and Google Books responds by providing a list of books that hit on the search terms and relevant excerpts from those books. *Id.* at 209-10. A group of authors claimed that Google Books infringed copyrights on their works,

but the Second Circuit held Google Books was a fair use of its sources. The court of appeals reasoned that although Google Books copied books wholesale, an ordinary observer comparing the database to its sources would conclude the database's search results had a new purpose and character from the sources. *Id.* at 217.

2. Sometimes, though, the first step will not be enough—transformation will be less readily discernible on a side-by-side comparison. This will often be the case when modern and contemporary art are at issue. Many artists from the past century often have abandoned traditional visual and aesthetic qualities and focused instead on concepts and commentary through artistic creation, including commentary about art itself and the nature of the artistic community. *E.g.*, Arthur C. Danto, *After the End of Art* 16 (1997). With these types of works in particular, what lies on the surface is quite often not the full picture. Error lies in stopping at a side-by-side comparison, as the Second Circuit did here. Instead, a court should undertake a second step and consider evidence of context.

a. The notion that factfinders may need to learn something about the context of new art to decide questions of expressive meaning is not new. Consider a case from nearly a century ago involving the modernist sculptor Constantin Brancusi's *Bird in Space*:



Constantin Brancusi, *Bird in Space* (1926)

When Brancusi shipped the sculpture from Paris to New York for an exhibit, the U.S. Customs Service treated it as a piece of metals ware subject to a tariff, rather than a tariff-free artwork. *Brancusi v. United States*, No. T.D. 64063, 1928 Cust. Ct. LEXIS 3 (Cust. Ct. Nov. 26, 1928); MaryKate Cleary, “*But Is It Art?*” *Constantin Brancusi vs. the United States* (July 24, 2014), https://www.moma.org/explore/inside_out/2014/07/24/but-is-it-art-constantin-brancusi-vs-the-united-states/. Brancusi proved to the Customs Court this was wrong by introducing testimony from several experts about the sculpture’s expressive qualities. *Brancusi*, 1928 Cust. Ct. LEXIS, at *7-*8. While the court was not “in sympathy with these newer ideas,” it held that the work was “recognized” as influential in the art world. *Id.*

The same context-specific approach should be taken, when necessary, at the second step of the transformation analysis, and may include consideration of testimony from the relevant audience or receptive community. Indeed, this Court has already employed this approach in *Google*, where the Court relied on industry testimony to understand the transformative potential of the code copying at issue. 141 S. Ct. at 1204; *see supra*, p. 24.

This approach follows from settled principles of copyright law. They instruct, for example, that when a work is ‘directed to a particular audience,’ the substantial similarity analysis for infringement focuses on the reaction of a reasonable person from that audience, not from just anywhere. 4 Nimmer on Copyright § 13.03; *Dawson v. Hinshaw Music Inc.*, 905 F.2d 731, 736 (4th Cir. 1990). The principle logically applies to the question of transformation as well.

Perhaps most critically, an audience-specific approach also honors the First Amendment values protected by fair use, *Eldred*, 537 U.S. at 219. As this Court has emphasized, the First Amendment’s protection of speech requires no more than some sort of reasonably discernible message. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (“[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ ... would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.”); *accord Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1240 (11th Cir. 2018) (“[I]n determining whether conduct is expressive, we ask

whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message.” (citation and quotation marks omitted)). So, too, does fair use—fair use turns on whether transformation “may reasonably be perceived,” and is not limited to circumstances where all understand the secondary work to mean a certain thing or convey a certain message different from the expression or message of the reference work. *Campbell*, 510 U.S. at 583. Much like the First Amendment’s protections for speech, fair use is given a wide berth, and is not limited “only to those who speak clearly.” *Id.* (quoting *Yankee Pub’lg Inc. v. News Am. Pub’lg, Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992)). It follows that the fair-use defense should apply whenever “new expression, meaning, or message” can “reasonably be perceived.” *Id.* at 579, 582. An audience-specific approach thereby ensures that a wide range of reasonable views are considered, and that fair use does not turn on mainstream discernment of transformation.

This approach will pay dividends with conceptual works like Elaine Sturtevant’s *Warhol’s Flowers*. See *supra*, pp. 15-16. That work appears visually identical to its Warhol model, and an ordinary observer may wonder how it could possibly be anything but derivative and not transformative. But testimony from members of the art world—critics, curators, and artists—would quickly show the strong case for considering Sturtevant’s appropriation transformative. That expert testimony would establish that Sturtevant’s practice extended to its logical limits traditional forms of artistic imitation (e.g., Manet’s response to Titian, see *supra*, pp. 6-9), and in doing so “explor[ed] ideas of authenticity, iconicity and the making of artistic celebrity; the waxing and waning of the public appetite for styles like

Pop and Minimalism; and, ultimately, the nature of the creative process itself.” Margalit Fox, *Elaine Sturtevant, Who Borrowed Others’ Works Artfully, Is Dead at 89*, N.Y. Times, May 16, 2014, <https://www.nytimes.com/2014/05/17/arts/design/elaine-sturtevant-appropriation-artist-is-dead-at-89.html>.

3. Consideration of context will neither overburden courts nor unfairly advantage established artists like Warhol—a common refrain advanced by respondents in this case.

a. A rule that encourages factfinders to examine context when necessary is not the same thing as requiring every case involving a fair-use defense to go to trial. Far from it. The case law suggests that most fair-use issues are already being resolved at the pleadings stage. *E.g.*, *Lombardo v. Dr. Seuss Enters.*, L.P., 279 F. Supp. 3d 497, 504 (S.D.N.Y. 2017). Cases involving sophisticated artistic transformation of the sort here or highly technical procedures of the kind at issue in *Google* will be the exception, not the rule. Acknowledging that factfinders *may* need to look beyond the pleadings to understand the fair-use issue is not the same as saying they *must* do so in the mine run of cases.

And even where *some* context may be required to decide fair use, the necessary evidence may not be extensive. Return for a moment to the example of *Red Deb*, Deborah Kass’s variation on Warhol’s *Liz*. *See supra*, pp. 14-15. Given the close similarity between the works, a side-by-side comparison alone is unlikely to reveal transformation. But only a small measure of contextual evidence *would*: enough to know that Kass is a female artist, Jewish, and a lesbian, and that the subject of Warhol’s picture, Elizabeth Taylor, was one of the most glamorous stars of Hollywood’s Golden Age,

who converted to Judaism in her twenties. That modest degree of context shines a transformative light on Kass’s decision to retain much of her famous male colleague’s composition while putting her face in place of Taylor’s. Discovery regarding facts like these would not necessarily be voluminous.

b. The Second Circuit suggested that opening the door to context would force federal judges to “assume the role of art critic,” and for that reason rejected any method of analysis that would examine the “meaning” or message “behind” the works at issue in a fair-use case. Pet. App. 22a-23a. As explained above, that conclusion is simply incompatible with this Court’s precedents. But the premise is faulty as well—if anything, the opposite is true. As in any case that implicates specialized knowledge or particular communities—*e.g.*, expert testimony about the meaning of patent terms as understood by a person of ordinary skill in the art—permitting consideration of context and expert testimony ensures that judges do not have to play the role of expert.

Considering evidence of artistic meaning or message is well within the ordinary competence of trial courts. Artists’ statements may be considered without being treated as conclusive. Likewise, a court might consider the views of an art critic, but remain free to conclude the critic’s testimony requires further scholarly corroboration. Those judgments involve tasks of weighing evidence and determining credibility entirely familiar to trial courts. None of this calls on a judge to apply her own art-critical assessments of the work in issue.

Nor was the court of appeals right that a context-based approach would “create a celebrity-plagiarist privilege” under which a work is rubber-stamped as

transformative just because a blue-chip artist made it. Pet. App. 26a-27a. To be clear, *amici agree* that successful artists should not be able to rest on their laurels in a copyright action. A work is not transformative merely because it is made by a famous artist. Instead, consideration of contextual evidence will help a court go beyond superficial factors like notoriety and focus the inquiry on the actual meaning of the works. Indeed, there is every reason to believe that contextual evidence would most benefit art students now first exploring their creative direction, artists whose work is just emerging, and many others who are not well known or highly visible. For example, context is more likely to help a judge understand why a niche figure like Sturtevant may have achieved something transformational by appropriating the work of a household name like Warhol.

IV. Endorsing the Second Circuit’s approach would chill artistic practice across the country and frustrate the purposes of copyright.

For the reasons given, this Court’s precedents and the history that informs them strongly compel reversal and rejection of the Second Circuit’s superficial approach to examining fair use. But there are further reasons to stay the course and reject the Second Circuit’s novel side-by-side test. The court of appeals’s standard would have significant negative consequences for artistic practice, forestalling the creative innovation copyright is meant to advance.

As already explained, much art being made today depends on the kind of artistic use and reuse exemplified by the Prince Series. Indeed, while creative appropriation is “[a] strategy that has been used by artists for millennia,” it “took on new significance” in the past

century thanks to a number of artistic and cultural trends. *Appropriation*, MoMA Learning, https://www.moma.org/learn/moma_learning/themes/pop-art/appropriation/. That includes cubist collage and Marcel Duchamp's "Readymades" (everyday objects Duchamp signed and installed in galleries with only minor alterations) in Europe in the early twentieth century, and responses by Pop artists like Warhol and others to mass consumerism and celebrity culture in the United States in the mid-twentieth century. *See id.*; *Appropriation*, Tate Modern, <https://www.tate.org.uk/art/art-terms/a/appropriation>.

The Second Circuit's approach does not just threaten one famous artist's output with infringement liability or simply stand in tension with the history of artistic tradition. It strikes at the way artists today have been trained to understand and to make art. Significant forms of current and future artistic practice by emerging artists would be threatened with infringement liability.

The threat is not just to practicing artists. Given the facts of this case, artist foundations and other arts organizations are at risk as well. The liability they now face jeopardizes their charitable missions—which go far beyond preserving the works of past artists, and instead extend to projects aimed at educating the general public and supporting the arts community generally.⁶ For example, the Rauschenberg Foundation's "philanthropic activities, driven in part by a recently constituted Artists Council, primarily support small to midsize arts

⁶ Even if a secondary work created by an artist may not be entitled to a fair-use defense, an institution that reproduces or displays artwork may have a separate fair-use defense for the reproduction or display, *e.g.*, for academic purposes.

and socially engaged organizations that are contrarian and experimental, even courageous, in driving towards equity.” Robert Rauschenberg Foundation, *Foundation Mission*, <https://www.rauschenbergfoundation.org/foundation>. Accordingly, the grants awarded by the Foundation foster a range of cultural work across the country and the globe, from emergency pandemic aid for artists and dancers to support for arts criticism in the Middle East. Robert Rauschenberg Foundation, *Grants*, <https://www.rauschenbergfoundation.org/current-grants>.⁷

The threat will indeed be greatest for smaller, locally based arts organizations that do not have the resources to fight infringement claims in court. And the threat comes at a difficult time for arts institutions, which have faced significant challenges during the COVID pandemic. One non-profit, based on a survey of 19,398 arts organizations, estimates that the national financial loss to the arts stands at around \$15.2 billion. *The Economic Impact of Coronavirus on the Arts and Culture Sector*, Americans for the Arts, <https://www.americansforthearts.org/by-topic/disaster-preparedness/the-economic-impact-of-coronavirus-on-the-arts-and-culture-sector>. Given these circumstances, the philanthropic efforts of foundations and arts organizations are particularly critical now. Adopting a fair-use standard for visual art that threatens a wide swath

⁷ See also, e.g., Roy Lichtenstein Foundation, *News of Grants and Gifts*, <https://lichtensteinfoundation.org/news> (detailing support for, among other things, post-baccalaureate fellowships, diversity-and-inclusion initiatives at museums, emergency pandemic aid for artists, and curatorial research); Joan Mitchell Foundation, *Artist Programs*, <https://www.joanmitchellfoundation.org/artist-programs> (detailing fellowships for artists “working in the evolving fields of painting and sculpture”).

of practicing artists and institutions would exacerbate an already difficult situation for the arts community.

The risk is not diminished by the Second Circuit’s assertion that its holding was cabined to the context of commercial reproductions of a derivative work. Pet. App. 42a; *see also* Pet. App. 50a-52a (Jacobs, J., concurring). For one thing, the distinction finds no footing in the Copyright Act, this Court’s precedent, or logic. The complaint alleged—and the panel concluded—that the Prince Series *itself* was derivative of Goldsmith’s photograph and not transformative. The fact that Goldsmith sought relief as to reproductions of the Prince Series was immaterial to the panel’s analysis of the transformation question. The panel’s opinion is therefore an obvious roadmap for future copyright challenges to original works.

And even if the distinction made better doctrinal or logical sense, it would offer cold comfort to defendants in these cases. The right to reproduce images of a work of art is obviously crucial to artists and art institutions. This is especially so for foundations, like a number of *amici*, that rely on the right to reproduce images to fulfill their basic purposes: advancing knowledge of the artists they represent, fostering engagement with those artists’ legacies, and supporting their philanthropic efforts to advance both the arts and up-and-coming artists. *See supra*, pp. 34-35. A rule that creates widespread infringement liability for reproductions would hobble these *amici*’s work.

Finally, the Second Circuit’s approach would frustrate the constitutional values embedded in copyright law. Copyright is meant to “promote the Progress” of art, not punish it. U.S. Const. art. I, § 8, cl. 8. A rule that relies on superficial resemblance and ignores

transformative meaning erodes “one of the key limits that keep copyright from unconstitutionally suppressing speech and harming the very cultural richness it aims to promote.” Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 Harv. L. Rev. 683, 751 (2012). The result would be to “stifle the very creativity which [the Copyright Act] is designed to foster.” *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (citation omitted). And because fair use acts as a “built-in First Amendment accommodation[]” within the framework of copyright law, *Eldred*, 537 U.S. at 219-20, adopting a reading of the fair-use provision that dramatically narrows the expression protected by the defense would raise difficult First Amendment questions. So even if the interpretive question here were a closer call, the Court should choose the reading of the Copyright Act that avoids the “multitude of constitutional problems” the Second Circuit’s standard would raise. *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

For these reasons as well, the Court should reject the Second Circuit’s novel side-by-side standard and reaffirm the Court’s traditional approach, under which a new work’s appropriation of an older one is a fair use when the result is transformative.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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