

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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ANDY WARHOL FOUNDATION FOR THE)
VISUAL ARTS, INC.,)
Petitioner,)
v.) No. 21-869
LYNN GOLDSMITH, ET AL.,)
Respondents.)
- - - - -

Pages: 1 through 122
Place: Washington, D.C.
Date: October 12, 2022

HERITAGE REPORTING CORPORATION
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(202) 628-4888
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3 ANDY WARHOL FOUNDATION FOR THE)
4 VISUAL ARTS, INC.,)
5 Petitioner,)
6 v.) No. 21-869
7 LYNN GOLDSMITH, ET AL.,)
8 Respondents.)
9 - - - - -
10 Washington, D.C.
11 Wednesday, October 12, 2022
12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:02 a.m.
16
17 APPEARANCES:
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19 of the Petitioner.
20 LISA S. BLATT, ESQUIRE, Washington, D.C.; on behalf of
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24 United States, as amicus curiae, supporting the
25 Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case Number 21-869, Andy Warhol Foundation versus Goldsmith. Mr. Martinez.

ORAL ARGUMENT OF ROMAN MARTINEZ
ON BEHALF OF THE PETITIONER

MR. MARTINEZ: Mr. Chief Justice, and may it please the Court:

Both courts below agreed and Goldsmith doesn't dispute that Warhol's Prince Series can reasonably be perceived to convey a fundamentally different meaning or message from Goldsmith's photograph. The question in this case is whether that different meaning or message should play a role, any role, in the fair use analysis.

Our answer is yes. Warhol's transformative meaning puts points on the board under Factor 1 of the four-factor balancing test. Goldsmith and the Second Circuit say no. Warhol's new meaning is categorically irrelevant and can't be considered as part of Factor 1 or any other factor.

1 I want to emphasize three points.
2 First, the precedent supports us. Campbell
3 unambiguously requires an examination of meaning
4 or message. Google reaffirms that test and
5 cites Warhol's Soup Cans as a paradigmatic
6 example of when it's satisfied. Goldsmith's
7 test is at odds with both cases.

8 Second, our approach, unlike
9 Goldsmith's, maintains a balance between
10 protecting artists' rights to monetize their
11 works and encouraging new and important
12 follow-on expression. We give follow-on artists
13 credit for innovation at Factor 1 while
14 recognizing that Factor 4 and the other factors
15 will sometimes cut decisively the other way.

16 Goldsmith's necessity test, by
17 contrast, upends that balance. It banishes
18 transformative meaning from the equation
19 altogether, and by doing so, it violates 107's
20 text, contradicts precedent, and undermines
21 copyright's key goal, promoting creativity for
22 the public good.

23 Finally, the stakes for artistic
24 expression in this case are high. A ruling for
25 Goldsmith would strip protection not just from

1 the Prince Series but from countless works of
2 modern and contemporary art. It would make it
3 illegal for artists, museums, galleries, and
4 collectors to display, sell, profit from, maybe
5 even possess a significant quantity of works.
6 It would also chill the creation of new art by
7 established and up-and-coming artists alike.

8 These results are repugnant to
9 copyright and to the First Amendment. You
10 should reject them. We ask you to reaffirm
11 Campbell and reverse the decision below.

12 JUSTICE THOMAS: Could you give us an
13 example of any follow-on work that fails your
14 test?

15 MR. MARTINEZ: Sure. I think a
16 classic example would be a -- a book-to-movie
17 adaptation. I think that would be a follow-on
18 work. It would be a derivative work. I think,
19 if you -- if someone were to, you know, try to
20 do that, I think that the -- the original
21 creator, the author of the book, could very
22 easily assert that that was not fair use and
23 would have a winning case under Factor 4 and
24 probably also under Factor 1. And, certainly,
25 that would be a kind of classic example of a

1 follow-on work that would not count.

2 JUSTICE SOTOMAYOR: Why? I mean,
3 derivative works are generally in a different
4 medium, and almost all of them, even a
5 dramatization on -- on theater or even a motion
6 picture or a sequel, they add something new
7 according to your definition in your brief.

8 So why shouldn't they be protected as
9 well according to your theory?

10 MR. MARTINEZ: Yeah, I think -- I
11 think there's a Factor 4 issue and a Factor 1
12 issue. I think the most obvious problem would
13 be a Factor 4 problem for the person who's
14 trying to copy or -- or create the movie
15 adaptation.

16 JUSTICE SOTOMAYOR: I -- I'm sorry. I
17 read Factor 1, the purpose and character of the
18 use, including whether such use is of a
19 commercial nature or is for nonprofit
20 educational purposes.

21 So what's the use here? Is -- I think
22 I have to look at a use under 1 as well. So is
23 the use the creation of the Prince Series by
24 Warhol? Is it the 2016 license of the Orange
25 Prince? That factor, I think, is telling me to

1 look at a use.

2 So which use are you looking at?

3 MR. MARTINEZ: So -- so we think that
4 both uses are directly implicated in this case.
5 I know there's a significant amount of confusion
6 between our side and the other side on this, so
7 I'd like to try to clarify it.

8 This case came about because Ms.
9 Goldsmith contacted the foundation, asserted
10 that -- that the -- the original Warhol works
11 were infringing, demanded a quite substantial
12 seven-figure sum of money, and also demanded the
13 copyrights in the work.

14 JUSTICE SOTOMAYOR: I --

15 MR. MARTINEZ: We then filed --

16 JUSTICE SOTOMAYOR: -- I'm -- I'm
17 putting that aside.

18 MR. MARTINEZ: Sure.

19 JUSTICE SOTOMAYOR: Okay? They can
20 tell us whether they're claiming -- I think
21 they're out of the statute of limitations, so
22 they can't claim that.

23 MR. MARTINEZ: But --

24 JUSTICE SOTOMAYOR: So I think the
25 only thing they can claim under the statute is

1 the 2016 license.

2 MR. MARTINEZ: No, respectfully, Your
3 Honor, that's not right, because what they
4 claimed in their -- in their brief -- in their
5 complaint, and this is at JA 120 to 121, was
6 that they said that we were not allowed to
7 invoke our copyright in the works.

8 And that wasn't just a past question
9 that's sort of like water under the bridge
10 because of the statute of limitations. That has
11 ongoing significance because, if we --

12 JUSTICE SOTOMAYOR: All right. So
13 then I want to break them down. Assume that
14 it's the creation. I understand your argument.
15 It was a painting. It was a comment on
16 consumerism. If that's all he did, that's one
17 thing.

18 But let's look at the 2016 license of
19 Orange Prince, which is what I thought this case
20 was about, but putting that aside, assume it's
21 that.

22 MR. MARTINEZ: Okay. Assuming --
23 assuming that we're just talking about that
24 piece of the case, the licensing use --

25 JUSTICE SOTOMAYOR: Right.

1 MR. MARTINEZ: -- even with respect to
2 the licensing use, you'd still need to look at
3 Factor 1, which would look at -- at the purpose
4 and character of the use. And that would
5 certainly encompass the fact that Warhol's use,
6 the image that's being licensed, was
7 transformative and created -- and -- and -- and
8 infused a new meaning or message on top of
9 Goldsmith's original work.

10 JUSTICE SOTOMAYOR: That I give you --
11 I spot you. It should be considered.

12 MR. MARTINEZ: Well --

13 JUSTICE SOTOMAYOR: The Second Circuit
14 didn't. But then what do I do with the rest of
15 Factor 1, the purpose and use and -- and
16 character of the use? Because that's not just
17 up to the author. That's up to what was made,
18 what use was made of Orange Prince. It was a
19 highly commercial use. Goldsmith also licensed
20 her photographs to magazines, just as Warhol's
21 estate did.

22 So how is it that your 2006 license
23 and Goldsmith's photographs do not share the
24 same commercial purpose?

25 MR. MARTINEZ: Well, I think that it's

1 -- it's true that -- that there is a -- a
2 commercial purpose and so that might be a factor
3 that would cut against us when assessing Factor
4 1. We think that the -- the -- the quite
5 substantial and -- and this in our view
6 undisputed transformation in meaning or message
7 --

8 JUSTICE SOTOMAYOR: Yeah, but for that
9 --

10 MR. MARTINEZ: -- would -- would trump
11 that.

12 JUSTICE SOTOMAYOR: -- don't we have
13 to look at the context of the use?

14 MR. MARTINEZ: I -- I think you would
15 look at all -- all the factors. But --

16 JUSTICE SOTOMAYOR: Right.

17 MR. MARTINEZ: -- but, again, Your
18 Honor, I think your point -- it's not a small
19 point to say that the Second Circuit got this
20 wrong by banishing transformative meaning or
21 message. That's a huge deal.

22 JUSTICE SOTOMAYOR: Assume that it got
23 it wrong. The question is --

24 MR. MARTINEZ: How would we win -- how
25 would we still win?

1 JUSTICE SOTOMAYOR: -- you -- I
2 thought your brief was arguing -- and you seem
3 to be arguing something different today -- that
4 the transformation standing alone gives you
5 Factor 1.

6 MR. MARTINEZ: Right. So --

7 JUSTICE SOTOMAYOR: And I don't see
8 how that can be.

9 MR. MARTINEZ: -- Your Honor, I think
10 that's -- I think -- let me clarify our
11 position. Our position is that Factor 1 has to
12 encompass the new meaning or message. We do not
13 deny that there are other considerations that
14 may bear on Factor 1.

15 We think the district court below
16 correctly recognized that the transformative
17 meaning or message was so significant here that
18 that would mean that we win under Factor 1 and,
19 in fact, you know, for the other reasons under
20 the other factors that we also win the whole
21 case.

22 If you disagreed with us on that, I
23 think what you could do is make very clear that
24 the Second Circuit's banishment of meaning or
25 message from the inquiry was wrong. You could

1 send it back down to them.

2 I think you should say that the
3 transformation in meaning or message here was
4 substantial, but if you thought that other
5 factors had to be weighed, you could send it
6 back down to the district court or the Second
7 Circuit to reweigh that.

8 JUSTICE KAGAN: Mr. Martinez --

9 CHIEF JUSTICE ROBERTS: Mr. Martinez,
10 let -- let's suppose that I think you can do
11 this with technology instead of the mood that
12 Prince is conveying in the Goldsmith photograph.
13 You put a little smile on his face and say this
14 is a new message. The message is Prince can be
15 happy. Prince should be happy.

16 Is that enough of a transformation?
17 The message is different.

18 MR. MARTINEZ: I -- I think you would
19 certainly have to consider the new meaning or
20 message as part of the inquiry. And so, if the
21 question is whether that would be, like,
22 categorically irrelevant, the answer is no. And
23 I think the Second Circuit would -- would not
24 even consider it, and, therefore, the Second
25 Circuit's wrong.

1 I think, though, Your Honor, you're
2 sort of suggesting, I think correctly, that
3 there might be different degrees in
4 transformation that might make a difference in
5 the analysis. We -- we would agree with that.

6 CHIEF JUSTICE ROBERTS: Well, what I
7 guess I'm trying to suggest is that there may be
8 nothing left to the original author for
9 derivative works. I mean, if that's not a
10 derivative work, it's hard to see what would be.

11 MR. MARTINEZ: Well, I think if you're
12 -- I think it would do two things. First, at
13 Factor 1, you would have to look at the degree
14 of transformation in meaning or message.

15 I think that that wouldn't be
16 dispositive of the fair use question as a whole,
17 though, because I think you would then look at
18 Factor 4 and you would really have to look at
19 whether the market for the new work is -- is
20 in -- in a real substantial way, is going to be
21 a market substitute or compete with either the
22 original work or the potential derivative uses
23 of the original work by the original author.

24 So we think -- we're not denying that
25 Factor 4 is relevant here. We're just saying

1 that for purposes of Factor 1, you certainly
2 wouldn't ignore the transformative meaning or
3 message for purposes of that factor.

4 JUSTICE KAGAN: And --

5 MR. MARTINEZ: It just needs to be
6 considered as part of a holistic analysis.

7 JUSTICE KAGAN: -- can I take you
8 back, Mr. Martinez, to your answer to Justice
9 Thomas's question? Because you said: Well, the
10 classic example of non-transformative work would
11 be a movie from a book.

12 And, indeed, we expect Hollywood, when
13 it takes a book and makes a movie, to pay the
14 author of the book. But I think moviemakers
15 might be surprised by the notion that what they
16 do can't be fundamentally transformative.

17 I mean, mostly movies are tons of new
18 dialogue, sometimes new plot points, new
19 settings, new characters, new themes. You would
20 think new meaning and message.

21 So why is it that we, you know, can't
22 imagine that Hollywood could just take a book
23 and make a movie out of it without paying?

24 MR. MARTINEZ: I -- I -- first of all,
25 I -- I certainly agree with your -- your

1 bottom-line conclusion that you can't just take
2 a book and make a movie out of it. I think the
3 question is how do you get there and how do the
4 different factors play in.

5 We think two factors are relevant,
6 Factor 1 and Factor 4. The other factors are
7 probably also relevant, but Factor 1 and 4 may
8 be the most relevant.

9 With respect to Factor 1, we would say
10 that the normal sort of book-to-movie
11 transition, we don't think that the -- the --
12 the necessary sort of changes in the form
13 from -- from the written word into a movie, that
14 that would inherently be a change in meaning or
15 message.

16 It's possible -- and we think actually
17 in most cases, the -- the change from a book to
18 a movie wouldn't have a different meaning or
19 message, or, if it did, it would be very slight.

20 I think the more fundamental reason,
21 though, why the book-to-movie adaptation would
22 not be fair use is Factor 4, because the classic
23 thing, if you're an author, a successful author,
24 the -- the most natural derivative market -- the
25 derivative use of your work and the potential

1 market for your work, you know, you sell a
2 million copies of your book, the next thing you
3 want to do is make the movie based on the book.
4 That's like the classic thing you would do.

5 And so, of course, if someone comes in
6 and makes the movie, you know, a year before
7 you -- you make it, that would be interfering
8 with the market for your --

9 JUSTICE KAVANAUGH: Isn't the
10 classic --

11 MR. MARTINEZ: -- for your potential
12 market.

13 JUSTICE KAVANAUGH: -- isn't the
14 classic thing with a photograph that it'll be
15 used in stories about the subject of the
16 photograph and, therefore, competing in the same
17 market that this adaptation was used in?
18 Namely, it was used in a story about Prince, not
19 a story about Warhol.

20 And at least from the perspective of
21 the other side and some of the amicus briefs,
22 that's the key distinction here.

23 MR. MARTINEZ: I -- I don't -- I don't
24 think so, Your Honor. I don't think -- and I
25 think the Second Circuit actually agreed with us

1 on this. They said that the -- the -- the
2 primary work itself would not actually compete
3 as a market substitute for -- with -- with
4 Goldsmith's photograph. And I think that's
5 exactly right.

6 I don't think that the -- the standard
7 use of -- of Goldsmith's work would be to
8 create, you know, Warhol-style transformed
9 celebrity, you know, art -- fine art portraits
10 in the way that Warhol did.

11 And I -- I think, in any event, if you
12 had concerns about that --

13 JUSTICE KAVANAUGH: No, but it's used
14 --

15 MR. MARTINEZ: -- it's really a Factor
16 4 --

17 JUSTICE KAVANAUGH: -- I mean, I guess
18 this goes to the use, but it's being used in a
19 story about Prince, just like the '84 story in
20 Vanity Fair.

21 MR. MARTINEZ: Oh, you mean the story
22 like the Vanity Fair article?

23 JUSTICE KAVANAUGH: Mm-hmm.

24 MR. MARTINEZ: I -- I don't -- well, I
25 guess what I would say is that if you think that

1 that's a competing sort of substitute, that's a
2 Factor 4 inquiry. I think that the court below
3 recognized that -- that the Warhol work did not
4 compete as a market substitute at Factor 4 with
5 the Goldsmith photograph and this is really a
6 Factor 1 case.

7 JUSTICE JACKSON: Can I -- sorry.

8 MR. MARTINEZ: Yes, Justice Jackson,
9 sorry.

10 JUSTICE JACKSON: Can I have you focus
11 in on Factor 1? Because I sort of thought that
12 that's really what we were focused on here. And
13 you continue to say that meaning and message --
14 you think the problem with the Second Circuit is
15 that they banished meaning and message from that
16 factor. I understand that.

17 But it doesn't help me to understand
18 how you use or you purport to use meaning and
19 message in the context of the purpose or
20 character -- and character inquiry in Factor 1.

21 So I could see, for example, as we
22 evaluate the purpose and character of the use,
23 that you might say: Well, this is a new purpose
24 insofar as our purpose was to provide a new
25 meaning and message. So it's sort of embedded

1 in the consideration of purpose, or this is --
2 has a new character because -- because it
3 conveys a new meaning and message.

4 Is that how you're doing this? I
5 didn't see you --

6 MR. MARTINEZ: Sure.

7 JUSTICE JACKSON: -- filtering mean --
8 meaning and message through --

9 MR. MARTINEZ: So --

10 JUSTICE JACKSON: -- purpose and
11 character.

12 MR. MARTINEZ: -- thank you, and thank
13 you for focusing on the text. Let's talk about
14 the text. The text talks about purpose and
15 character. I don't think there's any real
16 dispute about what those words mean. We think
17 that the transformative meaning or message
18 directly affects both purpose and character, so
19 let me just take them one at a time.

20 With respect to purpose, we're talking
21 about visual art, and visual art is intended to
22 be seen by audiences. The -- a major purpose of
23 visual artists is to communicate through their
24 work, you know, when they put the work in front
25 of the audience, certain meanings or messages to

1 that audience.

2 JUSTICE JACKSON: Can I just stop you
3 for a second? Are you just sort of
4 hypothesizing about that, or are you saying that
5 was actually the purpose of this use in this
6 situation?

7 MR. MARTINEZ: I think --

8 JUSTICE JACKSON: Because anybody can
9 sort of say after the fact, oh, a purpose of
10 visual art is X. I thought this was about --

11 MR. MARTINEZ: I think --

12 JUSTICE JACKSON: -- the purpose of
13 the use in this particular case.

14 MR. MARTINEZ: I don't -- I don't
15 think it's -- I don't think it's disputed and I
16 think it's common sense that -- that artists
17 like Warhol intended their works to be seen and
18 -- and were intending to communicate, you know,
19 messages through their works.

20 JUSTICE JACKSON: So it wasn't the
21 purpose of this particular use to illustrate the
22 Vanity Fair article. This is where the
23 commercial part comes in.

24 MR. MARTINEZ: I --

25 JUSTICE JACKSON: That wasn't the

1 purpose?

2 MR. MARTINEZ: That -- that was part
3 of the purpose if you look at it at a higher
4 level of generality. We're not saying that's
5 irrelevant. But I think even when you look at
6 the actual article it was illustrating, it was
7 illustrating an article entitled "Purple Fame"
8 that was all about Prince's, like, emerging
9 celebrity iconic status.

10 And so it's perfectly natural to
11 illustrate that article that you would want a
12 Warhol-type work that has as its meaning or
13 message a -- a picture of Prince that shows him
14 as the exemplar of sort of the dehumanizing
15 effects of celebrity culture in America.

16 JUSTICE ALITO: How is --

17 MR. MARTINEZ: But just to go back to
18 the -- oh, sorry.

19 JUSTICE ALITO: No, go ahead. Finish.

20 MR. MARTINEZ: But just to go on the
21 text, so I do think that a new meaning or
22 message, like, necessarily changes the purpose
23 of the original work.

24 As to character, just briefly,
25 character just means a quality, trait, or

1 attribute. And, certainly, if -- if the -- the
2 message of the work changes, that would be a
3 quality, trait, or attribute of the work.

4 And I think the problem with
5 Goldsmith's side is that they're essentially
6 arguing that a new meaning or message has
7 nothing to do with purpose, has -- doesn't
8 change the character of the work, and it's
9 just -- the only level of generality you can
10 look at those things is -- is at the level of,
11 well, they're both portraits of Prince, they
12 must be the same. And I don't think that's a
13 common sense or appropriate way to look at this.

14 Sorry, Justice Alito.

15 JUSTICE ALITO: How is a court to
16 determine the purpose of meaning, the message or
17 meaning of works of art like a photograph or a
18 painting? Should it receive testimony by the
19 photographer and the artist? Do you call art
20 critics as experts? How does a court go about
21 doing this?

22 MR. MARTINEZ: So, Justice Alito, I
23 think that the short answer is I think the court
24 can do it in exactly the same way that this
25 Court and the lower courts did in the Campbell

1 case.

2 So, in the Campbell case, the issue
3 was parody, but in order -- one of the issues in
4 the case was whether the 2 Live Crew song was,
5 in fact, a parody, and in order to do that, the
6 Court needed to assess what the meaning or
7 message of the work was.

8 And Justice Souter, in his opinion for
9 the Court at page 583, he -- he sort of, like,
10 does his own analysis. So I think you could
11 just look at the two works and figure out what
12 you think as a judge.

13 But I think that more likely, in most
14 of these cases, the way that they've been
15 litigated for almost 40 years, that the
16 litigants would put forward -- in addition to
17 the works themselves, put forward evidence.
18 Sometimes it's evidence from the -- the creator,
19 both creators. Sometimes it's expert evidence.
20 Sometimes it's other kinds of evidence.

21 But that's sort of like the standard
22 run-of-the-mill way that -- that -- that
23 litigants in -- in these copyright cases try to
24 argue about and establish meaning or message.
25 And we think that's totally appropriate in this

1 circumstance.

2 JUSTICE ALITO: Well, you make it
3 sound --

4 JUSTICE KAGAN: But even --

5 JUSTICE ALITO: -- you make it sound
6 simple, but maybe it's not so simple at least in
7 some cases to determine what is the meaning or
8 the message of -- of a work of art. There can
9 be a lot of dispute about what the meaning or
10 the message is. Some people would say it's not
11 necessarily the meaning or the message that the
12 artist had in mind.

13 I don't know, if you called Andy
14 Warhol as a -- as a witness, what would he say
15 was the purpose of his -- and the -- the message
16 or meaning of his -- of his creation?

17 MR. MARTINEZ: I -- I wish I could
18 answer that question. He's not with us, as you
19 know, Your Honor.

20 JUSTICE ALITO: I know that.

21 MR. MARTINEZ: But I will say -- I
22 will say this about the problem that you've
23 pointed to, which is a real concern, and I
24 understand why it's a real problem. I think
25 that the answer to that problem is solved by

1 Campbell, because Campbell does not say that the
2 court or the fact finder needs to figure out the
3 meaning or message. It says it needs to figure
4 out whether a new meaning or message could
5 reasonably be perceived.

6 And that creates a -- a -- a bit of
7 latitude, of -- of sort of wiggle room that
8 defers to the fact that there might indeed be,
9 you know, a bunch of different reasonable
10 interpretations of art.

11 JUSTICE KAGAN: You say in your -- in
12 your reply brief that the new thing has to be
13 important, correct?

14 MR. MARTINEZ: That's -- taking that
15 from Google, new and important, yes.

16 JUSTICE KAGAN: And -- and -- and how
17 does -- how do you go about thinking about
18 what's important --

19 MR. MARTINEZ: Well, I think you would
20 --

21 JUSTICE KAGAN: -- in the follow-on
22 work?

23 MR. MARTINEZ: I think, in the context
24 of copyright law, you would look at important in
25 light of the objectives of copyright law. And,

1 here, it's promoting creativity for the public
2 good. And so you would look at that just the
3 same way that Judge Leval talked about in his --
4 in his decision and I think the way that both
5 the Campbell and Google Courts did.

6 And what Google said, right after it
7 said --

8 JUSTICE KAGAN: I mean, that doesn't
9 give me a lot of specificity. I understand that
10 we're supposed to be encouraging creativity, but
11 -- but what's the difference in the follow-on
12 work that when we look at it, we can say, well,
13 that's an important difference that does
14 something that -- that we really need to hear or
15 to see?

16 MR. MARTINEZ: So what the Court said
17 in Campbell was it equated the new or important
18 inquiry with -- with a serious inquiry into
19 transformative meaning or message. And when the
20 -- when Campbell uses that language, "new and
21 important," it's immediately following the --
22 the sentence where it's quoting -- sorry -- when
23 Google uses that phrase, it's immediately
24 following the place where it quotes the language
25 in Google -- in Campbell that says new meaning

1 or message, you know, count.

2 JUSTICE SOTOMAYOR: Counsel, going
3 back to your answer to Justice Kavanaugh and now
4 to Justice Kagan, what's the right level of
5 generality? You keep going back to the author's
6 purpose, and I can't stay there because, when I
7 look at Harper & Row, we defined the purpose of
8 the use as news reporting. In Campbell, we
9 repeatedly referred to the uses -- the use as
10 its parody character. In Google, we talked
11 about creating a new product that does something
12 different.

13 That's a fairly high level of
14 generality, and that's the level we talked of.

15 MR. MARTINEZ: Well, I think --

16 JUSTICE SOTOMAYOR: And so --

17 MR. MARTINEZ: Sorry.

18 JUSTICE SOTOMAYOR: -- I don't know
19 why the level that we talk about here is the
20 actual use, which is what Section 1 tells us to
21 do, of this piece of art. And we go back to
22 Justice Kavanaugh's point, the specific use was
23 of this one part of the Prince Series, only one
24 level of it, as a photograph in the life of
25 Prince.

1 Now that use -- you say on Factor 4
2 that it doesn't compete with the photograph,
3 Goldsmith's photograph, but hard to see how not.
4 They both sell photographs to magazines, and
5 they both sell photographs to magazines to
6 display Prince's -- Prince's vision or Prince's
7 look.

8 So I guess I go back to my point,
9 which is why isn't the general -- the -- the
10 higher level of generality what Section 1 is
11 looking at?

12 MR. MARTINEZ: Your Honor, I don't
13 think that that's what Section 1 is getting at,
14 but I think Campbell makes that absolutely clear
15 because, if it were the case that you had to
16 look at the higher level of generality, in
17 Campbell, what you would have said is you have a
18 Roy Orbison song that's a work of popular music
19 that's commenting on sexual attraction, and you
20 have a 2 Live Crew song that's also a work of
21 popular music, also commenting on sexual
22 attraction, they would have the same purpose.

23 But you didn't do that. Instead, you
24 said let's -- we need to look at the meaning or
25 message, and then you analyzed whether the

1 second work was -- had a different meaning or
2 message because it was commenting on the first.
3 So you had to do that analysis.

4 And I actually think Goldsmith's test
5 actually requires you to do that analysis.
6 They're not asking you to overturn the parody
7 case law. What they're asking you to say is to
8 -- is that the only meaning or message that can
9 possibly ever count as a difference in meaning
10 or message is when you have a parody. But
11 that's -- that's our --

12 JUSTICE KAVANAUGH: Isn't the --

13 JUSTICE BARRETT: Well, I don't think
14 --

15 JUSTICE KAVANAUGH: -- isn't the --

16 JUSTICE BARRETT: -- that's true. I
17 mean, I -- I think that the -- one -- one thing
18 that Campbell pointed out is that 2 Live Crew
19 couldn't have parodied or -- and this would also
20 apply to commenting on, this would also apply to
21 critiquing maybe in the way that Warhol's
22 Campbell Soup painting does, but that you needed
23 the object. He didn't need or Warhol didn't
24 need Goldsmith's particular photo, right? I
25 mean, it could have been a different photo of

1 Prince.

2 MR. MARTINEZ: Well, what Goldsmith
3 said below is that he did need the -- the photo.
4 And I think that's -- that's reflected in the
5 district court opinion.

6 But I think leaving -- just stepping
7 back from the question of -- of need, I think
8 that it's true that in parody there might be a
9 -- an especially strong need to quote from the
10 -- the work that you're critiquing. But that's
11 not -- that doesn't mean that -- that -- that
12 that's a requirement of transformative meaning
13 or message.

14 And as Your Honor pointed out, when
15 Google invokes the soup cans hypothetical, the
16 soup cans -- you know, if you're -- if you're
17 issuing a comment on consumerism, you don't need
18 to use, you know, a copyrighted Campbell's soup
19 can logo in order to make that comment.

20 JUSTICE BARRETT: Yeah. But you could
21 use Cheerios. I mean, you'd have to use -- I
22 mean, it doesn't have --

23 MR. MARTINEZ: You could find some --

24 JUSTICE BARRETT: Yeah. It just
25 doesn't have --

1 MR. MARTINEZ: You could find one
2 that's not copyrighted.

3 JUSTICE BARRETT: -- the same punch if
4 it's generic. Well -- okay.

5 MR. MARTINEZ: But I think what -- but
6 I think the soup cans example is especially
7 helpful on that point because it doesn't look
8 for some sort of need or justification. You
9 know, neither party sort of argued and the
10 courts below didn't, like, assess a necessity
11 test.

12 I understand Goldsmith at this stage
13 in the case to be introducing for the first time
14 a kind of indispensability requirement, which is
15 -- has really no footing in any of the Court's
16 case law and really wouldn't make a lot of
17 sense. Certainly, the soup cans example, it was
18 not, like, indispensable for -- for Warhol to --
19 to use the Campbell's soup logo in order to
20 create that image, and yet the Court itself
21 recognized that was a paradigmatic example of --
22 of fair use.

23 JUSTICE KAVANAUGH: You said something
24 a minute ago about commenting on the original
25 being a key feature. And I think that's true

1 with the -- the examples listed in the statutory
2 text as well where they're commenting on the
3 original. And I think that the -- the import of
4 Campbell is that parody is a comment on the
5 original in some respects.

6 But how is a photograph used in an
7 article about Prince commenting in any way on
8 the original photograph? You might say that's
9 the wrong way to look at it probably, but if
10 that's what you're going to say, tell me why.

11 MR. MARTINEZ: Could I just answer the
12 -- the -- your point about the text?

13 JUSTICE KAVANAUGH: Mm-hmm.

14 MR. MARTINEZ: Because I think that
15 the text does not actually require commenting or
16 criticizing the original. It just says comment
17 or criticism. And so there's nothing textually
18 that requires the comment actually to be the
19 original.

20 I think the better way to understand
21 the text is if you look at Justice Blackmun's
22 dissent in the Sony case, not a point that was
23 -- this point was not, you know, what he was
24 dissenting on, but he was describing those
25 different uses, and what he said is that they're

1 all productive uses. And -- and that was the
2 term that was used at that time to talk about
3 the sort of transformative uses --

4 JUSTICE KAVANAUGH: Well, if --

5 MR. MARTINEZ: -- that we're talking
6 about now.

7 JUSTICE KAVANAUGH: -- if you go to
8 Campbell, the -- the part of Campbell right
9 before the part that you quoted says the central
10 purpose of this investigation is to see in
11 Justice Story's words whether the new work
12 merely supersedes the objects of the original
13 creation or, instead, adds something new.

14 MR. MARTINEZ: Exactly. And so I
15 think what -- what "supersedes" is doing there
16 is it's set up as a -- it's juxtaposed as the
17 opposite of what comes after the "instead"
18 clause. And what the "instead" clause is new
19 meaning or message.

20 And so I think what it's recognizing
21 is that the superseding that Justice -- Justice
22 Story was worried about is when you don't have a
23 new meaning or message.

24 JUSTICE KAVANAUGH: Can you go back to
25 the question I asked about --

1 MR. MARTINEZ: Sure. Right.

2 JUSTICE KAVANAUGH: -- when a
3 photograph is used in a --

4 MR. MARTINEZ: Is it commenting on the
5 original?

6 JUSTICE KAVANAUGH: -- in -- in a
7 story about the subject of the photograph, how
8 is that not superseding the object of the
9 original photograph?

10 MR. MARTINEZ: So it's -- it's not
11 because it has a transformative meaning or
12 message. It would have sent a different message
13 to have -- to use the Goldsmith photograph
14 illustrating that "Purple Fame" article. The
15 "Purple Fame" picture, the picture that
16 accompanied that -- that article, was intended
17 to -- or did show its -- its meaning. Its
18 meaning or message was about the dehumanizing
19 effects of celebrity as applied to Prince.

20 The Goldsmith photograph, as she
21 herself said below -- this is at JA 490 --
22 around 496 -- she was testifying as to what she
23 was capturing was a photo realistic portrait of
24 Prince that showed him as fragile and
25 vulnerable.

1 There's no real dispute in this case
2 that the meaning or message of the two works
3 were different. The only real question in this
4 case is whether that difference matters.

5 And it has to matter both because of
6 the text of 107, which talks about purpose and
7 character, and -- sorry.

8 JUSTICE KAVANAUGH: Does it matter,
9 though, how the new photograph, the Warhol
10 photograph, is used? It's used in a magazine
11 article about Prince. That would be one thing.
12 It's used in a museum setting.

13 MR. MARTINEZ: I --

14 JUSTICE KAVANAUGH: That might be
15 something very different because the Goldsmith
16 photograph competes with the Warhol in the
17 first.

18 MR. MARTINEZ: I think, if you're
19 talking about a particular use, absolutely, it
20 would matter for Factor 4. I think it would
21 also potentially matter as to Factor 1, but it
22 wouldn't cancel out the fact that you would have
23 to consider transformative meaning or message.

24 I just want to emphasize, though, and
25 this is a very important point, this case really

1 is not about just the licensing use. This case
2 is about the creation. If you look at the
3 request that -- her request for relief and our
4 request for relief in the original complaints,
5 this was a dispute over who owns the copyright
6 to these works.

7 She was asking for an injunction from
8 us that would prevent us not just from licensing
9 the one 2016 work, she wanted an injunction that
10 would prevent us from reproducing, displaying,
11 selling, or licensing those works.

12 The -- the -- the order that we won
13 from the district court was -- was an order that
14 as a matter of law summary judgment fair use as
15 to all 16 works. She didn't dispute that. In
16 fact, she proposed the order that the district
17 court ultimately issued.

18 So this case is not just about the
19 use. It's about the creation. And the reason
20 that she wants to change the subject and make it
21 only about the creation -- about the licensing
22 use is because she realizes that if this case
23 turns -- this case is about use -- about the
24 creation of the works, then it would have
25 dramatic spillover consequences not just for the

1 Prince Series but for all sorts of works of
2 modern art that incorporate preexisting images
3 and use preexisting images as raw material in
4 generating completely new creative expression by
5 follow-on artists.

6 JUSTICE KAGAN: I -- I wonder, Mr.
7 Martinez, if your case doesn't benefit from a
8 certain kind of hindsight. I mean, now we know
9 who Andy Warhol was and what he was doing and
10 what his works have been taken to mean, so it's
11 easy to say that there's something importantly
12 new in what he did with this image.

13 But, if you imagine Andy Warhol as a
14 struggling young artist, who we didn't know
15 anything about, and then you look at these two
16 images, you might be tempted to say something
17 like, well, I don't get it. All he did was take
18 somebody else's photograph and put some color
19 into it.

20 So -- so it seems that it's harder
21 than you say. I mean, we can't always count on
22 the fact that Andy Warhol is Andy Warhol to know
23 how to make this inquiry.

24 MR. MARTINEZ: Yeah. I think
25 you're -- you're right in part, Justice Kagan,

1 but I actually think that that sort of
2 emphasizes the importance of this case. This
3 case isn't just about Warhol. It's about the
4 young and up-and-coming artists who want to be
5 Warhol's successors.

6 You know, the artists' amicus brief, I
7 think, says that the average, you know, salary
8 or -- or earnings for a young artist is less
9 than \$50,000 a year. Think about what it would
10 be like for that artist who wants to create new
11 and innovative work that integrates preexisting
12 images.

13 If this Court were to adopt
14 Goldsmith's rule and say that that's not going
15 to count, it's -- the fact that you're doing
16 something completely new and different in terms
17 of meaning or message, it makes no difference,
18 that person is going to be dissuaded.

19 They don't want to have -- be tied up
20 in litigation where they're going to have to pay
21 attorneys' fees. They don't want to have
22 their -- their -- their hard work then nullified
23 and their copyrights essentially taken over by
24 -- by people who -- who created the original
25 works.

1 So this case is very important not
2 just for those artists. It's also important for
3 museums, collectors, galleries who want to
4 display these works. I see my time's expired.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Under your test, you know, there are
8 artists whose work consists of a single color
9 within a frame, right? I'm sure you recognize
10 those. And --

11 MR. MARTINEZ: So I've heard, Your
12 Honor.

13 CHIEF JUSTICE ROBERTS: Yeah.
14 Mondrian, Albers. And let's say somebody has --
15 uses a different color. You know, the original
16 is blue, and the -- the -- the allegedly
17 copyright violation work is -- is yellow.

18 Sort of following up on Justice
19 Alito's point, if you got art critics to come in
20 and say that blue sends a particular message,
21 yellow sends a different one, would -- would
22 that satisfy any claim of copyright violation?

23 MR. MARTINEZ: Well, I think, at -- at
24 the threshold, you'd have a question of whether
25 that was -- that was, you know, infringement or

1 not. I don't think anyone can copyright a
2 color. But just assuming it was infringement, I
3 think you would look at --

4 CHIEF JUSTICE ROBERTS: Well, are
5 those -- I mean, maybe you don't know, but, I
6 mean, are those paintings copyrighted or --

7 MR. MARTINEZ: I don't know the
8 specific paintings, Your Honor. Sorry. But --

9 CHIEF JUSTICE ROBERTS: Well, they're
10 a frame with a color in them.

11 MR. MARTINEZ: I think, if it was just
12 the color, I don't think you can copyright a
13 color. I do think, though -- let's just assume
14 that -- that you made other changes and there
15 was a -- a -- some sort of minor change.

16 I think you would still do the -- the
17 four-factor analysis. I think, at Factor 1, you
18 would have to look whether there's, in fact, a
19 new meaning or message.

20 It sounds to me like under the
21 hypothetical there's no difference in meaning or
22 message. And so I think it would be a -- a
23 loser under Factor 1.

24 CHIEF JUSTICE ROBERTS: Well, you --
25 you and I might think there's no difference, but

1 I'm sure there's art critics who will tell you
2 there's a great difference between blue and
3 yellow.

4 MR. MARTINEZ: And -- and I think what
5 a court would have to do in -- in -- if you're
6 assessing whether those two works -- again,
7 assuming that there was infringement, assessing
8 whether they had a different meaning or message,
9 you would have to listen to those critics and
10 you -- you know, we see experts on both sides of
11 almost every case, right, and they don't always
12 say the things that persuade the court.

13 And you'd have to take them seriously
14 to the extent that you would listen to their
15 arguments, and then you'd judge whether it was
16 reasonably perceived -- whether their view of --
17 of a transformed meaning or message is
18 reasonable, whether it could reasonably be
19 perceived.

20 And I think that in a lot of these
21 cases, where you're really talking about a very
22 minor change and -- and someone's just a
23 knock-off artist making a bogus claim to new
24 meaning or message, I think that juries or fact
25 finders can exercise their common sense and say

1 that there's no transformative meaning or
2 message there.

3 CHIEF JUSTICE ROBERTS: Thank you.
4 Justice Thomas?

5 JUSTICE THOMAS: I assume that the
6 Orange Prince is -- is -- is copyright.

7 MR. MARTINEZ: Yes. And I think that
8 copyright's directly at issue in this case.

9 JUSTICE THOMAS: The -- let's say that
10 I'm both a Prince fan, which I was in the '80s,
11 and --

12 (Laughter.)

13 JUSTICE KAGAN: No longer?

14 (Laughter.)

15 JUSTICE THOMAS: Well --

16 (Laughter.)

17 JUSTICE THOMAS: -- so only on
18 Thursday nights.

19 (Laughter.)

20 JUSTICE THOMAS: But let's say that
21 I'm also a Syracuse fan and I decide to make one
22 of those big blowup posters of Orange Prince and
23 change the colors a little bit around the edges
24 and put "Go Orange" underneath.

25 Would you sue me --

1 MR. MARTINEZ: Would -- would -- would
2 -- would --

3 JUSTICE THOMAS: -- for infringement?

4 MR. MARTINEZ: -- would the -- would
5 the Warhol foundation sue you if you were to do
6 that?

7 JUSTICE THOMAS: Well, you're their
8 lawyer, so --

9 MR. MARTINEZ: I -- I can't comment on
10 whether we would sue you. But I think, to --
11 to -- to try to get at your question, Your
12 Honor, I think the question of whether that
13 would be fair use, I mean, it sounds like
14 you're, by hypothesis, asking me to consider
15 that there's, like, a different meaning or
16 message associated with the work. I don't think
17 that's the only part of the -- the inquiry.

18 I think that everyone recognizes that
19 at Factor 1, the ultimate goal here is to figure
20 out whether the follow-on user is doing
21 something sort of creative that matters --

22 JUSTICE THOMAS: Oh, I'm just waving
23 it in the -- I'm waving it during the game with
24 a big Prince face on it, Go Orange.

25 MR. MARTINEZ: Yeah. I -- I think

1 that in -- in circumstances like that, it's very
2 unlikely if it was just one of you that -- that
3 -- that anyone would see you.

4 JUSTICE THOMAS: Oh, no, no. I'm
5 going to market it to all my Syracuse buddies.

6 (Laughter.)

7 MR. MARTINEZ: So I think, in that
8 case, the -- a court would -- would quite
9 reasonably look at that and say that this is not
10 the kind of -- of productive creativity
11 promoting use that is -- is --

12 JUSTICE THOMAS: So, in other words,
13 you would sue me?

14 (Laughter.)

15 MR. MARTINEZ: I would not sue -- I --
16 I -- I think that -- I think that you would
17 probably have a very weak case against me, Your
18 Honor.

19 JUSTICE THOMAS: So -- but you've just
20 changed position with Goldsmith then.

21 MR. MARTINEZ: No, not at all, Your
22 Honor. I think that in -- in this kind of
23 circumstance, I think this -- this is totally
24 different because there is a transformative
25 meaning or message and there's an enormous

1 amount of creativity.

2 JUSTICE THOMAS: Well, I had Go Orange
3 under it. I've changed the message.

4 MR. MARTINEZ: Right. But, as I was
5 saying, in addition to the -- the difference in
6 meaning or message, I think it's fair to
7 consider at Factor 1 whether the kind of
8 transformation is the kind that the copyright
9 laws are intended to foster, which is really
10 encouraging follow-on artists to -- to use
11 creativity to kind of introduce new ideas into
12 the public domain.

13 I think that -- that with all respect
14 to your -- your very accomplished re-rendering
15 of Prince, I think that what -- what Warhol did
16 here, as even Goldsmith concedes, was very
17 substantially creative and -- and absolutely is
18 consistent with the goals of copyright law.

19 CHIEF JUSTICE ROBERTS: Justice Alito?

20 JUSTICE ALITO: Very often a popular
21 song will be originally performed by one artist
22 and then other artists come along and perform it
23 in a very different way. Presumably, they think
24 that they are conveying a different meaning or
25 message when they alter the way it's performed.

1 Is it possible for any of them to --
2 that any of them would not be infringing the
3 original copyright?

4 MR. MARTINEZ: I think it would be
5 very hard to imagine a circumstance in which
6 they were not infringing ultimately under the --
7 you know, the full analysis.

8 JUSTICE ALITO: Why would that be?

9 MR. MARTINEZ: Well, I think it would
10 be in part because of Factor 4 because I think
11 that you would have -- you know, it would sound
12 like if you -- if you have -- Roy Orbison does a
13 version of "Pretty Woman" and then another sort
14 of Roy -- Roy Orbison style "Pretty Woman"
15 emerges, I think it would directly compete with
16 the original. So I think you'd have a very big
17 Factor 4 problem.

18 I think, under Factor 3, if you're
19 taking an enormous, you know, percentage of the
20 work, that would weigh against you as well. I
21 think that, you know, would you get points on
22 the board because of a transformative meaning or
23 message? Maybe. But I don't think that in that
24 kind of hypothetical that that would win the
25 day.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

3 JUSTICE SOTOMAYOR: I think my
4 colleague, Justice Thomas, needs a lawyer.

5 (Laughter.)

6 JUSTICE SOTOMAYOR: And I'm going to
7 provide it.

8 I see the first and fourth factors as
9 closely related. And I think he has a better
10 case because he's not using it at the game for
11 commercial purposes. But even if he were, it
12 wouldn't be related to the picture. It would be
13 related to the team. That's no different than
14 that case involving -- what mayor was it?

15 MR. MARTINEZ: The Kienitz case?

16 JUSTICE SOTOMAYOR: Yes, exactly, in
17 which the T-shirts took his face and put
18 something about his statement about a party on
19 the T-shirt. And the Court said that's okay
20 because that was really a commentary on a social
21 issue, and it is commercial but in a different
22 way.

23 But I -- what I don't -- having a
24 problem with is, why doesn't the fourth factor
25 just destroy your defense in this case? Meaning

1 you licensed directly to a magazine, which is
2 exactly what the original creator does, and as
3 Justice Kavanaugh said, it was licensing to the
4 very topic that both do, which is two magazines
5 that are talking about the life of Warhol -- not
6 Warhol, but of Prince.

7 So why isn't that direct competition?

8 MR. MARTINEZ: So a couple comments on
9 that. First --

10 JUSTICE SOTOMAYOR: And -- and for
11 commercial purposes.

12 MR. MARTINEZ: First of all, just to
13 -- just to reemphasize, it's not just the
14 licensing use in this case. But just assuming
15 we're just talking about the licensing use here,
16 I think that -- that Judge Koeltl's analysis of
17 Factor 4 is essentially correct. And -- and
18 with respect to the Second Circuit, I think the
19 Second Circuit's analysis of Factor 4 was overly
20 influenced by its impression that these were
21 essentially, for all intents and purposes, the
22 same work because they were both portraits of
23 Prince.

24 If we were going to rerun the Factor 4
25 analysis and if you wanted to look at it, I

1 would just suggest you look at the briefing in
2 -- in the lower courts because we obviously
3 didn't do it here. I think the key things that
4 I would suggest that would deserve attention
5 would be, who is the audience for Warhol,
6 Warhol's licensing versus Goldsmith's licensing?

7 I think there's substantial record
8 evidence showing that the -- the audience is
9 different in terms of the license -- the people
10 who would do the licensing, where Goldsmith's
11 works were predominantly being targeted more to
12 photorealistic sort of like -- you know, like a
13 Newsweek or -- or, in most cases, like rock and
14 roll magazines and other kinds of -- of
15 publications.

16 I think you'd look at the price to see
17 whether there were market substitutes. There,
18 you'd see that Warhol's works, even at the
19 licensing as opposed to the -- the -- the
20 purchase of the original works, were selling for
21 a lot more. I think you would look at the
22 aesthetics. The aesthetics are quite different.
23 And I also think you would look at the
24 transformed meaning or message.

25 All those things, I think -- we think

1 we -- we would win for the reasons that the
2 district court said.

3 If you disagreed with us on that, I
4 think maybe you would say this is a fact issue
5 that's got to go to a jury. But it certainly
6 wouldn't be summary judgment on -- as to Factor
7 4 for Goldsmith.

8 JUSTICE SOTOMAYOR: All right.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?
10 Justice Gorsuch?

11 JUSTICE KAVANAUGH: In 1984, did
12 Vanity Fair need to pay Goldsmith?

13 MR. MARTINEZ: No, Your Honor. I
14 think -- I don't think they needed to pay, but I
15 think what this Court recognized in Campbell is
16 that if people offer to pay or do pay, that
17 doesn't -- that doesn't make a difference. I
18 mean, I think, in the 2 Live Crew example, they,
19 in fact, did try to -- to get a license even
20 though, as the Court recognized, it wasn't
21 required.

22 JUSTICE KAVANAUGH: And then, on your
23 point about up-and-coming artists, obviously,
24 that can be played both ways. And some of the
25 amicus briefs -- I just want you to comment on

1 this. One of the amicus briefs says your
2 position poses an existential threat to
3 photographers. So I just want you to comment on
4 that.

5 MR. MARTINEZ: We -- we -- we
6 absolutely strongly disagree with that.

7 JUSTICE KAVANAUGH: And why, though?

8 MR. MARTINEZ: Because we think that
9 -- that the kind of transformation that's
10 important here is -- is -- is something that
11 really adds -- it creates a new original work in
12 a fundamental way, not just because the work's
13 in a different form or because it has different
14 colors; because it has a different meaning or
15 message.

16 And I don't think in the circumstance,
17 especially if -- if we are right on Factor 4
18 that there's either zero or not much impingement
19 on her market, we don't think that that actually
20 destroys anyone's livelihood.

21 JUSTICE KAVANAUGH: Thank --

22 MR. MARTINEZ: Rather, we think that
23 promotes creativity in artists of all kinds.

24 JUSTICE KAVANAUGH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: Mr. Martinez, I
3 think one of the problems that you have, as
4 evidenced by a lot of the questions that you've
5 been getting, is with the derivative works
6 protection, you know, which, in, you know,
7 106(2), actually talks about transforming any
8 other form in which a work may be recast,
9 transformed, or adapted.

10 And it seems to me like your test,
11 this meaning or message test, risks stretching
12 the concept of transformation so broadly that it
13 kind of eviscerates Factor 1 and puts all of the
14 emphasis on Factor 4. I mean, when you've been
15 asked about book to movie and -- and -- and, you
16 know, songs, you keep flipping to Factor 4.

17 So, if a work is derivative, like Lord
18 of the Rings, you know, book to movie, is your
19 answer just like, well, sure, that's a new
20 meaning or message, it's transformative, so all
21 that matters is 4?

22 MR. MARTINEZ: I don't think that Lord
23 of the Rings is -- has the -- has a
24 fundamentally different meaning or message, but
25 I would have to probably --

1 JUSTICE BARRETT: The movie?

2 MR. MARTINEZ: -- but I would probably
3 have to learn more and read the books and see
4 the movies to give you a --

5 (Laughter.)

6 MR. MARTINEZ: -- definitive judgment
7 on that. And I recognize reasonable people
8 could probably disagree on that.

9 I think that with respect to the
10 derivative work issue, I think textually it's
11 very important that in the -- in Section 106,
12 when it's -- it's talking about derivative --
13 sorry, in Section 101, when it's defining
14 derivative works and later in the copyright
15 statutes, when it's giving protection to
16 derivative works, it says it's subject to
17 Section 107. And so, just textually, we know
18 that the fact that you're a derivative work
19 doesn't mean fair use is out the window.

20 So is there a tension between those
21 two in some cases? I think probably there is
22 some tension, and I think that what it means is
23 that you need to do a very careful analysis of
24 new meaning or message, and -- and it's really
25 going to be only in the cases that -- that there

1 really fundamentally is a new meaning or message
2 that are going to be able to sort of satisfy
3 that first factor.

4 With respect to the balance between
5 Factor 1 and Factor 4, I think Factor 4 plays a
6 role when it comes to some of the very
7 challenging hypotheticals that were put forward
8 by Goldsmith and the government and by the
9 Court.

10 I don't think it's -- it's -- it's
11 really that big a deal in this case, though,
12 because this case really involves a very
13 fundamental transformation in meaning or message
14 and we think very little impingement on the
15 market under Factor 4.

16 JUSTICE BARRETT: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Jackson?

19 JUSTICE JACKSON: Yes. So I've been
20 trying to figure out when you continually say
21 "transformational meaning and message" and
22 you're focusing on meaning and message, it feels
23 like it's doing a lot of work with respect to
24 your Factor 1 analysis, and I think -- I think
25 that it might be because you're conflating

1 meaning or message with purpose.

2 What I've heard you say a couple times
3 is that the purpose of Warhol in this situation
4 was to essentially convey a different meaning or
5 message, that, you know, the original was
6 conveying Prince in a vulnerable light and so
7 the purpose was to convey him in a more iconic
8 way.

9 But the statute -- and I think this is
10 something that Justice Sotomayor has sort of
11 focused on and to some extent Justice Thomas
12 with his hypothetical. The statute seems to be
13 looking at purpose at a -- in a different way,
14 that it's saying the purpose is, are you using
15 it for a commercial nature? Is it going in a
16 magazine or is it going to a school? When you
17 look at the actual text of the fair use factors,
18 it's purpose and character of the use, including
19 whether such use is of a commercial nature or
20 for nonprofit educational purposes.

21 So I think you're actually treating
22 purpose differently than in the statute. So can
23 you --

24 MR. MARTINEZ: Sure. So I think we're
25 -- we're definitely not conflating meaning or

1 message with purpose. I think what we're saying
2 is similar to -- it's not quite conflating, but
3 we think they're related. We think that one way
4 to get to a different purpose is if you have a
5 different meaning or message.

6 Let me just give you an example. Say
7 that you had a portrait of Abraham Lincoln and
8 Abraham Lincoln was depicted in a heroic way.
9 And then you had another portrait that depicted
10 him in a very negative way. I think that the
11 purpose of both of those works would be
12 fundamentally different, and --

13 JUSTICE JACKSON: Absolutely not what
14 the statute says about purpose. You -- you just
15 made my point exactly.

16 MR. MARTINEZ: No, Your Honor.

17 JUSTICE JACKSON: That it's not --
18 there may be a different meaning or message, but
19 if both of those depictions are going in a
20 magazine for a commercial nature, the purpose,
21 the reason why you've used it, is -- is the
22 same.

23 MR. MARTINEZ: Well, let's just look
24 at the moment of creation. At the moment of
25 creation, they have different purposes, I -- I

1 think. One -- one is to show Lincoln as a good
2 guy. One is to show him as a bad guy. And --

3 JUSTICE JACKSON: So what -- what is
4 the work of "including whether such use is of a
5 commercial nature or for nonprofit educational
6 purposes"? I thought that was Congress telling
7 us what kind of purpose, you know, it cared
8 about.

9 MR. MARTINEZ: Right. I think that's
10 -- Congress is saying that -- it says
11 "including," so it doesn't say that's the only
12 factor, number one. And, number two, as this
13 Court held in Campbell, the commercial use is
14 not like the main event and certainly not the
15 only dispositive event. And that was actually
16 the -- the exact issue in Campbell.

17 JUSTICE JACKSON: Well, but it's a
18 type of purpose. Why are you doing this?

19 MR. MARTINEZ: Of course.

20 JUSTICE JACKSON: You're saying why am
21 I doing this? Because I want to depict Abraham
22 Lincoln in a heroic way. When Congress is
23 saying why are you doing this, because I want to
24 put this -- you know, are you doing this because
25 you want to sell it commercially? Are you

1 doing it --

2 MR. MARTINEZ: But, Your Honor, I
3 think, if that were the way to -- the right --
4 the only level of generality to look at -- we're
5 not -- I'm not denying, by the way, that I think
6 you could look at purpose in that way, and that
7 would also be a -- a legitimate way of looking
8 at it, of -- of considering it.

9 What I'm saying is that you can't
10 exclude meaning or message. And I think the
11 best case to show that is Campbell because
12 Campbell, again, you have two works of popular
13 music that at your level of generality have the
14 exact same purpose.

15 Or entertaining people on the radio.
16 You know, I listened to them on Spotify
17 yesterday. They have the same purpose. What's
18 different between them is the difference between
19 their message.

20 JUSTICE JACKSON: Why isn't that
21 character? Why isn't the difference that you're
22 pointing to character and that's -- and that's
23 something you factor in? I'm not excluding it.
24 I'm just saying it's not purpose.

25 MR. MARTINEZ: We think it's both

1 purpose and character. We think it's purpose
2 because the -- the meaning or message that
3 someone is communicating is tied up with their
4 purpose. If I give a speech that says vote for
5 Biden or vote for Obama or vote for Mitt Romney,
6 I'm giving a speech, but the purpose in giving
7 the speech is to convince people to -- of my
8 meaning or message.

9 JUSTICE JACKSON: All right. One
10 final question. If you -- let's say you win on
11 this point of the Second Circuit made a mistake
12 with respect to the way in which they treated
13 meaning and message and the Court vacates.

14 Would you want us to go on and deal
15 with the other factors or --

16 MR. MARTINEZ: I don't think the other
17 factors are briefed up in this Court.

18 JUSTICE JACKSON: Right.

19 MR. MARTINEZ: And so I -- I think,
20 you know, there are some questions that have
21 been raised about the other factors. I think
22 it's reasonable to think that -- that there
23 might be some factual issues there that should
24 go back -- probably maybe even back to the
25 district court. It could even require a trial.

1 We won at summary judgment on -- on
2 that. But, if you thought differently or had
3 concerns about Judge Koeltl's treatment of the
4 other factors, I think that would be the
5 appropriate disposition.

6 Thank you, Your Honor.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 MR. MARTINEZ: Thank you.

10 CHIEF JUSTICE ROBERTS: Ms. Blatt.

11 ORAL ARGUMENT OF LISA S. BLATT

12 ON BEHALF OF THE RESPONDENTS

13 MS. BLATT: Thank you, Mr. Chief
14 Justice, and may it please the Court:

15 Fair use is an affirmative defense.
16 It involves a multi-factor balancing test, and
17 Factor 1 focuses on purpose: What is the reason
18 or justification to take another's copyrighted
19 work?

20 The reason can't be to avoid paying
21 the customary price or the drudgery of coming up
22 with something fresh. The copier has to explain
23 why it needed and not just wanted to use someone
24 else's expression.

25 Here, Petitioner has never given any

1 reason for copying Ms. Goldsmith's picture to
2 commercially license Warhol's Orange Prince in
3 2016. Indeed, Warhol got the picture only in
4 1984 because Ms. Goldsmith was paid and
5 credited.

6 Petitioner responds Warhol is a
7 creative genius who imbued other people's art
8 with his own distinctive style.

9 But Spielberg did the same for films
10 and Jimi Hendrix for music. Those giants still
11 needed licenses. Even Warhol followed the
12 rules. When he did not take a picture himself,
13 he paid the photographer. His foundation just
14 failed to do so here.

15 Petitioner argues adding new meaning
16 is a good enough reason to copy for free. But
17 that test would decimate the art of photography
18 by destroying the incentive to create the art in
19 the first place, and it's obvious why the
20 multi-billion dollar industries of movies,
21 music, and publishing are horrified.

22 Petitioner's colloquial definition of
23 the word "transformative" is too easy to
24 manipulate. The act also gives creators and not
25 copiers the right to make derivative works that

1 transform the original into new ones with new
2 meaning.

3 If Petitioner's test prevails,
4 copyrights will be at the mercy of copycats.
5 Anyone could turn Darth Vader into a hero or
6 spin off "All in the Family" into "The
7 Jeffersons" without paying the creators a dime.

8 I welcome your questions.

9 JUSTICE THOMAS: Ms. Blatt, you -- in
10 your -- in your brief and even in your opening
11 statement, you focus on purpose in 107. You did
12 not mention character in your opening statement,
13 and you don't give it a primary role in your
14 briefs.

15 What role does it play in your
16 analysis?

17 MS. BLATT: Character, I mean, I think
18 we don't -- we agree with their definition that
19 character of the use of the copying is one of
20 commercial licensing.

21 And the purpose -- I mean, it's just
22 -- I think that they are very similar here. The
23 purpose and character of commercial licensing,
24 the purpose and character of a parody, I guess,
25 is very similar, so I'm not sure that they ever

1 play and haven't seen them play a distinct role
2 in any of the case law or in the common law for
3 that matter.

4 JUSTICE KAGAN: How --

5 MS. BLATT: But -- yeah?

6 JUSTICE KAGAN: -- how can you inquire
7 into purpose and character without thinking
8 about meaning or message? You know, what --
9 what the first factor is really asking you to do
10 is to say what is this use doing, and how can
11 you answer that question without thinking about
12 the use's meaning --

13 MS. BLATT: So we --

14 JUSTICE KAGAN: -- its message?

15 MS. BLATT: -- we absolutely think
16 meaning and message is relevant as it relates to
17 purpose.

18 JUSTICE KAGAN: So that is different
19 from what the Second Circuit said, because I
20 thought the Second Circuit took it out of the
21 analysis entirely, said it was irrelevant to the
22 question.

23 MS. BLATT: No. And I -- I think
24 that's very unfair to three members of Article
25 III who three times said meaning and message is

1 relevant. What they --

2 JUSTICE KAGAN: Three members?

3 MS. BLATT: Three times. What they --
4 yes. Well, it's -- I find it insulting to the
5 Second Circuit panel when they said do not
6 assume the role of art critic and buy this
7 notion of, well, Prince is shy here and he's
8 iconic there. But, of course, meaning and
9 message is relevant as to purpose.

10 I mean, I can just keep reading you
11 quotes, but you know how to read a decision as
12 best as I do. But, on the very same page
13 they're yakking about, it says it has to be
14 reasonably perceived as having a distinctive
15 artistic purpose, one that conveys a new
16 meaning.

17 It's just saying what you can't have,
18 and what we're all unified on, the government,
19 us, and all of our amici, is you cannot have a
20 bare purpose to add new meaning to someone
21 else's art for profit.

22 And if that's all he has, he has
23 nothing else. He has no justification for this
24 other than I wanted to take someone else's art
25 and put my own distinctive style on. And one

1 expert thought that Prince looked happy or dead
2 or, I don't know, larger than life, and one
3 thought he looked -- the artist here thought
4 Prince looked real.

5 And so that is all the Second Circuit
6 had, was they had a district court opinion that
7 went completely, this is a Warhol, and, oh, my
8 God, it's a Warhol, so it's transformative by
9 definition.

10 And the Second Circuit said: No, no,
11 we're not going to do that here. You're going
12 to have to give me something more than this is a
13 Warhol with a distinctive style.

14 JUSTICE ALITO: Well, what's a --

15 JUSTICE KAGAN: And where do you --

16 JUSTICE ALITO: Go ahead.

17 JUSTICE KAGAN: Where do you get the
18 idea that you have to need the -- the original
19 work?

20 MS. BLATT: So where we get the need
21 is from the five times in Campbell that the
22 Court said it, but it's --

23 JUSTICE KAGAN: So Campbell doesn't
24 say that. Campbell says, well, if you need the
25 original work, that's the paradigmatic case.

1 But it doesn't say that if you don't need the
2 original work, the first -- you -- it can't be
3 transformative.

4 MS. BLATT: So, yeah, let me just
5 state our -- our test. When the defendant has
6 an asserted purpose for copying someone else's
7 work, you ask was there -- was the copying of
8 the original needed to best achieve the
9 defendant's -- I'm sorry, yeah, the copier's
10 purpose?

11 Now, in Campbell, it is very
12 significant that they are mis-citing and quoting
13 Campbell. The Court did not hold it could be
14 reasonably perceived as having a new meaning.
15 The Court actually held it could be reasonably
16 perceived as criticizing or commenting on the
17 original.

18 And without that necessary element and
19 the Court five times said it was critical, it
20 was critical, it was the heart, and without the
21 need to mimic, you have no claim to the victim's
22 imagination.

23 And why we know that new meaning could
24 not have been the test --

25 JUSTICE KAGAN: But Campbell starts

1 with a statement of things being new and
2 different and encouraging creativity to give new
3 and different things the kind of fair use pass.

4 And then Google follows up on that and
5 it doesn't talk about -- in -- in -- in -- in
6 your language at all, and it uses Warhol as an
7 example of how somebody can take an original
8 work and make it be something entirely different
9 and that that's exactly what the fair use
10 doctrine wants to protect.

11 So, you know, I take it that Campbell
12 has some language that cuts your way in -- in --
13 in the sense of saying, well, if you are
14 commenting on the original, that's real fair use
15 protection. We almost don't need to go any
16 further.

17 But, if you're not commenting on the
18 original, there's still the -- the possibility
19 under -- under Campbell and then certainly under
20 Google that, yes, this is fair use because it's
21 the kind of thing we think of as truly
22 transformative.

23 MS. BLATT: So I would say you should
24 look at a holding over a dicta that uses a
25 non-statutory word, transformative, when the

1 actual word transformation is in the statute.

2 The dicta that they're relying on is
3 saying we think that when you have a parodic
4 purpose and a parody in the process of shedding
5 light, which I'm just quoting your words,
6 shedding light on the original, you benefit
7 society and create new meaning.

8 But why you know and why all that
9 matters in this case is they had an affirmative
10 defense and they just didn't give you a good
11 reason for copying.

12 And why you know that Campbell just
13 completely rules that out is what mattered in
14 Campbell was exclusively the parodic purpose.
15 If new meaning were and message were relevant,
16 the Court would have been spending the whole
17 time talking about the pretty woman you wanted
18 to meet on the street versus all those not so
19 pretty women you didn't want to meet on the
20 street that were hairy, bald, two-timing Mr. Mix
21 and one was pregnant and wasn't sure whose
22 friend it was. No one was talking about the
23 women's personalities in Campbell.

24 It was just --

25 CHIEF JUSTICE ROBERTS: Was it, Ms.

1 Blatt --

2 MS. BLATT: -- were you trying to
3 criticize. No one was talking about the
4 personalities of George Washington in Folsom
5 versus Marsh. It was just, is this a biography
6 about Washington? And, no, that's too -- that's
7 too -- that's the same purpose.

8 CHIEF JUSTICE ROBERTS: Ms. Blatt, you
9 said that the only thing that's different was
10 the -- the distinctive style of Warhol.

11 I think your friend's point is -- is
12 broader than that. It's not just that Warhol
13 has a different style. It's that unlike
14 Goldsmith's photograph, Warhol sends a message
15 about the depersonalization of modern culture
16 and celebrity status and the iconic -- and --
17 and it goes through the different features to
18 support that.

19 So it's not just a different style.
20 It's a different purpose. One is the commentary
21 on modern society. The other is to show what
22 Prince looks like.

23 MS. BLATT: Yes, I think -- right.
24 And when I say distinctive style, his
25 distinctive style, by definition, is commenting

1 on celebrity and dehumanizing him. And we're
2 saying that that level of what is the
3 personality, what do we perceive in Prince's
4 face, or what we think about when we think about
5 what the author intended, would just drive a
6 giant hole through a derivative work, which, by
7 definition, is a work that adds new meaning to
8 the original.

9 And anytime -- I know you wanted to
10 stick to book versus movies, but any spinoff,
11 any adaptation is -- it just starts with a new
12 meaning. Take "All in the Family." Norman Lear
13 would be turning over in his grave right now.
14 He had more spinoffs than any show in American
15 history. "The Jeffersons" was about a
16 prospering African American family who lived on
17 the East Side. "All in the Family" was about a
18 white bigot living in Queens who couldn't keep
19 up with society. And in his --

20 CHIEF JUSTICE ROBERTS: But they both
21 were -- they both were television shows, right,
22 and they were portraying a particular
23 socioeconomic, whatever, element.

24 This is a whole different thing. The
25 one is a picture. You want it there to show

1 what Prince looks like. So it's a photograph,
2 sure, composed in a particular way and all that.
3 The other, you're not looking at it. The
4 message you have -- if you put them side by
5 side, the message is not the same. The one is
6 Prince's hair is like this. His expression is
7 like that. The other one's entirely different.
8 That's why they put the black around -- around
9 one eye. That's why it's just the disembodied
10 face, all of that.

11 And you don't say, oh, here are two
12 pictures of Prince. You say that's a picture of
13 Prince, and this is a work of art sending a
14 message about modern society.

15 MS. BLATT: That just would turn
16 Folsom versus Marsh on its head, which was they
17 had a completely imaginized autobiography of
18 George Washington, the first president, and all
19 that mattered to Justice Story was that they
20 were depicting -- both works were depicting the
21 life of George Washington.

22 Your test lies madness in the way of
23 almost every photograph to a silkscreen or
24 lithograph or any editing. I guarantee the
25 air-brushed pictures of me look better than the

1 real pictures of me, and they have a very
2 different meaning and message to me.

3 (Laughter.)

4 JUSTICE ALITO: What do you think --

5 CHIEF JUSTICE ROBERTS: Well, I think
6 that's not right. I mean, I think you would
7 look at --

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: -- I think you
10 would look at both of them, and one would say
11 those are pictures of the same woman. This one
12 may look a little better than that one, but it's
13 the same woman, it's for the same purpose, it's
14 to show what she looks like.

15 But, if you had a picture, a
16 photograph of you and then a Warhol, you know,
17 it's just not the same thing. You look at the
18 Warhol thing and you say, oh, that's -- you
19 know, that's --

20 MS. BLATT: The problem --

21 CHIEF JUSTICE ROBERTS: -- counsel.
22 The other one --

23 MS. BLATT: -- the problem with this
24 line of -- of theory is you're just putting
25 photography in its own category and saying

1 photography can just be ripped to shreds because
2 you can always edit a picture and make these
3 arguments, black-and-white versus color, et
4 cetera. But, once you move to any other type of
5 medium, books, movies, and songs, these
6 giants -- there are giants in all these creative
7 fields who by very -- by virtue of the fact that
8 they took someone else's worth -- work and
9 transformed it into shows that are way more
10 valuable.

11 If I could just talk about Factor 4
12 because his answer was just astonishing, that --
13 the first half of his argument was solve
14 everything under Factor 4. The last half of his
15 argument is we win in this case under Factor 4
16 because of a trial in a different market. And
17 imagine my Jeffersons hypothetical. Everything
18 he said about Warhol versus a Goldsmith is the
19 same article you could have said about the
20 audiences that want to watch "Mork and Mindy"
21 versus "Happy Days."

22 (Laughter.)

23 MS. BLATT: That is one character from
24 "Happy Days" involving some Martian who came in,
25 and Robin Williams was so funny that a whole new

1 show was created called "Mork and Mindy." They
2 had nothing to do with one another, different
3 audiences.

4 And under his view, just everything he
5 said about Factor 4 you would have a trial in
6 every single case. And he just basically forces
7 all authors to go into Factor 4 with one hand
8 tied behind their back where there's already a
9 finding that this is a transformative work.

10 Ms. Goldsmith lost a -- lost under
11 summary judgment under Factor 4 because the
12 district court said, hey, you have a
13 transformative Warhol, and it is inconceivable
14 that somebody would want a shy-looking Prince
15 over a -- the same market that wants a happy,
16 iconic Prince.

17 JUSTICE JACKSON: Ms. Blatt --

18 JUSTICE ALITO: Ms. Blatt, what --
19 what do you think the Second Circuit meant when
20 it yakked about art critics, about judges not
21 being art critics? Did -- was the -- was the
22 point that a judge is supposed to determine
23 whether -- a -- a person who knows nothing about
24 either of the works of art is supposed to
25 determine whether they seem different? You

1 can't have testimony, evidence about the meaning
2 of those things?

3 MS. BLATT: So the -- the district
4 court -- I mean, sorry, the Second Circuit had
5 left open very large amounts of type of fair use
6 that I think -- or, sorry, transformative
7 purpose that we would not think is correct,
8 where I think, in their view, you can look at it
9 objectively.

10 What the district court -- sorry, the
11 Second Circuit was saying about don't assume the
12 role of art critic was the notion that you would
13 have such a level of specificity as to the vibe
14 that the -- that the character being depicted
15 was giving off, just like the -- the notion
16 of -- you know, we could talk about all kinds of
17 movies and adaptations. Was the character in
18 Jaws, the book, different than the way the
19 sheriff was depicted in the movie? And we could
20 get -- The Shining is the best example. We know
21 Stephen King had a very specific view of who
22 Jack was. It was basically him and it was a
23 tragedy, and we know what Stanley Kubrick did to
24 it. He said, I don't like your Jack. I'm going
25 to do my Jack, who's a horror -- a horror film.

1 JUSTICE ALITO: Suppose that the Mona
2 Lisa was copyrighted and somebody, a real --
3 really skillful copyist, made almost an exact
4 copy. Most people could never detect the
5 difference, except the -- the copyist changed
6 the color of her dress.

7 If you showed those two to most people
8 today, they would say, well, all right, brown
9 dress, blue dress, red dress, doesn't make any
10 difference, right? That's not really important.

11 But, if you called somebody who knows
12 something about Renaissance art, the person
13 would say that makes a big difference. If
14 that's a blue dress, that's sending a message.
15 If it's a red dress, that's sending a different
16 message.

17 MS. BLATT: So where I think all this
18 goes wrong is you're just focusing on meaning
19 and message independent of the underlying use.
20 In this case, the statute, just by its terms, is
21 talking about use.

22 And in the case of the Conde Nast, the
23 use is to portray Prince. If you reprint our
24 pictures, whether it's Ms. Goldsmith's or Andy
25 Warhol's, you're commenting on the pictures. I

1 don't think you're saying anything about Prince.
2 Your use of those pictures is to describe and
3 discuss the case, same way with the briefs and
4 news articles. These are news reporting or any
5 kind of commentary about the pictures.

6 And in your Mona Lisa example, fair
7 use never -- I mean, nobody sues an artist or
8 sued 2 Live Crew when they were in the recording
9 studio. You have to look at the actual use.
10 And in -- and in -- and in Campbell, the Court
11 said in a parody, fine, we'll give you -- we'll
12 spot you that, but we'll send it back for a
13 trial under Factor 4. But, if you're going to
14 start using it for advertising, that doesn't
15 count as an appropriate use under Factor 1.

16 The same thing was true in Sony. It
17 wasn't the recording that the Court was focused
18 on. It was the time shifting. When you watch
19 it at home, for -- not for money, you know, not
20 for profit, that's the only way you're going to
21 be able to see the show that the networks were
22 -- were offering.

23 JUSTICE BARRETT: So, Ms. Blatt, what
24 about the use in the museum, like a Warhol
25 hanging in a museum, versus the use in Conde

1 Nast and Vanity Fair? Is there any difference?

2 MS. BLATT: Absolutely and for a
3 variety of reasons. The first is Factor 4. And
4 we have the largest museum in the world sitting
5 next to me on my right, who -- who's on my right
6 and not one on my left. Factor 4 is just
7 different. Goldsmith doesn't compete in that
8 market.

9 On Warhol -- if I can just take you
10 away from Prince -- and also now that this
11 Prince Series is famous, I don't see how any
12 museum can't display these. But the Prince
13 Series is very complicated because of the
14 license. But, if their poster child for museums
15 is Andy Warhol, let them tell you what Andy
16 Warhols they're worried about.

17 He got -- he took all the pictures of
18 the famous ones or he got a license. Marilyn,
19 who's I think worth a lot of money now, that
20 picture is in the public domain. That guy
21 didn't renew the copyright, Gene Korman, before
22 he died and the copyright law was passed. So I
23 don't know what they're worried about.

24 If you look at the pictures in the
25 museum brief, it's a bunch of naked women. And

1 no one is trying to say that naked women are
2 going to be taken down from museums. There is
3 nothing that -- I just -- the pop art they were
4 --

5 JUSTICE KAGAN: But maybe there's a
6 different point about museums, and the point is
7 why do museums show Andy Warhol? They show Andy
8 Warhol because he was a transformative artist
9 because he took a bunch of photographs and he
10 made them mean something completely different.
11 And people look at Elvis and people look at
12 Marilyn Monroe or Elizabeth Taylor and Prince,
13 and they say this has an entirely different
14 message from the thing that started it all off.
15 And that's why he's hanging up on those museums.

16 And that's why whatever the Section 4
17 -- the -- the Factor 4 inquiry might be, that's
18 why it's hard to look at it and not say under
19 Factor 1 that's transformation.

20 MS. BLATT: Well, in our view, that --
21 I mean, I think the government might have a
22 different view under museums, but everyone
23 agrees that in museums there's going to be fair
24 use. And there's also particular provisions,
25 mainly 109, that both our brief and the

1 government's brief talk about that separates for
2 display for museum purposes.

3 But, on your -- under where I think I
4 disagree with you is just that the display in a
5 museum of Prince is still copying and still
6 using Ms. Goldsmith's in a way that doesn't
7 justify the copying of Ms. Goldsmith.

8 Now she doesn't have market harm,
9 still fair use, she can't sue. All remedies as
10 to museums and to possession and sale were
11 waived here in the complaint. You read the
12 complaint accurately, but it was all expressly
13 disclaimed.

14 And so all we have here is the
15 commercial licensing. But you also have a
16 disclaimer both in the Second Circuit and in the
17 Supreme Court that Warhol doesn't have a claim
18 -- I'm sorry, that Ms. Goldsmith doesn't have a
19 claim for museums.

20 JUSTICE JACKSON: Can you -- can you
21 --

22 JUSTICE SOTOMAYOR: Counsel -- excuse
23 me. Do you have a claim for the original Prince
24 Series, the original painting?

25 MS. BLATT: So the -- the possession

1 and physical -- the -- it turns on the license
2 because, remember, Warhol had -- there was --
3 these were produced under a license, and so it's
4 unclear whether all 16 were made pursuant to
5 that license or made as drafts.

6 And if Warhol wants to -- and -- and
7 the Warhol -- the Warhol foundation doesn't even
8 own any of these. So the possession and sale is
9 not -- wouldn't be with respect to them.

10 But assuming that they were all
11 lawfully created, they can be -- then this turns
12 under 109(a), which says you can -- you can sell
13 the possession.

14 JUSTICE SOTOMAYOR: So what do you
15 think --

16 MS. BLATT: What's not protected is
17 just the commercial licensing.

18 JUSTICE SOTOMAYOR: Justice -- Judge
19 Jacobs below said he didn't think that the
20 Second Circuit's decision or injunctive relief
21 encumbered the original Prince Series -- I'm
22 quoting him, I think -- or anything that was
23 hanging in museums and things.

24 Do you read -- what's at issue here?
25 What use is at issue? Is it the 2000 and --

1 MS. BLATT: Only the commercial
2 licensing. And I think 46(a) --

3 JUSTICE SOTOMAYOR: What commercial
4 licensing?

5 MS. BLATT: Of Orange Prince in 2016,
6 plus --

7 JUSTICE SOTOMAYOR: Right, plus.

8 MS. BLATT: -- the request for
9 injunctive relief for other similar commercial
10 editorial licensing, so in -- for magazine
11 usages.

12 JUSTICE JACKSON: Can we go back to
13 your --

14 CHIEF JUSTICE ROBERTS: Thank you.

15 JUSTICE JACKSON: Oh.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas?

19 Justice Alito?

20 Justice Sotomayor?

21 Justice Kagan?

22 Justice -- Justice Jackson.

23 JUSTICE JACKSON: Yes, thank you. Can
24 we go back to the necessary condition?

25 MS. BLATT: Mm-hmm.

1 JUSTICE JACKSON: Because I'm still
2 not quite understanding it.

3 First, I thought there was something
4 in the legislative history that I may have read
5 about Congress considering a necessary condition
6 and taking it out. Does that sound familiar to
7 you?

8 MS. BLATT: No.

9 JUSTICE JACKSON: No? Okay. Maybe I
10 made that up.

11 MS. BLATT: That doesn't mean it's not
12 there. The legislative history, though, is very
13 helpful because it's got -- and I highly
14 recommend the Menell, Balganesh, Jane Ginsburg
15 brief because it gives you all of the complete
16 history and background, and they would read it a
17 little beyond relation back where it's necessary
18 to copy, but it basically is limited to these
19 very core usage -- uses -- usages.

20 JUSTICE JACKSON: But what about --
21 what about commentary? That's what I'm worried
22 about, right? The parody, I understand, you
23 would say it's necessary and so that would fall
24 into your fair use test.

25 But something like the Campbell's soup

1 can, where we've already established perhaps he
2 could have used some other item to make the same
3 kind of comment, would that not be necessary?

4 MS. BLATT: No, I think that
5 Campbell's soup fits in two places, and Justice
6 Kennedy's concurrence in Campbell is really good
7 on this point.

8 What Justice Kennedy is saying is that
9 the writer can always pick his target. You can
10 always pick what book review you want to
11 critique or what song you want to parody. So
12 it's never you have to say, well, you didn't
13 necessarily have to pick on my song.

14 So Warhol was entitled to -- to -- to
15 comment on Campbell's Soup as a form of talking
16 about consumerism and make whatever broader
17 point he wanted to make about society.

18 But the Campbell's Soup label, not
19 only is it a completely different purpose
20 because one's an advertising logo that goes on a
21 supermarket shelf to a work of art, but -- and I
22 think the government's brief says this -- he
23 can't have used a generic soup can, he had to
24 use the Campbell's Soup logo.

25 Same as if he had picked Cheerios.

1 It would have been really weird to do, I guess
2 back then they didn't have the giant Cheerios,
3 but you've got to use Cheerios to make your
4 point about consumerism and brand loyalty.

5 JUSTICE JACKSON: You're saying it's
6 still necessary?

7 MS. BLATT: Absolutely necessary.

8 JUSTICE JACKSON: Some -- some branded
9 product?

10 MS. BLATT: And what the government
11 would say, and, obviously, the government can
12 speak for herself, but it's, they would say, at
13 least useful. And we're okay with that. We're
14 actually okay with anything other than the new
15 meaning or message test.

16 JUSTICE JACKSON: But you're -- so --
17 so you're -- the Second Circuit looked at this a
18 certain way. And are you saying they -- they
19 did it wrong?

20 MS. BLATT: No, they did it absolutely
21 correct because they were just rejecting the
22 district court and saying, we're leaving open
23 everything but something that says Prince looked
24 iconic versus Prince looked shy based on these
25 interpretations of what one might reasonably

1 think of Prince's, I don't know, mood or
2 something, or personality.

3 But I read the Second Circuit as way
4 broad, saying, you don't have to comment. I
5 mean, I think they leave open all kinds of stuff
6 like collages, like if you took a picture of
7 Prince and made him into a -- like Goldsmith's
8 Prince and made him into a big butterfly, I
9 think they would say that's completely fair use.

10 So I think, for your purposes, and
11 which is what's driving all the -- you know, the
12 amici being kind of very upset here, is just to
13 reject a new meaning or message test where it's
14 just a bare, unadorned new meaning or message
15 test. It's not tied to any purpose other than I
16 want to make some money off some art and I had
17 some really cool idea here.

18 JUSTICE JACKSON: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Ms. Dubin.

22 ORAL ARGUMENT OF YAIRA DUBIN

23 FOR THE UNITED STATES, AS AMICUS CURIAE,

24 SUPPORTING THE RESPONDENTS

25 MS. DUBIN: Mr. Chief Justice, and may

1 it please the Court:

2 Two questions drive Factor 1: Does
3 the use serve a distinct purpose or instead
4 supersede the original, and what is the
5 justification for copying? Both point against
6 fair use here.

7 The foundation has never tried to show
8 that copying the Goldsmith photograph's creative
9 elements was essential to accomplish a distinct
10 purpose.

11 And the foundation commercially
12 licensed Warhol's Prince to serve the same
13 purpose as the original, depicting Prince in an
14 article about Prince.

15 Using another artist's work as a
16 starting point to turn around and compete
17 directly with their original has never been
18 considered fair. The foundation suggests
19 otherwise, only by urging you to look primarily
20 to what the silk screens mean rather than why
21 the copying was justified.

22 The Court should reject that test. It
23 misreads Campbell, it requires courts to inquire
24 into the meaning of art, and it would
25 destabilize longstanding industry licensing

1 practices that promote the creation of original
2 works. Sequels, spinoffs, adaptations all
3 become fair game if conveying a different
4 meaning confers license to copy.

5 I welcome the Court's questions.

6 CHIEF JUSTICE ROBERTS: Counsel, in --
7 in what way is the government's position
8 different from that of Respondents?

9 MS. DUBIN: We agree with Respondent
10 that the most straightforward way to establish
11 fair use under the first factor is if your work
12 is -- if your use is commenting on the original,
13 criticizing it, or otherwise shedding light on
14 the original, but fair use is an affirmative
15 defense.

16 And we would leave open to defendants
17 in various cases to establish that their copying
18 was justified for other reasons. The problem
19 with Petitioner's approach here is that they
20 haven't tried to establish that the copying was
21 justified, just that the meaning of the works
22 was different. And the Court has never
23 recognized that to be a sufficient justification
24 under the first factor.

25 CHIEF JUSTICE ROBERTS: Well, you

1 agree, don't you, that the -- the Warhol work is
2 not a commentary on the Goldsmith photograph,
3 right?

4 MS. DUBIN: We would agree. And they
5 have never argued that.

6 CHIEF JUSTICE ROBERTS: And Goldsmith
7 had a very different purpose than Warhol. She
8 was photographing Prince. This is what he looks
9 like.

10 Now a lot goes into that composition,
11 but it's not that Warhol's work was just a
12 different composition, was it?

13 MS. DUBIN: We think that the relevant
14 question is what is the use at issue here, and
15 the use at issue here is to depict Prince in an
16 article about Prince, which is very similar to
17 the purpose at issue when Goldsmith took the
18 photo.

19 CHIEF JUSTICE ROBERTS: But, if you
20 really wanted to know what Prince looks like,
21 you wouldn't get that from Warhol's depiction.
22 He doesn't have one eye that's, you know,
23 blacker than the other. He -- his head doesn't
24 float in the air as it does in Warhol's but not
25 in Goldsmith's. And that's because -- I think

1 your friend on the other side would say it's
2 because the purpose of that picture is not to
3 show you what Prince looks like. It's supposed
4 to show you a particular perspective on the pop
5 era and celebrity status. No?

6 MS. DUBIN: Those changes that Your
7 Honor is discussing are the same sorts of
8 changes that really accompany the adaptation or
9 transformation of any derivative work. You can
10 imagine all of those comments being made about a
11 book being transformed into a movie. Those are
12 comments about a change in style, a change in
13 aesthetic appearance, and things of those
14 nature.

15 That has never been thought sufficient
16 under the first factor to be a different
17 purpose.

18 JUSTICE JACKSON: What about
19 character? Is that sufficient for character?
20 You talk about them together. And so is
21 character doing different work at all in this
22 analysis?

23 MS. DUBIN: The Court has long
24 considered them together as a unit and then done
25 an inquiry into purpose and character together.

1 We think that if you were inclined to do so, you
2 could look at character as focusing more on the
3 commercial nature of the works -- of the use at
4 issue and the purpose as looking to, you know,
5 what was the justification for copying.

6 But, either way, you would come to the
7 same analysis here, which is that this is a
8 highly commercial use that usurps the market for
9 the original and that the justification for
10 copying isn't present.

11 JUSTICE JACKSON: But the meaning or
12 message you say is not indicative of character?

13 MS. DUBIN: That's not our position.
14 The position is that meaning or message can be
15 relevant insofar as it assists the Court in
16 determining what is the purpose and character.
17 And I think that's exactly what the Court looked
18 at in Campbell.

19 In Campbell, the Court looked at the
20 meaning or message of the 2 Live Crew song to
21 determine if it was, in fact, a parody and
22 therefore had purpose and character that we're
23 looking for under Factor 1.

24 JUSTICE KAGAN: The -- the purpose of
25 all copyright law is to foster creativity. So

1 why shouldn't we ask at Factor 1, not in a
2 determinative way, there's Factors 2, 3, and 4,
3 but in Factor 1, well, is this really creative?
4 Is this thing we have here something new and
5 entirely different? That seems -- you know, it
6 seems to fit right into why we're having this
7 inquiry in the first place.

8 MS. DUBIN: The purpose of the
9 copyright law are to serve as the engine of free
10 expression, but the balance that Congress struck
11 in achieving that is to say we do that best by
12 protecting the rights of original creators and
13 protecting the incentive to create with a safety
14 valve --

15 JUSTICE KAGAN: Except when we don't.
16 I mean, we protect original creators except when
17 we don't, and the purpose of the entire thing is
18 to foster creativity. So why shouldn't we ask
19 whether, at the follow-on level, there really is
20 creativity here?

21 And then we can ask a whole bunch of
22 other questions about -- about markets and --
23 and so forth, but -- but to -- to take that out
24 of the analysis, to say it doesn't matter that
25 some -- that the follow-on work is -- is -- is

1 adding something of real significance to
2 artistic expression, why would we do that?

3 MS. DUBIN: I think the most
4 significant difficulty with -- with Petitioner's
5 approach is not -- we're not trying to take it
6 out of the occasion. It's not about putting
7 points on the board. It's whether it goes to
8 the purpose and character of the use.

9 And I think -- maybe this helps with
10 what Your Honor is driving at. In the statute,
11 there is a specific right given to the copyright
12 holder to derivative works, to prepare
13 derivative works, and that provision looks to
14 whether a secondary work transforms -- that's
15 the language of the statute -- the original. So
16 Congress thought about this question and gave
17 that right to the original copyright holder.

18 Someone who wants to make a
19 creative -- a very, very creative work can go
20 and license that work to use it, or they can
21 justify why they needed to take this work or why
22 it was essential or highly useful to take this
23 work in order to create the work.

24 But what's going on here is you have
25 someone who's just saying my second work was

1 very creative, my second work was transformative
2 in the colloquial sense. And that doesn't fit
3 within the definition of derivative works versus
4 the safety valve for fair use.

5 JUSTICE JACKSON: Can I -- can I just
6 paraphrase what I thought I heard you say?
7 Because I'm not an expert in this area.

8 So the whole of copyright law itself
9 in this area is to give the person who has the
10 copyright the right to make other uses of the
11 thing. It's sort of like a property interest in
12 -- I get to -- I, because I hold the copyright,
13 get to make other uses. So, when someone else
14 makes another use of your thing, you then can
15 question, you then say: Why are you using my
16 thing to do your work?

17 And I think your argument is, if that
18 person says I'm using your work because I have a
19 better idea or because I want to add a little
20 thing to it or because I want -- that's not
21 going to be good enough. They have to say I'm
22 using your work for some other purpose that's --
23 that's outside of or in addition to I want to
24 add a new meaning.

25 Am I right -- at a very high level of

1 generality, did I sort of get what your point
2 is?

3 MS. DUBIN: I think you got it exactly
4 right, Justice Jackson. That -- that is our --
5 that is our point. The point is that you have
6 to justify the copying, not just explain why
7 your work is a creative addition to the world of
8 creative additions. And I think that's
9 important because of the derivative work right
10 that I was discussing, and it's important
11 because of sort of how the licensing regimes
12 work across industries where there are many,
13 many very, very creative people who are
14 producing derivative works, whether it's the one
15 that Respondents' counsel already addressed, but
16 it's -- it's -- you know, it's Spielberg, it's
17 Scorsese, it is so many people who do tremendous
18 creative additions to the work that they're
19 using, but because they don't have the sort of
20 justification for copying, they need to get a
21 license.

22 JUSTICE SOTOMAYOR: How do we get --
23 how do we fit your answer to the following
24 scenarios, okay? Do you acknowledge that a
25 commercial licensing would be fair, such as an

1 authorized reproduction of Orange Prince in an
2 art magazine or in a book about Warhol?

3 MS. DUBIN: We would analyze that by
4 running through the four fair use factors, and I
5 think in that case --

6 JUSTICE SOTOMAYOR: How would you deal
7 with the first one? Because it is a commercial
8 use. It's use of a painting that you say is a
9 derivative -- derivative work. So how do we
10 explain that?

11 MS. DUBIN: Right. I think Factor 1
12 and Factor 4 might play out differently than
13 here. Factor 1, you might say the purpose is to
14 say something about Warhol, to teach about
15 Warhol. And under Factor 4, you might say that
16 it's very unlikely that that would harm the
17 market for the Goldsmith photograph because her
18 photograph could not be used for that sort of
19 occasion.

20 JUSTICE SOTOMAYOR: So how about the
21 commercial license for Orange Prince, like
22 happened here? Why do you say it doesn't fit
23 for a magazine about Prince's life?

24 MS. DUBIN: Because the purpose of the
25 Goldsmith photograph is to depict Prince, and

1 while there might be differences in how she did
2 it and how Warhol did it, they were both being
3 used in this -- when you compare the two, the
4 work and the -- and the use, they're both being
5 used for the purpose of depicting Prince. Let's
6 have it --

7 JUSTICE SOTOMAYOR: So let's go back
8 to Vanity Fair, which was -- it was paid for,
9 but assume it wasn't, okay? But Vanity Fair was
10 an article about Prince, but its focus was on
11 his superstar status, his consumer sort of life.
12 It seems as if those purposes coexisted -- not
13 coexisted but were joined at the hip with using
14 a Warhol because Warhol was known for making
15 commentary on the very same issues.

16 So did they -- why would they have
17 needed a license back then?

18 MS. DUBIN: I think the key to
19 thinking about this case is what is the
20 justification for borrowing. Why did you need
21 to take the creative elements of the Goldsmith
22 photograph? So, to produce the Warhol version
23 of Prince, Warhol could have taken a photograph
24 of Prince himself. He could have used other
25 photographs. He didn't need to reproduce the

1 creative elements of the Goldsmith photograph to
2 have that effect.

3 JUSTICE ALITO: Well, what if Andy
4 Warhol -- what if Prince would not have sat for
5 a photo by somebody sent by Andy Warhol, and
6 Andy Warhol wanted to comment on Prince, and
7 what he needed was a full-face portrait looking
8 straight ahead, and I don't know how many of
9 those were available, but he had to take one of
10 those, so he chose this one?

11 Wouldn't -- wouldn't he have --
12 wouldn't it be highly necessary for him to take
13 one of those photos to do what he wanted to do?

14 MS. DUBIN: You might have a different
15 argument in a case where, you know, someone
16 has -- has passed away and there's only one
17 version of the photograph that you could
18 possibly use. That might be a different case,
19 and you might be able to establish a
20 justification for borrowing.

21 And, like I said, we don't want to
22 foreclose additional justifications working, but
23 this is a very different case. What happened
24 here is that Vanity Fair, because they had a
25 license, picked this photograph and gave it to

1 Andy Warhol so that he could produce an image of
2 it. And that's the opposite of having a
3 justification for borrowing. That's I wanted to
4 start here because it was a very good photograph
5 of Prince, and that enables Andy Warhol's
6 duplicative methods because it works to
7 reproduce that as a photographic negative.

8 JUSTICE ALITO: Is that dependent on
9 the fact that he could have picked another
10 photo? Do we know that there were other photos
11 that met the criteria that I mentioned?

12 MS. DUBIN: There were other full --
13 full-face photographs of Prince. I think
14 they're in Respondents' -- in Petitioner's
15 brief. And I also think very much in his -- in
16 Andy Warhol's life, after the 1960s, when he was
17 sued for copyright infringement, he often took
18 photos of the people he was going to paint, and
19 so that, you know, was Dolly Parton, Jane Fonda,
20 and many other celebrities.

21 JUSTICE BARRETT: So I have a question
22 about the derivatives. When I asked your friend
23 on the other side about derivative use and the
24 tension between the transformation point here,
25 and you also pointed to the language that I

1 asked Mr. Martinez about, the transformative in
2 the derivative use provision, he responded to
3 me, well, sure, but, you know, that's also
4 subject to the fair use statute, so they have to
5 be read, you know, in tandem.

6 What's your response to his point?

7 MS. DUBIN: We think they have to be
8 read in tandem, although the word "transform" is
9 in the provision for derivative works, and it is
10 not in the fair use factors. It was, I think, a
11 shorthand for the purpose and character inquiry
12 drawn from Judge Leval's articles, which all
13 look to transformative purpose, not
14 transformative content, which is, I take it, how
15 they are framing the case.

16 I do think that if you are sort of
17 thinking about how to balance those rights and
18 carve out space, you would never want a reading
19 of the fair use safety valve that totally
20 eviscerates the derivative work rights. And
21 that's what we're particularly concerned about
22 with Petitioner's test here, because so many
23 derivative works can be described as conveying
24 new meanings or messages.

25 JUSTICE KAVANAUGH: You said in your

1 opening that the position of Petitioner would
2 destabilize longstanding industry practice. So
3 why -- can you flesh that out, why you think
4 that?

5 MS. DUBIN: Yes, and that follows
6 right up from what I was just saying to Justice
7 Barrett, which is across industries there's --
8 one of the -- the greatest incentives given to
9 original -- original artists to create
10 particularly in spaces where their original work
11 maybe doesn't have the same commercial viability
12 as derivatives, the incentive is the licensing
13 of derivatives, so whether that's photographers,
14 books who are hoping that a movie takes their
15 book, things of that nature.

16 All of those, I think, would be
17 subject to a different meaning or message
18 analysis like Petitioner proposes here. And so
19 it's whether, I think Justice Kagan said
20 earlier, the -- the plot is changed, the story
21 line is altered, new characters are added. It
22 would seem to me it's very hard to distinguish
23 those from what's going on here, which is
24 suggesting that a change in a particular face
25 from vulnerable to iconic is enough to justify

1 fair use under the first factor.

2 And, you know, Petitioner has said
3 today that it's really more about putting points
4 on the board. But the way that I had understood
5 their test is that they said that that sort of
6 meaning or message renders fair use presumptive,
7 and that's in their brief at 40. And I think
8 that's the particular danger of an approach like
9 that as to how much meaning or message could
10 tilt the test and how frequent you'd be able to
11 find a new meaning or message and how hard it
12 would be to disprove.

13 JUSTICE JACKSON: So, if we agree with
14 you that the first -- about the mistakes or
15 affirm on the grounds of the first factor, why
16 wouldn't we just vacate and send it back and let
17 the Second Circuit go ahead and do all the other
18 aspects of the analysis?

19 You asked us to affirm. And I'm just
20 wondering, since it wasn't briefed, two, three,
21 four, why -- why wouldn't we send it back?

22 MS. DUBIN: If you agree with us?

23 JUSTICE JACKSON: Yes. Are you asking
24 to affirm?

25 MS. DUBIN: Yeah.

1 JUSTICE JACKSON: Yes. And my
2 question is, why -- why are you asking to affirm
3 the entirety of the Second Circuit's analysis in
4 this case as opposed to sending it back and let
5 the rest operate? Is that not what's happening
6 here?

7 MS. DUBIN: The Second Circuit made --
8 ruled on the second, third, and fourth
9 factors --

10 JUSTICE JACKSON: Correct.

11 MS. DUBIN: -- and they did so
12 correctly. So there's no reason I --

13 JUSTICE JACKSON: But that part is not
14 briefed. I mean, we haven't gone through the
15 second -- is that -- is the second, third, and
16 fourth factors briefed before us now?

17 MS. DUBIN: Petitioner only sought
18 certiorari on the first factor. So I think, if
19 you were going to reverse or vacate, you would
20 do so on the first factor, but I think it is
21 well within the Court's purview to affirm based
22 on agreeing with one of -- either how we have
23 approached fair use under the first factor or
24 with agreeing with the Second Circuit and then
25 affirming on the rest of the Second Circuit.

1 JUSTICE JACKSON: But would we go
2 through the rest of the analysis? We wouldn't
3 talk about it, we would just affirm and move on?

4 MS. DUBIN: I think that would be what
5 you would do if you were limiting yourself to
6 the way that Petitioner has framed this case.

7 If there were things at the point the
8 Court wanted to clarify to help the lower courts
9 in this difficult area on a case-by-case basis
10 in the second through fourth -- second through
11 factors, the Court could -- could certainly do
12 that.

13 JUSTICE SOTOMAYOR: Can -- can I ask
14 the question slightly differently, which is
15 let's assume we adopt Petitioner's first
16 argument, the argument first raised here,
17 because he seemed to be saying in his briefs
18 that meaning and -- that meaning trumps
19 everything else, but, here, he says it's only
20 one variable.

21 Let's assume that we were to find that
22 the Second Circuit should have given more weight
23 to meaning, and so that the first factor is at
24 either an equipoise or slightly favors him or
25 whatever, or favors him a lot, why would we

1 affirm and not vacate and remand?

2 MS. DUBIN: So we think that the --
3 the Second Circuit did consider meaning or
4 message. We agree with Respondent. They --
5 they do mention that they considered meaning or
6 message several times in their analysis.

7 But, if the Court found that they
8 didn't weigh it heavily enough or you agree with
9 the position being put forth by Petitioner
10 today, then I think the right answer would be to
11 vacate and have the court run the analysis with
12 that change on Factor 1.

13 JUSTICE SOTOMAYOR: Okay.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas, anything further?

17 Justice Alito?

18 Justice Sotomayor, anything further?

19 Justice Kagan?

20 Justice Gorsuch?

21 JUSTICE GORSUCH: I am a little
22 uncertain about the government's position on
23 what it means in Factor 1. The purpose of the
24 use could mean, as we've discussed, they are
25 both being used for identifying an individual in

1 a magazine, okay, or it could mean the purpose
2 of the use could have something to do with the
3 artistic message being conveyed.

4 I've heard bits of both flavors from
5 -- from both sides in this case. And -- and,
6 certainly, the Second Circuit thought that the
7 -- the latter idea, that there's some artistic
8 message that's relevant at Step 1 is part of the
9 analysis.

10 And what is the government's position?
11 I -- I -- I -- I -- I could see possibly saying
12 oh, no, it's only that it's being used for
13 commercial purposes in a magazine. It's the
14 same use of the image and that any differences
15 between the images is something that we take
16 account of maybe in -- in Factor 3, which has to
17 do with the amount and substantiality of the
18 portion used.

19 Can you help clarify that for me?

20 MS. DUBIN: Yes. We think it's
21 principally the purpose and character of the
22 use. It's a broad inquiry. And we're not
23 trying to carve out certain justifications from
24 not being made.

25 But what you are looking at is whether

1 you have a purpose along the lines that is
2 distinct, right, it's distinct from the original
3 purpose, and that the use at issue was essential
4 for you to copy from the underlying work to
5 accomplish that purpose.

6 And I think that the Court -- what the
7 Court --

8 JUSTICE GORSUCH: Yeah, I'm going to
9 stop you.

10 MS. DUBIN: Yeah.

11 JUSTICE GORSUCH: I'm sorry. But that
12 -- that -- that isn't helpful for me.

13 MS. DUBIN: Okay.

14 JUSTICE GORSUCH: Okay? And -- and
15 maybe I'm being too dramatic in the difference
16 between the two, but I -- I do see a way to read
17 Number 1, the first factor, in two very
18 different ways. The purpose of the use could be
19 the purpose of this particular use in a
20 commercial setting, right, I mean, because it
21 does go on and talk about commercial versus
22 non-commercial.

23 And, here, we would say they are both
24 being used in magazine covers to identify an
25 individual. Okay? Done.

1 Or one could say: Ah, but Andy Warhol
2 had all sorts of different subjective meanings
3 and a reasonable viewer could take away
4 different meanings from them.

5 Is that second thing relevant at all
6 at the first step in the government's view? And
7 I'd kind of like a yes or a no if I can get one
8 out of you.

9 MS. DUBIN: Can I say yes to part of
10 your question and explain why? Is that okay?

11 (Laughter.)

12 JUSTICE GORSUCH: You -- you can do
13 whatever you want. I was just hoping for a yes
14 or no.

15 (Laughter.)

16 MS. DUBIN: Well, the -- the reason
17 that I -- the reason that I would like to do
18 that is because you asked about his subjective
19 intent, but then you also asked about the
20 reasonable perception of the audience. So I
21 don't think the subjective intent is relevant,
22 so that's a no to that part of the question.

23 JUSTICE GORSUCH: All right.

24 MS. DUBIN: But, to the subject, the
25 audience's perception, I think it can be

1 relevant and here is how. I think Campbell's
2 Soup Cans is a very good example of this.

3 In Campbell's Soup Cans, the effect on
4 the viewer, the effect on the audience depended
5 on the incorporation of -- of a very well-known
6 commercial advertising logo. It wouldn't have
7 worked if you had --

8 JUSTICE GORSUCH: Well, let me stop
9 you there. And I'm sorry to interrupt again.
10 But, see, Campbell's Soup seems to me an easy
11 case because the purpose of the use for Andy
12 Warhol was not to sell tomato soup in the
13 supermarket. It was to induce a reaction from a
14 viewer in a museum or in other settings.

15 And the difficulty of this case is
16 that this -- this particular image is being used
17 arguably maybe for the same purpose, to identify
18 an individual in a magazine, okay, in a
19 commercial setting.

20 So the Campbell's Soup one seems to me
21 a very different case. This is a much harder
22 case. So back to my question.

23 MS. DUBIN: So I completely agree with
24 you on the purpose of the use being very
25 different in the Campbell's Soup Can analysis,

1 which makes it an easier case. But -- and also,
2 I was also using the Campbell's Soup Can as an
3 example of why the effect on the audience would
4 matter. And the effect on the audience in the
5 Campbell's Soup Can case, it would matter that
6 you incorporated from a preexisting commercial
7 advertising logo as opposed to made your own
8 logo, made up a logo.

9 Whereas, here, if he had taken his own
10 photograph of Prince, that wasn't necessary for
11 the effect, which is a very different type of
12 analysis.

13 I hope I answered Your Honor's
14 question.

15 JUSTICE GORSUCH: You've done a great
16 job. Thank you.

17 CHIEF JUSTICE ROBERTS: Yes, Justice
18 Kagan.

19 JUSTICE KAGAN: Can I just ask you
20 about that? Because you said it wasn't
21 necessary. But I had thought that one of the
22 differences between these two briefs was that
23 Ms. Blatt says it has to be necessary and that
24 the government says, well, it -- it's a --
25 necessary is -- is a significant part of the

1 question, but, even if it's not necessary, it
2 can satisfy Factor 1.

3 MS. DUBIN: You're exactly right.
4 That is a difference between us. I think that
5 -- and -- and the answer in the Campbell's Soup
6 Can analysis is probably that it's not necessary
7 that he needed to use the Campbell's soup can
8 but that -- because maybe he could have used
9 Cheerios, but that it was highly useful to use
10 that type of advertising logo.

11 I think the best example of those --
12 of those distinctions is in a book review, where
13 it's not necessary to incorporate the underlying
14 book. You can certainly imagine publishing the
15 book review without incorporating some excerpts
16 from the underlying work, but then you'd be
17 telling the reader things as opposed to showing
18 them. So it makes that far more effective to
19 the audience.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh?

22 JUSTICE KAVANAUGH: So the exact words
23 we use on that question in the opinion, if we
24 were to agree with your side, will undoubtedly
25 be the subject of a lot of debate, so I want to

1 get it exactly right.

2 So what are you -- what are you
3 advocating? I've heard you say necessary,
4 essential, or highly useful. Is that the
5 formulation?

6 MS. DUBIN: We would say that's a
7 great formulation or you could say necessary or
8 at least useful or you could say just essential,
9 and I think that covers it. But I think the
10 best way to explain what the --

11 JUSTICE KAVANAUGH: Okay. Those are
12 going to be in --

13 (Laughter.)

14 JUSTICE KAVANAUGH: Those are very
15 different in -- you know, in some courts of
16 appeals.

17 MS. DUBIN: So the reason --

18 JUSTICE KAVANAUGH: So what's your --
19 what's your best, like you -- your best answer
20 as to what the best formulation is from the
21 perspective of the United States for the opinion
22 --

23 MS. DUBIN: If you're going --

24 JUSTICE KAVANAUGH: -- if your side
25 wins?

1 MS. DUBIN: If you're going for the
2 straightforward clarity of a one-word answer, I
3 would say essential. The reason we use --

4 JUSTICE KAVANAUGH: No, you can use
5 multiple words. What's the formulation?

6 (Laughter.)

7 MS. DUBIN: The reason we said
8 necessary or at least useful and the reason we
9 used that formulation was because, in a lot of
10 cases and a lot of the most straightforward fair
11 cases, it will be necessary. And I think that's
12 why Respondent has used that word.

13 We think that there are cases in which
14 it is essential or highly useful and those
15 should also count.

16 JUSTICE KAVANAUGH: So -- so --

17 JUSTICE KAGAN: I always thought
18 necessary and essential were synonyms. So, if
19 you say necessary and you say essential, that to
20 me means the same thing, which is something
21 different from useful or even highly useful.

22 MS. DUBIN: We think that highly
23 useful works too. And -- and, like I said, I
24 think the reason that a highly useful test would
25 work is in the book review context that I gave

1 Your Honor earlier, which it's not necessary,
2 and I think in a lot of examples that's the
3 case.

4 I think using the word "necessary"
5 does lead to more straightforward results in the
6 mine-run of cases.

7 JUSTICE KAVANAUGH: Okay. I'm going
8 to really pin you down again on that.

9 MS. DUBIN: Yes.

10 JUSTICE KAVANAUGH: Necessary or
11 highly useful or necessary or -- or at least
12 useful?

13 MS. DUBIN: We would say necessary or
14 at least useful. And the important thing is
15 that it's an affirmative defense. So the
16 defendant in the case is giving a justification
17 for why their borrowing is necessary.

18 What really separates us from
19 Petitioner is not necessary versus useful or
20 essential. It's that we think you need that
21 justification for borrowing, right? We think
22 you need some reason why it was essential for
23 you to incorporate the preexisting work.

24 I think the best formulation given
25 your considerations here is necessary or at

1 least useful. That's how I would phrase it for
2 your opinion.

3 JUSTICE KAVANAUGH: Very helpful,
4 thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 JUSTICE BARRETT: So you would leave
8 out "essential"?

9 (Laughter.)

10 MS. DUBIN: I was deferring to Justice
11 Kagan, who sees "necessary" and "essential" as
12 synonyms, but I think that "essential" would
13 work as well.

14 JUSTICE BARRETT: Okay. Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Jackson?

17 JUSTICE JACKSON: And can I just
18 clarify, essential to incorporate the existing
19 work in order to what? In order to achieve a
20 purpose that's different than I just have a
21 better idea, right, in order to achieve a
22 purpose that transcends a changed message or
23 meaning, right?

24 MS. DUBIN: That's exactly right. In
25 order to achieve a distinct purpose.

1 JUSTICE JACKSON: A distinct purpose?

2 Thank you.

3 MS. DUBIN: Yes. That's exactly
4 right.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Rebuttal, Mr. Martinez?

8 REBUTTAL ARGUMENT OF ROMAN MARTINEZ
9 ON BEHALF OF THE PETITIONER

10 MR. MARTINEZ: Thank you, Your Honor.

11 I want to address three things,
12 meaning or message/purpose, indispensability,
13 usefulness, necessity, and then the consequences
14 of this case.

15 With respect to meaning or message, I
16 understood my friend, Ms. Blatt, to concede, she
17 said it was absolutely true that you could
18 consider meaning or message at Factor 1 as part
19 of the -- the purpose inquiry. She said that.

20 I took that to be a very big
21 difference from what she said in her brief. In
22 page 2 of her brief, she says it would be a
23 fool's errand to conduct that analysis. And, on
24 page 22 of her brief, she says that courts are
25 just incapable of doing this.

1 I think that's a very significant
2 concession, and we agree with that concession.
3 We think that it requires a reversal in this
4 case or at least a vacatur of the Second
5 Circuit's ruling because, on pages 22 to 23 of
6 the Second Circuit's analysis, I think they were
7 unambiguously saying that courts cannot try to
8 do this meaning or message inquiry and then they
9 go on to say, instead, you need to look at the
10 degree of visual similarity.

11 Now I'm not sure what the government's
12 position exactly is, whether they've made the
13 same concession or not. As I understood the
14 government's position with respect to purpose,
15 they continue to hold the line that the level of
16 generality has to be, these are two portraits of
17 Prince, therefore, they are the same purpose,
18 which I understand to mean that if you have two
19 different portraits of Prince conveying very
20 different meaning or messages, it doesn't
21 matter.

22 In other words, they would still
23 excommunicate meaning or message from the Factor
24 1 analysis. We don't think that's right. We
25 don't think it's consistent with the text,

1 Campbell, Google, all the things that we've
2 already talked about.

3 Secondly, with respect to
4 indispensability, I understood my friend, Ms.
5 Blatt, again, to concede that the position she
6 took in her brief is -- is not the right one or
7 at least to say she's fine with the government's
8 much different and lower standard. She went
9 from indispensability in the brief to usefulness
10 here at oral argument.

11 With respect to whether usefulness is
12 required, a couple things. First of all,
13 Goldsmith herself conceded usefulness. And if
14 you just look at -- at page 76a of the Petition
15 Appendix, the district court quoted her as
16 conceding usefulness and even perhaps as
17 conceding necessity.

18 Secondly, usefulness, at least in the
19 sense that it's been discussed here today, has
20 not been briefed, has not been argued at any
21 stage in the case. We heard a long colloquy on
22 exactly what the varying different standards
23 mean.

24 If you thought that that was some sort
25 of requirement, at a minimum, we would need to

1 have a fair opportunity to satisfy that
2 requirement once you tell us what the law is.

3 As to what the law should be with
4 respect to usefulness, we think the real way --
5 the best way to look at this is it's a question
6 of justification. And the way you should get
7 the answer to what kind of justification is
8 required, if you look at Judge Leval's article
9 at page 1111, he talks about the justification
10 for the taking being the addition of new meaning
11 or message. We think that's what Campbell had
12 in mind.

13 Essentially, you're justified in -- in
14 borrowing at least under Factor 1 to some extent
15 if you are -- if -- if you're doing something
16 more than just avoiding the drudgery of coming
17 up with something new on your own.

18 And, finally, with respect to
19 usefulness, just on the facts, we absolutely
20 would satisfy this not just because she conceded
21 it but because, of course, it's useful for --
22 for an artist -- for an artist to use an artist
23 reference. The whole purpose of an artist
24 reference is to make use of that because it's
25 useful in creating the work of art, the second

1 work of art. So, of course, it was -- it was
2 useful.

3 Goldsmith herself concedes in her
4 brief that we needed to use a picture of Prince.
5 And I think both the government and Goldsmith
6 said that, hey, they could have used any old
7 picture of Prince, and the examples they give is
8 to point to a bunch of other copyrighted
9 pictures of Prince that appeared in our brief at
10 pages 16 to 17.

11 But it can't be the case that their
12 answer is that we should have borrowed from
13 someone else and then we'd be having the same
14 case with a different photographer. I think the
15 reality, Justice Alito, to your point is any
16 picture of Prince that was out there in 1984
17 when Warhol was creating this work, there's
18 every reason to believe it would have been
19 copyrighted.

20 The copyright attaches in the
21 photograph at the moment the photograph is
22 taken. There's no reason to believe that there
23 would have been any sort of non-copyrighted
24 option.

25 Finally, Your Honors, consequences.

1 On consequences, it's really important to
2 understand that the creation of the Warhol works
3 is directly at play in this case. If you look
4 at the request for relief, both sides requested
5 essentially an adjudication of who owns the
6 copyright. That turns on whether it was -- the
7 -- whether the -- Warhol acted lawfully or
8 unlawfully at the moment of creation.

9 We sought a declaratory judgment, we
10 sought summary judgment as to all 16 works, not
11 just the two works, Orange and Purple, that are
12 at issue here. We sought a declaratory judgment
13 as to all 16 works. We won that declaratory
14 judgment. They appealed and they got that
15 victory overturned.

16 Ms. Blatt says that she's -- in some
17 other segments of the case, maybe it was at oral
18 argument, maybe it was at briefing, she sort of,
19 like, changed the relief she was seeking. It
20 doesn't matter. We sought a declaratory
21 judgment on all 16 works. We won that. That's
22 in play. And the creation matters.

23 I think the other reason the creation
24 matters, Justice Barrett, to your question, is
25 because it directly -- it directly governs the

1 display question when you're talking about
2 museums.

3 The reason a museum can display a work
4 under -- under Section 109 is because it was
5 lawfully made. So the question is, at the
6 moment it was made, was it lawful?

7 The copyright question of who owns the
8 copyrights here turns on that. If the -- if
9 Warhol infringed the copyright, it wasn't
10 lawfully made, Your Honors, this case has
11 meanings -- has implications beyond just Warhol.
12 It affects all artists and especially
13 contemporary artists. We ask you to reverse.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel. The case is submitted.

16 (Whereupon, at 11:45 a.m., the case
17 was submitted.)

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