

No. 21-869

IN THE
Supreme Court of the United States

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

Petitioner,

v.

LYNN GOLDSMITH AND LYNN GOLDSMITH, LTD.,

Respondents.

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

**BRIEF FOR THE ROBERT RAUSCHENBERG
FOUNDATION, ROY LICHTENSTEIN
FOUNDATION, AND BROOKLYN MUSEUM
AS *AMICI CURIAE* SUPPORTING PETITIONER**

WILLIAM E. EVANS
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210

JAIME A. SANTOS
Counsel of Record
ANDREW KIM
GOODWIN PROCTER LLP
1900 N Street NW
Washington, DC 20036
jsantos@goodwinlaw.com
(202) 346-4000

Counsel for Amici Curiae

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INTEREST OF THE AMICI CURIAE¹

Amici curiae the Robert Rauschenberg Foundation, Roy Lichtenstein Foundation, and Brooklyn Museum advance the visual arts in a broad range of media, subjects, styles, materials, and techniques. *Amici* believe that a vibrant artistic culture is essential to the flourishing of a democratic society, and that significant new art emerges through dialogue with existing art. Accordingly, *amici* have submitted their views as *amici curiae* in important copyright and fair-use cases. See, e.g., *Google LLC v. Oracle Am. Inc.*, 141 S. Ct. 1183 (2021); *Cariou v. Prince*, No. 08-cv-11327, 2013 WL 8180422 (S.D.N.Y. filed Oct. 22, 2013).

Amici have a strong interest in the question presented by the petition for a writ of certiorari. The Copyright Act's fair-use provision carefully balances the limited protections of copyright law against the free-speech and expressive interests at stake in the creation and display of artworks. While this Court's precedents have been careful to sustain that critical balance, the Second Circuit's decision has upset it, along with the settled expectations of artists, art foundations, and museums across the country that have long understood that using existing imagery to create new expression falls comfortably within the fair-use doctrine. For the reasons stated in this brief, *amici* respectfully urge the Court to grant review.

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

INTRODUCTION

Artists are frequently inspired by what they see, and that inspiration sometimes involves use or appropriation—when one artist uses or builds on existing imagery to create a new work of her own. One need look no further than *amici*'s own artworks or exhibitions to see this phenomenon in action. Robert Rauschenberg's pathbreaking "Combines" integrate quotidian objects (newspaper clippings, taxidermied animals, etc.) into traditional painted canvases, while Roy Lichtenstein's Pop-Art masterpieces ironize recognizable comic-book and advertising images. And the Brooklyn Museum not only owns but regularly presents to the public numerous works dependent on the appropriation and transformation of existing imagery, as in its 2010 exhibition *Andy Warhol: The Last Decade*, and its 2021-2022 exhibition *Andy Warhol: Revelation*.

The fair-use doctrine, which was codified in the Copyright Act, recognizes and protects that type of copying use as long as the new work "transform[s]" the original by "add[ing] something new and important." *Google LLC v. Oracle Am. Inc.*, 141 S. Ct. 1183, 1203 (2021). That "something new" has long been understood to mean a change that imbues the new work "with a further purpose or different character, altering the first with new expression, meaning, or message." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). This type of creative appropriation is "consistent with that creative 'progress' that is the basic constitutional objective of copyright itself." *Google*, 141 S. Ct. at 1203 (quoting U.S. Const. art. I, § 8, cl. 8).

Relying on these principles, *amici* and others who create, display, or safeguard artistic works have long understood that the fair-use doctrine protects one art-

ist's creative use of another's imagery to provide it with new meaning or expression. The Second Circuit's decision in this case upends that settled understanding. Departing from the principles laid down by this Court and followed by other circuits, the panel held that the Prince Series could not be transformative as a matter of law because a side-by-side comparison test convinced the panel that a photograph of the musician Prince taken by Lynn Goldsmith remained the "recognizable foundation" of the Prince Series. App. 26a. The panel reached this conclusion despite acknowledging that there were significant aesthetic differences between the works, and without considering contextual evidence (*i.e.*, expert opinion) that could shed light on whether those differences imbued the new works with a different expression or message than Goldsmith's photograph.

The panel's decision is contrary to the entire nature of artistic practice, as is evident from centuries of artistic tradition. It erroneously renders context meaningless in the fair-use analysis, and therefore undermines the careful balance struck by this Court's fair-use decisions. The decision neuters an historically robust fair-use defense and exposes artists, as well as the institutions that display their works, to new and dramatically expanded liability for copyright infringement. Unless corrected, the decision threatens to impose a deep chill on artistic progress, as creative appropriation of existing images has been a staple of artistic development for centuries and remains essential to much of contemporary art. This Court should grant review of the Second Circuit's departure from this Court's fair-use canon.

ARGUMENT

I. The Second Circuit’s decision is contrary to centuries of artistic tradition.

Artistic progress depends on productive engagement with existing art. As Justice Story observed, in art as elsewhere there are “few, if any, things” that “are strictly new and original throughout.” *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845). Artists recognize this, too—they know better than anyone that “[n]o poet, no artist of any art, has his complete meaning alone.” T.S. Eliot, *Tradition and the Individual Talent* (1919), available at <https://www.poetryfoundation.org/articles/69400/tradition-and-the-individual-talent>. In fact, artists are forthright that the question is not *whether* an artist will borrow from existing art, but *how*: “Immature poets imitate; mature poets steal; bad poets deface what they take, and good poets make it into something better, or at least something different.” T.S. Eliot, *Philip Massinger* (1921), available at <https://www.bartleby.com/200/sw11.html>. Unsurprisingly, then, the history of artistic innovation is the history of artists using, reusing, and recontextualizing the work of their contemporaries and predecessors.

1. Some of history’s most profoundly transformative artworks are the ones that borrow most extensively and openly from existing models. Take Édouard Manet’s *Olympia*:



Édouard Manet, *Olympia* (1863)

The painting is now considered a foundational work of artistic modernism, but it created a furor when it was first exhibited at the Paris Salon of 1865. See *Édouard Manet (1832–1883)*, Metropolitan Museum of Art, https://www.metmuseum.org/toah/hd/mane/hd_mane.htm. The scandal was due not just to the picture's sexual frankness, but also to its irreverent treatment of traditional art. Manet's picture is part of a tradition of imitation, even as it upends that tradition by using imitation to comment on imitation. *Olympia* references the Venetian master Titian's *Venus of Urbino*:



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

The *Venus of Urbino* was itself an outstanding example of Renaissance *imitatio*—the practice of creating an original work from an existing model. For Titian, the model was the *Sleeping Venus* of Giorgione, a Venetian Renaissance master with whom Titian trained:



Giorgione, *Sleeping Venus* (ca. 1510)

Manet's *Olympia* borrows extensively from Titian's picture in structure and detail. But in the place of the Renaissance master's classically idealized nude, Manet recontextualizes the scene and confronts viewers with the worldly, hardened gaze of a contemporary Parisian prostitute, and depicts her Black servant offering a tribute of flowers, presumably from a grateful client.

2. Manet's provocative rejoinder to the Renaissance nude soon inspired further imitative transformations in turn, including a number of responses by Manet's contemporary, Paul Cézanne. The best known of those, *Une Moderne Olympia (A Modern Olympia)*, retains the basics of Manet's composition while transfiguring it, replacing Manet's coolly controlled style with the hallucinatory line and brushwork characteristic of early Cézanne, and making the treatment of prostitution yet more blunt by bringing a lounging, admiring male client directly into the picture.



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

Manet's painting continues to generate transformative artworks today. For example, in 2017, Mickalene Thomas took *Olympia's* format and worked another change on it, "oust[ing] the white European woman from the bed where she often lounges, attended by a black maidservant," and installing the Black servant as the powerful object of desire at the center of the picture:



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

Another contemporary artist, Yasumasa Morimura of Japan, has also made art out of imitating *Olympia*. In his 2018 work *Une Moderne Olympia* (which references Cézanne's response to Manet, *see supra*, pp. 4-7), Morimura, a man, poses for the two human roles in Manet's composition. The way he does so transforms both figures: Manet's prostitute becomes a kind of male geisha, and the original Black maid in *Olympia* morphs into a gender-bending figure—a mash-up of Cézanne's

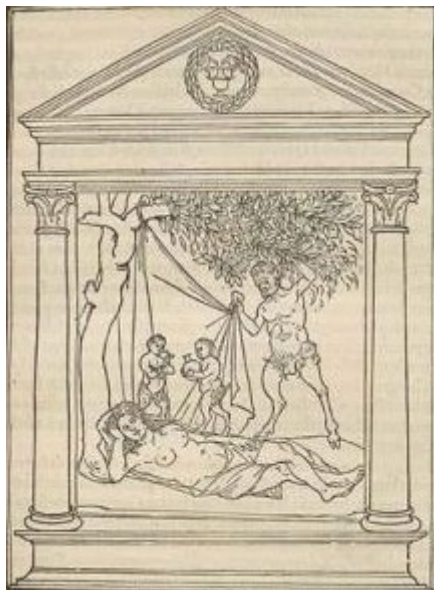
male client and the Black maid, clad in top-hat, evening gloves, and the Black maid's pink smock.



Yasumasa Morimura, *Une Moderne Olympia* (2018)

Each of these works creates new meaning from another artist's imagery. Indeed, their new meanings depend in large part on resemblance to the model. Yet all of these works would flunk the superficial side-by-side test applied by the Second Circuit. Under that approach, what matters is whether an earlier work is "the recognizable foundation upon which [a newer work] is built." Pet. App. 26a. But for each of these notable examples, an earlier artwork is not only recognizable in, but also provides the foundation for, the newer work. And this is true not just for the modern art—Manet's *Olympia* and the works by Cézanne, Thomas, and Morimura responding to it—but for Titian and Giorgione's Renaissance masterpieces, too. As already noted, Titian borrowed from Giorgione; and even Giorgione's groundbreaking picture (likely the first reclining nude

in European painting) seems to have been based on a figure in a fifteenth-century Venetian woodcut:



Attributed to Francesco Colonna, Morgan Library, <https://www.themorgan.org/collection/printed-books-and-bindings/134068>.

3. Like the tradition of the Renaissance reclining nude and Manet's *Olympia*, Warhol's iconic Pop art has inspired a variety of transformative responses that use Warhol's images to create new meaning. For example, contemporary artist Deborah Kass, "one of the most consistently innovative and productive artists of the post-Pop era,"² interpolated her own face into Warhol's silkscreen of Elizabeth Taylor:

² *Red Deb*, Smithsonian, Nat'l Portrait Gallery, https://www.si.edu/object/red-deb%3Anpg_C_NPG.2013.75.1 (*Red Deb*).

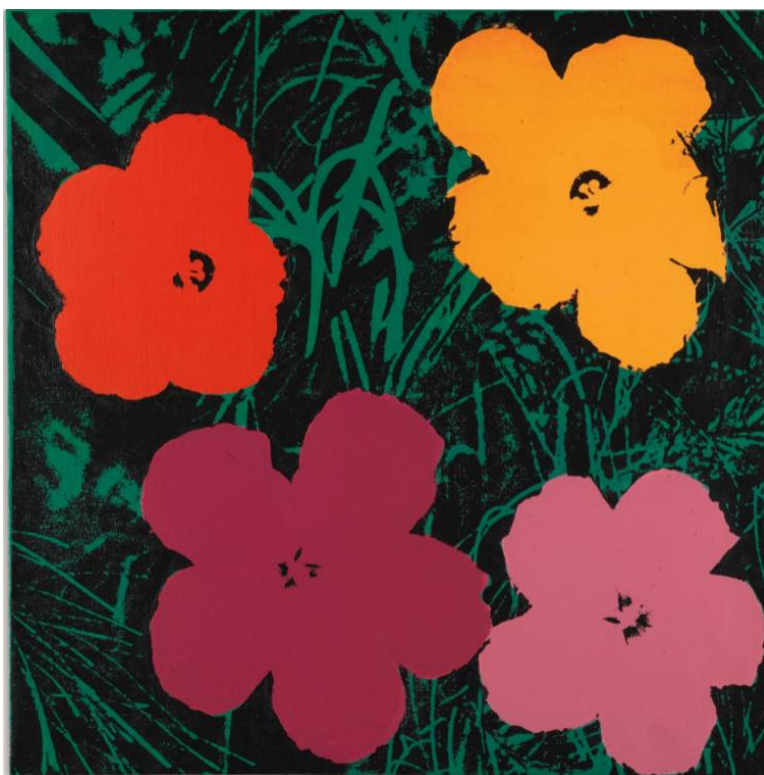


Left: Andy Warhol, *Liz* Right: Deborah Kass,
Red Deb

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

Other transformative responses to Warhol are even more difficult to distinguish from their original. Indeed, some are superficially indistinguishable from the original Warhol—deliberately and meaningfully so. One artist, Elaine Sturtevant, created "an exact replication" of Warhol's *Flowers* series, which "allowed [Sturtevant's] audiences to experience the disorienting

feeling of viewing an ‘authentic’ Warhol, but one created under the aegis of another,” and allowed Sturtevant to “make a feminist statement while also ruminating upon the concepts of originality, copyright, and artistic ownership.” Tori Campbell, *Appropriation! When Art (very closely) Inspires Other Art*, Artland, <https://magazine.artland.com/appropriation-when-art-very-closely-inspires-other-art/>.



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

These examples demonstrate that the aesthetic dynamic present in the Prince Series—transformative appropriation of existing art—is not peculiar to Warhol. It is as old as art itself, part of its lifeblood, though it is

arguably more important to artists now than ever before, *see infra*, pp. 26-27.

It is not peculiar to the visual arts, either. There are many prominent examples from other branches of the arts. Transformative music routinely appropriates older music, for example. Take Johannes Brahms's First Symphony (1855-1876): when unsubtle listeners noted to Brahms that he had used a melody in the finale that closely recalls the famous theme from the finale of Ludwig van Beethoven's Ninth Symphony (1822-1824), Brahms is said to have shot back, "Any ass can see that!" *Johannes Brahms, Symphony No. 1 in C minor, Op. 68*, N.Y. Philharmonic, <https://nyphil.org/~media/pdfs/program-notes/1819/Brahms-Symphony-No-1.pdf>. Transformative borrowing in music can be even more wholesale, too. Igor Stravinsky's ballet *Pulcinella* (1919-1920, rev. 1965), which inaugurated the composer's neoclassical period, injects modernist rhythms and harmonies into 18th-century music that was (wrongly, it turns out) attributed to Giovanni Battista Pergolesi. *Igor Stravinsky - Pulcinella*, Boosey & Hawkes, https://www.boosey.com/pages/cr/catalogue/cat_detail?sl-id=1&musicid=3471.

Similar appropriation occurs in landmarks of literature. The plots of William Shakespeare's English and Roman history plays (ca. 1590s-1610s) are largely borrowed from the chronicles of Hall (1548, rev. 1550) and Holinshed (1577, rev. 1587), and from Sir Thomas North's translation of Plutarch (1588), respectively. *See Shakespeare's Sources*, Encyclopedia Britannica, <https://www.britannica.com/biography/William-Shakespeare/Shakespeares-sources>. T.S. Eliot's watershed modernist poem *The Waste Land* (1922) patches together quotations from prior texts stretching across millen-

nia and ranging from nineteenth-century opera libretti (Richard Wagner’s text for *Tristan und Isolde* (1857-1859)) to medieval Italian poetry (Dante Alighieri’s *Commedia* (1308-1320)) to ancient Hindu scripture (the *Bhagavad Gita* (ca. 200 BCE)). See T.S. Eliot, *The Waste Land* (1922), annotated version available at <https://wasteland.windingway.org/>.

The Second Circuit’s reasoning is therefore irreconcilable with the basic realities of artistic practice and tradition. A decision that would dismiss centuries of original art as derivative and not transformative cannot be correct.

II. The Second Circuit’s decision unsettles the balance struck by this Court’s fair-use decisions.

Neither the parties nor the court of appeals disputed that there are plain aesthetic differences between Warhol’s Prince Series and the Goldsmith photograph—in other words, that the two works differed significantly in style and expression. Under this Court’s decisions, that should have pointed strongly toward a conclusion that the Prince Series is transformative. But the panel held the opposite, finding it decisive that a side-by-side comparison between the works showed that the Goldsmith photograph “remain[ed] the recognizable foundation upon which the Prince Series is built.” Pet. App. 26a. In other words, the panel held that as long as a new work bears a surface resemblance to an older work, the new work *cannot* be transformative as a matter of law, *even if it is meaningfully and expressively distinct from the older work*. That is contrary to this Court’s precedents and in conflict with the law as followed by other circuits. It also ignores the essential element of contextual meaning.

1. Start with *Campbell*. There, the Court made clear that a work is “transformative” when it “adds something new, with a further purpose or different character, altering the first with a new expression, meaning, or message.” 510 U.S. at 579. Applying that standard, the Court held that 2 Live Crew’s rap “Pretty Woman,” which parodies Roy Orbison’s rock ballad “O, Pretty Woman,” could be transformative, even though 2 Live Crew’s rap took from “the heart of the [Orbison] original.” *Id.* at 587 (internal quotation marks omitted). The superficial resemblance to Orbison’s ballad did not undermine the rap’s transformative character (and indeed, was essential to it)—after all, 2 Live Crew “need[ed] to mimic [Orbison’s] original to make its point.” *Id.* at 580-581. In that respect, the rap was “like other comment or criticism” that has always been protected by the fair-use doctrine. *Id.* at 579. The Court of Appeals, in holding otherwise, had erred “by confining” its analysis “to one relevant fact, the commercial nature of the use,” and “giving” that one fact “virtually dispositive weight.” *Id.* at 583-584. That attempt to elevate one facet of the inquiry into a “*per se* rule” was contrary “to the long common-law tradition of fair use adjudication.” *Id.* at 585.

Campbell teaches that the degree of resemblance between a new and old work is the beginning of the fair-use analysis, not the end. A court must ask whether the resemblance has a novel expressive function. Where a reasonable observer can discern a new meaning—as when a reviewing essay quotes from the work under review, or when a parody skewers its target’s style—the work is transformative, not derivative.

Google reinforces these principles. There, this Court held that the fair-use doctrine applied, because alt-

though Google “copied portions of [Oracle’s application programming interface (“API”) packages] precisely,” it used that exactly copied material “to create [a] new product[]”: “a highly creative and innovative tool for a smartphone environment.” 141 S. Ct. at 1203. The Court reasoned that, “[t]o the extent that Google used parts of the [Oracle API] to create a new platform that could be readily used by programmers, *its use was consistent with that creative ‘progress’ that is the basic constitutional objective of copyright itself.*” *Id.* (emphasis added). In reaching this conclusion, the Court analogized the copying to artistic practice, observing that “[a]n artistic painting might, for example, fall within the scope of fair use even though it precisely replicates a copyrighted advertising logo to make a comment about consumerism.” *Id.* (citations omitted). There is no better example of that analogy than the work of Warhol, the artist famous for his silkscreens of Campbell’s Soup cans and life-sized replicas of Brillo boxes:



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



Andy Warhol, *Brillo Boxes* (1964)

2. These fair-use principles should have protected the Prince Series.

Warhol used Goldsmith’s photograph and “add[ed] something new, ... altering” the photograph “with a new expression, meaning, or message.” *Campbell*, 510 U.S. at 579. The Prince Series had its genesis in Goldsmith’s black and white photograph of Prince, which was then provided to Warhol as an “artist reference” by Vanity Fair in commissioning him to create something of his own from it. Pet. App. 2a. Warhol thus used but meaningfully altered that reference work in a manner fully consistent with his characteristic “repetitions, distortions, camouflages, incongruous colors, and endless recyclings” of imagery—techniques Warhol used not to replicate but to “destabliz[e] the image.”³ That use is

³ See Donna De Salvo, *Andy Warhol: From A to B and Back Again* 32 (2018); see also *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001) (discussing Warhol’s use of “distortion” and “careful ma-

legally indistinguishable from 2 Live Crew’s rap transformation of Orbison’s ballad in *Campbell* or from Google’s use of Oracle’s code as a building block for its own product. As even the Second Circuit recognized (e.g., Pet. App. 24a), the resulting Prince Series has obvious and meaningful aesthetic differences from the original photograph. Goldsmith had captured Prince as “not a comfortable person” and a “vulnerable human being,” Pet. App. 10a, portraying him in stark black-and-white, in his everyday clothes, his face finely etched in the light, warily regarding the viewer. Warhol approaches the material entirely differently. He removed Prince’s upper body (thereby also removing his off-stage clothing), blew up and flattened the musician’s facial details, and transferred the image to a silkscreen drenched in billboard-bright color. The resulting silkscreens transfigure the original photograph, turning an essentially private, psychologizing individual portrait into an ironic emblem of celebrity culture, a postmodern answer to religious iconography. Whether described as part of Warhol’s own commentary on celebrity or his subversion and destabilization of imagery, the Prince Series is plainly transformative.

The Second Circuit only concluded otherwise by improperly focusing its analysis on “one relevant fact,” *Campbell*, 510 U.S. at 583—its observation, upon a side-by-side comparison of images in the briefs, that Goldsmith’s photograph “remain[ed] the recognizable foundation” for the Prince Series. App. 26a. The panel purported to apply *Campbell* and *Google*, but instead it defied those decisions by bypassing the necessarily con-

nipulation of context” to provide “social comment” about the exploitation and dehumanization of celebrity”).

text-specific fair-use analysis. Those cases made clear that resemblance has a place in the fair-use analysis, but is far from decisive. After all, if “[a]n artistic painting might ... fall within the scope of fair use even though it precisely replicates a copyrighted advertising logo to make a comment about consumerism,” then an artwork that significantly *alters* its copyrighted source image in order to virtually *reverse* the source image’s aesthetic effect must be a fair use. *Google*, 141 S. Ct. at 1203.

The court of appeals suggested that the Prince Series was a mere “adaptation” of the original photograph, analogizing it to film adaptations of novels. Pet. App. 17a-24a. That was a clear category mistake. An adaptation—which may well fall within the scope of “derivative” and non-transformative works—presents *the same content as the original* in another medium: say, a new film that tells on the screen the same story an old novel did on the page, *e.g.*, Pet. App. 24a, or a board game that tells the same story as the beloved television series *Friends*. By contrast, the Prince Series silkscreens *create new content* by taking the original photograph and altering it to create new works that communicate new meaning and expression. That is a transformation, not an adaptation.

The Second Circuit’s holding, and the mechanical side-by-side test it relied on to reach that conclusion, are fundamentally at odds with *Campbell* and *Google*, and with the approaches taken by other courts of appeals that faithfully apply this Court’s decisions. Pet. 24-31 (discussing the circuit split). Under those decisions, Warhol’s appropriation and alteration of the Goldsmith photograph for a distinct aesthetic purpose was a fair use. The Second Circuit’s sharp departure

from this Court’s fair-use precedents and the decisions of other circuits warrants certiorari.

III. Context, long understood as a critical aspect of determining transformation, has been rendered virtually meaningless in the most important regional circuit for the art world.

It sometimes *will be* plainly apparent from a simple side-by-side comparison that an artist’s use of an existing work was transformative. But some changes in expression may escape the perception of a lay observer—one with an untrained artistic eye, such as juries or judges presiding over copyright cases. That should be no surprise, as art—and particularly modern and post-modern art—can go beyond the mere superficial appearance of a work. When that is the case, evidence of context bearing on the transformation inquiry will be not just helpful but necessary—a side-by-side comparison should be where the analysis *starts*, not where it *stops*. In *Google*, for example, this Court did not rely on its own gut instinct about software before determining that Google’s use of the Sun Java API was transformative—the significant evidence heard by the jury at trial “convince[d] [the Court]” not to judge a book by its cover when evaluating fair use. 141 S. Ct. at 1203-1205.

That may be necessary in fair-use cases involving the visual arts as well. Some artworks, particularly contemporary works, are transformative uses even though they are hard or impossible to distinguish from their models. And in those cases, the Second Circuit’s side-by-side test, performed as that court would have it without any consideration of context or expert testimony, will work the most mischief. This case therefore provides the Court with an excellent opportunity to

clarify what tools courts can and should use in the “case-by-case” determination of whether an artistic use “may reasonably be perceived” to be transformative. *Campbell*, 510.U.S. at 577, 582.

1. Often, transformation in art will be readily apparent. A court should start where the Second Circuit ended, by comparing the two works together, preferably in their original form rather than through reproduction (as the latter often obscures details of scale and material significant to a work’s expression). In the run-of-the-mill case, that will be enough to discern transformation. An observer comparing Francis Bacon’s *Study after Velázquez’s Portrait of Pope Innocent X* to the source named in its title likely will have no trouble perceiving how Bacon turns Velázquez’s study of power into a study of terror:



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

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

Transformation may also be quickly ascertained if the artist has openly stated their transformative goal and objective indicia show the goal was accomplished. In *Campbell*, for example, if the group's rap had not already made it plain, 2 Live Crew was forthright about their intent to mock Orbison's ballad, and the rap's linguistic and musical disfigurement of the original bore out that stated purpose. 510 U.S. at 573.

2. Some transformations are less immediately and instinctively apparent than Bacon's deconstruction of Velázquez or 2 Live Crew's savaging of Orbison. In those cases, rather than reflexively foreclosing the possibility of fair use, a court should consider relevant context, which will often be available on the face of the pleadings or otherwise undisputed and subject to judicial notice. Return for a moment to the example of *Red Deb*, Deborah Kass's variation on Warhol's *Liz*. *See supra*, pp. 10-11. Considered side-by-side, the two pictures appear similar. It takes a least some modest additional context to understand the transformative nature of Kass's work. One needs to know that Kass is a female artist, Jewish, and a lesbian, and that the subject of Warhol's picture, Elizabeth Taylor, was one of the most glamorous stars of Hollywood's Golden Age, who converted to Judaism in her twenties. Armed with that information, Kass's decision to retain much of her famous male colleague's composition while putting her face in place of Taylor's is more clearly transformative.

Other works will require more context for a court to make an informed determination about transformation. One example discussed above is Elaine Sturtevant's *Warhol Flowers*. *See supra*, p. 12. That work is *visually identical* to its Warhol source. The immediate (and natural) reaction of a lay observer may be to ask how it

is possible that such a work could be anything but derivative. But the impulse of a lay observer is sometimes not an appropriate guide for the context-specific inquiry required to determine fair use.

Sturtevant's work is made from and for a specific milieu in which art is defined not by any objective aesthetic quality in the work (individual brushwork, a novel handling of compositional form), but instead simply by the work's being recognized and interpreted as art by reasonable observers in its intended audience (which may include curators, scholars, collectors or other participants in the art world). *See, e.g.*, Arthur C. Danto, *After the End of Art* 11-17 (1997). It is thus well-established that where a work has a "particular audience," the fair-use analysis focuses on the reaction of *that* audience, not of a more general layperson or judge. *See, e.g.*, 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.03; *Dawson v. Hinshaw Music Inc.*, 905 F.2d 731, 736 (4th Cir. 1990).⁴

⁴ Indeed, this Court has long recognized that when questions of artistic or intellectual expression are at stake—questions implicating First Amendment protections—the analysis does not turn on the view of "an ordinary member of any given community," but instead on what "a reasonable person," armed with context and evaluating the work "as a whole," would conclude. *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987) (standard for obscenity). The Second Circuit's application of an acontextual standard in the context of fair use, which this Court has recognized is a "built-in First Amendment accommodation[]" in the Copyright Act, *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003), is therefore inconsistent

So a court confronted with a conceptual piece like Sturtevant's should consider expert testimony from the contemporary art world. That testimony could establish that Sturtevant's practice took to its logical limits traditional forms of artistic imitation (*e.g.*, Manet's response to Titian, *see supra*, pp. 4-7), and in doing so "explor[ed] ideas of authenticity, iconicity and the making of artistic celebrity; the waxing and waning of the public appetite for styles like Pop and Minimalism; and, ultimately, the nature of the creative process itself." Margalit Fox, *Elaine Sturtevant, Who Borrowed Others' Works Artfully, Is Dead at 89*, N.Y. TIMES (May 16, 2014), <https://www.nytimes.com/2014/05/17/arts/design/elaine-sturtevant-appropriation-artist-is-dead-at-89.html>.

If the court of appeals did not agree with the district court that a transformative use was immediately obvious from a side-by-side comparison, then the correct move would have been to remand the case for further factual development about any relevant context bearing on transformation—not to hold that the similarity of the two images made fair use unavailable as a matter of law. Contrary to the Second Circuit's suggestion, this approach does not require judges to "assume the role of art critic." Pet. App. 22a. Quite the opposite—just as in any other fact-bound inquiry that requires specialized knowledge, allowing consideration of context and opinion testimony ensures that the judge does *not* have to assume the role of the expert. Nor does the approach fall into the trap the Second Circuit described of "create[ing] a celebrity-plagiarist privilege" under

with this Court's First Amendment jurisprudence more broadly.

which a work is rubber-stamped as transformative just because a blue-chip artist made it. Pet. App. 26a-27a. Instead, considering contextual evidence (including expert testimony) is more likely to help a judge understand why a niche figure like Sturtevant may have achieved something transformational by appropriating the work of a household name like Warhol.⁵

Finally, the appropriate contextual approach will not require every dispute over fair use in the arts to go to trial. Most cases can be decided without discovery. See, e.g., *Lombardo v. Dr. Seuss Enterprises, L.P.*, 279 F. Supp. 3d 497, 504-505 (S.D.N.Y. 2017) (collecting authority for proposition that fair-use defenses are often decided without discovery). All that is required in most instances is faithful application of *Campbell* and *Google*, and thoughtful attention to appearance and context as revealed by the works at issue as well as the pleadings or undisputed evidence. In those less common cases when the specialized nature of the work and audience require further fact development and expert testimony, a court should avail itself of those resources, and should not be hamstrung by the Second Circuit's rigid side-by-side rule.

⁵ See also, e.g., Irina Tarsis, *Paper, Rock, Scissors: Smith-Clay Conflict and Resolution*, Center for Art Law (Nov. 4, 2013), <https://itsartlaw.org/2013/11/04/paper-rock-scissors-smith-clay-conflict-and-resolution/> (describing a fair-use dispute arising from Lauren Clay's aesthetic transformations of David Smith's "monumental steel sculptures"); Ivy Cooper, *Hello Masterpiece: Leslie Holt* (May 10-June 21, 2008), http://phdstl.com/hello_masterpiece.html (describing Leslie Holt's Hello Masterpiece series, in which Sanrio's Hello Kitty is placed in recreations of masterworks of European and American Art in miniature, creating a "conflation of high and mass culture that marks 21st century Capitalism").

IV. The Second Circuit’s decision will have an enormous chilling effect on the arts.

The Second Circuit tried to minimize the significance of its opinion in this case, reassuring readers that the “artistic worth of the Prince Series” remains “the domain of art historians, critics, collectors, and the museum-going public.” Pet. App. 27a. That is entirely beside the point—the legal question is not whether the Prince Series is good art, but whether it is a fair use of Goldsmith’s photograph. And by erroneously answering the latter question in the negative, the decision threatens to ensure the first question is never answered or even posed for future work, because it will discourage the creation of new art.⁶

As suggested above, much art being made today depends on the kind of extensive borrowing from existing visual culture exemplified by the Prince Series. Indeed, appropriation is widely recognized as a hallmark of modernist and contemporary art. While appropriation is “[a] strategy that has been used by artist for millennia,” it “took on new significance” in the past century thanks to a number of artistic and cultural trends. *Ap-*

⁶ The panel also marketed its holding as cabined to the context of *commercial reproductions* of a derivative work. Pet. App. 42a; *see also* Pet. App. 50a-52a (Jacobs, J., concurring). But that distinction finds no footing in the Copyright Act or this Court’s precedent. It also makes no sense. The panel’s reasoning focused on whether the Prince Series *itself* was a fair use of the Goldsmith photograph; the fact that Goldsmith only sought relief as to reproductions of the Prince Series was immaterial to the substance of the panel’s fair-use analysis. The panel’s opinion is therefore an obvious roadmap for future copyright challenges to original transformative works. And in any event, the right to reproduce images of an original is obviously crucial to the practical work of artists, galleries, and museums.

appropriation, MoMA Learning, https://www.moma.org/learn/moma_learning/themes/pop-art/appropriation/. That includes cubist collage and Marcel Duchamp’s “Readymades” (everyday objects Duchamp signed and installed in galleries with only minor alterations) in Europe in the early twentieth century, and responses by Pop artists like Warhol and others to mass consumerism and celebrity culture in the United States in the mid-twentieth century. *See id.*; *Appropriation*, Tate Modern, <https://www.tate.org.uk/art/art-terms/a/appropriation>. So the Second Circuit’s reasoning does not just threaten one famous artist’s output with infringement liability—it strikes at the heart of the way artists today have been raised to make and understand art. Whole currents of creative practice would be exposed to litigation and thereby widely discouraged.

Artists themselves are perhaps most obviously at risk, but they are not the only ones who could face the threat of liability under the Second Circuit’s misguided and novel approach. In past lawsuits, galleries have been named as defendants just for displaying allegedly infringing art. *See, e.g., Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (naming gallery as a defendant); *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (same); *see also* 17 U.S.C. § 109(c) (permitting the display of copies “lawfully made”). And despite the fact that a handful of blue-chip artists (like Warhol) command headline-grabbing prices, most galleries are small businesses that survive on threadbare margins when they are not in the red altogether. James Tarmy, *Why Do So Many Art Galleries Lose Money?*, Bloomberg (July 30, 2015), <https://bloom.bg/2Qw0Etg>. Museums face similar risks. As with galleries, the risks will be disproportionately hard on smaller museums outside large cities, which

provide local access to art and arts education for most Americans.

This threat could not come at a worse time for the arts, which are already suffering disastrous losses as a result of the COVID pandemic. One non-profit, based on a survey of 19,398 arts organizations, estimates that spending on art by Americans is down \$15.5 billion since the beginning of the pandemic. *The Economic Impact of Coronavirus on the Arts and Culture Sector*, Americans for the Arts, <https://www.americansforthearts.org/by-topic/disaster-preparedness/the-economic-impact-of-coronavirus-on-the-arts-and-culture-sector>. Permitting the Second Circuit's unjustified expansion of copyright-infringement liability to stand would be a further unnecessary catastrophe for the arts community.

It would also offend constitutional values. Copyright is meant to "promote the Progress" of art, not punish it. U.S. Const. art. I, § 8, cl. 8. By distorting the fair-use doctrine, the Second Circuit's decision erodes "one of the key limits that keep copyright from unconstitutionally suppressing speech and harming the very cultural richness it aims to promote." Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 Harv. L. Rev. 683, 751 (2012). The result will be to "stifle the very creativity which [the Copyright Act] is designed to foster." *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (citation omitted). That is a perverse result, and this Court should step in to prevent it.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

WILLIAM E. EVANS
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210

JAIME A. SANTOS
Counsel of Record
ANDREW KIM
GOODWIN PROCTER LLP
1900 N Street NW
Washington, DC 20036
jsantos@goodwinlaw.com
(202) 346-4000

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Counsel for Amici Curiae