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

BRIEF OF THE ART INSTITUTE OF CHICAGO, J. PAUL GETTY TRUST, LOS ANGELES COUNTY MUSEUM OF ART, METROPOLITAN MUSEUM OF ART, THE MUSEUM OF MODERN ART, NELSON-ATKINS MUSEUM OF ART, SAN FRANCISCO MUSEUM OF MODERN ART, SOLOMON R. GUGGENHEIM FOUNDATION, WHITNEY MUSEUM OF AMERICAN ART, AND THE ASSOCIATION OF ART MUSEUM DIRECTORS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Amici are museums and an association of directors of art museums that collect, study, conserve, and present significant works of art across times and cultures to connect people to creativity, knowledge, and ideas, and to engage and inspire a diverse range of audiences through innovative programs of exhibitions, education, publications, and other activities.[2] Their collections feature, *inter alia*, artworks that borrow from and build upon prior works, from ancient to contemporary art.

The museums' core missions extend beyond current exhibitions on gallery walls, and include the display and publication of reproductions of such artwork, including in catalogs, publications, educational materials, websites, documentaries, and other resources. Because these museums, like many other museums, can only display a fraction of their collections at any given time, these publishing activities are often the only way museums can fulfill their missions for their broader collections. Copyright

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[1] No one other than the *amici* and their counsel authored this brief, in whole or in part, or made a monetary contribution intended to fund its preparation or submission. Blanket consent from the Parties is noted in the docket.

[2] *Amici* are the Art Institute of Chicago, J. Paul Getty Trust, Los Angeles County Museum of Art, Metropolitan Museum of Art, The Museum of Modern Art, Nelson-Atkins Museum of Art, San Francisco Museum of Modern Art, Solomon R. Guggenheim Foundation, Whitney Museum of American Art, and the Association of Art Museum Directors.

law should not unduly restrict or discourage such fundamental and longstanding activities.

Amici have a defining interest in promoting the progress of science and useful arts through these activities, and in maintaining consistent application of the fair use doctrine, as stewarded by this Court. The Second Circuit deviated from this Court's precedents in ways that create uncertainty and threaten to chill museums' essential pursuits. *Amici* file together, and in favor of neither party, solely to address the confused analysis in the decision below and its unintended ramifications for *amici* and their missions.

Amici stress that they do not intend to favor one medium or artistic genre over another. Museums value both photography and Pop Art as important and valuable traditions of artistic expression. To further the creation and dissemination of all manner of creative endeavors and to support the progress and development of the arts, *amici* seek only to advocate for a clear and coherent application of fair use, consistent with this Court's precedent.

SUMMARY OF ARGUMENT

The Second Circuit's novel treatment of the copyright fair use analysis creates uncertainty that requires modification and clarification. Otherwise, museums will be chilled in their core activities, contrary to the constitutional purpose of copyright law to promote the progress of science and useful arts.

1. In analyzing the first fair use factor ("purpose and character of the use"), the Second Circuit misapplied the doctrine of "artistic neutrality," and relied on a flawed "objective assessment" of Warhol's artistic use of Goldsmith's 1981 photograph of the musician Prince, with a mistaken focus on whether that photograph was a "recognizable foundation" in Warhol's 1984 "Prince Series" of works.

This Court established the principle of "artistic neutrality" to deter judges from evaluating the "worth" of artistic works "outside of the narrowest and most obvious limits" for fear that "some works of genius would be sure to miss appreciation." *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 251 (1903). In particular, *Bleistein* admonishes courts not to deny copyright protection for so-called "low" art because the untrained eyes of judges may miss relevant creative and artistic considerations.

The decision below turns artistic neutrality on its head. The Second Circuit rebuked the district court for acting like an art critic in finding fair use based on a "subjective evaluation of the underlying artistic message of the works." Pet. App. 2a. Then, the Second Circuit reached the opposite conclusion based on its purportedly "objective" side-by-side comparison of the two works, finding that Goldsmith's photograph remained a "recognizable foundation" in Warhol's screen print. Pet. App. 26a. In so doing, the court's analysis proscribed consideration of, and otherwise ignored, key aspects of artistic analysis, including artistic traditions, meaning, context, and process. Contrary to this Court's teachings in *Bleistein*, the net

result is that the character of Warhol's artistic contributions was found lacking as a matter of law based on the untrained eyes of Second Circuit judges, sitting in judgment nearly 40 years after the fact while expressly disregarding available context.

The standard for transformativeness is not strictly an objective test to be assessed in a vacuum, but the Second Circuit erred by evaluating transformativeness in just this way. The proper test, as articulated by this Court, is whether transformative purpose and character "may reasonably be perceived." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994). Analysis of the "purpose and character" should embrace, where available and relevant, facts relating to artistic traditions, intent, context, and process, as well as the way the work was conceived and received at the time of creation. This is how fair use decisions since *Campbell* have generally approached the first factor.

Courts have not focused in isolation on whether the earlier work is "recognizable" in the later work. And such a focus would be inconsistent with and contrary to how artists creating new works have used and referenced prior works over many decades (indeed centuries). Contextual considerations are especially important for museums because their curatorial and programming decisions are not governed exclusively by contemporary aesthetics. Rather, decisions are informed by a multitude of factors, including artist statements, artistic movements, the creative process, and cultural and historical import. Recent museum exhibits reflect that the Second Circuit's purportedly

objective "recognizable foundation" standard is detached from, and contrary to, how artworks are evaluated, curated, displayed, and promoted by museums.

2. The Second Circuit's decision also causes uncertainty for museums because it creates risk for routine and fundamental museum activities by its muddled distinctions concerning potential copyright liability for "original works" and "reproductions."

It is unclear how the decision below parsed and evaluated subdivisions of the market for copies of the works in the Prince Series. The Second Circuit found that the fourth factor weighed against fair use based on the market for licensed reproductions, and, in turn, that each of the fair use factors favors Goldsmith such that "AWF's defense of fair use fails as a matter of law." Pet. App. 43a. But the court also implied that the sixteen original Prince Series works did not harm the "direct sales" market for Goldsmith's Photograph, and it purported to "set aside" the licensing of the Prince Series "for use in museum exhibits and publications" as "not particularly relevant." Pet. App. 39a.

The decision below creates uncertainty as to whether uses in other markets, including the primary market for the "original works" or the licensing market for "museum exhibits and publications," are fair uses, or simply, somehow, not implicated in the analysis. The decision below tied its fair use (and, presumably, infringement) conclusion to its perception (not supported by the record) that Goldsmith did not seek remedies as to the original

works in Prince Series. *See* Pet. App. 29a n.8, 40a–42a; *see also* Pet. App. 50a–51a (Jacobs, J., concurring). But the standard for whether or not original works on display at museums risk a claim of infringement that museums would have to litigate should not turn on the vagaries of a plaintiff's pleading choices.

The museums serve broad audiences, including those who physically attend their galleries and those who do not. Museums create and publish, in many media, reproductions of works on display or in their collections, including works not usually on display that otherwise would be inaccessible to the public. The avenues for such reproductions include catalogues, documentaries, websites, and other embodiments of creative works. Where, as here, original works incorporating elements of preexisting works do not usurp the market for such works and offer enormous benefits to the art-viewing public, their display and reproduction by museums should, at a minimum, be found *non-infringing* (as opposed to "not particularly relevant").

Because of the nebulous boundaries in the decision below, the museums and the Association are concerned as to how this ruling would be applied, including to these same works, other Warhol or contemporary works, and generally any works that incorporate preexisting works, as well as whether the ruling will impact the museums' wide-ranging missions. This uncertainty creates a chilling effect on the museums' activities, which any decision by this Court should seek to avoid.

ARGUMENT

Copyright exists in U.S. law "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const., art. I, § 8, cl. 8. This constitutional purpose embraces incentives both to create and disseminate works. *See, e.g.*, *Golan v. Holder*, 565 U.S. 302, 326 (2012).

Fair use facilitates these constitutional objectives. It encourages the creation of new works that build upon prior copyrighted works. *See, e.g.*, *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1203 (2021) (reuse of copyrighted API to create new operating system is consistent with "basic constitutional objective" to incentivize creation); *Campbell*, 510 U.S. at 579 ("[T]he goal of copyright . . . is generally furthered by the creation of transformative works."); *Warner Bros. v. Am. Broad. Cos.*, 720 F.2d 231, 242 (2d Cir. 1983) ("[T]he 'parody' branch of the 'fair use' doctrine is itself a means of fostering the creativity protected by the copyright law."); *Mattel Inc. v. Walking Mt. Prods.*, 353 F.3d 792, 806 (9th Cir. 2003) ("[A]llowing artistic freedom and expression and criticism of a cultural icon . . . . serves the aims of the Copyright Act by encouraging the very creativity and criticism that the Act protects."); *see generally Campbell*, 510 U.S. at 569 ("Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." (citation omitted)). In addition, fair use privileges activities that disseminate knowledge, such as educational and

scholarly uses. 17 U.S.C. § 107; *see also Golan*, 565 U.S. at 324 (progress of science "refers broadly to 'the creation and spread of knowledge and learning'"); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454 (1984) (finding consumer time-shifting was fair use, discussing "societal benefits" of "expand[ing] public access" to television programs).

These constitutional objectives are consistent with the core missions of museums like *amici*. *See Marano v. Metro. Museum of Art*, 844 F. App'x 436, 438–39 (2d Cir. 2021) (holding that museum's use of photograph in website exhibition was fair use where website opens museum's collection to millions of virtual viewers and "align[s] the Met's fair use of the Photo with copyright's very purpose" (internal quotation marks omitted)). Museums effectuate these objectives by, among other activities, acquiring, collecting, preserving, and displaying works, and publishing reproductions of such works in catalogs, educational materials, documentaries, and other print and online resources. These activities include and prominently feature works that build on preexisting works. Museums rely on fair use not only to decide what works to display and publish, but also whether and how they can exhibit and promote those works to a panoply of audiences and interests. And, such activities confer significant benefits to the public that, where relevant, must be evaluated as part of the fair use analysis. *See Google*, 141 S. Ct. at 1206 ("[W]e must take into account the public benefits the copying will likely produce.").

The Second Circuit decision impinges on these fundamental museum activities. As discussed more fully below, the decision did not take into account relevant considerations, perhaps unintentionally calling into question (from a copyright perspective) entire artistic movements, artists, and works. The effect is to chill museums' exhibition and promotion of these classes of art, to the detriment of the public at large. Further, while the decision below attempted to safeguard certain museum-relevant activities, its confused and unclear analysis creates uncertainty for museums and warrants clarification as to museums' display of original works and their publication of reproductions.

I. The Second Circuit's "Recognizable Foundation" Approach Does Not Encourage the Progress of Science and Useful Arts, Contrary to the Purpose of Copyright Law and Fair Use and the Missions of Museums.

As this Court has instructed, fair use is a flexible, context-driven, multi-factor analysis that is to be evaluated in light of "all the evidence." *See, e.g.*, *Google*, 141 S. Ct. at 1197; *Campbell*, 510 U.S. at 577 ("not to be simplified with bright-line rules"); *see also Marano*, 844 F. App'x at 439 (requiring "individualized analysis"); *Cambridge Univ. Press v. Albert*, 906 F.3d 1290, 1300 (11th Cir. 2018) (demanding "holistic" review); *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006) ("open-ended and context-sensitive").

The first fair use factor is "the purpose and character of the use, including whether such use is of

a commercial nature or is for nonprofit educational purposes[.]" 17 U.S.C. § 107(1). Analysis of the first factor requires more than a naïve visual inspection of the works; it also requires consideration of contextual facts going to the purpose and character of the defendant's use.

In finding that Warhol's Prince Series was not transformative and not a fair use, the Second Circuit diverged from these rules. The court introduced a novel standard under the guise of "objectivity" that effectively prohibits artwork that is "both recognizably deriving from, and retaining the essential elements of, its source material" when "viewing the works side-by-side[.]" Pet. App. 23a–24a. This approach places off limit other evidence and information concerning artistic traditions, intent, context, and process—information that previously would have been considered in evaluating fair use according to precedent, and consistent with the real-world practices of museum curators.

A. The Decision Below Failed to Consider Longstanding Artistic Traditions Using Elements of Pre-existing Works in New Works.

The Second Circuit's decision effectively ignored that art incorporating substantial elements of preexisting works has a long and distinguished history—and should not be discounted as mere copying, as the court below effectively did. Over the centuries, artists have leveraged, repurposed, and re-contextualized preexisting works. The examples below illustrate how artists do so as part of artistic

customs and social commentaries, and create new works with new meanings—even as the earlier work is recognizable to some extent in the later work.

In the Baroque era, Giovanni Panini painted *Modern Rome* (1757, below), which depicts a sumptuous gallery contrived to show famous Roman monuments and art as paintings within the gallery. Included are essentially copies of preexisting works, including Michelangelo's *Moses*, Bernini's statutes of *Constantine*, *David*, *Apollo*, and *Daphne*, and his fountains in Piazza Navona.

Panini's *Modern Rome* (1757)
On view at The Metropolitan Museum of Art[3]

In the French neoclassical era, Jean-August-Dominique Ingres painted a portrait of *Madame Moitessier* (1856, below left).[4] This painting used a then-unusual pose taken from the ancient Roman wall painting *Herakles Finding His Son Telephas* (below, right). Ingres himself was familiar with this work from engravings. By incorporating this reference, Ingres likened his model to an Olympian goddess.

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[3] https://www.metmuseum.org/art/collection/search/437245.

[4] https://www.nationalgallery.org.uk/paintings/jean-auguste-dominique-ingres-madame-moitessier.


In the modern era, Vincent Van Gogh made twenty-one paintings based on works by Jean Francois Millet, an artist he greatly admired. Van Gogh enlarged black-and-white prints of Millet's work, and then painted them in color. He used these images "as a subject" and would "improvise color on it."[5] In his *First Steps, after Millet* (1890, first image below), Van Gogh squared-up a photograph his brother had sent him of Millet's *First Steps* (c.1859–66, second image below), transferred it to canvas, and painted over it.

[5] https://www.metmuseum.org/art/collection/search/436526.

Van Gogh's *First Steps, after Millet* (1890)
On view at the Metropolitan Museum of Art[6]

Millet's *First Steps* (c.1859–66)

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[6] *Id.*

By the 1960s, Pop Art had emerged as a leading artistic movement. "Pop" refers to "popular" (as opposed to elitist) culture, employing heavy use of kitsch, irony, and commentary on contemporary culture. Artists including Claus Oldenburg, Andy Warhol, and Roy Lichtenstein pioneered works that challenged traditions of fine art by including imagery from popular and mass culture, such as advertising, comic books, celebrities, and mass-produced objects.

Pop artists also were fascinated with the reproduction, commodification, and propaganda in contemporary culture. For example, Lichtenstein's *Drowning Girl* at The Museum of Modern Art (1963, first below), is a painting derived from an excerpt of a page from a romance comic book published by DC Comics, *Secret Hearts* #83 (1962, second below), enlarged many times over. Among other aspects, the work questions "the value society ascribes to different forms of art."[7] Lichtenstein noted that his "work is actually different from comic strips in that every mark is really in a different place, however slight the difference seems to some. The difference is often not great, but it is crucial."[8]

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[7] https://www.moma.org/collection/works/80249.

[8] *Id.*

Lichtenstein's *Drowning Girl* (1963).

Secret Hearts #83 (DC Comics 1962)

Another artist, Elaine Sturtevant, was fascinated with repetition and began to "repeat" the works of her contemporaries. Warhol once gave her one of his silkscreens so that she could produce her own version.

Sturtevant's *Study for Warhol Flowers* (1965)[9]
Off view at the Art Institute of Chicago

[9] https://www.artic.edu/artworks/235037/study-for-warhol-flowers.

Warhol's *Flowers* (1964)[10]
Off view at the Metropolitan Museum of Art

Contemporary artists continue to leverage preexisting artwork in exciting, challenging, and meaningful ways. Street artist Banksy painted a piece, *Girl with a Pierced Eardrum* (2017, first below), onto a building in Bristol. This in reference to Vermeer's masterpiece, *Girl with a Pearl Earring* (1665, second below), with Banksy's version stripped to monochrome blue with streaked and dripping paint, and an ADT alarm box in place of Vermeer's famous pearl earring.[11]

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[10] https://www.metmuseum.org/art/collection/search/761208.

[11] Alice Yoo, *New Banksy Piece: 'The Girl with the Pierced Eardrum'* (Oct 20, 2014), https://mymodernmet.com/new-banksy-piece-vermeer-girl-with-a-pearl-earring/.

Banksy's *Girl with a Pierced Eardrum* (2017)

Vermeer's *Girl with a Pearl Earring* (1665)

These examples, mostly from *amici*'s collections and exhibitions, are just illustrative—and *amici* recognize that other submissions will likely provide this Court with numerous additional examples of artworks that borrow from preexisting works through the course of art history. For present purposes, the

critical point is that such works, whether from Van Gogh or more contemporary artists, are recognized and valued in the art world and are regularly collected and exhibited by *amici*. Notably, in 2014, *amici* The Museum of Modern Art staged an exhibition, *Sturtevant: Double Trouble*, surveying Elaine Sturtevant's fifty-year career.[12] *Amici* San Francisco Museum of Modern Art's recent exhibition *Afterimages: Pop Art and Beyond* "brought together artists and ideas associated with Pop art with later generations . . . to explore the resonances that other cultural and artistic movements of the 1960s find today."[13] And all of these works would not be considered transformative under the Second Circuit's "recognizable foundation" approach.

B. The Second Circuit's "Recognizable Foundation" Approach Improperly Proscribed Consideration of Artistic Context and Creation.

The decision below criticized the district court for assuming "the role of art critic to ascertain the intent behind or meaning of the works at issue," invoking this Court's principle of artistic neutrality. Pet. App. 22a–23a & n.4 (quoting *Bleistein*).

In fact, notwithstanding this Court's admonishment in *Bleistein*, courts routinely consider

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[12] https://www.moma.org/calendar/exhibitions/1454.

[13] https://www.sfmoma.org/exhibition/afterimages-pop-art-and-beyond-from-the-fisher-and-sfmoma-collections/.

evidence of intent and meaning in assessing fair use. *See, e.g.*, *Campbell*, 510 U.S. at 572 (noting affidavit describing intent to satirize); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1174 (9th Cir. 2013) (affirming summary judgment of fair use where it was undisputed that defendant's work conveyed a different message, and plaintiff's testimony confirmed same); *Blanch*, 467 F.3d at 253 (affirming summary judgment of fair use based on "undisputed description" that artist used plaintiff's image "as fodder for his commentary on the social and aesthetic consequences of mass media"); *Leibovitz v. Paramount Pictures Corp.*, 948 F. Supp. 1214, 1222 (S.D.N.Y. 1996) (summary judgment of fair use where there was "unchallenged testimony" of parodic intent), *aff'd*, 137 F.3d 109 (2d Cir. 1998).

The Second Circuit misapplied the doctrine of artistic neutrality. The doctrine admonishes judges not to make themselves the arbiters of artistic merit for the purposes of copyrightability, for fear that judges may miss elements of artistic significance. This doctrine does not render judges (or juries) incapable of considering and resolving disputes that relate to artistic issues based on the evidence presented. No authority requires courts to ignore additional information about a work beyond the four corners of the work itself—its creation, its context, its meaning, its reception. This is not deciding artistic merit but considering artistic meaning and significance, which courts are often called on to assess outside the fair use context. *See* 17 U.S.C. § 106A(a)(3)(B) (prohibiting destruction of work of visual art "of recognized stature"); *Castillo v. G&M*

Realty LP, 950 F.3d 155, 166 (2d Cir. 2020) ("We conclude that a work is of recognized stature when it is one of high quality, status, or caliber that has been acknowledged as such by a relevant community.").

As the Ninth Circuit Court of Appeals noted in assessing fair use, "[c]ontext is everything." *Mattel*, 353 F.3d at 801 (affirming summary judgment of fair use, emphasizing importance of "social context" and "actual context"); *see also Blanch*, 467 F.3d at 251 (fair use is "open-ended and context-sensitive"). Relevant contexts for fair use analysis should include, at a minimum, the context of the defendant's work as of the time it was created and how it is displayed, published, and received. *See Google*, 141 S. Ct. at 1208 (assessing Google's motives for copying not when plaintiff's Java language "first c[ame] on the market," but later, when programmers were already "used to it"); *Bouchat v. Balt. Ravens Ltd. P'ship*, 619 F.3d 301, 314–15 (4th Cir. 2010) (assessing uses of original copyrighted team logo as historical items in a "museum-like setting" which "adds something new").

Here, however, the Second Circuit set aside context in favor of an apparent standard that asks if, viewing the works at issue side-by-side, the earlier work is a "recognizable foundation" of the later work. *See* Pet. App. 26a ("[T]he Goldsmith Photograph remains the recognizable foundation upon which the Prince Series is built."). *Amici* are not aware of prior fair use cases that have adopted this approach and do not believe it is appropriate for assessing fair use, particularly as applied to contemporary art.

A contextual, historical approach is not only consistent with precedent, but also with practical realities in the visual art world. Curators rarely acquire, display, or publish works without considering and providing this critical contextual information. Artworks are generally displayed in museums and shown in museum publications with relevant context that enables viewers to understand and appreciate the meaning and significance of the works.

The Second Circuit also failed to consider the artistic process that Warhol used to create the Prince Series, and how that impacts the artistic differences between the two works. According to the Second Circuit, the Prince Series works are "much closer to presenting the same work [*i.e.*, as Goldsmith's photograph] in a different form . . . than they are to being works that make a transformative use of the original." Pet. App. 25a.

Warhol's artistic modifications take on greater significance when properly contextualized. He did not simply duplicate the elements of Goldsmith's photograph, as the Second Circuit concluded. Pet. App. 25a–26a. Warhol created high-contrast half-tone images, marked up the images with revisions, printed the images on acetate to create an "under-drawing," and then painted the images by hand. JA378. Warhol's technique reflected his artistic innovations that contributed broadly to the Pop Art movement.

So, from the perspective of *amici*, Warhol did more than simply take Goldsmith's black-and-white photograph, flatten it, and magnify or minimize

certain features, as the Second Circuit described. Pet. App. 26a. Goldsmith's photograph is a photorealistic, black-and-white image. There is no latent color that Warhol could "magnify" or "minimize," as the Second Circuit suggested. *Id.* Warhol's selection and arrangement of "loud, unnatural colors," *id.*, was wholly his invention, and applied by hand. And, Warhol's fantastical color choices are generally recognized by museum curators as manifestations of his commentary on commodification, commerciality, and propaganda. This can be seen more fully when viewing Warhol's entire Prince Series:

JA505–06.

The parties and the court below appeared to agree "that the Prince Series reflects Andy Warhol's talent, creativity, and distinctive aesthetic." Pet. App. 27a. By ignoring context and focusing on "recognizable

foundation," however, the Second Circuit missed important considerations relevant to the fair use analysis, such as the historical context of Warhol's work, the artistic elements that comprise Warhol's "style," what those elements convey, and how all these differ from Goldsmith's photograph.

Amici also suggest that the Second Circuit did not appropriately consider the public benefit from the creation of new and innovative artworks. In *Google*, this Court instructed courts to "take into account the public benefits the copying will likely produce" as part of the fair use analysis. 141 S. Ct. at 1206. For artworks such as the Prince Series, *amici* respectfully suggest this requires consideration of the reception of, and reaction to, such works in the art world, including museums. As set out above, the artistic traditions of which the Prince Series is a part are recognized and valued in the community of museums that collect, preserve, and exhibit contemporary art. Indeed, *amici* San Francisco Museum of Modern Art is currently hosting an exhibit entitled *Afterimages: Pop Art and Beyond*, which examines how artistic traditions including Andy Warhol have shaped American consciousness, including by exploration of celebrity and consumer culture.[14]

In this light, *amici* respectfully suggest that the Second Circuit's commentary about a "celebrity-plagiarist privilege," Pet. App. 26a–27a, is both

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[14] https://www.sfmoma.org/exhibition/afterimages-pop-art-and-beyond-from-the-fisher-and-sfmoma-collections/.

ahistorical and misses the point. Of course, Warhol's use of Goldsmith's photograph should not be permissible simply because Warhol is famous and his silkscreen style is renowned and recognizable. At the same time, Warhol's innovative and now recognized style and process of creation, and their established place in contemporary art are not "entirely irrelevant," Pet. App. 26a, but should be *an* appropriate consideration for a court in assessing whether and to what extent the Prince Series alters Goldsmith's photograph in a way that creates something new, with new meaning and character. That, as this Court has held, is a critical purpose of the fair use analysis. *See Google*, 141 S. Ct. at 1208 (emphasizing "creative improvements, new applications, and new uses"); *Campbell*, 510 U.S. at 579 ("central purpose" of first factor inquiry is whether a work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message").

Amici take no position on what fair use outcome the Second Circuit should have reached as to commercial reproductions of the Prince Series if the court had properly considered the context and meaning of Warhol's works and not focused on its "recognizable foundation" standard. But *amici* do believe there was important context here that the court below unfortunately declined to consider at all as part of its fair use analysis. This Court should include such considerations in its fair use analysis, and not adopt the "recognizable foundation" standard used by the Court below.

II. The Second Circuit's Decision Creates Confusion as to the Fair Use Standards for "Original Works" as Opposed to Published Reproductions, Fostering Uncertainty for Museums.

In addition to adopting a fair use standard that strayed from precedent and artistic traditions, the Second Circuit's decision reached a befuddling conclusion as to which embodiments of Warhol's Prince Series were or may not have been infringing. This confusing result, perhaps borne from an effort to limit the impact of its decision on museums like *amici*, unfortunately had the opposite effect—promoting uncertainty and so creating a chilling effect for museums.

A. The Decision Below Creates Uncertainty as to the Sixteen Original Prince Series Works, and the Market for "Museum Exhibits and Publications."

In analyzing the fourth fair use factor, "the effect of the [defendant's] use upon the potential market for or value of the copyrighted work," 17 U.S.C. § 107(4), the Second Circuit focused on the market for commercial reproductions of Goldsmith's photograph and Warhol's Prince Series. Pet. App. 37a–41a. Whether correctly or not, the court found that the works of Goldsmith and Warhol compete in the market for commercial reproductions of images of Prince. Pet. App. 49a–50a. The court focused on the market for commercial reproductions because, it said, Goldsmith was not "seriously" suggesting that the

original Prince Series infringed her market, only the reproductions. Pet. App. 37a.

Based on this perceived market impact, the Second Circuit found that the Prince Series was infringing or, as the court stated, that AWF's "defense of fair use fails as a matter of law." Pet. App. 43a. At the same time, the court *appeared* to suggest that the original Prince Series did not impinge on Goldsmith's copyright, at least in its comment that "what encroaches on Goldsmith's market is AWF's commercial licensing of the Prince Series, not Warhol's original creation." Pet. App. 42a. The decision also suggests, without explanation, that certain museum uses of the Prince Series and reproductions of it do not implicate Goldsmith's market—or, at least, are "not particularly relevant." Pet. App. 39a ("Setting aside AWF's licensing of Prince Series works for use in museum exhibits and publications about Warhol, which is not particularly relevant for the reasons set out in our discussion of the primary market for the works . . . .").[15]

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[15] To the extent the Second Circuit appeared to assume (in its reference to "licensing of Prince Series works for use in museum exhibits") that museums would generally require a license from AWF to display publicly the original Prince Series works, that is incorrect. Under 17 U.S.C. § 109(c), "the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers

This muddled and cryptic reasoning leaves the status of Warhol's original works, and reproductions of those works by museums, in copyright limbo. The court certainly did not find such uses to be fair use and therefore non-infringing. Indeed, as noted, it found that AWF's "defense of fair use fails as a matter of law." Pet. App. 43a.

The concurrence below sought to reassure museums and collectors that their rights in original works in the Prince Series would not be disturbed. Pet. App. 50a–52a. But, like the panel, its basis for doing so was that Goldsmith did not seek remedies as to the original Prince Series, only as to "licensed reproductions." Pet. App. 50a. And even the concurrence did not state that the original Prince Series, let alone licensed reproductions of those works by museums, would be non-infringing. It simply commented that, "[h]ad the use [at issue] been Warhol's use of the photograph to construct the modified image, we would need to reassess." Pet. App. 52a. While the concurrence seeks to reassure museums and private art collectors that their rights

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present at the place where the copy is located." Notably, because this "display right" applies only to a work "lawfully made under this title," the Second Circuit's messy resolution raises uncertainty for museums as to whether this display right applies here. While the museums believe any such museum display would be held a fair use even if Section 109(c) did not apply, the prospect of having to litigate such issues with respect to copyright holders is concerning for museums.

will not be disturbed, it only highlights the confusing distinctions in the panel decision.

B. The Decision Below Has Uncertain Application to Museums, Chilling Core Museums' Activities.

The Second Circuit's confused parsing of the market for potentially infringing works leaves *amici* concerned about the decision's implications for museums—implications this Court should consider in reaching a decision.

As noted, the Second Circuit did not state that the works in the original Prince Series were not infringing, and it did not hold that museum reproductions of such works, as part of making their collections available to a broader audience, were permissible. More troubling, the court failed to provide a framework for assessing which "licensed reproductions" of the Prince Series by museums might be fair uses going forward.

As written, the decision below has concerning implications for museums. For example, under the Second Circuit's ruling the status of museums' display of original artworks that incorporate preexisting works is unclear. The concurrence notes that "[t]he sixteen original works [in the Prince Series] have been acquired by various galleries, art dealers, and the Andy Warhol Museum" and asserts that "[t]his case does not decide their rights to use and dispose of those works because Goldsmith does not seek relief as to them." Pet. App. 50a. But the panel found the Prince Series works were substantially similar to the

Goldsmith Photograph and that the fair use defense failed as a matter of law. Taken at face value, this could mean that all embodiments of the series (whether "originals" or reproductions) were infringing when made and continue to infringe when used. This cannot be the intended result, and the language of the panel and concurrence suggests that this was not purposeful. Nevertheless, intended or not, the result is potentially the same with the correlative chilling effect on museums.

Illustrative examples offered by the court below only compound this confusion. The concurrence suggests that whether licensed reproductions of Warhol's Prince Series works may harm Goldsmith's market turns on a functional distinction. The panel found that Goldsmith's photograph and Warhol's images competed in the market for licensed depictions of Prince in magazines. According to the concurrence, "[w]hen one of the Prince Series works is licensed to a magazine, it functions as a portrait of the musician Prince—as does Goldsmith's photograph." Pet. App. 51a. But consider a Prince Series work that is licensed to a magazine as a part of a retrospective on Pop Art, or as the cover illustration for the catalog of a museum exhibition of Pop Art. In such contexts, the work would hardly be said to function as a portrait of Prince—but whether such uses would be permissible or infringing as to Goldsmith's rights remains unclear.

More generally, the museums engage in a wide range of activities to showcase their collections to their physical and virtual audiences. These include

not only physical exhibitions, but online exhibitions, catalogs of exhibitions, promotion of exhibitions, documentaries, and other activities, all of which involve reproductions of original works in the museums' collections or on loan to them. Such activities may include not only works in the Prince Series, but many other works of contemporary art that borrow from preexisting materials subject to copyright, as Warhol did. Are such museum activities permitted by the Second Circuit's decision as "not particularly relevant" or are they potentially infringing as to rights of creators of earlier works?

The Second Circuit found such activities "not particularly relevant" because Goldsmith purportedly did not seek remedies as to the original Prince Series. Pet. App. 39a. Whether that is so is actually unclear in the record.[16] But the uncertainty for the museums

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[16] In Goldsmith's initial counterclaim, she sought permanent injunctive relief against, among other acts, the Foundation "displaying the Infringing Image and any other Warhol-created works that are substantially similar to the Goldsmith Photo or Infringing Image." JA120. Goldsmith also sought "actual damages and all profits earned by the Foundation attributable to infringement of the Goldsmith Photo." *Id.*

Goldsmith's opening appellant brief to the Second Circuit makes separate mention of the "original" Warhol works only to say that "Critically, this case is not *principally* about the Foundation's right to display the original Warhol works in galleries or museums." Opening Br. 41, No. 19-2420 (2d Cir. Nov. 27, 2019), ECF. No. 117 (emphasis added). The brief argues that the market for the original Warhols, which was the main focus of

lies in the next case. There, a copyright holder may seek relief as to an "original" work of art alleged to infringe an earlier work, whether in the form of damages for infringement or equitable relief, or as to reproductions of such works created and disseminated by museums. A copyright holder may claim that its public display right, 17 U.S.C. § 106(5), is infringed by a museum's display of an original contemporary art work that is allegedly infringing. It may claim that its reproduction or distribution right, 17 U.S.C. §

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the Warhol Foundation's expert report, was not the only relevant market, noting that "Goldsmith's infringement claim *principally* targets the Foundation's *commercial and editorial licensing* activities." *Id.* at 50 (first emphasis added). At the same time, Goldsmith's brief below also argued that, "The record reflects some degree of overlap between the market for Warhol's original paintings, drawings, and prints and Goldsmith's fine art prints." *Id.* at 50 n.4.

It appears it was not until oral argument at the Second Circuit that Goldsmith took a position distinguishing remedies as to originals and reproductions—but then only as to equitable remedies. Judge Lynch inquired, "I know that you're not asking—I think you're not asking, I guess I can confirm this with you, for the Warhol images to be destroyed or to be turned over to you or something of that sort." Oral Argument at 6:58, No. 19-2420 (2d Cir. Sept. 15, 2020), https://www.courtlistener.com/audio/71561/the-andy-warhol-foundation-v-goldsmith/.
Goldsmith's counsel responded, "Ms. Goldsmith is not seeking the destruction of any Warhol art, anything hanging in the museum. . . . We're not seeking the destruction of any Andy Warhol silkscreens or other art." *Id.* at 7:58. Of course, this response disclaimed only seeking destruction of the original Warhols, not damages as to such original works.

106(1), (3), is infringed by a museum's use of reproductions of an allegedly infringing work in exhibition catalogs, website promotions, or documentaries, for example. The Second Circuit's decision provides no guidance for museums as to whether such activities with respect to works of contemporary art that borrow from earlier works may be found infringing.[17]

Although the museums believe various defenses should and would apply in such scenarios, the prospect of such litigation creates uncertainty that chills museums' ability to make works in their collections or exhibitions available to the public, whether in originals or in reproductions across media. As the concurrence below acknowledged, "[r]isk of a copyright suit or uncertainty about an artwork's status can inhibit the creative expression that is a goal of copyright." Pet. App. 51a.

The museums' activities, including display, exhibition, and publication, are a critical part of their missions. And, these activities provide an important public benefit, in furtherance of the constitutional

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[17] Notably, in some prior cases where a defendant was alleged to have infringed the plaintiffs' copyrighted works through varied uses, the Second Circuit examined the different uses and reached a conclusion as to whether each was a fair use or not, providing guidance for future scenarios. *See Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 176 (2d Cir. 2018) ("It is useful to analyze separately distinct functions of the secondary use (i.e., the use by TVEyes of Fox's copyrighted material), considering whether each independent function is a fair use."); *Authors Guild v. Google, Inc.*, 804 F.3d 202, 216–29 (2d Cir. 2015).

objectives of copyright. This public benefit should not be neglected in the fair use analysis. To the extent that the panel opinion discussed the benefits provided by artwork that references other artwork, it deemed the public interest "highly relevant when assessing equitable remedies" but apparently not appropriate to consider at the pre-remedies stage. Pet. App. 29a. Cordoning off consideration of the public benefits in this way contradicts this Court's instruction to "take into account the public benefits the copying will likely produce" as part of the fair use analysis. *Google*, 141 S. Ct. at 1206.

Further, such late-stage consideration of public benefits, as suggested by the court below, would likely chill those very benefits before they can be realized—that a court might hesitate before ordering an original work destroyed is far from the positive sanction that a fair use finding provides, and hardly shields museums from the risk of litigation. Although museums believe they should and would prevail on any fair use issues of this kind that might arise, this Court has recognized that vindicating a fair use defense can be onerous. *See Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1513 (2020) (characterizing relying on fair use as "roll[ing] the dice," as fair use disputes are "notoriously fact sensitive and often cannot be resolved without a trial")

Moreover, museums function as "a site where artists and audiences engage[] openly with untested

ideas."[18] Their activities implicate the vital First Amendment concerns that copyright law must balance. *See Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003) (emphasizing fair use as one of copyright law's "traditional First Amendment safe-guards"); *Bouchat v. Balt. Ravens Ltd. P'ship*, 737 F.3d 932, 944 (4th Cir. 2013) (fair use "crucial to the exchange of opinions and ideas" to counter the "inevitable chilling effects" of over-broad copyright). While museums will hold fast to their values of free speech and artistic freedom, uncertainty in the fair use domain makes these values more difficult to attain.

If the Second Circuit's confused distinction with respect to "originals" and reproductions were endorsed and applied more broadly, it would have an uncertain impact on museums' display, exhibition, and publishing activities which any decision by this Court should avoid. Where, as here, it has been found that an original work does not usurp a preexisting work's primary market, the enormous benefit of museums' display and publication to the art-viewing public, as to both original works and published reproductions, should be upheld as fair uses even if this Court affirms the Second Circuit's finding of infringement below.

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[18] *Mission & Values*, https://whitney.org/about/mission-values.

CONCLUSION

Amici respectfully request that the Court take the foregoing into consideration in its decision.

June 17, 2022 Respectfully submitted,

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