No. 20-____

IN THE
SUPREME COURT OF THE UNITED STATES

G&M REALTY L.P., *et al.*,
Petitioners,

v.

MARIA CASTILLO, *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Designed to create for visual artists a "moral right" of "integrity," the Visual Artists Rights Act of 1990 ("VARA") authorizes courts to impose statutory damages of up to $150,000 against the owner of a work of visual art if the owner intentionally destroys a work of "recognized stature"—a novel term, undefined in VARA, which fails to provide a person of ordinary intelligence fair notice of what is prohibited.

Did the Due Process Clause of the Fifth Amendment permit the district court to impose liability against a property owner under the "recognized stature" provision of VARA, and award enhanced statutory damages of $6.75 million, for destroying works of graffiti art affixed to his warehouses being demolished in connection with development of his property?

PARTIES TO THE PROCEEDING

Petitioners are G&M Realty L.P.; 22-50 Jackson Avenue Owners, L.P.; 22-52 Jackson Avenue LLC; ACD Citiview Buildings, LLC; and Gerald Wolkoff, the defendants below.

Respondents are Maria Castillo, James Cochran, Luis Gomez, Bienbenido Guerra, Richard Miller, Carlo Nieva, Kenji Takabayashi, Nicholai Khan, Jonathan Cohen, Sandra Fabara, Luis Lamboy, Esteban Del Valle, Rodrigo Henter de Rezende, William Tramontozzi, Jr., Thomas Lucero, Akiko Miyakami, Christian Cortes, Carlos Game, James Rocco, Steven Lew, Francisco Fernandez, Kai Niederhausen, and Rodney Rodriguez, the plaintiffs below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court, Petitioners G&M Realty L.P., 22-50 Jackson Avenue Owners, L.P., 22-52 Jackson Avenue LLC, and ACD Citiview Buildings, LLC state that they have no corporate parent and that no publicly held corporation owns 10% or more of an interest in them. Petitioner Gerald Wolkoff is an individual.

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The amended opinion of the United States Court of Appeals for the Second Circuit is reported at 950 F.3d 155 and reproduced in the Appendix to this Petition at App. 1. The decision of the United States District Court for the Eastern District of New York regarding Petitioners' motion pursuant to Federal Rules of Civil Procedure 52(b) and 59(a) is available at 2018 WL 2973385 and reproduced in the Appendix at App. 21. The decision of the United States District Court for the Eastern District of New York following the advisory jury's verdict is reported at 320 F. Supp. 3d 421 and reproduced in the Appendix to this Petition at App. 84.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the Second Circuit was entered on February 20, 2020. In response to the "public health concerns relating to COVID-19," the Chief Justice extended the time to file a petition for certiorari to 150 days from the date of the lower court judgment. Order of March 19, 2020, 589 U.S. — (2020).

RULE 29.4(b) STATEMENT

This Petition draws into question the constitutionality of the Visual Artists Rights Act of 1990, and 28 U.S.C. § 2403(a) may therefore apply. The Second Circuit did not certify to the Attorney General of the United States that the constitutionality of the Visual Artists Rights Act was in question.

CONSTITUTIONAL & STATUTORY PROVISIONS

The Fifth Amendment's Due Process Clause provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

The Visual Artists Rights Act of 1990 provides, in relevant part:

> Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art subject to the limitations set forth in section 113(d), shall have the right to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

17 U.S.C. § 106A(a)(3)(B).

Title 17 of the U.S. Code provides, in relevant part:

> Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any references to copyright shall be deemed to include the rights conferred by Section 106A(a).

17 U.S.C. § 501(a).

Title 17 of the U.S. Code also provides, in relevant part:

> (1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $750 or more than $30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.
>
> (2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000.

17 U.S.C. § 504(c)(1), (2).

The full texts of these provisions are reproduced at App. 154–61.

INTRODUCTION

What does a case about the destruction of graffiti art[1] affixed to an aging warehouse in Queens, New York have to do with the United States Constitution? A lot, it turns out.

This Petition concerns the most controversial provision of the Visual Artists Rights Act of 1990 ("VARA")—itself an exceedingly unusual statute. VARA authorizes courts to impose statutory damages of up to $150,000 against the owner of a work of visual art of "recognized stature" if the owner destroys it. 17 U.S.C. §§ 106A(a)(3)(B), 501(a), 504(c)(2).

Tacked on to legislation authorizing 85 federal judgeships, passed in the waning hours of the 101st Congress, VARA marked the first and only time that Congress has conferred artists with "moral rights"—a concept borrowed from the laws of European countries. The "recognized stature" provision concerns itself with an artist's "moral right" to "integrity"—broadly speaking, the right to ensure that the work is not altered without the artist's consent.

VARA's "recognized stature" provision raises a host of constitutional red flags—including questions

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[1] Reference to the works at issue here as "graffiti art" is not intended to be pejorative. *See* The Concise Oxford Dictionary of Art Terms 114 (2d ed. 2010) (discussing the origins of development of graffiti art). This style is sometimes referred to as "aerosol art" because of the type of paint canisters used to compose the works.

about Congress's authority to enact it,[2] and First Amendment objections.[3] But, as relevant here, the

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[2] The source of Congress's power to enact VARA is not self-evident, and subject to serious doubt. Some legislative materials point to the Constitution's Copyright Clause, but "the scant history of the Copyright Clause fails to reflect an explicit concern with recognizing the personal rights of authors as an independent end." Roberta Rosenthal Kwall, The Soul of Creativity: Forging a Moral Rights Law for the United States 24 (2010); *see also id*. at 23 ("[T]he primary objective of our copyright law is to ensure the copyright owner's receipt of all financial rewards to which she is entitled by virtue of copyright ownership. Authorship and copyright ownership, pursuant to the statutory scheme, are two distinct categories."); Christopher J. Robinson, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 Fordham L. Rev. 1935, 1963 (2000) ("There is no evidence that the enactment of VARA serves the copyright policy of encouraging the creation or dissemination of art."); Eric E. Bensen, *The Visual Artists Rights Act of 1990: Why Moral Rights Cannot Be Protected Under the United States Constitution*, 24 Hofstra L. Rev. 1127, 1132 (1996) ("VARA is unconstitutional because there is no source of power in the Constitution for federal regulation of moral rights").

[3] While not directly at issue in this case, the "recognized stature" provision implicates the First Amendment because it penalizes even intentional destruction intended to express ideas and viewpoints. *See* Amy M. Adler, *Against Moral Rights*, 97 Calif. L. Rev. 263, 284 (2009) ("destroying art can be a valuable way of making art . . . [it is] a central quality of 'art' itself"); *see generally* Dario Gamboni, The Destruction of Art: Iconoclasm and Vandalism Since the French Revolution (2018); *see also* Brian Soucek, *Aesthetic Judgment in Law*, 69 Ala. L. Rev. 381, 386 (2017) ("The First Amendment prohibits state-enforced orthodoxy in aesthetics no less than in politics or religion."); Bensen, *The Visual Artists Rights Act of 1990: Why Moral Rights Cannot Be Protected Under the United States Constitution*, 24 Hofstra L. Rev. at 1138–41 (1996) (contending the VARA violates the First Amendment); Cathy Gellis, *In New 5Pointz Decision, Second Circuit Concludes That VARA Trumps*

"recognized stature" provision also egregiously runs afoul of the Fifth Amendment's due process requirements because Congress neglected to define this novel phrase, which fails to provide a person of ordinary intelligence fair notice of what is prohibited.

The "recognized stature" provision of VARA also clearly impairs the traditional rights of property owners, which include the right to dispose or destroy one's property.[4] *See* Drew Thornley, *The Visual Artists Rights Act's "Recognized Stature" Provision: A Case for Repeal*, 67 Clev. St. L. Rev. 351, 354 (2019) (discussing "the potential threats VARA poses to fundamental principles of property and contract and, thus, to fundamental American freedoms"); Adler, *Against Moral Rights*, 97 Calif. L. Rev. at 265 ("I

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the Constitution, TechDirt (Mar. 6, 2020), https://www.techdirt.com/articles/20200305/20175044048/new-5pointz-decision-second-circuit-concludes-that-vara-trumps-constitution.shtml ("the Second Circuit has illuminated, in stark relief, what an unconstitutional disaster [VARA] is.").

[4] *See*, *e.g.*, *Horne v. Dep't of Agric.*, 576 U.S. 350, 361 (2015) ("bundle" of property rights includes right to "dispose of" one's property); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (property "denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it"); *see also* Richard A. Epstein, Supreme Neglect: How to Revive Constitutional Protection for Private Property 20 (2008) ("Everywhere, ownership also includes rights to use, transform, develop, consume, or dispose of property."); Black's Law Dictionary 1105 (6th ed. 1990) (defining "owner" as "He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases, even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right.").

question the most basic premise of moral rights law: that law should treat visual art as a uniquely prized category that merits exceptions from the normal rules of property and contract."); Robinson, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 Fordham L. Rev. at 1935–36 (VARA "marked a significant departure from prior property law," and was "revolutionary" in conferring artists rights "even when the original work to be protected is no longer in his possession"); George C. Smith, *Let the Buyer of Art Beware; Artists' Moral Rights Trump Owners' Property Rights Under the Visual Artists Rights Act*, The Recorder, Jan. 10, 1991 (calling VARA "one of the most extraordinary realignments of private property rights ever adopted by Congress . . . .").

In this case, the inherent deficiencies of the "recognized stature" provision emerged with full force. Congress's silence about this unfamiliar term left the lower courts to invent their own test, and use it to impose a $6.75 million award against Petitioners who, absent VARA, unquestionably had the right to demolish the warehouses, and the affixed graffiti art, in connection with development of property.[5] The result was a denial of Petitioners' due

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[5] The Daily News Editorial Board called the Second Circuit's decision a "frontal assault on property rights." *Paint That a Shame: The Crazy Precedent Set by a 5Pointz Appeals Ruling*, Daily News, Feb. 20, 2020, https://www.nydailynews.com/opinion/ny-edit-graffiti-is-illegal-20200226-n6chh5ijgvahzavxkns3ymr6ny-story.html; *see also* Thornley, *The Visual Artists Rights Act's "Recognized Stature" Provision: A Case for Repeal*, 67 Clev. St. L. Rev. at 370 ("The

process rights—and a dangerous, and influential precedent from the Second Circuit concerning this significant provision of VARA.

The Second Circuit's opinion here decided an important question of federal law that has not been, but should be, settled by this Court. Its opinion also conflicts with relevant decisions of this Court. The Court should grant this Petition. *See* SUP. CT. R. 10(c).

STATEMENT OF THE CASE

A. "Moral Rights" and The Visual Artists Rights Act

"Moral right[s]" are those "of an author or artist, based on natural-law principles, to guarantee the integrity of a creation despite any copyright or property-law right of its owner." Black's Law Dictionary (11th ed. 2019); *see also* Kwall, The Soul of Creativity: Forging a Moral Rights Law for the United States 55–56 ("Moral rights are aimed at preserving an author's dignity, honor, and autonomy"); Adler, *Against Moral Rights*, 97 Calif. L. Rev. at 264 (2009) ("Moral rights allow an artist to control what you do with his work of art even after he has sold it and even if you are not in privity of contract with him."). One "moral right" is the right

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5Pointz ruling reveals the substantial threat [VARA] poses to our nation's long-standing commitment to private property and freedom of contract"); Chused, *Moral Rights: The Anti-Rebellion Graffiti Heritage of 5Pointz*, 41 Colum. J.L. & Arts at 589 (the district court's opinion in this case "failed to address the interests of the developers in any meaningful way").

of "integrity"—broadly speaking, the right to ensure that the work is not changed without the artist's consent.

While "most countries in Western Europe have a long tradition of recognizing moral rights,"[6] the Framers of the United States Constitution "were not fully cognizant of these specific rights given their subsequent emergence in Europe years later,"[7] and "[m]oral rights were only recently and grudgingly accepted in the United States."[8]

That limited acceptance came in the form of the Visual Artists Rights Act of 1990 ("VARA"), Pub. L. No. 101-650, 104 Stat. 5089, 5128 (1990). Part of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990), VARA was "[t]acked on to" legislation authorizing 85 federal judgeships in "the dying hours of the 101st Congress," "a compromise between many conflicting interests, and the result was immediately criticized from several quarters." Robinson, *The "Recognized Stature"*

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[6] William M. Landes & Richard A. Posner, The Economic Structure of Intellectual Property Law 270 (2003).

[7] Kwall, The Soul of Creativity: Forging a Moral Rights Law for the United States 57.

[8] Adler, *Against Moral Rights*, 97 Calif. L. Rev. at 266; *see also Weinstein v. Univ. of Ill.*, 811 F.2d 1091, 1095 n.3 (7th Cir. 1987) ("*droit moral*" is a "Continental principle" that "no American jurisdiction follows as a general matter"); *Gilliam v. Am. Broad. Cos., Inc.*, 538 F.2d 14, 24 (2d Cir. 1976) ("American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than personal, rights of authors.").

Standard in the Visual Artists Rights Act, 68 Fordham L. Rev. at 1935; *see also* Kwall, The Soul of Creativity: Forging a Moral Rights Law for the United States 28 (VARA was passed "with little debate or discussion . . . . Sponsors of th[e] bill had to include several unrelated measures in order to appease senators who would otherwise oppose the federal judgeships bill.").[9]

"VARA provides very circumscribed federal statutory protection for the moral rights of certain visual artists . . . ." Kwall, The Soul of Creativity: Forging a Moral Rights Law for the United States 28. Relevant here is VARA's provision that, subject to certain limitations, "the author of a work of visual art . . . shall have the right to prevent any destruction of a work of recognized stature, and any

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[9] The United States joined the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 6*bis*, S. Treaty Doc. No. 99-27 (entered by the United States Mar. 1, 1989). Although the Berne Convention has features protecting moral rights, VARA was not enacted to fulfill the United States' treaty obligations. *See* 136 Cong. Rec. H13,297, 13,313 (daily ed. Oct. 27, 1990) (statement of Rep. Kastenmeier); H.R. Rep. 101-514 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6917–18 (noting Congress's view that adhering to the Berne Convention did not require enacting new federal legislation); Kwall, The Soul of Creativity: Forging a Moral Rights Law for the United States 30 ("When the United States originally joined the Berne Convention . . . Congress believed that no additional moral rights protections were needed . . . ."); Bensen, *The Visual Artists Rights Act of 1990: Why Moral Rights Cannot Be Protected Under the United States Constitution*, 24 Hofstra L. Rev. at 1133 ("VARA was not passed pursuant to the Berne Convention")

intentional or grossly negligent destruction of that work is a violation of that right." 17 U.S.C. § 106A(a)(3)(B) (the "recognized stature" provision of VARA).[10] A defendant found to have willfully violated the "recognized stature" provision of VARA is subject to actual damages or statutory damages up to $150,000. 17 U.S.C. §§ 501(a), 504(c)(2).

B. The History of 5Pointz

This case concerns works of graffiti art that Petitioners allowed to be painted on the walls of buildings they owned on the 22-50 block of Jackson Avenue in Long Island City, Queens, New York. More than 10,000 such works were painted at the site, destroyed by other artists, and then covered by those artists with new works between 2002 and 2013. Beginning in the early 1990s, several graffiti artists dubbed this property the "Phun Phactory" and began to cover the warehouses with unauthorized works. Gerald Wolkoff, an owner and the principal decisionmaker for the property, subsequently granted Pat DeLillo permission for himself and others to create graffiti on Wolkoff's property, so long as the art did not contain religious,

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[10] Despite its European origins, "VARA actually provides greater protection than the civil law jurisdictions to the extent it prohibits destruction of works of 'recognized stature.'" Kwall, The Soul of Creativity: Forging a Moral Rights Law for the United States 156; *id.* at 44 ("Interestingly, civil law countries typically do not protect an author against complete destruction of her work."); Robinson, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 Fordham L. Rev. at 1936–37 ("recognized stature" provision of VARA "granted a moral right beyond that commonly accepted in Europe").

political, or pornographic content. Wolkoff designated DeLillo as the individual in charge of overseeing the graffiti art to be placed on the property.

In 2002, Wolkoff shifted oversight responsibilities to Jonathan Cohen. As with DeLillo, there was no written agreement; rather, both parties understood that graffiti artists were permitted to paint on Wolkoff's property, provided their works contained no pornographic, religious, or political content. Cohen "oversaw the site, kept it clean and safe, allotted wall space, and explained the site's rules and norms to new artists." App. 96.

The property, ultimately referred to as "5Pointz," operated as "a site of creative destruction" whose works continually changed. App. 97. At any point in time, as many as 350 pieces appeared on 5Pointz's walls. Cohen oversaw an informal process for determining when a work could be "covered" by another artist, and competition between artists to paint over the work of a predecessor was a crucial aspect of 5Pointz. As a result, most works had short lifespans; over the 11 years that Cohen oversaw the project, approximately 10,650 works were painted and then destroyed by other artists. App. 2–3, 97. None of the works were owned by the artists; they were owned by Wolkoff and his companies, on whose property they were affixed.

From the outset of his relationship with both DeLillo and Cohen, Wolkoff made clear his ultimate goal was to develop the properties, which would require demolition of the buildings. *Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212, 223 (E.D.N.Y.

2013). To ensure he could move forward with his development plans when the time came, Wolkoff included 60 or 90-day demolition clauses in all of his leases on his 5Pointz properties.

After years of discussions, planning, and negotiations, on August 21, 2013, the City Planning Commission granted Wolkoff's company, G&M Realty, a special use permit to develop the property as a residential apartment complex. The City Council unanimously approved the proposed project on October 9, 2013. That proposal included, at G&M Realty's suggestion, a stipulation that the development include 12,000 square feet of artist studio and gallery space, a 50-by-200 foot wall in the courtyard specifically reserved for artists to continue their work, and approximately 200 affordable housing units.

Upon learning that the development project was moving forward, Cohen and others sought to block it. Cohen filed an unsuccessful application with the City Landmarks Preservation Commission to preserve 5Pointz as a location of "cultural significance." Cohen also unsuccessfully sought to raise funds to purchase the property himself.

C. District Court Proceedings

i. The Initial Lawsuit and Preliminary Injunction Hearing

In a last-ditch effort to halt construction, on October 10, 2013, Cohen and a number of other artists sued, seeking an injunction under VARA barring the defendants from modifying or destroying

certain of the works then on the walls at 5Pointz (the "*Cohen* suit"). App. 86.[11]

The district court entered a ten-day temporary restraining order and "encourage[d] counsel to try and settle the matter." *Cohen v. G&M Realty L.P.*, No. 1:13-cv-05612 (E.D.N.Y. Oct. 17, 2013), Minute Entry. After the ten days elapsed, the district court extended the temporary restraining order and scheduled an evidentiary hearing for the following week. *Id.* at ECF No. 23.

Starting on November 6, 2013, the district court conducted a three-day evidentiary hearing on the plaintiffs' application for a preliminary injunction. At the hearing, the district court made clear that it "love[d] the work, personally"; that it was "going to tear [his] heart to see it torn down"; and that, "If I find a lawful means of being able to support aerosol art as . . . 'recognized stature,' I would like to do that." *Id.* at ECF No. 205 at 12, ECF No. 206 at 59. The court nonetheless made clear that it expected to deny the preliminary injunction, *id.* at ECF No. 206 at 61, and "exhorted the plaintiffs to photograph all those [works] which they might wish to preserve." *Cohen*, 988 F. Supp. 2d at 227.

On November 12, 2013, the court issued a three-sentence order denying plaintiff's motion for a preliminary injunction, dissolving the temporary restraining order, and stating that a "written opinion

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[11] Respondents invoked the district court's jurisdiction under 28 U.S.C. § 1331. That initial complaint involved 24 works, only 17 of which remain at issue.

will soon be issued." *Cohen*, No. 1:13-cv-05612, at ECF No. 34. After the court issued that order, Wolkoff directed the whitewashing of virtually all the artwork on the 5Pointz site. *Cohen v. G&M Realty L.P.*, No. 18-538 (2d Cir. May 4, 2020), ECF No. 112 at 20–21 (Wolkoff testifying about rationale for commencing whitewashing).

The district court subsequently issued its written decision on the preliminary injunction motion, lamenting that it "regrettably had no authority under VARA to preserve 5Pointz." *Cohen*, 988 F. Supp. 2d at 226. The decision noted that the court was limited by VARA to deciding "whether a particular work of visual art that was destroyed was one of 'recognized stature.'" *Id.* The court also reiterated its affinity for the works at 5Pointz, stating that "our souls owe a debt of gratitude to the plaintiffs for having brought the dusty walls of defendants' buildings to life." *Id.* at 225.

The district court observed that "some" of the works "present sufficiently serious questions going to the merits to make them a fair ground for litigation." *Id.* at 226 (citation and quotations omitted). But the court found that the plaintiffs had failed to demonstrate irreparable harm, and that a preliminary injunction was therefore unwarranted because any injury could be compensated by damages. *Id.* at 227. The court also noted that the public's interests were protected without an injunction because the City Planning Commission had conditioned Wolkoff's development on his plan for "3,300 square feet of the exterior of the new buildings to be made available for art." *Id.* But the court persisted in its efforts to preserve 5Pointz,

urging the defendants to "do even more," "make much more space available, and give written permission to Cohen to continue to be the curator," and suggesting that their willingness to follow these suggestions might influence the court in the event it "might be required to consider the issue of monetary damages." *Id.*

ii. Plaintiffs' Second Lawsuit and Trial

In June 2015, nine additional artists brought a related VARA suit against the defendants (the "*Castillo* suit"). While the initial *Cohen* complaint covered only 24 works, the *Castillo* suit plus changes by the plaintiffs in the *Cohen* suit to the works involved brought the total number of works at issue in this litigation to 49, created by 21 different artists. The *Castillo* and *Cohen* suits were consolidated for a trial that took place over 15 days between October 16 and November 17, 2017.

In their effort to establish "recognized stature" under VARA, the plaintiffs introduced expert and lay testimony regarding the artistic quality of the works and the credentials of each plaintiff artist. For the defendants, Wolkoff testified and offered two expert witnesses: one on "recognized stature" and one on the works' appraisal value.

iii. The Advisory Jury's Verdict and the Court's Decision

Although all of the testimony and evidence was presented to a jury, the plaintiffs waived their jury rights (with the defendants' consent) prior to summations. The district court converted the jury to an advisory jury.

On November 15, 2017, the advisory jury rendered its verdict in a one-hundred page verdict form, finding violations as to 36 of the 49 works. App. 4. It found 28 of the destroyed works to be of "recognized stature" while finding that 8 other works that allegedly were not fully whitewashed "had been mutilated, distorted, or otherwise modified to the prejudice of the artists' honor or reputation" in violation of a separate VARA provision. *Id.* The advisory jury deemed these violations to be willful and awarded the plaintiffs a total of $545,750 in actual damages and $651,750 in statutory damages. *Id.*

The district court issued its written opinion on February 12, 2018. Disagreeing with the advisory jury, the judge found 45 of the 49 works to be of "recognized stature," and awarded $6.75 million in damages—the maximum amount permitted under VARA. App. 87–88, 121.

As to "recognized stature," the district court adopted a prior district court formulation that the "recognized stature" requirement mandates "a two-tiered showing: (1) that the visual art in question has 'stature,' *i.e.* is viewed as meritorious, and (2) that this stature is 'recognized' by art experts, other members of the artistic community, or by some cross-

section of society." App. 104–05 (quoting *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994), *aff'd in part, vacated in part, rev'd in part*, 71 F.3d 77 (2d Cir. 1995)).

The opinion found that 45 of the 49 works were of "recognized stature," but did not address the evidence of such recognition for the works individually or cite any recognition of the works by third parties prior to the whitewashing. App. 108–10. The court instead stated that "Jonathan Cohen selected the handful of works from the thousands at 5Pointz for permanence and prominence on long-standing walls," App. 106, and reasoned that because Cohen "called the shots and had the respect of his artistic community," the fact that he "chose the works that are worthy of VARA protection in this litigation speaks volumes to their recognized stature." App. 107.

The opinion further cited evidence that the artists had all "achieved artistic recognition outside of 5Pointz," through other works not at issue in the case, and it credited the plaintiffs' expert's "detailed findings as to the skill and craftsmanship of each of the 49 works, the importance of 5Pointz as a mecca for aerosol art, the academic and professional interest of the art world in the works, and her professional opinion that they were all of recognized stature." App. 107.

The district court further concluded that the plaintiffs had failed "to establish a reliable market value for their works." App. 112–113. The opinion deemed the methodology of plaintiffs' damages expert to be "flawed," and noted "most [plaintiffs]

testified that they had never sold a work for more than a few thousand dollars." App. 112. The district court therefore awarded no actual damages. App. 113.

However, the opinion concluded that the defendants' violation of VARA was willful, and awarded the maximum statutory damages of $150,000 per work, for a total damages award of $6.75 million. App. 87–88, 121. The district court stated that "[i]f not for Wolkoff's insolence, these damages would not have been assessed." App. 121.

The district court entered judgment in both the *Cohen* and *Castillo* actions on February 15, 2018. The defendants timely filed notices of appeal. After filing the notices of appeal, the defendants moved pursuant to Federal Rules of Civil Procedure 52 and 59 to set aside the district court's findings of fact and conclusions of law and for a new trial, or alternatively, to vacate the judgment and enter judgment in the defendants' favor. The Second Circuit held these consolidated appeals in abeyance pending disposition of those motions.

iv. The Court's Post-Trial Opinion

The defendants' post-trial motions challenged, among other things, the district court's rulings regarding "recognized stature," and finding of a "willful" violation. On June 13, 2018, the district court denied the defendants' post-trial motions.

The defendants filed timely amended notices of appeal on July 13, 2018 to include this post-trial opinion.

D. Second Circuit Proceedings

Before the Second Circuit, the defendants vigorously contested the district court's determination that 45 of the works were of "recognized stature" and the finding of willfulness, and asserted that their due process rights had been violated by the district court's judgment. *Cohen v. G&M Realty L.P.*, No. 18-538 (2d Cir. Feb. 8, 2019), ECF No. 120 at 52–55, 63–67.

On February 20, 2020, the Second Circuit affirmed the district court's judgment.[12]

Calling "recognized stature" "necessarily a fluid concept," the Second Circuit held 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. A work's high quality, status or caliber is its stature, and the acknowledgement of that stature speaks to the work's recognition. The most important component of stature will generally be artistic quality. The relevant community typically will be the artistic community, comprising art historians, art critics, museum curators,

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[12] The next day, the Second Circuit issued an amended opinion, revising three lines. *See* Debra Cassens Weiss, *'Heartbroken' Appeals Judge Removes Misunderstood Monet Reference from Opinion*, ABA Journal (Feb. 25, 2020), https://www.abajournal.com/news/article/heartbroken-appeals-judge-removes-misunderstood-monet-reference-from-opinion.

> gallerists, prominent artists, and other experts.

App. 8–9 (citations omitted).

As for how to prove all of this, the court explained that "expert testimony or substantial evidence of non-expert recognition will generally be required to establish recognized stature." App. 9. Applying this standard, the court of appeals affirmed the district court's determination that the 45 works were of "recognized stature," and the defendants were therefore liable for their destruction.

As to whether the violation was willful, the court of appeals again agreed with the district court's determination that it was, and left in place the maximum award of statutory damages, in the amount of $6.75 million.[13]

As for the defendants' due process arguments, the Second Circuit paid them short shrift, declining to even mention them, except to note: "We have considered Wolkoff's other contentions and conclude they lack merit." App. 20.

After the Second Circuit issued its decision, Petitioners timely moved to stay the Second Circuit's mandate pending this petition for *certiorari*. The court of appeals granted that motion over the opposition of the plaintiffs. *Cohen v. G&M Realty L.P.*, No. 18-538 (2d Cir. May 4, 2020), ECF No. 172.

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[13] Plaintiffs have asked the district court to award them more than $2.6 million in legal fees and costs. *See Castillo v. G&M Realty L.P.*, No. 15-cv-3230 (E.D.N.Y. Mar. 15, 2018), ECF No. 81-1 at 20; 17 U.S.C. § 505.

REASONS FOR GRANTING THE PETITION

This case concerns an unconstitutional application of an unconstitutionally vague statutory provision at odds with fundamental legal principles and long-standing decisions of this Court. The decision below is important, and warrants this Court's review.

I. The Second Circuit's Decision Is Wrong

The critical issue in the district court, and on appeal, was whether the specific works created by the plaintiffs at 5Pointz were of "recognized stature." In concluding that they were, and imposing liability under VARA on that basis, the lower courts violated Petitioners' due process rights in conflict with long-standing decisions by this Court.

A. The Imposition of Liability Based on a Finding That the Works Were of "Recognized Stature" Violated Due Process

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). "This requirement of clarity" is "essential to the protections provided by the Due Process Clause of the Fifth Amendment." *Id.*

"[P]unishment fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless

that it authorizes or encourages seriously discriminatory enforcement.'" *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).[14]

This Court long ago deemed unconstitutional punishment under a statute lacking "an ascertainable standard" which left open "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89–90 (1921) (finding "void for repugnancy to the Constitution" a federal statute prohibiting "unjust or unreasonable" rates or charges).

The "recognized stature" provision of VARA utterly fails these tests. *See* Thornley, *The Visual Artists Rights Act's "Recognized Stature" Provision: A Case for Repeal*, 67 Clev. St. L. Rev. at 367 ("VARA leaves so much open to subjective interpretation . . . . One cannot objectively determine whether a work of art is one 'of recognized stature'"); *id.* at 365 (the term "recognized stature" is "ripe for inconsistent results from factfinders, *i.e.*, judges and juries"); Keshawn M. Harry, *A Shattered Visage: The*

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[14] These principles apply, like the Due Process Clause itself, to civil proceedings. *See*, *e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1209–10 (2018); *id.* at 1225 (Gorsuch, J., concurring) (due process's "demand of fair notice" applies in "civil cases affecting a person's life, liberty, or property"); *Fox Television Stations*, 567 U.S. 239; *Champlin Ref. Co. v. Corporation Com'n of State of Okla.*, 286 U.S. 210, 243 (1932) ("these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process").

Fluctuation Problem with the Recognized Statute Provision in the Visual Artists Rights Act of 1990, 9 J. Intell. Prop. L. 193, 208 (2001) ("At the core of all the potential pernicious effects of the Recognized Stature Provision is the imprecision of the phrase recognized stature."); Bensen, *The Visual Artists Rights Act of 1990: Why Moral Rights Cannot Be Protected Under the United States Constitution*, 24 Hofstra L. Rev. at 1142 ("the vagueness of the term 'stature' leaves what is basically a policy decision to the trier of fact to determine on a subjective basis"); Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 Colum.-VLA J.L. & Arts 477, 480 n.19 (1990) (observing about the "recognized stature" provision that "the criterion may be incoherent" and is "regrettable"). Even proponents of moral rights acknowledge that VARA is "poorly drafted." Kwall, The Soul of Creativity: Forging a Moral Rights Law for the United States 147.

The problem in this case starts with Congress's decision to regulate the conduct of property owners and others by using a novel term, "recognized stature,"[15] and then failing to define it.

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[15] Petitioners have not identified use of the term elsewhere in the United States Code. It appeared in a since-repealed statute establishing the Commission on Merchant Marine and Defense. *See* Department of Defense Authorization Act of 1985, Pub. L. No. 98-525, § 1536(c)(1)(C), 98 Stat. 2492, 2633 (1984) (codified at 46 U.S.C. app. 1120), *repealed*, Act of Oct. 6, 2006, Pub. L. No. 109-304, § 19, 120 Stat. 1485. That law established the

That problem is compounded by the absence of a ready, reasonable interpretation of "recognized stature" based on ordinary or natural meaning. Unsurprisingly, Petitioners have not located the term in any general usage dictionary or art dictionary. *See*, *e.g.*, The Concise Oxford Dictionary of Art Terms (2d ed. 2010) (over 1,900 entries "covering all aspects of the visual art world"); The Thames & Hudson Dictionary of Art Terms (2003) (over 2,000 entries covering "the vast vocabulary of art in all its forms").[16]

Evaluation of the individual words "recognized" and "stature" also fails to provide a person of ordinary intelligence fair notice about whether a particular work is shielded from destruction by VARA.

The word *recognized* encompasses a wide variety of meanings. *See, e.g.*, *Recognize*, Webster's New World College Dictionary 1121 (3d ed. 1997)

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qualifications for members of the Commission, requiring that five of them be appointed by the President "from among individuals of recognized stature and distinction who by reason of their background, experience, and knowledge in the fields of merchant ship operations, shipbuilding and its supporting industrial base, maritime labor, and defense matters are particularly suited to serve on the Commission." *Id.*

[16] This distinguishes the "recognized stature" language in VARA from instances where Congress fails to define a novel legislative term, but its meaning can be readily understood and evaluated objectively, with reference to ascertainable information. *Cf. BFP v. Resolution Trust Corporation*, 511 U.S. 531, 537–41 (1994) (addressing the term "reasonably equivalent value").

(defining "recognized stature" during the period of VARA's enactment to include: "(1) *to be aware* (as in 'to *recognize* an old friend after many years'); (2) *to acknowledge* (as in 'to *recognize* a claim'); and (3) *to accept* (as in 'to *recognize* defeat')); Oxford English Dictionary (2d ed. 1989). Further, no general usage dictionary supplies an essential element for understanding the word in the context of VARA: *who* must do the recognizing? Without reference to VARA's text or even its legislative history, the Second Circuit held that it is "a relevant community," which "will typically be the artistic community, comprising art historians, art critics, museum curators, gallerists, prominent artists, and other experts." App. 9. Nor did the court explain how the word applies when members of these "communities" do not agree, or how many members must "recognize" a work's stature to satisfy this requirement of VARA, or whether the requisite recognition is qualitative, quantitative, or both.

Leading general usage dictionaries generally define *stature* to mean possessing a "quality *or* status gained by growth, development, or achievement." *See, e.g.*, *Stature*, Merriam-Webster's Collegiate Dictionary 1149 (10th ed. 1993) (emphasis added). Of course, "quality" and "status" are quite different—and may point in opposite directions. The Second Circuit held that a "work's high quality, status or caliber is its stature," and "[t]he most important component of stature will generally be artistic quality." App. 9.

Distilling the Second Circuit's test to its essence, liability under VARA's "recognized stature" provision

may be imposed when someone destroys a work of visual art of some sufficiently high degree of "quality" where that quality is acknowledged by some "relevant community."[17] But that test, made up out of whole cloth, is dangerous and inconsistent with separation of powers principles.[18] And its use in this case to impose a $6.75 million award against Petitioners was both wrong and unconstitutional.[19]

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[17] The district court's jury charge instructed the jury that "stature" means "viewed as meritorious," and that stature is "recognized by art experts, other members of the artistic community, or some cross-section of society." *Castillo v. G&M Realty L.P.*, No. 1:15-cv-03230 (E.D.N.Y. Nov. 15, 2017), ECF No. 65.

[18] The vagueness doctrine "is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Dimaya*, 138 S. Ct. at 1212; *id.* at 1224 (Gorsuch, J., concurring) (the "void for vagueness doctrine, properly conceived, serves as a faithful expression of ancient due process and separation of powers principles the framers recognized as vital to ordered liberty under our Constitution"). This Court has the "responsibility to enforce the [separation of powers] principle when necessary." *Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991).

[19] There is yet another problem posed by VARA's "recognized stature" provision: "By imposing a requirement that the value of artistic endeavors be subject to judicial scrutiny, VARA violates a basic norm of copyright jurisprudence dating back to Justice Holmes' famous warning over a century ago in *Bleistein v. Donaldson Lithographing Company*, that '[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.'" Chused, *Moral Rights: The Anti-Rebellion Graffiti Heritage of 5Pointz*, 41 Colum. J.L. & Arts at 625 (citing 188 U.S. 239, 251

As this Court explained nearly a century ago, in *Connally v. General Constr. Co.*, 269 U.S. 385, 394 (1926), the "constitutional guaranty of due process" does not permit "the application of the law [to] depend[], not on a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries."

This Court has accordingly struck down statutes requiring evaluation of a defendant's conduct using "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *See Williams*, 553 U.S. at 306. It has done the same when presented with "the absence of any standard for defining" terms giving rise of culpability. *Smith v. Goguen*, 415 U.S. 566, 579, 582 (1974).

(1903))); *see also* Bensen, *The Visual Artists Rights Act of 1990: Why Moral Rights Cannot Be Protected Under the United States Constitution*, 24 Hofstra L. Rev. at 1142 ("The danger of subjectivity in determining 'stature' is especially strong under VARA, because it calls on the trier of fact to make aesthetic judgments."). Imagine having to apply the indeterminate "recognized stature" standard to one of 2019's most talked about works of visual art: a banana duct-taped to a wall. *See* ArtNet News, *Maurizio Cattelan's 'Comedian' Explained: Here's Everything We Published on the Viral Banana Art, All in One Place*, ArtNet News (Dec. 17, 2019), https://news.artnet.com/art-world/maurizio-cattelan-banana-explained-1732773 ("Like it or not, the most talked-about artwork of 2019 is a banana).

VARA's novel and undefined "recognized stature" provision leaves "unclear as to what fact must be proved." *Fox Television Stations*, 567 U.S. at 253. "The law's silence leaves judges to their intuitions and the people to their fate," inviting "arbitrary power." *Dimaya*, 138 S. Ct. at 1223, 1224 (Gorsuch, J., concurring).[20]

These perils are accentuated by the fact that VARA's "recognized stature" provision directly and strikingly impinges on property rights—as occurred in this case. *See Cramp v. Bd. of Pub. Instruction of Orange Cty.*, 368 U.S. 278, 287 (1961) ("The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution."). This Court's "precedents require Congress to enact exceedingly clear language if it wishes to significantly alter . . . the power of the Government over private property." *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849–50 (2020); *see also* Thornley, *The Visual Artists Rights Act's "Recognized Stature" Provision: A Case for Repeal*, 67 Clev. St. L. Rev. at 367 ("The absence of a consistent, objective standard alone should

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[20] To the extent the "recognized stature" provision might be analogized to "community standards" provisions in other legislation, the "recognized stature" provision has "no similar history" remotely comparable to experience with the conduct regulated in those statutes. *Cf. Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 812 (2011) (Alito, J., concurring).

foreclose the possibility that visual artists' moral rights trump the rights of property owners.").

Congress placed the courts in a difficult predicament when it selected a novel and undefined term as the predicate for imposing liability following the destruction of visual art. But courts are limited to interpreting statutes; they may not legislate to fill the gaps.[21] Here, the lower courts violated this basic principle, supplying their own ideas about what it means for a work of visual art to be of "recognized stature." This after-the-fact standard obviously could not have provided fair notice to Petitioners about whether the 5Pointz works in question were shielded from demolition by VARA.

Moreover, the district court proceedings illustrate that VARA's "recognized stature" provision fails to provide the fair notice required by the Due Process Clause: a judgment about whether the works were of "recognized stature" was possible only after very expensive and lengthy discovery and expert testimony—and even then, the advisory jury and the district court judge disagreed about 17 of the 45

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[21] "This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives." *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1738 (2020).

works, despite having heard the same arguments, and seen the same evidence.[22] App. 87–88, 93.

This Court should grant the Petition and vacate the judgment of liability under VARA's "recognized stature" provision.

B. The Imposition of Enhanced Statutory Damages for "Willful" Violation of the "Recognized Stature" Provision Violated Due Process

A defendant found to have violated the "recognized stature" provision of VARA is subject to actual damages or statutory damages. Here, the district court concluded that the plaintiffs had failed "to establish a reliable market value for their works," and deemed the methodology of plaintiffs' damages expert "flawed," noting "most [plaintiffs] testified that they had never sold a work for more than a few thousand dollars." App. 112–13. The district court therefore awarded no actual damages. App. 113.

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[22] There is also reason to doubt the provision helps artists. "Economics suggests that integrity rights . . . may do more harm than good and on balance actually discourage artistic creation." Landes & Posner, The Economic Structure of Intellectual Property Law 276; *see also* Adler, *Against Moral Rights*, 97 Calif. L. Rev. at 265 ("[T]he right of integrity threatens art because it fails to recognize the profound artistic importance of modifying, even destroying, works of art, and of freeing art from the control of the artist."); *id.* at 279 ("there is an artistic value in modifying, defacing and even destroying unique works of art"); *id.* at 272 ("Moral rights law enshrines notions of art directly at odds with contemporary artistic practice.").

Even an award of actual damages would have been unconstitutional for the reasons discussed in Section I.A. But the award of enhanced statutory damages separately violated due process in at least two respects.

First, the Due Process Clause does not permit the imposition of statutory damages where no defendant could discern what conduct is actually proscribed. As detailed above, the term "recognized stature" fails to provide a person of ordinary intelligence fair notice of what is prohibited. Because Petitioners could not reasonably have been expected to know at the time the works were destroyed that they were of "recognized stature" and therefore protected by VARA, a finding of willful violation is foreclosed. *Cf. Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007) ("where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violation of *a standard*, but reckless ones as well") (emphasis added).

Second, in light of the lack of actual damages sustained by the plaintiffs, the $6.75 million damages award here "is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable," in violation of the defendants' due process rights.[23] *Cf. State Farm*

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[23] While the advisory jury and the district court both found defendants' actions were willful for each work of "recognized stature," the district court's award of statutory damages departed wildly from that of the advisory jury. The jury awarded a total of $607,000 for 28 works; the district court

Mut. Auto. Ins. Co., v. Campbell, 538 U.S. 408, 425–26 (2003) (holding that the Constitution presumptively limits punitive damages to no more than nine times compensatory damages). The application of due process principles used to evaluate punitive damages is particularly appropriate here, where it is clear that enhanced statutory damages were awarded as a form of punishment. *See* App. 121 ("If not for Wolkoff's insolence, these damages would not have been assessed."); *cf. Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352–53 (1998) (observing that statutory damages can serve as punishment).

The award of enhanced damages here on the ground that Petitioners acted willfully conflicts with relevant decisions of this Court, and warrants review.

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awarded $6.75 million for 45 works. The jury's average award for the 28 works was $21,679; the district court awarded $150,000 for each of the 45 works. The jury awarded more than $30,000 (the statutory limit for a non-willful violation, 17 U.S.C. § 504(c)(1)) for 6 of the 28 works; the district court awarded five times that amount for each of the 45 works.

II. The Second Circuit's Decision Is Important and Warrants This Court's Review

The Second Circuit's decision has already been described as a "landmark" ruling with broad implications. *See*, *e.g.*, Bill Donohue, *Top 7 Copyright Rulings of 2020: A Midyear Report*, Law360 (June 25, 2020), https://www.law360.com/articles/1284138/top-7-copyright-rulings-of-2020-a-midyear-report (the "high-profile decision by an influential court like the Second Circuit was an immediate landmark, playing an outsize role in how such cases will be litigated in the future"); Andrea Arndt & Caleb Green, *Black Lives Matter Murals: Intellectual Property v. Real Property Rights*, JD Supra (July 9, 2020), https://www.jdsupra.com/legalnews/black-lives-matter-murals-intellectual-83384/ (calling the Second Circuit's opinion a "landmark case").

Respondents' counsel has made a similar claim: "The Second Circuit's landmark decision is a monumental win for the rights of all artists in this country." Eileen Kinsella, *A Stunning Legal Decision Just Upheld a $6.75 Million Victory for the Street Artists Whose Works Were Destroyed at the 5Pointz Graffiti Mecca*, ArtNet News (Feb. 20, 2020), https://news.artnet.com/art-world/5pointz-real-estate-developer-appeals-order-to-pay-street-artists-1358323.[24]

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[24] The decision's impact is magnified by the fact that cases concerning VARA's "recognized stature" provision typically

But the decision leaves property owners across the country with considerable "uncertainty when it comes to ownership of art." Richard A. Herman, *Art Versus Commerce*, Mich. Bar. J. 26, 29 (Dec. 2018). As *The New York Daily News* editorial board observed after the Second Circuit's decision:

> The devilish problem now is extrapolating the ruling's logic to other cases. Like the 999 out of 1,000 instances in which a building owner—or, in the case of a bridge or school, the public—didn't invite graffiti and can't tell whether it's of what the law calls 'recognized stature.'
>
> What's a building owner supposed to do, consult with a curator before ordering a cleanup?

Daily News Editorial Board, *Paint That a Shame: The Crazy Precedent Set by a 5Pointz Appeals Ruling*, Daily News, Feb. 20, 2020,

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settle before courts have the opportunity to address the meaning and application of the provision. *See*, *e.g.*, *Palmer v. Homeco LLC*, No. 5:17-cv-00492 (W.D. Okla. Nov. 19, 2018), ECF No. 94; *Craig v. Princeton Enters. LLC*, No. 2:16-cv-10027 (E.D. Mich. Apr. 20, 2017), ECF No. 46; *Fontes v. Autocom Networks, Inc.*, No. 3:15-cv-02044 (N.D. Cal. Dec. 15, 2015), ECF No. 16; *Johnson v. Empire State Realty Trust, Inc.*, No. 1:14-cv-00487 (S.D.N.Y. June 3, 2014), ECF No. 17; *Jackson v. Curators of the Univ. of Mo.*, No. 2:11-cv-04023 (W.D. Mo. May 15, 2012), ECF No. 25; *Twitchell v. West Coast Gen'l Corp.*, No. 2:06-cv-04857 (C.D. Cal. Nov. 17, 2008), ECF No. 142; *Campusano v. Cort*, No. 3:98-cv-03001 (N.D. Cal. Dec. 14, 1999), ECF No. 156; *Du Val v. Northwestern Univ.*, No. 1:98-cv-07960 (N.D. Ill. Aug. 9, 1999), ECF No. 9.

https://www.nydailynews.com/opinion/ny-edit-graffiti-is-illegal-20200226-n6chh5ijgvahzavxkns3ymr6ny-story.html; *see also* Chused, *Moral Rights: The Anti-Rebellion Graffiti Heritage of 5Pointz*, 41 Colum. J.L. & Arts at 627 ("building owners who allow graffiti to be painted on their walls now face legal and financial risks"); Blake Brittain, *Protest Art Fate Tied to Obscure, Rarely Litigated Copyright Law*, Bloomberg Law (July 16, 2020), https://news.bloomberglaw.com/us-law-week/protest-art-fate-tied-to-obscure-rarely-litigated-copyright-law.

Judge Manion of the Seventh Circuit expressed similar concern more than two decades ago, warning "those who are purchasers or donees of art had best beware" that VARA may render them "the perpetual curator of a piece of visual art that has lost (or perhaps never had) its luster." *Martin v. City of Indianapolis*, 192 F.3d 608, 616 (7th Cir. 1999) (Manion, J., dissenting).

This Court's review is warranted. The Second Circuit decided an important question of federal law about VARA which has not been, but should be, settled by this Court. The Second Circuit's affirmance of the district court's judgment, which violates due process in several respects, is incompatible with important and long-standing decisions of this Court. *See* SUP. CT. R. 10(c).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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