No. 21-869

In the Supreme Court of the United States

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

v.

LYNN GOLDSMITH AND LYNN GOLDSMITH LTD.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Andy Warhol produced a series of silkscreens by reproducing respondent Lynn Goldsmith's photographic portrait of the musician Prince and adding additional elements. Petitioner Andy Warhol Foundation then licensed those works to Vanity Fair, a magazine that has also featured Goldsmith's portraits of musicians and celebrities.

The question presented is whether the Second Circuit correctly held that Warhol's silkscreens of Prince did not constitute a transformative use, where Warhol's silkscreens shared the same purpose as Goldsmith's copyrighted photograph and retained essential artistic elements of Goldsmith's photograph.

CORPORATE DISCLOSURE STATEMENT

Respondent Lynn Goldsmith, Ltd. has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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INTRODUCTION

This case does not warrant this Court's review. The petition mischaracterizes this Court's precedent and the Second Circuit's opinion in an attempt to manufacture a circuit split that does not exist. Far from pioneering a novel fair-use test, the Second Circuit faithfully applied this Court's test for transformativeness—a component of the first fair-use factor—by determining that a secondary work by Andy Warhol that replicated respondent Lynn Goldsmith's photograph did not "add[] something new, with a further purpose or different character, altering the

first with new expression, meaning, or message." Pet.App.13a (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)). Every other circuit applies that test, too. And, far from dismissing this Court's most recent guidance in *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021) (which issued after the original panel opinion), the Second Circuit painstakingly incorporated *Google* into its analysis in a revised opinion. The Second Circuit then weighed all four fair-use factors holistically and concluded that all four factors weighed against fair use here. Petitioner does not challenge the Second Circuit's holdings with respect to those other factors, and the Second Circuit applied the established, fact- and context-specific test for transformativeness. No further review is warranted.

STATEMENT

A. Factual Background

1. Respondent Lynn Goldsmith is a world-renowned photographer best known for her portraits of rock musicians like Michael Jackson, Bruce Springsteen, Bob Dylan, Madonna, James Brown, the Beatles, and the Rolling Stones, to name just a few. C.A.2 Joint Appendix (JA) 194, JA581-82, JA993-96. Her work graces more than 100 album covers. Pet.App.3a. Museums across the country—from the Smithsonian National Portrait Gallery to the Brooklyn Museum of Art—showcase her photographs. JA192, JA1640-63. National magazines, like Vanity Fair, Rolling Stone, Time, and Sports Illustrated have frequently featured her work. JA1639. Goldsmith herself has published many books of her photographs, including a New York Times bestseller. *Id.* She also founded Lynn Goldsmith, Ltd., the first photo agency focused on celebrity portraiture. Pet.App.3a-4a. For her accomplishments in photography, on October 26, 2021,

Goldsmith won a Lucie Award—the photography equivalent of an Oscar.

In 1981, Goldsmith took a series of photographs of the musician Prince after pitching Prince to Myra Kreiman, the photo editor of Newsweek, as "the next big thing." JA698. Newsweek's Kreiman described Goldsmith as "our A list photographer for this type of assignment"—someone Newsweek trusted not only to photograph rock musicians, but to identify who to cover. JA771. Newsweek gave Goldsmith full authorial control, leaving it entirely to her what the photographs should convey. JA717. "[W]hen Lynn Goldsmith took somebody into the studio," Kreiman explained, "you generally expected to get something that was . . . exceptional. That was creative. That was very well-lit, very polished and brought out a feel for the person themselves." JA773. Goldsmith agreed to photograph Prince for Newsweek, and retained the copyright in her work. JA200, JA538-39, JA775-76.

Goldsmith photographed Prince over two days, first at a concert at the Palladium and then in an intense session at her studio. JA715-716, JA999. Before the latter session, Goldsmith arranged the lighting "to showcase" Prince's "'chiseled bone structure.'" Pet.App.3a. Goldsmith chose a white backdrop for her initial shots, explaining that a "white background is hardest to light. You can move to other things, like dark gray, but . . . it takes time to light white." JA1556. She also compiled a playlist of music designed to make Prince comfortable and to build rapport. JA1537, JA1549. "I made sure to have the roots of rock and roll, Robert Johnson, James Brown, Howling Wolf." JA1537.

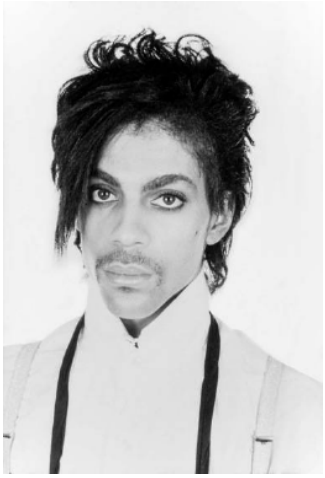
When Prince arrived, Goldsmith observed that he cut a more fragile figure in her studio than onstage. JA1544. "With Prince, I could sense immediately . . . that this is a very shy person, so you go slowly, you read the signals."

JA1544-45. Goldsmith thus applied purple eyeshadow and lip gloss to Prince in order to connect with him and to accentuate his sensuality. Pet.App.4a. She chose purple because she felt "Prince was in touch with the female part of himself, but he is very much male." JA1545.

Goldsmith also decided to shoot with a Nikon 35-mm camera, which allowed her to "move quickly, [to] adjust quickly." JA1558-59. She then mixed 85- and 105-mm lenses, which she believed would best capture the shape of Prince's face. Pet.App.4a-5a. As Goldsmith explained, "If I put a wide angle on him, he wouldn't have looked like that, so there is a choice." JA1560. "There is a reason I pick everything I pick." JA1517.

Goldsmith began by taking approximately 12 black-and-white photographs. JA200, JA1001. Then she switched to color film. Throughout, she directed Prince in order to help him relax before the camera. JA1550. She had him button his high-collared shirt, "just to try to get action." JA1554. "This is not a person who is just going to get in front of a camera and give," Goldsmith explained. JA1554-55. With Prince "I felt fortunate that I got something," Goldsmith reflected, because "he was really struggling." JA1552.

Goldsmith took the following photograph—the subject of this case—during that session.



The makeup that Goldsmith applied is visible, where light glints off the singer's glossed lower lip. JA1547. The pinpricks of light in Prince's eyes reflect Goldsmith's photographer's umbrellas. JA1555. And the well of shadow around Prince's eyes and the shadows that stray across Prince's chin are products of Goldsmith's lighting choices. JA1582.

Newsweek ultimately featured a different Goldsmith photograph from Prince's concert, not the above picture. JA1704. Over the ensuing years, Goldsmith has offered one of her color photographs of Prince for sale through the Morrison Hotel Gallery, JA1608-14, which specializes in "fine art music photography," JA1602. She also published that color photograph in her book *Rock and Roll Stories*. JA1575-76; JA1611-14.

2. In 1984, Prince's star exploded with the release of his legendary Purple Rain album. Vanity Fair, a frequent outlet for Goldsmith's work, JA1639, contacted Goldsmith's agency seeking a photograph of Prince that could be used as an "artist reference" for an illustration that Vanity Fair was commissioning for the article "Purple Fame." JA541. (An artist reference is a photograph that

an artist uses to create a different visual work, such as a sketch or painting).

Vanity Fair and Goldsmith agreed to a $400 licensing fee and Goldsmith sent Vanity Fair an 11x14-inch portrait of Prince—the above black-and-white photograph that Goldsmith took of Prince at her studio. JA1021-22, JA1156. The Vanity Fair/Goldsmith licensing agreement required Vanity Fair to return the photograph to Goldsmith after 15 days; required that any Vanity Fair illustration based on Goldsmith's photograph could run only in Vanity Fair's November 1984 issue; prescribed the size of any Vanity Fair illustration; and limited which Vanity Fair editions could print the illustration (*i.e.*, only editions for certain geographical regions). JA541, JA1021. The licensing agreement also required Vanity Fair to give a photo credit to Goldsmith as the "source photograph" for the illustration, to be placed alongside the illustration. JA1046, JA1048. The license spelled out in all capital letters: "NO OTHER USAGE RIGHTS GRANTED." JA541.

Unbeknownst to Goldsmith, the artist that Vanity Fair commissioned for the illustration was Andy Warhol, whose popularity was then resurging. Warhol's art replicated Goldsmith's photograph exactly by using a process called silkscreening. Typically, when Warhol produced a silkscreen, he began by reproducing the photograph on paper or canvas. JA1313. Then Warhol placed the silkscreen on a primed canvas, poured ink onto it, and used a squeegee to draw the ink through the mesh onto the canvas. JA1320, JA798-99. After removing the silkscreen, a print of the photographic image remained. JA798-99. Warhol then painted "over the printed impression, using the image outline as a rough guide." JA1320. Once the paint dried, Warhol printed an additional silkscreen of the photo atop the acrylic. JA1321.

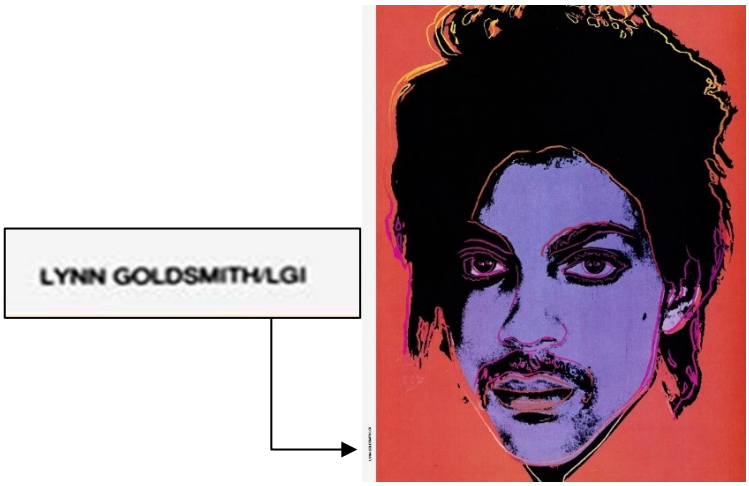
Gerard Malanga, Warhol's assistant, later explained in an interview with respect to Warhol's works: "When we took up screen-printing, it was not to get away from the preconceived image, but to more fully exploit it through the commercial techniques of multiple reproduction." JA1340. As one book on Warhol put it, "Silkscreening allowed [Warhol] to appropriate an image—publicity still, press clipping." Wayne Koestenbaum, *Andy Warhol* 60 (2001). He also has explained that Warhol "was jubilant to discover an efficient way of making paintings that were virtually photographs, illicitly transposed—smuggled across the hygienic border separating the media." *Id.* at 61.

Warhol's appropriation of photographs as the base for his silkscreens had prompted copyright-infringement lawsuits from photographers who objected to Warhol's unlicensed use of their works. In 1966, photographer Patricia Caulfield sued Warhol for infringement after Warhol reproduced a Caulfield photograph from Modern Photography magazine to create a series of silkscreen paintings. JA613-15. The case settled. JA547, JA927-28. Later, photographer Henri Dauman sued Warhol's estate and foundation for infringement after realizing that Warhol in 1964 had reproduced Dauman's Life Magazine photograph of Jacqueline Kennedy at President Kennedy's funeral to make at least 45 silkscreened works. *See Dauman v. Andy Warhol Found. for Visual Arts, Inc.*, 1997 WL 337488, at *3 (S.D.N.Y. June 19, 1997) (denying Foundation's motion to dismiss). That case also settled. JA547, JA634-39.

After the Caulfield litigation, Warhol "realized that he had to be very careful about appropriating for the fear of being sued again," as Warhol's assistant Malanga explained before this litigation. JA924-26, JA928-31. By the

1970s, Warhol had largely ceased lifting celebrity photographs from the mass media. JA1361, JA1368. Instead, Warhol took his own photographs or obtained licenses before using the photographs as the base for silkscreens of celebrities or wealthy patrons. JA1324, JA931-35.

Vanity Fair's November 1984 issue ran Warhol's illustration with the following credit:



Warhol, however, did not stop with that commissioned illustration, nor did he seek anyone's permission to reproduce Goldsmith's work. Warhol reproduced Goldsmith's portrait to make 15 additional works: 11 paintings, two drawings, and two screen prints on paper. Pet.App.8a. For the paintings and prints, Warhol used the silkscreen process described above, inking Goldsmith's photograph onto canvas or paper and then overlaying the image with colors. JA797-98. For the drawings, Warhol projected Goldsmith's photograph onto a piece of paper and then traced over it. JA802-03.

Goldsmith's photograph was the basis for the entire Prince Series. All of the Warhol works thus unsurprisingly carried forward essential features of her original composition. Pet.App.34a. Warhol kept the same angle of Prince's gaze. JA1582. He reproduced the shadows ringing Prince's eyes and darkening his chin. JA1582. Warhol replicated the same dark bangs partially obscuring Prince's right eye. Pet.App.34a. Warhol even copied the light and shadow on Prince's lips, which owe their pattern to the gloss that Goldsmith asked Prince to apply. Pet.App.35a n.10. Even the reflections from Goldsmith's photographer's umbrellas in Prince's eyes remain visible in Warhol's series. Pet.App.36a.

Upon Warhol's death in 1987, petitioner Andy Warhol Foundation (AWF) assumed ownership of the Prince Series. AWF sold 12 of the originals to private galleries or art dealers for extremely large sums. JA1779-83, JA562, JA1821-31. The Andy Warhol Museum in Pittsburgh holds the remaining four works. Pet.App.9a. AWF retains the copyright to the Prince Series, Pet.App.9a; JA561-62; JA494-95, and has licensed the works to publishers, galleries, and museums, Pet.App.9a. Those licenses have included many of the same outlets where Goldsmith could potentially market her photograph. JA870-72; JA1161-62; Pet.App.39a.

3. After Prince died in 2016, Condé Nast, Vanity Fair's parent company, asked AWF for permission to reproduce one of the Prince Series works in a special Vanity Fair tribute issue. Pet.App.9a. AWF offered Condé Nast a menu of possible works; Condé Nast selected an image of Prince saturated in bright orange paint for the cover. JA1096. AWF charged Condé Nast a $10,000 licensing fee and a $250 temporary usage fee, JA559-60, required Condé Nast to provide a copyright attribution to AWF,

JA1115, and required AWF's preapproval of the cover before publication, JA1131.

Vanity Fair in April 2016 published the image on the cover of its special issue "The Genius of Prince," JA1095-1100, which stayed on newsstands for three months and had a print run of some 100,000 copies. JA904-06, JA1140. Unlike Warhol's 1984 illustration for Vanity Fair—which came from the same Warhol series—Goldsmith received no credit whatsoever. JA1142. In Vanity Fair's rush to push the special Prince tribute issue to newsstands, its rights clearance research did not uncover that Goldsmith holds the copyright to the photograph that Warhol reproduced in his work. JA886-91, JA1145-47.

Vanity Fair also republished its 1984 profile of Prince online. JA1078, JA1089. The Warhol cover image of Prince subsequently began circulating on social media, where Goldsmith saw it. JA1676. Goldsmith was stunned to realize that Warhol had created silkscreens of Prince using her original portrait. JA1156, JA1571-72, JA1676. "What I rarely forget in my pictures is somebody's eyes and I kept seeing that image come up on various social networks, the quote-unquote Warhol, in different colors …. I went and looked at my digital archive and went, those are the eyes." JA1577-78. Warhol's depiction of Prince struck her as "identical" to her own portrait. JA1581. "Not just the outline of his face, his face, his hair, his features, where the neck is. It's the photograph." JA1582.

Goldsmith informed Michael Hermann, AWF's director of licensing, that she believed the Vanity Fair cover infringed her copyright. JA854-55. Goldsmith sent Hermann a copy of a color photograph that she initially believed Warhol had reproduced in his works. After doing additional research, Goldsmith emailed Herman later that same day a copy of the black and white photo her agency

had licensed to Vanity Fair years before. JA727-32, JA735-38, JA1152-54, JA1156-59. Goldsmith also included a "gif"—an animated image—in which she superimposed Warhol's Vanity Fair cover onto her photograph to show they were a clear match. JA1158.

AWF (at Pet. 11-12) claims that Goldsmith threatened to sue unless AWF paid Goldsmith "a substantial sum of money." But the only evidence in the record reflects that in July 2016, Goldsmith told Hermann that she hoped to "find a way to amicably resolve" the issue. JA1152.

B. Proceedings Below

1. It was AWF, not Goldsmith, that initiated the present suit. In April 2017, AWF sued her without warning in the United States District Court for the Southern District of New York for a declaratory judgment that the Prince Series did not infringe Goldsmith's copyright, or in the alternative, that the Prince Series was fair use. Pet.App.2a.

Goldsmith filed a counterclaim for copyright infringement under 17 U.S.C. §§ 106, 501. Pet.App.2a. Goldsmith sought damages and injunctive relief to prevent AWF "from further reproducing, modifying, preparing derivative works from, selling, offering to sell, publishing or displaying" the Prince Series. JA535. On appeal, Goldsmith said that she is not seeking to enjoin display of the original Warhol works. Pet.App.29a & n.8.

2. The district court granted summary judgment to AWF, holding that Warhol's appropriation of the Goldsmith Photograph constituted fair use. As to the first fair-use factor, the purpose and character of the work, the court reasoned that works are *per se* transformative "[i]f looking at the works side-by-side, the secondary work has a different character, a new expression, and employs new

aesthetics with [distinct] creative and communicative results." Pet.App.16a (quoting Pet.App.71a). Applying that bright-line rule, the court concluded that Warhol could "reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure." Pet.App.72a.

The court further held that the second factor, "the nature of the copyrighted work," favored neither party. Pet.App.73a-74a. The court reasoned that the third factor, "the amount and substantiality of the portion used," favored AWF because Warhol altered Goldsmith's photograph in some ways, despite "cop[ying]" "the pose and angle of Prince's head." Pet.App.78a. As to the fourth and final factor, the court deemed the effect "upon the potential market for or value of" Goldsmith's original photograph minimal on the theory that AWF's commercial-licensing activities did not act as market substitutes for Goldsmith's photograph. Pet.App.79a, 81a.

3. a. The Second Circuit reversed, holding that all four fair-use factors as a matter of law favored Goldsmith and, considered holistically, precluded any finding of fair use. 992 F.3d 99 (2d Cir. 2021). As to the first factor—one component of which assesses whether Warhol's Prince Series is "transformative"—the Second Circuit asked whether the work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." *Id.* at 109-10 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)). The court explained that this inquiry is fact- and context-specific and necessitates a close look at the meaning, message, and purpose of the works at issue. *Id.* at 110-11.

The court thus rejected the notion that "any secondary work that adds a new aesthetic or new expression to its source material is necessarily transformative." *Id.* at

111. Instead, the court observed, some secondary works are non-transformative even if they add novel elements—like a film adaptation of a novel, a quintessential derivative work. *Id.* at 111-12. And, because under the Copyright Act, the copyright holder retains the right to all derivative works, 17 U.S.C. § 101, the court expressed concern that an overly loose test for transformativeness would cut into a core statutory right of copyright holders. 992 F.3d at 112. Conversely, the court observed, some secondary works are transformative even if the artist expressly disavows trying to create a new meaning or message—for instance, works by the artist Richard Prince that copied another artist's copyrighted photographs but juxtaposed and altered them alongside others. *Id.* at 113. Those secondary works therefore transformed the original work "in the creation of new information, new aesthetics, new insights and understanding." *Id.* at 110.

Applying that context-specific approach, the court held that Warhol's Prince Series was not transformative even though the works include some visual differences from Goldsmith's portrait. The court explained that the Prince Series "retains the essential elements of the Goldsmith Photograph without significantly adding to or altering those elements." *Id.* at 115. Further, the two works shared a common, highly specific purpose—functioning as an artistic portrait of the artist Prince. *Id.* at 114.

The court held that the second factor, the nature of the copyrighted work, also favored Goldsmith because her photograph is both unpublished and creative. *Id.* at 117. The third factor, "the amount and substantiality of the portion used," also favored Goldsmith. Goldsmith's composition centered on Prince's face; Warhol copied her image of Prince's face wholesale, and there was no evidence that Warhol "required *Goldsmith's* photograph"—

as opposed to a stock photo—to create the Prince Series. *Id.* at 118-19.

Finally, as to the fourth factor, the court held that AWF's *commercial licensing* of the Prince Series to magazines traded off with the market for Goldsmith's portrait, because both functioned as artistic portraits of the same person. *Id.* at 121. The court thus found the potential for substantial harm to Goldsmith in the licensing market. *Id.* at 122. The court did not address any issues relating to the original creation of the Prince Series itself, since Goldsmith was not seeking relief as to those works.

Judge Jacobs concurred, emphasizing that the decision below "does not consider, let alone decide, whether the infringement encumbers the original Prince Series works," or "whether original works of art that borrow from protected material are likely to infringe." *Id.* at 127. All that the panel held was that AWF infringed on Goldsmith's copyright by *licensing images* from the Prince Series to magazines and other venues, because both the reproductions and Goldsmith's photographs compete for the market for images of Prince's face.

b. After the panel decision issued, this Court decided *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183 (2021), which held that Google's copying of Oracle's computer code was fair use as a matter of law. AWF petitioned for rehearing, arguing, *inter alia*, that *Google* undermined the court's opinion.

The Second Circuit granted panel rehearing, withdrew the original opinion, and issued an amended opinion addressing *Google*. The court concluded that "AWF's argument that *Google* undermines our analysis rests on a misreading of both the Supreme Court's opinion and ours, misinterpreting both opinions as adopting hard and fast categorical rules of fair use" when the inquiry is in fact

"highly contextual and fact specific." Pet.App.43a-44a. The court explained that *Google* held that copying of copyrighted code was fair use in the "unusual context" of "copyrights in computer code." Pet.App.44a. But that holding does not carry over to the visual-art context, the court reasoned, because *Google* itself emphasized the differences between those two contexts, including stronger copyright protection for artistic works. Pet.App.13a.

The court also rejected AWF's contentions that the decision "effectively outlaw[s]" Warhol-style art or chills visual artists. Pet.App.45a; *see also* Pet.App.52a (Jacobs, J., concurring) ("Had the use been Warhol's use of the photograph to construct the modified image, we would need to reassess.").

REASONS FOR DENYING THE PETITION

I. The Second Circuit's Decision Faithfully Follows This Court's Precedents

AWF chiefly urges review by accusing the Second Circuit of defying this Court's fair-use precedents. That argument mischaracterizes both this Court's cases and the decision below, which applied the Court's longstanding test for transformativeness. Further, far from ignoring this Court's recent *Google* decision, the panel carefully revised its opinion to account for *Google*.

1. AWF (at 3) mischaracterizes this Court's precedents as holding that "a new work is 'transformative' if it" merely "has a new 'meaning or message' distinct from that of the preexisting work." (quoting *Google*, 141 S. Ct. at 1202-03). That abbreviated quotation of "meaning or message" recurs throughout the petition. *See* Pet. 5-6, 17, 18, 22. But the selective use of the quotation misstates the law. This Court has never suggested that a work is *always* transformative if it carries any different meaning or

message. Rather, this Court has held that the transformativeness inquiry involves "whether the new work merely 'supersede[s] the objects' of the original creation … or instead adds something new, *with a further purpose or different character, altering* the copyrighted work with new expression, meaning or message." *Campbell*, 510 U.S. at 579 (emphasis added); *see also Google*, 141 S. Ct. at 1202.

Thus, the work must have a new purpose or character, to such an extent that the new work alters the original. Not every new message automatically qualifies; "the new work" may still "merely supersede[] the objects of the original creation." *Campbell*, 510 U.S. at 579. Otherwise, every work of copying would be transformative; the act of appropriation itself conveys a different meaning and message from the original creation. So too, every derivative work, such as every film adaptation of a novel, would be transformative—even though the Copyright Act, 17 U.S.C. § 106(2), reserves to the copyright holder the rights to derivative works. Pet.App.17a.

In *Campbell*, for instance, the Court called for "case-by-case analysis" to assess when differences between two works are sufficient to lend the secondary work a new purpose and character. 510 U.S. at 577. There, the Court considered a commercial parody by 2 Live Crew of Roy Orbison's song, "Oh, Pretty Woman." *Id.* at 572. Acuff-Rose Music, Inc., who owned the rights to the original song, had refused to permit the use of the song and therefore sued 2 Live Crew and its record company. *Id.* at 573. The Court deemed 2 Live Crew's song a transformative use because it "reasonably could be perceived as commenting on the original or criticizing it, to some degree." *Id.* at 583. Because 2 Live Crew's song objectively had a

different purpose—to "comment[] on the original or criticiz[e] it"—that purpose transformed the original into something new. *Id.*

AWF contends (at 18-19), that *Google* "reaffirm[s] that transformativeness" hinges on whether a secondary work "convey[s] a different meaning or message" because this Court deemed Google's work transformative even though Google copied thousands of lines of code verbatim. But *Google* did not alter *Campbell*'s purpose-focused test. To the contrary, *Google* held that Google's use was transformative because Google used the code "to create new products" and "a new platform," *i.e.*, different purposes from the original point of the Java code in question. 141 S. Ct. at 1203.

2. The Second Circuit correctly applied this Court's precedent by asking whether Warhol's Prince Series "merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character." Pet.App.13a (quoting *Campbell*, 510 U.S. at 579). Because the Prince Series' "use of its source material" was not "in service of a 'fundamentally different and new' artistic purpose and character, such that the secondary work stands apart from the 'raw material' used to create it," the court found no fair use as a matter of law. Pet.App.23a-24a. In short, as prominent copyright scholar Professor Jane Ginsburg concluded, the Second Circuit "followed [this Court's] lead" in "navigat[ing] between unfair appropriation and fair reuse." Jane C. Ginsburg, *US Second Circuit Court of Appeals tames 'transformative' fair use; rejects 'celebrity-plagiarist privilege'; clarifies protectable expression in photographs*, 16 J. of Intell. Prop. L. & Prac. 638, 643 (2021).

AWF accuses the decision below of adopting a *per se* rule for when a secondary work is transformative. Pet. 17, 21. But the Second Circuit's decision emphasizes *four*

times that "fair use presents a holistic, context-sensitive inquiry" that "does not lend itself to simple bright-line rules." Pet.App.12a-13a,16a, 31a, 44a. Thus, contrary to AWF's contention (at 2), the Second Circuit did not "*forbid[]* ascertaining whether the follow-on work conveys a different meaning or message from the original, where both pieces are works of art that share a visual resemblance." Quite the contrary, the Second Circuit expressed that fair use can be heavily influenced by whether a work "conveys a new meaning or message separate from its source material" when determining if there is "a distinct artistic purpose." Pet.App.22a.

Further eschewing definitive pronouncements, the court declined to "attempt to[] catalog all of the ways in which an artist might achieve that end." *Id.* In short, the Second Circuit simply rejected petitioner's proposed categorical rule that whenever an artist or another viewer *subjectively* opines that the secondary work has a new meaning or message, that alone makes the work transformative. *Id.* That modest conclusion tracks the leading copyright treatise, which explains that the law would otherwise "recogniz[e] any alteration as transformative." *Id.* (quoting 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[B][6]).

AWF (at 3, 20) further faults the Second Circuit for concluding that a secondary work "must, at a bare minimum, comprise something more than the imposition of another artist's style on the primary work such that the secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material." Pet.App.23a-24a. AWF caricatures that reasoning as requiring courts to mechanically compare two artworks and reject fair use whenever the second work "recognizably" retains visual elements of the original. Pet. 4, 13, 17, 20-21, 27.

But the Second Circuit did not adopt that purported test. To the contrary, the court recognized "that the Warhol works display the distinct aesthetic sensibility that many would immediately associate with Warhol's signature style – the elements of which are absent from the Goldsmith photo." Pet.App.24a. The problem was not simply that Warhol retained a number of "essential elements of the Goldsmith Photograph without significantly adding to or altering those elements." Pet.App.25a-26a. Rather, the two works also shared the same overarching purpose of creating visual art, and the same "narrow but essential" purpose of functioning as "portraits of the same person." Pet.App.24a-25a. Those context-specific features, taken together, were dispositive. *Id.*

Underscoring the context-specific nature of its holding, the Second Circuit reiterated that other works that directly copy photographs into a new work *can be* transformative. For instance, the Second Circuit recognized that some works by appropriation artist Richard Prince were transformative even though those works incorporated another artist's photographs in their entirety. Pet.App.14a-15a. Similarly, the court recognized that a Jeff Koons painting that incorporated a copyrighted photograph was a fair use because Koons used the photograph as part of an "'entirely different type of art.'" Pet.App.21a. Those works were transformative because the secondary works could "reasonably be perceived as embodying a distinct artistic purpose, one that conveys a new meaning or message separate from its source material." Pet.App.22a.

AWF (at 23) faults the Second Circuit for "defining the 'function' of the respective works as being 'identical' simply because they were both 'works of visual art' that are 'portraits of the same person.'" According to AWF, "virtually any new work seeking to make use of an earlier

one can be described as having an 'identical' function in that broad sense." But the additional issue here was that both works were used for editorial purposes to illustrate publications. And AWF's proposed alternative—to distinguish the two works based on subjective views about the "very different messages" the two works conveyed—would "create a celebrity plagiarist privilege" to "pilfer the creative labors of others." Pet.App.27a.

3. It is not only the decision below that disproves AWF's thesis that the Second Circuit rendered fair-use doctrine a dead letter. District courts within the Second Circuit have repeatedly applied *Goldsmith* and found fair use in other cases. Those courts correctly read *Goldsmith* as requiring courts to "examine whether the secondary work's use of the source material is for a 'fundamentally different and new artistic purpose and character.'" *Easter Unlimited, Inc. v. Rozier*, 2021 WL 4409729, at *11 (E.D.N.Y. Sept. 27, 2021); *accord Fioranelli v. CBS Broad., Inc.*, 2021 WL 3372695, at *20 (S.D.N.Y. July 28, 2021).

For instance, applying *Goldsmith*, the Eastern District of New York found fair use of the distinctive Halloween mask from the movie Scream, even though the secondary use (a cartoon version of the mask in a logo) reproduced all the key features of the original. The court explained that the secondary use—by professional basketball player Terry Rozier—was transformative because the purpose was to promote Rozier's nickname, "Scary Terry." *Easter Unlimited*, 2021 WL 4409729, at *7, *11, *14.

Similarly, the Southern District of New York held that a docudrama's use of 9/11 footage shot at Ground Zero was fair, even though the docudrama replicated the footage exactly. *Fioranelli*, 2021 WL 3372695, at *20-*21, *34 (citing *Goldsmith*, 992 F.3d at 113). The court noted

that the purpose of the footage in the docudrama was to simulate how the fictionalized families in the film would react to seeing the news unfold on 9/11. *Id.* at *27. This use transformed the original purpose "to record history and share it with the world." *Id.*

4. AWF (at 23-24) mystifyingly accuses the Second Circuit of giving short shrift to *Google*. But, after this Court decided *Google*, AWF petitioned for rehearing on the ground that the panel decision defied *Google*. The Second Circuit responded by "grant[ing] the petition … in large part to give careful consideration to that opinion," amended its opinion to fully account for *Google*, and thoroughly explained why AWF's position misread *Google* and the panel decision. Pet.App.43a-46a. And the court of appeals' subsequent decision discusses *Google* at length. Pet.App.3a, 11a, 13a, 14a, 16a, 19a-20a, 24a, 41a, 52a.

AWF (at 23) criticizes the Second Circuit for focusing on *Google*'s computer-code context, contending that *Google* broadly holds that verbatim copying is fair use whenever the copying has a different message or meaning. But AWF elides (at 22) that the copying in *Google* was not *solely* "'for the same reason' as the original work." Google's copying also served a further, new purpose: the use of code sought "to create new products," to "expand the use and usefulness of Android-based smartphones," to offer "programmers a highly creative and innovative tool," and "to create a new platform." 141 S. Ct. at 1203.

Moreover, *Google* itself limited its analysis to "consider[ing] the four factors set forth in the fair use statute as we find them applicable to the kind of computer programs before us." *Id.* at 1201. *Google* contrasted "computer programs" with "books, films, and many other 'literary works,'" since computer programs "almost always serve functional purposes" rather than reflecting

artistic expression. *Id.* at 1198. *Google* likewise emphasized that "copyright's protection may be stronger where the copyrighted material . . . serves an artistic rather than a utilitarian function." *Id.* at 1197. And *Google* stated that "[t]he fact that computer programs are primarily functional makes it difficult to apply traditional copyright concepts in that technological world." *Id.* at 1208.

AWF's own amicus brief in *Google* refutes its current reading of *Google*. There, AWF contended that, because software is "functional" and receives "a 'lower degree of protection than more traditional [copyrighted] works,'" whatever the Court held in *Google* would "not necessarily fit neatly in copyright cases involving the creative arts." Rauschenberg Found. & AWF Amicus Br. 18-19, No. 18-956. Similarly, AWF's amicus, Professor Rebecca Tushnet, has elsewhere publicly stated, "*Warhol* and *Google* are actually completely different cases and probably do not bear very much on one another." Rebecca Tushnet, Media Law Resource Center, Panel Discussion, "*The Warhol Foundation v. Goldsmith*: Reining in Transformative Use?" (Apr. 6, 2021).[1]

AWF (at 24) argues that the Second Circuit missed the "*core point*" of *Google* because *Google* "directly analogized to Warhol's visual art—the Campbell's Soup Cans work." But the Second Circuit heard that point loud and clear. The court explained that replicating an advertising photo—as Warhol's Campbell's Soup series famously did—"might . . . fall within the scope of fair use." Pet.App.24a n.5 (quoting *Google*, 141 S. Ct. at 1203). Warhol's Campbell Soup works transforms a commercial image into an artistic work commenting on consumer culture. Pet.App.24a. Unlike a manufacturer's soup can,

[1] Professor Tushnet's comment begins at minute 16:23 of the recording on file with the Media Law Resource Center.

which is ultimately destined for the garbage can, here Goldsmith's original work is itself an artistic portrait of an individual.

II. This Case Does Not Implicate Any Circuit Split

Contrary to AWF's claims (at 24-32), the Second Circuit has not parted ways with other circuits. First, as discussed, the Second Circuit did not categorically prohibit courts from inquiring into whether a secondary work of art that visually resembles the original "conveys a different meaning or message." Pet. 2. Rather, as the Second Circuit explained, the inquiry is fact- and context-specific. Second, AWF is also wrong (at 29-31) that other circuits hold that works that convey a different meaning or message from the original *always* qualify as transformative. Like the Second Circuit, they too hold the inquiry is context-specific.

1. **Ninth Circuit.** AWF (at 24-28) heavily relies on *Seltzer v. Green Day*, 725 F.3d 1170 (9th Cir. 2013). But, contrary to AWF's contention, *Seltzer* did not focus exclusively on whether the secondary work carries a new meaning or message. The original work there was an illustration of a screaming, contorted face. *Id.* at 1173. A video designer for the band Green Day spray-painted a cross on the illustration, surrounded it with religious symbols, then placed the altered version into a video backdrop that played during the band's performances. *Id.* at 1174. The Ninth Circuit held that the image as it appeared in the video backdrop was fair use because the context of that use gave the work "a further purpose." *Id.* at 1176-77. By placing the illustration in a video, "[w]ith [a] spray-painted cross . . . surrounded by religious iconography," the image's purpose changed from street art to "'raw material' in the . . . video backdrop." *Id.* at 1176-77. *Seltzer* accordingly illustrates that secondary works can be transformative when "their *purpose* was completely

transformed from their original use." *Id.* at 1178 (emphasis added). Further, *Seltzer* determined that "the meaning of the original" is not dispositive. *Id.* at 1177-78.

AWF's reliance on the Ninth Circuit is also ironic. AWF curiously does not mention the Ninth Circuit's subsequent decision in *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, 983 F.3d 443 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2803 (2021), which refutes AWF's view of Ninth Circuit law. There, the Ninth Circuit held that "the addition of new expression to an existing work is not a get-out-of-jail-free card that renders the use of the original transformative." *Id.* at 453. Moreover, *Dr. Seuss* cited *Seltzer* to emphasize that the secondary work must "possess[] a further purpose or different character," which is a "benchmark[] of transformative use." *Id.* at 453-54 (citing *Seltzer*, 725 F.3d at 1177-78). *Dr. Seuss* thus held that a version of Dr. Seuss's *Oh, the Places You'll Go!* that used characters and images from *Star Trek*, but otherwise "paralleled [the original's] purpose," was not transformative despite "extensive new content." *Id.* at 453-54. AWF inexplicable ignores this obviously relevant decision.

AWF in a footnote cites *Tresóna Multimedia, LLC v. Burbank High School Vocal Music Ass'n*, 953 F.3d 638 (9th Cir. 2020) (cited at Pet. 29 n.1). But that case, like *Seltzer* focused on the different *purpose* a secondary work served. *Tresóna* involved a copyrighted song that a high school rearranged and incorporated into a musical. *Id.* at 642-43. Although *Tresóna* observed that the new arrangement added "new expression, meaning, and message," those differences did not make the new arrangement transformative *per se*. *Id.* at 650. Rather, the Ninth Circuit deemed the rearrangement transformative because the musical changed the song's original commercial purpose to "the nonprofit education of the students in

the music program." *Id.* at 649. So too here, had Goldsmith produced a commercial advertisement, the Second Circuit signaled that it would have likely accepted a fair-use defense for Warhol's Prince Series. Pet.App.24a n.5. But because Goldsmith's photograph and Warhol's Prince Series shared the same purpose, and because Warhol retained a litany of essential elements of Goldsmith's composition, the latter was not transformative. Pet.App.25a-26a.

Far from creating a circuit split, prominent academics have concluded that the decision below *harmonizes* circuits' approaches by ensuring that the Second Circuit's transformative use framework "echoes the Ninth Circuit's." Ginsburg, *supra*, at 642. Before the decision below, some courts believed that the Second Circuit defined transformative use so broadly that secondary works could be wholly derivative of the original work. *See Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (citing *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013)). The decision below "course correct[ed]" by recognizing that "derivative works" like film adaptations of movies are not fair use, similar to the line the Ninth Circuit has drawn in distinguishing between fair use and non-transformative copying. Ginsburg, *supra*, at 642.

2. AWF (at 29-31) is likewise incorrect that other circuits focus exclusively on whether the secondary use changed the meaning and message of the original.

Federal Circuit. AWF (at 30-31) portrays *Gaylord v. United States*, 595 F.3d 1364 (Fed. Cir. 2010), as focused on "the addition of a new meaning or message," not the "degree of visual alteration." But, as the Second Circuit explained, *Gaylord* fully comports with the decision below. Pet.App.24a-25a. There, the original work was the sculpture in the Korean War Memorial, and the secondary work was a stamp that the Postal Service created from a

photo of the sculpture. *Gaylord*, 595 F.3d at 1369-70. After the sculptor sued for infringement, the Federal Circuit rejected the Postal Service's fair-use defense because both works shared the same underlying purpose: honoring Korean War veterans. *Id.* at 1373-74. The decision below analogized *Gaylord*'s sculpture and stamp, with their identical "purpose and function" despite their "different expressive character," to the Goldsmith Photograph and the Prince Series. Pet.App.24a-25a. *Gaylord* thus dovetails with the decision below: changes to the original's purpose, not "new meaning" or the "degree of visual alteration," drive whether a secondary use is transformative.

First Circuit. AWF (at 30) cites *Nunez v. Caribbean International News Corp.*, 235 F.3d 18 (1st Cir. 2000). But that case again illustrates that a secondary work can be transformative by using an original work for a completely different purpose. There, a newspaper reprinted copyrighted naked modeling photographs of "Miss Puerto Rico Universe" for a story about whether the photographs were appropriate for a Miss Puerto Rico Universe. *Id.* at 21. The First Circuit held that reprinting the photographs in the newspaper for news commentary was an entirely different purpose from what "motivated the creation of the [original]" photographs in a modeling portfolio. *Id.* at 23. That holding in no way impugns the Second Circuit's conclusion that when two works *share* a purpose, essential artistic elements, and compete for the same market, the facts may sometimes prompt a finding of infringement. Pet.App.25a-26a, 38a.

Third Circuit. AWF (at 31) invokes *Murphy v. Millennium Radio Group, LLC*, 650 F.3d 295 (3d Cir. 2011), but that case also underscores that other circuits focus on the *purpose* of the work, just like the Second Circuit did

below. In *Murphy*, the Third Circuit contrasted the purpose of a magazine photo of two radio hosts against a version of the photo that the station cropped and posted to its website. *Id.* at 306-07. The court concluded that the station's version was not transformative because it shared the same purpose as the original: to "inform[] the public" that the hosts won an award. *Id.* at 306. The Third Circuit's extensive analysis on "the purpose of the[] use" once again refutes AWF's argument that other circuits consider only whether the secondary use imparts "new meaning" to the original. *Id.* at 307.

Fourth Circuit. AWF (at 30) mischaracterizes this circuit as holding that a secondary use is transformative so long as it "imbu[es] the original with new . . . meaning" as well. *Brammer v. Violent Hues Productions, LLC*, 922 F.3d 255, 261, 263-64 (4th Cir. 2019), examined the meaning of a secondary work alongside whether it "serve[d] a different purpose" or "new function." The court held that a copyrighted photograph of Washington's Adams Morgan neighborhood was not transformative when used to highlight D.C. tourist attractions on a website. *Id.* at 263. The court concluded that the photo did not serve a new purpose on the website because the website "used the Photo expressly for its content — that is, to depict Adams Morgan." *Id.* at 264.

Similarly, *Bouchat v. Baltimore Ravens Ltd. Partnership*, 737 F.3d 932, 940, 947 (4th Cir. 2013) held that the Baltimore Ravens' "Flying B" logo as used in a documentary and historical displays was transformative. Those uses "differ[] significantly from [the] original function as the team's logo" because they "preserve a specific aspect of Ravens history." *Id.* at 947.

Sixth Circuit. AWF (at 29-30) claims that the fair-use inquiry in *Balsley v. LFP, Inc.*, 691 F.3d 747 (6th Cir. 2012), "was [] trained on 'ascertain[ing] the intent behind

or meaning of the works at issue." But the court did not hold that any secondary work with a different intent or meaning is necessarily transformative. Instead, *Balsley* held that while adding new message or meaning *may* contribute to transformativeness, courts also consider whether the secondary use's purpose differs from the original or, alternatively, "serv[es] as a market replacement." *Id.* at 759. The court concluded that an online photo of a newscaster was not transformative when *Hustler* cropped it for its magazine, because that medium was "a market replacement" for the original. *Id.*

3. AWF (at 31) complains of "confusion about how to conduct the transformativeness inquiry." But AWF's support for that contention comes from sources that predate both *Google* and the decision below. *See* 4 Melville Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[1][b] (2019) (pre-*Google* edition); David Shipley, *A Transformative Use Taxonomy: Making Sense of the Transformative Use Standard*, 63 Wayne L. Rev. 267, 267 (2018) (same); 1 Leonard D. DuBoff et al, *Art Law Deskbook: Ch. 1 Copyright*, Part 9 Fair Uses (2018 Lexis) (same); Shoshana Rosenthal, Note, *A Critique of the Reasonable Observer: Why Fair Use Fails to Protect Appropriation Art*, 13 Colo. Tech. L.J. 445, 450 (2015) (same). These sources fail to consider how this Court's most recent fair-use case weighs on the transformativeness inquiry. This Court just decided its first fair-use decision in decades; *Google* has now elucidated how the fair-use factors apply in the software context.

Moreover, AWF's sources reiterate this Court's repeated holding that "fair use depends on the context." *See, e.g.*, *Google*, 141 S. Ct. at 1199. AWF's cited treatises concede that courts consider context when assessing transformativeness. *See* Mark S. Lee, *Entertainment and Intellectual Property Law* § 1:49 (2021). They also

note that courts have "continually disavowed" drawing a "magic bright line" in this arena, instead favoring "case-by case adjudication." Nimmer, *supra*, at § 13.05[B][4] n.314. The inherently fact- and context-specific nature of the transformativeness inquiry makes hard judgment calls inevitable. This Court has eschewed bright-line rules in this area, and courts are perfectly capable of applying this Court's precepts case-by-case.

III. AWF Grossly Exaggerates the Effect of the Decision Below

1. AWF and its amici take a Chicken-Little approach to the decision below, but the sky is not remotely close to falling. AWF singles out one component (transformativeness) of one element of the four-factor fair-use test, while ignoring the Second Circuit's determination that all other factors weighed against fair use as well. It is hardly clear that the Second Circuit would have found fair use even had the court gone AWF's way on transformativeness, because the fair-use test is a holistic inquiry. *See* Pet.App.12a-13a. Transformativeness is simply not outcome-determinative. *See Campbell*, 510 U.S. at 594.

Further, this case is not even over yet. Although the Second Circuit decided the issues of fair use and substantial similarity, the court "express[ed] no view on the viability of AWF's remaining defenses, which are appropriately considered by the district court in the first instance." Pet.App.46a n.14. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Mil. Inst. v. United States*, 113 S. Ct. 2431, 2432 (1993) (Scalia, J., respecting the denial of certiorari).

2. AWF (at 33-35) contends that the decision below hollows out the purpose of fair-use doctrine by denigrating works that rely on earlier pieces for artistic purposes.

Quite the contrary, the Second Circuit cautioned that "we do not hold that the primary work must be 'barely recognizable' within the secondary work" in order for the secondary work to be transformative. Pet.App.23a. Further, the court held that although the works share the same purpose, as portraits of Prince, "this observation does not *per se* preclude a conclusion that the Prince Series makes fair use of the Goldsmith Photograph." Pet.App.25a. And the Second Circuit rejected the notion that its decision would cast doubt upon "art that employs pre-existing imagery," repeating that the focus is on whether the secondary use "embod[ies] a new purpose." Pet.App.41a-42a.

AWF (at 33) accuses the Second Circuit of "artificially … limit[ing]" instances of permissible visual replication "to situations where 'the secondary work *comments on the original* in some fashion.'" (quoting Pet.App.14a). False: the Second Circuit said that those situations present "the most straightforward cases of fair use," but that "in *Cariou v. Prince*, we rejected the proposition that a secondary work *must* comment on the original in order to qualify as fair use." Pet.App.14a.

AWF (at 34) also condemns the Second Circuit for purportedly "collaps[ing] the transformativeness inquiry" into the "substantial similarity analysis," which asks whether visual similarities between works would rise to the level of appropriation in the eyes of a reasonable observer. But as noted, *supra* pp. 17-19, the Second Circuit's transformative use analysis does not rely solely on "visual similarity," *contra* Pet. 34. The Second Circuit also examined the "purpose and function" of the works Pet.App.24a-25a, again in keeping with this Court's precedent.

3. AWF (at 35-38) casts the decision below as threatening "the creation of new art," ownership, sales, museum

displays, and the "destruction" of seminal works in the artistic canon, including Warhol's whole oeuvre. But the decision below hardly presages a bonfire. As AWF semi-acknowledges (at 37), the Second Circuit distinguished between "the *creation* of the Prince Series and the *licensing* of the Prince Series." The court rejected AWF's accusation that its decision "effectively outlaw[s]" Warhol-style art. Pet.App.45a. The court stated that nothing in its opinion would "stifle[] the creation of art that may reasonably be perceived as conveying a new meaning or message, and embodying a new purpose." Pet.App.42a. And, as noted, the court repeatedly endorsed *other* examples of artworks that directly copied from an original yet were nonetheless transformative. *Supra* p. 19; Pet.App.20a-21a, 23a.

Furthermore, the court limited its ruling to AWF's *commercial licensing* of images from the Prince Series that trade off with the market for Goldsmith to license her own photograph of Prince. Goldsmith "expressly disclaim[ed] seeking some of the most extreme remedies available to copyright owners," such as destruction of the infringing work. Pet.App.42a. Thus, the court noted that "what encroaches on Goldsmith's market is AWF's commercial licensing of the Prince Series, not Warhol's original creation." Pet.App.42a. Art that occupies a separate primary market from its source material would have "significantly more 'breathing space.'" Pet.App.42a (quoting *Campbell*, 510 U.S. at 579).

Judge Jacobs similarly emphasized that "the holding does not consider, let alone decide, whether the infringement encumbers the original Prince Series works." Pet.App.50a (Jacobs, J., concurring). It is simply false that the Second Circuit made "unlawful a large number of works of art that borrow from from—but *add to*—preexisting creations." Pet. 35. Instead, as mentioned, since

Goldsmith, district courts within the Second Circuit have found fair use even when the secondary work incorporates the original wholesale. *Supra* pp. 19-20.

One would think that organizations like AWF would welcome the Second Circuit's limitations on its holding and would avoid calling their collections and business models into question. Yet AWF (at 37-38) proclaims that "[n]othing in the court's broad rule for distinguishing between transformative uses and non-transformative uses is based on whether the allegedly infringing work is the original . . . or a licensed copy." Au contraire, both the court and Judge Jacobs' concurrence acknowledged that if copyright owners seek equitable relief covering the original works, courts *should* consider the threat to the public interest. Pet.App.29a-30a, 52a.

Finally, it is the height of irony for AWF to argue that modern artists like Warhol cannot survive unless they can replicate other artists' copyrighted works without permission. Those original copyright-holders have their own First Amendment interests and serve significant artistic aims of their own. *See Harper & Row Publ'rs, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985). For instance, these artists enjoy a First Amendment right to control their protected expression against appropriation, which is not a "lesser right" than AWF's asserted interest. *Id.* at 559. In short, "[t]he fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance." *Id.* at 558 (quoting *Iowa State Univ. Rsch. Found., Inc. v. Am. Broad. Cos., Inc.*, 621 F.2d 57, 61 (2d. Cir. 1980)).

The Second Circuit summed up the same point: "[J]ust as artists must pay for their paint [or] canvas … if they choose to incorporate the existing copyrighted expression of other artists *in ways that draw their purpose*

and character from that work … they must pay for that material as well." Pet.App.45a (emphasis added). The upshot of the decision below is that AWF cannot continue to license a secondary work to the very magazine where respondent might market her original work.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

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