

No. 21-869

IN THE
Supreme Court of the United States

ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS,
INC.,

Petitioner,

v.

LYNN GOLDSMITH, ET AL.,

Respondents.

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

**BRIEF OF SENATOR MARSHA BLACKBURN AS
AMICUS CURIAE SUPPORTING RESPONDENTS**

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT	7
I. Through The Copyright Act, Congress Intended To Incentivize And Protect Original Work, In Keeping With The Founders’ Design.	7
A. Throughout American History, Copyright Law Was Crafted To Protect Original Creative Works.	7
B. The Copyright Act’s Text And Structure Include Broad Protection Against Use Of Copyrighted Material In Derivative Works.	11
C. The Copyright Act’s Legislative History Confirms Congress’s Intent To Incentivize And Protect Original Work.	17
II. The Second Circuit’s Application Of The Copyright Act Properly Protects Creators Of Original Work.....	24
CONCLUSION.....	28

TABLE OF AUTHORITIES

	Page(s)
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	<i>passim</i>
<i>Cent. Bank, N.A. v. First Interstate Bank, N.A.</i> , 511 U.S. 164 (1994).....	12
<i>Estate of Cowart v. Nicklos Drilling Co.</i> , 505 U.S. 469 (1992).....	12
<i>Dolan v. U.S. Postal Serv.</i> , 546 U.S. 481 (2006).....	14
<i>Emerson v. Davies</i> , 8 F. Cas. 615 (C.C.D. Mass. 1845).....	11
<i>Folsom v. Marsh</i> , 9 F.Cas. 342 (CC Mass. 1841)	5, 10, 15
<i>Google LLC v. Oracle Am., Inc.</i> , 141 S. Ct. 1183 (2021).....	15
<i>Harper & Row Publishers, Inc. v. Nation Enters.</i> , 471 U.S. 539 (1985).....	<i>passim</i>
<i>New Prime Inc. v. Oliveira</i> , 139 S. Ct. 532 (2019).....	23
<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984).....	3, 13

<i>Star Athletica, L.L.C. v. Varsity Brands, Inc.</i> , 137 S. Ct. 1002 (2017).....	12
<i>State Farm Fire & Cas. Co. v. U. S. ex rel. Rigsby</i> , 580 U.S. 26 (2016).....	17
<i>Story v. Holcombe</i> , 23 F. Cas. 171 (C.C.D. Ohio 1847)	10
<i>Twentieth Century Music Corp. v. Aiken</i> , 422 U.S. 151 (1975).....	3
<i>Washington State Dep't of Soc. & Health Servs. v. Guardianship Est. of Keffeler</i> , 537 U.S. 371 (2003).....	14
Constitutional Provisions and Statutes	
U.S. Const. art. I, § 8, cl. 8.....	1, 3, 7
17 U.S.C. § 101	3, 13
17 U.S.C. § 106.....	3, 13
17 U.S.C. § 107	4, 13, 15, 16
Copyright Act of 1790, Pub. L. No. 1-15, 1 Stat. 124	9
Copyright Act of 1976, 17 U.S.C. §§ 101- 1332	3
Statute of Anne, 8 Anne, c. 19 (1710)	7

Other Authorities

H.R. REP. NO. 94-1476 (1975)	<i>passim</i>
S. REP. NO. 94-473 (1975).....	5, 12, 18, 19
Comments from Bart Herbison, Exec. Dir. Nashville Songwriters Ass'n Int'l on " <i>Review of ASCAP and BMI Consent Decrees</i> ," U.S. Dep't of Justice (Aug. 5, 2014), https://www.justice.gov/sites/default/ files/atr/legacy/2014/08/13/307686.pd f	27
Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess. (H.R. Judiciary Comm. Print 1961)	20, 21
<i>Copyright Timeline: A History of Copyright in the United States</i> , ASS'N OF RSCH. LIBRS., https://www.arl.org/copyright- timeline/	8
THE FEDERALIST NO. 43 (James Madison).....	3, 8
James Madison, <i>Madison Debates</i> AVALON PROJECT (Aug. 18, 1787)	8

- Marcus IV, *Answers to Mr. Mason's
Objections to the New Constitution,
Recommended by the late
Convention at Philadelphia,*
CONSOURCE (Mar. 14, 1788)8
- Nate Rau, Nashville's Musical Middle
Class Collapses, THE TENNESSEAN
(Jan. 28, 2015),
[https://www.tennessean.com/story/e
ntertainment/music/2015/01/04/nash
ville-musical-middle-class-collapses-
new-dylans/21236245/](https://www.tennessean.com/story/entertainment/music/2015/01/04/nashville-musical-middle-class-collapses-new-dylans/21236245/)27
- Annie Reuter, *Evolution of The
Nashville Songwriter: From Solo
Writes To Songwriting Apps,*
FORBES (May 16, 2020),
[https://www.forbes.com/sites/anniere
uter/2020/05/16/evolution-of-the-
nashville-songwriter-from-solo-
writes-to-songwriting-
apps/?sh=21d028a745a3](https://www.forbes.com/sites/anniereuter/2020/05/16/evolution-of-the-nashville-songwriter-from-solo-writes-to-songwriting-apps/?sh=21d028a745a3).....26, 27
- Robert Stoner & Jéssica Dutra,
*Copyright Industries in the U.S.
Economy: The 2020 Report,* Int'l
Intellectual Prop. Alliance,
[https://www.iipa.org/files/uploads/20
20/12/2020-IIPA-Report-FINAL-
web.pdf](https://www.iipa.org/files/uploads/2020/12/2020-IIPA-Report-FINAL-web.pdf)2

Paul Williams, President and
Chairman, Am. Soc’y of Composers,
Authors and Publishers (ASCAP),
Keynote Address at the CISAC
World Creators Summit (June 5,
2013),
[https://www.ascap.com/playback/2013/06/action/uncertainty_copyright_a
nd_courage](https://www.ascap.com/playback/2013/06/action/uncertainty_copyright_and_courage)27, 28

INTEREST OF *AMICUS CURIAE*¹

Amicus Senator Marsha Blackburn is a member of the United States Senate who is charged with the constitutional authority “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art. I, § 8, cl. 8. From its very first sessions, Congress has enacted statutes to protect the original creations of copyright owners, including the Copyright Act of 1976, as amended, which currently serves as the primary basis for copyright protection in the United States.

Senator Blackburn has a strong interest in ensuring that the Copyright Act is interpreted in keeping with Congress’s intent—which in turn reflects the vision of the Founders—to preserve the economic incentive for creators to make original works of artistic genius. Strong copyright protections have provided the legal environment under which American musicians, authors, artists, photographers, and other content creators have flourished for centuries. The music, art, and other creative industries in turn create millions of American jobs and add \$1.5 trillion in economic value for Americans

¹ No party’s counsel authored this brief in whole or in part, and no person or entity, other than *amicus* or her counsel, made a monetary contribution to fund the brief’s preparation or submission. All parties in this case have consented to *amicus*’s filing of this brief.

in 2019 alone.² Petitioner Andy Warhol Foundation for the Visual Arts, Inc.'s ("Petitioner") proposed test, which would dissolve copyright protections whenever a copycat artist subjectively intended to impart a new meaning or message to prior protected work, would frustrate Congressional intent, upend the longstanding legal framework for copyrights, and jeopardize the vibrant media and entertainment sector of the American economy that depend on strong copyright and licensing protections.

Senator Blackburn is a United States Senator for Tennessee and is, among other assignments, a Member of the U.S. Senate Judiciary Committee and its Subcommittee on Intellectual Property. Senator Blackburn has also served as the Executive Director of the Tennessee Film, Entertainment, and Music Commission, and she co-sponsored the Support the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2019 (a proposal that was included as part of an omnibus COVID-19 Relief Bill and signed into law in December 2020), a landmark copyright enactment designed to create an easier and more affordable way for small creators to address copyright infringement.

SUMMARY OF ARGUMENT

At its heart, U.S. copyright law exists to incentivize the creation of original works of art by

² Robert Stoner & Jéssica Dutra, *Copyright Industries in the U.S. Economy: The 2020 Report*, Int'l Intellectual Prop. Alliance, <https://www.iipa.org/files/uploads/2020/12/2020-IIPA-Report-FINAL-web.pdf>.

providing artists with a time-limited exclusive right to benefit financially from their efforts. As this Court has noted, copyrights provide a “fair return for an ‘author’s’ creative labor,” with the “ultimate aim . . . to stimulate artistic creativity for the general public good.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *see also Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984) (“The purpose of copyright is to create incentives for creative effort.”). These benefits of copyright protection were so well established at the Founding that it was “solemnly adjudged . . . to be a right of common law,” and the authors of the Federalist predicted that the “utility” of Congress’s power to protect copyrights “will scarcely be questioned.” THE FEDERALIST NO. 43 (James Madison); *see also* U.S. Const. art. 1, § 8, cl. 8.

Pursuant to the Copyright Clause, Congress has protected copyrights from as early as 1790, and courts subsequently developed common law to establish the parameters of those rights. Congress enacted the Copyright Act of 1976, 17 U.S.C. §§ 101-1332, to codify the common-law principles that had developed since the Founding, under which “every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.” *Sony*, 464 U.S. at 451.

The Act provides broad protection for artists to enjoy an exclusive right for a period of years to any derivative use of their original creations—such as film or stage adaptations of a novel or music distribution rights. *See* 17 U.S.C. §§ 101, 106. Artists

could also consent to the use of their creations, and the Act codified a limited common-law “fair use” exception to copyright protection that would permit certain uses where the creator’s consent could be presumed. *See Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 549 (1985).

Specifically, Congress envisioned “fair use” as a holistic, case-specific inquiry into whether a secondary artist had made use of a prior protected work in a new context for an unrelated end. Congress cited as paradigmatic examples the use of a work of art in teaching materials, scholarly criticism, or news reporting. *See* 17 U.S.C. § 107. Congress also made clear the importance of evaluating whether a derivative work competed in the same market as the original. Congress asked courts to consider, for example, whether the “purpose and character” of a derivative use “is of a commercial nature or is for nonprofit educational purposes,” and “the effect of the use upon the potential market for or value of the copyrighted work.” *Id.* § 107(1), (4). Indeed, the Act’s legislative history makes clear that this focus on the potential commercial harm to artists of copycat works was critical to the Act’s passage. *See infra* pp. 21–24; *see also Harper & Row*, 471 U.S. at 566 (describing effect on the market as “the single most important element of fair use”).

While copyright law thus prohibits some artists from making unauthorized use of another’s work, Congress viewed that result as promoting free speech, not infringing it. Indeed, this Court has described copyright protection as “the engine of free expression,” as it supplies an “economic incentive to

create and disseminate ideas.” *Harper & Row*, 471 U.S. at 558. Congress’s context-sensitive test for fair use also promotes free expression, because it protects only those “transformative” uses that “provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). Fair use, however, can never extend so far as to protect identical or near-identical facsimiles that “supersede the use of the original,” *Harper & Row*, 471 U.S. at 550 (citation omitted), or that serve as a market “substitute” for a copyrighted work, *Folsom v. Marsh*, 9 F. Cas. 342, 344–45 (C.C.D. Mass. 1841); *accord*, S. REP. NO. 94–473, at 65 (1975).

By contrast, Petitioner puts forth a purportedly objective test that can apparently be satisfied through testimony about either artist’s subjective intent. Pet. Br. at 20, 45, 48. But Petitioner’s suggestion that any derivative work that “modifies the meaning or message” of an original creation constitutes fair use (Pet. Br. at 29) would undermine Congress’s carefully calibrated regime for promoting and protecting artistic expression. Congress nowhere enacted Petitioner’s “meaning or message” test in the text of the Copyright Act. To the contrary, the “purpose and character” test adopted by Congress requires an objective inquiry into whether an artist has made novel use of an original work for a different purpose (such as education). And Congress specifically pointed to market substitutability as a strong indication that two works share the same “purpose and character,” meaning commercial sale of the derivative work would be unfair. A “meaning or message” test, by contrast, would turn U.S. copyright

law on its head, protecting pirates and plagiarizers whenever they could plausibly attribute a new meaning to a follow-on work. Petitioner's test would also entangle courts in making difficult aesthetic judgments about whether two different artistic works convey the same meaning or message. Courts are not art critics, and even if they were, the exclusive focus on aesthetic intent bears little relationship to the critical question of whether one artist is depriving another of the fruits of an original creation.

Honoring Congressional intent and faithfully applying the statutory fair-use factors protects the creative efforts of artists, musicians, and authors who rely on copyright protections to make a living. It would, for example, protect Respondents' original photographs in this case, which serve as the "source image[s]" for Andy Warhol's "Prince" series, and compete in the same market as the Warhol art for publication in magazines seeking to run images of Prince. JA607 n.1. The diluted test for fair use proposed by Petitioner would instead eviscerate the licensing market by which artists control the use and distribution of their original works, which in turn could hobble the critical media and entertainment sector of the American economy. The Court should reject Petitioner's asserted test and affirm the Second Circuit.

ARGUMENT

I. THROUGH THE COPYRIGHT ACT, CONGRESS INTENDED TO INCENTIVIZE AND PROTECT ORIGINAL WORK, IN KEEPING WITH THE FOUNDERS' DESIGN.

A. Throughout American History, Copyright Law Was Crafted To Protect Original Creative Works.

American legal history, from the U.S. Constitution and its historical antecedents to early federal case law, demonstrates that the core purpose of copyright protections is to encourage and protect creators of original work.

The Constitution itself speaks to the importance of creating a uniform federal framework to safeguard original creative works. In Article 1, Section 8, the Constitution empowers Congress to “promote the Progress of Science and useful Arts,” by securing “to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art. 1, § 8, cl. 8.

This “Copyright Clause” centers on “Authors and Inventors” of original work and was designed to incentivize original creations and protect their makers’ exclusive rights. Relying on the British Statute of Anne—which established the principles of author ownership of copyright and a fixed term of protection, Statute of Anne, 8 Anne, c. 19 (1710)—the Constitution’s Framers included the “Copyright Clause” to incentivize “authors, artists, and scientists to create original works by providing creators with a

monopoly.”³ The Convention Debates make this purpose clear, as James Madison submitted two clauses for consideration that were focused on the protection of original work. James Madison, *Madison Debates*, AVALON PROJECT (Aug. 18, 1787) (proposing Congressional power “to secure to literary authors their copy rights for a limited time” and “to secure to Authors exclusive rights for a certain time”). And James Iredell—a North Carolina lawyer and ardent supporter of the Constitution writing under the pen name “Marcus” in response to George Mason’s Objections to the New Constitution after the Philadelphia Convention—defended the Copyright Clause as an “encouragement to genius.” Marcus IV, *Answers to Mr. Mason’s Objections to the New Constitution, Recommended by the late Convention at Philadelphia*, CONSOURCE (Mar. 14, 1788).

The protection of authors and inventors via copyright was seen by the Founders as a service to the “public good.” THE FEDERALIST NO. 43 (James Madison). James Madison argued that “[t]he utility of [copyright] power will scarcely be questioned,” because copyright protection for authors in England was “solemnly adjudged . . . to be a right of common law.” *Id.* Madison explained that “[t]he right to useful inventions seems with equal reason to belong to the inventors.” *Id.* Essentially, Madison believed that “[t]he public good fully coincides” with protecting the creator of an original work. *Id.* In contrast, the

³ *Copyright Timeline: A History of Copyright in the United States*, ASS’N OF RSCH. LIBRS., <https://www.arl.org/copyright-timeline/> (last visited August 15, 2022).

constitutional debates did not explore exceptions to copyright protection or the rights of those who made copies or follow-on work based on original artistic creation.

Right on the heels of adopting the federal Constitution, the Second Congress enacted a statute protecting copyright holders in 1790. The Copyright Act of 1790—an almost verbatim copy of the British Statute of Anne that applied exclusively to U.S. citizens—established that an author “shall have the sole right and liberty of printing, reprinting, publishing and vending [the author’s] map, chart, book or books, for the term of fourteen years.” Pub. L. No. 1-15 § 1, 1 Stat. 124. Section 2 of the 1790 Act further prohibited any person from “print[ing], reprint[ing], publish[ing], or import[ing]” any “such map, chart, book or books” without the author’s consent. *Id.* § 2. The 1790 Act was amended twice—extending copyright restrictions to etchings and requiring notice of copyright registration on copies of works and, later, expanding the jurisdiction of courts to hear patent and copyright cases—but no portion of the 1790 Act or amendments made allowances, aside from consent, for the derivative use or copying of an original artistic creation. *See* Pub. L. No. 1-15, 1 Stat. 124.

Similarly, early cases, from which the fair-use doctrine emerged, emphasized that copyright was designed, first and foremost, to protect an artist’s original work. As Justice Story explained in a seminal case holding that an edited compilation of George Washington’s papers infringed a prior, unpublished collection, “[t]he general property in the

manuscripts remains in the writer and his representatives, as well as the general copyright. A fortiori, third persons, standing in no privity with either party, are not entitled to publish them, to subserve their own private purposes of interest, or curiosity, or passion.” *Folsom*, 9 F. Cas. at 346.

Justice Story nevertheless recognized there could be instances where an author draws upon and makes such changes to prior protected material that it results in an “original and new work” that falls outside the scope of the copyright. *Id.* at 347. To determine when that occurs, Justice Story analyzed “the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” *Id.* at 348. In light of these considerations, Justice Story determined that a copy or derivative work was prohibited if it “cite[d] the most important parts of the work, with a view, not to criticise, but to *supersede* the use of the original work, and *substitute* the review for it.” *Id.* at 344–45 (emphases added); *see also Story v. Holcombe*, 23 F. Cas. 171, 173 (C.C.D. Ohio 1847) (finding that a work that “communicates the same knowledge as the original work, . . . is an actionable violation of literary property”). Importantly, the transformation analysis—which is a fact-intensive inquiry involving “[m]any mixed ingredients,” *Folsom*, 9 F. Cas. at 348—focused on whether “the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another.” *Id.* If that was the case, the copying “constitute[d] a piracy pro tanto.” *Id.*

By contrast, historical copyright principles demonstrate that the artist’s purpose in producing an imitative work is of limited importance in determining infringement. As Justice Story explained, to determine fair use “[t]he true question is, whether the same plan, arrangement and combination of materials have been used before *for the same purpose or for any other purpose.*” *Emerson v. Davies*, 8 F. Cas. 615, 618–19 (C.C.D. Mass. 1845) (emphasis added) (finding plaintiff infringed defendant’s arithmetic textbook by creating highly similar copies of sections on addition and subtraction). With that understanding, the Court found that it would be permissible for an author to gather and borrow materials from known sources, but they must be “*combined in a different manner* from what was in use before” and serve as “*real improvements* upon the existing modes” in order to avoid infringement. *Id.* at 619 (emphases added). That is because copyright is designed to protect the “skill and labor” of the artist, and an imitator has no right to take “substantially and designedly” from the work, skill, and labor of another. *Id.* Petitioner’s asserted “meaning or message” test disregards this important aspect of U.S. copyright law.

B. The Copyright Act’s Text And Structure Include Broad Protection Against Use Of Copyrighted Material In Derivative Works.

The copyright principles espoused by the Framers and discussed in early cases laid the groundwork for the Copyright Act of 1976. Following passage of the 1790 Act, Congress revised general copyright

protections on several occasions, but largely deferred to the judiciary to address copyright protections on a case-by-case basis. *Cf.* H.R. REP. NO. 94-1476, at 66 (1975); S. REP. NO. 94-473, at 62. Following approximately 150 years of legal development, the Copyright Act of 1976 was a large-scale endeavor to codify established copyright principles, including the fair-use doctrine that had emerged as a limited carve-out to copyright protection.

The text and structure of the Copyright Act of 1976 make clear that copyright is principally designed to protect an artist's rights against improper copying or imitation. When interpreting a statute, the Court follows "the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992); *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 188 (1994) ("Policy considerations cannot override our interpretation of the text and structure of [a statute]."). Accordingly, the Court must endeavor to read the statute in a way that "giv[es] each word its ordinary, contemporary, common meaning." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (internal citations and quotations omitted). This is particularly important for copyright, as this Court has previously condemned courts that give "insufficient deference to the scheme established by the Copyright Act." *Harper & Row*, 471 U.S. at 545. A straightforward reading of the Copyright Act shows that Congress sought to protect and incentivize the creative efforts of a copyright holder, including protecting against use in derivative works, with only limited exceptions.

Section 106 of the Copyright Act, for starters, grants “exclusive rights” to copyright owners, including the broad right to “prepare derivative works based upon the copyrighted work.” 17 U.S.C. § 106. A “derivative work” is defined, in turn, as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.” *Id.* § 101.

This broad conception shows that Congress could not have intended to take outside the realm of copyright protection any use of prior protected work for a different meaning or message. If a mere change in purpose were the touchstone, then nearly any “musical arrangement,” “dramatization,” “fictionalization,” or “motion picture version” of copyrighted material would easily fit the bill. *Id.*

In contrast to the broad scope of section 106, section 107 codified the limited fair-use exception to copyright protection set forth in *Folsom* and similar cases. Section 107 begins by stating that the “fair use of a copyrighted work, including such use . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” *Id.* § 107. As several members of this Court have noted, “[e]ach of these uses . . . reflects a common theme: each is a *productive* use, resulting in some added benefit to the public beyond that produced by the first author’s work.” *Sony*, 464 U.S. at 478 (Blackmun, J., dissenting); *see also Campbell*,

510 U.S. at 579 (explaining that a “transformative” use “provide[s] social benefit, by shedding light on an earlier work, and, in the process, creating a new one”).

This Court has held that this statutory list of acceptable purposes is “illustrative” of permissible fair use. *Campbell*, 510 U.S. at 577. But while the list is not exhaustive, it does not follow that any new purpose attached to preexisting artwork would defeat the copyright. To the contrary, any permissible fair use not listed in the statute should share the same characteristics as the items in the enumerated list. *Cf. Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (“A word is known by the company it keeps”—a rule that “is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.”); *Washington State Dep’t of Soc. & Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371, 384 (2003) (“[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”).

Importantly, the statutory examples of fair use all involve uses that discuss, critique, or elaborate upon the original work in some unrelated forum, rather than copying elements to compete—or to substitute—in the same market as the original. Teachers, researchers, and art critics may make use of copyrighted material as necessary to create innovative work in their respective professions, but textbooks, academic articles, and art reviews are not market substitutes for the underlying work. The

Copyright Act's preceding history, codified into the plain text of the statute, likewise confirms that fair use precludes a use that "supersede[s] the use of the original work, and substitute[s] the review for it." *Folsom*, 9 F. Cas. at 344–45; see also *Harper & Row*, 471 U.S. at 550.

The text of the fair-use exception further demonstrates that the imputed meaning of a derivative work has a limited role at best in determining its application to otherwise applicable copyright protections. Borrowing from Justice Story's fair-use analysis in *Folsom*, the statute requires that courts weigh four different factors: (1) "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," (2) "the nature of the copyrighted work," (3) "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," and (4) "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107. This Court has recently reaffirmed the statutory factors and the need to consider all four elements. See *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1201 (2021). In other words, Petitioner's exclusive focus on the "meaning or message" of a derivative work, at the expense of the express textual factors, would eviscerate the statutory mandate by Congress that courts should make case-by-case fair-use determinations.

The first factor of the fair-use test (which is the crux of the case before this Court) demonstrates that Petitioner's reading cannot be correct. This factor focuses on the "purpose and character of the use,

including whether such use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. § 107(1). The text makes no reference to meaning or message. And by attempting to narrow this factor substantially by focusing on merely the artist’s meaning or message of a derivative use, Petitioner would eliminate the textual instruction to consider whether the use is “commercial” or “nonprofit” in nature. As noted, “[t]he fact that a publication [is] commercial . . . tends to *weigh against* a finding of fair use,” regardless of the meaning or message. *Harper & Row*, 471 U.S. at 562 (emphasis added). Further, this statutory explication of what constitutes the “purpose and character of the use” reinforces the lesson to be drawn from the statutory examples of fair use discussed above: A use is more likely to be fair when it is deployed in a different context (or market) than the original.

Similarly, the fourth factor under the test reinforces the notion that a follow-on work must do something more than merely attribute a new meaning or message to a previous work. Consistent with the rights granted to copyright holders under section 106 of the Copyright Act, analysis under the fourth factor must consider the author’s rights and expectations in derivative markets, an “important economic incentive to the creation of originals.” *Campbell*, 510 U.S. at 593. And the fourth factor, which focuses on the effect of the use upon the potential market for the copyrighted work, can be distilled down to an examination of whether the second work will “act[] as a substitute” for the original. *Id.* at 591. In other words, the fourth factor reflects the statute’s balance between the strong economic rights of a copyright

owner in controlling the fruits of his or her intellectual labor and society's right to use the work in a manner that provides transformative value.

In brief, Petitioner's bright-line position, a purportedly objective test that can be satisfied through testimony about either artist's subjective intent, cannot be squared with the text and structure of the Copyright Act. Instead, the Act requires courts to take a holistic approach when analyzing fair use and carefully consider each factor—including whether the derivative use would compete in the same market with the original.

C. The Copyright Act's Legislative History Confirms Congress's Intent To Incentivize And Protect Original Work.

Because the text, history, and structure of the Copyright Act demonstrate that Petitioner is urging the wrong test, there is no "need [to] accept petitioner's invitation to consider the legislative history." *State Farm Fire & Cas. Co. v. U.S. ex rel. Rigsby*, 137 S. Ct. 436, 444 (2016) (internal quotations omitted). Accordingly, this Court need not attempt to divine Congressional intent based on the discussions contained in the legislative history of the Copyright Act. But to the extent the Court deems it relevant, Petitioner's view of the legislative history is improperly limited. Instead, the Copyright Act's legislative history underscores Congress's intent to protect the rights of copyright holders from infringement and to codify a fair-use standard that comports with historical U.S. copyright principles.

Despite years of protracted negotiations, the House and Senate Committee Reports accompanying the Copyright Act do not provide a detailed discussion of fair use or the specific statutory factors. This omission is by design. In adopting section 107, the House Report explicitly stated that “courts must be free to adapt the doctrine in particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.” H.R. REP. NO. 94-1476, at 66; *see* S. REP. NO. 94-473, at 62 (same).

What little discussion exists in the legislative history supports a reading of the Copyright Act that aligns with historic U.S. copyright principles. *First*, both the House and Senate Reports provide examples of fair use—similar to those ultimately included in section 107—that illustrate a much narrower test than Petitioner urges. Specifically, both reports list the following examples of materials that may be subject to the fair-use exception:

- Quotation of excerpts in a review or criticism for purposes of illustration or comment.
- Quotation of short passages in a scholarly or technical work, for illustration or clarification of the author’s observations.
- Use in a parody of some of the content of the work parodied.

- Summary of an address or article, with brief quotations, in a news report.
- Reproduction by a library of a portion of a work to replace part of a damaged copy.
- Reproduction by a teacher or student of a small part of a work to illustrate a lesson.
- Reproduction of a work in legislative or judicial proceedings or reports.
- Incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located at the scene of an event being reported.

H.R. REP. NO. 94-1476, at 65; S. REP. NO. 94-473, at 61–62. While these examples are not exhaustive, they provide “general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses.” Pet. Br. at 41 (quoting *Campbell*, 510 U.S. at 577–78).

Importantly, the “unifying theme” in these categories is not, as Petitioner argues, that copying of a work is fair use as long as it provides a new meaning or message. Rather, these categories are clear examples of allowing targeted use of copyrighted work in limited situations where the new work adds to or alters the original and deploys it in a different forum, without impinging on the original artist’s economic

incentive to create the copyrighted work in the first place.

Specifically, Congress adopted these examples from a 1961 Report by the Copyright Register, which was commissioned by Congress for the purpose of amending the Copyright Act. Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, H.R. 6354, 87th Cong., 1st Sess., 24 (H.R. Judiciary Comm. Print 1961) (“1961 Report”). As the 1961 Report explains in connection with the list of examples, “broadly speaking, [fair use] means that a reasonable portion of a copyrighted work may be reproduced without permission when necessary for a legitimate purpose *which is not competitive* with the copyright owner’s market for his work.” *Id.* (emphasis added).

Accordingly, the examples identified by Congress illustrate a much more limited fair-use carve-out than the one urged by Petitioner. For instance, none of the categories anticipate wholesale copying of an entire copyrighted work. *See, e.g.*, H.R. REP. NO. 94-1476, at 65 (“use in a parody *of some of the content* of the work parodied”) (emphasis added); *id.* (“*quotation of excerpts* in a review or criticism for the purposes of illustration or comment”) (emphasis added); *id.* (“summary of an address or article, with *brief quotations*, in a news report”) (emphasis added). And other examples directly contradict Petitioner’s argument that copying is permissible so long as it “conveys a new meaning or message.” *See* Pet. Br. at 41. For example, “reproduction by a library of a portion of a work to replace part of a damaged copy” may constitute fair use, but it cannot be said to add

some new meaning or message. H.R. REP. NO. 94-1476, at 65. At bottom, these categories reflect Congress's concern with protecting artists and incentivizing original creation, while making limited and reasonable exceptions for follow-on works that provide a productive public use in a different forum than the original.

Second, and contrary to Petitioner's position, the legislative history shows that the existence of financial benefit and market competition for the derivative work is a key factor in determining fair use. Indeed, immediately following the list of examples incorporated by the House and the Senate into their committee reports, the 1961 Report noted that the fair-use factors are "interrelated and their relative significance may vary, but the fourth one—the competitive character of the use—*is often the most decisive.*" 1961 Report at 24–25 (emphasis added).

The competitive and commercial nature of fair use was an important consideration in negotiation of the draft bill language. Specifically, the final text of the bill that emerged from the House Report amended the first fair-use factor—the purpose and character of the use—to state explicitly that this factor includes a consideration of "whether such use is of a *commercial nature or is for non-profit educational purposes.*" H.R. REP. NO. 94-1476, at 66 (emphasis added). The House was careful to note that the commercial character of a work may not be determinative of fair use, but it was an important factor that must be weighed alongside each of the other statutory factors.

Id. This addition remained part of the draft text and was ultimately enacted as part of section 107.

More broadly, both the House and Senate Reports refer throughout to the commercial considerations related to fair use. *See, e.g., id.* at 73–74 (noting in the context of newsletters, “[c]opying by a profit-making user of even a small portion of a newsletter may have a significant impact on the commercial market for the work”); *id.* at 73 (noting in the context of copying works for the use of blind persons that “[w]hile the making of multiple copies . . . of a work for general circulation requires the permission of the copyright owner, . . . the making of a single copy . . . by an individual as a free service for a blind person[] would properly be considered a fair use”); *id.* at 72 (noting that in the context of fair use for educational broadcasting, one would look at factors including whether those “responsible for the broadcast were paid, the size and nature of the audience . . . and, in the case of recording made for broadcast, the number of copies reproduced and the extent of their reuse or exchange”). While some of these examples focus on fair use for educational purposes, the “general standards of fair use are applicable to all kinds of uses of copyrighted material.” *Id.* at 72.

Additionally, the focus in the legislative history on the limited *number* of copies in the fair-use context demonstrates Congress’s desire to protect the commercial expectations of the copyright holder. *Id.* at 74 (noting that fair use would apply to “a *single copy* reproduction of an excerpt from a copyrighted work by a calligrapher”) (emphasis added); *id.* at 71 (noting that fair use would apply to “a *single copy* of

recordings of performances by students” or “[a] *single copy* of a sound recording”) (emphasis added). Where Congress allowed multiple copies to qualify as fair use, it explicitly noted that this was a departure from the norm. *Id.* at 66 (“[T]he newly-added reference to ‘multiple copies for classroom use’ is a recognition that, under the proper circumstances of fairness, the doctrine can be applied to reproductions of multiple copies for the members of a class.”). This is consistent with both the text of the Copyright Act and the Second Circuit’s application of *Campbell* in this case, which determined that “unrestricted and widespread conduct of the sort engaged in by [Petitioner] would result in a substantially adverse impact on the potential market for the Goldsmith Photograph.” JA636 (citing *Campbell*, 510 U.S. at 590) (internal quotations omitted).

By cherry-picking examples from the legislative history, Petitioner ignores key Congressional concerns that contradict its simplistic fair-use test that singularly focuses on whether a work provides some new meaning or message. This Court should not countenance such a one-sided view. “If courts feel free to pave over . . . statutory texts in the name of more expeditiously advancing a policy goal, [they] risk failing to take account of legislative compromises essential to a law’s passage and, in that way, thwart rather than honor the effectuation of congressional intent.” *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019) (internal quotations omitted). Affirming the Second Circuit’s faithful application of the statutory fair-use factors honors Congress’s conscious choice to codify those factors as it did and properly

protects and incentivizes the creative endeavors of copyright holders.

II. THE SECOND CIRCUIT'S APPLICATION OF THE COPYRIGHT ACT PROPERLY PROTECTS CREATORS OF ORIGINAL WORK.

This Court should affirm. As noted above, whether a derivative work satisfies the fair-use carve-out “must be decided on its own facts,” *Harper & Row*, 471 U.S. at 560, and all statutory factors “are to be explored, and the results weighed together, in light of the purposes of copyright,” *Campbell*, 510 U.S. at 578. The Second Circuit did just that.

If Petitioner's test were adopted, at least three of the four statutory factors would be effectively read out of the law. Indeed, under Petitioner's conception, the fair-use test would depend on whether a litigant could claim some subjective meaning or message for a derivative work that is new and different from the original, thus removing any requirement for courts to consider the *objective* features of the copyrighted work or its copy. Identical or near-identical copies would be able to compete in the same market as genuine original creations, as long as the copycat artist could point to some new meaning or message that he or she attributes to the derivative work.

The facts of this case illustrate the problems with Petitioner's test. Petitioner expends much energy attempting to convince this Court that Andy Warhol's silkscreens of famous artists sought to convey a different meaning or message than Respondents' original photographs. Pet. Br. at 10–20. But that

focus on the artist's intent ignores the critical context that gave rise to this case. The specific use that Petitioner sought to make of Mr. Warhol's art was to commercialize it for a Condé Nast article commemorating the life of Prince. JA608. Respondents have previously licensed photographs to Condé Nast—including the very photograph that Mr. Warhol used as the basis for his Prince series. JA606–07. Respondents' photograph and Mr. Warhol's art based on that photograph thus are substitutes in the same market for magazine photographs of Prince.

As the Second Circuit found, “there can be no meaningful dispute that the overarching purpose and function of the two works at issue here is identical, not merely in the broad sense that they are created as works of visual art, but also in the narrow but essential sense that they are portraits of the same person.” JA622. Further, Mr. Warhol's pieces are “commercial in nature,” and he should not be allowed to monetize them “without paying Goldsmith the ‘customary price’ for the rights to her work.” JA626–27. Mr. Warhol's pieces threaten Respondents' ability to license their photographs of Prince broadly, and Respondents were deprived of the royalty payments to which they would have otherwise been entitled for the specific license that Petitioner received from Condé Nast for Mr. Warhol's pieces. JA638.

Petitioner's test also threatens the livelihood of many other artists. As the Second Circuit points out, permitting Mr. Warhol's use of Respondents' photographs “would effectively destroy” the broader market to license photographs of musicians to serve

as the basis for stylized derivative images, because the majority of such source images would become free under Petitioner’s test. JA639; *see* Resps. Br. 47–50. Such a result “risks disincentivizing artists from producing new work by decreasing its value—the precise evil against which copyright law is designed to guard.” JA639.

Similarly, Petitioner’s test would hurt musicians and songwriters like those who make Tennessee their home. Such songwriters comprise “the heartbeat” of Nashville, the home of country music,⁴ and they rely on copyright protection and associated licensing and royalties to safeguard and fund their work and daily lives. Despite the wide variety of new platforms available to publish, share, and enjoy music, the number of songwriters has declined dramatically. Indeed, according to the Nashville Songwriters Association International, “Nashville has lost 80% or more of those who claimed songwriting as a fulltime occupation since the year 2000.”⁵ With the prevalence of streaming services, artists are being paid less and,

⁴ Annie Reuter, *Evolution of The Nashville Songwriter: From Solo Writes To Songwriting Apps*, FORBES (May 16, 2020), <https://www.forbes.com/sites/anniereuter/2020/05/16/evolution-of-the-nashville-songwriter-from-solo-writes-to-songwriting-apps/?sh=21d028a745a3>.

⁵ Comments from Bart Herbison, Exec. Dir. Nashville Songwriters Ass’n Int’l on “*Review of ASCAP and BMI Consent Decrees*,” U.S. Dep’t of Justice (Aug. 5, 2014), <https://www.justice.gov/sites/default/files/atr/legacy/2014/08/13/307686.pdf>.

accordingly, have less incentive to create new music.⁶ Allowing monetization of derivative works that merely incorporate a new meaning or message, as Petitioner suggests, will further hinder these talented musicians and songwriters—Nashville’s “musical middle class”—in obtaining compensation for their work.⁷

Ultimately, adopting Petitioner’s approach would create an amorphous and unreasonably simplistic fair-use inquiry that undermines the historical goals of U.S. copyright law. Without copyright law that incentivizes and protects original works—but instead allows infringement for any work that “can reasonably be perceived as communicating a new meaning or message,” Pet. Br. at 33—musicians and songwriters like those in Nashville are prevented from predictably recovering the gains of their creative labors. “Copyright is the main driver of technical innovation,” but arguments like Petitioner’s—that wrongly view copyright protections as *stifling* innovation—deplete “copyright protections and sanction[] unfair business models that hurt authors.”⁸

⁶ See Reuter, *supra* n.4 (reporting that “[w]ith the rise of streaming, songwriters aren’t getting paid fairly and many are looking for work elsewhere”).

⁷ Nate Rau, *Nashville’s Musical Middle Class Collapses*, THE TENNESSEAN (Jan. 28, 2015), <https://www.tennessean.com/story/entertainment/music/2015/01/04/nashville-musical-middle-class-collapses-new-dylans/21236245/>.

⁸ Paul Williams, President and Chairman, Am. Soc’y of Composers, Authors and Publishers (ASCAP), Keynote Address

At bottom, “[i]ntellectual property rights are a cornerstone of democracy,” and the Court must keep “authors’ rights . . . *at the very center* of every discussion about copyright.”⁹

CONCLUSION

For the foregoing reasons, this Court should affirm and find in favor of Respondents.

Respectfully submitted,

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at the CISAC World Creators Summit (June 5, 2013), https://www.ascap.com/playback/2013/06/action/uncertainty_copyright_and_courage.

⁹ Williams, *supra* n.8.