No. 21-869

IN THE
Supreme Court of the United States

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

Petitioner,

v.

LYNN GOLDSMITH AND LYNN GOLDSMITH, LTD.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* PROF. ZVI S. ROSEN IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* is submitted in support of Respondents pursuant to Rule 37 of the Rules of this Court.[1]

Amicus is an Assistant Professor at the Southern Illinois University School of Law and has studied the history and development of copyright law in the United States. *Amicus* also served as the 2015-2016 Abraham L. Kaminstein Scholar in Residence at the United States Copyright Office. *Amicus* has no financial interest in the parties to or the outcome of this case. *Amicus* has a professional and academic interest in seeing copyright law develop in a manner that best promotes the creation and distribution of new works of authorship. To that end, *amicus* presents a summary of their understanding of the relevant history to aid the Court in its deliberations.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person made a monetary contribution to the preparation or submission of this brief, save that funds for printing and service of this brief were provided by the Copyright Alliance. *Amicus's* university affiliation is for identification purposes only; Southern Illinois University or its School of Law takes no position on this case. Keegan Dennis and Taylor Ingram, law students at the Southern Illinois University School of Law, assisted with the preparation of this brief.

SUMMARY OF ARGUMENT

Following substantial discussion, debate, and study, the 1976 Copyright Act included two related provisions. The first gave creators the exclusive right to prepare derivative works, which is defined 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.

17 U.S.C. §§ 101, 106(2) (emphasis added). The second provided a defense of fair use to alleged infringers of this right (or others) based on four nonexclusive factors, namely

> (1) the purpose and character of the use. . .
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used. . .
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id. § 107. This test was based on caselaw since the mid-1800s which developed the doctrine of fair use out of the older (and now obsolete) fair abridgement doctrine. These interlocking provisions give a creator, like respondent, the ability to make a living off of her work, not just out of selling literal copies but by authorizing derivative works based on her photography. However, petitioner urges that this Court instead apply the "transformativeness" test for fair use, applied in highly specific contexts not at bar here,

to overwhelm the interlocking statutory mechanism for protection of works designed by Congress.

The Second Circuit Court of Appeals, below, understood that petitioner's approach is mistaken and did not allow the transformativeness inquiry to consume the copyright statute. *Amicus* submits this brief to the Court to provide additional historical material to further demonstrate that the approach taken by the Second Circuit Court of Appeals was correct and should be affirmed.

ARGUMENT

I. The Statutory Fair Use Factors and Exclusive Rights to Create Derivative Works Are the result of a Long Historical Development and Congressional Judgment.

> "[C]opyrights approach. . .the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent." *Folsom v. Marsh*, 9. F.Cas. 342 (C.C.D. Mass. 1841) (Story, J.).
>
> "[A] page of history is worth a volume of logic." *Eldred v. Ashcroft,* 537 U.S. 186, 123 S. Ct. 769, 154 L. Ed. 2d 683 (2003) (Ginsburg, J.) (discussing copyright term extension act).

The case at hand concerns how courts should determine whether a work is "transformative" and is thus a fair use of the original work instead of being an infringement by dint of being an unauthorized derivative of the original work. I write in support of Respondent in this case to provide historical context for the parallel development of fair use and derivative rights in works and to urge the court to not apply

transformativeness to fair use in a way which would swamp the text of the statute both as to fair use and derivative works.

A. 1840-1870: Fair Use Develops from Fair Abridgment

The genesis of the fair use doctrine is generally traced to Justice Story's opinion while riding Circuit in *Folsom v. Marsh*, concerning the copyright in President Washington's papers. 9 F.Cas. at 342. Following President Washington's death, his nephew Justice Washington worked with Chief Justice Marshall to identify the historian Jared Sparks as the proper editor for the papers, leading to publication of the 12-volume *The Writings of George Washington* in 1837-1838. *Id.* at 344. In 1840, the Rev. Charles W. Upham adapted Sparks's work into a two-volume work wherein President Washington told the story of his life in his own words called *The Life of Washington*, accompanied by text by Upham. *Id.* In all, over a third of Upham's work was taken from Sparks's 12 volumes, all of it originally by Washington. *Id.* at 348.

Sparks's publisher Charles Folsom sued Upham, his publisher Bela Marsh, and others, arguing that *The Life of Washington* infringed the copyright in the 12-volume work. *Id.* Finding that over 300 pages of Upham's works, consisting entirely of letters by Washington, were copied from Sparks's work, the question before the court was thus whether the work was infringing. *Id.* The Court considered but rejected claims that the letters were public domain, leaving only the core question of infringement. *Id.* at345.

For a century, English courts found that an abridgement was not infringing if it was a "fair abridgement." This doctrine descended from an English case where

the court had drawn a distinction between "true abridgements" which were "fairly made" and "coloured shortenings." *Gyles v. Wilcox*, 2 Atkyns 141, 142-43, 26 E.R. 489 (Ct. Ch. 1740); George Ticknor Curtis, A Treatise on the Law of Copyright 265 (C.C. Little and J. Brown, 1847). The rule from that case was that a fair abridgement was one that showed unique work and genius, while an infringing work would be a shortening of a work without substantial labor, presumably to take advantage of the original author's work. *Gyles*, 2 Atkyns at 142-43.

The difficulty for Justice Story is that the "defendants' work cannot properly be treated as an abridgment of that of the plaintiffs," and thus a new doctrinal approach was needed. *Folsom*, 9 F. Cas. at 347. Justice Story thus brought forth a new doctrine, albeit one with a substantial doctrinal continuity with the fair abridgment doctrine – fair use. Matthew Sag, *The Pre-History of Fair Use*, 76 Brook. L. Rev. 1371 (2011).

The factors provided by Justice Story are familiar to anyone who has read Section 107 of the current copyright law. *Folsom*, 9 F. Cas. at 348. The fair use inquiry Story provided looks to 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. Applying these factors, Justice Story found that the taking of 300 pages of letters was too much of an appropriation to constitute fair use, focused specifically on the market effects of Upham's work. *Id.* at 349. Interestingly, Justice Story indicated that if it

had been an abridgement, the doctrine of fair abridgment might apply. *Id.*

The law at the time allowed essentially any transformation or other derivative work, including abridgments, contrary to the law today. *Id.* at 344. The doctrine from the fair abridgment rule was really one that straight copying of a work was not permitted but independent abridgment was permitted. *Id.* at 345. This idea that authors did not possess an exclusive right to create derivative works was subject to criticism in the first American treatise on copyright, by George Ticknor Curtis in 1847, who found it "apparent that no writer can make and publish an abridgment, without taking to himself profits of literary matter which belong to another." *Curtis* at 276. In his treatise Curtis also commented that the fair use of a previous publication was a recognized doctrine, implicitly something different from the fair abridgement doctrine he criticized, but that there were not (yet) good examples of the doctrine being positively applied. *Id.* at 241. Curtis likewise argued for an exclusive right of translation, asserting that

> [t]he property of the original author embraces something more than the words in which his sentiments are conveyed. It includes the ideas and sentiments themselves, the plan of the work, and the mode of treating and exhibiting the subject. In such cases, his right may be invaded, in whatever form his own property may be reproduced. The new language in which his composition is clothed by translation affords only a different medium of communicating that in which he has an exclusive property; and to attribute to such a new medium the effect of entire originality, is

> to declare that a change of dress alone annihilates the most important subject of his right of property.

Id. at 292-293. This describes modern copyright law, which protects derivative works.

However, the courts were not yet ready to accept this, as was dramatically shown a few years later, when the Circuit Court in Philadelphia was called upon to adjudicate whether an unauthorized translation of the literary blockbuster *Uncle Tom's Cabin* infringed the author's copyright. *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. PA. 1853). Harriet Beecher Stowe had secured a German translator for her novel and collaborated with him to produce a superior authorized translation. *Id.* However, the Philadelphia German newspaper *Die Freie Presse* prepared its own translation and published it serially, leading Stowe to sue for infringement. *Id.* The Court took a view of copyright which deliberately denied any derivative rights in Stowe's work, holding that she held only the "exclusive right to print, reprint and vend it." *Id.* at 208. The Court concluded that "[a] translation may, in loose phraseology, be called a transcript or copy of her thoughts or conceptions, but in no correct sense can it be called a copy of her book." *Id.*

As such, in the mid-19th century, copyright law had not yet developed an exclusive right to derivative works, although it was beginning to be considered. The academic view was that derivative rights existed in works, but Courts were not willing to accept this absent a statute which made such rights clear. Fair use was beginning to be discussed, but what it meant was as yet unclear. The next major case of *Lawrence v. Dana* would be the first case to use "fair use" describing the doctrine, and would clarify and give

some new scope to the doctrine, and a major revision of copyright law a few years later would begin to establish derivative rights in creative works. 15 F. Cas. 26 (C.C.D. Mass. 1869).

In that case in 1869, involving an annotated edition of Henry Wheaton's treatise on international law, the court recognized "fair use" as a defense, but held it was inapplicable, because the alleged infringing work "occupies the same field and was designed for the same class of readers, and was 'made and composed' for the same general purpose" as the original work. *Id.* at 58. The case was partly argued by G.T. Curtis's brother (and former Justice of this Court) B.R. Curtis, and the court noted G.T. Curtis's critique of the fair abridgment doctrine, but held it was still good law before holding that the infringing annotated edition was not a fair abridgement but instead "precisely what it purports to be, a reprint of the text of the author, with notes by a new editor." *Id.* at 59. Put another way, "fair use" and "fair abridgment" were clearly understood as two separate doctrines. *Id.*

B. 1870 – Congress Begins to Recognize Individual Derivative Work Rights; Fair Abridgement is Discarded

The next year Congress finally provided for a form of protection for authors against unauthorized derivative works. An earlier law from 1856 had established exclusive public performance rights for authors of plays, and the 1870 Copyright Act extended that to provide that "authors may reserve the right to dramatize or to translate their own works." U.S. Copyright Act 1870, 16 Stat. 198, 212 (1870). The Librarian of Congress would in turn promulgate regulations clarifying that authors could reserve these rights by "printing the words 'Right of translation

reserved.' or 'All rights reserved.' below the notice of copyright entry, and notifying the Librarian of Congress of such reservation, to be entered upon the record." Directions for Securing Copyrights, Librarian of Congress (1874). The requirement to reserve these rights was formally eliminated in 1891. Act of March 3, 1891, Pub. L. 51-565, 26 Stat.. 1106 (1891).

The 1870 Act did not mention abridgements, but in the next major treatise on copyright in 1879, Eaton S. Drone asserted that "in the United States, an author . . . has the exclusive right, without special reservation, to abridge it." Eaton S. Drone, *A Treatise on The Law of Property in Intellectual Productions in Great Britain and the United States* 334 (1879). Drone's argument at some length against a right of fair abridgment seems to have been convincing – or at least captured the development of feelings about copyright law. No further reported cases of the fair abridgement defense being argued in the United States are found in reported cases from then on.

C. 1909: Congress Enumerates Specific Derivative Work Rights

It had long been understood that the 1870 Copyright Act, a modestly updated version of the 1790 and 1831 Acts, was insufficient as America entered into a new era. In 1909 Congress passed a new copyright law which modernized copyright administration, but it left a great deal undefined. Copyright Act of 1909, Pub. L. 60-349, 35 Stat. 1075 (1909). There was no longer an attempt to define which works were protected by copyright; copyright now extended to "all the writings of an author." *Id.* at 1078. The term fair use does not appear at all, an intentional choice to leave the doctrine to the courts. Alan Latman, Fair Use of Copyrighted Works (1958), reprinted as Study No. 14,

in Copyright Revision Studies Nos. 14-16, prepared for the S. Comm. on the Judiciary, 86th Cong., 2d Sess., Copyright Law Revision 18 (Comm. Print 1960) (hereinafter "Latman Study"). Meanwhile, language at once technical and broad defined the scope of what we now call derivative works by stating that a copyright owner held the

> exclusive right . . . [t]o translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

Copyright Act of 1909 35 Stat. at 1075. This language made the same mistake as the earlier laws did in itemizing rather than providing a simple derivative works right, but the new law did embrace how derivative works were construed at the time. Literary works in particular received broad protection, with a prohibition against unlawfully "making any other version thereof." *Id.* Some other types of works received essentially no protection against derivative uses. *Id.* at 1078-79. In this case, the initially ambitious 1909 Act ended up being a dramatic move forward but still something of a half measure.

D. 1917-1976: Fair Use Coalesces into Legislation Including the Factors from *Folsom v. Marsh*

In 1917, Arthur Weil published the next major treatise on copyright in the United States. In it he noted that fair use had "been gradually enlarged" over

the years. Arthur Weil, *American Copyright Law* 429 (1917). To Weil, fair use meant "a use which is legally permissive, either because of the scope of a copyright, the nature of a work, or by reason of the application of known commercial, social or professional usage." *Id.* Instead of giving his own test of fair use, Weil simply quoted the standard given in *Folsom*. *Id.* at 431. Weil also recognized that it was it was "entirely within the limits of fair use to make parodies or literary perversions of copyrighted work." *Id*. at 432. Perhaps ironically, because fair use remained undefined by statute and instead served only as a general doctrine, it was not necessary to determine how a parody fit into the general framework from *Folsom*. Weil also noted that the broad language of section 1(b) for derivative works "appears to reserve the exclusive right of abridgment to the copyright proprietor, thus terminating difficult controversies of fact, under the prior law." *Id.* at 74.

In his 1936 treatise, Leon H. Amdur took a more modern approach to the collection of rights now known as derivative rights and termed them the "right of transformation." *Copyright Law and Practice* 285 (1936). This conceptual shift was important – recognizing the derivative works right as a general right, rather than the somewhat polyglot formation used in the 1909 Act and in previous treatises. Although this usage lost out in favor of "derivative works," the 1976 Act makes clear this includes an exclusive right to transform one's work. Copyright Act of 1976, Public Law 94-553, 90 Stat. 2541 (1976).

In the mid-20th century there were several attempts to formulate factors for determining whether a use of a copyrighted work was fair. However, all rely heavily on the criteria given by Justice Story in *Folsom,* with

occasional attempts to add additional factors. In his treatise Amdur asserted that they are (1) the nature of the original work, (2) the nature of the use, (3) the purpose of the use, (4) the intent of the use, and (5) whether credit was given. Amdur, *supra,* at 778. Several years later, in his 1944 treatise Horace G. Ball asserted that there were three key elements of fair use and his treatise analyzes the developing law of fair use around them – "(1) The nature, scope and purpose of the work in question. . . (2) The extent, relative value, purpose and effect of the material appropriated. . .[and] (3) intent." *Law of Copyright and Literary Property* 262-63 (1944). A decade later, in an influential article, Chief Judge Yankwich of the Southern District of California stated that a determination of fair use "require[s] consideration of (1) the quantity and importance of the portions taken; (2) their relation to the work of which they are a part; (3) the result of their use upon the demand for the copyrighted publication." Leon R. Yankwich, *What Is Fair Use?*, 22 U. Chi. L. Rev. 203, 213 (1954). Once in the 1950s and again in the 1970s this Court had the opportunity to address the fair use doctrine, but each time a recusal led the Court to split evenly 4-4. Robert Brauneis, *Parodies, Photocopies, Recusals, and Alternate Copyright Histories: The Two Deadlocked Supreme Court Fair Use Cases*, 68 Syracuse L. Rev. 7 (2018).

This was the state of the law in 1955, when the U.S. Copyright Office, at the request of Congress, began a series of "Revision Studies" of Copyright Law, laying the groundwork for what would become the current copyright law over two decades later in 1976. Study number 14 (out of over thirty) by Alan Latman focused on the question of fair use, and provides a detailed survey of fair use up to that point. Latman Study. The study did not make a specific recommendation, instead

giving a number of different options, ranging from keeping the law's current silence on fair use or mentioning it but going no further, to suggestions of a statute which laid out general factors for fair use or specifying specific situations where fair use would apply. *Id.* at 32-33. In the study the question is raised whether parody is given greater protection than other forms of fair use, but not answered. *Id.* at 9-10. Among the comments received and appended to the study is one from Prof. Melville Nimmer, still a few years away from first publication of his treatise. In his comment letter Nimmer suggests that parody is indeed entitled to greater but not unlimited protection, and further urged that the statute not attempt to define fair use. *Id.* at 42-43.

By 1963 a draft of the copyright bill included a forerunner of the modern language of Section 107, combining the fourth approach (a list of situations) followed by the third approach (general factors for determining fair use, with neither one being exclusive. Richard Dannay, *Factorless Fair Use: Was Melville Nimmer Right,* 60 J. Copyright Soc'y U.S.A. 127, 129 (2012-2013). Factors which had been urged in the past, such as credit and intent, were not included, in favor of a restatement of the test used in *Folsom* in more modern language. *Id.* In 1964 Melville Nimmer once again urged that fair use only be mentioned in general terms in the law, and in response the bills introduced in the House and Senate in 1965 simply stated that "[n]otwithstanding the provisions of Section 106, the fair use of a copyrighted work is not an infringement of copyright." *Id.* at 130. Congress thought the better of this though, and in 1966 copyright revision bills restored the earlier language providing situations and factors for when fair use would be found. *Id*. The current language of section

107 closely tracks the language from the 1966 bill, and these situations and factors were explicitly made non-exclusive.

E. Congress Formalizes a General Derivative Work Right

The story for derivative works in what would become the 1976 Act is far simpler. In July of 1964, S. 3008 and H.R. 11947 were introduced, providing that a right to prepare derivative works was exclusive to the copyright owner, and that would endure into Section 106 of the current copyright law. S. 3008, 88th Cong. (1964); H.R. 11947, 88th Cong. (1964) (codified in 17 U.S.C. 106.).There was more discussion of what exactly a derivative work is, but a definition was settled on and written into Section 101 of the copyright law, that it is "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." 17 U.S.C. 101.

The choice of specifically enumerated factors for fair use and a right to create derivative works which includes an exclusive right to transform was not always the state of law, and reflects a conscious choice by Congress, reflecting two decades of active lawmaking and over a century of legal development before that.

F. 1976-Present: "Transformativeness" Threatens to Overwhelm the Statutory Text

The 1976 Copyright Act served to standardize the fair use analysis, although it was simply meant to codify the current state of the law. Copyright Act of 1976, Public Law 94-553, 90 Stat. 2541 (1976). In theory this should have led to greater uniformity and predictability, but some felt the need to consider factors created confusion. Motivated by these concerns, in 1990 Judge Pierre Leval of the 2nd Circuit Court of Appeals (then of the U.S. District Court for the Southern District of New York) published his influential article *Toward a Fair Use Standard*. 103 Harv. L. Rev. 1105 (1990). Judge Leval argued that for the first fair use factor (if not overall) the

> the heart of the fair user's case…turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.

Id. at 1111 (emphasis in original). The obvious dissonance between the exclusive grant of a right to create transformative works to the copyright holder and a standard for fair use that turns on whether the use is transformative is not addressed. Having covered the history of fair use from *Folsom*, one can also hear that this statement of transformativeness owes far more to the deprecated fair abridgement doctrine than to fair use since *Folsom*. Judge Leval's opinion, stated later, is that the four factor test adopted by Congress was a mistake, and

> the inclusion of superfluous words in the [copyright] statute was likely to cause trouble. While the fair use statute was under .consideration, [Melville Nimmer] recommended that it be pared down to the bare bones: 'fair use . . . is not an infringement.' Had his wisdom been followed, many of these quixotic misadventures might have been avoided.

Pierre Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. Rev. 1449, 1466 (1997). *See also,* Benjamin Moskowitz, Note, *Toward a Fair Use Standard Turns 25: How Salinger and Scientology Affected Transformative Use Today,* 25 Fordham Univ. Intell. Prop. Media & Ent. J.L. 1057 (2015). . Obviously, this preference does not square with what Congress provided for in the 1976 Act, which explicitly requires courts to consider (at least) four factors. 17 U.S.C. 107. However, this Court has used Judge Leval's analysis to handle two situations Congress did not cleanly address. As discussed, parody has always been understood to be protected by the fair use doctrine, but although it was discussed, it was not included explicitly in Section 107. *Id.* Thus, when faced with a parody of Roy Orbison's "Pretty Woman," this Court held that the use was possibly transformative as parody and thus the other factors of the statutory fair use analysis would be given less weight. *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

Computers were but a glint in the eye of the drafters of the 1976 Act – a committee to study computers and copyright was underway at the time of the passage of the 1976 Act but modern computer fair use problems were mostly theoretical at that point. Final Report of the National Commission on New Technology Uses of

Copyrighted Works (Jul. 31, 1978). When a long-running dispute over the re-creation of computer code between technology giants Oracle and Google reached this Court a second time, transformativeness was once again invoked to find fair use. *Google LLC v. Oracle America, Inc.*, 593 U.S. ___ (2021). However, this case is once again an unusual one, as it was a situation where

> fair use can play an important role in determining the lawful scope of a computer program copyright, such as the copyright at issue here. It can help to distinguish among technologies. It can distinguish between expressive and functional features of computer code where those features are mixed. It can focus on the legitimate need to provide incentives to produce copyrighted material while examining the extent to which yet further protection creates unrelated or illegitimate harms in other markets or to the development of other products. In a word, it can carry out its basic purpose of providing a context-based check that can help to keep a copyright monopoly within its lawful bounds.

Google at 16-17. The Court below, in an amended opinion, understood this, noting that "the court in *Google* took pains to emphasize that the unusual context of the case," and declining to find this case to be similar. *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 51 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412, 212 L. Ed. 2d 402 (2022). The case at bar is a fairly standard case of an unauthorized derivative work, not a case of parody or technical computer functions at the bleeding edge of copyright protection.

While in theory transformativeness only goes to the first fair use factor – the purpose and character of the use – when found, as by the District Court in this case, the other factors are often found to be less important. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 325 (S.D.N.Y. 2019). This makes sense in a parody context, a long recognized specific circumstance where fair use applies. It makes much less sense in a more general case involving an unauthorized derivative work or set of works, where the statute makes clear what rights the author has.

II. THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS REFLECTS THIS HISTORICAL BACKGROUND AND SHOULD BE AFFIRMED.

The Second Circuit's decision below stands at the end of a long line of decisions in that Circuit evaluating the weight and scope given to transformativeness in the fair use inquiry, and held that the

> secondary work's transformative purpose and character 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

Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 42 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412, 212 L. Ed. 2d 402 (2022). This is commonsense given the scope of the author's exclusive right to create or authorize derivative works, but it is at the core of what is being argued here. The question presented by the Petitoner is how a court

should consider the "meaning or message" of the use, but that framing intentionally elides the meaning of transformativeness in a fair use inquiry outside specific cases where the four factors provided by Congress are not an ideal fit. Brief for Petitioner at i, *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412, 212 L. Ed. 2d 402 (2022) (No. 21-869). Unlike cases of parody and highly functional software, the creation of a fairly straightforward set of unauthorized derivative works is a case that calls for straightforward application of the four fair use factors. That is exactly what the Second Circuit Court of Appeals called for – simply following the statute, and not attempting to bypass it with cases that were specific to their facts.

Accordingly, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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