

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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ANDY WARHOL FOUNDATION FOR THE )  
VISUAL ARTS, INC., )  
Petitioner, )  
v. ) No. 21-869  
LYNN GOLDSMITH, ET AL., )  
Respondents. )  
- - - - -

Pages: 1 through 122  
Place: Washington, D.C.  
Date: October 12, 2022

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4           VISUAL ARTS, INC.,                            )  
5                                    Petitioner,                            )  
6                                    v.    ) No. 21-869  
7           LYNN GOLDSMITH, ET AL.,                    )  
8                                    Respondents.                        )

9           - - - - -  
10                                   Washington, D.C.  
11                                   Wednesday, October 12, 2022

12  
13                   The above-entitled matter came on for  
14           oral argument before the Supreme Court of the  
15           United States at 10:02 a.m.

16  
17           APPEARANCES:  
18           ROMAN MARTINEZ, ESQUIRE, Washington, D.C.; on behalf  
19                   of the Petitioner.  
20           LISA S. BLATT, ESQUIRE, Washington, D.C.; on behalf of  
21                   the Respondents.  
22           YAIRA DUBIN, Assistant to the Solicitor General,  
23                   Department of Justice, Washington, D.C.; for the  
24                   United States, as amicus curiae, supporting the  
25                   Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case Number 21-869, Andy Warhol Foundation versus Goldsmith. Mr. Martinez.

ORAL ARGUMENT OF ROMAN MARTINEZ  
ON BEHALF OF THE PETITIONER

MR. MARTINEZ: Mr. Chief Justice, and may it please the Court:

Both courts below agreed and Goldsmith doesn't dispute that Warhol's Prince Series can reasonably be perceived to convey a fundamentally different meaning or message from Goldsmith's photograph. The question in this case is whether that different meaning or message should play a role, any role, in the fair use analysis.

Our answer is yes. Warhol's transformative meaning puts points on the board under Factor 1 of the four-factor balancing test. Goldsmith and the Second Circuit say no. Warhol's new meaning is categorically irrelevant and can't be considered as part of Factor 1 or any other factor.

1                   I want to emphasize three points.  
2       First, the precedent supports us. Campbell  
3       unambiguously requires an examination of meaning  
4       or message. Google reaffirms that test and  
5       cites Warhol's soup cans as a paradigmatic  
6       example of when it's satisfied. Goldsmith's  
7       test is at odds with both cases.

8                   Second, our approach, unlike  
9       Goldsmith's, maintains a balance between  
10      protecting artists' rights to monetize their  
11      works and encouraging new and important  
12      follow-on expression. We give follow-on artists  
13      credit for innovation at Factor 1 while  
14      recognizing that Factor 4 and the other factors  
15      will sometimes cut decisively the other way.

16                  Goldsmith's necessity test, by  
17      contrast, upends that balance. It banishes  
18      transformative meaning from the equation  
19      altogether, and by doing so, it violates 107's  
20      text, contradicts precedent, and undermines  
21      copyright's key goal, promoting creativity for  
22      the public good.

23                  Finally, the stakes for artistic  
24      expression in this case are high. A ruling for  
25      Goldsmith would strip protection not just from

1 the Prince Series but from countless works of  
2 modern and contemporary art. It would make it  
3 illegal for artists, museums, galleries, and  
4 collectors to display, sell, profit from, maybe  
5 even possess a significant quantity of works.  
6 It would also chill the creation of new art by  
7 established and up-and-coming artists alike.

8 These results are repugnant to  
9 copyright and to the First Amendment. You  
10 should reject them. We ask you to reaffirm  
11 Campbell and reverse the decision below.

12 JUSTICE THOMAS: Could you give us an  
13 example of any follow-on work that fails your  
14 test?

15 MR. MARTINEZ: Sure. I think a  
16 classic example would be a -- a book-to-movie  
17 adaptation. I think that would be a follow-on  
18 work. It would be a derivative work. I think,  
19 if you -- if someone were to, you know, try to  
20 do that, I think that the -- the original  
21 creator, the author of the book, could very  
22 easily assert that that was not fair use and  
23 would have a winning case under Factor 4 and  
24 probably also under Factor 1. And, certainly,  
25 that would be a kind of classic example of a

1 follow-on work that would not count.

2 JUSTICE SOTOMAYOR: Why? I mean,  
3 derivative works are generally in a different  
4 medium, and almost all of them, even a  
5 dramatization on -- on theater or even a motion  
6 picture or a sequel, they add something new  
7 according to your definition in your brief.

8 So why shouldn't they be protected as  
9 well according to your theory?

10 MR. MARTINEZ: Yeah, I think -- I  
11 think there's a Factor 4 issue and a Factor 1  
12 issue. I think the most obvious problem would  
13 be a Factor 4 problem for the person who's  
14 trying to copy or -- or create the movie  
15 adaptation.

16 JUSTICE SOTOMAYOR: I -- I'm sorry. I  
17 read Factor 1, the purpose and character of the  
18 use, including whether such use is of a  
19 commercial nature or is for nonprofit  
20 educational purposes.

21 So what's the use here? Is -- I think  
22 I have to look at a use under 1 as well. So is  
23 the use the creation of the Prince Series by  
24 Warhol? Is it the 2016 license of the Orange  
25 Prince? That factor, I think, is telling to me

1 to look at a use.

2 So which use are you looking at?

3 MR. MARTINEZ: So -- so we think that  
4 both uses are directly implicated in this case.  
5 I know there's a significant amount of confusion  
6 between our side and the other side on this, so  
7 I'd like to try to clarify it.

8 This case came about because Ms.  
9 Goldsmith contacted the foundation, asserted  
10 that -- that the -- the original Warhol works  
11 were infringing, demanded a quite substantial  
12 seven-figure sum of money, and also demanded the  
13 copyrights in the work.

14 JUSTICE SOTOMAYOR: I --

15 MR. MARTINEZ: We then filed --

16 JUSTICE SOTOMAYOR: -- I'm -- I'm  
17 putting that aside.

18 MR. MARTINEZ: Sure.

19 JUSTICE SOTOMAYOR: Okay? They can  
20 tell us whether they're claiming -- I think  
21 they're out of the statute of limitations, so  
22 they can't claim that.

23 MR. MARTINEZ: But --

24 JUSTICE SOTOMAYOR: So I think the  
25 only thing they can claim under the statute is



1 the 2016 license.

2 MR. MARTINEZ: No, respectfully, Your  
3 Honor, that's not right, because what they  
4 claimed in their -- in their brief -- in their  
5 complaint, and this is at JA 120 to 121, was  
6 that they said that we were not allowed to  
7 invoke our copyright in the works.

8 And that wasn't just a past question  
9 that's sort of like water under the bridge  
10 because of the statute of limitations. That has  
11 ongoing significance because, if we --

12 JUSTICE SOTOMAYOR: All right. So  
13 then I want to break them down. Assume that  
14 it's the creation. I understand your argument.  
15 It was a painting. It was a comment on  
16 consumerism. If that's all he did, that's one  
17 thing.

18 But let's look at the 2016 license of  
19 Orange Prince, which is what I thought this case  
20 was about, but putting that aside, assume it's  
21 that.

22 MR. MARTINEZ: Okay. Assuming --  
23 assuming that we're just talking about that  
24 piece of the case, the licensing use --

25 JUSTICE SOTOMAYOR: Right.

1           MR. MARTINEZ: -- even with respect to  
2           the licensing use, you'd still need to look at  
3           Factor 1, which would look at -- at the purpose  
4           and character of the use. And that would  
5           certainly encompass the fact that Warhol's use,  
6           the image that's being licensed, was  
7           transformative and created -- and -- and infused  
8           a new meaning or message on top of Goldsmith's  
9           original work.

10           JUSTICE SOTOMAYOR: That I give you --  
11           I spot you. It should be considered.

12           MR. MARTINEZ: Well --

13           JUSTICE SOTOMAYOR: The Second Circuit  
14           didn't. But then what do I do with the rest of  
15           Factor 1, the purpose and use and -- and  
16           character of the use? Because that's not just  
17           up to the author. That's up to what was made,  
18           what use was made of Orange Prince. It was a  
19           highly commercial use. Goldsmith also licensed  
20           her photographs to magazines, just as Warhol's  
21           estate did.

22           So how is it that your 2006 license  
23           and Goldsmith's photographs do not share the  
24           same commercial purpose?

25           MR. MARTINEZ: Well, I think that it's

1 -- it's true that -- that there is a -- a  
2 commercial purpose and so that might be a factor  
3 that would cut against us when assessing Factor  
4 1. We think that the -- the -- the quite  
5 substantial and -- and this in our view  
6 undisputed transformation in meaning or message  
7 --

8 JUSTICE SOTOMAYOR: Yeah, but for that  
9 --

10 MR. MARTINEZ: -- would -- would trump  
11 that.

12 JUSTICE SOTOMAYOR: -- don't we have  
13 to look at the context of the use?

14 MR. MARTINEZ: I -- I think you would  
15 look at all -- all the factors. But --

16 JUSTICE SOTOMAYOR: Right.

17 MR. MARTINEZ: -- but, again, Your  
18 Honor, I think your point, it's not a small  
19 point to say that the Second Circuit got this  
20 wrong by banishing transformative meaning or  
21 message. That's a huge deal.

22 JUSTICE SOTOMAYOR: Assume that it got  
23 it wrong. The question is --

24 MR. MARTINEZ: How would we win -- how  
25 would we still win?

1 JUSTICE SOTOMAYOR: -- you -- I  
2 thought your brief was arguing, and you seem to  
3 be arguing something different today, that the  
4 transformation standing alone gives you Factor  
5 1.

6 MR. MARTINEZ: Right. So --

7 JUSTICE SOTOMAYOR: And I don't see  
8 how that can be.

9 MR. MARTINEZ: -- Your Honor, I think  
10 that's -- I think -- let me clarify our  
11 position. Our position is that Factor 1 has to  
12 encompass the new meaning or message. We do not  
13 deny that there are other considerations that  
14 may bear on Factor 1.

15 We think the district court below  
16 correctly recognized that the transformative  
17 meaning or message was so significant here that  
18 that would mean that we win under Factor 1 and,  
19 in fact, you know, for the other reasons under  
20 the other factors that we also win the whole  
21 case.

22 If you disagreed with us on that, I  
23 think what you could do is make very clear that  
24 the Second Circuit's banishment of meaning or  
25 message from the inquiry was wrong. You could

1 send it back down to them.

2 I think you should say that the  
3 transformation in meaning or message here was  
4 substantial, but if you thought that other  
5 factors had to be weighed, you could send it  
6 back down to the district court or the Second  
7 Circuit to reweigh that.

8 JUSTICE KAGAN: Mr. Martinez --

9 CHIEF JUSTICE ROBERTS: Mr. Martinez,  
10 let -- let's suppose that I think you can do  
11 this with technology instead of the mood that  
12 Prince is conveying in the Goldsmith photograph.  
13 You put a little -- a smile on his face and say  
14 this is a new message. The message is Prince  
15 can be happy. Prince should be happy.

16 Is that enough of a transformation?  
17 The message is different.

18 MR. MARTINEZ: I -- I think you would  
19 certainly have to consider the new meaning or  
20 message as part of the inquiry. And so, if the  
21 question is whether that would be like  
22 categorically irrelevant, the answer is no. And  
23 I think the Second Circuit would -- would not  
24 even consider it, and, therefore, the Second  
25 Circuit's wrong.

1           I think, though, Your Honor, you're  
2 sort of suggesting, I think correctly, that  
3 there might be different degrees in  
4 transformation that might make a difference in  
5 the analysis. We -- we would agree with that.

6           CHIEF JUSTICE ROBERTS: Well, what I  
7 guess I'm trying to suggest is that there may be  
8 nothing left to the original author for  
9 derivative works. I mean, if that's not a  
10 derivative work, it's hard to see what would be.

11           MR. MARTINEZ: Well, I think if you're  
12 -- I think it would do two things. First, at  
13 Factor 1, you would have to look at the degree  
14 of transformation in meaning or message.

15           I think that that wouldn't be  
16 dispositive of the fair use question as a whole,  
17 though, because I think you would then look at  
18 Factor 4 and you would really have to look at  
19 whether the market for the new work is -- is  
20 in -- in a real substantial way, is going to be  
21 a market substitute or compete with either the  
22 original work or the potential derivative uses  
23 of the original work by the original author.

24           So we think -- we're not denying that  
25 Factor 4 is relevant here. We're just saying

1 that for purposes of Factor 1, you certainly  
2 wouldn't ignore the transformative meaning or  
3 message for purposes of that factor.

4 JUSTICE KAGAN: And --

5 MR. MARTINEZ: It just needs to be  
6 considered as part of a holistic analysis.

7 JUSTICE KAGAN: -- can I take you  
8 back, Mr. Martinez, to your answer to Justice  
9 Thomas's question? Because you said: Well, the  
10 classic example of non-transformative work would  
11 be a movie from a book.

12 And, indeed, we expect Hollywood, when  
13 it takes a book and makes a movie, to pay the  
14 author of the book. But I think moviemakers  
15 might be surprised by the notion that what they  
16 do can't be fundamentally transformative.

17 I mean, mostly movies are tons of new  
18 dialogue, sometimes new plot points, new  
19 settings, new characters, new themes. You would  
20 think new meaning and message.

21 So why is it that we, you know, can't  
22 imagine that Hollywood could just take a book  
23 and make a movie out of it without paying?

24 MR. MARTINEZ: I -- I -- first of all,  
25 I -- I certainly agree with your -- your

1 bottom-line conclusion that you can't just take  
2 a book and make a movie out of it. I think the  
3 question is how do you get there and how do the  
4 different factors play in.

5 We think two factors are relevant,  
6 Factor 1 and Factor 4. The other factors are  
7 probably also relevant, but Factor 1 and 4 may  
8 be the most relevant.

9 With respect to Factor 1, we would say  
10 that the normal sort of book-to-movie  
11 transition, we don't think that the -- the --  
12 the necessary sort of changes in the form  
13 from -- from the written word into a movie, that  
14 that would inherently be a change in meaning or  
15 message.

16 It's possible -- and we think actually  
17 in most cases, the -- the change from a book to  
18 a movie wouldn't have a different meaning or  
19 message, or, if it did, it would be very slight.

20 I think the more fundamental reason,  
21 though, why the book-to-movie adaptation would  
22 not be fair use is Factor 4, because the classic  
23 thing, if you're an author, a successful author,  
24 the -- the most natural derivative market -- the  
25 derivative use of your work and the potential



1 market for your work, you know, you sell a  
2 million copies of your book, the next thing you  
3 want to do is make the movie based on the book.  
4 That's like the classic thing you would do.

5 And so, of course, if someone comes in  
6 and makes the movie, you know, a year before  
7 you -- you make it, that would be interfering  
8 with the market for your --

9 JUSTICE KAVANAUGH: Isn't the  
10 classic --

11 MR. MARTINEZ: -- for your potential  
12 market.

13 JUSTICE KAVANAUGH: -- isn't the  
14 classic thing with a photograph that it'll be  
15 used in stories about the subject of the  
16 photograph and, therefore, competing in the same  
17 market that this adaptation was used in?  
18 Namely, it was used in a story about Prince, not  
19 a story about Warhol.

20 And at least from the perspective of  
21 the other side and some of the amicus briefs,  
22 that's the key distinction here.

23 MR. MARTINEZ: I -- I don't -- I don't  
24 think so, Your Honor. I don't think -- and I  
25 think the Second Circuit actually agreed with us

1 on this. They said that the -- the -- the  
2 primary work itself would not actually compete  
3 as a market substitute for -- with -- with  
4 Goldsmith's photograph. And I think that's  
5 exactly right.

6 I don't think that the -- the standard  
7 use of -- of Goldsmith's work would be to  
8 create, you know, Warhol-style transformed  
9 celebrity, you know, art -- fine art portraits  
10 in the way that Warhol did.

11 And I -- I think, in any event, if you  
12 had concerns about that --

13 JUSTICE KAVANAUGH: No, but it's used  
14 --

15 MR. MARTINEZ: -- it's really a Factor  
16 4 --

17 JUSTICE KAVANAUGH: -- I mean, I guess  
18 this goes to the use, but it's being used in a  
19 story about Prince, just like the '84 story in  
20 Vanity Fair.

21 MR. MARTINEZ: Oh, you mean the story  
22 like the Vanity Fair article?

23 JUSTICE KAVANAUGH: Mm-hmm.

24 MR. MARTINEZ: I -- I don't -- well, I  
25 guess what I would say is that if you think that

1 that's a competing sort of substitute, that's a  
2 Factor 4 inquiry. I think that the court below  
3 recognized that -- that the Warhol work did not  
4 compete as a market substitute at Factor 4 with  
5 the Goldsmith photograph and this is really a  
6 Factor 1 case.

7 JUSTICE JACKSON: Can I -- sorry.

8 MR. MARTINEZ: Yes, Justice Jackson,  
9 sorry.

10 JUSTICE JACKSON: Can I have you focus  
11 in on Factor 1 because I sort of thought that  
12 that's really what we were focused on here. And  
13 you continue to say that meaning and message,  
14 you think the problem with the Second Circuit is  
15 that they banished meaning and message from that  
16 factor. I understand that.

17 But it doesn't help me to understand  
18 how you use or you purport to use meaning and  
19 message in the context of the purpose or  
20 character -- and character inquiry in Factor 1.

21 So I could see, for example, as we  
22 evaluate the purpose and character of the use,  
23 that you might say: Well, this is a new purpose  
24 insofar as our purpose was to provide a new  
25 meaning and message. So it's sort of embedded

1 in the consideration of purpose or this is --  
2 has a new character because -- because it  
3 conveys a new meaning and message.

4 Is that how you're doing this? I  
5 didn't see you --

6 MR. MARTINEZ: Sure.

7 JUSTICE JACKSON: -- filtering mean --  
8 meaning and message through --

9 MR. MARTINEZ: So --

10 JUSTICE JACKSON: -- purpose and  
11 character.

12 MR. MARTINEZ: -- thank you, and thank  
13 you for focusing on the text. Let's talk about  
14 the text. The text talks about purpose and  
15 character. I don't think there's any real  
16 dispute about what those words mean. We think  
17 that the transformative meaning or message  
18 directly affects both purpose and character, so  
19 let me just take them one at a time.

20 With respect to purpose, we're talking  
21 about visual art, and visual art is intended to  
22 be seen by audiences. The -- a major purpose of  
23 visual artists is to communicate through their  
24 work, you know, when they put the work in front  
25 of the audience, certain meanings or messages to

1 that audience.

2 JUSTICE JACKSON: Can I just stop you  
3 for a second? Are you just sort of  
4 hypothesizing about that, or are you saying that  
5 was actually the purpose of this use in this  
6 situation?

7 MR. MARTINEZ: I think --

8 JUSTICE JACKSON: Because anybody can  
9 sort of say after the fact, oh, a purpose of  
10 visual art is X. I thought this was about --

11 MR. MARTINEZ: I think --

12 JUSTICE JACKSON: -- the purpose of  
13 the use in this particular case.

14 MR. MARTINEZ: I don't -- I don't  
15 think it's -- I don't think it's disputed, and I  
16 think it's common sense that -- that artists  
17 like Warhol intended their works to be seen and  
18 were intending to communicate, you know,  
19 messages through their works.

20 JUSTICE JACKSON: So it wasn't the  
21 purpose of this particular use to illustrate the  
22 Vanity Fair article. This is where the  
23 commercial part comes in.

24 MR. MARTINEZ: I --

25 JUSTICE JACKSON: That wasn't the

1 purpose?

2 MR. MARTINEZ: That -- that was part  
3 of the purpose if you look at it at a higher  
4 level of generality. We're not saying that's  
5 irrelevant. But I think even when you look at  
6 the actual article it was illustrating, it was  
7 illustrating an article entitled "Purple Fame"  
8 that was all about Prince's, like, emerging  
9 celebrity iconic status.

10 And so it's perfectly natural to  
11 illustrate that article that you would want a  
12 Warhol-type work that has as its meaning or  
13 message a -- a picture of Prince that shows him  
14 as the exemplar of sort of the dehumanizing  
15 effects of celebrity culture in America.

16 JUSTICE ALITO: How is the --

17 MR. MARTINEZ: But just to go back  
18 to -- oh, sorry.

19 JUSTICE ALITO: No, go ahead. Finish.

20 MR. MARTINEZ: But just to go on the  
21 text, so I do think that a new meaning or  
22 message, like, necessarily changes the purpose  
23 of the original work.

24 As to character, just briefly,  
25 character just means a quality, trait, or

1 attribute. And, certainly, if -- if the -- the  
2 message of the work changes, that would be a  
3 quality, trait, or attribute of the work.

4 And I think the problem with  
5 Goldsmith's side is that they're essentially  
6 arguing that a new meaning or message has  
7 nothing to do with purpose, has -- doesn't  
8 change the character of the work, and it's  
9 just -- the only level of generality you can  
10 look at those things is -- is at the level of,  
11 well, they're both portraits of Prince, they  
12 must be the same. And I don't think that's a  
13 common sense or appropriate way to look at this.

14 Sorry, Justice Alito.

15 JUSTICE ALITO: How is a court to  
16 determine the purpose of meaning, the message or  
17 meaning of works of art like a photograph or a  
18 painting? Should it receive testimony by the  
19 photographer and the artist? Do you call art  
20 critics as experts? How does a court go about  
21 doing this?

22 MR. MARTINEZ: So, Justice Alito, I  
23 think that the short answer is I think the court  
24 can do it in exactly the same way that this  
25 Court and the lower courts did in the Campbell

1 case.

2           So, in the Campbell case, the issue  
3 was parody, but in order -- one of the issues in  
4 the case was whether the 2 Live Crew song was,  
5 in fact, a parody. And in order to do that, the  
6 Court needed to assess what the meaning or  
7 message of the work was.

8           And Justice Souter, in his opinion for  
9 the Court at page 583, he -- he sort of, like,  
10 does his own analysis. So I think you could  
11 just look at the two works and figure out what  
12 you think as a judge. But I think that more  
13 likely, in most of these cases, the way that  
14 they've been litigated for almost 40 years, that  
15 the litigants would put forward -- in addition  
16 to the works themselves, put forward evidence.  
17 Sometimes it's evidence from the -- the creator,  
18 both creators. Sometimes it's expert evidence.  
19 Sometimes it's other kinds of evidence.

20           But that's sort of like the standard  
21 run-of-the-mill way that -- that -- that  
22 litigants in -- in these copyright cases try to  
23 argue about and establish meaning or message.  
24 And we think that's totally appropriate in this  
25 circumstance.



1 JUSTICE ALITO: Well, you make it  
2 sound --

3 JUSTICE KAGAN: But even --

4 JUSTICE ALITO: -- you make it sound  
5 simple, but maybe it's not so simple at least in  
6 some cases to determine what is the meaning or  
7 the message of -- of a work of art. There can  
8 be a lot of dispute about what the meaning or  
9 the message is. Some people would say it's not  
10 necessarily the meaning or the message that the  
11 artist had in mind.

12 I don't know, if you called Andy  
13 Warhol as a -- as a witness, what would he say  
14 was the purpose of his -- and the -- the message  
15 or meaning of his -- of his creation?

16 MR. MARTINEZ: I -- I wish I could  
17 answer that question. He's not with us, as you  
18 know, Your Honor.

19 JUSTICE ALITO: I know that.

20 MR. MARTINEZ: But I will say -- I  
21 will say this about the problem that you've  
22 pointed to, which is a real concern, and I  
23 understand why it's a real problem. I think  
24 that the answer to that problem is solved by  
25 Campbell, because Campbell does not say that the

1 court or the fact finder needs to figure out the  
2 meaning or message. It says it needs to figure  
3 out whether a new meaning or message could  
4 reasonably be perceived.

5 And that creates a -- a -- a bit of  
6 latitude, of -- of sort of wiggle room that  
7 defers to the fact that there might indeed be,  
8 you know, a bunch of different reasonable  
9 interpretations of art.

10 JUSTICE KAGAN: You say in your -- in  
11 your reply brief that the new thing has to be  
12 important, correct?

13 MR. MARTINEZ: That's -- taking that  
14 from Google, new and important, yes.

15 JUSTICE KAGAN: And -- and -- and how  
16 does -- how do you go about thinking about  
17 what's important --

18 MR. MARTINEZ: Well, I think you would  
19 --

20 JUSTICE KAGAN: -- in the follow-on  
21 work?

22 MR. MARTINEZ: I think, in the context  
23 of copyright law, you would look at important in  
24 light of the objectives of copyright law. And  
25 here, it's promoting creativity for the public

1 good. And so you would look at that just the  
2 same way that Judge Leval talked about in his --  
3 in his decision and I think the way that both  
4 the Campbell and Google Courts did.

5 And what Google said, right after it  
6 said --

7 JUSTICE KAGAN: I mean, that doesn't  
8 give me a lot of specificity. I understand that  
9 we're supposed to be encouraging creativity, but  
10 -- but what's the difference in the follow-on  
11 work that when we look at it, we can say, well,  
12 that's an important difference that does  
13 something that -- that we really need to hear or  
14 to see?

15 MR. MARTINEZ: So what the Court said  
16 in Campbell was it equated the new or important  
17 inquiry with -- with a serious inquiry into  
18 transformative meaning or message. And when the  
19 -- when Campbell uses that language, "new and  
20 important," it's immediately following the --  
21 the sentence where it's quoting -- sorry -- when  
22 Google uses that phrase, it's immediately  
23 following the place where it quotes the language  
24 in Google -- in Campbell that says new meaning  
25 or message, you know, count.

1 JUSTICE SOTOMAYOR: Counsel, going  
2 back to your answer to Justice Kavanaugh and now  
3 to Justice Kagan, what's the right level of  
4 generality? You keep going back to the author's  
5 purpose, and I can't stay there because, when I  
6 look at Harper & Row, we defined the purpose of  
7 the use as news reporting. In Campbell, we  
8 repeatedly referred to the uses -- the use as  
9 its parody character. In Google, we talked  
10 about creating a new product that does something  
11 different.

12 That's a fairly high level of  
13 generality, and that's the level we talked of.

14 MR. MARTINEZ: Well, I think --

15 JUSTICE SOTOMAYOR: And so --

16 MR. MARTINEZ: Sorry.

17 JUSTICE SOTOMAYOR: -- I don't know  
18 why the level that we talk about here is the  
19 actual use, which is what Section 1 tells us to  
20 do, of this piece of art. And we go back to  
21 Justice Kavanaugh's point, the specific use was  
22 of this one part of the Prince Series, only one  
23 level of it, as a photograph in the life of  
24 Prince.

25 Now that use -- you say on Factor 4

1 that it doesn't compete with the photograph,  
2 Goldsmith's photograph, but hard to see how not.  
3 They both sell photographs to magazines, and  
4 they both sell photographs to magazines to  
5 display Prince's -- Prince's vision or Prince's  
6 look.

7 So I guess I go back to my point,  
8 which is why isn't the general -- the -- the  
9 higher level of generality what Section 1 is  
10 looking at?

11 MR. MARTINEZ: Your Honor, I don't  
12 think that that's what Section 1 is getting at,  
13 but I think Campbell makes that absolutely clear  
14 because, if it were the case that you had to  
15 look at the higher level of generality, in  
16 Campbell, what you would have said is you have a  
17 Roy Orbison song that's a work of popular music  
18 that's commenting on sexual attraction, and you  
19 have a 2 Live Crew song that's also a work of  
20 popular music, also commenting on sexual  
21 attraction, they would have the same purpose.

22 But you didn't do that. Instead, you  
23 said let's -- we need to look at the meaning or  
24 message, and then you analyzed whether the  
25 second work was -- had a different meaning or

1 message because it was commenting on the first.

2 So you had to do that analysis.

3 And I actually think Goldsmith's test  
4 actually requires you to do that analysis.

5 They're not asking you to overturn the parody  
6 case law. What they're asking you to say is to  
7 -- is that the only meaning or message that can  
8 possibly ever count as a difference in meaning  
9 or message is when you have a parody. But  
10 that's -- that's our --

11 JUSTICE KAVANAUGH: Isn't the --

12 JUSTICE BARRETT: Well, I don't think  
13 --

14 JUSTICE KAVANAUGH: -- isn't the --

15 JUSTICE BARRETT: -- that's true. I  
16 mean, I -- I think that the -- one -- one thing  
17 that Campbell pointed out is that 2 Live Crew  
18 couldn't have parodied or -- and this would also  
19 apply to commenting on, this would also apply to  
20 critiquing maybe in the way that Warhol's  
21 Campbell soup painting does, but that you needed  
22 the object. He didn't need or Warhol didn't  
23 need Goldsmith's particular photo, right? I  
24 mean, it could have been a different photo of  
25 Prince.

1                   MR. MARTINEZ: Well, what Goldsmith  
2 said below is that he did need the -- the photo.  
3 And I think that's -- that's reflected in the  
4 district court opinion.

5                   But I think leaving -- just stepping  
6 back from the question of -- of need, I think  
7 that it's true that in parody there might be a  
8 -- an especially strong need to quote from the  
9 -- the work that you're critiquing. But that's  
10 not -- that doesn't mean that -- that -- that  
11 that's a requirement of transformative meaning  
12 or message.

13                   And as Your Honor pointed out, when  
14 Google invokes the soup cans hypothetical, the  
15 soup cans -- you know, if you're -- if you're  
16 issuing a comment on consumerism, you don't need  
17 to use, you know, a copyrighted Campbell soup  
18 can logo in order to make that comment.

19                   JUSTICE BARRETT: Yeah. But you could  
20 use Cheerios. I mean, you'd have to use -- I  
21 mean, it doesn't -- it has --

22                   MR. MARTINEZ: You could find some --

23                   JUSTICE BARRETT: Yeah. It just  
24 doesn't have --

25                   MR. MARTINEZ: You could find one

1 that's not copyrighted.

2 JUSTICE BARRETT: -- the same punch if  
3 it's generic. Well -- okay.

4 MR. MARTINEZ: But I think what -- but  
5 I think the soup cans example is especially  
6 helpful on that point because it doesn't look  
7 for some sort of need or justification. You  
8 know, neither party sort of argued and the  
9 courts below didn't, like, assess a necessity  
10 test.

11 I understand Goldsmith at this stage  
12 in the case to be introducing for the first time  
13 a kind of indispensability requirement, which is  
14 -- has really no footing in any of the Court's  
15 case law and really wouldn't make a lot of  
16 sense. Certainly, the soup cans example, it was  
17 not, like, indispensable for -- for Warhol to --  
18 to use the Campbell soup logo in order to create  
19 that image, and yet the Court itself recognized  
20 that was a paradigmatic example of -- of fair  
21 use.

22 JUSTICE KAVANAUGH: You said something  
23 a minute ago about commenting on the original  
24 being a key feature. And I think that's true  
25 with the -- the examples listed in the statutory



1 text as well where they're commenting on the  
2 original. And I think that the -- the import of  
3 Campbell is that parody is a comment on the  
4 original in some respects.

5 But how is a photograph used in an  
6 article about Prince commenting in any way on  
7 the original photograph? You might say that's  
8 the wrong way to look at it probably, but if  
9 that's what you're going to say, tell me why.

10 MR. MARTINEZ: Could I just answer the  
11 -- the -- your point about the text?

12 JUSTICE KAVANAUGH: Mm-hmm.

13 MR. MARTINEZ: Because I think that  
14 the text does not actually require commenting or  
15 criticizing the original. It just says comment  
16 or criticism. And so there's nothing textually  
17 that requires the comment actually to be the  
18 original.

19 I think the better way to understand  
20 the text is if you look at Justice Blackmun's  
21 dissent in the Sony case, not a point that was  
22 -- this point was not, you know, what he was  
23 dissenting on, but he was describing those  
24 different uses, and what he said is that they're  
25 all productive uses. And -- and that was the

1 term that was used at that time to talk about  
2 the sort of transformative uses --

3 JUSTICE KAVANAUGH: Well, if --

4 MR. MARTINEZ: -- that we're talking  
5 about now.

6 JUSTICE KAVANAUGH: -- if you go to  
7 Campbell, the -- the part of Campbell right  
8 before the part that you quoted says the central  
9 purpose of this investigation is to see in  
10 Justice Story's words whether the new work  
11 merely supersedes the objects of the original  
12 creation or, instead, adds something new.

13 MR. MARTINEZ: Exactly. And so I  
14 think what -- what "supersedes" is doing there  
15 is it's set up as a -- it's juxtaposed as the  
16 opposite of what comes after the "instead"  
17 clause. And what the "instead" clause is new  
18 meaning or message.

19 And so I think what it's recognizing  
20 is that the superseding that Justice -- Justice  
21 Story was worried about is when you don't have a  
22 new meaning or message.

23 JUSTICE KAVANAUGH: Can you go back to  
24 the question I asked about --

25 MR. MARTINEZ: Sure. Right.

1 JUSTICE KAVANAUGH: -- when a  
2 photograph is used in a --

3 MR. MARTINEZ: Is it commenting on the  
4 original?

5 JUSTICE KAVANAUGH: -- in -- in a  
6 story about the subject of the photograph, how  
7 is that not superseding the object of the  
8 original photograph?

9 MR. MARTINEZ: So it's -- it's not  
10 because it has a transformative meaning or  
11 message. It would have sent a different message  
12 to have -- to use the Goldsmith photograph  
13 illustrating that "Purple Fame" article. The  
14 "Purple Fame" picture, the picture that  
15 accompanied that -- that article, was intended  
16 to -- or did show its -- its meaning. Its  
17 meaning or message was about the dehumanizing  
18 effects of celebrity as applied to Prince.

19 The Goldsmith photograph, as she  
20 herself said below, this is at JA 490 -- around  
21 496, she was testifying as to what she was  
22 capturing was a photo realistic portrait of  
23 Prince that showed him as fragile and  
24 vulnerable.

25 There's no real dispute in this case

1 that the meaning or message of the two works  
2 were different. The only real question in this  
3 case is whether that difference matters.

4 And it has to matter both because of  
5 the text of 107, which talks about purpose and  
6 character, and -- sorry.

7 JUSTICE KAVANAUGH: Does it matter,  
8 though, how the new photograph, the Warhol  
9 photograph, is used? It's used in a magazine  
10 article about Prince. That would be one thing.  
11 It's used in a museum setting.

12 MR. MARTINEZ: I --

13 JUSTICE KAVANAUGH: That might be  
14 something very different because the Goldsmith  
15 photograph competes with the Warhol in the  
16 first.

17 MR. MARTINEZ: I think, if you're  
18 talking about a particular use, absolutely, it  
19 would matter for Factor 4. I think it would  
20 also potentially matter as to Factor 1, but it  
21 wouldn't cancel out the fact that you would have  
22 to consider transformative meaning or message.

23 I just want to emphasize, though, and  
24 this is a very important point, this case really  
25 is not about just the licensing use. This case

1 is about the creation. If you look at the  
2 request that -- her request for relief and our  
3 request for relief in the original complaints,  
4 this was a dispute over who owns the copyright  
5 to these works.

6 She was asking for an injunction from  
7 us that would prevent us not just from licensing  
8 the one 2016 work, she wanted an injunction that  
9 would prevent us from reproducing, displaying,  
10 selling, or licensing those works.

11 The -- the -- the order that we won  
12 from the district court was -- was an order that  
13 as a matter of law summary judgment fair use as  
14 to all 16 works. She didn't dispute that. In  
15 fact, she proposed the order that the district  
16 court ultimately issued.

17 So this case is not just about the  
18 use. It's about the creation. And the reason  
19 that she wants to change the subject and make it  
20 only about the creation -- about the licensing  
21 use is because she realizes that if this case  
22 turns -- this case is about use -- about the  
23 creation of the works, then it would have  
24 dramatic spillover consequences not just for the  
25 Prince Series but for all sorts of works of

1 modern art that incorporate preexisting images  
2 and use preexisting images as raw material in  
3 generating completely new creative expression by  
4 follow-on artists.

5 JUSTICE KAGAN: I -- I wonder, Mr.  
6 Martinez, if your case doesn't benefit from a  
7 certain kind of hindsight. I mean, now we know  
8 who Andy Warhol was and what he was doing and  
9 what his works have been taken to mean. So it's  
10 easy to say that there's something importantly  
11 new in what he did with this image.

12 But, if you imagine Andy Warhol as a  
13 struggling young artist, who we didn't know  
14 anything about, and then you look at these two  
15 images, you might be tempted to say something  
16 like, well, I don't get it. All he did was take  
17 somebody else's photograph and put some color  
18 into it.

19 So -- so it seems that it's harder  
20 than you say. I mean, we can't always count on  
21 the fact that Andy Warhol is Andy Warhol to know  
22 how to make this inquiry.

23 MR. MARTINEZ: Yeah. I think  
24 you're -- you're right in part, Justice Kagan,  
25 but I actually think that that sort of

1 emphasizes the importance of this case. This  
2 case isn't just about Warhol. It's about the  
3 young and up-and-coming artists who want to be  
4 Warhol's successors.

5           You know, the artists' amicus brief, I  
6 think, says that the average, you know, salary  
7 or -- or earnings for a young artist is less  
8 than \$50,000 a year. Think about what it would  
9 be like for that artist who wants to create new  
10 and innovative work that integrates preexisting  
11 images.

12           If this Court were to adopt  
13 Goldsmith's rule and say that that's not going  
14 to count, it's -- the fact that you're doing  
15 something completely new and different in terms  
16 of meaning or message, it makes no difference,  
17 that person is going to be dissuaded.

18           They don't want to have -- be tied up  
19 in litigation where they're going to have to pay  
20 attorneys' fees. They don't want to have  
21 their -- their -- their hard work then nullified  
22 and their copyrights essentially taken over by  
23 -- by people who -- who created the original  
24 works.

25           So this case is very important not

1 just for those artists. It's also important for  
2 museums, collectors, galleries who want to  
3 display these works. I see my time's expired.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Under your test, you know, there are  
7 artists whose work consists of a single color  
8 within a frame, right? I'm sure you recognize  
9 those. And --

10 MR. MARTINEZ: So I've heard, Your  
11 Honor.

12 CHIEF JUSTICE ROBERTS: Yeah.  
13 Mondrian, Albers. And let's say somebody has --  
14 uses a different color. You know, the original  
15 is blue, and the -- the -- the allegedly  
16 copyright violation work is -- is yellow.

17 Sort of following up on Justice  
18 Alito's point, if you got art critics to come in  
19 and say that blue sends a particular message,  
20 yellow sends a different one, would -- would  
21 that satisfy any claim of copyright violation?

22 MR. MARTINEZ: Well, I think, at -- at  
23 the threshold, you'd have a question of whether  
24 that was -- that was, you know, infringement or  
25 not. I don't think anyone can copyright a



1 color. But just assuming it was infringement, I  
2 think you would look at --

3 CHIEF JUSTICE ROBERTS: Well, are  
4 those -- I mean, maybe you don't know, but, I  
5 mean, are those paintings copyrighted or --

6 MR. MARTINEZ: I don't know the  
7 specific paintings, Your Honor. Sorry. But --

8 CHIEF JUSTICE ROBERTS: Well, they're  
9 framed with a color in them.

10 MR. MARTINEZ: I think, if it was just  
11 the color, I don't think you can copyright a  
12 color. I do think, though -- let's just assume  
13 that -- that you made other changes and there  
14 was a -- a -- some sort of minor change.

15 I think you would still do the -- the  
16 four-factor analysis. I think, at Factor 1, you  
17 would have to look whether there's, in fact, a  
18 new meaning or message.

19 It sounds to me like under the  
20 hypothetical there's no difference in meaning or  
21 message. And so I think it would be a -- a  
22 loser under Factor 1.

23 CHIEF JUSTICE ROBERTS: Well, you --  
24 you and I might think there's no difference, but  
25 I'm sure there's art critics who will tell you

1       there's a great difference between blue and  
2       yellow.

3                   MR. MARTINEZ:   And -- and I think what  
4       a court would have to do in -- in -- if you're  
5       assessing whether those two works -- again,  
6       assuming that there was infringement, assessing  
7       whether they had a different meaning or message,  
8       you would have to listen to those critics and  
9       you -- you know, we see experts on both sides of  
10      almost every case, right, and they don't always  
11      say the things that persuade the court.

12                   And you'd have to take them seriously  
13      to the extent that you would listen to their  
14      arguments and then you'd judge whether it was  
15      reasonably perceived -- whether their view of --  
16      of a transformed meaning or message is  
17      reasonable, whether it could reasonably be  
18      perceived.

19                   And I think that in a lot of these  
20      cases, where you're really talking about a very  
21      minor change and -- and someone is just a  
22      knock-off artist making a bogus claim to new  
23      meaning or message, I think that juries or fact  
24      finders can exercise their common sense and say  
25      that there's no transformative meaning or

1 message there.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 Justice Thomas?

4 JUSTICE THOMAS: I assume that the  
5 Orange Prince is -- is -- is copyright.

6 MR. MARTINEZ: Yes. And I think that  
7 copyright's directly at issue in this case.

8 JUSTICE THOMAS: The -- let's say that  
9 I'm both a Prince fan, which I was in the '80s,  
10 and --

11 (Laughter.)

12 JUSTICE KAGAN: No longer?

13 (Laughter.)

14 JUSTICE THOMAS: Well --

15 (Laughter.)

16 JUSTICE THOMAS: -- so only on  
17 Thursday night.

18 (Laughter.)

19 JUSTICE THOMAS: But let's say that  
20 I'm also a Syracuse fan and I decide to make one  
21 of those big blowup posters of Orange Prince and  
22 change the colors a little bit around the edges  
23 and put "Go Orange" underneath.

24 Would you sue me --

25 MR. MARTINEZ: Would -- would -- would

1 -- would --

2 JUSTICE THOMAS: -- for infringement?

3 MR. MARTINEZ: -- would the -- would  
4 the Warhol foundation sue you if you were to do  
5 that?

6 JUSTICE THOMAS: Well, you're their  
7 lawyer, so --

8 MR. MARTINEZ: I -- I can't comment on  
9 whether we would sue you. But I think, to --  
10 to -- to try to get at your question, Your  
11 Honor, I think the question of whether that  
12 would be fair use, I mean, it sounds like  
13 you're, by hypothesis, asking me to consider  
14 that there's, like, a different meaning or  
15 message associated with the work. I don't think  
16 that's the only part of the -- the inquiry.

17 I think that everyone recognizes that  
18 at Factor 1, the ultimate goal here is to figure  
19 out whether the follow-on user is doing  
20 something sort of creative that matters --

21 JUSTICE THOMAS: Oh, I'm just waving  
22 it in the -- I'm waving it during the game with  
23 a big Prince face on it, Go Orange.

24 MR. MARTINEZ: Yeah. I -- I think  
25 that in -- in circumstances like that, it's very

1 unlikely if it was just one of you that -- that  
2 -- that anyone would see you.

3 JUSTICE THOMAS: Oh, no, no. I'm  
4 going to market it to all my Syracuse buddies.

5 (Laughter.)

6 MR. MARTINEZ: So I think, in that  
7 case, the -- a court would -- would quite  
8 reasonably look at that and say that this is not  
9 the kind of -- of productive creativity  
10 promoting use that is -- is --

11 JUSTICE THOMAS: So, in other words,  
12 you would sue me?

13 (Laughter.)

14 MR. MARTINEZ: I would not sue -- I --  
15 I -- I think that -- I think that you would  
16 probably have a very weak case against me, Your  
17 Honor.

18 JUSTICE THOMAS: So -- but you've just  
19 changed position with Goldsmith then.

20 MR. MARTINEZ: No, not at all, Your  
21 Honor. I think that in -- in this kind of  
22 circumstance, I think this -- this is totally  
23 different because there is a transformative  
24 meaning or message and there's an enormous  
25 amount of creativity.

1 JUSTICE THOMAS: Well, I had Go Orange  
2 under it. I've changed the message.

3 MR. MARTINEZ: Right. But, as I was  
4 saying, in addition to the -- the difference in  
5 meaning or message, I think it's fair to  
6 consider at Factor 1 whether the kind of  
7 transformation is the kind that the copyright  
8 laws are intended to foster, which is really  
9 encouraging follow-on artists to -- to use  
10 creativity to kind of introduce new ideas into  
11 the public domain.

12 I think that -- that with all respect  
13 to your -- your very accomplished re-rendering  
14 of Prince, I think that what -- what Warhol did  
15 here, as even Goldsmith concedes, was very  
16 substantially creative and -- and absolutely is  
17 consistent with the goals of copyright law.

18 CHIEF JUSTICE ROBERTS: Justice Alito?

19 JUSTICE ALITO: Very often a popular  
20 song will be originally performed by one artist  
21 and then other artists come along and perform it  
22 in a very different way. Presumably, they think  
23 that they are conveying a different meaning or  
24 message when they alter the way it's performed.

25 Is it possible for any of them to --

1 that any of them would not be infringing the  
2 original copyright?

3 MR. MARTINEZ: I think it would be  
4 very hard to imagine a circumstance in which  
5 they were not infringing ultimately under the --  
6 you know, the full analysis.

7 JUSTICE ALITO: Why would that be?

8 MR. MARTINEZ: Well, I think it would  
9 be in part because of Factor 4 because I think  
10 that you would have -- you know, it would sound  
11 like if you -- if you have -- Roy Orbison does a  
12 version of "Pretty Woman" and then another sort  
13 of Roy -- Roy Orbison style "Pretty Woman"  
14 emerges, I think it would directly compete with  
15 the original. So I think you'd have a very big  
16 Factor 4 problem.

17 I think, under Factor 3, if you're  
18 taking an enormous, you know, percentage of the  
19 work, that would weigh against you as well. I  
20 think that, you know, would you get points on  
21 the board because of a transformative meaning or  
22 message? Maybe. But I don't think that in that  
23 kind of hypothetical that that would win the  
24 day.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: I think my  
3 colleague, Justice Thomas, needs a lawyer.

4 (Laughter.)

5 JUSTICE SOTOMAYOR: And I'm going to  
6 provide it.

7 I see the first and fourth factors as  
8 closely related. And I think he has a better  
9 case because he's not using it at the game for  
10 commercial purposes. But even if he were, it  
11 wouldn't be related to the picture. It would be  
12 related to the team. That's no different than  
13 that case involving -- what mayor was it?

14 MR. MARTINEZ: The Kienitz case?

15 JUSTICE SOTOMAYOR: Yes, exactly, in  
16 which the T-shirts took his face and put  
17 something about his -- statement about a party  
18 on the T-shirt. And the Court said that's okay  
19 because that was really a commentary on a social  
20 issue, and it is commercial but in a different  
21 way.

22 But I -- what I don't -- having a  
23 problem with is, why doesn't the fourth factor  
24 just destroy your defense in this case? Meaning  
25 you licensed directly to a magazine, which is



1 exactly what the original creator does, and as  
2 Justice Kavanaugh said, it was licensing to the  
3 very topic that both do, which is two magazines  
4 that are talking about the life of Warhol -- not  
5 Warhol, but of Prince.

6 So why isn't that direct competition?

7 MR. MARTINEZ: So a couple comments on  
8 that. First --

9 JUSTICE SOTOMAYOR: And -- and for  
10 commercial purposes.

11 MR. MARTINEZ: First of all, just to  
12 -- just to reemphasize, it's not just the  
13 licensing use in this case. But just assuming  
14 we're just talking about the licensing use here,  
15 I think that -- that Judge Koeltl's analysis of  
16 Factor 4 is essentially correct. And -- and  
17 with respect to the Second Circuit, I think the  
18 Second Circuit's analysis of Factor 4 was overly  
19 influenced by its impression that these were  
20 essentially, for all intents and purposes, the  
21 same work because they were both portraits of  
22 Prince.

23 If we were going to rerun the Factor 4  
24 analysis and if you wanted to look at it, I  
25 would just suggest you look at the briefing in

1 -- in the lower courts because we obviously  
2 didn't do it here. I think the key things that  
3 I would suggest that would deserve attention  
4 would be, who is the audience for Warhol,  
5 Warhol's licensing versus Goldsmith's licensing?  
6 I think there's substantial record evidence  
7 showing that the -- the audience is different in  
8 terms of the license -- the people who would do  
9 the licensing, where Goldsmith's works were  
10 predominantly being targeted more to  
11 photorealistic sort of like -- you know, like a  
12 Newsweek or -- or, in most cases, like rock and  
13 roll magazines and other kinds of -- of  
14 publications.

15 I think you'd look at the price to see  
16 whether there were market substitutes. There,  
17 you'd see that Warhol's works, even at the  
18 licensing as opposed to the -- the -- the  
19 purchase of the original works, were selling for  
20 a lot more. I think you would look at the  
21 aesthetics. The aesthetics are quite different.  
22 And I also think you would look at the  
23 transformed meaning or message.

24 All those things, I think -- we think  
25 we -- we would win for the reasons that the

1 district court said.

2 If you disagreed with us on that, I  
3 think maybe you would say this is a fact issue  
4 that's got to go to a jury. But it certainly  
5 wouldn't be summary judgment on -- as to Factor  
6 4 for Goldsmith.

7 JUSTICE SOTOMAYOR: All right.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?  
9 Justice Gorsuch?

10 JUSTICE KAVANAUGH: In 1984, did  
11 Vanity Fair need to pay Goldsmith?

12 MR. MARTINEZ: No, Your Honor. I  
13 think -- I don't think they needed to pay, but I  
14 think what this Court recognized in Campbell is  
15 that if people offer to pay or do pay that  
16 doesn't -- that doesn't make a difference. I  
17 mean, I think, in the 2 Live Crew example, they,  
18 in fact, did try to -- to get a license even  
19 though, as the Court recognized, it wasn't  
20 required.

21 JUSTICE KAVANAUGH: And then, on your  
22 point about up-and-coming artists, obviously,  
23 that can be played both ways. And some of the  
24 amicus briefs -- I just want you to comment on  
25 this. One of the amicus briefs says your

1 position poses an existential threat to  
2 photographers. So I just want you to comment on  
3 that.

4 MR. MARTINEZ: We -- we -- we  
5 absolutely strongly disagree with that.

6 JUSTICE KAVANAUGH: And why, though?

7 MR. MARTINEZ: Because we think that  
8 -- that the kind of transformation that's  
9 important here is -- is -- is something that  
10 really adds -- it creates a new original work in  
11 a fundamental way, not just because the work's  
12 in a different form or because it has different  
13 colors; because it has a different meaning or  
14 message.

15 And I don't think in the circumstance,  
16 especially if -- if we're right on Factor 4,  
17 that there's either zero or not much impingement  
18 on her market, we don't think that that actually  
19 destroys anyone's livelihood.

20 JUSTICE KAVANAUGH: Thank --

21 MR. MARTINEZ: Rather, we think that  
22 promotes creativity in artists of all kinds.

23 JUSTICE KAVANAUGH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice  
25 Barrett?

1                   JUSTICE BARRETT: Mr. Martinez, I  
2 think one of the problems that you have, as  
3 evidenced by a lot of the questions that you've  
4 been getting, is with the derivative works  
5 protection, you know, which, in, you know,  
6 106(2), actually talks about transforming any  
7 other form in which a work may be recast,  
8 transformed, or adapted.

9                   And it seems to me like your test,  
10 this meaning or message test, risks stretching  
11 the concept of transformation so broadly that it  
12 kind of eviscerates Factor 1 and puts all of the  
13 emphasis on Factor 4. I mean, when you've been  
14 asked about book to movie and -- and -- and, you  
15 know, songs, you keep flipping to Factor 4.

16                   So, if a work is derivative, like Lord  
17 of the Rings, you know, book to movie, is your  
18 answer just like, well, sure, that's a new  
19 meaning or message, it's transformative, so all  
20 that matters is 4?

21                   MR. MARTINEZ: I don't think that Lord  
22 of the Rings is -- has the -- has a  
23 fundamentally different meaning or message, but  
24 I would have to probably --

25                   JUSTICE BARRETT: The movie?

1                   MR. MARTINEZ:  -- but I would probably  
2                   have to learn more and read the books and see  
3                   the movies to give you a --

4                   (Laughter.)

5                   MR. MARTINEZ:  -- definitive judgment  
6                   on that.  And I recognize reasonable people  
7                   could probably disagree on that.

8                   I think that with respect to the  
9                   derivative work issue, I think textually it's  
10                  very important that in the -- in Section 106,  
11                  when it's -- it's talking about derivative --  
12                  sorry, in Section 101, when it's defining  
13                  derivative works and later in the copyright  
14                  statutes when it's giving protection to  
15                  derivative works, it says it's subject to  
16                  Section 107.  And so, just textually, we know  
17                  that the fact that you're a derivative work  
18                  doesn't mean fair use is out the window.

19                  So is there a tension between those  
20                  two in some cases?  I think probably there is  
21                  some tension, and I think that what it means is  
22                  that you need to do a very careful analysis of  
23                  new meaning or message, and -- and it's really  
24                  going to be only in the cases that -- that there  
25                  really fundamentally is a new meaning or message

1 that are going to be able to sort of satisfy  
2 that first factor.

3 With respect to the balance between  
4 Factor 1 and Factor 4, I think Factor 4 plays a  
5 role when it comes to some of the very  
6 challenging hypotheticals that were put forward  
7 by Goldsmith and the government and by the  
8 Court.

9 I don't think it's -- it's -- it's  
10 really that big a deal in this case, though,  
11 because this case really involves a very  
12 fundamental transformation in meaning or message  
13 and we think very little impingement on the  
14 market under Factor 4.

15 JUSTICE BARRETT: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Jackson?

18 JUSTICE JACKSON: Yes. So I've been  
19 trying to figure out when you continually say  
20 "transformational meaning and message" and  
21 you're focusing on meaning and message, it feels  
22 like it's doing a lot of work with respect to  
23 your Factor 1 analysis, and I think -- I think  
24 that it might be because you're conflating  
25 meaning or message with purpose.

1           What I've heard you say a couple times  
2           is that the purpose of Warhol in this situation  
3           was to essentially convey a different meaning or  
4           message, that, you know, the original was  
5           conveying Prince in a vulnerable light and so  
6           the purpose was to convey him in a more iconic  
7           way.

8           But the statute -- and I think this is  
9           something that Justice Sotomayor has sort of  
10          focused on and to some extent Justice Thomas  
11          with his hypothetical. The statute seems to be  
12          looking at purpose at a -- in a different way,  
13          that it's saying the purpose is, are you using  
14          it for a commercial nature? Is it going in a  
15          magazine or is it going to a school? When you  
16          look at the actual text of the fair use factors,  
17          it's purpose and character of the use, including  
18          whether such use is of a commercial nature or  
19          for nonprofit educational purposes.

20          So I think you're actually treating  
21          purpose differently than in the statute. So can  
22          you --

23          MR. MARTINEZ: Sure. So I think we're  
24          -- we're definitely not conflating meaning or  
25          message with purpose. I think what we're saying



1 is similar to -- it's not quite conflating, but  
2 we think they're related. We think that one way  
3 to get to a different purpose is if you have a  
4 different meaning or message.

5 Let me just give you an example. Say  
6 that you had a portrait of Abraham Lincoln and  
7 Abraham Lincoln was depicted in a heroic way.  
8 And then you had another portrait that depicted  
9 him in a very negative way. I think that the  
10 purpose of both of those works would be  
11 fundamentally different, and --

12 JUSTICE JACKSON: Absolutely not what  
13 the statute says about purpose. You -- you just  
14 made my point exactly.

15 MR. MARTINEZ: No, Your Honor.

16 JUSTICE JACKSON: That it's not --  
17 there may be a different meaning or message, but  
18 if both of those depictions are going in a  
19 magazine for a commercial nature, the purpose,  
20 the reason why you've used it, is -- is the  
21 same.

22 MR. MARTINEZ: Well, let's just look  
23 at the moment of creation. At the moment of  
24 creation, they have different purposes, I -- I  
25 think. One -- one is to show Lincoln as a good

1       guy. One is to show him as a bad guy. And --

2                   JUSTICE JACKSON: So what -- what is  
3       the work of including whether such use is of a  
4       commercial nature or for nonprofit educational  
5       purposes? I thought that was Congress telling  
6       us what kind of purpose, you know, it cared  
7       about.

8                   MR. MARTINEZ: Right. I think that's  
9       -- Congress is saying that -- it says  
10      "including," so it doesn't say that's the only  
11      factor, number one. And, number two, as this  
12      Court held in Campbell, the commercial use is  
13      not like the main event and certainly not the  
14      only dispositive event. And that was actually  
15      the -- the exact issue in Campbell.

16                   JUSTICE JACKSON: Well, but it's a  
17      type of purpose. Why are you doing this?

18                   MR. MARTINEZ: Of course.

19                   JUSTICE JACKSON: You're saying why am  
20      I doing this, because I want to depict Abraham  
21      Lincoln in a heroic way; when Congress is saying  
22      why are you doing this, because I want to put  
23      this -- you know, are you doing this because you  
24      want to sell it commercially or are you doing --

25                   MR. MARTINEZ: But, Your Honor, I

1 think, if that were the way to -- the right --  
2 the only level of generality to look at -- we're  
3 not -- I'm not denying, by the way, that I think  
4 you could look at purpose in that way, and that  
5 would also be a -- a legitimate way of looking  
6 at it, of -- of considering it.

7           What I'm saying is that you can't  
8 exclude meaning or message. And I think the  
9 best case to show that is Campbell because  
10 Campbell, again, you have two works of popular  
11 music that at your level of generality have the  
12 exact same purpose.

13           Or entertaining people on the radio.  
14 You know, I listened to them on Spotify  
15 yesterday. They have the same purpose. What's  
16 different between them is the difference between  
17 their message.

18           JUSTICE JACKSON: Why isn't that  
19 character? Why isn't the difference that you're  
20 pointing to character and that's -- and that's  
21 something you factor in? I'm not excluding it.  
22 I'm just saying it's not purpose.

23           MR. MARTINEZ: We think it's both  
24 purpose and character. We think it's purpose  
25 because the -- the meaning or message that

1 someone is communicating is tied up with their  
2 purpose. If I give a speech that says vote for  
3 Biden or vote for Obama or vote for Mitt Romney,  
4 I'm giving a speech, but the purpose in giving  
5 the speech is to convince people to -- of my  
6 meaning or message.

7 JUSTICE JACKSON: All right. One  
8 final question. If you -- let's say you win on  
9 this point of the Second Circuit made a mistake  
10 with respect to the way in which they treated  
11 meaning and message and the Court vacates.

12 Would you want us to go on and deal  
13 with the other factors or --

14 MR. MARTINEZ: I don't think the other  
15 factors are briefed up in this Court.

16 JUSTICE JACKSON: Right.

17 MR. MARTINEZ: And so I -- I think,  
18 you know, there are some questions that have  
19 been raised about the other factors. I think  
20 it's reasonable to think that -- that there  
21 might be some factual issues there that should  
22 go back -- probably maybe even back to the  
23 district court. It could even require a trial.

24 We won at summary judgment on -- on  
25 that. But, if you thought differently or had

1 concerns about Judge Koeltl's treatment of the  
2 other factors, I think that would be the  
3 appropriate disposition.

4 Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 MR. MARTINEZ: Thank you.

8 CHIEF JUSTICE ROBERTS: Ms. Blatt.

9 ORAL ARGUMENT OF LISA S. BLATT

10 ON BEHALF OF THE RESPONDENTS

11 MS. BLATT: Thank you, Mr. Chief  
12 Justice, and may it please the Court:

13 Fair use is an affirmative defense.  
14 It involves a multi-factor balancing test, and  
15 Factor 1 focuses on purpose: What is the reason  
16 or justification to take another's copyrighted  
17 work?

18 The reason can't be to avoid paying  
19 the customary price or the drudgery of coming up  
20 with something fresh. The copier has to explain  
21 why it needed and not just wanted to use someone  
22 else's expression.

23 Here, Petitioner has never given any  
24 reason for copying Ms. Goldsmith's picture to  
25 commercially license Warhol's Orange Prince in

1 2016. Indeed, Warhol got the picture only in  
2 1984 because Ms. Goldsmith was paid and  
3 credited.

4           Petitioner responds Warhol is a  
5 creative genius who imbued other people's art  
6 with his own distinctive style.

7           But Spielberg did the same for films  
8 and Jimi Hendrix for music. Those giants still  
9 needed licenses. Even Warhol followed the  
10 rules. When he did not take a picture himself,  
11 he paid the photographer. His foundation just  
12 failed to do so here.

13           Petitioner argues adding new meaning  
14 is a good enough reason to copy for free. But  
15 that test would decimate the art of photography  
16 by destroying the incentive to create the art in  
17 the first place, and it's obvious why the  
18 multi-billion dollar industries of movies,  
19 music, and publishing are horrified.

20           Petitioner's colloquial definition of  
21 the word "transformative" is too easy to  
22 manipulate. The act also gives creators and not  
23 copiers the right to make derivative works that  
24 transform the original into new ones with new  
25 meaning.

1                   If Petitioner's test prevails,  
2 copyrights will be at the mercy of copycats.  
3 Anyone could turn Darth Vader into a hero or  
4 spin off "All in the Family" into "The  
5 Jeffersons" without paying the creators a dime.

6                   I welcome your questions.

7                   JUSTICE THOMAS: Ms. Blatt, you, in  
8 your -- in your brief and even in your opening  
9 statement, you focus on purpose in 107. You did  
10 not mention character in your opening statement,  
11 and you don't give it a primary role in your  
12 briefs.

13                   What role does it play in your  
14 analysis?

15                   MS. BLATT: Character, I mean, I think  
16 we don't -- we agree with their definition that  
17 character of the use of the copying is one of  
18 commercial licensing.

19                   And the purpose -- I mean, it's just  
20 -- I think that they are very similar here. The  
21 purpose and character of commercial licensing,  
22 the purpose and character of a parody, I guess,  
23 is very similar, so I'm not sure that they ever  
24 play and haven't seen them play a distinct role  
25 in any of the case law or in the common law for

1 that matter.

2 But -- yeah?

3 JUSTICE KAGAN: How can you inquire  
4 into purpose and character without thinking  
5 about meaning or message? You know, what --  
6 what the first factor is really asking you to do  
7 is to say what is this use doing, and how can  
8 you answer that question without thinking about  
9 the use's meaning --

10 MS. BLATT: So we --

11 JUSTICE KAGAN: -- its message?

12 MS. BLATT: -- we absolutely think  
13 meaning and message is relevant as it relates to  
14 purpose.

15 JUSTICE KAGAN: So that is different  
16 from what the Second Circuit said, because I  
17 thought the Second Circuit took it out of the  
18 analysis entirely, said it was irrelevant to the  
19 question.

20 MS. BLATT: No. And I -- I think  
21 that's very unfair to three members of Article  
22 III who three times said meaning and message is  
23 relevant. What they --

24 JUSTICE KAGAN: Three times.

25 MS. BLATT: Yes. Well, it's -- I find



1 it insulting to the Second Circuit panel when  
2 they said do not assume the role of art critic  
3 and buy this notion of, well, Prince is shy here  
4 and he's iconic there. But, of course, meaning  
5 and message is relevant as to purpose.

6 I mean, I can just keep reading you  
7 quotes, but you know how to read a decision as  
8 best as I do. But, on the very same page  
9 they're yacking about, it says it has to be  
10 reasonably perceived as having a distinctive  
11 artistic purpose, one that conveys a new  
12 meaning.

13 It's just saying what you can't have  
14 and what we're all unified on, the government,  
15 us, and all of our amici, is you cannot have a  
16 bare purpose to add new meaning to someone  
17 else's art for profit.

18 And if that's all he has, he has  
19 nothing else. He has no justification for this  
20 other than I wanted to take someone else's art  
21 and put my own distinctive style on. And one  
22 expert thought that Prince looked happy or dead  
23 or, I don't know, larger than life, and one  
24 thought he looked -- the artist here thought  
25 Prince looked real.

1                   And so that is all the Second Circuit  
2 had, was they had a district court opinion that  
3 went completely, this is a Warhol, and, oh, my  
4 God, it's a Warhol, so it's transformative by  
5 definition.

6                   And the Second Circuit said: No, no,  
7 we're not going to do that here. You're going  
8 to have to give me something more than this is a  
9 Warhol with a distinctive style.

10                   JUSTICE ALITO: Well, what's a --

11                   JUSTICE KAGAN: And where do you --

12                   JUSTICE ALITO: Go ahead.

13                   JUSTICE KAGAN: Where do you get the  
14 idea that you have to need the -- the original  
15 work?

16                   MS. BLATT: So where we get the need  
17 is from the five times in Campbell that the  
18 Court said it, but it's --

19                   JUSTICE KAGAN: So Campbell doesn't  
20 say that. Campbell says, well, if you need the  
21 original work, that's the paradigmatic case.  
22 But it doesn't say that if you don't need the  
23 original work, the first -- you -- it can't be  
24 transformative.

25                   MS. BLATT: So, yeah, let me just

1 state our -- our test. When the defendant has  
2 an asserted purpose for copying someone else's  
3 work, you ask was there -- was the copying of  
4 the original needed to best achieve the  
5 defendant's -- I'm sorry, yeah, the copier's  
6 purpose?

7 Now, in Campbell, it is very  
8 significant that they are mis-citing and quoting  
9 Campbell. The Court did not hold it could be  
10 reasonably perceived as having a new meaning.  
11 The Court actually held it could be reasonably  
12 perceived as criticizing or commenting on the  
13 original.

14 And without that necessary element and  
15 the Court five times said it was critical, it  
16 was critical, it was the heart, and without the  
17 need to mimic, you have no claim to the victim's  
18 imagination.

19 And why we know that new meaning could  
20 not have been the test --

21 JUSTICE KAGAN: But Campbell starts  
22 with a statement of things being new and  
23 different and encouraging creativity to give new  
24 and different things the kind of fair use pass.

25 And then Google follows up on that and

1 it doesn't talk about -- in -- in -- in -- in  
2 your language at all, and it uses Warhol as an  
3 example of how somebody can take an original  
4 work and make it be something entirely different  
5 and that that's exactly what the fair use  
6 doctrine wants to protect.

7           So, you know, I take it that Campbell  
8 has some language that cuts your way in -- in --  
9 in the sense of saying, well, if you are  
10 commenting on the original, that's real fair use  
11 protection. We almost don't need to go any  
12 further.

13           But, if you're not commenting on the  
14 original, there's still the -- the possibility  
15 under -- under Campbell and then certainly under  
16 Google that, yes, this is fair use because it's  
17 the kind of thing we think of as truly  
18 transformative.

19           MS. BLATT: So I would say you should  
20 look at a holding over a dicta that uses a  
21 non-statutory word, transformative, when the  
22 actual word transformation is in the statute.

23           The dicta that they're relying on is  
24 saying we think that when you have a parodic  
25 purpose and a parody in the process of shedding

1 light, which I'm just quoting your words,  
2 shedding light on the original, you benefit  
3 society and create new meaning.

4 But why you know and why all that  
5 matters in this case is they had an affirmative  
6 defense and they just didn't give you a good  
7 reason for copying.

8 And why you know that Campbell just  
9 completely rules that out is what mattered in  
10 Campbell was exclusively the parodic purpose.  
11 If new meaning were and message were relevant,  
12 the Court would have been spending the whole  
13 time talking about the pretty woman you wanted  
14 to meet on the street versus all those not so  
15 pretty women you didn't want to meet on the  
16 street that were hairy, bald, two-timing Mr. Mix  
17 and one was pregnant and wasn't sure whose  
18 friend it was. No one was talking about the  
19 women's personalities in Campbell.

20 It was just --

21 CHIEF JUSTICE ROBERTS: Was it, Ms.  
22 Blatt --

23 MS. BLATT: -- were you trying to  
24 criticize. No one was talking about the  
25 personalities of George Washington in Folsom

1 versus Marsh. It was just, is this a biography  
2 about Washington? And, no, that's too -- that's  
3 too -- that's the same purpose.

4 CHIEF JUSTICE ROBERTS: Ms. Blatt, you  
5 said that the only thing that's different was  
6 the -- the distinctive style of Warhol.

7 I think your friend's point is -- is  
8 broader than that. It's not just that Warhol  
9 has a different style. It's that unlike  
10 Goldsmith's photograph, Warhol sends a message  
11 about the depersonalization of modern culture  
12 and celebrity status and the iconic -- and --  
13 and it goes through the different features to  
14 support that.

15 So it's not just a different style.  
16 It's a different purpose. One is the commentary  
17 on modern society. The other is to show what  
18 Prince looks like.

19 MS. BLATT: Yes, I think -- right.  
20 And when I say distinctive style, his  
21 distinctive style, by definition, is commenting  
22 on celebrity and dehumanizing him. And we're  
23 saying that that level of what is the  
24 personality, what do we perceive in Prince's  
25 face, or what we think about when we think about

1 what the author intended, would just drive a  
2 giant hole through a derivative work, which, by  
3 definition, is a work that adds new meaning to  
4 the original.

5           And anytime -- I know you wanted to  
6 stick to book versus movies, but any spinoff,  
7 any adaptation is -- it just starts with a new  
8 meaning. Take "All in the Family." Norman Lear  
9 would be turning over in his grave right now.  
10 He had more spinoffs than any show in American  
11 history. "The Jeffersons" was about a  
12 prospering African American family who lived on  
13 the East Side. "All in the Family" was about a  
14 white bigot living in Queens who couldn't keep  
15 up with society. And in his --

16           CHIEF JUSTICE ROBERTS: But they both  
17 were -- they both were television shows, right,  
18 and they were portraying a particular  
19 socioeconomic, whatever, element.

20           This is a whole different thing. The  
21 one is a picture. You want it there to show  
22 what Prince looks like. So it's a photograph,  
23 sure, composed in a particular way and all that.  
24 The other, you're not looking at it. The  
25 message you have -- if you put them side by

1 side, the message is not the same. The one is  
2 Prince's hair is like this. His expression is  
3 like that. The other one's entirely different.  
4 That's why they put the black around -- around  
5 one eye. That's why it's just the disembodied  
6 face, all of that.

7 And you don't say, oh, here are two  
8 pictures of Prince. You say that's a picture of  
9 Prince, and this is a work of art sending a  
10 message about modern society.

11 MS. BLATT: That just would turn  
12 Folsom versus Marsh on its head, which was they  
13 had a completely imaginized autobiography of  
14 George Washington, the first president, and all  
15 that mattered to Justice Story was that they  
16 were depicting -- both works were depicting the  
17 life of George Washington.

18 Your test lies madness in the way of  
19 almost every photograph to a silkscreen or  
20 lithograph or any editing. I guarantee the  
21 air-brushed pictures of me look better than the  
22 real pictures of me, and they have a very  
23 different meaning and message to me.

24 (Laughter.)

25 JUSTICE ALITO: What's your --



1 CHIEF JUSTICE ROBERTS: Well, I think  
2 that's not right. I mean, I think you would  
3 look at --

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: -- I think you  
6 would look at both of them, and one would say  
7 those are pictures of the same woman. This one  
8 may look a little better than that one, but it's  
9 the same woman, it's for the same purpose, it's  
10 to show what she looks like.

11 But, if you had a picture, a  
12 photograph of you and then a Warhol, you know,  
13 it's just not the same thing. You look at the  
14 Warhol thing and you say, oh, that's -- you  
15 know, that's --

16 MS. BLATT: The problem --

17 CHIEF JUSTICE ROBERTS: -- counsel.  
18 The other one --

19 MS. BLATT: -- the problem with this  
20 line of -- of theory is you're just putting  
21 photography in its own category and saying  
22 photography can just be ripped to shreds because  
23 you can always edit a picture and make these  
24 arguments, black-and-white versus color, et  
25 cetera. But, once you move to any other type of

1 medium, books, movies, and songs, these  
2 giants -- there are giants in all these creative  
3 fields who by very -- by virtue of the fact that  
4 they took someone else's worth -- work and  
5 transformed it into shows that are way more  
6 valuable.

7           If I could just talk about Factor 4  
8 because his answer was just astonishing, that --  
9 the first half of his argument was solve  
10 everything under Factor 4. The last half of his  
11 argument is we win in this case under Factor 4  
12 because of a trial in a different market. And  
13 imagine my Jeffersons hypothetical. Everything  
14 he said about Warhol versus a Goldsmith is the  
15 same article you could have said about the  
16 audiences that want to watch "Mork and Mindy"  
17 versus "Happy Days."

18           (Laughter.)

19           MS. BLATT: That is one character from  
20 "Happy Days" involving some Martian who came in,  
21 and Robin Williams was so funny that a whole new  
22 show was created called "Mork and Mindy." They  
23 had nothing to do with one another, different  
24 audiences.

25           And under his view, just everything he

1 said about Factor 4 you would have a trial in  
2 every single case. And he just basically forces  
3 all authors to go into Factor 4 with one hand  
4 tied behind their back where there's already a  
5 finding that this is a transformative work.

6 Ms. Goldsmith lost a -- lost under  
7 summary judgment under Factor 4 because the  
8 district court said, hey, you have a  
9 transformative Warhol, and it is inconceivable  
10 that somebody would want a shy-looking Prince  
11 over a -- the same market that wants a happy,  
12 iconic Prince.

13 JUSTICE JACKSON: Ms. Blatt --

14 JUSTICE ALITO: Ms. Blatt, what --  
15 what do you think the Second Circuit meant when  
16 it yakked about art critics, about judges not  
17 being art critics? Did -- was the -- was the  
18 point that a judge is supposed to determine  
19 whether -- a person who knows nothing about  
20 either of the works of art is supposed to  
21 determine whether they seem different? You  
22 can't have testimony, evidence about the meaning  
23 of those things?

24 MS. BLATT: So the -- the district  
25 court -- I mean, sorry, the Second Circuit had

1 left open very large amounts of type of fair use  
2 that I think -- or, sorry, transformative  
3 purpose that we would not think is correct,  
4 where I think, in their view, you can look at it  
5 objectively.

6 What the district court -- sorry, the  
7 Second Circuit was saying about don't assume the  
8 role of art critic was the notion that you would  
9 have such a level of specificity as to the vibe  
10 that the -- that the character being depicted  
11 was giving off, just like the -- the notion  
12 of -- you know, we could talk about all kinds of  
13 movies and adaptations. Was the character in  
14 Jaws, the book, different than the way the  
15 sheriff was depicted in the movie? And we could  
16 get -- The Shining is the best example. We know  
17 Stephen King had a very specific view of who  
18 Jack was. It was basically him and it was a  
19 tragedy, and we know what Stanley Kubrick did to  
20 it. He said I don't like your Jack. I'm going  
21 to do my Jack, who's a horror -- a horror film.

22 JUSTICE ALITO: Well, suppose that the  
23 Mona Lisa was copyrighted and somebody, a real  
24 -- really skillful copyist, made almost an exact  
25 copy. Most people could never detect the

1 difference, except the -- the copyist changed  
2 the color of her dress.

3           If you showed those two to most people  
4 today, they would say, well, all right, brown  
5 dress, blue dress, red dress, doesn't make any  
6 difference, right? That's not really important.

7           But, if you called somebody who knows  
8 something about Renaissance art, the person  
9 would say that makes a big difference. If  
10 that's a blue dress, that's sending a message.  
11 If it's a red dress, that's sending a different  
12 message.

13           MS. BLATT: So where I think all this  
14 goes wrong is you're just focusing on meaning  
15 and message independent of the underlying use.  
16 In this case, the statute, just by its terms, is  
17 talking about use.

18           And in the case of the Conde Nast, the  
19 use is to portray Prince. If you reprint our  
20 pictures, whether it's Ms. Goldsmith's or Andy  
21 Warhol's, you're commenting on the pictures. I  
22 don't think you're saying anything about Prince.  
23 Your use of those pictures is to describe and  
24 discuss the case, same way with the briefs and  
25 news articles. These are news reporting or any

1 kind of commentary about the pictures.

2           And in your Mona Lisa example, fair  
3 use never -- I mean, nobody sues an artist or  
4 sued 2 Live Crew when they were in the recording  
5 studio. You have to look at the actual use.  
6 And in -- and in -- and in Campbell, the Court  
7 said in a parody, fine, we'll give you -- we'll  
8 spot you that, but we'll send it back for a  
9 trial under Factor 4. But, if you're going to  
10 start using it for advertising, that doesn't  
11 count as an appropriate use under Factor 1.

12           The same thing was true in Sony. It  
13 wasn't the recording that the Court was focused  
14 on. It was the time shifting. When you watch  
15 it at home, for -- not for money, you know, not  
16 for profit, that's the only way you're going to  
17 be able to see the show that the networks were  
18 -- were offering.

19           JUSTICE BARRETT: So, Ms. Blatt, what  
20 about the use in the museum, like a Warhol  
21 hanging in a museum, versus the use in Conde  
22 Nast and Vanity Fair? Is there any difference?

23           MS. BLATT: Absolutely and for a  
24 variety of reasons. The first is Factor 4. And  
25 we have the largest museum in the world sitting

1 next to me on my right, who -- who's on my right  
2 and not one on my left. Factor 4 is just  
3 different. Goldsmith doesn't compete in that  
4 market.

5 On Warhol -- if I can just take you  
6 away from Prince -- and also now that this  
7 Prince Series is famous, I don't see how any  
8 museum can't display these. But the Prince  
9 Series is very complicated because of the  
10 license. But, if the poster child for museums  
11 is Andy Warhol, let them tell you what Andy  
12 Warhols they're worried about.

13 He got -- he took all the pictures of  
14 the famous ones or he got a license. Marilyn,  
15 who's I think worth a lot of money now, that  
16 picture is in the public domain. That guy  
17 didn't renew the copyright, Gene Korman, before  
18 he died and the copyright law was passed. So I  
19 don't know what they're worried about.

20 If you look at the pictures in the  
21 museum brief, it's a bunch of naked women. And  
22 no one is trying to say that naked women are  
23 going to be taken down from museums. There is  
24 nothing that -- I just -- the pop art they were  
25 --

1                   JUSTICE KAGAN: But maybe there's a  
2 different point about museums, and the point is  
3 why do museums show Andy Warhol? They show Andy  
4 Warhol because he was a transformative artist  
5 because he took a bunch of photographs and he  
6 made them mean something completely different.  
7 And people look at Elvis and people look at  
8 Marilyn Monroe or Elizabeth Taylor and Prince,  
9 and they say this has an entirely different  
10 message from the thing that started it all off.  
11 And that's why he's hanging up on those museums.

12                   And that's why whatever the Section 4  
13 -- the -- the Factor 4 inquiry might be, that's  
14 why it's hard to look at it and not say under  
15 Factor 1 that's transformation.

16                   MS. BLATT: Well, in our view, that --  
17 I mean, I think the government might have a  
18 different view under museums, but everyone  
19 agrees that in museums there's going to be fair  
20 use. And there's also particular provisions,  
21 mainly 109, that both our brief and the  
22 government's brief talk about that separates for  
23 display for museum purposes.

24                   But, on your -- under where I think I  
25 disagree with you is just that the display in a



1 museum of Prince is still copying and still  
2 using Ms. Goldsmith's in a way that doesn't  
3 justify the copying of Ms. Goldsmith.

4 Now she doesn't have market harm,  
5 still fair use, she can't sue. All remedies as  
6 to museums and to possession and sale were  
7 waived here in the complaint. You read the  
8 complaint accurately, but it was all expressly  
9 disclaimed.

10 And so all we have here is the  
11 commercial licensing. But you also have a  
12 disclaimer both in the Second Circuit and in the  
13 Supreme Court that Warhol doesn't have a claim  
14 -- I'm sorry, that Ms. Goldsmith doesn't have a  
15 claim for museums.

16 JUSTICE JACKSON: Can you --

17 JUSTICE SOTOMAYOR: Counsel -- excuse  
18 me. Do you have a claim for the original Prince  
19 Series, the original painting?

20 MS. BLATT: So the -- the possession  
21 and physical -- the -- it turns on the license  
22 because, remember, Warhol had -- there was --  
23 these were produced under a license, and so it's  
24 unclear whether all 16 were made pursuant to  
25 that license or made as drafts.

1                   And if Warhol wants to -- and -- and  
2                   the Warhol -- the Warhol Foundation doesn't even  
3                   own any of these. So the possession and sale is  
4                   not -- wouldn't be with respect to them.

5                   But assuming that they were all  
6                   lawfully created, they can be -- then this turns  
7                   under 109(a), which says you can -- you can sell  
8                   the possession.

9                   JUSTICE SOTOMAYOR: So what do you  
10                  think --

11                  MS. BLATT: What's not protected is  
12                  just the commercial licensing.

13                  JUSTICE SOTOMAYOR: Justice -- Judge  
14                  Jacobs below said he didn't think that the  
15                  Second Circuit's decision or injunctive relief  
16                  encumbered the original Prince Series -- I'm  
17                  quoting him, I think -- or anything that was  
18                  hanging in museums and things.

19                  Do you read -- what's at issue here?  
20                  What use is at issue? Is it the 2000 and --

21                  MS. BLATT: Only the commercial  
22                  licensing. And I think 46(a) --

23                  JUSTICE SOTOMAYOR: What commercial  
24                  licensing?

25                  MS. BLATT: Of Orange Prince in 2016,

1 plus --

2 JUSTICE SOTOMAYOR: Right, plus.

3 MS. BLATT: -- the request for  
4 injunctive relief for other similar commercial  
5 editorial licensing, so in -- for magazine  
6 usages.

7 JUSTICE JACKSON: Can we go back to  
8 your --

9 CHIEF JUSTICE ROBERTS: Thank you.

10 JUSTICE JACKSON: Oh.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Justice Thomas?

14 Justice Alito?

15 Justice Sotomayor?

16 Justice Kagan?

17 Justice -- Justice Jackson.

18 JUSTICE JACKSON: Yes, thank you. Can  
19 we go back to the necessary condition?

20 MS. BLATT: Mm-hmm.

21 JUSTICE JACKSON: Because I'm still  
22 not quite understanding it.

23 First, I thought there was something  
24 in the legislative history that I may have read  
25 about Congress considering a necessary condition

1 and taking it out. Does that sound familiar to  
2 you?

3 MS. BLATT: No.

4 JUSTICE JACKSON: No? Okay. Maybe I  
5 made that up.

6 MS. BLATT: That doesn't mean it's not  
7 there. The legislative history, though, is very  
8 helpful because it's got -- and I highly  
9 recommend the Menell, Balganesh, Jane Ginsburg  
10 brief because it gives you all of the complete  
11 history and background, and they would read it a  
12 little beyond relation back where it's necessary  
13 to copy, but it basically is limited to these  
14 very core usage -- uses -- usages.

15 JUSTICE JACKSON: But what about --  
16 what about commentary? That's what I'm worried  
17 about, right? The parody, I understand, you  
18 would say it's necessary and so that would fall  
19 into your fair use test.

20 But something like the Campbell's soup  
21 can where we've already established perhaps he  
22 could have used some other item to make the same  
23 kind of comment, would that not be necessary?

24 MS. BLATT: No, I think that  
25 Campbell's soup fits in two places, and Justice

1 Kennedy's concurrence in Campbell is really good  
2 on this point.

3           What Justice Kennedy is saying is that  
4 the writer can always pick his target. You can  
5 always pick what book review you want to  
6 critique or what song you want to parody. So  
7 it's never you have to say, well, you didn't  
8 necessarily have to pick on my song.

9           So Warhol was entitled to -- to -- to  
10 comment on Campbell's Soup as a form of talking  
11 about consumerism and make whatever broader  
12 point he wanted to make about society. But the  
13 Campbell's Soup label, not only is it a  
14 completely different purpose because one's an  
15 advertising logo that goes on a supermarket  
16 shelf to a work of art, but -- and I think the  
17 government's brief says this, he can't have used  
18 a generic soup can, he had to use the Campbell's  
19 Soup logo.

20           Same as if he had picked Cheerios.  
21 It would have been really weird to do, I guess  
22 back then they didn't have the giant Cheerios,  
23 but you've got to use Cheerios to make your  
24 point about consumerism and brand loyalty.

25           JUSTICE JACKSON: You're saying it's

1 still necessary?

2 MS. BLATT: Absolutely necessary.

3 JUSTICE JACKSON: Some -- some branded  
4 product?

5 MS. BLATT: And what the government  
6 would say, and, obviously, the government can  
7 speak for herself, but it's -- they would say at  
8 least useful. And we're okay with that. We're  
9 actually okay with anything other than the new  
10 meaning or message test.

11 JUSTICE JACKSON: But you're -- so --  
12 so you're -- the Second Circuit looked at this a  
13 certain way. And are you saying they -- they  
14 did it wrong?

15 MS. BLATT: No, they did it absolutely  
16 correct because they were just rejecting the  
17 district court and saying, we're leaving open  
18 everything but something that says Prince looked  
19 iconic versus Prince looked shy based on these  
20 interpretations of what one might reasonably  
21 think of Prince's, I don't know, mood or  
22 something, or personality.

23 But I read the Second Circuit as way  
24 broad, saying, you don't have to comment. I  
25 mean, I think they leave open all kinds of stuff

1 like collages, like if you took a picture of  
2 Prince and made him into a -- like Goldsmith's  
3 Prince and made him into a big butterfly, I  
4 think they would say that's completely fair use.

5 So I think, for your purposes, and  
6 which is what's driving all the -- you know, the  
7 amici being kind of very upset here, is just to  
8 reject a new meaning or message test where it's  
9 just a bare, unadorned new meaning or message  
10 test. It's not tied to any purpose other than I  
11 want to make some money off some art and I had  
12 some really cool idea here.

13 JUSTICE JACKSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 Ms. Dubin.

17 ORAL ARGUMENT OF YAIRA DUBIN

18 FOR THE UNITED STATES, AS AMICUS CURIAE,

19 SUPPORTING THE RESPONDENTS

20 MS. DUBIN: Mr. Chief Justice, and may  
21 it please the Court:

22 Two questions drive Factor 1: Does  
23 the use serve a distinct purpose or instead  
24 supersede the original and what is the  
25 justification for copying? Both point against

1 fair use here.

2           The foundation has never tried to show  
3 that copying the Goldsmith photographs' creative  
4 elements was essential to accomplish a distinct  
5 purpose.

6           And the foundation commercially  
7 licensed Warhol's Prince to serve the same  
8 purpose as the original, depicting Prince in an  
9 article about Prince.

10           Using another artist's work as a  
11 starting point to turn around and compete  
12 directly with their original has never been  
13 considered fair. The foundation suggests  
14 otherwise, only by urging you to look primarily  
15 to what the silk screens mean rather than why  
16 the copying was justified.

17           The Court should reject that test. It  
18 misreads Campbell, it requires courts to inquire  
19 into the meaning of art, and it would  
20 destabilize longstanding industry licensing  
21 practices that promote the creation of original  
22 works. Sequels, spinoffs, adaptations all  
23 become fair game if conveying a different  
24 meaning confers license to copy.

25           I welcome the Court's questions.



1 CHIEF JUSTICE ROBERTS: Counsel, in --  
2 in what way is the government's position  
3 different from that of Respondents?

4 MS. DUBIN: We agree with Respondent  
5 that the most straightforward way to establish  
6 fair use under the first factor is if your work  
7 is -- if your use is commenting on the original,  
8 criticizing it or otherwise shedding light on  
9 the original, but fair use is an affirmative  
10 defense.

11 And we would leave open to defendants  
12 in various cases to establish that their copying  
13 was justified for other reasons. The problem  
14 with Petitioner's approach here is that they  
15 haven't tried to establish that the copying was  
16 justified, just that the meaning of the works  
17 was different. And the Court has never  
18 recognized that to be a sufficient justification  
19 under the first factor.

20 CHIEF JUSTICE ROBERTS: Well, you  
21 agree, don't you, that the -- the Warhol work is  
22 not a commentary on the Goldsmith photograph,  
23 right?

24 MS. DUBIN: We would agree. And they  
25 have never argued that.

1 CHIEF JUSTICE ROBERTS: And Goldsmith  
2 had a very different purpose than Warhol. She  
3 was photographing Prince. This is what he looks  
4 like.

5 Now a lot goes into that composition,  
6 but it's not that Warhol's work was just a  
7 different composition, was it?

8 MS. DUBIN: We think that the relevant  
9 question is what is the use at issue here, and  
10 the use at issue here is to depict Prince in an  
11 article about Prince, which is very similar to  
12 the purpose at issue when Goldsmith took the  
13 photo.

14 CHIEF JUSTICE ROBERTS: But, if you  
15 really wanted to know what Prince looks like,  
16 you wouldn't get that from Warhol's depiction.  
17 He doesn't have one eye that's, you know,  
18 blacker than the other. He -- his head doesn't  
19 float in the air as it does in Warhol's but not  
20 in Goldsmith's. And that's because -- I think  
21 your friend on the other side would say it's  
22 because the purpose of that picture is not to  
23 show you what Prince looks like. It's supposed  
24 to show you a particular perspective on the pop  
25 era and celebrity status. No?

1 MS. DUBIN: Those changes that Your  
2 Honor is discussing are the same sorts of  
3 changes that really accompany the adaptation or  
4 transformation of any derivative work. You can  
5 imagine all of those comments being made about a  
6 book being transformed into a movie. Those are  
7 comments about a change in style, a change in  
8 aesthetic appearance, and things of those  
9 nature.

10 That has never been thought sufficient  
11 under the first factor to be a different  
12 purpose.

13 JUSTICE JACKSON: What about  
14 character? Is that sufficient for character?  
15 You talk about them together. And so is  
16 character doing different work at all in this  
17 analysis?

18 MS. DUBIN: The Court has long  
19 considered them together as a unit and then done  
20 an inquiry into purpose and character together.  
21 We think that if you were inclined to do so, you  
22 could look at character as focusing more on the  
23 commercial nature of the works -- of the use at  
24 issue and the purpose as looking to, you know,  
25 what was the justification for copying.

1           But either way, you would come to the  
2 same analysis here, which is that this is a  
3 highly commercial use that usurps the market for  
4 the original and that the justification for  
5 copying isn't present.

6           JUSTICE JACKSON: But the meaning of  
7 message you say is not indicative of character?

8           MS. DUBIN: That's not our position.  
9 The position is that meaning or message can be  
10 relevant insofar as it assists the Court in  
11 determining what is the purpose and character.  
12 And I think that's exactly what the Court looked  
13 at in Campbell.

14           In Campbell, the Court looked at the  
15 meaning or message of the 2 Live Crew song to  
16 determine if it was, in fact, a parody and  
17 therefore had purpose and character that we're  
18 looking for under Factor 1.

19           JUSTICE KAGAN: The -- the purpose of  
20 all copyright law is to foster creativity. So  
21 why shouldn't we ask at Factor 1, not in a  
22 determinative way, there's Factors 2, 3, and 4,  
23 but in Factor 1, well, is this really creative?  
24 Is this thing we have here something new and  
25 entirely different? That seems -- you know, it

1 seems to fit right into why we're having this  
2 inquiry in the first place.

3 MS. DUBIN: The purpose of the  
4 copyright law are to serve as the engine of free  
5 expression, but the balance that Congress struck  
6 in achieving that is to say we do that best by  
7 protecting the rights of original creators and  
8 protecting the incentive to create with a safety  
9 valve --

10 JUSTICE KAGAN: Except when we don't.  
11 I mean, we protect original creators except when  
12 we don't, and the purpose of the entire thing is  
13 to foster creativity. So why shouldn't we ask  
14 whether, at the follow-on level, there really is  
15 creativity here?

16 And then we can ask a whole bunch of  
17 other questions about -- about markets and --  
18 and so forth, but -- but to -- to take that out  
19 of the analysis, to say it doesn't matter that  
20 some -- that the follow-on work is -- is -- is  
21 adding something of real significance to  
22 artistic expression, why would we do that?

23 MS. DUBIN: I think the most  
24 significant difficulty with -- with Petitioner's  
25 approach is not -- we're not trying to take it

1 out of the equation. It's not about putting  
2 points on the board. It's whether it goes to  
3 the purpose and character of the use.

4           And I think -- maybe this helps with  
5 what Your Honor is driving at. In the statute,  
6 there is a specific right given to the copyright  
7 holder to derivative works, to prepare  
8 derivative works. And that provision looks to  
9 whether a secondary work transforms -- that's  
10 the language of the statute -- the original. So  
11 Congress thought about this question and gave  
12 that right to the original copyright holder.

13           Someone who wants to make a  
14 creative -- a very, very creative work can go  
15 and license that work to use it, or they can  
16 justify why they needed to take this work or why  
17 it was essential or highly useful to take this  
18 work in order to create the work.

19           But what's going on here is you have  
20 someone who's just saying my second work was  
21 very creative, my second work was transformative  
22 in the colloquial sense. And that doesn't fit  
23 within the definition of derivative works versus  
24 the safety valve for fair use.

25           JUSTICE JACKSON: Can I -- can I just

1 paraphrase what I thought I heard you say?

2 Because I'm not an expert in this area.

3           So the whole of copyright law itself  
4 in this area is to give the person who has the  
5 copyright the right to make other uses of the  
6 thing. It's sort of like a property interest in  
7 -- I get to -- I, because I hold the copyright,  
8 get to make other uses. So, when someone else  
9 makes another use of your thing, you then can  
10 question, you then say: Why are you using my  
11 thing to do your work?

12           And I think your argument is, if that  
13 person says I'm using your work because I have a  
14 better idea or because I want to add a little  
15 thing to it or because I want -- that's not  
16 going to be good enough. They have to say I'm  
17 using your work for some other purpose that's --  
18 that's outside of or in addition to I want to  
19 add a new meaning.

20           Am I right -- at a very high level of  
21 generality, did I sort of get what your point  
22 is?

23           MS. DUBIN: I think you got it exactly  
24 right, Justice Jackson. That -- that is our --  
25 that is our point. The point is that you have

1 to justify the copying, not just explain why  
2 your work is a creative addition to the world of  
3 creative additions. And I think that's  
4 important because of the derivative work right  
5 that I was discussing, and it's important  
6 because of sort of how the licensing regimes  
7 work across industries where there are many,  
8 many very, very creative people who are  
9 producing derivative works, whether it's the one  
10 that Respondents' counsel already addressed, but  
11 it's -- it's -- you know, it's Spielberg, it's  
12 Scorsese, it is so many people who do tremendous  
13 creative additions to the work that they're  
14 using, but because they don't have the sort of  
15 justification for copying, they need to get a  
16 license.

17 JUSTICE SOTOMAYOR: How do we get --  
18 how do we fit your answer to the following  
19 scenarios, okay? Do you acknowledge that a  
20 commercial licensing would be fair, such as an  
21 authorized reproduction of Orange Prince in an  
22 art magazine or in a book about Warhol?

23 MS. DUBIN: We would analyze that by  
24 running through the four fair use factors, and I  
25 think in that case --



1                   JUSTICE SOTOMAYOR: How would you deal  
2 with the first one? Because it is a commercial  
3 use. It's use of a painting that you say is a  
4 derivative -- derivative work. So how do we  
5 explain that?

6                   MS. DUBIN: Right. I think Factor 1  
7 and Factor 4 might play out differently than  
8 here. Factor 1, you might say the purpose is to  
9 say something about Warhol, to teach about  
10 Warhol. And under Factor 4, you might say that  
11 it's very unlikely that that would harm the  
12 market for the Goldsmith photograph because her  
13 photograph could not be used for that sort of  
14 occasion.

15                   JUSTICE SOTOMAYOR: So how about the  
16 commercial license for Orange Prince, like  
17 happened here? Why do you say it doesn't fit  
18 for a magazine about Prince's life?

19                   MS. DUBIN: Because the purpose of the  
20 Goldsmith photograph is to depict Prince, and  
21 while there might be differences in how she did  
22 it and how Warhol did it, they were both being  
23 used in this -- when you compare the two, the  
24 work and the -- and the use, they're both being  
25 used for the purpose of depicting Prince. Let's

1 have it --

2 JUSTICE SOTOMAYOR: So let's go back  
3 to Vanity Fair, which was -- it was paid for,  
4 but assume it wasn't, okay? But Vanity Fair was  
5 an article about Prince, but its focus was on  
6 his superstar status, his consumer sort of life.  
7 It seems as if those purposes coexisted -- not  
8 coexisted but were joined at the hip with using  
9 a Warhol because Warhol was known for making  
10 commentary on the very same issues.

11 So did they -- why would they have  
12 needed a license back then?

13 MS. DUBIN: I think the key to  
14 thinking about this case is what is the  
15 justification for borrowing. Why did you need  
16 to take the creative elements of the Goldsmith  
17 photograph? So, to produce the Warhol version  
18 of Prince, Warhol could have taken a photograph  
19 of Prince himself. He could have used other  
20 photographs. He didn't need to reproduce the  
21 creative elements of the Goldsmith photograph to  
22 have that effect.

23 JUSTICE ALITO: Well, what if Andy  
24 Warhol -- what if Prince would not have sat for  
25 a photo by somebody sent by Andy Warhol, and

1 Andy Warhol wanted to comment on Prince, and  
2 what he needed was a full-face portrait looking  
3 straight ahead, and I don't know how many of  
4 those were available, but he had to take one of  
5 those, so he chose this one?

6           Wouldn't -- wouldn't he have --  
7 wouldn't it be highly necessary for him to take  
8 one of those photos to do what he wanted to do?

9           MS. DUBIN: You might have a different  
10 argument in a case where, you know, someone  
11 has -- has passed away and there's only one  
12 version of the photograph that you could  
13 possibly use. That might be a different case,  
14 and you might be able to establish a  
15 justification for borrowing.

16           And, like I said, we don't want to  
17 foreclose additional justifications working, but  
18 this is a very different case. What happened  
19 here is that Vanity Fair, because they had a  
20 license, picked this photograph and gave it to  
21 Andy Warhol so that he could produce an image of  
22 it. And that's the opposite of having a  
23 justification for borrowing. That's I wanted to  
24 start here because it was a very good photograph  
25 of Prince, and that enables Andy Warhol's

1 duplicative methods because it works to  
2 reproduce that as a photographic negative.

3 JUSTICE ALITO: Is that dependent on  
4 the fact that he could have picked another  
5 photo? Do we know that there were other photos  
6 that met the criteria that I mentioned?

7 MS. DUBIN: There were other full --  
8 full-face photographs of Prince. I think  
9 they're in Respondents' -- in Petitioner's  
10 brief. And I also think very much in his -- in  
11 Andy Warhol's life, after the 1960s, when he was  
12 sued for copyright infringement, he often took  
13 photos of the people he was going to paint, and  
14 so that, you know, was Dolly Parton, Jane Fonda,  
15 and many other celebrities.

16 JUSTICE BARRETT: So I have a question  
17 about the derivatives. When I asked your friend  
18 on the other side about derivative use and the  
19 tension between the transformation point here,  
20 and you also pointed to the language that I  
21 asked Mr. Martinez about, the transformative in  
22 the derivative use provision, he responded to  
23 me, well, sure, but, you know, that's also  
24 subject to the fair use statute, so they have to  
25 be read, you know, in tandem.

1                   What's your response to his point?

2                   MS. DUBIN: We think they have to be  
3 read in tandem, although the word "transform" is  
4 in the provision for derivative works, and it is  
5 not in the fair use factors. It was, I think, a  
6 shorthand for purpose and character inquiry  
7 drawn from Judge Leval's articles, which all  
8 look to transformative purpose, not  
9 transformative content, which is, I take it, how  
10 they are framing the case.

11                   I do think that if you are sort of  
12 thinking about how to balance those rights and  
13 carve out space, you would never want a reading  
14 of the fair use safety valve that totally  
15 eviscerates the derivative work rights. And  
16 that's what we're particularly concerned about  
17 with Petitioner's test here, because so many  
18 derivative works can be described as conveying  
19 new meanings or messages.

20                   JUSTICE KAVANAUGH: You said in your  
21 opening that the position of Petitioner would  
22 destabilize longstanding industry practice. So  
23 why -- can you flesh that out, why you think  
24 that?

25                   MS. DUBIN: Yes, and that follows

1 right up from what I was just saying to Justice  
2 Barrett, which is across industries there's --  
3 one of the -- the greatest incentives given to  
4 original -- original artists to create  
5 particularly in spaces where the original work  
6 maybe doesn't have the same commercial viability  
7 as derivatives, the incentive is the licensing  
8 of derivatives, so whether that's photographers,  
9 books who are hoping that a movie takes their  
10 book, things of that nature.

11 All of those, I think, would be  
12 subject to a different meaning or message  
13 analysis like Petitioner proposes here. And so  
14 it's whether, I think Justice Kagan said  
15 earlier, the -- the plot is changed, the story  
16 line is altered, new characters are added. It  
17 would seem to me it's very hard to distinguish  
18 those from what's going on here, which is  
19 suggesting that a change in a particular face  
20 from vulnerable to iconic is enough to justify  
21 fair use under the first factor.

22 And, you know, Petitioner has said  
23 today that it's really more about putting points  
24 on the board. But the way that I had understood  
25 their test is that they said that that sort of

1 meaning or message renders fair use presumptive,  
2 and that's in their brief at 40. And I think  
3 that's the particular danger of an approach like  
4 that as to how much meaning or message could  
5 tilt the test and how frequent you'd be able to  
6 find a new meaning or message and how hard it  
7 would be to disprove.

8 JUSTICE JACKSON: So, if we agree with  
9 you that the first -- about the mistakes or  
10 affirm on the grounds of the first factor, why  
11 wouldn't we just vacate and send it back and let  
12 the Second Circuit go ahead and do all the other  
13 aspects of the analysis?

14 You asked us to affirm. And I'm just  
15 wondering, since it wasn't briefed, two, three,  
16 four, why -- why wouldn't we send it back?

17 MS. DUBIN: If you agree with us?

18 JUSTICE JACKSON: Yes. Are you asking  
19 to affirm?

20 MS. DUBIN: Yeah.

21 JUSTICE JACKSON: Yes. And my  
22 question is why -- why are you asking to affirm  
23 the entirety of the Second Circuit's analysis in  
24 this case as opposed to sending it back and let  
25 the rest operate? Is that not what's happening

1 here?

2 MS. DUBIN: The Second Circuit made --  
3 ruled on the second, third, and fourth  
4 factors --

5 JUSTICE JACKSON: Correct.

6 MS. DUBIN: -- and they did so  
7 correctly. So there's no reason I --

8 JUSTICE JACKSON: But that part is not  
9 briefed. I mean, we haven't gone through the  
10 second -- is that -- is the second, third, and  
11 fourth factors briefed before us now?

12 MS. DUBIN: Petitioner only sought  
13 certiorari on the first factor. So I think, if  
14 you were going to reverse or vacate, you would  
15 do so on the first factor, but I think it is  
16 well within the Court's purview to affirm based  
17 on agreeing with one of -- either how we have  
18 approached fair use under the first factor or  
19 with agreeing with the Second Circuit and then  
20 affirming on the rest of the Second Circuit.

21 JUSTICE JACKSON: But would we go  
22 through the rest of the analysis? We wouldn't  
23 talk about it, we would just affirm and move on?

24 MS. DUBIN: I think that would be what  
25 you would do if you were limiting yourself to



1 the way that Petitioner has framed this case.

2 If there were things at the point the  
3 Court wanted to clarify to help the lower courts  
4 in this difficult area on a case-by-case basis  
5 in the second through fourth -- second through  
6 factors, the Court could -- could certainly do  
7 that.

8 JUSTICE SOTOMAYOR: Can -- can I ask  
9 the question slightly differently, which is  
10 let's assume we adopt Petitioner's first  
11 argument, the argument first raised here,  
12 because he seemed to be saying in his briefs  
13 that meaning and -- that meaning trumps  
14 everything else, but, here, he says it's only  
15 one variable.

16 Let's assume that we were to find that  
17 the Second Circuit should have given more weight  
18 to meaning, and so that the first factor is at  
19 either an equipoise or slightly favors him or  
20 whatever, or favors him a lot, why would we  
21 affirm and not vacate and remand?

22 MS. DUBIN: So we think that the --  
23 the Second Circuit did consider meaning or  
24 message. We agree with Respondent. They --  
25 they do mention that they considered meaning or

1 message several times in their analysis.

2 But, if the Court found that they  
3 didn't weigh it heavily enough or you agree with  
4 the position being put forth by Petitioner  
5 today, then I think the right answer would be to  
6 vacate and have the court run the analysis with  
7 that change on Factor 1.

8 JUSTICE SOTOMAYOR: Okay.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Justice Thomas, anything further?

12 Justice Alito?

13 Justice Sotomayor, anything further?

14 Justice Kagan?

15 Justice Gorsuch?

16 JUSTICE GORSUCH: I am a little  
17 uncertain about the government's position on  
18 what it means in Factor 1. The purpose of the  
19 use could mean, as we've discussed, they are  
20 both being used for identifying an individual in  
21 a magazine, okay, or it could mean the purpose  
22 of the use could have something to do with the  
23 artistic message being conveyed.

24 I've heard bits of both flavors from  
25 -- from both sides in this case. And -- and,

1 certainly, the Second Circuit thought that the  
2 -- the latter idea, that there's some artistic  
3 message that's relevant at Step 1 is part of the  
4 analysis.

5           And what is the government's position?  
6 I -- I -- I -- I -- I could see possibly saying  
7 oh, no, it's only that it's being used for  
8 commercial purposes in a magazine. It's the  
9 same use of the image and that any differences  
10 between the images is something that we take  
11 account of maybe in -- in Factor 3, which has to  
12 do with the amount and substantiality of the  
13 portion used.

14           Can you help clarify that for me?

15           MS. DUBIN: Yes. We think it's  
16 principally the purpose and character of the  
17 use. It's a broad inquiry. And we're not  
18 trying to carve out certain justifications from  
19 not being made.

20           But what you are looking at is whether  
21 you have a purpose along the lines that is  
22 distinct, right, it's distinct from the original  
23 purpose, and that the use at issue was essential  
24 for you to copy from the underlying work to  
25 accomplish that purpose.

1                   And I think that the Court -- what the  
2 Court --

3                   JUSTICE GORSUCH: Yeah, I'm going to  
4 stop you.

5                   MS. DUBIN: Yeah.

6                   JUSTICE GORSUCH: I'm sorry. But that  
7 -- that -- that isn't helpful for me.

8                   MS. DUBIN: Okay.

9                   JUSTICE GORSUCH: Okay? And -- and  
10 maybe I'm being too dramatic in the difference  
11 between the two, but I -- I do see a way to read  
12 Number 1, the first factor, in two very  
13 different ways. The purpose of the use could be  
14 the purpose of this particular use in a  
15 commercial setting, right, I mean, because it  
16 does go on and talk about commercial versus  
17 non-commercial.

18                   And, here, we would say they are both  
19 being used in magazine covers to identify an  
20 individual. Okay? Done.

21                   Or one could say: Ah, but Andy Warhol  
22 had all sorts of different subjective meanings  
23 and a reasonable viewer could take away  
24 different meanings from them.

25                   Is that second thing relevant at all

1 at the first step in the government's view? And  
2 I'd kind of like a yes or a no if I can get one  
3 out of you.

4 MS. DUBIN: Can I say yes to part of  
5 your question and explain why? Is that okay?

6 (Laughter.)

7 JUSTICE GORSUCH: You -- you can do  
8 whatever you want. I was just hoping for a yes  
9 or no.

10 (Laughter.)

11 MS. DUBIN: Well, the -- the reason  
12 that I -- the reason that I would like to do  
13 that is because you asked about his subjective  
14 intent, but then you also asked about the  
15 reasonable perception of the audience. So I  
16 don't think the subjective intent is relevant,  
17 so that's a no to that part of the question.

18 JUSTICE GORSUCH: All right.

19 MS. DUBIN: But, to the subject, the  
20 audience's perception, I think it can be  
21 relevant and here is how. I think Campbell's  
22 Soup Cans is a very good example of this.

23 In Campbell's Soup Cans, the effect on  
24 the viewer, the effect on the audience depended  
25 on the incorporation of -- of a very well-known

1 commercial advertising logo. It wouldn't have  
2 worked if you had --

3 JUSTICE GORSUCH: Well, let me stop  
4 you there. And I'm sorry to interrupt again.  
5 But, see, Campbell's Soup seems to me an easy  
6 case because the purpose of the use for Andy  
7 Warhol was not to sell tomato soup in the  
8 supermarket. It was to induce a reaction from a  
9 viewer in a museum or in other settings.

10 And the difficulty of this case is  
11 that this -- this particular image is being used  
12 arguably maybe for the same purpose, to identify  
13 an individual in a magazine, okay, in a  
14 commercial setting.

15 So the Campbell's Soup one seems to me  
16 a very different case. This is a much harder  
17 case. So back to my question.

18 MS. DUBIN: So I completely agree with  
19 you on the purpose of the use being very  
20 different in the Campbell's Soup Can analysis,  
21 which makes it an easier case. But -- and also,  
22 I was also using the Campbell's Soup Cans as an  
23 example of why the effect on the audience would  
24 matter. And the effect on the audience in the  
25 Campbell's Soup Can case, it would matter that

1 you incorporated from a preexisting commercial  
2 advertising logo as opposed to made your own  
3 logo, made up a logo.

4           Whereas, here, if he had taken his own  
5 photograph of Prince, that wasn't necessary for  
6 the effect, which is a very different type of  
7 analysis.

8           I hope I answered Your Honor's  
9 question.

10           JUSTICE GORSUCH: You've done a great  
11 job. Thank you.

12           CHIEF JUSTICE ROBERTS: Yes, Justice  
13 Kagan.

14           JUSTICE KAGAN: Can I just ask you  
15 about that? Because you said it wasn't  
16 necessary. But I had thought that one of the  
17 differences between these two briefs was that  
18 Ms. Blatt says it has to be necessary and that  
19 the government says, well, it -- it's --  
20 necessary is -- is a significant part of the  
21 question, but, even if it's not necessary, it  
22 can satisfy Factor 1.

23           MS. DUBIN: You're exactly right.  
24 That is a difference between us. I think that  
25 -- and -- and the answer in the Campbell's Soup

1 Can analysis is probably that it's not necessary  
2 that he needed to use the Campbell's soup can,  
3 because maybe he could have used Cheerios, but  
4 that it was highly useful to use that type of  
5 advertising logo.

6 I think the best example of those --  
7 of those distinctions is in a book review, where  
8 it's not necessary to incorporate the underlying  
9 book. You can certainly imagine publishing the  
10 book review without incorporating some excerpts  
11 from the underlying work, but then you would be  
12 telling the reader things as opposed to showing  
13 them. So it makes that far more effective to  
14 the audience.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Kavanaugh?

17 JUSTICE KAVANAUGH: So the exact words  
18 we use on that question in the opinion, if we  
19 were to agree with your side, will undoubtedly  
20 be the subject of a lot of debate, so I want to  
21 get it exactly right.

22 So what are you -- what are you  
23 advocating? I've heard you say necessary,  
24 essential, or highly useful. Is that the  
25 formulation?



1 MS. DUBIN: We would say that's a  
2 great formulation or you could say necessary or  
3 at least useful or you could say just essential,  
4 and I think that covers it. But I think the  
5 best way to explain what the --

6 JUSTICE KAVANAUGH: Okay. Those are  
7 going to be in --

8 (Laughter.)

9 JUSTICE KAVANAUGH: Those are very  
10 different in -- you know, in some courts of  
11 appeals.

12 MS. DUBIN: So the reason --

13 JUSTICE KAVANAUGH: So what's your --  
14 what's your best, like you -- your best answer  
15 as to what the best formulation is from the  
16 perspective of the United States for the opinion  
17 --

18 MS. DUBIN: If you're going --

19 JUSTICE KAVANAUGH: -- if your side  
20 wins?

21 MS. DUBIN: If you're going for the  
22 straightforward clarity of a one-word answer, I  
23 would say essential. The reason we use --

24 JUSTICE KAVANAUGH: No, you can use  
25 multiple words. What's the formulation?

1 (Laughter.)

2 MS. DUBIN: The reason we said  
3 necessary or at least useful and the reason we  
4 used that formulation was because, in a lot of  
5 cases and a lot of the most straightforward fair  
6 cases, it will be necessary. And I think that's  
7 why Respondent has used that word.

8 We think that there are cases in which  
9 it is essential or highly useful and those  
10 should also count.

11 JUSTICE KAVANAUGH: So -- so --

12 JUSTICE KAGAN: I always thought  
13 necessary and essential were synonyms. So, if  
14 you say necessary and you say essential, that to  
15 me means the same thing, which is something  
16 different from useful or even highly useful.

17 MS. DUBIN: We think that highly  
18 useful works too. And -- and, like I said, I  
19 think the reason that a highly useful test would  
20 work is in the book review context that I gave  
21 Your Honor earlier, which it's not necessary,  
22 and I think in a lot of examples that's the  
23 case.

24 I think using the word "necessary"  
25 does lead to more straightforward results in the

1 mine-run of cases.

2 JUSTICE KAVANAUGH: Okay. I'm going  
3 to really pin you down again on that.

4 MS. DUBIN: Yes.

5 JUSTICE KAVANAUGH: Necessary or  
6 highly useful or necessary or -- or at least  
7 useful?

8 MS. DUBIN: We would say necessary or  
9 at least useful. And the important thing is  
10 that it's an affirmative defense. So the  
11 defendant in the case is giving a justification  
12 for why their borrowing is necessary.

13 What really separates us from  
14 Petitioner is not necessary versus useful or  
15 essential. It's that we think you need that  
16 justification for borrowing, right? We think  
17 you need some reason why it was essential for  
18 you to incorporate the preexisting work.

19 I think the best formulation given  
20 your considerations here is necessary or at  
21 least useful. That's how I would phrase it for  
22 your opinion.

23 JUSTICE KAVANAUGH: Very helpful,  
24 thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: So you would leave  
3 out essential?

4 (Laughter.)

5 MS. DUBIN: I was deferring to Justice  
6 Kagan who sees necessary and essential as  
7 synonyms but I think that essential would work  
8 as well.

9 JUSTICE BARRETT: Okay, thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Jackson?

12 JUSTICE JACKSON: And can I just  
13 clarify, essential to incorporate the existing  
14 work in order to what? In order to achieve a  
15 purpose that's different than I just have a  
16 better idea, right, in order to achieve a  
17 purpose that transcends a changed message or  
18 meaning, right?

19 MS. DUBIN: That's exactly right. In  
20 order to achieve a distinct purpose.

21 JUSTICE JACKSON: A distinct purpose.  
22 Thank you.

23 MS. DUBIN: Yes. That's exactly  
24 right.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 A rebuttal, Mr. Martinez?

3 REBUTTAL ARGUMENT OF ROMAN MARTINEZ

4 ON BEHALF OF THE PETITIONER

5 MR. MARTINEZ: Thank you, Your Honor.

6 I want to address three things,  
7 meaning or message/purpose, indispensability,  
8 usefulness, necessity and then the consequences  
9 of this case.

10 With respect to meaning or message, I  
11 understood my friend Ms. Blatt to concede, she  
12 said it was absolutely true that you could  
13 consider meaning or message at Factor 1 as part  
14 of the -- the purpose inquiry. She said that.

15 I took that to be a very big  
16 difference from what she said in her brief. In  
17 page 2 she says it would be a fool's errand to  
18 conduct that analysis. And, on page 22 of her  
19 brief she says that courts are just incapable of  
20 doing this.

21 I think that's a very significant  
22 concession and we agree with that concession.  
23 We think that it requires a reversal in this  
24 case or at least a vacatur of the Second  
25 Circuit's ruling because on pages 22 to 23 of

1 the Second Circuit's analysis, I think they were  
2 unambiguously saying that courts cannot try to  
3 do this meaning or message inquiry and then they  
4 go on to say, instead, you need to look at the  
5 degree of visual similarity.

6 Now, I'm not sure what the  
7 government's position exactly is, whether  
8 they've made the same concession or not. As I  
9 understood the government's position with  
10 respect to purpose, they continue to hold the  
11 line that the level of generality has to be,  
12 these are two Portraits of Prince, therefore,  
13 they are the same purpose, which I understand to  
14 mean that if you have two different Portraits of  
15 Prince conveying very different meaning or  
16 messages, it doesn't matter.

17 In other words, they would still  
18 excommunicate meaning or message from the Factor  
19 1 analysis. We don't think that's right. We  
20 don't think it's consistent with the text.  
21 Campbell, Google, all the things that we've  
22 already talked about.

23 Secondly, with respect to  
24 indispensability, I understood my friend, Ms.  
25 Blatt, again, to concede that the position she

1 took in her brief is -- is not the right one, or  
2 at least to say she's fine with the government's  
3 much different and lower standard. She went  
4 from indispensability in the brief to usefulness  
5 here at oral argument.

6 With respect to whether usefulness is  
7 required, a couple of things. First of all,  
8 Goldsmith herself conceded usefulness. And if  
9 you just look at page 76A of the petition  
10 appendix, the district court quoted her as  
11 conceding usefulness and even perhaps as  
12 conceding necessity.

13 Secondly, usefulness, at least in the  
14 sense that it's been discussed here today, has  
15 not been briefed, has not been argued at any  
16 stage in the case. We heard a long colloquy on  
17 exactly what the varying different standards  
18 mean.

19 If you thought that that was some sort  
20 of requirement, at a minimum we would need to  
21 have a fair opportunity to satisfy that  
22 requirement, once you tell us what the law is.

23 As to what the law should be with  
24 respect to usefulness, we think the real way --  
25 the best way to look at this is it's a question

1 of justification. And the way you should get  
2 the answer to what kind of justification is  
3 required, if you look at Judge Leval's article  
4 at page 1111, he talks about the justification  
5 for the taking being the addition of new meaning  
6 or message. We think that's what Campbell had  
7 in mind.

8           Essentially you're justified in -- in  
9 borrowing, at least you under Factor 1 to some  
10 extent, if you are -- if -- if you're doing  
11 something more than just avoiding the drudgery  
12 of coming up with something new on your own.

13           And, finally, with respect to  
14 usefulness, just on the facts, we absolutely  
15 would satisfy this, not just because she  
16 conceded it, but because of course it's useful  
17 for -- for an artist -- for an artist to use an  
18 artist reference. The whole purpose of an  
19 artist reference is to make use of that because  
20 it's useful in creating the work of art, the  
21 second work of art. So of course it was -- it  
22 was useful.

23           Goldsmith herself concedes in her  
24 brief that we needed to use a picture of Prince.  
25 And I think both the government and Goldsmith



1 said that, hey, they could have used any old  
2 picture of Prince, and the examples they give is  
3 to point to a bunch of other copyrighted  
4 pictures of Prince that appeared in our brief at  
5 pages 16 to 17.

6 But it can't be the case that their  
7 answer is that we should have borrowed from  
8 someone else and then we'd be having the same  
9 case with a different photographer. I think the  
10 reality, Justice Alito, to your point is any  
11 picture of Prince that was out there in 1984  
12 when Warhol was creating this work, there's  
13 every reason to believe it would have been  
14 copyrighted.

15 The copyright attaches in the  
16 photograph at the moment the photograph is  
17 taken. There's no reason to believe that there  
18 would have been any sort of non-copyrighted  
19 option.

20 Finally, Your Honors, consequences.  
21 On consequences, it's really important to  
22 understand that the creation of the Warhol works  
23 is directly at play in this case. If you look  
24 at the request for relief, both sides requested  
25 essentially an adjudication of who owns the

1 copyright. That turns on whether it was -- the  
2 -- whether the -- Warhol acted lawfully or  
3 unlawfully at the moment of creation.

4 We sought a declaratory judgment, we  
5 sought summary judgment as to all 16 works, not  
6 just the two works, orange and purple, that are  
7 at issue here. We sought a declaratory judgment  
8 as to all 16 works. We won that declaratory  
9 judgment. They appealed and they got that  
10 victory overturned.

11 Ms. Blatt says that she's -- in some  
12 other segments of the case, maybe it was at oral  
13 argument, maybe it was at briefing, she sort of  
14 like changed the relief she was seeking. It  
15 doesn't matter. We sought a declaratory  
16 judgment on all 16 works. We won that. That's  
17 in play. And the creation matters.

18 I think the other reason the creation  
19 matters, Justice Barrett, to your question, is  
20 because it directly -- it directly governs the  
21 display question when you're talking about  
22 museums.

23 The reason a museum can display a work  
24 under -- under section 109 is because it was  
25 lawfully made. So the question is at the moment

1 it was made, was it lawful?

2 The copyright question of who owns the  
3 copyrights here turns on that. If the -- if  
4 Warhol infringed the copyright, it wasn't  
5 lawfully made, Your Honors, this case has  
6 meanings -- has implications beyond just Warhol.  
7 It affects all artists and especially  
8 contemporary artists. We ask you to reverse.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel. The case is submitted.

11 (Whereupon, at 11:45 a.m., the case  
12 was submitted.)

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## Official - Subject to Final Review

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