No. 21-869

In The
Supreme Court of the United States

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

Petitioner,

v.

LYNN GOLDSMITH AND LYNN GOLDSMITH, LTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF ART LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici are law professors with an interest in art law, the First Amendment, or copyright law.[1] They have an interest in the proper interpretation and application of the First Amendment and copyright law to art. Because the Second Circuit opinion threatens to chill the creation of new works of art and conflicts with the law of this Court and other circuits, amici believe this Court should reverse the Second Circuit and hold that Warhol's art is legally protected. A list of amici appears in Appendix A.

SUMMARY OF THE ARGUMENT

By making its own views on the merits of Andy Warhol's artistic work determinative and ignoring the meaning and the message his art may have for the artistic community, the Second Circuit decision runs afoul of the First Amendment. Courts should not be gatekeepers deciding what qualifies as art. This Court's First Amendment precedent protects speech that a reasonable observer could perceive as communicating

[1] Pursuant to Supreme Court Rule 37, counsel for amici represent that this brief was authored solely by amici and their counsel. No part of this brief was authored by the parties or their counsel, and no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief. Affiliations are provided for identification purposes; this brief does not purport to present the institutional views, if any, of their employers. Counsel for petitioner and respondent filed blanket consent to the filing of all amicus briefs.

a message different from what the copyright owner intended, whether or not the court itself perceives or agrees with that message.

ARGUMENT

I. THE FAIR USE DOCTRINE IS A FIRST AMENDMENT SAFEGUARD FOR ALL WORKS THAT USE PREEXISTING EXPRESSION

Copyright law restricts speech and presents a clear tension with the First Amendment. Copyright law is compatible with the First Amendment only because of two "built-in First Amendment accommodations"—the idea/expression dichotomy (which is not at issue here) and fair use. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

Fair use protects the First Amendment rights of both speakers and listeners by ensuring that those whose speech involves dialogue with preexisting copyrighted works are not prevented from sharing that speech with the world. *See Golan v. Holder*, 565 U.S. 302, 328–29 (2012) (the "First Amendment protections" embodied in fair use require courts to afford "considerable latitude for scholarship and comment" (citations omitted)). As Judge Leval explained, "fair use serves as the First Amendment's agent within the framework of copyright." Pierre N. Leval, *Campbell As Fair Use Blueprint?*, 90 Wash. L. Rev. 597, 614 (2015). It is only because of fair use and the idea/expression

dichotomy—the two "speech-protective purposes and safeguards embraced by copyright law"—that copyright law has avoided the "heightened review" often merited when Congress limits the freedom of speech. *Golan*, 565 U.S. at 329 (citation omitted).

Notably, fair use "allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself[.]" *Eldred*, 537 U.S. at 219. Interpreting fair use to flatly exclude any work in which the preexisting work "remains . . . recognizable," as the panel did here (JA624), grants copyright owners the very monopoly on certain forms of expression that fair use was intended to prevent. This not only undermines copyright law, it conflicts with the First Amendment.

II. THE PANEL OPINION IS INCONSISTENT WITH THE FIRST AMENDMENT BECAUSE IT IGNORES THE MEANING AND MESSAGE OF WARHOL'S ART

A. The Second Circuit's Visual Similarity Test Ignores A Work's Meaning And Message

This Court has cautioned that courts should not style themselves as art critics passing on the worth and meaning of artistic works. As Justice Holmes explained:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and

> most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. . . . It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time.

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903). Justice Scalia applied the same principle in the First Amendment context, writing, "For the law courts to decide 'What is Beauty' is a novelty even by today's standards." *Pope v. Illinois*, 481 U.S. 497, 505 (1987) (Scalia, J., concurring).

In its attempt to fashion a test that avoids that trap, the Second Circuit instead fell directly into it. Immediately after warning that a judge "should not assume the role of art critic," JA621, the court went on to do exactly that, basing its own analysis solely on its "viewing the works side-by-side." *Id.* at 622. Indeed, based on this decision, a court deciding a fair use case must, on its own behalf, with no context, visually analyze the works at issue to make a subjective aesthetic judgment: whether the court perceives that the second work evidences "the imposition of another artist's style on the primary work" or whether the second work "recognizably deriv[es]" from the first. *Id.* at 621–22.

The Second Circuit's new standard focuses solely on the aesthetic and purely visual similarity between the two works at issue and dismisses the possibility of any meaning or message that a judge does not perceive on the surface.

That is not the law. *Campbell* establishes that courts must view a work as transformative if it adds a new "meaning or message," even if they themselves don't 'get' the message, so long as an audience may reasonably perceive it. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579, 582 (1994) (the question is whether transformative meaning "may reasonably be perceived," not whether the new expression "is in good taste or bad").

Instead of following *Campbell*, the Second Circuit established a rule that when two works are facially similar enough, they are never transformative. *See* JA621–22 ("[T]he secondary work's transformative purpose and character must, at a bare minimum, comprise something more than the imposition of another artist's style on the primary work such that the secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material."). That is, the Second Circuit assumed as a matter of law that visual works that are facially similar can *never* differ in their purpose and can *never* convey a different expression, meaning, or message. That approach contradicts this Court's decision last Term in *Google v. Oracle* as well as the weight of authority in other circuits. *See Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183, 1203 (2021) (an artist's use of an existing work "might . . . fall within the scope of fair use even though it precisely replicate[d]" a copyrighted work); *Campbell*, 510 U.S. at 580 (the defendant's "use of some elements of a prior author's composition to create a new one" may be transformative); *Seltzer v. Green*

Day, Inc., 725 F.3d 1170, 1177 (9th Cir. 2013) (the defendant's work is "typically viewed as transformative as long as new expressive content or message is apparent . . . even where . . . the allegedly infringing work makes few physical changes to the original. . . ."); *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 939 (9th Cir. 2002) (the inclusion of lightly edited copyrighted clip in a video montage was transformative even though the clip remained recognizable).

To make matters worse, the Second Circuit disavowed any inquiry into the meaning of a visual work, stating that courts should not "seek to ascertain the . . . meaning of the works at issue." JA621. But to ignore a work's meaning and message is to ignore the essence of its expressive value.

B. Focusing Only On A Work's Visual Similarity To Another Work Is Inconsistent With The First Amendment

That rule is inconsistent with the First Amendment. The First Amendment recognizes that communication can take many different forms and requires courts to consider the variety of meanings that can reasonably be attached to a particular work by different observers. What is to one person an "unseemly expletive" is to another a powerful message; "one man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 23, 25–26 (1971) (jacket reading "Fuck the Draft" was protected speech because the Court looked beyond the "cognitive content" of speech to protect the

"emotive function" beneath the surface "which, practically speaking, may often be the more important element of the overall message sought to be communicated"); *see also Hannegan v. Esquire, Inc*., 327 U.S. 146, 157–58 (1946) ("What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. . . . But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system."). Indeed, the very same word can convey radically different meanings based on who uses it and in what context. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (trademark office violated the First Amendment when it denied registration of the name of a rock band chosen by a member of a minority group to "reclaim" a racial slur directed at that group); *see also Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) (the Lanham Act's bar on registration of "immoral[] or scandalous" trademarks violates the First Amendment).

This Court has expressly recognized that the First Amendment does not require "a narrow, succinctly articulable message." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (parade was constitutionally protected speech even absent a "particularized" message). Otherwise, the First Amendment would "never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Id.*; *see also Cohen*, 403 U.S. at 26 (linguistic speech "conveys not only ideas capable of relatively

precise, detached explication, but otherwise inexpressible emotions as well").

Nor must a speaker's message be facially obvious to a judge for her speech to be constitutionally protected. As the Court warned in *Pope v. Illinois*, the First Amendment protects a work even if its meaning is appreciated by only a "minority of a population." 481 U.S. at 501 n.3. When confronted with a work of art, courts must therefore consider all of the work's potential audiences and the messages those audiences may reasonably perceive, or risk running afoul of the First Amendment. *See Cohen*, 403 U.S. at 25 ("[W]e think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.").

In such circumstances, the First Amendment's answer to the difficulty of discerning the meaning or message of speech is to err on the side of permitting speech where it would be permissible if considered from the perspective of *some* relevant observer. The Court made this clear in *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009). In *Summum*, the Court analyzed whether the First Amendment required a city to allow a private group to place a donated monument in a park in which other donated monuments were already present. The Court held that the city was not required to accept the monument, reasoning that the placement of a monument is a form of government speech. *Id.* at 470–71. In arguing otherwise, the would-be monument donor warned that the government speech doctrine

could be used as a "subterfuge for favoring certain private speakers over others based on viewpoint," and suggested that a government entity accepting a privately donated monument should be required to adopt a formal resolution publicly embracing the monument's "message." *Id.* at 473.

The Court disagreed. The Court explained that the donor's argument assumed "that a monument can convey only one 'message'—which is, presumably, the message intended by the donor—and that, if a government entity that accepts a monument for placement on its property does not formally embrace *that* message, then the government has not engaged in expressive conduct." *Id.* at 474. But that argument "fundamentally misunderstands the way monuments convey meaning." *Id.* Rather than conveying a simple message, "the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways." *Id.* Accordingly, "it frequently is not possible to identify a single 'message' that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor." *Id.* at 476. Thus, the Court recognized, "text-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable." *Id.* at 475.

So too with art. Consider Marcel Duchamp's *Fountain*. Is *Fountain* one of the most important works of

twentieth century art, or is it just a urinal? Different people would likely answer that question differently. But courts can neither decide who is right nor ignore the question. The First Amendment requires courts to consider the wide variety of possible meanings conveyed by a work of art. And it accordingly protects Duchamp's message even if any individual judge looks at *Fountain* and thinks "that's not art."

The Second Circuit opinion does the opposite. Rather than take into account the meaning or message of Warhol's art to different audiences, the opinion erases its potential meaning from the fair use analysis entirely. The Second Circuit held that a work of visual art that "recognizably deriv[es] from, and retain[s] the essential elements of," a pre-existing work can *never* be transformative. JA622. It did not take into account whether Warhol's work has a different potential meaning or message than the photograph on which it was based. Under the Second Circuit's test, that question is irrelevant if the new work is too similar in appearance to the original work. Ignoring the transformative message of a work of art violates the fair use doctrine and the First Amendment.

C. A Test Based Only On Visual Similarity Will Chill The Creation Of New Art

The Second Circuit's error in disregarding the Supreme Court's guidance with respect to both fair use and the First Amendment is particularly egregious in this case because of Warhol's recognized influence on

modern art and on a whole generation of artists working today who will be chilled were this ruling to stand. The silkscreen prints by Andy Warhol are some of the most widely recognized and iconic works of the twentieth century, taught to every student of modern art. *See* 1 H.H. Arnason & Elizabeth C. Mansfield, *History of Modern Art* 477 (7th ed. 2013) (introductory textbook on modern art explaining how Warhol's silkscreens "examin[e] . . . contemporary American folk heroes and glamourous movie stars"); *see also* The Metropolitan Museum of Art, *Andy Warhol, Marilyn*, in *The Metropolitan Museum of Art Guide* 233 (2012) ("Warhol's embrace of commercial methods transformed Marilyn's image" by recasting it as a consumer product).

In refusing to consider that Warhol's work might convey a new or different message, the Second Circuit ignored the very expression that makes Warhol a pivotal figure in twentieth-century art. Courts cannot protect the First Amendment value of a Warhol work, or many other works of art, by looking only at their surfaces and disregarding underlying meaning. Scholars can and do differ over whether we should view art from the artist's perspective or the plaintiff's perspective or the perspective of a reasonable audience member or the perspective of a viewer with some familiarity with art. *See* Rebecca Tushnet*, Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 Law & Lit. 20 (2013); Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. Rev. 559 (2016); Jeanne C. Fromer & Mark A. Lemley, *The Audience in Intellectual Property Infringement*, 112 Mich. L. Rev. 1251 (2014). But

virtually all of those perspectives see something new and important in Warhol's work.

To be clear, our point is not that the Court should protect Warhol's works because they are famous. Quite the contrary. Fair use is supposed to "guarantee [] breathing space within the confines of copyright[.]" *Campbell*, 510 U.S. at 579. Our point is that if fair use does not even protect these familiar works despite volumes and indeed entire careers devoted to explicating their meaning, it is difficult to see how there can be any breathing room for new artists or forms of art that challenge a judge's notions of what counts as art.

* * *

By insisting that courts evaluate art only from the perspective of someone who sees only what is on the surface, the Second Circuit opinion not only excludes a wide swath of transformative works from the protection of fair use, it also contravenes this Court's guidance that speech can convey a wide variety of messages, even if those messages are not facially obvious to a court. The Second Circuit's failure to consider the variety of meanings that can be attached to a particular work by different observers is therefore inconsistent with the Court's speech jurisprudence. *Summum* held that courts could not properly take the monument at issue in that case only at face value. *Tam* held the same for the trademark at issue in that case, and *Hurley* for the parade at issue in that case. So too here. This Court should not take the painting at issue in this case only at face value, ignoring the meaning

Warhol's transformation conveys to different audiences—customers, critics, and the public at large. Indeed, the Second Circuit stands alone among its sister circuits in doing so. *Compare Seltzer*, 725 F.3d at 1177 (holding that the defendant's use of a copyrighted work with "few physical changes to the original" is transformative "as long as new expressive content or message is apparent," even if the meaning of that message is "debatable"); *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 21–22 (1st Cir. 2000) (reproduction of salacious photographs deemed transformative where the photographs "were shown not just to titillate, but also to inform").

"First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed." *Yankee Pub. Inc. v. News Am. Pub. Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992) (quoted in *Campbell*, 510 U.S. at 579). And likewise, First Amendment protections do not apply only to artists whose message appears plainly on the face of their artwork.

CONCLUSION

This Court should reverse the Second Circuit and hold that Andy Warhol's art is not illegal.

Respectfully submitted,

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