

No. 21-869

IN THE
Supreme Court of the United States

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

—v.—

LYNN GOLDSMITH and LYNN GOLDSMITH, LTD.,
Respondents.

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

**BRIEF OF ARTISTS AS *AMICI CURIAE*
SUPPORTING PETITIONER**

KELSEY J. CURTIS
WILSON SONSINI
GOODRICH & ROSATI, P.C.
1700 K Street NW, Fifth Floor
Washington, DC 20006
(202) 973-8800
kcurtis@wsgr.com

BRIAN M. WILLEN
Counsel of Record
JASON MOLLICK
NATHALIE M. GORMAN
WILSON SONSINI
GOODRICH & ROSATI, P.C.
1301 Avenue of the Americas,
40th Floor
New York, New York 10019
(212) 999-5800
bwillen@wsgr.com
jmollick@wsgr.com
ngorman@wsgr.com

Attorneys for Amici Curiae

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INTEREST OF THE AMICI

Amici are working artists, art teachers, and curators who use existing material to create new works of art with new meanings and messages. They seek to provide their perspective on the harmful impact the Second Circuit's test—or any fair use test focused primarily on the visual similarity between different works—would have on artists in the United States and the art that they create.¹

Amicus Darren Bader is an artist living and working in New York City. His mix of Pop and Concept Art focuses on found object sculpture and absurdist proposals. His work features in the collections of the Dallas Museum of Art, Walker Art Center, and the Whitney Museum of American Art, among others.

Amicus Barbara Kruger is an artist whose multimedia and collage works have earned international acclaim. Her works feature in the collections of The Los Angeles County Museum of Art, The National Gallery of Art, the Art Institute of Chicago, and the Museum of Contemporary Art, Los Angeles, among others. She has been awarded the Golden Lion at the Venice Biennale and is a Distinguished Professor of New Genres at the UCLA School of the Arts and Architecture.

Amicus Leslie Hewitt is an artist and Associate Professor at the Cooper Union for the Advancement of Science and Art. Solo presentations of her work

¹ The undersigned counsel for amici authored this brief on a pro bono basis. No monetary contribution was made to fund the preparation or submission of the brief, with the exception of filing costs which were paid by counsel. All parties have consented to the filing of amici curiae briefs in this case.

have been held at the Studio Museum in Harlem and the Institute of Contemporary Art, Boston, and elsewhere. Her work features in the collections of the Museum of Modern Art, the Institute of Contemporary Art, Boston, The Walker Art Center, The Menil Collection, and the Kemper Museum of Art, among others.

Amicus Liz Linden is an artist whose work often concerns the relationship between text and image in popular culture. Her work has been exhibited in the Whitney Museum of American Art in New York, the Hammer Museum in Los Angeles, Lunds Kunsthall in Sweden, the Museum of Contemporary Art Australia in Sydney, and elsewhere. Her critical art writing has appeared in various publications including *Art Journal* and *Camera Obscura*. She currently teaches contemporary art theory and practice at San José State University.

Amicus Jill Magid is an artist, writer, filmmaker, and professor. She has had solo exhibitions at institutions around the world including Dia Bridgehampton, Museo Universitario Arte Contemporáneo (MUAC), Mexico City, Tate Modern, London, and the Whitney Museum of American Art, New York. Her feature film, *The Proposal*, premiered at Tribeca Film Festival in 2018 and was released in theaters across the U.S. Magid is the recipient of the 2017 Calder Prize.

Amicus Michael Mandiberg is an interdisciplinary artist who created *Print Wikipedia*, edited *The Social Media Reader* (NYU Press), founded the New York Arts Practicum, and co-founded Art+Feminism. His work has been exhibited at Los Angeles County Museum of Art, the Whitney Museum of American Art, The New Museum, and Musée d'Art Moderne de

la Ville de Paris, among others. Mandiberg is Professor of Media Culture at the College of Staten Island, CUNY and Doctoral Faculty at The Graduate Center, CUNY.

Amicus Sara Greenberger Rafferty is a multidisciplinary visual artist and an Associate Professor and the Director of Graduate Studies in Photography at Pratt Institute. She has also been on faculty at Columbia University, RISD, and Parsons, and elsewhere. Her works feature in the collections of the Museum of Modern Art, the Whitney Museum of American Art, the Carnegie Museum of Art, the Solomon R. Guggenheim Museum, among others.

Amicus Alfred Steiner is an artist and lawyer who often creates works for the express purpose of posing novel aesthetic and legal questions, for example. His works have been presented at institutions such as Artists Space and The Drawing Center, as well as in commercial galleries in the United States and abroad, and have been discussed in *The New Yorker*, *The New York Times*, *The Boston Globe*, and *The Guardian*.

Amicus Robert Storr is an artist, critic, curator, and professor. He is formerly the senior curator of paintings and sculptures at the Museum of Modern Art in New York, and the former visual arts director of the Venice Biennale. He served as the Stavros Niarchos Foundation Dean of the Yale School of Art, and has taught at Harvard University and New York University. He is a recipient of the medal of Chevalier des Arts et des Lettres and an Officer of that Order, one of the French Government's highest awards for contributions to culture.

Amicus Hank Willis Thomas is a conceptual artist working primarily with themes related to perspective, identity, commodity, media, and popular

culture. His work has been exhibited in the International Center of Photography, NY; the Guggenheim Museum Bilbao, Spain; Hong Kong Arts Centre, Hong Kong, and Zeitz Museum of Contemporary Art Africa, Capetown, South Africa, among others. Thomas's work features in the collections of the Museum of Modern Art, Solomon R. Guggenheim Museum, the Whitney Museum of American Art, the Metropolitan Museum of Art, and the National Gallery of Art, Washington, D.C., among others.

As artists whose pieces often integrate preexisting works, as well as teachers and mentors to young artists, amici have a strong interest in ensuring the proper application of copyright law, including the law of fair use, to ensure that artists are permitted to build and comment on existing images and art as they create new works. Amici fear that the Court of Appeals' opinion threatens the ability of artists to create new works that incorporate existing material, and fails to protect artists from financially crippling copyright litigation. For these reasons, amici urge this Court to reverse the Second Circuit's ruling and clarify that in the visual art world, a work that incorporates existing material to further a different meaning or message constitutes a transformative work, weighing in favor of fair use.

SUMMARY OF THE ARGUMENT

Copyright protections are designed to provide incentives for creators to produce a flourishing and expressive culture. But copyright laws also necessarily restrict speech and have the potential to limit free expression. Enter "fair use," which aims to prevent a "rigid application" of copyright law that

“would stifle the very creativity which that law is designed to foster.” *Stewart v. Abend*, 495 U.S. 207, 236 (1990). Fair use is an integral protection for working artists who seek to use, incorporate, and comment upon existing materials—including other works of art, advertising imagery, historic or political photographs, and other elements of visual culture—to create new works of art. This case involves such a work: an Andy Warhol print depicting Prince in Warhol’s recognizable artistic technique. The Second Circuit found that Warhol’s print was not “transformative” because, in the court’s view, the work “remains both recognizably deriving from, and retaining the essential elements of, its source material”—a photograph of Prince taken by Respondent Lynn Goldsmith. Pet. App. at 24a.

The Court of Appeals’ surprising and restrictive approach to fair use thwarts the Constitution’s and copyright law’s goal of promoting creativity, and is anathema to centuries of established artistic practice of expressing new meaning through the interrogation and integration of pre-existing works. It renders legally perilous the long-established practice of copying, quotation, variation, and appropriation in art. These approaches have been a cornerstone of art for centuries, and have become a core component of contemporary artistic practice, including that of the amici. Far from lacking creativity, incorporating or appropriating existing source material—sometimes with little ostensible change in outward form—is in fact a wellspring of precisely the type of artistic expression that copyright law is intended to promote. Simply put, whether a work of art is visually similar to an existing work cannot be the *sine qua non* of whether that work is “transformative” under the first fair use factor—whether it alters the “first with new

expression, meaning, or message.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

Beyond being at odds with artistic tradition and practice, the Second Circuit’s visual similarity test for determining transformativeness under the first fair use factor creates tremendous risk for practicing artists who use, build on, or incorporate existing material into their works. Such a test also poses a substantial risk to artists who desire to engage with historic and political images, particularly since so many of those images are owned by a few conglomerates. The expanded risk of legal liability—or the threat of new lawsuits—would deter such artists from creating the works they wish to make, out of worry that those works may not appear visibly different enough to be considered transformative by certain judges. This is particularly dangerous and worrisome to artists who do not have the financial resources to fight copyright litigation—which, practically speaking, means that this decision poses a threat to the vast majority of working artists in the United States. For fear of litigation, artists, including many who already live and work on the margins, would self-censor, curtailing their creativity to steer clear of being hauled into court and potentially bankrupted by litigation that may prove their work was protected under fair use all along.

To ensure that the Copyright Act promotes rather than chills artistic expression, amici urge the Court to reverse the Second Circuit’s ruling and clarify that artists engage in transformative fair use when they utilize existing material to further a different meaning or message.

ARGUMENT

I. Appropriation, Quotation, and Copying Have Played Key Roles in Artistic Practice Throughout History

Whether characterized as “copying,” “appropriation,” “imitation,” or “quotation,” artists’ incorporation of and variations on other artists’ work is, and has been for centuries, a key component of artistic practice and self-expression. See, e.g., Tori Campbell, *Appropriation! When Art (very closely) Inspires Other Art*, Artland, <https://magazine.artland.com/appropriation-when-art-very-closely-inspires-other-art>. For artists, to use another’s work is not to plagiarize it, “[b]ut to imbibe it, reconstitute it, and breathe a fresh life into it That’s how [artists] learn and grow.” Nick Bantock, *The Trickster’s Hat: A Mischievous Apprenticeship in Creativity*, 124 (2014). Indeed for many artists throughout history, copying has been a cornerstone of making art. It remains integral to the practices of many contemporary artists, both as a useful aesthetic tool and as a component of a dialogue amongst artists about what art means and how it operates. See Ian Ballon, *Art Law – Cases and Controversies*, § 5.01 (“Appropriation is a ‘strategy that has been used by artists for millenia...”).

Copying was a key component of renaissance art in Europe, where master artists headed workshops of apprentices who created copies and variations on the supervising artist’s works—hence the profusion of paintings from this period attributed to the “School of Leonardo” or the “School of Michelangelo.” Many artists who eventually became famous in their own right developed their approaches first by copying the works of earlier

masters. For example, the painters Perugino, Ghirlandaio and Leonardo da Vinci were all trained at the studio of Andrea del Verocchio. *The Making of an Artists: Training and Practice*, Italian Renaissance Learning Resources, <http://www.italianrenaissanceresources.com/units/unit-3/essays/training-and-practice/>. In turn, Perugino likely later trained Raphael (<https://www.britannica.com/biography/Perugino>); Michelangelo trained in part at Ghirlandaio's studio. *Domenico Ghirlandaio*, National Gallery of Art, <https://www.nga.gov/collection/artist-info.1336.html>. This workshop system spawned entire lineages of artists.

Various forms of copying have played a similar role in the artistic traditions of many non-Western countries, from “the reverent *linmo* practice in traditional Chinese painting to the ‘mimesis ... of ancestral designs as a form of sympathetic magic’ in the work of Australian Aboriginal artists.” Liz Linden, *Alone in the Crowd: Appropriated Text and Subjectivity in the Work of Rirkrit Tiravanija* (2016) (internal citations omitted); see also *Copying and Imitation in the Arts of China on View at the Princeton University Art Museum*, <https://pr.princeton.edu/news/01/q1/0220-artchina.htm> (explaining that Chinese artistic practice has long perceived copying not merely as a way to replicate great art of the past, but as a mechanism whereby artists can develop a “personal style ... [by] prob[ing] the essential qualities of a past master’s style”); Low Sze Wee, *Copying is a virtue in Chinese ink painting*, ThinkChina (Nov. 26, 2021), <https://www.thinkchina.sg/copying-virtue-chinese-ink-painting> (“[A]s illustrated by the example of ink painting, techniques and styles are understood,

practised and transmitted from one generation to the next by copying. Hence, there is value in allowing or even encouraging artists to copy the works of others.”). Thus, regardless of time or place, copying has served and still serves a vital function far beyond mere reproduction: it is a means by which artists learn through their art and evolve their own artistic practices.

But copying is not merely a historical practice—to the contrary, it has been and remains a key vehicle for artistic expression. For example, Manet’s “Le Déjeuner sur l’herbe”—one of the most famous paintings of the Western canon—imitated key elements of “The Judgment of Paris,” an engraving by Marcantonio Raimondi.



Raimondi, *The Judgment of Paris*

Raimondi’s engraving, in turn, drew from two earlier works: a design by Raphael for his “Judgment of Paris” and Titian’s “The Pastoral Concert.” See *Le Déjeuner sur l’herbe*, Musée Orsay, <https://www.musee-orsay.fr/en/node/187364>.



Raphael, *Judgment of Paris*

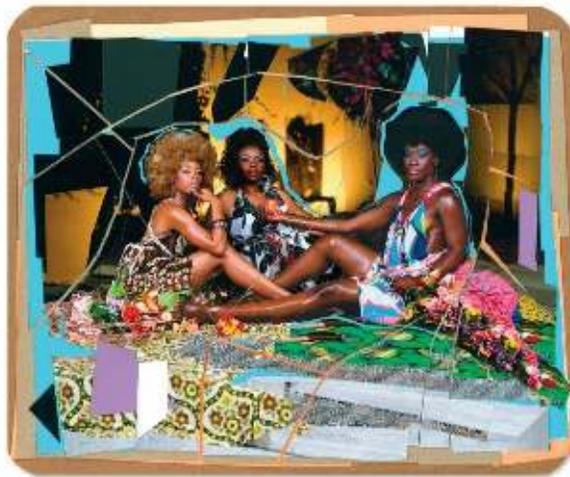


Titian, *Pastoral Concert*

Generations of artists have since created their own versions of Manet's copied work. Monet and Cézanne both created paintings titled: "Le Déjeuner sur l'herbe" that depict picnics in a forest, just like Manet. Picasso went even further, creating *over 40* variations of the work. Museu Picasso, *The variations of "Le déjeuner sur l'herbe" by Picasso, an in-depth look at the work of Manet* (Dec. 9, 2018), <https://www.blogmuseupicassobcn.org/2018/09/variation-s-dejeuner-lherbe-picasso-depth-look-manet/?lang=en>. Modern reworkings of "Le Déjeuner" were especially important for African American artists, including Ayana V. Jackson, Robert Colescott, Mickalene Thomas, and Faith Ringgold who created their own versions of the painting that substituted Black models, thereby asserting their place in European art history while critiquing its racial assumptions and, in certain instances, transposing the original image of figures on the grass into new media including photographs and collages. *See Rizzoli Celebrates African American Artists*, Rizzoli New York (Feb. 14, 2020), <https://www.rizzoliusa.com/2020/02/14/rizzoli-celebrates-african-american-art-history/>:



Colescott,
Sunday Afternoon with Joaquin Murietta



Thomas,
Le Déjeuner sur L'herbe: Les Trois Femmes Noires

The fact that works such as these are immediately recognizable versions of Manet's original is integral to their power and message.

Similarly, another of Manet's masterworks, "Olympia," was modeled directly after Titian's "Venus of Urbino." As with "Déjeuner," "Olympia" has in turn been the source of countless reworkings, many of them aimed at shedding new light on the racial and sexual politics of Manet's picture and its status as a landmark of Western art. See Robert Storr & Carol Armstrong, *Lunch With Olympia* (2017) (catalog for 2013 exhibit of the Yale School of Art featuring hundreds of works imitating, reworking, and referencing "Déjeuner" and "Olympia"; explaining that Manet's canvases have "given rise to more parodies and pastiches than any other works of their time and for that matter all but a handful of works in the whole history of modern art").

This history of imitation, borrowing, and quotation illustrates the critical importance of copying to art. And that practice has a purpose. Artists routinely replicate each other's work to comment on what art is or should be, how art should function, and on culture and history more generally. This lineage of works is, at its core, a multinational, intergenerational conversation about how art should work, dealing with key questions both about composition and how the human experience can be portrayed. Copying—and related acts of visual appropriation—makes this and other profound (and indeed, foundational) discussions between artists, and artists and viewers, possible.

II. Appropriation, Quotation, and Copying Continue to Be Central to Modern Artistic Practice; Contemporary Artists, Including Amici, Make Varied and Active Use of Preexisting Works

A. Appropriation Became More Central to Artistic Practice in the 20th and 21st Centuries

If copying has always been common in art, the 20th and 21st centuries have, if anything, supercharged its role in artistic practice. See Ian Ballon, *Art Law – Cases and Controversies*, § 5.01 (“Appropriation ... took on new significance in the mid-twentieth century with the rise of consumerism and the proliferation of images through mass media outlets from magazines to television.”). The mechanization of society—the crucial role in contemporary life of the mass production of objects and images—is a primary subject for many artists, who use appropriation and quotation as a way of interrogating what art means in a world where everything can be made and remade again and again, with little to no cost. While “[i]n principle, a work of art has always been reproducible ... mechanical reproduction of a work of art ... represents something new”—and digital reproduction and dissemination is yet another revolution that has rapidly accelerated the speed at which works of art can be created and disseminated. See Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, *Illuminations*, (ed. Hannah Arendt, Schocken Books 1969). Integrating pre-existing works into new works is the key means by which artists contend with and comment on a world in which works are infinitely reproducible and in which

people's direct experience of the world is continually mediated by screens.

An early and influential example of such artistic inquiry is the work of Marcel Duchamp, who focused on creating art out of objects and artworks that already existed. For Duchamp, the artistry of this approach lay in the decision to arrange, modify, or recontextualize objects or preexisting works. The elevation of something quotidian, the tweaking of a piece to give it a new message, all with limited intervention, was, to Duchamp, the artist's role.

One notable intervention was Duchamp's cheeky modification of the Mona Lisa. He took a postcard of the famous painting, doodled a mustache on it, and scribbled a new title on the bottom, an acronym standing for a provocative sexual joke. *L.H.O.O.Q. or La Joconde*, Norton Simon Museum, <https://www.nortonsimon.org/art/detail/P.1969.094>:



Duchamp's appropriation of one of the most famous paintings of the Western canon, his deliberate injection of silliness into a painting that is ordinarily treated with the utmost deference, were a deliberate effort to undermine the self-seriousness he saw in much traditional European painting. His very light modifications—effectively, just a few lines and a few letters—transform an iconic and respected work into something clownish and subversive. As such, “L.H.O.O.Q. or La Joconde” serves both as a critique of traditional mimetic painting and as a proof of concept for Duchamp's theory: that an artist can take the whole of a work, make small modifications to it, and create a piece that is entirely new. *Cf.* Elizabeth Mix, *Appropriation and the Art of the Copy (May 2015): Marcel Duchamp and the Conceptual Shift of the Copy, Choice*, <https://ala-choice.libguides.com/c.php?g=372675&p=2520119>.

B. Quotation and Appropriation of Photographs Allows Contemporary Artists, Including Amici, to Examine the Role of Images in Culture

Countless contemporary artists have followed in Duchamp's footsteps, using appropriation and quotation to communicate commentary and critique. In particular, the appropriation and re-appropriation of photographs is fertile ground for artistic creativity. This is in part because photographs are easily reproduced. More importantly, the outsized impact of photographs in the 20th and 21st century, during which time America and the world became ever more saturated with images, motivated and continues to motivate artists to interrogate the ubiquity and reproducibility of images in modern life. The art critic and theorist Rosalind Krauss described this inquiry

as an exploration of “[w]hat it would look like to produce a work that acted out the discourse of reproductions without originals” She posited that “it would look like a certain kind of play with the motions of photographic reproduction.” Rosalind E. Krauss, *The Originality of the Avant Garde and Other Modernist Myths*, 168 (MIT Press, 1986); see also Liz Linden, *Reframing Pictures: Reading the Art of Appropriation*, Faculty of the Arts - Papers (Archive), 40, 42 (2016) (“[T]he works that became iconic of contemporary appropriation art’s exploration of semiotic models of representation are most often appropriations using photographs, including the stoic ‘Marlboro Man’ of Richard Prince [and] the sober share-croppers in Levine’s rephotography of Walker Evans’s works”).

Amicus Barbara Kruger’s art is one example of such “play with the motions of photographic reproduction.” In addition to creating works featuring only text and displaying footage that she has shot herself, Ms. Kruger has used pre-existing images to comment on the workings of power in contemporary society. She creates immersive textual installations and multi-channel video works. She is particularly well known for her superimposition of text commentary onto illustrations or photographs, as in one of her most well known works “We Don’t Need Another Hero”:



Ms. Kruger views photographs and other visual media as constituting hard evidence of contemporary cultural life. By using pre-existing photographs and videos, she engages directly with this evidence, effectively annotating the visual artifacts of our times. For this commentary to resonate, the thing commented upon (be it a photograph or a video) must evoke, immediately and legibly, the issues on which Ms. Kruger comments. Frequently, the best way to achieve this effect is to comment on works that already exist.

Because Ms. Kruger's technique retains its identity regardless of size or medium, it lends itself to easy reuse by others. Rather than fight against that, she has incorporated these appropriations into her own art-making. For example, for a show in Austria exploring the "aesthetic of appropriation," Ms. Kruger found hundreds of images online that were based on her work and riff on her easily recognized style. She reproduced those images as vinyl wallpaper that covered a 200-foot wall, making a further comment on the expansion of technology and the notion of what art and authorship can be. *Barbara Kruger*, Art Forum (2011), <https://www.artforum.com/print/reviews/201207/barbara-kruger-31952>:



Kruger, *That's the Way We Do It*

Similarly, Rosalind Krauss cites the work of Sherrie Levine as emblematic of the kind of “play with the motions of photographic reproduction” that is such a critical piece of artists’ conversations about originality in an era of mass reproduction. Krauss, *The Originality of the Avant Garde* at 168. Levine created a variety of reproductions of existing works by male artists, some lightly and others significantly modified, to critique the dominance of men in art and narratives of art history that largely exclude women. One such intervention is her famed 1981 re-photographing of iconic Walker Evans photographs taken during the Great Depression, a series entitled “After Walker Evans.” See *After Walker Evans: 4*, The Met, <https://www.metmuseum.org/art/collection/search/267214>. Later, in 2001, amicus Michael Mandiberg appropriated Levine’s appropriation, uploading scans of the same Evans work Levine re-photographed to websites entitled, alternately, *afterwalkerevans.com* and *aftersherrielevine.com*. Mandiberg created the

websites “to facilitate [the] dissemination [of the photographs] as a comment on how we come to know information in this burgeoning digital age.” *Ibid.* By appropriating the same Walker Evans photographs that Levine appropriated, and recasting them as a digital project, including by providing links to high-resolution, downloadable versions of the images, and “certificates of authenticity” that visitors to the website can print and sign themselves, Mandiberg interrogates the very nature of originality and authenticity in art, and particularly photography, in an era in which most images are easily accessible and reproducible. See Carol Ness, *He who steals my artwork steals ... what, exactly?* (Oct. 29, 2008) https://www.berkeley.edu/news/berkeleyan/2008/10/29_artwork.shtml.

Amici Hank Willis Thomas and Liz Linden also use images taken from newspapers and magazines. Blown up and recontextualized as artworks, these images create art which both memorializes and critiques key episodes in America’s history and politics. In his series “Unbranded,” “Thomas digitally removes slogans and product names from historical and contemporary advertisements, ‘un-branding’ them” and “interrogating how advertising images reproduce and reinforce the changing American ideals of race and femininity.” Stephanie Kulke, *Artist Hank Willis Thomas ‘unbrands’ ads to reveal questions about cultural values*, *Northwestern Now* (Apr. 5, 2018), <https://news.northwestern.edu/stories/2018/april/artist-hank-willis-thomas-unbrands-ads-to-reveal-questions-about-cultural-values/>. Through these text-free, “naked” advertisements, Thomas seeks to reveal how the media uses “the repetition of imagery of a certain type” to invoke certain “myths and generalizations [that one] can attach.” *Ibid.*; see also *Hank*

Willis Thomas, Unbranded: Artist Stories,
[https://www.youtube.com/watch?v=YdR0GOLF918;](https://www.youtube.com/watch?v=YdR0GOLF918)
Hank Willis Thomas: Unbranded,
[https://icamiami.org/exhibition/hank-willis-thomas/.](https://icamiami.org/exhibition/hank-willis-thomas/)



Hank Willis Thomas, *Why Wait Another Day to be Adorable? Tell Your Beautician "Relax Me."*, 1968/2007, LightJet Print, various sizing, edition of 5 plus 1 AP. Courtesy the artist and Jack Shainman Gallery.



Hank Willis Thomas, *Aggressive loyalty*, 1963/2015, 2015, digital chromogenic print, various sizing, edition of 3 plus 2 AP. Courtesy the artist and Jack Shainman Gallery.



Hank Willis Thomas, *House rules!*, 1967/2015, 2015 digital chromogenic print, various sizing, edition of 3 plus 2 AP. Courtesy the artist and Jack Shainman Gallery.

Similarly, Linden's ongoing series Cartoons comments on how the news media represents specific moments in American history. Linden juxtaposes images from newspaper stories with a carefully chosen sentence from the accompanying article. For example:



United States troops continue to fight and die

Linden, *Cartoon* (04/09/06, from text by Anthony Tommasini, photo by Stephen Crowley), 2006



"And so we've got to use new tactics, new efforts, new assets to protect ourselves against an enemy that will strike us at any moment."

Linden, *Cartoon* (08/17/06, from text by Jim Rutenberg, photo by Evan Vucci), 2006



The day shimmered with history

Linden, *Cartoon* (11/05/08, from text by Adam Nagourney, photo by Ozier Muhammad), 2008

Thomas also uses images to reflect on important historical events through his Retroflective series. The images in this series are partially obscured versions of archival photographs, modified such that at first, only the figures the artist chooses can be seen. Once a viewer looks at the image with special glasses provided to view the works, or by taking a flash photograph, the entirety of the original photograph becomes visible. For example:



Hank Willis Thomas, *My father died for this country too/ I am an American also*, 2018, screenprint on retroreflective vinyl, mounted on Dibond, 60 x 48 in. (SHWT18.007). Courtesy the artist and Jack Shainman Gallery. The two images are “without flash” and “with flash.”

The purpose of partially obscuring and then revealing the images to the viewer is “to illuminate stories and parts of history that often get overlooked.” Loney Abrams, *Hank Willis Thomas’s Reflective Protest Images Illuminate Overlooked Histories—and the Hyper-Consumption of Photography Today*, ArtSpace (Apr. 28, 2018), <https://www.artspace.com/magazine/interviews/features/on-the-wall/hank-willis-thomass-reflective-protest-images-illuminate-overlooked-historiesand-the-55404>.

Thomas also purposefully places the viewers in the role of photographer, encouraging them “to dig below the layers of popular culture and media distraction” “in an era in which there are more images produced in a single second than any of us can make sense of in our entire lives.” “Interview with Hank Willis Thomas and Kambui Olujimi,” BOMB Magazine (Apr. 3, 2018), https://bombmagazine.org/articles/hank-willis-thomas-and-kambui-olujimi/?source=post_page. In other words, Thomas seeks to show that “[w]hile we’re dealing with new situations, we’re actually revisiting cycles and need to learn from past successes and mistakes.” *Ibid.*

Removing photographs from their original context, recontextualizing them as art works, and adding or removing text allows Thomas and Linden to present commentary on current and historical events and on the role of images in shaping specific cultural perceptions and understandings. Appropriating pre-existing images directly from newspapers and magazines is critical to the resonance of this work. The power of the artists’ critiques comes from using the images that people actually saw in their newspapers or magazines, or on news apps, as they experienced the relevant events. The fact that these images are palpably authentic, that they are of a

particular time and place, grounds the artists' critiques in lived reality in a way that a replica never could.

Amicus Leslie Hewitt similarly recontextualizes photographs by re-photographing preexisting photographs and magazines. Her work comments on how “[o]ur ways of seeing, feeling, dreaming, and mourning are connected to an image-saturated world.” *Leslie Hewitt* 123 (Cay Sophie Rabinowitz ed., Osmos Books 2019). Hewitt emphasizes the role of photographs as physical objects that are inherently limited. Through her re-photography of old photographs, Hewitt “look[s] at the edge ... , [at] what didn’t make the frame,” and she contemplates “the limits of photography” and its cultural role. Tiana Reed, *An Artist Who Is Unsettling the Centuries-Old Traditions of Still Life: With her evocative images of printed matter, Leslie Hewitt is breaking down the boundaries between sculpture and photography, past and present*, N.Y. Times (September 11, 2019), <https://www.nytimes.com/2019/09/11/t-magazine/leslie-hewitt.html>.

Amicus Sara Greenberger Rafferty also modifies existing images; many of her works, like Warhol’s, focus on celebrities. She manipulates images to subvert carefully cultivated public personas. Her variations on photographs of comediennes Carol Burnett and Goldie Hawn take pre-existing images of women famous for making people laugh and subvert the images’ superficial joy, “peeling away the veneer of the comic to expose the darkness below.” Sara Greenberger Rafferty, *THE NEW YORKER* (Sept. 28, 2009):



Rafferty, *Goldie I and II*, 2009

In a culture where celebrities are brands crafted with meticulous detail, Rafferty's works remind the viewer of celebrities' humanity by exposing the messiness that lies beneath the slick perfection of art-directed, publicist-approved photos.

C. Artists Working Across Different Media Employ Copying and Quotation in Their Works

While photography is one major site of copying or appropriation-related techniques, it is by no means the only medium in which artistic quotation takes place. Indeed, Thomas used sports jerseys to create quilts based on famous artworks, including Matisse's "Fall of Icarus" and Picasso's "Guernica," to comment on European modernist art's "complicated influence on black artists" Caroline Goldstein, *An Eye-Opening Exhibition Looks at How Black Artists Have Dissected and Rearranged the History of European Modernism—See It Here*, Artnet (Mar. 24, 2020), <https://news.artnet.com/art-world/phillips-collection-riffs-and-relations-1814136>.



Matisse, *The Fall of Icarus*, 1943



Hank Willis Thomas, *The Fall of Icarus (La chute d'Icare)*, 2017, mixed media including sport jerseys, 96 x 72 inches (approx.). Image courtesy of the artist and the Portland Art Museum.



Picasso, *Guernica*, 1937



Hank Willis Thomas, *Guernica*, 2017, mixed media including sports jerseys 131 x 281 inches.

Image courtesy of the artist and the Boca Raton Museum of Art.

Another major contemporary artist working in this vein is Faith Ringgold, whose work was recently the subject of a major exhibition at the New Museum in New York. See *Faith Ringgold: American People*, <https://www.newmuseum.org/exhibitions/view/faith-ringgold-american-people>. One of Ringgold's most well-known quilt series, the 12-piece "French Collection," reworks famous paintings by European artists, including Manet, Picasso, Van Gogh, Matisse,

and Monet, as part of the imagined experiences of a character, Willa Marie Simone, whose fictional journey through the European art world the works chart. See *The French Collection and the liberty of Faith Ringgold*, <https://www.phaidon.com/agenda/art/2022/March/02/The-French-Collection-and-the-liberty-of-Faith-Ringgold/>. For example, in French Collection #5 (Matisse's Model), Ringgold quotes directly from Matisse's "Dance" to tell a new story of art history that brings Black women into the foreground. See, e.g., Simone Gage, *Faith Ringgold's French Collection: Jo Baker's Birthday*, <https://mcam.mills.edu/publications/shiftingperspectives/catalogue/simone.html>:



Matisse, "Dance (I)," 1909



Ringgold, *Matisse's Model: The French Collection Part I*, 1991

As another example, Elaine Sturtevant, known professionally as Sturtevant, routinely recreated the works of other artists in different media (e.g., a lightly modified recreation of Roy Lichtenstein's original print "Crying Girl" as a painting entitled "Lichtenstein, Frighten Girl"):



Lichtenstein,
Crying Girl, 1963

Sturtevant, *Lichtenstein*,
Frighten Girl, 1966

Characterizing her works as “repetition[.]” Sturtevant used reproductions to “explor[e] ideas of authenticity, iconicity and the making of artistic celebrity.” Margalit Fox, *Elaine Sturtevant, Who Borrowed Others’ Work Artfully, Is Dead at 89*, N.Y. Times (May 16, 2014), <https://www.nytimes.com/2014/05/17/arts/design/elaine-sturtevant-appropriation-artist-is-dead-at-89.html>. Her “repetition” of other artists’ works called into question why an original is valuable, why certain works become iconic, and why particular artists are elevated and lionized for their works while others are not. Her work was controversial—precisely because it raised critical points about what makes art valuable. The importance of this dialogue has been reaffirmed by shows at the Museum of Modern Art as well as numerous international venues—and also by the enduring value of her bold “repetitions,” which sometimes outstrip the value of the originals. *Ibid.*

Amicus Jill Magid also uses quotation (or a form of re-presentation) to engage with the legacies of artists, and issues of originality and exclusivity. In particular, her multimedia project “The Barragán Archives” focuses on corporate ownership of exclusive rights to artist’s works. The Mexican, Pritzker-Prize-winning architect Luis Barragán’s professional archives are owned by Vitra, a high-end furniture

company. See Barragán Foundation, <https://www.barragan-foundation.org>. Magid studied and created works based on the personal archives maintained in Barragán's home in Mexico City, a museum and a UNESCO World Heritage Site. But she was refused access to the archive owned by Vitra, as well as the right to reproduce any of his work. Without access to photographs of Barragán's architecture, Magid instead chose to frame and display published books opened to pages containing photographs of Barragán's works. See, e.g., Jill Magid, *El Bebedero at Las Arboledas by Armando Salas Portugal*, Art Record (last modified Dec. 20, 2021), <https://www.art-record.com/share/wriwg>; <https://www.art-record.com/share/wcnOD>. By framing and recontextualizing the books, which function like wall-mounted sculptures, Magid creates a physical rejection of the boundaries placed on the Barragán collection, advocating for artists and the public to be able to engage freely with Barragán's works and his legacy.

D. The Importance of Copying to Artistic Practice Means that the Second Circuit's Decision Would Profoundly Limit Artists' Ability to Create

As these examples illustrate, the use of existing cultural artifacts to create new works with new meanings—often with limited (or no) formal changes—has long been, and remains, integral to art making. Incorporating such images and objects is how many artists comment on the culture that exists around them. Such replication and reformulation is not only compatible with artistic value, creativity, and vibrancy—it is often *essential* to the ability of

artists to say what they want to say and create new meanings and understandings.

That is why amici are so alarmed by and concerned about the Second Circuit's ruling in this case. As we now discuss, the Court of Appeals' approach to fair use puts longstanding artistic practices in legal peril, in the process denigrating art that borrows, appropriates, and replicates prior works as something akin to plagiarism or exploitation. That fundamentally misunderstands art history and art making—and it threatens important artistic expression contrary to the purposes of copyright law.

III. The Second Circuit's Visual Similarity Test Chills Artistic Practice And Creation, Contrary to The Core Purpose of Copyright Law

As the above examples—both historical and contemporary—show, art that incorporates earlier works is important. It raises meaningful issues, voices societal critiques, and brings to light unconsidered nuances. Copyright law encourages that creation. But without a sufficiently broad and clear fair use defense, much of that expression will never come to be. The risk of creating art may simply be too great.

That risk is particularly palpable for the overwhelming majority of artists, who lack the resources and capacity to defend themselves against expensive litigation as Warhol has done. Craft and fine artists in the United States earn a median pay of \$49,960 a year. *Craft and Fine Artists: Occupational Outlook Handbook*, U.S. Bureau of Labor Statistics (last modified Apr. 18, 2022), <https://www.bls.gov/ooh/arts-and-design/craft-and-fine-artists.htm#tab-1>. For those

artists, a copyright infringement suit could be financially crippling—even if they ultimately prevail. As amicus Steiner explains, any “savings” for future expenses “like children’s education or retirement” “could quickly vanish if [the average] artist[] were forced to defend a copyright infringement lawsuit.” Alfred Steiner, *A Few Observations on Copyright and Art*, *Landslide: A Publication of the ABA Section of Intellectual Property Law* (Jan. 2013). And several amici have already experienced hardship because of the uncertainty surrounding fair use and the expense it would be to litigate the issue. This reality highlights that not only would an unclear or narrow fair use rule significantly curtail artists’ willingness to create, depriving society of new works of art and new sources of cultural meaning, it could also inflict ruinous hardship on artists who believe they are engaging in fair use but are nonetheless sued. *See* Ian Ballon, *Art Law – Cases and Controversies*, § 5.01 (“[B]ecause many appropriation artists provide commentary on modern culture, images from the distant past [or images they create from scratch] may not afford the raw materials they need for their works of art. For this reason, copyright fair use provides essential protection for creative expression.”).

A. This Court Should Reaffirm that a Work Is Transformative Under the Fair Use Analysis If It Conveys a Meaning or Message Different From the Original Work It Incorporates

To avoid the loss of artistic expression and to protect artists from crushing litigation, the fair use defense needs to be both clear and sufficiently attuned to the lessons of art history and contemporary practice. In

that vein, this Court should reaffirm that in the visual art world, “a copying use that adds something new and important” “fulfills the objective of copyright law to stimulate creativity for public illumination” and thus constitutes a “transformation” under the fair use analysis. *Google LLC v. Oracle Am., Inc.*, 141 S.Ct. 1183, 1202-03 (2021) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990)).

In other words, the Court should reaffirm and elaborate on its observation in *Campbell* that when a latter work “alter[s] the first with new expression, meaning, or message,” it is “transformative” for purposes of the fair use defense. *Campbell*, 510 U.S. at 579; *see also Tresóna Multimedia, LLC v. Burbank High Sch. Vocal Music Ass’n*, 953 F.3d 638, 649 (9th Cir. 2020) (explaining that works “are transformative when ‘new expressive content or message is apparent,’ even if ‘the allegedly infringing work makes few physical changes to the original or fails to comment on the original’”) (quoting *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1177 (9th Cir. 2013)).

The Court should reject, emphatically, any “visual-similarity bar” like the Second Circuit’s novel, *per se* requirement that a latter work must not “recognizably deriv[e] from” or “retain[] the essential elements of, its source material.” *See* Pet. App. 23a-24a. Infusing the fair use analysis with a visual-similarity bar is in direct conflict with this Court’s recent observation in *Google* that “[a]n ‘artistic painting’ might, for example, fall within the scope of fair use even though it precisely replicates a copyrighted ‘advertising logo to make a comment about consumerism.’” 141 S. Ct. at 1203 (quoting 4 Nimmer on Copyright §13.05[A][1][b]). It also contravenes the very purpose of copyright law and

would create confusion, uncertainty, and chilling legal risk for practicing artists.

B. The Ever-Present Threat of Litigation Will Chill Artistic Expression, Especially for Artists That Incorporate Existing Images and Art Into Their Works, Because Most Artists Do Not Have the Resources to Fight a Copyright Infringement Suit

The uncertainty created by the Second Circuit is particularly problematic considering the extreme remedies available under copyright law, including statutory damages, costs and attorney’s fees, and injunctions that can lead to the impoundment and destruction of works of art deemed to be infringing. 17 U.S.C. §§ 502–505. One amicus aptly described the current fair use doctrine as a “minefield” where even if the actual damages would only be \$10,000, a suit could end up costing millions. Given that risk, artists may well choose not to create works that integrate other images or creations—the well-known technique of “appropriation.” Instead, they will self-censor to avoid even the risk of litigation. And, because the ever-present threat of litigation looms larger over artists who appropriate, the unequal burden threatens to distort the art world by rendering certain well-recognized categories of artistic practice more legally dangerous than others. The chill of potential litigation may keep artists from engaging in that artistic practice in the first place, meaning that the Warhols and Barbara Krugers of the future may never materialize. As one amicus noted, even Warhol was not “Warhol” when he first started using existing images in his work. Allowing this chill would encourage the exact opposite of the power codified in

the Constitution: “To promote the Progress of ... useful Arts.” U.S. Const. art. I, § 8, cl. 8.

True, a few well-established artists like Warhol (or in this case, his estate) may have the resources to risk litigation and liability, but the vast majority of artists do not. The art market—distinct from the art world—is extremely top heavy. For instance, in the modern art sector, the top five artists accounted for 41% of sales by value in 2020; and in the contemporary art sector, the top 20 artists accounted for 55% of sales by value. Dr. Clare McAndrew, “The Art Market 2021,” Art Basel & UBS (2021). Additionally, museums “focus[] disproportionately on an elite group of around 300 international artists and estates.” Julia Halperin, “Almost one third of solo shows in US museums go to artists represented by five galleries,” Julia Halperin, *Almost one third of solo shows in US museums go to artists represented by five galleries*, The Art Newspaper (Apr. 1, 2015), <https://www.theartnewspaper.com/2015/04/02/almost-one-third-of-solo-shows-in-us-museums-go-to-artists-represented-by-five-galleries>. But there are over 48,000 craft and fine artists currently working in the United States. <https://www.bls.gov/ooh/arts-and-design/craft-and-fine-artists.htm#tab-1>. They have a median annual income of only \$49,960. *Ibid.*

It is no exaggeration that copyright litigation would have a serious financial impact on anyone so situated. The prospect that such litigation could arise—and, more particularly, the prospect of the expense that would accompany such litigation—would persuade many prudent people, who are dedicated to making art but also need to make a living and care for their families, to start managing risk by avoiding legally dangerous modes of expression. And as discussed above, giving “fair use”

a narrow or unclear meaning would make the well-known and long-established technique of “appropriation” particularly risky, and may cause artists to avoid it altogether. Indeed, even one of the panel members from the Second Circuit admitted that its visual similarity test may create “[r]isk of a copyright suit or uncertainty about an artwork’s status, [which] can inhibit the creativity that is a goal of copyright.” Pet. App. 51a (Jacobs, J., concurring). This uncertainty will inevitably suppress artistic expression. It will distort the art world, composed of a broad and varied swath of citizens. And it will stifle important messages. Artists, like free speech itself, need breathing space to create new expression without fear that copyright litigation might cripple their careers and livelihoods.

C. A Visual Similarity Test Forbids Too Much Art That Provides Important Commentary on History and Culture

Even apart from the chilling confusion, a visual-similarity bar would unacceptably curtail artistic expression. As exemplified above, much meaningful art draws on, incorporates, and even outright copies existing images to convey a distinct message. According to amicus Linden, sometimes modifying the pre-existing image neuters the whole point of the later work. The purpose of the new work resides in taking an image and saying: “Look at this thing that is in the world that you didn’t look at before.” Similarly, amicus Steiner explains that copyright law needs to be clarified to “foster[] a robust dialogue involving artists and contemporary culture.” Steiner, *A Few Observations, supra*. Without the ability to weave the images and creations that have come to be the fabric of our society into new works, much

thought-provoking artistic commentary will be worse than lost—it will be eliminated before conception.

A visual-similarity analysis would also have a particularly worrisome effect on artistic commentary that uses political imagery, because the ownership of historic images is remarkably concentrated. By the turn of the 21st century, the “consolidation of large stock agencies” had led to “huge conglomerate agencies such as: ... Corbis ... [and] Getty Images,” Jeremy Rowe, *Copyrights and Other Rights in Photographic Images* (2002), <https://vintagephoto.com/reference/copyrightarticle1.htm>, which have since combined their collections, Damien Demolder, *Corbis Images content to be distributed by Getty*, *Digital Photography Review* (Jan. 25, 2016), <https://www.dpreview.com/news/7484881039/corbis-images-content-to-be-distributed-by-getty>. Even without Corbis, Getty’s stockpile, for example, includes “80 million [images] from its Hulton Archive historical collection.” *Ibid.* Through Corbis, Getty now also controls the Bettmann Archive, which “is one of the most significant historical photo collections in the world, comprising more than 11 million negatives and prints, spanning the 19th and 20th centuries.” *The Bettman Archive*, *Picturing Black History* (2021), <https://www.picturingblackhistory.org/bettmann-archive>. That archive is “swollen with images of practically every event worth writing on a calendar.” Isaac Schultz, *This Vast Photo Archive Is Hidden Inside a Cold, Heavily Guarded Limestone Mine*, *Atlas Obscura* (May 11, 2020), <https://www.atlasobscura.com/articles/hidden-photo-archive-mine>. Indeed, when Corbis purchased the Bettman Archive, Bettmann declared that Corbis “now own[ed] the history of everything.” *Ibid.*

Without a broad, clear fair use defense, this consolidated ownership of history creates a massive

concern for artists who want to engage with specific political issues and, to do so, need to use particular images that may be the only photograph capturing a certain moment in history. When powerful companies have a monopoly on licensing historic photos, artists—regardless of financial success—cannot afford to take on those companies and can be refused a license (a situation that certain amici have personally experienced). Conglomerates can set the terms in a one-sided manner—such as requiring unilateral termination-at-will clauses, or restrictions on the display of the resulting work—that would effectively prevent the artist from using the image in a way that conveys the intended meaning or message. Needless to say, the idea that an artist can simply license a photograph is not a practical solution. Indeed, even outside the realm of conglomerate-owned political or historic photographs, as amicus Steiner has explained, for artists “licensing is often impractical or impossible.” Steiner, *A Few Observations, supra*.

D. A Visual Similarity Test Will Change How Art Is Taught, Altering the Course of Art’s Future

Finally, limiting artists’ ability to re-use existing works in new art will have a significant impact on how art is taught. Although the “educational purpose” piece of the fair use analysis protects most art that is used in or created for a classroom (17 U.S.C. § 107(1)), a narrow or confusing fair use test would still make much of art education nugatory, as it could not be implemented outside the classroom without unacceptable legal risk.

Amicus Rafferty, who has taught a class titled “Adventures in Reproduction” at four universities including Amherst, explained that even though she would likely continue to teach about reproduction regardless of the breadth or clarity of the “transformativeness” inquiry, she tells her students that once they graduate they may have to stop innovating in certain ways or risk getting sued. Amicus Mandiberg, who is the Professor of Media Culture at the College of Staten Island/CUNY, teaches students to communicate via art in the way that communication is done today: through copying and remixing culture. But similar to amicus Rafferty, Mandiberg worries about how students can apply these principles post-graduation without opening themselves up to suit. Amicus Linden teaches “The Arts in U.S. Society: Originality, Influence, and Appropriation” and similarly warns her students about how murky fair use currently is. This uncertainty often frustrates her students, who want clear answers to whether any given work is “legal” or not.

Thus, a narrow or unclear ruling could lead teachers to simply not teach certain methodologies, or to discourage students from pursuing certain avenues of exploration in their art making practice after graduation. In other words, to protect students from the threat of litigation, and train them to protect themselves in the future, teachers might caution students against creating certain types of work—foreclosing whole methods of expression and effectively cutting off avenues of creativity at the inception of a career. Unless this Court makes clear that artistic expression is transformative if it infuses an existing image with new meaning or a new message, then the inevitable consequence will be a reduction of artistic expression for both novices and

veterans alike, and a flattening of artistic discourse harmful to both artists and the public.

CONCLUSION

This Court should reverse, vacate the Second Circuit’s novel fair use test, and reaffirm that in the visual art world, “a copying use that adds something new and important” is “transformative” under the fair use analysis even if the later work is visually similar to and derived from the former. *Google*, 141 S.Ct. at 1202-03.

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Respectfully submitted,

/s/ Brian M. Willen

BRIAN M. WILLEN

Counsel of Record

JASON MOLLICK

NATHALIE M. GORMAN

WILSON SONSINI

GOODRICH & ROSATI, P.C.

1301 Av. of the Ams., 40th Fl.

New York, New York 10019

(212) 999-5800

bwillen@wsgr.com

jmollick@wsgr.com

ngorman@wsgr.com

KELSEY J. CURTIS

WILSON SONSINI

GOODRICH & ROSATI, P.C.

1700 K Street NW, Fifth Floor

Washington, DC 20006

(202) 973-8800

kcurtis@wsgr.com

Attorneys for Amici Curiae