

# 19-2420

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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THE ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC.,  
*Plaintiff-Counter-Defendant-Appellee,*

v.

LYNN GOLDSMITH, LYNN GOLDSMITH, LTD.,  
*Defendants-Counter-Plaintiffs-Appellants.*

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On Appeal from the United States District Court  
for the Southern District of New York  
No. 17-cv-2532 (Hon. John G. Koeltl)

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**CORRECTED BRIEF OF THE ROBERT RAUSCHENBERG  
FOUNDATION, ROY LICHTENSTEIN FOUNDATION, WHITNEY  
MUSEUM OF AMERICAN ART, MUSEUM OF MODERN ART, AND THE  
SOLOMON R. GUGGENHEIM FOUNDATION AS *AMICI CURIAE* IN  
SUPPORT OF APPELLEE'S PETITION FOR PANEL REHEARING  
AND REHEARING EN BANC**

Jaime A. Santos  
Andrew Kim  
GOODWIN PROCTER LLP  
1900 N Street, N.W.  
Washington, D.C. 20036  
(202) 346-4000  
*JSantos@goodwinlaw.com*  
*AndrewKim@goodwinlaw.com*

April 30, 2021 (corrected May 3, 2021)

Counsel for *Amici Curiae*

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for *Amici Curiae* states as follows:

- The Robert Rauschenberg Foundation has no parent corporation, and no company holds 10 percent or more of its stock.
- The Roy Lichtenstein Foundation has no parent corporation, and no company holds 10 percent or more of its stock.
- The Whitney Museum of American Art has no parent corporation, and no company holds 10 percent or more of its stock.
- The Museum of Modern Art has no parent corporation, and no company holds 10 percent or more of its stock.
- The Solomon R. Guggenheim Foundation has no parent corporation, and no company holds 10 percent or more of its stock.

## INTEREST OF THE *AMICI CURIAE*<sup>1</sup>

*Amici curiae* the Robert Rauschenberg Foundation, Roy Lichtenstein Foundation, Whitney Museum of American Art, Museum of Modern Art, and The Solomon R. Guggenheim Foundation advance the visual arts in a wide range of media, subjects, styles, materials, and techniques. *Amici* are committed to the principle that art reflects an important cultural dialogue, and that freedom of artistic expression is fundamental to a democratic society. The Copyright Act’s fair-use provision carefully balances the limited protections of copyright law against the free speech and expressive interests at stake in the creation and display of artworks. *Amici* seek to ensure that this Court’s interpretation of the fair-use doctrine sustains that balance. A description of each *amicus curiae* is listed in the Appendix.

## INTRODUCTION

Progress in the arts often involves one artist using or reusing another artist’s imagery as the basis for her own creative effort. The fair-use doctrine recognizes and protects that “copying use” from claims of infringement, so long as it transforms the original by “add[ing] something new and important.” *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1203 (2021); *see also Campbell v. Acuff-Rose Music,*

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<sup>1</sup> All parties have consented to the filing of this brief. No party’s counsel authored this brief in whole or in part. No party or party’s counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than *amici curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

*Inc.*, 510 U.S. 569, 579 (1994) (transformative use “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message”).

The panel’s opinion is at odds with this time-honored artistic tradition. Under the panel’s decision, a secondary use is not transformative unless it “embod[ies] an entirely distinct artist purpose,” “*entirely separate from its source material.*” Op. 25 (emphasis added). And where “the secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material,” then it cannot be fair use. Op. 28. This new standard, which finds no support in precedent, will chill many artists in this Circuit from making new works and critically impair the rest of the artistic community’s engagement with such works.

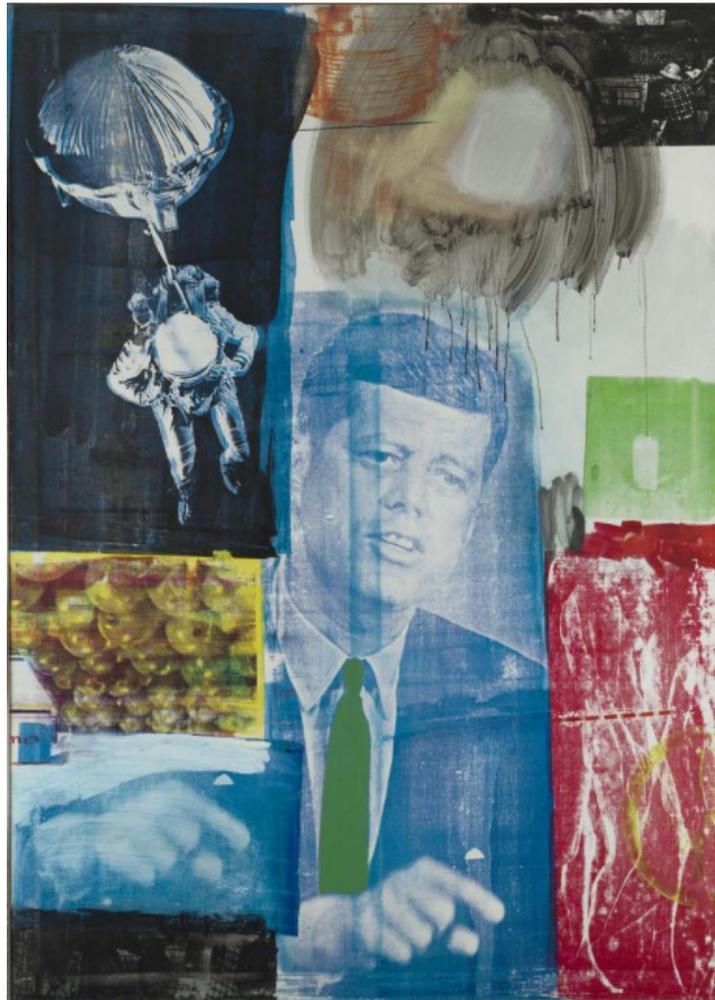
## ARGUMENT

### **I. Artists Have Long Used Other Artists’ Work as “Raw Material” to Inspire the Creation of New Works Embedded with New Meaning.**

As Justice Story recognized, in art, as elsewhere, there are “few, if any, things” that “are strictly new and original throughout.” *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845). In Western and non-Western cultures, artists have advanced the creative arts by using, reusing, recontextualizing, and reinterpreting existing art to create new expression, meaning, and message.

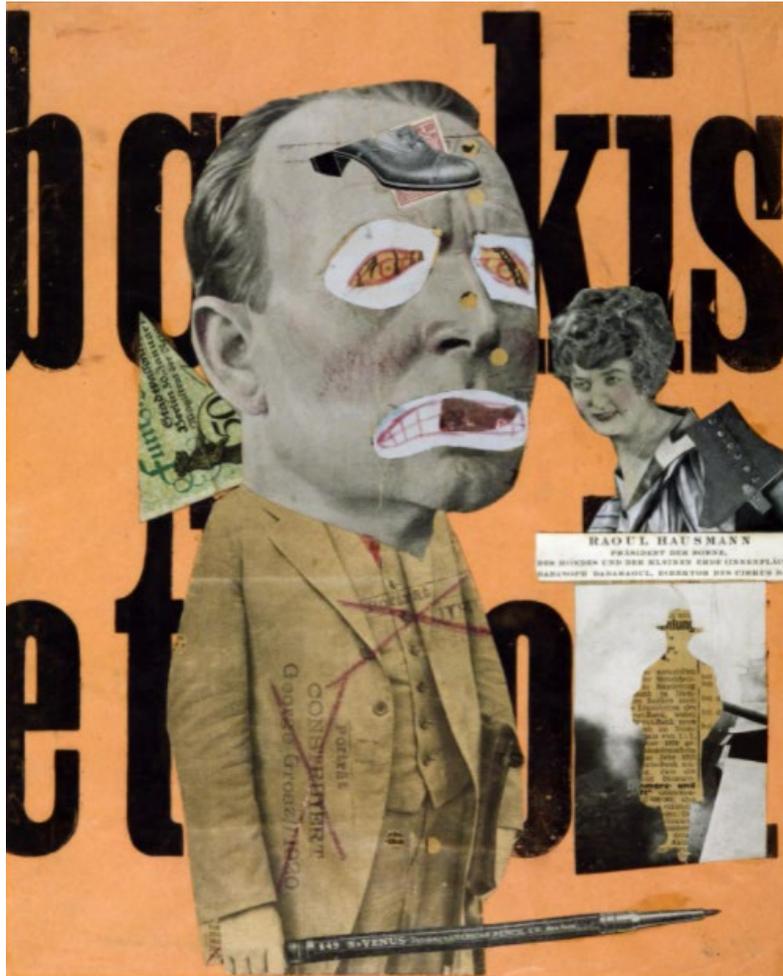
Sometimes, artists use just a snippet of a prior work, alone or in combination with other works, to create new expression. For example, Robert Rauschenberg’s

famous “Combines” melded pictures, words, and objects from a variety of sources, turning them into, in his words, “ingredients” in “compositions which are dependent on reportage of current events and elements in our current environment[] to give the work the possibility of being reconsidered and viewed in a totally new context.” Gay Morris, *When Artists Use Photographs: Is It Fair Use, Legitimate Transformation or Rip-Off?*, 80 ARTnews 102, 104 (1981). Rauschenberg’s 1963 work, *Retroactive I*, fuses familiar political images and cultural themes of the era:



Robert Rauschenberg Foundation, *Retroactive I*, <https://www.rauschenbergfounda>

tion.org/art/art-in-context/retroactive-i (last accessed Apr. 30, 2021). Dadaists in the early twentieth century critiqued social structures and political strategies through photo montages, like Raoul Hausmann's 1919-1920 piece, *The Art Critic*:



Tate, *Photomontage*, <https://bit.ly/32Uvmz7> (last accessed Apr. 30, 2021).

Other times artists create new works by making changes to existing works that are much more slight, recognizing that modest alterations—to the setting, color, subject, or context—can sometimes be the best way to provide a new artistic, political, or social contribution to the cultural dialogue. For example, Manet's 19th-

century Impressionist masterpiece, *Olympia*, borrowed from the 16th-century *Venus of Urbino* by Titian, which in turn used as its foundation Giorgione's *Sleeping Venus*:



Édouard Manet, *Olympia* (1863) (Musée d'Orsay, oil on canvas)



Titian, *Venus of Urbino* (1538) (Uffizi Gallery, oil on canvas)



Giorgione, *Sleeping Venus* (1510) (Gemäldegalerie Alte Meister, Dresden, oil on canvas).

Manet's work "recognizably deriv[ed] from" earlier Renaissance pieces. Op. 28. But Manet's work was intended to convey a different message than its 16th-century counterparts by placing a French prostitute in the stead of the Italian courtesan from three centuries earlier. As the French novelist Emile Zola remarked:

When our artists give us Venuses, they correct nature, they lie. Edouard Manet asked himself why lie, why not tell the truth; he introduced us to Olympia, this *fille* of our time, whom you meet on the sidewalks.

Frits Andersen, *Corpus Delicti*, in *Reinventions of the Novel: Histories and Aesthetics of a Protean Genre* 79 (2004).

In a contemporary iteration, Mickalene Thomas uses the pose as a commentary on race: “oust[ing] the white European woman from the bed where she often lounges, attended by a black maidservant,” such as the one in Manet’s work.



Mickalene Thomas, *A Little Taste Outside of Love* (2007) (Brooklyn Museum of Art, enamel and rhinestones on wood panel).

Pablo Picasso, in his 1957 painting, *The Maids of Honor*, similarly reworked *Las Meninas*, a masterwork of the Spanish Golden Age painted by Diego Velázquez, by using a new perspective and a Cubist style to create new meaning and message—not unlike Warhol’s reworking of Goldsmith’s photograph in his own style:



Solomon R. Guggenheim Foundation, *Comparative Works* (2012), [http://web.guggenheim.org/exhibitions/picasso/artworks/maids\\_of\\_honor](http://web.guggenheim.org/exhibitions/picasso/artworks/maids_of_honor); see also James C. Harris,

MD, *Las Meninas (The Maids of Honor)*, 68 Arch Gen Psychiatry 124-125 (2011), <https://jamanetwork.com/journals/jamapsychiatry/fullarticle/211013>.

Van Gogh did the same, creating a series of paintings in which he “translat[ed]” the works of others—principally Jean-François Millet—into new works through his own perspective, color, and technique. Van Gogh Museum, *Van Gogh and Millet*, <https://www.vangoghmuseum.nl/en/stories/van-gogh-and-millet#0> (last visited Apr. 30, 2021). Van Gogh’s use of Eugène Delacroix’s 1849 work, *The Good Samaritan*, to create his own 1890 work, *The Good Samaritan (After Delacroix)*, is exemplary:



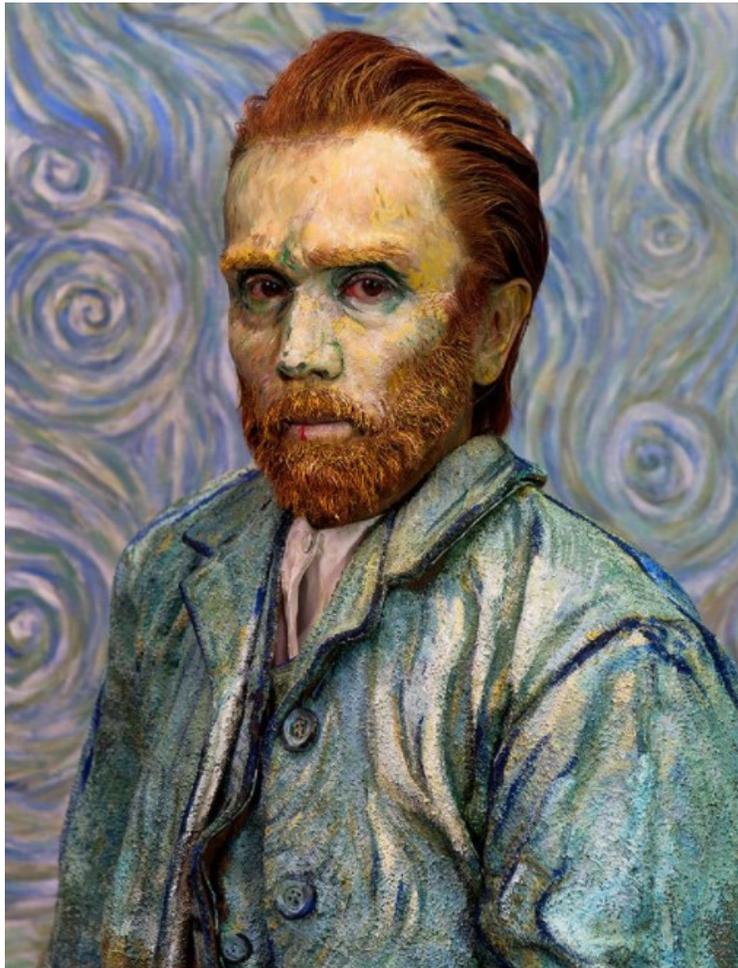
Anastasia Manioudaki, *Vincent van Gogh Copying Other Artists*, Daily Art Magazine (May 27, 2020), <https://www.dailyartmagazine.com/van-gogh-copy/>.

The ability to “appropriate” existing imagery for their own use is especially vital to artists working in an age pervasively affected by mass media, consumerism, and celebrity. See Tate, *Appropriation*, <https://www.tate.org.uk/art/art-terms/a/appropriation> (last visited Apr. 30, 2021); MoMA Learning, *Appropriation*, [https://www.moma.org/learn/moma\\_learning/themes/pop-art/appropriation/](https://www.moma.org/learn/moma_learning/themes/pop-art/appropriation/) (last visited Apr. 30, 2021). Yasumasa Morimura, for example, appropriates masterpieces from Western artists and injects himself into them as a way to recontextualize those pieces and, in the process, question the way those works have shaped our collective cultural memory. Morimura’s 2018 work, *Une Moderne Olympia*, thus transforms Manet’s classic painting:



Charlotte Jansen, *Japanese Artist Yasumasa Morimura Faces Off with Old Masters in New York*, *Wallpaper\** (Oct. 17, 2018), <https://www.wallpaper.com/art/yasumasa-morimura-japan-society-gallery>.

Morimura's 2016 piece, *Self-Portraits Through Art History (Van Gogh / Blue)*, appropriates a self-portrait of one of history's greatest appropriators:



Jansen, *supra*.

Deborah Kass and Cindy Sherman have mimicked and reworked the signature styles and pieces of iconic male artists as a way of commenting on the nature of

artistic representation, and on the male-dominated nature of the art world. In Sherman's 1990 photograph, *Untitled #224*, she reenvisioned Caravaggio's 1593 painting, *Bacchino Malato*, by assuming the role of the subject of Caravaggio's classic work:



Magda Michalska, *Cindy Sherman vs Old Masters*, DailyArt Magazine (May 8, 2017), <https://www.dailyartmagazine.com/cindy-sherman-old-masters/>.

Contrary to the panel's suggestion (at 31), Appellee's position does not make fair use a one-way ratchet available to only "celebrity" artists. Warhol's works have themselves frequently been appropriated by others. For example, Kass created an entire series of Warhol-derived works in which she added new expression and meaning by replacing Warhol's celebrity images with those of herself or her personal

heroes. In doing so, she created “a feminist revision of art history through the imagery of one of its most famous male protagonists.” Tori Campbell, *Appropriation! When Art (Very Closely) Inspires Other Art*, Artland, <https://magazine.artland.com/appropriation-when-art-very-closely-inspires-other-art/> (last accessed Apr. 30, 2021). Kass’s 2012 piece, *Red Deb*, used Warhol’s famous 1965 piece, *Liz*, as recognizably raw material and substituted her own image in place of Elizabeth Taylor:



Smithsonian, Nat’l Portrait Gallery, *Red Deb*, [https://www.si.edu/object/red-deb%3Anpg\\_C\\_NPG.2013.75.1](https://www.si.edu/object/red-deb%3Anpg_C_NPG.2013.75.1) (last accessed Apr. 30, 2021).

Elaine Sturtevant similarly challenged the male-dominated nature of artistic representation through her *Repetitions* series, in which she exactly replicated the works of famous male artists to “make a feminist statement while also ruminating upon the concepts of originality, copyright, and artistic ownership.” Campbell, *supra*. Her 1990 work, *Warhol Flowers*, is a plain-replica reuse of Warhol’s own *Flower* series:



*Id.*

And Charles Lutz created a series of paintings, sculptures, and installations that also exactly replicated Warhol's works, including the following piece:



Charles Lutz, *BABEL (Brillo Stockholm Type)* (2013) (silkscreen on cardboard).

Lutz submitted his copies to the Andy Warhol Art Authentication Board for the stated purpose of obtaining the Board’s judgment that the works were not “authentic” Warhols, which it did by stamping them “DENIED.” He then exhibited these stamped replicas in his *Warhol Denied* series as a conceptual project about authenticity in art. Michael Straus, *Charles Lutz “Babel (Brillo Stockholm Type),”* Brooklyn Rail (Mar. 2013), <https://brooklynrail.org/2013/03/artseen/charles-lutz>.

The fair-use doctrine exists to ensure that an overly rigid application of copyright law will not “stifle” the creativity that each of these examples embodies. *Campbell*, 510 U.S. at 577 (citation omitted).

## **II. The Panel’s Erroneous Decision Will Have An Enormous Chilling Effect on Artists, Museums, and Galleries Alike.**

The panel’s new test for transformation cannot be reconciled with the history of artistic expression describe above. It asks judges evaluating whether a second work makes fair use of a primary work to “view[] the works side-by-side” and determine whether “the secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material.” Op. 28. If so, the piece is not transformative. All of the above works—and myriad other artistic reworkings—would seem to clearly fail that test. As would the works in *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), and *Seltzer v. Green Day, Inc.*, 725 F.3d 1170

(9th Cir. 2013), the latter of which involved a “prominent” and recognizable drawing (depicted on the left below) reproduced with a cross and black streaks on top of it (depicted on the right), *id.* at 1173-1174:



While claiming fidelity to the notion that “[i]t would be a dangerous undertaking” for judges to be “final judges of the worth of pictorial illustrations,” Op. 27 & n.3 (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)), the panel’s decision forces judges to engage in that “dangerous undertaking.” Instead of looking at the change in message and expression delivered by a work, as *Campbell* and *Cariou* require, the panel defines artistic fair use by focusing on how much has been taken. Such a misplaced focus limits creativity in a manner no court has done before.

The panel’s decision cannot be reconciled with precedent. Fair use fully permits “a copying use that adds something new and important.” *Google*, 141 S. Ct. at 1202-1203. It allows the type of artistic progress depicted above to continue when “copying” serves a purpose or results in a change of meaning different from that of the original creation. And the Supreme Court has already recognized that *exact replicas* can be fair use. *Id.* at 1203 (using, as an example, a thinly veiled reference to a Warhol piece replicating a Campbell’s soup can). Thus, a side-by-side comparison and a determination that one work recognizably derives from another should not deprive a secondary work of fair-use protection.

The panel purports to reassure “art historians, critics, collectors, and the museum-going public” that its decision will have no untoward consequences, suggesting that assessing the aesthetic worth of art that builds on others’ work still remains in their “domain.” Op. 33. That cold comfort ignores the decision’s chilling effect. The panel’s new standard will create liability risks and—even where a secondary work is ultimately found to qualify for fair use—litigation costs that could render the age-old tradition of using prior works too costly to be worth the creative effort.

This will not only deter artists from running the risk of infringement claims; it will also impact members of the artistic community that foster artistic works. Galleries, for example, have often been litigation targets for simply *displaying* works

that allegedly infringe. *See, e.g., Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (naming Sonnabend Gallery as a defendant); *Cariou*, 714 F.3d 694 (naming Gagosian Gallery as a defendant); *see also* 17 U.S.C. § 109(c) (permitting the display of copies “lawfully made”). And galleries often survive on the thinnest of margins (if not operate at a loss) to begin with. *See, e.g., James Tarmy, Why Do So Many Art Galleries Lose Money?*, Bloomberg (July 30, 2015), <https://bloom.bg/2Qw0Etg>. An erroneously narrow view of fair use, like the one articulated by the panel, will make artists hesitant to use prior works to create their own, and make galleries hesitant to display these types of works, which will reciprocally discourage artists from making them.

The chilling effect could reach museums as well—critical members of the artistic community that not only display, but also foster, artistic works; support artists; and fully engage in the community’s cultural conversations. And despite operating in a different (and less-commercial) context than galleries, museums have previously been targets of litigation threats for displaying works that make fair use of other pieces. The uncertainty created by the panel decision could exacerbate those risks, particularly for museums that are smaller and less well-funded.

Indeed, Judge Jacobs even recognized in his concurrence (at 1-2) that the panel’s decision could have unintended negative consequences for the artistic community at large—in his words, “undirected ramifications”—and acknowledged

that “uncertainty about an artwork’s status can inhibit the creativity that is a goal of copyright.” But uncertainty is precisely what the panel’s new standard for transformation creates. Such an outcome completely undermines fair use’s *raison d’être*: to ensure that copyright law not “stifle the very creativity which that law is designed to foster.” *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (citation omitted). Fair use “is one of the key limits that keep copyright from unconstitutionally suppressing speech and harming the very cultural richness it aims to promote.” Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 Harv. L. Rev. 683, 751 (2012). And maintaining that limit is particularly important in this Circuit given New York’s role in the art world. Many of the world’s most important galleries and museums—including the Gagosian Gallery, David Zwirner Gallery, Guggenheim Museum, Whitney Museum of American Art, Metropolitan Museum of Art, and Museum of Modern Art—are located within this Circuit.

Depriving the world of the next generation of works that build upon prior pieces, in the same manner that Manet borrowed from Giorgione and Titian (and Thomas and Morimura borrowed from Manet), or in the same spirit with which Van Gogh drew upon Millet, would not advance the goals of the Copyright Act. The First Amendment values embodied in the fair-use doctrine are intended to prevent such stifling; that is why a “new expression, meaning, or message” is all that is supposed to be required to make a “copying” work transformative. *Campbell*, 510

U.S. at 579. The Court should rehear this case and restore the proper balance between copyright protection and fair use.

### CONCLUSION

This Court should grant the petition for rehearing.

Dated: April 30, 2021  
(corrected May 3, 2021)

Respectfully submitted,

/s/ Jaime A. Santos

Jaime A. Santos

Andrew Kim

GOODWIN PROCTER LLP

1900 N Street, N.W.

Washington, D.C. 20036

(202) 346-4000

*JSantos@goodwinlaw.com*

*AndrewKim@goodwinlaw.com*

*Counsel for Amici Curiae*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rules of Appellate Procedure 29(a)(4) and 32(g)(1), I hereby certify that the foregoing Corrected Brief of the Robert Rauschenberg Foundation, Roy Lichtenstein Foundation, Whitney Museum of American Art, Museum of Modern Art, and The Solomon R. Guggenheim Foundation as *Amici Curiae* In Support of Appellee's Petition for Panel Rehearing and Rehearing En Banc complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(b)(4). According to the word count feature of Microsoft Word, the word-processing system used to prepare the brief, the brief contains 2,588 words.

I further certify that the foregoing brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman font, a proportionally spaced typeface.

Dated: May 3, 2021

/s/ Jaime A. Santos  
Jaime A. Santos

**CERTIFICATE OF SERVICE**

I hereby certify that on May 3, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the Second Circuit by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

/s/ Jaime A. Santos

Jaime A. Santos

## APPENDIX OF *AMICI CURIAE*

The **Robert Rauschenberg Foundation** fosters the legacy of Rauschenberg's life and work. Rauschenberg created the Robert Rauschenberg Foundation to advance creativity in the arts through grants, artist and research residencies, and special projects, all in support of artistic and social innovation. The Foundation supports artists, initiatives, and institutions that embody the same innovative, inclusive, and multidisciplinary approach that Rauschenberg exemplified in both his art and philanthropic endeavors.

The **Roy Lichtenstein Foundation** was established to facilitate public access to the work of Roy Lichtenstein and the art and artists of his time; create a catalogue raisonné of all known Lichtenstein works; and share information which could assist the development and education of the next generations of curators, critics and scholars concerning the artist Roy Lichtenstein. The Foundation has also rescued and donated the historically consequential Shunk-Kender and Harry Shunk Photography Collections to a consortium of five international museums/research centers. It provides consistent support for the advancement of artistic innovation and art history.

The **Whitney Museum of American Art** was incorporated in 1936, and is a New York not for profit educational corporation. The Whitney collects, exhibits, preserves, researches, and interprets art of the United States in the broadest global, historical and interdisciplinary contexts.

The **Museum of Modern Art** was founded in 1929 as an educational institution, and is dedicated to being the foremost museum of modern art in the world and manifests this commitment by establishing, preserving, and documenting a permanent collection of the highest order that reflects the vitality, complexity and unfolding patterns of modern and contemporary art; by presenting exhibitions and educational programs of unparalleled significance; by sustaining a library, archives, and conservation laboratory that are recognized as international centers of research; and by supporting scholarship and publications of preeminent intellectual merit.

The **Solomon R. Guggenheim Foundation** was established in 1937 and is dedicated to promoting the understanding and appreciation of modern and contemporary art through exhibitions, education programs, research initiatives, and publications. The international constellation of museums includes the Solomon R. Guggenheim Museum, New York; the Peggy Guggenheim Collection, Venice; the

Guggenheim Museum Bilbao; and the future Guggenheim Abu Dhabi. An architectural icon and “temple of spirit” where radical art and architecture meet, the Solomon R. Guggenheim Museum was recently designated as a UNESCO World Heritage site.