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Figure 1. A black and white portrait photograph of Prince taken in 1981 by Lynn Goldsmith.

created a silkscreen portrait of Prince, which appeared alongside an article about Prince in the November 1984 issue of *Vanity Fair*. See fig. 2, *infra*. The article, titled “Purple Fame,” is primarily about the “sexual style” of the new celebrity and his music. *Vanity Fair*, Nov. 1984, p. 66. Goldsmith received her \$400 fee, and *Vanity Fair* credited her for the “source photograph.” 2 App. 323, 325–326. Warhol received an unspecified amount.

In addition to the single illustration authorized by the *Vanity Fair* license, Warhol created 15 other works based on Goldsmith’s photograph: 13 silkscreen prints and two

impressions” served as an “under-drawing,” over which Warhol painted colors by hand. *Id.*, at 165.

or them.

One of Goldsmith’s studio photographs, a black and white portrait of Prince, is the original copyrighted work at issue in this case. See fig. 1, *infra*.

In 1984, Goldsmith, through her agency, licensed that photograph to *Vanity Fair* to serve as an “artist reference for an illustration” in the magazine. 1 App. 85. The terms of the license were that the illustration was “to be published in *Vanity Fair* November 1984 issue. It can appear one time full page and one time under one quarter page. No other usage right granted.” *Ibid*. Goldsmith was to receive \$400 and a source credit.

To make the illustration, *Vanity Fair* hired pop artist Andy Warhol. Warhol was already a major figure in American art, known among other things for his silkscreen portraits of celebrities.[1] From Goldsmith’s photograph, Warhol created a silkscreen portrait of Prince, which appeared alongside an article about Prince in the November 1984 issue of *Vanity Fair*. See fig. 2, *infra*. The article, titled “Purple Fame,” is primarily about the “sexual style” of the new celebrity and his music. *Vanity Fair*, Nov. 1984, p. 66. Goldsmith received her \$400 fee, and *Vanity Fair* credited her for the “source photograph.” 2 App. 323, 325–326. Warhol received an unspecified amount.

In addition to the single illustration authorized by the *Vanity Fair* license, Warhol created 15 other works based on Goldsmith’s photograph: 13 silkscreen prints and two pencil drawings. The works are collectively referred to as the “Prince Series.” See Appendix, *infra*. Goldsmith did not know about the Prince Series until 2016, when she saw the image of an orange silkscreen portrait of Prince (“Orange Prince”) on the cover of a magazine published by *Vanity Fair*’s parent company, Condé Nast. See fig. 3, *infra*.

By that time, Warhol had died, and the Prince Series had passed to the Andy Warhol Foundation for the Visual Arts, Inc. AWF no longer possesses the works,[2] but it asserts copy- right in them. It has licensed images of the works for commercial and editorial uses. In particular, after Prince died in 2016, Condé Nast contacted AWF about the possibility of reusing the 1984 *Vanity Fair* image for a special edition magazine that would commemorate Prince. Once AWF informed Condé Nast about the other Prince Series images, however, Condé Nast obtained a license to publish *Orange Prince* instead. The magazine, titled “The Genius of Prince,” is a tribute to “Prince Rogers Nelson, 1958–2016.” It is “devoted to

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Figure 2. A purple silkscreen portrait of Prince created in 1984 by Andy Warhol to illustrate an article in Vanity Fair.

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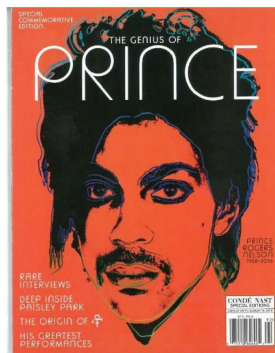


Figure 3. An orange silkscreen portrait of Prince on the cover of a special edition magazine published in 2016 by Condé Nast.

Prince instead. The magazine, titled “The Genius of Prince,” is a tribute to “Prince Rogers Nelson, 1958–2016.” It is “devoted to Prince.” 2 App. 352. Condé Nast paid AWF \$10,000 for the license. Goldsmith received neither a fee nor a source credit.

Remember that Goldsmith, too, had licensed her Prince images to magazines such as Newsweek, to accompany a story about the musician, and Vanity Fair, to serve as an artist reference. But that was not all. Between 1981 and 2016, Goldsmith’s photos of Prince appeared on or between the covers of People, Readers Digest, Guitar World, and Musician magazines. See, e.g., fig. 4, *infra*.



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People magazine, in fact, paid Goldsmith \$1,000 to use one of her copyrighted photographs in a special collector’s edition, “Celebrating Prince: 1958–2016,” just after Prince died. People’s tribute, like Condé Nast’s, honors the life and music of Prince. Other magazines, including Rolling Stone and Time, also released special editions. See fig. 5, *infra*. All of them depicted Prince on the cover. All of them used a copyrighted photograph in service of that object. And all of them (except Condé Nast) credited the photographer.

When Goldsmith saw Orange Prince on the cover of Condé Nast’s special edition magazine, she recognized her work. “It’s the photograph,” she later testified. 1 App. 290. Orange Prince crops, flattens, traces, and colors the photo but otherwise does not alter it. See fig. 6, *infra*.

Goldsmith notified AWF of her belief that it had infringed her copyright. AWF then sued Goldsmith and her agency for a declaratory judgment of noninfringement or, in the alternative, fair use. Goldsmith counterclaimed for infringement.

The District Court granted summary judgment for AWF. 382 F. Supp. 3d 312, 316 (SDNY 2019). The court considered the four fair use factors enumerated in 17 U. S. C. §107 and held that the Prince Series works made fair use of Goldsmith’s photograph. As to the first factor, the works were “transformative” because, looking at them and the photograph “side-by-side,” they “have a different character, give Goldsmith’s photograph a new expression, and employ new aesthetics with creative and communicative results distinct from Goldsmith’s.” 382 F. Supp. 3d, at 325–326 (internal quotation marks and alterations omitted). In particular, the works “can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure,” such that “each Prince Series work is immediately recognizable as a ‘Warhol’ rather than as a photograph of Prince.” *Id.*, at 326. Although the second factor, the nature of Goldsmith’s

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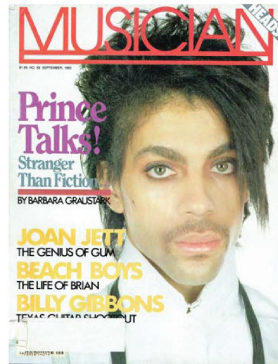


Figure 4. One of Lynn Goldsmith's photographs of Prince on the cover of Musician magazine.

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Figure 5. Four special edition magazines commemorating Prince after he died in 2016.

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Figure 6. Warhol's orange silkscreen portrait of Prince superimposed on Goldsmith's portrait photograph.

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uses. In *Google*, the Court suggested 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.’” 593 U. S., at \_\_\_\_ (slip op., at 24–25) (quoting 4 M. Nimmer & D. Nimmer, Copyright §13.05[A][1][b] (2019), in turn quoting N. Netanel, Making Sense of Fair Use, 15 Lewis & Clark L. Rev. 715, 746 (2011) (some internal quotation marks omitted)). That suggestion refers to Warhol’s works that incorporate advertising logos, such as the Campbell’s Soup Cans series. See fig. 7, *infra*.

Yet not all of Warhol’s works, nor all uses of them, give rise to the same fair use analysis. In fact, Soup Cans well illustrates the distinction drawn here. The purpose of Campbell’s logo is to advertise soup. Warhol’s canvases do



Figure 7. A print based on the Campbell’s soup can, one of Warhol’s works that replicates a copyrighted advertising logo.



of Campbell’s logo is to advertise soup. Warhol’s canvases do not share that purpose. Rather, the Soup Cans series uses Campbell’s copyrighted work for an artistic commentary on consumerism, a purpose that is orthogonal to advertising soup. The use therefore does not supersede the objects of the advertising logo.[15]

Moreover, a further justification for Warhol’s use of Campbell’s logo is apparent. His Soup Cans series targets the logo. That is, the original copyrighted work is, at least in part, the object of Warhol’s commentary. It is the very nature of Campbell’s copyrighted logo—well known to the public, designed to be reproduced, and a symbol of an every-day item for mass consumption—that enables the commentary. Hence, the use of the copyrighted work not only serves a completely different purpose, to comment on consumerism rather than to advertise soup, it also “conjures up” the original work to “she[d] light” on the work itself, not just the subject of the work. *Campbell*, 510 U. S., at 579, 588.[16] Here, by contrast, AWF’s use of Goldsmith’s photograph does not target the photograph, nor has AWF offered another compelling justification for the use. See *infra*, at 34–35, and nn. 20–21.

B

AWF contends, however, that the purpose and character of its use of Goldsmith’s photograph weighs in favor of fair use because Warhol’s silkscreen image of the photograph, like the Campbell’s Soup Cans series, has a new meaning or message. The District Court, for example, understood the Prince Series works to portray Prince as “an iconic, larger-than-life figure.” 382 F. Supp. 3d, at 326. AWF also asserts that the works are a comment on celebrity. In particular, “Warhol’s Prince Series conveys the dehumanizing nature of celebrity.” Brief for Petitioner 44. According to AWF, that new meaning or message, which the Court of Appeals ignored, makes the use “transformative” in the fair use sense. See *id.*, at 44–48. We disagree.

1

*Campbell* did describe a transformative use as one that “alter[s] the first [work] with new expression, meaning, or message.” 510 U. S., at 579; see also *Google*, 593 U. S., at \_\_\_\_ (slip op., at 24). That description paraphrased Judge Leval’s law review article, which referred to “new information, new aesthetics, new insights and understandings.” Leval 1111. (Judge Leval contrasted such additions with

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APPENDIX



Andy Warhol created 16 works based on Lynn Goldsmith's photograph: 14 silkscreen prints and two pencil drawings. The works are collectively known as the Prince Series.

substantiality of the portion used in relation to the copyrighted work as a whole," §107(3); and fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work," all favor Goldsmith. See 11 F. 4th, at 45–51. Because this Court agrees with the Court of Appeals that the first factor likewise favors her, the judgment of the Court of Appeals is

Affirmed.

APPENDIX



Notes

1 A silkscreen is a fine mesh fabric used in screen printing. Warhol's practice was to deliver a photograph to a professional silkscreen printer with instructions for alterations, such as cropping and high contrasting. 1 App. 160, 163. The latter alteration would "flatten" the image. Once Warhol approved, the printer would "reproduc[e]" the altered image "like a photographic negative onto the screen." *Id.*, at 164. For canvas prints, Warhol "would then place the screen face down on the canvas, pour ink onto the back of the mesh, and use a squeegee to pull the ink through the weave and onto the canvas." *Ibid.* The resulting "high-contrast half-tone impressions" served as an "under-drawing," over which Warhol painted colors by hand. *Id.*, at 165.

2 AWF sold 12 of the works to collectors and galleries, and it transferred custody of the remaining four works to the Andy Warhol Museum in Pittsburgh.

3 The Court of Appeals considered not only the possibility of market harm caused by the actions of AWF but also "whether 'unrestricted and widespread conduct of the sort engaged in by [AWF] would result in a substantially adverse impact on the potential market' " for the photograph, including the market for derivative works. 11 F. 4th 26, 49–50 (CA2 2021) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994)); see also *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 568 (1985).

4 Take a critical book review, for example. Not only does the review, as a whole, serve a different purpose than the book; each quoted passage within the review likely serves a different purpose (as an object of criticism) than it does in the book. That may not always be so, however, and a court must consider each use within the whole to determine whether the copying is fair. *W. Patry, Fair Use* §3:1, pp. 129–130 (2022).

5 In theory, the question of transformative use or transformative purpose can be



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gold frames”—disconnected from the everyday world of products and personalities—Warhol’s paintings landed like a thunderclap. A. Danto, *Andy Warhol 36* (2009). Think Soup Cans or, in another vein, think Elvis. Warhol had created “something very new”—“shockingly important, transformative art.” B. Gopnik, *Warhol 138* (2020); Gopnik, *Artistic Appropriation*.

To see the method in action, consider one of Warhol’s pre-Prince celebrity silkscreens—this one, of Marilyn Monroe. He began with a publicity photograph of the actress. And then he went to work. He reframed the image, zooming in on Monroe’s face to “produc[e] the disembodied effect of a cinematic close-up.” 1 App. 161 (expert declaration).



At that point, he produced a high-contrast, flattened image on a sheet of clear acetate. He used that image to trace an outline on the canvas. And he painted on top—applying exotic colors with “a flat, even consistency and an industrial appearance.” *Id.*, at 165. The same high-contrast image was then reproduced in negative on a silkscreen, designed

own; they cannot do what they do without borrowing from or otherwise making use of the work of others. That is the way artistry of all kinds—visual, musical, literary—happens (as it is the way knowledge and invention generally develop). The fair-use test’s first factor responds to that truth: As understood in our precedent, it provides “breathing space” for artists to use existing materials to make fundamentally new works, for the public’s enjoyment and benefit. *Id.*, at 579. In now remaking that factor, and thus constricting fair use’s boundaries, the majority hampers creative progress and undermines creative freedom. I respectfully dissent.[2]

I

A

Andy Warhol is the avatar of transformative copying. Cf. *Google*, 593 U. S., at \_\_\_\_–\_\_\_\_ (slip op., at 24–25) (selecting Warhol, from the universe of creators, to illustrate what transformative copying is). In his early career, Warhol worked as a commercial illustrator and became experienced in varied techniques of reproduction. By night, he used those techniques—in particular, the silkscreen—to create his own art. His own—even though in one sense not. The silkscreen enabled him to make brilliantly novel art out of existing “images carefully selected from popular culture.” D. De Salvo, *God Is in the Details*, in *Andy Warhol Prints 22* (4th rev. ed. 2003). The works he produced, connecting traditions of fine art with mass culture, depended on “appropriation[s]”: The use of “elements of an extant image[ ] is Warhol’s entire modus operandi.” B. Gopnik, *Artistic Appropriation vs. Copyright Law*, *N. Y. Times*, Apr. 6, 2021, p. C4 (internal quotation marks omitted). And with that m.o., he changed modern art; his appropriations and his originality were flip sides of each other. To a public accustomed to thinking of art as formal works “belong[ing] in gold frames”—disconnected from the everyday world of products and personalities—Warhol’s paintings landed like a thunderclap. A. Danto, *Andy Warhol 36* (2009). Think Soup Cans or, in another vein, think Elvis. Warhol had created “something very new”—“shockingly important, transformative art.” B. Gopnik, *Warhol 138* (2020); Gopnik, *Artistic Appropriation*.

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to function as a selectively porous mesh. Warhol would “place the screen face down on the canvas, pour ink onto the back of the mesh, and use a squeegee to pull the ink through the weave and onto the canvas.” *Id.*, at 164. On some of his Marilyns (there are many), he reordered the process—first ink, then color, then (perhaps) ink again. See *id.*, at 165–166. The result—see for yourself—is miles away from a literal copy of the publicity photo.



Andy Warhol, Marilyn, 1964, acrylic and silkscreen ink on linen

And the meaning is different from any the photo had. Of course, meaning in great art is contestable and contested (as is the premise that an artwork is great). But note what some experts say about the complex message(s) Warhol’s Marilyns convey. On one level, those vivid, larger-than-life paintings are celebrity iconography, making a “secular, profane subject[ ]” “transcendent” and “eternal.” *Id.*, at 209 (internal quotation marks omitted). But they also function as a biting critique of the cult of celebrity, and the role it plays

At that point, he produced a high-contrast, flattened image on a sheet of clear acetate. He used that image to trace an outline on the canvas. And he painted on top—applying exotic colors with “a flat, even consistency and an industrial appearance.” *Id.*, at 165. The same high-contrast image was then reproduced in negative on a silkscreen, designed to function as a selectively porous mesh. Warhol would “place the screen face down on the canvas, pour ink onto the back of the mesh, and use a squeegee to pull the ink through the weave and onto the canvas.” *Id.*, at 164. On some of his Marilyns (there are many), he reordered the process—first ink, then color, then (perhaps) ink again. See *id.*, at 165–166. The result—see for yourself—is miles away from a literal copy of the publicity photo.



Andy Warhol, Marilyn, 1964, acrylic and silkscreen ink on linen

And the meaning is different from any the photo had. Of course, meaning in great art is contestable and contested (as is the premise that an artwork is great). But note what some experts say about the complex message(s) Warhol’s Marilyns convey. On one level, those vivid, larger-than-life paintings are celebrity iconography, making a “secular, profane subject[ ]” “transcendent” and “eternal.” *Id.*, at 209 (internal quotation marks omitted). But they also function as a biting critique of the cult of celebrity, and the role it plays in American life. With misaligned, “Day-Glo” colors suggesting “artificiality and industrial production,” Warhol portrayed the actress as a “consumer product.” The Metropolitan Museum of Art Guide 233 (2012); The Metropolitan Museum of Art, Marilyn (2023) (online source archived at <https://www.supremecourt.gov>). And in so doing, he “exposed the deficiencies” of a “mass-media culture” in which “such superficial icons loom so large.” 1 App. 208, 210 (internal quotation marks omitted). Out of a publicity photo came both memorable portraiture and pointed social commentary.

As with Marilyn, similarly with Prince. In 1984, Vanity Fair commissioned Warhol to create a portrait based on a black-and-white photograph taken by noted photographer Lynn Goldsmith:

As he did in the Marilyn series, Warhol cropped the photo, so that Prince’s head fills the whole frame: It thus becomes “disembodied,” as if “magically suspended in space.” *Id.*, at 174. And as before, Warhol converted the cropped photo into a higher-contrast image, incorporated into a silkscreen. That image isolated and exaggerated the darkest details of Prince’s head; it also reduced his “natural, angled position,” presenting him in a more face-forward way. *Id.*, at 223. Warhol traced,

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Andy Warhol, Prince, 1984, synthetic paint and silkscreen ink on canvas

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It does not take an art expert to see a transformation—but in any event, all those offering testimony in this case agreed there was one. The experts explained, in far greater detail than I have, the laborious and painstaking work that Warhol put into these and other portraits. See 1 App. 160–185, 212–216, 222–224. They described, in ways I have tried to suggest, the resulting visual differences between the photo and the silkscreen. As one summarized the matter: The two works are “materially distinct” in “their composition, presentation, color palette, and media”—*i.e.*, in pretty much all their aesthetic traits. *Id.*, at 227.[3] And with the change in form came an undisputed change in meaning. Goldsmith's focus—seen in what one expert called the “corporeality and luminosity” of her depiction—was on Prince's “unique human identity.” *Id.*, at 176, 227. Warhol's focus was more nearly the opposite. His subject was “not the private person but the public image.” *Id.*, at 159. The artist's “flattened, cropped, exotically colored, and unnatural depiction of Prince's disembodied head” sought to “communicate a message about the impact of celebrity” in contemporary life. *Id.*, at 227. On Warhol's canvas, Prince emerged as “spectral, dark, [and] uncanny”—less a real person than a “mask-like simulacrum.” *Id.*, at 187, 249. He was reframed as a “larger than life” “icon or totem.” *Id.*, at 257. Yet he was also reduced: He became the product of a “publicity machine” that “packages and disseminates commoditized images.” *Id.*, at 160. He manifested, in short, the dehumanizing culture of celebrity in America. The message could not have been more different.

A thought experiment may pound the point home. Suppose you were the editor of Vanity Fair or Condé Nast, publishing an article about Prince. You need, of course,

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the whole fair-use test. *Ante*, at 24.

Finally, back to the visual arts, for while Warhol may have been the master appropriator within that field, he had plenty of company; indeed, he worked within an established tradition going back centuries (millennia?). The representatives of three giants of modern art (you may know one for his use of comics) describe the tradition as follows: “[T]he use and reuse of existing imagery” are “part of art’s lifeblood”—“not just in workaday practice or fledgling student efforts, but also in the revolutionary moments of art history.” Brief for Robert Rauschenberg, Roy Lichtenstein, and Joan Mitchell Foundations et al. as *Amici Curiae* 6.

Consider as one example the reclining nude. Probably the first such figure in Renaissance art was Giorgione’s *Sleeping Venus*. (Note, though, in keeping with the “nothing comes from nothing” theme, that Giorgione apparently modeled his canvas on a woodcut illustration by Francesco Colonna.) Here is Giorgione’s painting:



Giorgione, *Sleeping Venus*, c. 1510, oil on canvas

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But things were destined not to end there. One of Giorgione’s pupils was Titian, and the former student undertook to riff on his master. The resulting *Venus of Urbino* is a prototypical example of Renaissance *imitatio*—the creation of an original work from an existing model. See *id.*, at 8; 1 G. Vasari, *Lives of the Artists* 31, 444 (G. Bull transl. 1965). You can see the resemblance—but also the difference:

Titian, *Venus of Urbino*, 1538, oil on canvas

The majority would presumably describe these Renaissance canvases as just “two portraits of reclining nudes painted to sell to patrons.” Cf. *ante*, at 12–13, 22–23. But wouldn’t that miss something—indeed, everything—about how an artist engaged with a prior work to create new expression and add new value?

And the reuse of past images was far from done. For here is Édouard Manet’s *Olympia*, now considered a foundational work of artistic modernism, but referring in obvious ways to Titian’s (and back a step, to Giorgione’s) *Venus*:

Manet, *Olympia*, 1863, oil on canvas

Here again consider the account of the Rauschenberg, Lichtenstein, and Mitchell Foundations: “The revolutionary shock of the painting depends on how traditional imagery remains the painting’s recognizable foundation, even as that imagery is transformed and wrenched into the present.” Brief as *Amici Curiae* 9. It is an especially striking example of a recurrent phenomenon—of how the development of visual art works across time and place, constantly building on what came earlier. In fact, the Manet has itself spawned further transformative paintings, from Cézanne to a raft of contemporary artists across the globe. See *id.*, at 10–11. But the

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Take a look at one last example, from a modern master very different from Warhol, but availing himself of the same appropriative traditions. On the left (below) is Velázquez’s portrait of Pope Innocent X; on the right is Francis Bacon’s Study After Velázquez’s Portrait.

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Velázquez, Pope Innocent X,  
c. 1650, oil on canvasFrancis Bacon, Study After  
Velázquez's Portrait of Pope  
Innocent X, 1953, oil on canvas

To begin with, note the word “after” in Bacon’s title. Copying is so deeply rooted in the visual arts that there is a naming convention for it, with “after” denoting that a painting is some kind of “imitation of a known work.” M. Clarke, *The Concise Oxford Dictionary of Art Terms* 5 (2d ed. 2010). Bacon made frequent use of that convention. He was especially taken by Velázquez’s portrait of Innocent X, referring to it in tens of paintings. In the one shown above, Bacon retained the subject, scale, and composition of the Velázquez original. Look at one, look at the other, and you know Bacon copied. But he also transformed. He invested his portrait with new “expression, meaning, [and] message,” converting Velázquez’s study of magisterial power into one of mortal dread. *Campbell*, 510 U. S., at 579.

But the majority, from all it says, would find the change immaterial. Both paintings, after all, are “portraits of [Pope Innocent X] used to depict [Pope Innocent X]” for hanging in some interior space, *ante*, at 12–13; so on the

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The majority thus treats creativity as a trifling part of the fair-use inquiry, in disregard of settled copyright principles and what they reflect about the artistic process. On the majority’s view, an artist had best not attempt to market even a transformative follow-on work—one that adds significant new expression,