

No. 24-3367

IN THE
United States Court of Appeals
for the Ninth Circuit

JEFFREY B. SEDLIK,
Petitioner,

v.

KATHERINE VON DRACHENBERG, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR RESPONDENTS

BENJAMIN WHO
Counsel of Record

Note: The Jurisdiction and Statement of the Case sections are omitted from this brief. This brief also fictitiously assumes that the Court of Appeals for the Ninth Circuit can selectively grant certiorari, and that it has issued a writ of certiorari to the United States District Court in this case.

QUESTION PRESENTED

The question presented is whether the tattoo created by Respondents is “fair use” of Petitioner’s source work under the first factor of §107 of the 1976 Copyright Act, which inquires into “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” 17 U. S. C. §107.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
SUMMARY OF ARGUMENT	2
THE FIRST FAIR USE FACTOR FAVORS RESPONDENTS AS A MATTER OF LAW	2
ARGUMENT	5
I. The First Factor Leans In Favor Of Secondary Uses That Serve Distinct Purposes From Those Of Their Source Works	5
A. <i>Warhol</i> Clarified That Purpose Is The Cardinal Question In First Factor Consideration	5
1. <i>Warhol</i> reworked what it means for a secondary work to be “transformative”	6
2. Under <i>Warhol</i> , purpose is a prior question to other considerations, such as commerciality or justification for copying	8
B. Both Petitioner’s Characterizations Of The Holding In <i>Warhol</i> Claiming Otherwise Are Wrong	10
1. Petitioner’s first reading of <i>Warhol</i> misses the crucial concept of purpose	10
2. Petitioner is mistaken in suggesting that a fair secondary use must either target its source work or present another compelling justification for its copying	11
II. Respondents’ Use Serves A Categorically Distinct Purpose From That Of Petitioner’s Photograph, And The Copying Can Be Independently Justified	13

A. Tattoos Have A History And Tradition Of Being Purposed To Serve Uniquely Personal, Identity-Related Ends	14
B. The Purpose Of Respondent’s Tattoo Is To Reflect An Aspect Of Farmer’s Identity And Alter His Bodily Expression.....	17
1. The district court errantly refused to consider Farmer’s motivations for obtaining the Davis tattoo.....	19
2. The district court failed to adequately articulate the purpose of the tattoo, beyond making an overly reductive commercial vs. noncommercial distinction	21
C. The Tattoo’s Purpose Is Categorically Distinct From The Identifying, Reference, Or Licensing Purposes Of Petitioner’s Source Work.....	23
1. Petitioner’s attempt to similarize the purposes of Respondents’ tattoo and the source photograph is misguided.....	25
2. The district court wrongly diminished Respondent’s tattoo to a mere change in medium, ignoring its distinct purpose	27
D. Although Unneeded, Respondent’s Tattoo Can Independently Justify Its Targeting Of Petitioner’s Source Work.....	29
1. The tattoo enables Farmer’s commentary on Petitioner’s photograph, and the photo is, at least in part, the object of that commentary.....	30
2. This Court should reject the district court’s creation of a novel targeting test because it runs wholly contrary to precedent	33

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith</i> , 598 U.S. 508, 535 (2023).....	passim
<i>Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith</i> , 11 F.4th 26, 37 (2d Cir. 2021)	11
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569, 579 (1994).....	passim
<i>Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.</i> , 2025 U.S.P.Q.2d 95, 4 (8th Cir. 2025)	9, 22, 37
<i>Google LLC v. Oracle Am., Inc.</i> , 593 U.S. 1, 24 (2021).....	passim
<i>Griner v. King</i> , 104 F.4th 1, 9 (8th Cir. 2024).....	9, 22, 24
<i>Hachette Book Grp., Inc. v. Internet Archive</i> , 115 F.4th 163, 181 (2d Cir. 2024)	9, 22, 29
<i>Keck v. Mix Creative Learning Ctr., L.L.C.</i> , 116 F.4th 448, 454 (5th Cir. 2024).....	passim
<i>Philpot v. Indep. J. Rev.</i> , 92 F.4th 252, 258 (4th Cir. 2024).....	9, 22, 23, 24
Statutes	
17 U.S.C. §107.....	6
Other Authorities	
A. Govenar, <i>The Changing Image of Tattooing in American Culture</i> , 5 J. American Culture 30 (1982)....	16

TABLE OF AUTHORITIES

(continued)

	Page(s)
Brick Store Museum, <i>Stories in Ink: The History & Modern Art of Tattooing</i> (2018)	15
G. Allen Smith, <i>The Slave's Gamble</i> (2013)	16
H. Medhi, <i>Ink On Skin: A Cultural Exploration Of The History And Significance Of Tattoos</i> , 11 Intl' J. Creative Research Thoughts 728 (2023)	17
H. Roggenkamp, A. Nicholls & J. Pierre, <i>Tattoos as a window to the psyche: How talking about skin art can inform psychiatric practice</i> , 7 World J. Psychiatry 148 (2017).....	17
J. Robinson, <i>In Polynesia, tattoos are more than skin deep</i> , National Geographic (2022).....	15
K. Schaeffer & S. Dinesh, <i>32% of Americans have a tattoo, including 22% who have more than one</i> , Pew Research Center (Aug. 15, 2023)	16, 17
M. Scallan, <i>Ancient ink: Iceman Otzi has the world's oldest tattoos</i> , Smithsonian Institution (Dec. 9, 2015).....	15
U. Karacaoglan, <i>Tattoo and taboo: On the meaning of tattoos in the analytic process</i> , 93 Int'l J. Psychoanalysis 5, 6 (2012)	34

OPINIONS BELOW

The order of the district court denying in part and granting in part the Respondents' motion for summary judgement/partial summary judgement and denying Petitioner's motion for summary judgement/summary adjudication (Resp. App. 1a–30a) has not yet been reported by the Federal Reporter and is available at 2022 BL 251649. The order of the district court granting Respondents' motion for reconsideration and granting Petitioner's motion for reconsideration is (Resp. App. 31b–43b) has not yet been reported by the Federal Reporter and is available at 2023 BL 362275.

SUMMARY OF ARGUMENT

THE FIRST FAIR USE FACTOR FAVORS RESPONDENTS AS A MATTER OF LAW

Silicone spatulas are revered tools in the kitchen due to their flexibility. In shallow frying pans and cavernous Dutch ovens alike, the silicone spatula shapes itself to perfectly match the contours of the cookware, allowing the chef to harvest every last drop of whatever savory substance she's concocted. Like the silicone spatula, fair use is designed to be a highly flexible doctrine of copyright law. Though it establishes "general principles, the application of which requires judicial balancing," specific applications of fair use "may well vary depending upon context," because the doctrine is "flexible."

Regrettably, that's not how the district court disposed of this case. Far from it, the court's order rejecting Respondents' fair use arguments employed a rigid interpretation of the doctrine that fails to reflect the contours of this case, which concerns a form of expression that no court has ever applied fair use to: tattoos. The district court balked at the idea of considering the unique features of tattoos, despite the fact that scrutinizing those features is precisely what excellent fair use analysis demands. In this sense, the district court's reasoning is akin to using a metal spatula to scrape a delectable roux out of a saucepan — neither make sense. This Court should reverse and find that the first fair use factor favors Respondents as a matter of law.

I. The first factor leans in favor of secondary uses that serve distinct purposes from those of their source works.

A. If nothing else, the Supreme Court's ruling in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* made one thing exceptionally clear: The key question the first factor asks is one of purpose. That is, if a secondary use

serves a sufficiently distinct purpose from that of its source work, then the first factor generally leans in its favor, even if other considerations like commerciality and a lack of specific justification for copying lean the other way.

B. Petitioner attempts to advance tenuous readings of *Warhol* that mischaracterize it beyond recognition; this Court should reject those efforts.

II. Respondents' secondary use serves a categorically distinct purpose from that of Petitioner's photograph, and the copying can be independently justified.

A & B. In this case, the purpose of Respondents' tattoo is to reflect an aspect of Blake Farmer's identity and to alter his bodily expression. Farmer got the tattoo for the purpose of expressing his deep association with the life of Miles Davis. This purpose can be "reasonably perceived" because it aligns with the history and tradition of tattoos being used to achieve uniquely personal identity-expressing and body-altering ends.

The district court refused to include Farmer's motivations for getting the tattoo in its considerations. This exclusion runs contrary to the spirit of first factor analysis and fails to take into account the unique role of tattoo bearers as part of the artistic process themselves. But even if this Court affirms the district court's exclusion, the purpose of the tattoo as Respondents articulate it can still be reasonably perceived due to the history and tradition of tattoos alone.

C. The tattoo's purpose as described above is unlike any of the purported purposes that Petitioner's photograph serves. The tattoo's purpose is not to "identify" or "depict" Miles Davis, though it may do so incidentally. Nor is its purpose to serve as an artistic reference. Nor do Respondents use the tattoo for licensing to other artists. Petitioner's attempts to similarize the tattoo's purpose with the original photograph's purpose are unpromising because they violate

Warhol's instruction to consider purpose within “the context of the particular use at issue.” The use at issue today is the tattoo — not Respondents’ social media posts or any artistic reference images made during the tattoo’s creation.

The district court found Respondents’ tattoo insufficiently transformative because it can be described as recasting Petitioner’s photograph in a new medium. This holding ignores the fact that Respondents’ tattoo does not *merely* recast its source work in a new medium — it also serves a categorically distinct purpose.

D. The fact that Respondents’ secondary use serves a highly distinct purpose from that of Petitioner’s photograph is enough for a finding of fair use under the first factor. But *Warhol* suggested that this claim to fairness can be further bolstered if a secondary work offers an independent justification for its copying. That’s the case here: Respondents *needed* to copy Petitioner’s photograph to enable Farmer’s commentary on it. Petitioner’s portrait of Miles Davis is far from generic: It contains unique artistic elements that stood out to Farmer. The fact that Farmer had the image permanently etched onto his arm, a “painful manipulation of the body,” is a mode of commentary — it expresses Farmer’s appreciation for the artistic elements that compose the “very nature” of the photograph. Thus, Petitioner’s photo is, “at least in part,” the object of Farmer’s commentary. Respondents targeted the photo, at Farmer’s bequest, to enable that commentary.

All told, Respondents used Petitioner’s photograph to serve an entirely new and distinct purpose, which is the most important consideration under the first factor. Respondents are further justified in their copying of the photograph because their targeting of the work enabled Farmer’s commentary on it. The first factor thus strongly favors Respondents as a matter of law, and this Court should reverse the district court’s incongruous holding.

ARGUMENT

I. The First Factor Leans In Favor Of Secondary Uses That Serve Distinct Purposes From Those Of Their Source Works

A. *Warhol* Clarified That Purpose Is The Cardinal Question In First Factor Consideration

Amidst the clamor of contention in this case, Petitioner and Respondents can agree on at least one key issue: The Supreme Court’s ruling in *Warhol* provides the answer to whether Respondents’ tattoo constitutes fair use under the first factor. *See generally* Br. for Pet., at 44–46. Yet it is difficult to read Petitioner’s opening brief and conclude we are discussing the same *Warhol*; Petitioner’s argument delivers a painfully grotesque characterization of the Court’s holding in that case. To illuminate the magnitude of this error, though, we must first begin with what the Court *did* say.

If the entire *Warhol* opinion had to be condensed into a single word, it would be this: purpose. Specifically, the Court’s judgment that the first factor favored photographer Lynn Goldsmith rested on the pivotal fact that her photograph of Prince and the Andy Warhol Foundation’s infringing use of that photograph shared the same purpose: “Both are portraits of Prince used in magazines to illustrate stories about Prince.” *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 535 (2023). But more broadly, the word “purpose” appears almost one hundred times in Justice Sotomayor’s 38-page-long majority opinion. That is no accident — *Warhol* refreshed first factor precedent by clarifying that “purpose” serves as the first factor’s “central question.” *Id.*, at 528 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)). And the Court made this idea impossible to miss by restating it in just about every way imaginable. *See, e.g., id.*, at 525 (“first fair use

factor instead focuses on whether an allegedly infringing use has a *further purpose . . .*”); *id.*, at 529 (“A use that has a *further purpose . . .* is said to be ‘transformative.’”); *id.*, at 532 (“the first fair use factor considers whether the use of a copyrighted work has a *further purpose . . .*”); and *id.*, at 539 n.15 (suggesting that Warhol’s Soup Cans would not be fair use under the first factor if they were licensed for use as a logo, because “[t]hat use would share much the *same purpose* of Campbell’s logo”) (emphases added in all instances). In heralding purpose as the “central question,” the Court brought first factor analysis into closer harmony with the statutory language of §107 (which probes the “purpose and character” of the challenged use). 17 U.S.C. §107.

1. *Warhol* reworked what it means for a secondary work to be “transformative”

Additionally, *Warhol* emphasized that “transformation,” a judicially-created concept that reigns supreme over first factor analyses, actually runs through “purpose” — that is, for a work to be considered transformative, it generally must serve a further, distinct purpose.¹ *Id.*, at 529. In this way, *Warhol* appeared to depart from earlier holdings which suggested transformation rested on a secondary work’s addition of an additional expression or novel aesthetic, which the Court noted might endanger copyright holders’ rights to derivatives of their works. *Id.*, at 541 (“[If] §107(1) weighs in favor of any use that adds some new expression, meaning, or

¹ Generally, because the Court did leave “different character” as the only other avenue by which secondary works can claim transformation, with “character” referring to a work’s commercial nature (i.e., nonprofit or for-profit). See *Warhol*, 598 U.S., at 529 (“A use that has a further purpose or different character is said to be ‘transformative.’”) (quoting *Campbell*, 510 U.S., at 579); and *id.*, at 538 n.14 (“the Court has previously employed “character” to encompass . . . the commercial or nonprofit character of an activity”) (internal quotation marks omitted). However, because neither *Warhol* nor today’s case concerns nonprofit secondary uses (differences in character), this avenue is irrelevant to Respondent’s argument.

message[.] . . . ‘transformative use’ would swallow the copyright owner’s exclusive right to prepare derivative works.”); *but see, e.g., Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 24 (2021) (holding “‘transformative’ to describe a copying use that adds something new and important”) (citation omitted); *Campbell*, 510 U.S., at 579 (transformative works “[add] something new, . . . altering the first with new expression, meaning, or message”). Critically, this reworking of “transformation” also means that secondary works can be exact copies of their source works yet still claim transformation — as the Court’s discussion of Warhol’s Soup Cans illustrated. *Warhol*, 598 U.S., at 538.

To be sure, *Warhol* did not throw the concept of adding “new meaning or message” out the window entirely. Far from it, the Court clarified that “meaning or message [is] simply relevant to whether the new use [serves] a purpose distinct from the original, or instead superseded its objects.” *Warhol*, 598 U.S., at 542. This phrasing epitomizes the sort of dominance *Warhol* bestowed onto the idea of purpose: First factor analysis is not primarily a *subjective* exploration of the work’s qualities or substance, but rather, “an *objective* inquiry into what use was made, *i.e.*, what the user does with the original work” (read: purpose). *Id.*, at 545 (emphasis added).² The subjective exploration may aid the objective determination, but the former is unnecessary if a secondary work plainly serves a distinct purpose, or objective, from its source work.

² Importantly, in this context, the *Warhol* Court isn’t using “objective” to mean “free of personal feelings, prejudices, or interpretations.” Rather, “objective” in this context relates to the objects of a work, *i.e.*, that work’s “aim[s], goal[s], or end[s].” *Objective*, Merriam-Webster (11th ed. 2025). Likewise, “subjective” in this context does not mean “modified or affected by personal views, experience, or background,” but rather, a work’s “substance, qualities, attributes, or relations.” *Subjective*, Merriam-Webster (11th ed. 2025).

2. Under *Warhol*, purpose is a prior question to other considerations, such as commerciality or justification for copying

Finally, *Warhol* established that “purpose” is not only the “central question” of the first factor — it is also a *prior question* to other considerations. Indeed, only because the two uses of Goldsmith’s photograph shared the same purposes, the Court held, did the issues of commerciality and justifications for copying even emerge as relevant. *See id.*, at 531 (holding that “commercial nature of the use ... looms larger” if a secondary work’s “claim to fairness in borrowing from another’s work diminishes”); *id.* (holding that the greater “the degree to which the use has a further purpose, ... the less will be the significance of other factors, like commercialism”); *id.*, at 547 (“because AWF’s commercial use of Goldsmith’s photograph to illustrate a magazine about Prince is so similar to the photograph’s typical use, a particularly compelling justification is needed”).

This holding is highly intuitive with respect to both commerciality and justification for use. For commerciality, the Court referenced the fourth fair use factor in noting that, if a secondary work serves a distinct purpose from its source work, the commercial nature of the secondary use is rather insignificant because no substitutive effect takes place. *See id.*, at 536 n.12 (“In this way, the first factor relates to the fourth, market effect . . . While the first factor considers whether and to what extent an original work and secondary use have substitutable purposes, the fourth factor focuses on actual or potential market substitution.”) (internal citation omitted). Likewise, for justification, the Court observed that, if a secondary work serves a distinct purpose from its source work, the secondary work is inherently “justified because it furthers the goal of copyright.” *Id.*, at 531. Thus, the purpose of a secondary work is a prior question — and even an

overriding consideration — to its commerciality and what justification it offers (or doesn't offer) for its copying.³

In sum, the positive formulation of *Warhol's* holding can be articulated like this: If a secondary work serves a purpose that is sufficiently distinct from its source work, the first factor nearly always leans in favor of fair use, even if commerciality or the absence of an explicit justification for copying leans the other way. In the short time since *Warhol*, a smattering of circuits have already applied this purpose-centric holding consistently and coherently. *See, e.g., Griner v. King*, 104 F.4th 1, 9 (8th Cir. 2024) (finding that the secondary use's purpose of "disseminat[ing] a meme" is not sufficiently distinct from the source photograph's purpose as a "meme template"); *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*, 2025 U.S.P.Q.2d 95, 4 (8th Cir. 2025) ("This *informational purpose* of the floorplans was new and went *beyond the purpose* of the designs") (emphasis added); *Philpot v. Indep. J. Rev.*, 92 F.4th 252, 258 (4th Cir. 2024) ("the two uses shared substantially the *same purpose*") (citation omitted and emphasis added); *Hachette Book Grp., Inc. v. Internet Archive*, 115 F.4th 163, 181 (2d Cir. 2024) ("IA's digital books serve the *same exact purpose* as the originals: making authors' works available to read.") (emphasis added).

Keck v. Mix Creative is particularly instructive: In that case, the Fifth Circuit held that a learning center's exact reproductions of an artist's work for use in art kit products

³ Doubtless, we recognize two caveats to this characterization. First, Warhol emphasized that distinctiveness in purpose is a matter of degree. *Warhol*, 593 U.S., at 532. Second, because first factor judgement is more akin to a scale than a checkbox, a secondary work that serves a distinct purpose from its source work may be even more decisively fair use if it is used for nonprofit purposes rather than commercial ones, meaning a favorable finding of distinct purpose doesn't *completely* override other considerations. *Cf. Campbell*, 510 U.S., at 585 ("The use . . . of a copyrighted work to advertise a product, even in a parody, will be entitled to less indulgence under the first factor . . . than the sale of a parody for its own sake, let alone one performed a single time by students in school.").

was fair under the first factor, because “the art kits had an educational purpose that was significantly different from the original, decorative purpose of [the source work].” *Keck v. Mix Creative Learning Ctr., L.L.C.*, 116 F.4th 448, 454 (5th Cir. 2024). Because the purpose of the secondary use was so distinct, the Fifth Circuit appropriately discounted other considerations, such as the highly commercial nature of the art kits, the art kits’ pixel-for-pixel copying which added no new expression or meaning to the source work, or the lack of any explicit justifications for targeting the source work.

B. Both Petitioner’s Characterizations Of The Holding In *Warhol* Claiming Otherwise Are Wrong

Given that purpose is the cardinal concept in *Warhol*, one would expect that Petitioner’s summary of the case holding addresses the topic thoroughly, right? Wrong. In contrast to the *Warhol* opinion, Petitioner’s entire analysis of the case mentions “purpose” just once — in a passing quotation from the *Warhol* opinion itself. *See* Br. for Pet., at 44–46. Rather than discussing purpose, Petitioner’s argument is consumed with subordinate topics like derivatives, targeting, and justification. In the words of Justice Sotomayor, Petitioner “misses the forest for a tree.” *Warhol*, 598 U.S., at 549. Accordingly, Petitioner’s brief advances two theories for what *Warhol* stands for, both of which are unpromising.

1. Petitioner’s first reading of *Warhol* misses the crucial concept of purpose

First, Petitioner suggests that, under *Warhol*, to be considered fair under the first factor, a secondary use must either fall into a category enumerated as fair in §107 or possess a degree of transformation beyond that required to qualify as a derivative work. Br. for Pet., at 44–45. (“The Supreme Court noted that the types of copying that are typically fair involve criticism, comment, news reporting,

teaching, scholarship, or research . . . Defendants did not argue that any of their uses falls into any of these categories, nor did they argue that their uses extend beyond the creation of derivative works”). Never mind that *Warhol* followed a line of cases in holding that the “purposes listed in the preamble paragraph of §107” are “illustrative and not limitative” and are intended to “guide the first factor inquiry,” not establish categorical labels of what is fair. *Warhol*, 598 U.S., at 528 (quoting *Campbell*, 510 U.S., at 577–578). Never mind, too, that the Court in *Warhol* observed that the uses listed in the preamble paragraph actually strengthen the case for regarding *purpose* as the dominant first factor question, because “[the uses listed] contemplate the use of an original work to serve a manifestly different purpose from the work itself.” *Id.* (quoting *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 37 (2d Cir. 2021)) (internal quotation marks omitted).

Petitioner is right about one thing — secondary uses must possess a degree of transformation beyond that required to qualify as a derivative work in order to be considered fair under the first factor. But to advance that argument without even *mentioning* the concept of purpose misses the mark. As discussed earlier, *Warhol* measures a secondary work’s degree of transformation based on the “degree of difference” between its purpose and that of its source work. *See, supra*, at 5–6. In other words, the key question is *still* that of purpose. Petitioner tells part of the story (sufficient transformation must surpass that of derivative works), but in leaving out key plot elements (the entire concept of purpose), doesn’t tell much of a story at all.

- 2. Petitioner is mistaken in suggesting that a fair secondary use must either target its source work or present another compelling justification for its copying**

Second, Petitioner proposes an even more dubious reading of *Warhol*: To be fair under the first factor, a secondary work must “target or have a critical bearing on the original work itself, not what it depicts.” Otherwise, it must “present a compelling justification for the use.” Br. for Pet., at 45 (internal quotation marks omitted). Pure fiction. *Warhol* did address the issues of targeting and justification, but in a manner markedly different from Petitioner’s reimagination. Let’s start with justification: Secondary uses with distinct enough purposes, the Court held, are inherently justified “in a broad sense” because they “[further] the goal of copyright . . . without diminishing the incentive to create.” *Warhol*, 598 U.S., at 531. As for targeting, *Warhol* held that a secondary use may be justified “in a narrower sense” if it targets an original work, but that this “independent justification” is only “particularly relevant” when “an original work and copying use share the same or highly similar purposes.” *Id.*, at 532. Again, the prior question is that of “purpose.” And yet again, Petitioner’s aversion to that word inhibits an accurate articulation of the Court’s holding. (If it sounds like “purpose” is becoming somewhat of a key word, that’s because, well, it is.) *See, supra*, at 5.

Petitioner appears ideologically snagged in *Warhol*’s declaration that, “AWF’s use of Goldsmith’s photograph does not target the photograph, nor has AWF offered another compelling justification for the use.” *Id.*, at 540; *accord* Br. for Pet., at 45 (Claiming that “if the use does not ‘target’ the original work, the defendant must present a ‘compelling’ justification for the use.”). But recall that the Court only probed whether AWF’s use targeted Goldsmith’s photograph or provided another compelling justification *after* it found AWF’s use shared the same purpose as that of its source, and accordingly, had no claim to a broad, inherent justification. In sum, secondary uses with distinct purposes from their

source works are inherently justified on a general level because they advance the aims of copyright without threatening to substitute the original work. These justified secondary uses may be *further* justified if targeting their source works is necessary to achieving their distinct purposes, but this further, independent justification is not necessary for a finding of fair use, even when the secondary use is commercial.

II. Respondent’s Use Serves A Categorically Distinct Purpose From That Of Petitioner’s Photograph, And The Copying Can Be Independently Justified

The first factor leans in favor of secondary uses that serve distinct purposes from their source works — the greater the difference in purpose, the greater the lean. *Warhol*, 598 U.S., at 529. In this case, the lean is extreme, as Respondents’ tattoo serves a categorically distinct purpose from Petitioner’s photograph. Whereas the original photo of Davis served to depict or identify him in an artistic light, Respondents’ tattoo reflects Farmer’s deep personal association with Miles Davis and alters Farmer’s bodily expression with a graphical representation of that association. These environments and purposes are “distinct and different.” *Google*, 593 U.S., at 31.

Further, the tattoo’s purpose as described above can be “reasonably perceived” because Farmer’s reasons for wanting the tattoo closely align with their history and tradition as deeply personal expressions of identity and as distinctly meaningful body modifications; the Court in *Google* conducted a similar analysis by comparing the copier’s intent with the history and tradition of the copying practice. *See id.*, at 30–32. The district court in this case errantly refused to consider Farmer’s motivation for obtaining the tattoo for two puzzling reasons (one technical and one semantic), neither of which accurately reflect this Court’s primary task of considering the purpose of the

challenged use against that of the original work — reflecting instead an aversion to granting tattoos the flexible consideration fair use analysis demands. However, even if this Court affirms that exclusion, it can and should still find that the tattoo’s distinct purpose can be reasonably perceived.

According to *Warhol*, that is enough. Because Respondents’ use serves a categorically distinct purpose from Petitioner’s photograph, the first factor already leans heavily in favor of fair use because the secondary use is broadly justified. *See, supra*, at 12. However, *Warhol* also noted that a secondary use’s claim to fairness can be further bolstered if it can offer a specific, independent justification for its copying. We can. Respondents *needed* to copy Petitioner’s photograph to enable Farmer’s commentary on it. The fact that Farmer had Petitioner’s photograph permanently etched onto his arm, a “painful manipulation of the body,” is a mode of commentary — it expresses Farmer’s appreciation for the artistic elements that compose the “very nature” of the photograph. Thus, Petitioner’s photo is, “at least in part,” the object of Farmer’s commentary. Respondents targeted the photo, at Farmer’s bequest, to enable that commentary.

A. Tattoos Have A History And Tradition Of Being Purposed To Serve Uniquely Personal, Identity-Related Ends

The history of tattoos is likely as old as humanity itself. The oldest human mummy discovered, known as Ötzi the Iceman, had 61 tattoos on various parts of his body. Researchers theorize these tattoos were used for healing and therapy, similar to acupuncture, suggesting that the earliest tattoos served body-altering purposes. M. Scallan, *Ancient ink: Iceman Otzi has the world's oldest tattoos*, Smithsonian Institution (Dec. 9, 2015). Later, Polynesian cultures used tattoos, or tatau, for deeply identity-related purposes: “Tatau

served as a form of ID or social rank, keeping track of the genealogy of the family, and representing important milestones.” J. Robinson, *In Polynesia, tattoos are more than skin deep*, National Geographic (2022). Indigenous groups in North America shared these purposes, with European explorers observing that “tribal members [had] unique patterns and imagery tattooed on their skin.” Brick Store Museum, *Stories in Ink: The History & Modern Art of Tattooing* (2018).

In the United States, the history of tattooing as expressions of identity is similar. Early American sailors used tattoos to *alter* their outward appearance so that their identities could be uniquely described on protection certificates to avoid impressment by British Navy ships. G. Allen Smith, *The Slave’s Gamble* (2013). Tattoos have also been strongly associated with military populations, dating back to World Wars I and II. One 1908 estimate purported that 75% of sailors in the U.S. Navy had tattoos, which served a variety of expressive purposes: “Some tattoos were a means of expressing the devotion to wives, children, family, and country . . . Others fortified the masculine egos of the wearers or vented the frustrations and anxieties of the War.” A. Govenar, *The Changing Image of Tattooing in American Culture*, 5 *J. American Culture* 30 (1982).

That history has carried over to today, where tattooing for expressive and identity-related reasons is commonplace. A 2023 survey found that almost a third (32%) of Americans have a tattoo, with 22% having more than one. K. Schaeffer & S. Dinesh, *32% of Americans have a tattoo, including 22% who have more than one*, Pew Research Center (Aug. 15, 2023). The same survey showed that an overwhelming majority elect to get tattoos for personal and identity-related purposes: 69% of tattooed adults reported “to remember or honor someone or something” as either a major or minor reason for getting their tattoos. *Id.* Almost half (47%) said

they got a tattoo to “make a statement about what they believe.” *Id.* A more recent trend is using tattoos “as a form of social and political commentary,” which allows individuals to “express their beliefs and values, or that are related to important social issues.” H. Medhi, *Ink On Skin: A Cultural Exploration Of The History And Significance Of Tattoos*, 11 *Intl’ J. Creative Research Thoughts* 728 (2023).

Traditionally, the decision to get a tattoo is one made carefully. Even among college students (perhaps the rashest demographic), “most tattooed respondents had taken months to decide what tattoo to get, obtained the tattoo in a reputable tattoo parlor, [and] spent a significant amount of money on it.” H. Roggenkamp, A. Nicholls & J. Pierre, *Tattoos as a window to the psyche: How talking about skin art can inform psychiatric practice*, 7 *World J. Psychiatry* 148 (2017).

Tattoos are also stigmatized in today’s society. 29% of Americans report that seeing a tattoo on someone “gives them a more negative than positive impression of that person.” Schaeffer, *supra*, at 15. People with tattoos are generally seen as “less attractive, sexy, spiritual, respectable, intelligent, and healthy.” Roggenkamp, *supra*, at 15. This stigma is important to note for two reasons. First, it provides further evidence that the decision to get a tattoo is a highly intentional one — a choice individuals make *despite* the potential societal backlash. Second, it suggests that people do not generally view tattoos are merely aesthetic or fashion devices, as one would see a decorative t-shirt or scarf. Rather, reasonable observers regard tattoos *differently* than these other forms of outward expression.

Broadly, this discussion of history and tradition is crucial because it relates to what purpose tattoos are reasonably perceived as serving, which is the test courts use to assess a secondary use’s purported purpose. *Cf., e.g., Campbell*, 510 U.S., at 582 (holding that “threshold question” when a

parodic purpose is proposed is whether that purpose “may *reasonably be perceived*” (emphasis added); *and see Warhol*, 598 U.S., at 543 (“The secondary work itself must *reasonably be perceived*” as serving a distinct purpose) (internal citation omitted and emphasis added). As the above analysis demonstrates, reasonable observers perceive tattoos as highly intentional expressions of identity or alterations of one’s outward presentation — not as merely aesthetic or decorative ornaments.

B. The Purpose Of Respondent’s Tattoo Is To Reflect An Aspect Of Farmer’s Identity And Alter His Bodily Expression

It is uncontested that Blake Farmer had deeply personal reasons for wanting a tattoo of Miles Davis emblazoned on his arm. Those reasons can be found in the record. Farmer “considered Miles Davis an important figure” and had contemplated getting a tattoo of Davis since college. Resp. App., at 4a. He identified with Davis’s rebellious spirit, and as a trumpet player himself, “developed a particular appreciation for Miles Davis while studying jazz music in college.” *Id.* Respondent Kat Von D, who became friends with Farmer after the two collaborated on a film project, agreed to create and ink the Davis tattoo for him without charge.

From these details, it is rather easy to identify the purpose of the tattoo Von D created: to reflect Farmer’s deep personal association with Miles Davis and alter Farmer’s bodily expression with a graphical representation of that association. This Court should accept this articulation of the tattoo’s purpose, as it most closely follows precedent. Recall that *Warhol* instructs us to analyze purpose within “the context of the *particular use at issue*.” *Warhol*, 598 U.S., at 535 (emphasis added). In this case, the particular use at issue is the tattoo — nothing more. Not Respondents’ social media posts about the tattoo. Nor the reference sketches Respondents created in the process of delivering the final

tattoo. Just the tattoo on Farmer’s arm. Determining the purpose of that tattoo, then, is simple, especially when the record is rich with details about Farmer’s motivations for acquiring it, which align closely with the history and tradition of tattoos being used as deeply personal markings of identity, affiliation, and culture. Thus, the purpose of the tattoo as Respondents articulate it — to reflect some part of Farmer’s identity and to alter his bodily expression — can be “reasonably perceived.” *See, supra*, at 16–17.

The Supreme Court did precisely the same sort of analysis in *Google*. In that case, the use at issue was Google’s “use of the Sun Java API,” a “user interface . . . [which] provides a way through which users . . . can manipulate and control task-performing computer programs via a series of menu commands.” *Google*, 593 U.S., at 26. In determining that Google’s copying was fair under the first factor because it served a distinct purpose from the Sun Java API, the Court relied on the same two considerations Respondents ask this Court to use today. First, it heavily emphasized Google’s *intent* behind copying the API: “[Google] *seeks* to create new products. It *seeks* to expand the use and usefulness of Android-based smartphones.” *Id.*, at 30 (emphases added). Then, it confirmed that Google’s intended purpose could be reasonably perceived by analyzing the *history and tradition* of API usage in the broader tech industry. It noted that Google’s actions could be called “reimplementation,” and that such a practice “is common in the industry” (tradition). *Id.*, at 31. It also observed that Sun had historically “used pre-existing interfaces in creating Java” (rooted in history). *Id.*

This Court should follow *Google*’s instructive analysis. Just as the Supreme Court harmonized Google’s intent with the history and tradition of API usage to conclude that its purpose of creating new products could reasonably be perceived, this Court should harmonize Farmer’s intent with

the history and tradition of tattoos to conclude that the identity-shaping purpose of Respondents' tattoo can surely be reasonably perceived.

1. The district court errantly refused to consider Farmer's motivations for obtaining the Davis tattoo⁴

The district court, however, approached this issue very differently. To begin, it refused to consider Farmer's motivations for commissioning the Davis tattoo in its analysis of the tattoo's purpose. The court provided two justifications for this exclusion, neither of which can stand.

First, the district court offered a puzzling technical reason for the refusal: "Courts *do* consider the motivation of the parties in analyzing fair use . . . However, Farmer is not a party to this action." Resp. App., at 20a. But courts have never limited first factor analysis by only considering testimony from parties of an action. Neither does §107. Quite the opposite, the spirit of first factor analysis has always been to consider all logically appropriate facts to achieve the ultimate goal: the most accurate determination of a secondary use's purpose and character. *Cf., e.g., Warhol*, 598 U.S., at 544 (instructing courts to consider "the meaning of a secondary work" using any reasonable means "to the extent necessary to determine whether the purpose of the use is distinct from the original"); *generally Google*, 593 U.S., at 31–32 (leaning on information conveyed by *amici*, who were not parties to the action, to aid in determining the purpose of Google's use of Sun Java's API).

But considering Farmer's motivations is especially necessary in this case, which is about a tattoo — not a painting, book, or a movie. Whereas paintings are created on

⁴ Even if this Court affirms the district court's exclusion of Farmer's motivations in its analysis, this Court can and should still find that the purpose of Respondents' tattoo as described here is reasonably perceived because of the history and tradition argument alone.

canvas, books on paper, and movies on film, tattoos are made by injecting ink particles into the skin of a real, live person, so that the tattoo quite literally becomes a *part* of that person. Unlike canvas, paper, or film, that person (in this case, Farmer) is usually just as involved in the artistic process as the tattoo artist is — selecting a design, considering color, determining location on the body, and providing consent for the artist to even begin inking. And in a very real sense, the bearer of a tattoo is part of the art itself. This Court’s task is to determine, as reasonably as can be perceived, the purpose of Respondents’ tattoo. That determination is aided by considering the objectives of the parties responsible for creating the tattoo. To that end, surely Farmer’s mindset matters as much as Respondents’. To hold otherwise would be to promote a “rigid application” of fair use that pays lip service to the doctrine’s demand for “judicial balancing, depending upon *relevant circumstances*.” *Google*, 593 U.S., at 20 (emphasis added).

To further illustrate why limiting analyses of motivation to parties involved in a case makes little sense, consider the incoherence such a holding would generate. Respondents in this case served as an enabler of Farmer’s intent — that is, as a tattoo artist, Respondent Kat Von D’s actions enabled Farmer to bring his tattoo into existence. Thus, Respondents’ motivation, in large part, was to realize Farmer’s intent. And by the district court’s own admission, “Courts *do* consider the motivation of the parties in analyzing fair use.” Resp. App., at 20a. But it would be impossible for this Court to fully understand Respondents’ motivations without considering Farmer’s intent. Yet this Court is also forbidden from doing just that? Surely this incoherence — birthed by a technical restriction of the district court’s own imagination — cannot be what fair use stands for.

Second, the district court appeared to imply that considering Farmer’s intentions would force its

consideration beyond the scope of this case: “The parties agree that Kat Von D’s use of the work is at issue, not Farmer’s use.” Resp. App., at 37b. There is no question that this case is about *Respondents’* use of Petitioner’s source work, which was creating the tattoo at issue today. But this concern about semantics — whether considering Farmer’s intentions would represent an analysis of Respondents’ or Farmer’s use — is unproductive. Contrary to the district court’s view, considering Farmer’s motivations does not distract first factor analysis away from Respondents’ use. Quite the opposite, given that those motivations are an integral part of Respondents’ use, they are highly relevant to this Court’s inquiry. *See, supra*, at 20.

Consider a cardiac surgeon who places a life-saving stent into her patient’s blood vessel. How would we articulate the purpose of the surgeon’s “use” of the stent? That answer would surely involve talking about the patient’s needs (i.e., “the patient’s blood vessel had collapsed, so he needed a stent to keep it open”). Yet considering the patient’s need for the stent does not, in any way, peel our broader analysis away from the *surgeon’s* use of the lifesaving device, somehow turning it into an analysis of the patient’s use. (In fact, it would be somewhat irrational to say that it is not the surgeon who places the stent, but rather the ailing patient, who “uses” the stent.)

Thus, the district court’s semantics concern needn’t worry this Court. There is no question that the challenged use in this case is the tattoo Respondents created. From there, the first factor asks this Court to consider that tattoo’s purpose. If considering Farmer’s intent can aid that determination, there is no reason why this Court shouldn’t.

2. The district court failed to adequately articulate the purpose of the tattoo, beyond making an overly reductive commercial vs. noncommercial distinction

Not once did the district court explicitly articulate what purpose it believed Respondents' tattoo serves. This omission is concerning, as almost every post-*Warhol* court has understood that, in order to compare the purposes of a secondary and original use, it is necessary to first state the purposes of those two uses. *See, e.g., Keck*, 116 F.4th, at 454 (stating the secondary use's purpose as "[inspiring] students to create their own art"); *Designworks Homes*, 2025 U.S.P.Q.2d, at 4 (stating the secondary use's purpose as "to show the layouts and dimensions of the homes to potential buyers"); *Griner v. King*, 104 F.4th, at 9 (stating the secondary use's purpose as "disseminat[ing] a meme"); *Philpot*, 92 F.4th, at 258 (stating the secondary use's purpose as "to depict 'The Nuge'"); *Hachette Book*, 115 F.4th, at 181 (stating the secondary use's purpose as "making authors' works available to read"). Indeed, it is difficult (impossible, even) to compare the purposes of two entities without knowing what the purposes of those entities are.

However, the closest the district court came to articulating the purpose of Respondents' tattoo can be found in its analysis of whether that purpose is commercial or not. *See* Resp. App., at 39b ("The social media posts may be seen as evidence of a *commercial purpose* . . . Whether the Tattoo was done for a *commercial purpose* is a material factual issue that must be resolved by a jury") (emphasis added). But this distinction falls far short of the standard articulated in *Warhol*, where the Court explicitly rejected stopping considerations of purpose at "commercial or not." *See Warhol*, 598 U.S., at 535 n.11 ("The Court does not define the purpose as simply 'commercial' or 'commercial licensing.'"). In fact, *Warhol* went even further, finding even an articulation of purpose as specific as "fungible products in the magazine market" insufficiently descriptive because it didn't "examine the copying's more specifically described purposes in the context of the particular use at issue." *Id.*

(internal quotations omitted). If even that specificity is insufficient, surely the lackluster articulation of purpose advanced by the district court — if it can even be called an articulation — is deficient.

C. The Tattoo’s Purpose Is Categorically Distinct From The Identifying, Reference, Or Licensing Purposes Of Petitioner’s Source Work

The purpose of Respondents’ tattoo — to reflect some aspect of Farmer’s identity and alter his bodily expression — is categorically distinct from that of Petitioner’s photograph. But first, what is the purpose of Petitioner’s image of Miles Davis? Fortunately, while no case has ever considered fair use in the context of tattoos, a plethora have considered fair use in the context of photographs, generating a great deal of ink on the purpose of such images. Petitioner’s original work is a celebrity photograph of Miles Davis. Resp. App., at 2a. Conveniently, *Warhol* also concerned a celebrity photograph — a portrait of Prince. There, the Court found, “A typical use of a celebrity photograph is to accompany stories about the celebrity.” *Warhol*, 598 U.S., at 534. In other words, the most typical purpose of celebrity photographs is to “depict” or “identify” that celebrity, as other courts have also held. See *Philpot*, 92 F.4th, at 252, 258–60 (describing purposes of a celebrity photograph as “to capture a portrait of [the celebrity],” “to identify [the celebrity],” and “to depict [the celebrity]”).

Warhol also noted that photographers may also license their work “to serve as a reference for an artist” so that she might “create stylized derivatives of their work.” *Id.*, at 535. In this case, Petitioner makes the same claim: “For decades, Sedlik has licensed the Photograph to other artists, including a tattooist, to make derivative works in various media, such as social media.” Br. for Pet., at 47–48.

Having defined both the purposes of Respondents' tattoo (secondary work) and Petitioner's photograph (source work), we now arrive at the paramount question: are these two purposes "sufficiently distinct"? *Warhol*, 598 U.S., at 550. This Court should answer a resounding "yes."

Forget, just for a moment, the licensing purpose of Petitioner's photograph, so that we can focus first on the "depicting" or "identifying" one. It should be beyond clear that Respondents' tattoo serves an entirely distinct and further purpose. Petitioner's photograph is a portrait of Miles Davis that identifies and depicts him, albeit in an artistic manner. While Respondents' tattoo may also achieve that effect incidentally, its dominant purpose is to reflect an aspect of its bearer's identity and to alter its bearer's bodily expression. Thus, the tattoo does not even remotely "supersede the objects" of Petitioner's photograph — it uses the photograph to serve entirely distinct ends. *Id.*, at 528.

Consider two cases where courts have found a secondary use to serve too similar a purpose with a "depicting" or "identifying" photograph. In *Philpot v. Indep. J. Rev.*, the Fourth Circuit held that using a near-exact copy of a photographer's image of guitarist Ted Nugent to accompany an article titled "15 Signs Your Daddy Was A Conservative" (sign #5 is "He [loves] 'The Nuge'") did not serve a distinct purpose from the original photo, as the copy served to identify Nugent. *Philpot*, 92 F.4th 252. In *Griner v. King*, the Eighth Circuit found that using the "Success Kid" photograph to "create and disseminate . . . a meme" did not serve a distinct purpose from "the original purpose to copyright the [original] image," which was to "[control] the commercial use of the meme." *Griner v. King*, 104 F.4th, at 9. Notice how these examples are nothing like today's case, which is instead more akin to the textbook example of fair use discussed at length in *Warhol: Warhol's Soup Cans*. Though his canvases "precisely replicate a copyrighted

advertising logo,” they “[use] Campbell’s copyrighted work for an artistic commentary on consumerism,” which is a distinct purpose “orthogonal to advertising soup.” *Warhol*, 598 U.S., at 539 (citation omitted). Respondents’ tattoo seeks to — and does — alter Farmer’s bodily expression, allowing him to express a deeply personal aspect of his identity. That purpose is orthogonal to depicting or identifying a celebrity.

1. Petitioner’s attempt to similarize the purposes of Respondents’ tattoo and the source photograph is misguided

Next, we visit the purported licensing purpose of the Davis photograph. According to Petitioner, the photograph has a purpose as an “artistic reference,” and he has, “[for] decades, licensed the Photograph to other artists, including a tattooist, to make derivative works in various media, such as social media.” Br. for Pet., at 47–48. Therefore, Petitioner argues that Respondents’ use of the photo “as an artistic reference and on social media are the same uses that Sedlik exploits with his Photograph.” *Id.*, at 47. This argument might be successful, had *Warhol* not explicitly rejected the sort of bundling sought by Petitioner here. Indeed, there, the Court noted that Goldsmith’s photo had “been used in multiple ways,” but because only “AWF’s commercial licensing of Orange Prince to Condé Nast” was alleged to be infringing, “[we] limit our analysis accordingly.” *Warhol*, 598 U.S., at 534. Analogously, in this case, Petitioner might claim Respondents used the Davis photograph in many ways. But only one specific use — the tattoo — is before this Court today. Accordingly, Petitioner’s first claim — that Respondents used the photo as an artistic reference — is dead at the outset. Respondents’ tattoo itself is not an artistic reference, nor is its purpose to be used as one.⁵

⁵ Petitioner likely knows this too, which would explain why he unsuccessfully sought to include Respondents’ “line drawing” (an artistic reference image Kat

Petitioner’s second claim is harder to put a finger on. One possibility is rather weak: that Respondents’ use of the photo “on social media” fails to serve a distinct purpose. But this claim is swiftly defeated, because as stated earlier, Respondents’ social media posts are not at issue before this Court. *See, supra*, at about three sentences ago. A stronger version of this claim might look like this: Petitioner uses the Davis photograph for the purpose of licensing it to other artists “to make derivative works in various media, such as social media,” and thus, Respondent, as an artist, used the photo in a similar fashion. Br. for Pet., at 47. But this argument, too, fails. Respondents’ specific use (the tattoo itself) cannot be described as serving any licensing purpose. Nor do Respondents seek to license the tattoo to other artists. In this way, the tattoo’s purpose is starkly different from the AWF’s use of Goldsmith’s photo in *Warhol*. There, the challenged use was precisely “licensing of the Orange Prince image,” which the Court found too similar to the licensing purposes of the original image. *Warhol*, 598 U.S., at 536. While Petitioner’s photo may have licensing purposes, Respondents’ tattoo does not even remotely exploit those same purposes with its specific use of the photo as a tattoo.

But perhaps Petitioner’s argument here is a veiled version of an even more promising position, articulated well by the district court: “The social media posts may be seen as evidence of a commercial purpose.” Resp. App., at 39b. In other words, Petitioner may argue that Respondents’ social media posts *indicate* that the purpose of the tattoo was not to promote Farmer’s identity or alter his bodily expression, but rather to “[market] Kat Von D’s brand or shop.” *Id.* But even this position is unfruitful. Even if we grant the district court’s holding that Respondents’ social media posts can

Von D made in the process of creating the tattoo) in the argument of his final brief before the district court. *See* Resp. App., at 40b–41b.

serve as evidence that the tattoos also had some commercial purpose, that does not diminish the tattoo's primary purpose as described earlier, which can readily be "reasonably perceived." *See, supra*, at 17–18. Secondary works can serve several purposes at once. A plethora of secondary uses found to be fair under the first factor have also incidentally served commercial purposes. No one doubts that the art kits sold by Mix Creative in *Keck v. Mix Creative* had some commercial objectives. *See Keck*, 116 F.4th, at 452. Nor does anyone doubt that Warhol stood to gain financially from his Soup Cans canvases (sold to the Museum of Modern Art in 1996 for a modern-day equivalent of \$29.14 million).⁶ As *Google* reminds us, "many common fair uses are indisputably commercial." *Google*, 593 U.S., at 33. But these uses are fair under the first factor because they unequivocally serve highly distinct purposes from their source materials, and as such, do not nettle copyright's "bête noire" — "the problem of substitution." *Warhol*, 598 U.S., at 528. All the evidence in this case points to the same conclusion: Respondents' tattoo serves a highly distinct purpose from Petitioner's photograph. Petitioner cannot deny this fact, so instead points the finger at Respondents' incidental commercial purposes — highly contested ones at that.⁷ This Court should reject this attempt to obfuscate.

2. The district court wrongly diminished Respondent's tattoo to a mere change in medium, ignoring its distinct purpose

The district court insisted that Respondents' tattoo represents a "new visual medium, akin to a 'translation' or

⁶ C. Vogel, *Modern Acquires 2 Icons of Pop Art*, N.Y. Times (Oct. 10, 1996), <https://www.proquest.com/docview/430682961>.

⁷ Respondents have not conceded that the tattoo even had commercial purposes. Rather, the district court concluded that whether the tattoo "was done for a commercial purpose is a material factual issue that must be resolved by a jury." Resp. App., at 39b.

‘motion picture version.’” Resp. App., at 37b (citation omitted). And this change in medium, the court reasoned, “is not sufficiently transformative.” *Id.* Petitioners echo this thinking: “[Respondents] copied the Photograph into a different medium — exactly what the Supreme Court held is not a transformative use.” Br. for Pet., at 47 (quoting *Warhol*, 598 U.S., at 543–44, 546). Two responses:

First, it is unclear what exactly the district court and Petitioner seek to accomplish by affording Respondents’ tattoo the — by their characterization, inglorious — description of being a “change in medium” of Petitioner’s work. They seem to have missed the subtle but critical distinction between “changing medium” and “*merely* changing medium.” Doubtless, a secondary work that *merely* recasts the source work in a different medium, without possessing any further purpose or character, is not transformative enough to be considered fair under the first factor. See *Warhol*, 598 U.S., at 529. But contrary to Petitioner’s claim, *Warhol* does not suggest that a change in medium precludes a finding of sufficient transformation. Quite the opposite, *Warhol* stressed that a secondary work can be considered sufficiently transformative even if it “precisely replicates” the original — ostensibly altering less than a change in medium would. *Id.*, at 538. This work, though, would need to have a sufficiently distinct purpose or further character.

Consequently, labeling Respondents’ tattoo a “change in medium” is unproductive for both the district court and Petitioner, as it says nothing about the tattoo’s purpose. They are better served arguing that the tattoo is *merely* a change in medium of Petitioner’s photograph. But to do so, they would have to start by comparing the purposes of the two uses — a crippling absence from both the district court’s judgment and Petitioner’s argument. Want a good example? We needn’t look further than the exact case Petitioner leans

on in making this argument, *Hachette Book Grp., Inc. v. Internet Archive*. There, the Second Circuit first compared the purpose of the books in Internet Archive’s Free Digital Library against the purpose of the publishers’ books and found the two “serve the same exact purpose.” *Hachette Book*, 115 F.4th, at 181. Only *after* a complete analysis of purpose and a finding of substantial similarity did the court deliver the line Petitioner quotes: “Changing the medium of a work is a derivative use rather than a transformative one.” *Id.* (citation omitted).

Second, Respondents have already demonstrated that the tattoo is not merely a change in medium, as it serves a categorically distinct purpose from that of its source work. Usually, works that merely represent a change in medium adopt the same or similar purposes as those of their source materials. *See Hachette Book*, 115 F.4th, at 181 (Holding that Internet Archive’s digital books *merely* recast the publisher’s books in a new format, and thus served the “same exact purpose”). That is not the case here.

D. Although Unneeded, Respondent’s Tattoo Can Independently Justify Its Targeting Of Petitioner’s Source Work

As explained earlier, *Warhol* held that secondary works with sufficiently distinct purposes are inherently justified “in a broad sense” in their copying because they “[further] the goal of copyright . . . without diminishing the incentive to create.” *Warhol*, 598 U.S., at 531. In other words, the secondary work does not serve as a substitute for the original. Thus, contrary to Petitioner’s claim, these works needn’t independently justify their copying or prove that they targeted the original. *See, supra*, at 12–13.

In this case, Respondents’ tattoo is broadly justified because it furthers the goal of copyright. Farmer uses a graphical depiction of a well-known artist to service his

personal expression of association with the artist’s “rebellious spirit,” and is himself the “canvas” of a meticulously created work of art. If that does not epitomize artistic advancement, nothing does. But more importantly, the tattoo does not “supersede the objects” of Petitioner’s photograph. *See, supra*, at 24. Respondents, by virtue of the distinct purpose for which they use Petitioner’s source work, are therefore justified in their copying and needn’t prove anything more. In *Keck*, for example, the Fifth Circuit did not require Mix Creative to further justify its copying or prove that it targeted the source work for any further purpose. Because its art kits represented a secondary work that served a “distinct, educational purpose,” their “use of Keck’s artwork was . . . ‘justified’ in [a] broad sense.” *Keck*, 116 F.4th, at 454–55 (citation omitted).

However, *Warhol* did suggest that a secondary’s work claim to the first factor could be further bolstered by an additional, independent justification for its copying. *Cf. Warhol*, 598 U.S., at 539–540 (observing that the case for considering Warhol’s Soup Cans fair under the first factor becomes even stronger because “a further justification . . . is apparent”). Though already broadly justified, Respondents’ tattoo can also offer a further justification for its copying of Petitioner’s photograph. That is, the tattoo targets the Davis photograph to enable Farmer’s commentary on it.

1. The tattoo enables Farmer’s commentary on Petitioner’s photograph, and the photo is, at least in part, the object of that commentary

Farmer has associated with Davis for decades. A lifelong trumpet player himself, Farmer became infatuated with Davis while studying jazz music in college. Resp. App., at 4a. Farmer developed a deep appreciation for Davis’s musical style, lyricism, and especially associated with the trumpeter’s “rebellious spirit,” which Farmer believed the two shared. Consequently, he had contemplated getting a

tattoo of Davis for several years before finally asking Respondents to create the tattoo at issue today.

Petitioner's photograph contains various elements that makes it distinct from other portrait of Davis, and it is likely these elements that spoke to Farmer, ultimately driving him to have the image permanently and prominently emblazoned on his body. Petitioner describes these details at length in the opening brief: "[Sedlik] instructed Davis to put his finger to his lips, symbolizing Davis' famous use of pauses between musical notes. Sedlik adjusted Davis' fingers to represent a series of musical notes. He directed Davis to tense his face to bring out an intensity of expression." Br. for Pet., at 7 (citations omitted). Farmer heavily associated with Davis's style, lyricism, and personality — all traits of the trumpeter that the photograph accentuates as a result of Petitioner's creative decisions. In other words, these features, the "very nature," of Petitioner's photograph, are what "enables the commentary." *Warhol*, 598 U.S., at 540.

What is Farmer's commentary? It's essentially the tattoo itself. More precisely, it is his passionate fondness and appreciation for the manner in which Petitioner's photograph acutely portrays aspects of Davis's life that Farmer deeply associates with — an affinity so deep that Farmer chose to have the exact image etched into his arm for what reasonably might be the rest of his life. Commentary is defined as "an expression of opinion." *Commentary*, Merriam-Webster (11th ed. 2025). Farmer's expression of his fondness for the Miles photograph is certainly an opinion on the work. If this commentary had to be converted to words, it would look something like, "I appreciate the artistic elements of Sedlik's portrait of Miles Davis so passionately that I got the photo tattooed on my arm." When expressed this way, Farmer's commentary sounds much more similar to the sorts of commentary uncontroversially accepted as fair by courts — praise for a novel in a book review, for example.

Importantly, this commentary is deeply specific to tattoos: Had Respondents recast Petitioner’s photograph in any other medium (e.g., a sculpture, painting, or video), the same commentating effect probably wouldn’t exist, much less be reasonably perceived. But the tattoo, which “inscribes on the body an incontrovertible expression” that is “more concrete, more forceful and more persuasive than any form of verbal expression,” is completely distinct. U. Karacaoglan, *Tattoo and taboo: On the meaning of tattoos in the analytic process*, 93 Int’l J. Psychoanalysis 5, 6 (2012). “The visual image . . . in the form of a tattoo [is perceived] as a vehicle for expressing [the bearer’s] innermost thoughts.” *Id.*, at 21. This “painful manipulation of the body” certainly ought to mean something in the eyes of this Court. *Id.*

Further, the tattoo’s copying was *necessary* because Petitioner’s photograph was, in part, the *object* of Farmer’s commentary. By his own account, Petitioner’s photo does not merely depict or identify Davis. *See* Br. for Pet., at 6. It is not generic. Rather, the photo features creative elements that speak to elements of Davis’s uniqueness as an artist and as a human. Thus, the “very nature” of the photo was what enabled Farmer’s commentary. A generic, identifying photo of Davis (imagine a DMV headshot) would not have sufficed for Farmer’s purposes. The Court in *Warhol* observed the same, explaining that the nature of Campbell’s copyrighted logo (“well known to the public, designed to be reproduced, and a symbol of an everyday item for mass consumption”) “enables the commentary.” *Warhol*, 598 U.S., at 540. And to be sure, the simple fact that Farmer pondered getting a tattoo of Miles Davis for years before ultimately deciding to create one using *this exact image* provides even further evidence that that Petitioner’s “original copyrighted work is, at least in part, the object of [Farmer’s] commentary.” *Id.*, at 540.

We should note that the tattoo's commentary is not limited to Farmer's appreciation for Petitioner's photograph. Rather, the tattoo's broader comment, as explained earlier, is Farmer's deep association with Miles Davis. *See, supra*, at 17. But the commentary of a secondary work needn't be limited to exclusively commenting on its source work. The Court in *Warhol* noted that Warhol's main objective with his Soup Cans canvases was to "comment on consumerism," which is hardly a commentary specific to Campbell's copyrighted logo. *Id.* What mattered, though, was that the logo was the object of his commentary "*at least in part.*" *Id.* (emphasis added). Respondents have demonstrated the same in this case. Their use "conjures up [Petitioner's] original work." *Id.* (quoting *Campbell*, 510 U.S., at 579).

We should also note that if it appears this discussion of Farmer's commentary is veering too far from this Court's consideration of *Respondents' use* of Petitioner's source work, this Court needn't worry. As explained earlier, any discussion of Farmer's commentary can be recast in the context of Respondents' use: Respondents' use of the tattoo was necessary for enabling Farmer's commentary, so the use was justified. *See, supra*, at 20–21. The unique nature of tattoos makes it so that the agent who creates the art is usually not the agent who advances a commentary, but this separation shouldn't matter to this Court. What *should* matter is that the former agent (Respondents in this case) needed to copy (targeted) a source work to enable some commentary on it, which well advances the aims of copyright.

2. This Court should reject the district court's creation of a novel targeting test because it runs wholly contrary to precedent

Petitioner questions the sincerity of Farmer's commentary, and by extension, Respondents' targeting justification: "[Respondents] admitted 'that had the

[Photograph] not existed, she would have just used another image.” Br. for Pet., at 47 (citation omitted). The district court took this line of reasoning as evidence that “the Tattoo can ‘stand on its own two feet and so requires justification for the very act of borrowing.’” Resp. App., at 38b (quoting *Campbell*, 510 U.S., at 581). According to the district court, the fact that Respondents would have proceeded with the creation of the tattoo anyways suggests that Respondents didn’t really *need* Petitioner’s original work to enable Farmer’s commentary. By the district court’s telling, this lack of necessity erodes the targeting justification. That is wrong.

The district court’s position suggests a completely novel targeting test that is wholly unsupported by precedent. Never have courts required commentators to prove that their expression would or could *not* have been made without the source material. Is Warhol expected to show he wouldn’t have commented on consumerism had the Campbell logo not existed? Nor have courts ever required commentators to show that the source work they targeted was 1-of-1 — singularly capable of enabling their commentary. Surely the *Warhol* Court did not believe that Campbell was the *only* copyrighted logo Warhol could have serviced to make his comment about consumerism. (What’s wrong with Pillsbury, Cheerios, Hostess, etc.?) On the contrary, *Warhol* followed *Campbell* in holding that “conjuring up” the original work to “shed light” on it represents a sufficient showing. *Warhol*, 598 U.S., at 540.

Had Campbell’s copyrighted logo not existed, Warhol likely would have, in the words of Petitioner, “just used another [brand’s logo].” Br. for Pet., at 47 (citation omitted). Thus, his commentary on consumerism would still have existed, albeit slightly differently by virtue of his targeting a different logo. In the same vein, though Farmer’s general commentary about Davis’s impact on his life would have

existed regardless of if Petitioner’s photo existed, the fact that the image is, in part, the object of the commentary (as we have independently shown) means that his commentary indeed *would have* looked somewhat different without it. This hypothetical change in Farmer’s commentary militates against the district court’s suggestion that his commentary can “stand on its own two feet,” or in other words, exists entirely independently of Petitioner’s source work. Resp. App., at 38b (quoting *Campbell*, 510 U.S., at 581).

Petitioner appears to employ the “would have just used another image” statement to make a slightly different argument — to speak to Farmer’s mindset in an attempt to discredit his commentary claim. After all, if Farmer came upon Petitioner’s image by chance and was ambivalent about its selection, it is unlikely he had any intention of commenting on it. This is quite a cynical position. It’s also one unsupported by the facts of this case. Nothing in the record indicates Farmer selected Petitioner’s image carelessly or haphazardly. Instead, the facts indicate the



Figure 1. The various images of Miles Davis that Farmer likely encountered over the years as possible tattoo options. Br. for Pet., at 28.

opposite: Farmer had contemplated getting a tattoo of Miles Davis for several years. It is highly likely that, during this time, he had encountered many of the “thousands of available photographs of Davis,” developing a rather strong sense for what he *didn’t* like. Br. for Pet., at 28; *see* fig. 1, *supra*. When he ultimately did decide to pull the trigger, he enlisted the help of Respondent Kat Von D, who is a highly reputable, award-winning tattooist. The two looked for source images carefully and eventually selected Petitioner’s photograph, likely because the artistic elements of the portrait enabled Farmer to express his affinity for Davis in his own way. *See, supra*, at 30–31; *see also* fig. 2, *infra*. Then, Farmer made the decision to have that image etched into his arm for, conceivably, forever. Everything about this process suggests methodical, deliberative thinking, supporting Respondents’ argument that Farmer targeted Petitioner’s photograph. If that’s not enough, what is?



Figure 2. The image Farmer ended up choosing to emblazon on his arm (Petitioner's photograph). Br. for Pet., at 6.

In sum, Respondents' tattoo is further justified in its copying of Petitioner's photograph because that original work is, in part, the object of Farmer's commentary. Thus, the tattoo "conjures up" Petitioner's photo itself, rather than merely the "subject of the work," Miles Davis. *Warhol*, 598 U.S., at 540.

Crucially, recall that this further justification only *bolsters* the case for a finding of fairness under the first factor; it is in no way necessary or required for such a finding. Google, for example, did not target Sun Java's API to comment on or criticize it — the use was already justified because it served a distinct, further purpose. Fair use. *See generally Google*, 593 U.S. 1. Likewise, Mix Creative's art kits did not target their source works, but they did serve a distinct educational purpose. Fair use. *See generally Keck*, 116 F.4th 448. And finally, the real estate agents in *Designworks Homes* did not target the home designs they copied, but their copying did serve a distinct, "informational" purpose. Fair use. *See generally Designworks Homes*, 2025 U.S.P.Q.2d 95.

* * *

For the foregoing reasons, Respondents' tattoo clearly made fair use of Petitioner's source photograph under the first factor. The tattoo serves a categorically distinct purpose from the original photograph, which is the "central question" of the first factor. *Warhol*, 598 U.S., at 528 (quoting *Campbell*, 510 U.S., at 579). Consequently, it "furthers the goal of copyright . . . without diminishing the incentive to create." *Id.*, at 531. Petitioner's arguments otherwise are grounded in misreadings of *Warhol* that mischaracterize key concepts such as transformation, derivatives, justification, and targeting. The district court committed numerous errors in ruling against Respondents; most concerning, its analysis reduced the tattoo to a "change in medium" of

Petitioner's photo and a commercial tool, failing to acknowledge the tattoo's most apparent purpose as a reflection of Farmer's identity and an alteration of his bodily expression — purposes that are "reasonably perceived" due to the history and tradition of tattoos as deeply personal expressions of identity and as distinctly meaningful body modifications. These errors cannot stand.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

BENJAMIN WHO
Counsel for Respondent

DECEMBER 2024