

SAY IT WITH PICTURES: IMAGE AND TEXT IN *ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC. v. GOLDSMITH*

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# SAY IT WITH PICTURES: IMAGE AND TEXT IN *ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC. V. GOLDSMITH*

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*Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, the Supreme Court's recent decision on the meaning of "transformative use" in fair use doctrine, is noteworthy for the unprecedented profusion of pictures in the opinions: magazine photos of Prince, Warhol silkscreens, and classical paintings—seventeen figures in all—some consisting of multiple images, all but one embedded in the opinions instead of being relegated to an appendix, and all but one in color. This striking visuality in the usual sea of words is significant for a number of reasons. First, the pictures by themselves constitute arguments. Justice Sotomayor, writing for the majority, and Justice Kagan for the dissent, have selected, located, and sequenced their images to present their opposing theories of the case, and it's worth examining how they did it. Second, the case foregrounds, as no previous SCOTUS case has, the relationships between words and pictures in judicial opinions. The Justices' words frame their chosen pictures differently, shaping our responses to both. Moreover, the Justices construe the activity of looking at pictures in very different, doctrinally relevant ways: their contrasting conceptions of pictorial meaning may follow from or, conversely, help drive their opposing understandings of transformative use. As pictures of all kinds play an ever-greater role in legal proof and legal argument, what judges think pictures mean, and when it should even be part of their job to figure out what they mean, become increasingly important matters. Andy Warhol Foundation tells us something about this.*

## INTRODUCTION

In *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* (AWF), the Supreme Court for the first time in nearly thirty years took up the meaning of “transformative use” within the fair use doctrine.<sup>1</sup> The facts of the case are relatively simple. In 1981, photographer Lynn Goldsmith took studio photos of the then-up-and-coming Prince.<sup>2</sup> In 1984, she licensed one of those photos to *Vanity Fair*, which provided it to Andy Warhol to use as an “artist reference” in creating a silkscreen portrait (*Purple Prince*) for an article about Prince.<sup>3</sup> Unbeknownst to Goldsmith, Warhol made not one but sixteen artworks (the *Prince Series*) from her photo.<sup>4</sup> In 2016, after Prince’s sudden death, the Andy Warhol Foundation licensed to Condé Nast, for the cover of a special magazine

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The paper’s title isn’t original. *See, e.g.,* Doris A. Graber, *Say It with Pictures*, 546 ANNALS AMER. ACAD. POL. & SOC. SCI. 85 (1996). Graber’s discussion of the persuasive power of television news in contrast to print media relies on some of the same general findings about pictorial perception and communication taken up in Part IV, *infra* notes 204–368 and accompanying text.

1. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023).
2. *Id.* at 515.
3. *Id.*
4. *Id.* at 518.

edition commemorating Prince, one of the other Prince silkscreen portraits that Warhol had made (*Orange Prince*).<sup>5</sup> Warhol did not have Goldsmith's permission to make other prints based on her photo, the Foundation didn't seek her permission to license *Orange Prince*, and Goldsmith was neither paid nor acknowledged when Condé Nast used it.<sup>6</sup>

Goldsmith informed the Foundation that she believed the Foundation had infringed her copyright in the photo.<sup>7</sup> The Foundation preemptively sued her, claiming noninfringement and fair use.<sup>8</sup> The trial court ruled in favor of the Foundation; the Second Circuit reversed, finding for Goldsmith.<sup>9</sup> The Supreme Court affirmed.<sup>10</sup> In a narrow decision addressing only the first factor of the fair use test—the “purpose and character” of the secondary use—the Court found that the factor favored Goldsmith, not the Foundation, because the purpose for which the Foundation used *Orange Prince* was “substantially the same” as that of the original photograph: both were “portraits of Prince used to depict Prince in magazine stories about Prince.”<sup>11</sup> Given this identity of commercial purposes, any “new expression, meaning, or message”<sup>12</sup> that Warhol's work may have added did not make the Foundation's use of Goldsmith's photograph “transformative” and hence presumptively fair, and according to the majority of the Court, *Orange Prince* wasn't really all that different from the photograph anyway.<sup>13</sup>

Many have written about the Court's interpretation of the first fair use factor and its possible implications for artists across all media who want to make new work (and earn a living from it) by borrowing creatively from others, as artists have always done.<sup>14</sup> My focus is different. I want to talk about the pictures

5. *Id.* at 518–19.

6. *Id.* at 519–22.

7. *Id.* at 522.

8. *Id.*

9. *Id.* For more details about the case, see *infra* notes 94–98 and accompanying text.

10. *Andy Warhol*, 598 U.S. at 551.

11. *Id.* at 526, 527. Elsewhere Justice Sotomayor uses slightly different wording: “Both are portraits of Prince used in magazines to illustrate stories about Prince.” *Id.* at 535.

12. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); see also *infra* text at note 103.

13. *Andy Warhol*, 598 U.S. at 521–22, 540–48.

14. E.g., Amy Adler, *The Supreme Court's Warhol Decision Just Changed the Future of Art*, ART IN AM. (May 26, 2023, 10:47 AM), <https://www.artnews.com/art-in-america/columns/supreme-court-andy-warhol-decision-appropriation-artists-impact-1234669718/> [<https://perma.cc/5Q8P-VGZH>] (warning that the majority's shift in focus from the artistic contribution a second, appropriating work makes to commercial concerns “will significantly limit the amount of borrowing from and building on previous works that artists can engage in”); Sandra M. Aistars, *Copyright's Lost Art of Substantial Similarity*, 26 VAND. J. ENT. & TECH. L. 109, 129 (2023) (arguing that skipping originality and substantial similarity analyses and relying exclusively on fair use to decide infringement cases involving visual artworks, as *AWT* does, fails to ensure adequate record; “substantial similarity comparisons allow courts to grasp aesthetic facts about works they are considering and about the creative process that produced them”); Judith B. Bass, *The Court's Failure to Recognize Image Licensing for Editorial Purposes Is Bad News for Content Providers*, 16 A.B.A. SEC. INTELL. PROP. L. 1 (2023) (criticizing the Court's decision for failure to recognize that image licensing may be for a commercial, yet also

news-reporting or editorial purpose, in which case it ought to be protected as fair use); Sarah Cascone, *Did the Supreme Court's Warhol Decision Further Complicate Copyright Law? Experts Weigh in on the Ruling's Ramifications*, ARTNET (May 26, 2023), <https://news.artnet.com/art-world/warhol-goldsmith-prince-ruling-fallout-2307975> [<https://perma.cc/TA5C-8TGD>] (surveying range of responses to the Court's opinion); Ben Davis, *Why Andy Warhol's 'Prince' Is Actually Bad, and the Warhol Foundation v. Goldsmith Decision Is Actually Good*, ARTNET (June 1, 2023), <https://news.artnet.com/opinion/warhol-foundation-v-goldsmith-fair-use-2311801> [<https://perma.cc/2L6H-998Q>] (alleging that the Court's decision may discourage "hacks" who don't actually do anything to transform the prior work, which would be a good thing); Blake Gopnik, *Ruling Against Warhol Shouldn't Hurt Artists. But It Might*, N.Y. TIMES (May 19, 2023) (citing Adler, *supra*), <https://www.nytimes.com/2023/05/19/arts/design/warhol-prince-supreme-court-copyright.html> (arguing that the decision was based on the narrow ground of the Foundation's failure to pay Goldsmith's licensing fee and did not address "the creation, display, or sale of any of the original Prince Series works," i.e., most of the uses of works of artistic appropriation in general, but noting that effects might be much broader); Peter J. Karol, *The Transformative Impact of Warhol v. Goldsmith*, ARTFORUM (June 5, 2023, 9:20 AM), <https://www.artforum.com/slant/the-transformative-impact-of-warhol-v-goldsmith-90667> [<https://perma.cc/UH9F-XXN2V>] (warning that the decision creates "a new, broadly applicable, transformative fair-use test: one that should concern even those artists who have little interest in licensing their creations to magazines. . . . The end result is that artists who make money from their practices and wish to use copyrighted source works must now be prepared to demonstrate, in a way a federal judge will immediately grasp, that their choices to use those particular source materials were 'reasonably necessary' to achieve clear goals."); Jennifer Jolly, *Warhol, Art, and Capitalism Before the Supreme Court*, THE EDGE (May 30, 2023), <https://www.theedgemedialog.org/warhol-art-and-capitalism-before-supreme-court/> [<https://perma.cc/NR8B-8CHG>] (taking the Court to task for not addressing capitalist nature of modern-art markets and concluding that "[t]his decision will have a chilling effect on art making where appropriation has long served as an important part of visual communication"); Yolanda M. King, *Written Statement: Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 23 CHL-KENT J. INTELL. PROP. L. 124, 126 (2023) (arguing that the Court properly construed transformative use narrowly to prevent "overdogs" from "weaponiz[ing it] against socially and/or economically disadvantaged creators"); Niki Kuckes, *From Andy Warhol to Barbie: Copyright's Fair Use Doctrine After Andy Warhol Foundation v. Goldsmith*, 29 ROGER WILLIAMS U. L. REV. 177, 260–61 (2024) (critiquing the Court's opinion on several grounds, including that "rather than provide needed guidance on the meaning of 'transformative' uses, the Court chose to issue a narrow and limited decision [and that] in so doing, the Court relied on the mistaken premise that the act of licensing can be separated from the validity of the image that is the subject of that license"); Michael D. Murray, *Copyright Transformative Fair Use After Andy Warhol Foundation v. Goldsmith*, 24 WAKE FOREST J. BUS. & INTELL. PROP. L. 21 (2023) (arguing that AWP's understanding of transformative use is consistent with fair use precedent); Caroline L. Osborne & Stephen Wolfson, *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, a Narrow Ruling or a Transformational Decision? An Essay*, 84 OHIO STATE L.J. ONLINE 1, 13 (2023) (arguing that "the Warhol decision begins to restore the balance intended by the fair use teeter-totter by moving from transformation to a purpose-focused inquiry," restoring the original understanding set out in Judge Pierre Leval's seminal article on fair use, but acknowledging that the ruling may hamper creation of "appropriation art"); Haley Palmer, *The 'Orange Prince' of Copyright: Warhol's Prince Series & Transformative Fair Use*, 38 NOTRE DAME J.L. ETHICS & PUB. POL'Y 409 (2024) (critiquing the Court's opinion for failing to recognize the connection between the aesthetics and purpose of artworks); William Patry, *Andy Warhol Foundation for the Visual Art, Inc. v. Goldsmith: Did the U.S. Supreme Court Tighten Up Fair Use?*, 18 J. INTELL. PROP. L. & PRAC. 628, 628 (2023) (insightful analysis of the opinion, speculating that as a result of the Court's narrow decision, "little if anything will change, save for a welcome reduction in fair use claims made by appropriation artists, as well as a greater willingness to license borderline uses"); Nicole O. Swanson & David Munkittrick, *The 'State of the Arts' After Andy Warhol Foundation v. Goldsmith*, PROSKAUER (Jan. 17, 2024), <https://www.mindingyourbusinesslitigation.com/2024/01/the-state-of-the-arts-after-andy-warhol-foundation-v-goldsmith/> [<https://perma.cc/GUC6-ECU4>] (discussing two post-AWP decisions that interpret the Court's holding in different ways); Hannibal Travis, *Warhol Foundation v. Goldsmith: Supreme Court Rules for Income Streams Over Artistic Freedom*, THE CONVERSATION (May 22, 2023, 8:26 AM), <https://theconversation.com/warhol-foundation-v-goldsmith-supreme-court-rules-for-income-streams-over-artistic-freedom-205986> [<https://perma.cc/WDD8-V5SQ>] (warning that the decision may stifle creative freedom); Bella Wetherington, *From Art Museums to the Supreme Court: How Does the Decision in Warhol v. Goldsmith Go Beyond Art?*, LIBR. FUTURES (Sept. 12, 2023), <https://www.libraryfutures.net/post/warhol-v-goldsmith> [<https://perma.cc/B6J5-9H8T>] ("While this can

in the opinions: Justice Sotomayor’s opinion for the majority and Justice Kagan’s dissent.<sup>15</sup>

Images have appeared in Supreme Court opinions before,<sup>16</sup> but never like this. *AWF* features seventeen separate illustrations, some consisting of multiple images, all photographs (including Goldsmith’s photo, Warhol’s silkscreen prints, magazine covers and articles, and famous paintings by others), all but one embedded in the opinions instead of being relegated to an appendix, and all but one in color.<sup>17</sup> The profusion of color images, including the stunning if not “lurid”<sup>18</sup> colors of Warhol’s silkscreen prints, distributed throughout the text draws us in. So do the multiple depictions of Prince himself, whose images attract our eyes for the same reason they might do so on the newsstand or at the supermarket checkout counter. This is not what we expect to encounter in the pages of the United States Reports. We’re being invited to *view* as much as we are to read—or rather, to read in light of our viewing, and vice versa.

What might this unprecedented visuality in SCOTUS opinions mean? In the past, Justices have used images here and there for various purposes, mostly in appendices to their opinions.<sup>19</sup> Typically, pictures have been employed to clarify and/or emphasize assertions made in the text,<sup>20</sup> sometimes to introduce a little outside reality to substantiate those assertions,<sup>21</sup> and sometimes just to offer a bit of background that doesn’t contribute anything of substance to the

be taken as a win for photographers like Goldsmith who rely on the licensing money their images bring in, the decision runs the risk of harming fair use by focusing too much on the commercial nature of the case in determining that the work violates the first factor of fair use (purpose and character of the use.); see also Jane C. Ginsburg, *Does ‘Transformative’ Fair Use Enviscerate the Author’s Exclusive Right to ‘Transform’ Her Work?*, 17 J. INTEL. PROP. L. & PRAC. 687 (2022) (discussing the Second Circuit opinion before SCOTUS decided *AWF* and agreeing with what turned out to be majority’s position on the first fair use factor but noting that consideration of other factors is also necessary).

A few have also commented on the atypically snarky exchange between Justice Sotomayor writing for the majority and Justice Kagan in her dissent. See, e.g., Davis, *supra* note 14; Joe Patrice, *Elena Kagan Uses Footnote To Unleash Surprise Sotomayor Diss Track*, ABOVE THE L. (May 18, 2023, 5:43 PM) <https://abovethelaw.com/2023/05/elena-kagan-footnote-withering-condemnation-warhol/> [<https://perma.cc/C3A9-HTKF>]; Osborne & Wolfson, *supra* note 14, at 7 (“an unprecedented and no holds barred dissent by Justice Kagan joined by Chief Justice Roberts that has everyone wanting the inside scoop”). Indeed, Justice Kagan herself spoke about it at a judicial conference in August 2023: “We just kind of went at each other hammer and tongs. We had some choice words for each other,’ Kagan said, drawing laughter from the audience. Kagan said that while she often agrees with Sotomayor, ‘I think Justice Sotomayor gets stuff wrong on other occasions and this is one of them.’” Josh Gerstein, *Kagan Enters Fray Over Congress’ Power to Police Supreme Court*, POLITICO (Aug. 3, 2023, 6:22 PM), <https://www.politico.com/news/2023/08/03/kagan-enters-fray-over-congress-power-to-police-supreme-court-00109770>.

15. Justice Gorsuch wrote a brief concurrence joined by Justice Jackson and containing no pictures. *Andy Warhol*, 598 U.S. at 553–58 (Gorsuch, J., concurring).

16. See Nancy Marder, *The Court and the Visual: Images and Artifacts in U.S. Supreme Court Opinions*, 88 CHI.-KENT L. REV. 331 (2013); see *infra* notes 19–20 and accompanying text.

17. See *Andy Warhol*, 598 U.S. at 517–52.

18. *Id.* at 565 (Kagan, J., dissenting).

19. Marder, *supra* note 16, at 331.

20. *Id.* at 336.

21. *Id.* at 337.

argument.<sup>22</sup> Occasionally, the Justices have used images to provide important information that can't easily be conveyed by words alone: for instance, maps that show at a glance the contorted geography of a proposed electoral district.<sup>23</sup>

In *AWF*, the pictures are truly substantive. Justices Sotomayor and Kagan have chosen, located, and sequenced their images, including some of the same images, to tell very different stories of the dispute. The Justices, moreover, use their pictures to present their respective theories of the case. The pictures by themselves constitute arguments. No SCOTUS opinions have come close to using pictures this way before, so it's worth examining how the Justices did it here.

Those pictures, of course, are surrounded by words: captions beneath some of the pictures,<sup>24</sup> text that explicitly refers to the pictures,<sup>25</sup> or other words the Justices use to draw inferences from those pictures and to develop the pictures' implications.<sup>26</sup> The pervasive picturing in *AWF* invites us, as no previous SCOTUS cases have, to think about the relationships between words and pictures in judicial opinions. Encountering illustrated texts is not the same experience as reading words alone. Our eyes gravitate to the pictures, impelling us to seek explanations for those pictures in the text, while the text frames our expectations about the meanings of pictures we have yet to see.

Justices Sotomayor and Kagan verbally frame our viewing in contrasting ways. Not surprisingly, the words they use to refer to and describe the pictures they show underscore their opposing narratives and arguments. More than that, though, their words conceive of *looking at pictures* differently. Justice Sotomayor implies that we should regard her pictures simply as visual support for and authentication of her verbal claims, much as most previous SCOTUS opinions with pictures have done.<sup>27</sup> Justice Kagan, in contrast, exhorts us to *really look* at the pictures, a more active engagement that may make us more responsive to what pictures—perhaps especially pictures like Warhol's—can do.<sup>28</sup> Relatedly, their opinions reflect different ideas about pictorial meaning in general. For Justice Sotomayor, pictures are just what they depict—in this case, “portraits of Prince.”<sup>29</sup> This is characteristic of a naïve realist stance toward pictures.<sup>30</sup> For Justice Kagan, pictorial meaning is a more complicated matter, emerging not only from what can be seen in the picture but also from the picture's contexts, including expert commentary and other pictures.<sup>31</sup>

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22. *Id.*

23. *Id.*

24. *See, e.g., Andy Warhol*, 598 U.S. at 517–39.

25. *See, e.g., id.*

26. *See, e.g., id.*

27. *See id.* at 539–42.

28. *See id.* at 565–66.

29. *See id.* at 526.

30. For a discussion of naïve realism, see *infra* notes 371–75 and accompanying text.

31. *See Andy Warhol*, 598 U.S. at 574 (Kagan, J., dissenting).

This is significant for two reasons. First, while the Justices' contrasting stances on pictorial meaning may follow from their opposing interpretations of the first fair use factor, the converse may also be true: they may approach fair use as they do in part because they have different ideas about pictorial meaning in general.<sup>32</sup> Second, and more broadly, as pictures of all kinds play an ever-greater role in legal proof and legal argument, getting decisions right depends on getting pictures right. What judges think pictures mean, and when it should even be part of their job to figure out what they mean, are increasingly important matters. *AWF* tells us something about this.

I begin in Part I surveying the Court's uses of images in the years before *AWF*. After a brief recap of the case itself, Part III describes in detail the images Justices Sotomayor and Kagan use. Here, I explain how the Justices have selected and organized their pictures to build their respective narratives and theories of the case. Next, Part IV examines more closely the relationships between text and image in general and then shows how in *AWF* the Justices' words and pictures interact to construct the meanings they intend their audiences to take from their opinions. Part V elucidates the Justices' contrasting ideas about looking at pictures and pictorial meaning in general and their corresponding views about the extent to which judges need to confront that meaning in fair use cases. I conclude by identifying a feature of pictorial meaning in this case that neither Justice appears to have recognized—the specific material use to which *Orange Prince* was put, as the cover image on a collectors' edition of a print magazine—which should be pertinent to the fair use analysis.

## I. PICTURES IN SUPREME COURT OPINIONS

Supreme Court Justices have included pictures in their opinions before. In a 2013 law review article, legal scholar Nancy Marder compiled a comprehensive list of images in SCOTUS opinions from 1997 to 2009.<sup>33</sup> In that thirteen-year period, she found twenty-three cases (a total of twenty-five separate opinions) with images of various sorts, including nineteen maps, three photos, eight charts or graphs, four diagrams, and seven “artifacts.”<sup>34</sup> Almost all of the pictures were black and white.<sup>35</sup> Marder observes that Justice Breyer used pictures during this period far more often than any other Justice.<sup>36</sup>

32. For a brief discussion of the opposing opinions as reflecting different art theoretical positions, see Note, *Copyright Act of 1976 — Fair Use — Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 137 HARV. L. REV. 410 (2023) (describing Justice Sotomayor's view of art as “formalist” and Justice Kagan's as “expressionist” and finding the latter to be more consonant with the aims of the First Amendment).

33. Marder, *supra* note 16, at 334–38.

34. *Id.* at 334–35.

35. See Marder, *supra* note 16, at 334 n.15.

36. *Id.* at 335, 337–38.

My research assistant, Andie King, and I have carried Professor Marder's survey forward. From 2010 to June 2023 (the end of the October 2022 term), a period of similar length (slightly less than fourteen years), we counted forty-two cases (a total of forty-seven separate opinions) with pictures.<sup>37</sup> This represents nearly a doubling of cases and opinions featuring pictures compared to the earlier period. The total number of images has nearly tripled, from forty-one to 119. Several other changes in the use of pictures are also apparent. From 1997 to 2009, maps constituted a plurality of the images; more recently, it has been photos (fifty-four), followed by artifacts of various kinds (photocopies of documents, notes, cartoons) (twenty-five), maps (twenty-three), charts or graphs (eleven), and diagrams (six). Increasingly, the images have been in color: in contrast to the almost entirely black-and-white images in the earlier period, nearly half of those appearing in 2010–2023 have been in color (58 of 119), all but one of those since 2015.<sup>38</sup> And the pictures have begun to migrate from appendices into the body of the opinions themselves. Professor Marder did not count this, but within the period we surveyed, pictures appeared in the bodies of opinions three times (out of thirty opinions) from 2010 through 2019 but ten times (out of seventeen opinions) since then.<sup>39</sup> Photos did not appear in the body of an opinion until 2022, when they did so twice;<sup>40</sup> they did so again in *AWTF* and in one later case.<sup>41</sup>

Two patterns appear to persist from the earlier period. As in 1997–2009, so too in 2010–2023, slightly more than half of the pictures appeared in or were appended to dissenting opinions (62 of 119), with an additional eight appearing in three concurring opinions.<sup>42</sup> Another constant is that Justice Breyer, until his

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37. We excluded from our count data tables that the Justices themselves appear to have created. Although the tables are a visual feature of the opinions (so is the text, for that matter), these sorts of tables can be meaningfully distinguished from other pictures (photos, maps, scans of documents) in that the latter do not originate with the Justices and represent reproductions of material taken from elsewhere—typically the record—and thus are tethered in a more direct way to the world of fact beyond the opinions themselves. We included photos or scans of tables originating elsewhere.

38. The count is heavily skewed by the thirty-two color images appearing in 2023 alone: four photos in *Jack Daniel's Prods., Inc. v. VIP Prods., LLC*, 599 U.S. 140, 148–49, 158 (2023); eleven proposed redistricting maps in *Allen v. Milligan*, 599 U.S. 1, 55–58 (2023) (Thomas, J., dissenting); and the seventeen photos in *AWTF*, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023).

39. See *supra* notes 33–36 and accompanying text.

40. *Egbert v. Boule*, 596 U.S. 482, 487–89 (2022); *Kennedy v. Bremerton School Dist.*, 597 U.S. 507, 549, 553, 555 (2022) (Sotomayor, J., dissenting).

41. *Jack Daniel's Prods.*, 599 U.S. at 148–49, 158.

42. Almost all SCOTUS decisions other than per curiam decisions feature unanimous or majority opinions whereas only about 60% include dissents. See Lee Epstein, William M. Landes, & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS, 101, 103 (2011) (reaching that conclusion based on a sample of all SCOTUS opinions from 1963, 1980 and 1990). The fact that slightly more than half of the opinions with pictures are dissenting opinions indicates that dissents disproportionately include pictures (although I have not determined whether this is a statistically significant difference). Note also that the three examples of more substantive uses of pictures in SCOTUS opinions discussed later in this Part, see *infra* notes 65–86 and accompanying text, are all from dissenting opinions. So there may be something to explain here. Marder, *supra* note 16, at 336–37, speculates that dissenters might



retirement in 2022, remained the most prolific user of pictures (twenty-six pictures in sixteen separate opinions since 2010). The next most-frequent users of pictures in 2010–2023 have been Justices Thomas (twenty-one pictures in five opinions),<sup>43</sup> Ginsburg (twenty pictures in five opinions), Kagan (nineteen pictures in five opinions, all since 2017),<sup>44</sup> and Sotomayor (twelve pictures in three opinions).<sup>45</sup>

What accounts for the dramatic increase, even before *AWF*, in the amount and prominence of pictures in SCOTUS opinions? It can readily enough be associated with the visual turn that has been going on in the law for some time now,<sup>46</sup> reflecting the increasing extent to which legal communication and legal rhetoric have been adopting the techniques and media of our pervasively visual popular culture. More and more pictures are presented before and at trial,<sup>47</sup> more in briefs to trial and appellate courts,<sup>48</sup> and more in judicial opinions generally.<sup>49</sup> The change in picturing practices might also reflect the Justices' perceived need for their opinions to be accessible to a wider audience, but apart

feel more need to include pictures in their opinions: "One way to understand the use of images in judicial opinions is as a tool to support an argument. It is not surprising, then, to find that those in dissent made use of images slightly more often than those in the majority. Dissenters need to use whatever tools are available to try to persuade the other [J]ustices to see the case their way." *Id.* at 336. Some explanation along those lines is plausible; one study has found that majority and dissenting opinions differ in written style, even within the opinions written by a single Justice, so it may well be that the Justices who write dissents are differently inclined to use pictures to support their arguments. Keith Carlson, Michael A. Livermore, & Daniel Rockmore, *A Quantitative Analysis of Writing Style on the U.S. Supreme Court*, 93 WASH. U. L. REV. 1461, 1497 (2016).

43. Eleven of these being the redistricting maps Justice Thomas appended to his dissent in *Allen v. Milligan*. *Allen*, 599 U.S. 1, 55–58, 92 app. (Thomas, J., dissenting).

44. Nine of her nineteen images are the pictures she included in *AWF*. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 562–90 (2023). (Kagan, J., dissenting).

45. Eight of these twelve images are the pictures she included in *AWF*. *Id.* at 517–52 (majority opinion). Also, Justices Sotomayor and Kagan were two of the three earliest SCOTUS adopters of "image-friendly tablets" for reading opinions to prepare for cases (the other being Justice Scalia), which may suggest a receptivity to picturing that was conducive to their reliance on visuals in *AWF*. Elizabeth Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1721 (2014).

46. See generally, e.g., Porter, *supra* note 45, at 1718–52.

47. See generally NEAL FEIGENSON & CHRISTINA SPIESEL, *LAW ON DISPLAY* (2009).

48. E.g., Steve Johansen & Ruth Anne Robbins, *Art-iculating the Analysis: Systemizing the Decision to Use Visuals as Legal Reasoning*, 20 LEGAL WRITING 57, 60 (2015) (outlining strategies for inclusion of diagrams, pictures, and other visuals in briefs); Porter, *supra* note 45, at 1725–40 (discussing use of images in complaints, briefs, and other documents); Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts - One Judge's Views*, 51 DUQ. L. REV. 3, 38 (2013) (advising lawyers to "[w]herever possible, use pictures, props (for example, trademarked items in a trademark case), maps, diagrams, and other visual aids, in your brief or at argument. Seeing a case makes it come alive to judges."); Adam L. Rosman, *Visualizing the Law: Using Charts, Diagrams, and Other Images to Improve Legal Briefs*, 63 J. LEGAL EDUC. 70, 70 (2013); Michael Whiteman, *Appellate Court Briefs on the Web: Electronic Dynamors or Legal Quagmire*, 97 LAW LIBR. J. 467, 472 (2005) (discussing how e-briefs facilitate inclusion of images).

49. In *AWF*, the Amicus Brief of Copyright Law Professors refers to "[t]he now-common practice of courts including entire images in their opinions, as in the opinion below." Brief for Copyright Law Professors as Amici Curiae Supporting Petitioner at 4, *Andy Warhol*, 598 U.S. 508 (No. 21-869).

from a trend toward the use of more simply written language,<sup>50</sup> the available evidence does not support that speculation.<sup>51</sup>

What purposes have pictures in SCOTUS opinions served? That any images at all appear in only a very small percentage of the cases—forty-two out of perhaps 900 to 1,000 decisions on the merits from 2010–2023, or less than 5%<sup>52</sup>—suggests that they’re hardly ever necessary. Pictures in appellate opinions aren’t needed to prove facts because appellate courts are not, for the most part, where facts are found. It might be helpful instead to think of them as analogous to illustrative aids at a hearing or trial: images offered to help clarify or explain the substantive evidence, which in this context would mean the facts as described in the text of the opinion. For instance, a data graphic inserted into an opinion can make the gist of that information (a trend over time, or the extent of the difference between one quantity and another) easy to see at a glance.<sup>53</sup> In *Allen v. Milligan*, Justice Thomas appended to his dissenting opinion eleven color maps representing the plaintiffs’ proposed redistricting plans, which showed that the plans sought to create a new electoral district on racial

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50. Keith Carlson, Michael A. Livermore, & Daniel Rockmore, *A Quantitative Analysis of Writing Style on the U.S. Supreme Court*, 93 WASH. U. L. REV. 1461, 1482–83 (2016) (quantitative analysis showing the complexity of the Court’s language as measured by Flesch-Kincaid Grade Level score significantly decreasing over time).

51. Considerable evidence indicates that SCOTUS opinions are responsive to public opinion in various ways, but as yet there is no evidence that the increasing simplicity and accessibility of the opinions’ written style is due to any recent general effort to address broader audiences. “[R]ecent comments by judges themselves corroborate our belief that judges use opinion language in part to manage public support. Justice Thomas once remarked: We’re there to write opinions that some busy person or somebody at their kitchen table can read and say, ‘I don’t agree with a word he said, but I understand what he said.’” Ryan C. Black, Justin Wedeking, Ryan J. Owens, & Patrick C. Wohlfarth, *The Influence of Public Sentiment on Supreme Court Opinion Clarity*, 50 L. & SOC’Y REV. 703, 707 (2016) (citations omitted). Neither this quotation, nor the authors’ quantitative study of SCOTUS language, however, adequately supports the speculation in the text above: Justice Thomas, besides being only one of nine Justices, does not suggest that his or anyone else’s writing style has become simpler or more accessible to lay readers over time, and the quantitative study associates simplicity of style with the felt need to address anticipated public opposition to decisions (the article does not report any changes over time).

One measure of any perceived need to reach out to broader audiences is the number of public appearances the Justices have made. The available data, going back only to 2014, do not indicate any upward trend since then: 2014: 111; 2015: 164; 2016: 174; 2017: 169; 2018: 152; 2019: 118; followed by a drop-off, no doubt due to COVID, and a partial rebound: 2020: 32; 2021: 33; 2022: 86. See SCOTUS Map, <https://www.scotusmap.com> [<https://perma.cc/2AK7-JPTP>] (all figures estimates). It may or may not be noteworthy that the Justices who made the most public appearances during this period—Sotomayor, Kagan, Breyer, and Ginsburg—are all from the Court’s liberal minority. Recalling Professor Marder’s suggestion that the greater proportion of pictures in SCOTUS dissents during the period she surveyed (1997–2009) may have been due to dissenting Justices’ greater felt need to use all of tools of persuasion at their disposal, it may be that the larger number of public appearances by the recent and current minority wing (at least in the more ideologically charged cases) reflects a similar perceived need.

52. See *supra* note 37 and accompanying text.

53. See, e.g., *Glossip v. Gross*, 576 U.S. 863, 946–48 (2015) (Breyer, J., dissenting); *Teva Pharms. v. Sandoz*, 574 U.S. 318, 336 (2015); *Schuette v. Coal. to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equal. by Any Means Necessary*, 572 U.S. 291, 385, 387–89 (2014) (Sotomayor, J., dissenting).

grounds in violation of the Voting Rights Act.<sup>54</sup> The maps make visible in an instant what the text lays out over three paragraphs: how a “longstanding, compact, and eminently sensible district [would] be radically transformed” by “extend[ing] a southwestern tendril into Mobile County to capture a dense, high-population majority-black cluster in urban Mobile.”<sup>55</sup>

Pictures in SCOTUS opinions have also served other, sometimes overlapping aims. Not infrequently, Justices have appended reproductions of government forms or other documents, not so much to explain further the assertion being made about the materials in the text as to provide a kind of warrant or authentication for that assertion—“showing the receipts,” as it were. For instance, dissenting in *Bostock v. Clayton County*, Justice Alito argued that no one at the time Title VII of the Civil Rights Act of 1964 was adopted thought that its prohibition on employment discrimination on the basis of “sex” included sexual orientation (or gender identity).<sup>56</sup> To support that position, he observed, among other things, that “at the time of the enactment of Title VII, the United States military had a blanket policy of refusing to enlist gays or lesbians, and under this policy for years thereafter, applicants for enlistment were required to complete a form that asked whether they were ‘homosexual.’”<sup>57</sup> This statement is perfectly clear and was not disputed, yet Justice Alito included a twenty-five-page appendix reproducing the application for enlistment, highlighting (on two of those pages) the pertinent questions.<sup>58</sup>

Photographs may serve a similar purpose, and by verifying the claims made in the text, the photos emphasize those claims. For instance, in *Shurtleff v. City of Boston*, Justice Gorsuch concurred in the judgment that the city’s refusal to let a private group fly a “Christian flag” outside of City Hall, where flags of many groups had flown next to the flags of the United States and of Massachusetts, violated the group’s First Amendment rights.<sup>59</sup> Gorsuch discussed the difficulty of determining when, if ever, flags bearing religious symbols posed an Establishment Clause issue:

The flags of many nations bear religious symbols. So do the flags of various private groups. Historically, Boston has allowed them all. The city has even flown a flag with a cross nearly identical in size to the one on petitioners’ flag. It was a banner presented by a secular group to commemorate the Battle of Bunker Hill.<sup>60</sup>

Readers have no difficulty understanding the description of this flag, and seeing a photo of it adds nothing to what is legally significant about the flag

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54. See 599 U.S. 1, 56–64 app. (2023) (Thomas, J., dissenting).

55. *Id.* at 56–57.

56. *Bostock v. Clayton County*, 590 U.S. 644, 685–90 (Alito, J., dissenting).

57. *Id.* at 690.

58. *Id.* at 754–79.

59. *Shurtleff v. City of Boston*, 596 U.S. 243, 276 (2022) (Gorsuch, J., concurring).

60. *Id.* at 279.

described (that it featured a cross nearly as large as the one on the flag in dispute), yet by showing us photos of the flag, Justice Gorsuch may have hoped to underscore his point in a way that words alone did not.

Sometimes Justices have used photos in their opinions merely to provide a bit of background, a touch of more or less colorful detail. So, for instance, in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, a case about what choice-of-law rule a court should use to determine the applicable substantive law in a Foreign Sovereign Immunities Act suit raising non-federal claims, Justice Kagan opened her statement of the facts: “Although the legal issue before us is prosaic, the case’s subject matter and background are anything but. At issue is the ownership of an Impressionist painting depicting a Paris streetscape: Camille Pissarro’s *Rue Saint-Honoré in the Afternoon, Effect of Rain*,” seized by the Nazis from the petitioner’s family.<sup>61</sup> Justice Kagan appended to her opinion a color photo of the painting and a color photo of a black-and-white photo showing the painting hanging in Lily Cassirer’s (the petitioner’s grandmother’s) home in Germany before the war.<sup>62</sup> In two other opinions, Justices Thomas and Alito, respectively, added legally and factually gratuitous pictures in what seem to have been appeals to their readers’ emotions: a photo of a murder victim in *Brumfield v. Cain*,<sup>63</sup> and a nineteenth-century political cartoon expressing contemporary anti-Catholic sentiment in *Espinoza v. Montana Department of Revenue*.<sup>64</sup>

In several instances, the pictures that Justices have included in their opinions have served more substantive functions, going beyond merely making textual assertions easier to grasp (although the line between this category and the first is not all that bright). For instance, in *Ysleta del Sur Pueblo v. Texas*, the issue was whether a federal statute permitted Texas to prohibit all gaming activities on the reservation subjected to Texas regulation or only those particular games that Texas law categorically prohibited.<sup>65</sup> The majority ruled that it was the latter.<sup>66</sup> Chief Justice Roberts dissented, arguing that the petitioner tribes’ “bingo” game, which the majority allowed because Texas law did not explicitly ban bingo, offered the practical equivalent of high-stakes slot machines, which Texas did ban.<sup>67</sup> To drive home his point, Justice Roberts appended to his opinion a photograph of these “bingo” machines, which look just like slot machines.<sup>68</sup> The photo “confirms that the electronic bingo played

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61. 596 U.S. 107, 110 (2022).

62. *Id.* at 117.

63. 576 U.S. 305, 350 (2015) (Thomas, J., dissenting).

64. 591 U.S. 464, 500 (2020) (Alito, J., concurring).

65. 596 U.S. 685, 685 (2022).

66. *Id.* at 706–08.

67. *Id.* at 713–14 (Roberts, J., dissenting).

68. *Id.* at 723.

at the Speaking Rock Entertainment Center is about as close to real bingo as Bingo the famous dog.”<sup>69</sup>

Photos played an even more important role in *Kennedy v. Bremerton School District*, in which the Supreme Court addressed whether a high-school football coach had a Free Exercise Clause right to pray as he did at the fifty-yard line after games or, instead, “whether [the] school district [was] required to allow one of its employees to incorporate a public, communicative display of the employee’s personal religious beliefs into a school event,” which would conflict with the Establishment Clause.<sup>70</sup> The majority and dissenting opinions clashed on several doctrinal points, but underlying their dispute were fundamentally different presentations of the facts—specifically, the nature of the coach’s prayers. Justice Gorsuch, writing for the majority, framed the case this way: “Joseph Kennedy lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks.”<sup>71</sup> In her dissenting opinion, Justice Sotomayor incorporated into her detailed account of the facts three black-and-white photos showing Coach Kennedy praying with and, in one case, apparently exhorting, crowds of kneeling players from both teams, as well as other people, while still others looked on.<sup>72</sup> While Justice Gorsuch described the coach’s prayers as “private” in the sense of an individual citizen’s religious expression,<sup>73</sup> the pictures make it very clear that the prayers were public in another, constitutionally relevant sense: conducted on the fifty-yard line, joined by players on both teams, and in full view of many others.<sup>74</sup> And by putting those pictures directly into her opinion rather than relegating them to an appendix,<sup>75</sup> Justice Sotomayor heightened their impact, making them an integral part of the story she recounted. This reflects a far more focused use of visual storytelling than, say, Justice Kennedy’s use of three photos in the appendix to his majority opinion in *Brown v. Plata* to illustrate the dire overcrowding and neglect in the California state prison system.<sup>76</sup>

Probably the SCOTUS case that most closely anticipates the extensive use of pictures in *AWF* is *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, also a copyright case. Justice Thomas, writing for the majority, held that Varsity’s designs were works of art separate from the useful article and thus eligible for copyright protection.<sup>77</sup> He included in an appendix to his opinion color drawings of the

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69. *Id.* at 713 n.1.

70. 597 U.S. 507, 558 (2022) (Sotomayor, J., dissenting).

71. *Id.* at 512 (majority opinion).

72. *Id.* at 549, 553, 555 (Sotomayor, J., dissenting). The first picture is captioned, “Photograph of J. Kennedy standing in group of kneeling players.” *Id.* at 549. The second and third are captioned, “Photograph of J. Kennedy in prayer circle,” with the respective dates on which the pictures were taken. *Id.* at 553, 555.

73. *Id.* at 529–30 (majority opinion).

74. *Id.* at 549, 553, 555 (Sotomayor, J., dissenting).

75. *Id.*

76. 563 U.S. 493, 548–49 (2011). For a discussion, see Marder, *supra* note 16, at 349–57.

77. *Star Athletica, LLC v. Varsity Brands, Inc.*, 580 U.S. 405, 424 (2017).

five designs at issue,<sup>78</sup> helpfully enabling readers to visualize what the case was about. Justice Ginsburg appended to her concurrence photographic reproductions of six exhibits to Varsity's application for copyright registration.<sup>79</sup> In his dissenting opinion, Justice Breyer included four color photographs<sup>80</sup>: two of rather tacky cat lamps, as examples of objects where the visual component at issue is physically or conceptually separate from the utilitarian function of the object itself and thus eligible for copyright protection,<sup>81</sup> and two of famous artworks, a Van Gogh painting of worn workman's shoes and Marcel Duchamp's *In Advance of the Broken Arm*, to illustrate the point that neither the shoes in the painting nor Duchamp's shovel would be eligible for protection because neither the style of the shoes nor the design of the shovel were separate from those objects' notionally useful functions.<sup>82</sup>

In all, *Star Athletica* includes fourteen pictures, nine of them in color—the most of any case before *AWF*.<sup>83</sup> Pictures were appended to three different opinions—more than in any other case.<sup>84</sup> The pictures depict several different sorts of things: drawings, documents, a painting, and sculpted objects.<sup>85</sup> The images of the drawings are helpful to understanding what the case is about because the copyrightability of the drawings was the main issue; Justice Breyer's four photos are similarly very helpful to understanding his analysis. And, in reaching for art-historical examples, Justice Breyer anticipates part of Justice Kagan's use of pictures in *AWF*.<sup>86</sup>

All of that said, in none of the *Star Athletica* opinions do pictures play nearly as pervasive and important a role as they do in Justices Sotomayor's and Kagan's opinions in *AWF*. I will discuss those pictures in a moment. First, a little background.

## II. *AWF*: A SUMMARY

Lynn Goldsmith, an accomplished photographer of rock stars, took studio photos of Prince in 1981.<sup>87</sup> She licensed some of them to various publications, including one for use by *Vanity Fair* as an “artist reference for an illustration.”<sup>88</sup> The artist was Andy Warhol, who adapted Goldsmith's photo to create not one

78. *Id.*

79. *Id.* at 428–38 (Ginsburg, J., concurring).

80. *Id.* at 450 (Breyer, J., dissenting).

81. *Id.*

82. *Id.*

83. *See generally id.*

84. *Id.* at 424, 428–38 (Ginsburg, J., concurring), 449 (Breyer, J., dissenting).

85. *Star Athletica*, 580 U.S. at 449 (Breyer, J., dissenting).

86. *Compare id.* at 449 (Breyer, J., dissenting), *with* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 562–66, 587–90 (2023) (Kagan, J., dissenting).

87. *Andy Warhol*, 598 U.S. at 516.

88. *Id.* at 517.

but a series of sixteen silkscreen prints and drawings, entitled the *Prince Series*.<sup>89</sup> *Vanity Fair* chose *Purple Prince* from this series to illustrate an article about Prince in its November 1984 issue.<sup>90</sup> After Prince's sudden death in 2016, many publishers put out special editions to commemorate his life and music.<sup>91</sup> One of those publishers, Condé Nast, which owned *Vanity Fair* back in 1984 and still does, used another print from Warhol's *Prince Series*, *Orange Prince* (owned by the Andy Warhol Foundation since Warhol's death in 1987), on the cover of its special issue, *The Genius of Prince*, without Goldsmith's permission and without crediting or compensating her.<sup>92</sup>

Goldsmith notified the Foundation that she believed the licensing to Condé Nast infringed upon her copyright of the photo.<sup>93</sup> The Foundation responded by suing for a declaratory judgment of noninfringement or, alternatively, fair use.<sup>94</sup> The District Court evaluated the four statutory fair use factors<sup>95</sup> and granted the Foundation summary judgment.<sup>96</sup> The Second Circuit reversed and granted summary judgment to Goldsmith, finding that all four factors favored her.<sup>97</sup> The Second Circuit also held that *Orange Prince* and the Goldsmith photo were "substantially similar as a matter of law."<sup>98</sup>

The Supreme Court affirmed.<sup>99</sup> The Court, considering only the first fair use factor,<sup>100</sup> concluded that the "purpose and character of the [secondary] use,

89. *Id.* at 517–18.

90. *Id.*

91. *See, e.g., The Genius of Prince*, CONDÉ NAST, 2016.

92. I do not know why the Foundation didn't simply pay Goldsmith for a license to use *Orange Prince*, as it had done for *Purple Prince* three decades earlier and as it could certainly have afforded to do. Copyright law expert William Patry, *supra* note 14, at 628, 635, writes: "Sharing a bit of that money-making deal[, the Foundation's receiving \$10,000 from Condé Nast for the use of *Orange Prince*,] with the photographer whose picture was used to make the artist reference behind the \$10,000 fee would not offend the Muses. . . . [Because of this and the Foundation's later decision to appeal to the Supreme Court on only the first fair-use factor, *AWF*] should be regarded as a failure of rudimentary common sense."

Incidentally, Condé Nast reissued *The Genius of Prince* in 2019 with a different cover featuring a close-up photo of Prince. *The Genius of Prince*, CONDÉ NAST, 2019.

93. *Andy Warhol*, 598 U.S. at 522.

94. *Id.*

95. The factors enumerated in the statute are: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107.

96. *Andy Warhol*, 598 U.S. at 522.

97. *Id.* at 523.

98. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 52–54 (2d Cir. 2021), *aff'd*, 598 U.S. 508 (2023).

99. *Andy Warhol*, 598 U.S. at 551.

100. The Foundation did not challenge the Second Circuit's holding that *Orange Prince* and the Goldsmith photograph were "substantially similar" for purposes of establishing infringement, *see id.* at 525, and note that the Second Circuit addressed substantial similarity even though the district court had not, *see id.* at 524. Nor did the Foundation challenge the Second Circuit's holdings regarding the second through fourth fair use factors. The Foundation's petition for certiorari framed the sole question presented as follows:

including whether such use is of a commercial nature or is for nonprofit educational purposes”—here, Warhol’s adaptation of Goldsmith’s photo to make *Orange Prince* and the Foundation’s licensing of *Orange Prince* to Condé Nast for its Prince-issue magazine cover—did not support fair use.<sup>101</sup>

Two leading precedents might have been expected to frame the analysis. The first was *Campbell v. Acuff-Rose Music, Inc.*,<sup>102</sup> in which the Court set out this highly influential approach to the first fair use factor:

The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely “supersede[s] the objects” of the original creation, (“supplanting” the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.” . . . [T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.<sup>103</sup>

The second was the more recent decision in *Google LLC v. Oracle America, Inc.*,<sup>104</sup> in which the Court held that Google’s appropriation, without permission or payment, of 11,500 lines of Oracle’s Sun Java API code to facilitate the development of commercial applications for its own Android phones was fair

“Whether a work of art is ‘transformative’ when it conveys a different meaning or message from its source material (as this Court, the Ninth Circuit, and other courts of appeals have held), or whether a court is forbidden from considering the meaning of the accused work where it ‘recognizably deriv[es] from’ its source material (as the Second Circuit has held).” Petition for Writ of Certiorari at i, *Andy Warhol*, 598 U.S. 508 (No. 21-869). The Court granted the petition. *Andy Warhol*, 598 U.S. at 525. Similarly, the Foundation’s reply brief focused exclusively on the first fair use factor. *E.g.*, Reply Brief for Petitioner at 1–2, *Andy Warhol*, 598 U.S. 508 (No. 21-869).

The Supreme Court’s exclusive focus on the first factor is doctrinally problematic, *see, e.g.*, Patry, *supra* note 14, at 634–36, and could distort later courts’ analyses of fair use law as a whole. For instance, as legal scholar Jane Ginsburg, *supra* note 14, at 587–88, and others have written (and as Justice Kagan touches upon in her dissent, *Andy Warhol*, 598 U.S. at 578–79 (Kagan, J., dissenting)), the fourth factor—the impact of the challenged use on the actual or potential market for the original or derivative works, which the copyright holder retains the exclusive right to make—will prohibit some copying even if that copying is transformative and hence satisfies the first factor. The Court had previously stated that the fair use factors ought to be considered together: “Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994). Roman Martinez, representing the Foundation at oral argument before the Court, repeatedly referred to what he termed the overlap between the first and fourth factors. *See generally* Oral Argument at 42:59, *Andy Warhol*, 598 U.S. 508 (No. 21-869), <https://www.oyez.org/cases/2022/21-869> [<https://perma.cc/7SLF-G2XX>]. The Court in *AWF*, however, did not address any fair use factors other than the first, although it noted in passing toward the end of the majority opinion that “copyright law is replete with escape valves[. . . one being] . . . the defense of fair use, including all its factors.” *Andy Warhol*, 598 U.S. at 550.

101. *Andy Warhol*, 598 U.S. at 550 (quoting 17 U.S.C. § 107(1)).

102. 510 U.S. at 579.

103. *Id.* at 579 (citations omitted).

104. 593 U.S. 1 (2021).



use.<sup>105</sup> The Court in *Google* opened its discussion of “[t]he [p]urpose and [c]haracter of the [u]se” by emphasizing the “new expression, meaning or message” principle from *Campbell*,<sup>106</sup> and reasoned that Google’s copying of Oracle’s code was transformative under this test because Google used the API code to create new products.<sup>107</sup> The Court added that the commercial nature of Google’s use was “not dispositive of the first factor” in light of the “inherently transformative” nature of that use.<sup>108</sup>

Justice Sotomayor, writing for the *AWF* majority,<sup>109</sup> construed “the purpose and character of the use” more narrowly.<sup>110</sup> The mere fact that the challenged use adds something new does not itself make the use fair; courts must consider “whether *and to what extent* the use at issue has a purpose or character different from the original.”<sup>111</sup> “If an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying.”<sup>112</sup> In this case, the Foundation’s use of *Orange Prince* and Goldsmith’s Prince photo shared the same purpose: “Both are portraits of Prince used in magazines to illustrate stories about Prince.”<sup>113</sup> What Justice Sotomayor perceived to be the close similarity of Warhol’s portrait to Goldsmith’s photo underscored this characterization: “When Goldsmith saw *Orange Prince* on the cover of Condé Nast’s special edition magazine, she

105. *Id.* at 40.

106. *Id.* at 29.

107. *Id.* at 30.

108. *Id.* at 32. Patry, *supra* note 14, at 633, argues that since *Google LLC v. Oracle* was decided largely on the basis of the *second* fair use factor, the nature of the copyrighted work, it had “little relevance” to the Supreme Court’s analysis in *AWF*, which was confined to the first factor.

109. Justices Thomas, Alito, Gorsuch, Kavanaugh, Barrett, and Jackson joined the majority opinion. Justice Gorsuch wrote a concurring opinion in which Justice Jackson joined. *Andy Warhol*, 598 U.S. 508.

110. *Id.* at 527.

111. *Id.* at 529 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

112. *Id.* at 532–33.

113. *Id.* at 535. In defining the fair use question as limited to the Foundation’s licensing of *Orange Prince* to Condé Nast for use in its 2016 commemorative issue, the Court appears to have accepted the argument made by the Solicitor General in the Government’s amicus brief. Brief for the United States as Amicus Curiae Supporting Respondents at 13–14, *Andy Warhol*, 598 U.S. 508 (No. 21-869).

It may seem a little odd to compare the secondary *use* of the copyrighted work to the copyrighted work itself, as the Court does, as opposed to the *use* the copyright holder made of her work. Here is what Justice Sotomayor appears to mean. Although she notes that Goldsmith licensed *other* photographs she took of Prince to illustrate other magazine stories about Prince, *Andy Warhol*, 598 U.S. at 534, including what appears to be another photo from the same session, *see infra* text preceding note 163, and that licensing photos of celebrities to magazines so that they can run those photographs is a “typical use” of celebrity photographs, *Andy Warhol*, 598 U.S. at 534, Goldsmith does not appear to have used the photograph at issue in this case for this particular purpose (although Justice Sotomayor later refers to “the photograph’s typical use,” *id.* at 547, seemingly trading on an ambiguity between the particular photo at issue and other Goldsmith photos of Prince). So the sense in which “[b]oth [the Goldsmith photo and *Orange Prince*] are portraits of Prince used in magazines to illustrate stories about Prince” must be that the Goldsmith photo was used in this way when it was licensed for use as an artist reference, from which Warhol made *Purple Prince*, a reproduction of which *Vanity Fair* then published. *Id.* at 535.

recognized her work. ‘It’s the photograph,’ she later testified. *Orange Prince* crops, flattens, traces, and colors the photo but otherwise does not alter it.”<sup>114</sup> And, of course, the Foundation’s use was commercial.<sup>115</sup>

Thus without some other justification for copying, the first factor cuts against fair use.<sup>116</sup> There was no such justification here.<sup>117</sup> Unlike the parody at issue in *Campbell*, or for that matter Warhol’s own previous *Campbell’s Soup Cans* series, both of which had to copy their respective originals in order to convey their intended meanings (parody in the case of 2 Live Crew’s use of Roy Orbison’s *Pretty Woman*; “artistic commentary on consumerism” in the case of the *Campbell’s Soup Cans* prints<sup>118</sup>), and so could be considered transformative uses despite that extensive copying, “AWF’s use of Goldsmith’s photograph does not target the photograph” in the same way.<sup>119</sup>

Finally, for two reasons, the mere fact that Warhol’s work may have “alter[ed] Goldsmith’s photo] with new expression, meaning, or message” could not by itself support a finding that the first factor weighs in favor of fair use.<sup>120</sup> Many, if not most, derivative works add new expression or new information to the original, so treating any work that does this as “transformative . . . would swallow the copyright owner’s exclusive right to prepare derivative works.”<sup>121</sup> Furthermore, it would enmesh judges in the hopeless task of divining artists’ subjective intentions to determine what “expression, meaning, or message” they hoped their work would convey.<sup>122</sup> As the court below put it, “the district judge should not assume the role of art critic and seek to ascertain the intent behind or meaning of the works at issue.”<sup>123</sup>

Justice Kagan, joined by Justice Roberts, dissented.<sup>124</sup> She argued that under *Campbell*, whenever the challenged use to a significant degree “add[s] something new, with a further purpose or different character, altering the [original] with new expression, meaning, or message,” it’s transformative, and the first fair use factor should favor the alleged infringer.<sup>125</sup> *Orange Prince* obviously meets that test; as with so many of Warhol’s other, more famous works, his method of producing art yields images of a distinctive character, adding recognizably new meaning and message to the originals on which his

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114. *Andy Warhol*, 598 U.S. at 522 (citation omitted).

115. *Id.* at 537.

116. *See id.* at 539–40.

117. *Id.*

118. *Id.* at 539.

119. *Id.* at 540.

120. *Id.* at 542 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

121. *Id.* at 541.

122. *Id.* (quoting *Campbell*, 510 U.S. at 579).

123. *Id.* at 544 (quoting *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 41 (2d Cir. 2021)). Justice Gorsuch emphasized this point in his concurrence (joined by Justice Jackson). *See infra* notes 385–414 and accompanying text.

124. *Andy Warhol*, 598 U.S. at 558–93 (Kagan, J., dissenting).

125. *Id.* at 559 (alteration in original) (quoting *Campbell*, 510 U.S. at 579).

works are based. Moreover, according to Justice Kagan, “it is not just that the majority does not realize how much Warhol added; it is that the majority does not care,”<sup>126</sup> because the majority’s sole concern in construing “the purpose and character”<sup>127</sup> of the Foundation’s use was that the Foundation used *Orange Prince* for the same commercial purpose for which Goldsmith had used her photo: they both licensed portraits of Prince to magazine publishers to illustrate articles about Prince.<sup>128</sup> Because, however, artists in all media borrow from other artists—Justice Kagan offers examples from literature, music, and fine art<sup>129</sup>—and most artists must at some point endeavor to use their work commercially in order to survive, the consequence of the majority’s unduly narrow interpretation of the first fair use factor will be to stifle creative work, precisely the opposite of the goal of copyright law more generally.<sup>130</sup>

Now let’s look at the pictures.

### III. PICTURES IN THE *AWF* OPINIONS

*AWF* is the most pictorial of any Supreme Court case to date. The sheer number of illustrations—seventeen across two opinions, several consisting of multiple images—is unprecedented. Every image is striking, certainly by the visual standards of the mostly text-only reports, and they are striking in different ways. There are the many full-color photos of silkscreen prints by Warhol,<sup>131</sup> including the sixteen-image array of his *Prince Series*,<sup>132</sup> and color photos of paintings by several other great artists in the Western canon (Giorgione, Titian, Manet, Velasquez, and Bacon)<sup>133</sup> in addition to the black-and-white Goldsmith photo of Prince and various magazine covers,<sup>134</sup> featuring both black-and-white and color images. The bright and sometimes jarringly contrasting Day-Glo colors of the Warhol silkscreens catch our eyes, as do the subtler and more harmonious colors and compositions of (most of) the classic paintings. Pictures of famous people also grab our attention. Many of the photos in this case, of course, portray a celebrity—Prince—as captured either in Warhol’s silkscreens or by photography (also in color except for two of the Goldsmith photos), and in almost all of the pictures we see, Prince is looking back at us, which generates an additional *frisson* of engagement with the late star.<sup>135</sup> Indeed, the pictures of

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126. *Andy Warhol* 598 U.S. at 559.

127. *Id.* (quoting *Campbell*, 510 U.S. at 579).

128. *Id.* at 535 (majority opinion).

129. *Id.* at 581–91 (Kagan, J., dissenting).

130. *Id.* at 560.

131. *Id.* at 563, 565; *id.* at 518–19, 522, 539, 552 (majority opinion).

132. *Id.* at 552 (majority opinion).

133. *Id.* at 587–91 (Kagan, J., dissenting).

134. *Id.* at 564; *id.* at 517, 519–22 (majority opinion).

135. On the importance of portraits that appear to look back at the viewer, see *infra* note 427 and accompanying text.

Warhol's work themselves are "celebrity images" in the sense that they are immediately recognizable as Warhol's regardless of the subject matter.

The pictures, moreover, permeate the opinions. They are not, as was so often the case in earlier SCOTUS opinions, relegated to appendices.<sup>136</sup> This integration of the images into the text of the opinions intimates that pictures and words are more tightly bound in *AWF* than in previous cases—that to understand the text, we will need to ponder the images to an extent to which, as consumers of SCOTUS opinions, we may not be accustomed.<sup>137</sup>

The displays of pictures throughout *AWF* pull us in, making us curious to learn just what the brouhaha was all about.<sup>138</sup> We want to find out what doctrinal significance, if any, the Justices thought these images had. The profusion and placement of all these colorful images also demand a sort of visual attention and visual inquiry that's unprecedented in SCOTUS opinions. We are invited to make comparisons that are "internal" to the dispute, as it were, between the Goldsmith photo and Warhol's *Orange Prince* and between *Orange Prince* and *Purple Prince*. We are also invited to use our eyes to go beyond the Prince images back to Warhol's method for making his art and to great artworks of the past.

In this Part, I describe the pictures each Justice uses and explain the pictures' narrative and rhetorical functions in the respective opinions. In the following Part, I make a second pass at the opinions, analyzing the interactions between the Justices' words and their pictures.

## *A. Justice Sotomayor's Majority Opinion: Pictures as Narrative and Argument*

### *1. The Pictures*

The first picture appears on the fourth page of the majority opinion: Lynn Goldsmith's black-and-white photograph of Prince taken in 1981, on which her claim of copyright infringement is based.<sup>139</sup> The photo shows Prince facing the camera, seen from mid-torso up, in a high-collared white shirt, draped with what might be a loose, thin black tie and wearing white suspenders.<sup>140</sup> The

136. See *supra* notes 33–86 and accompanying text.

137. See Porter, *supra* note 45, at 1690, 1708, 1712, 1715–17, 1724, 1728–29, 1729 n.197, 1745–46 on the significance of embedding images in the body of the opinion versus relegating them to an appendix.

138. Cf. Silvia Knobloch, Matthias Hastall, Dolf Zillmann & Coy Callison, *Imagery Effects on the Selective Reading of Internet Newsmagazines*, 30 COMM'N RSCH. 3, 23 (2003) (“[T]he incorporation of innocuous or threatening imagery in online displays of news headlines and in the reports proper increased selective attention to and the reading of the text of the reports.”).

139. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 517 (2023).

140. *Id.*

image is centered toward the top of the page.<sup>141</sup> Like many of the other photographs in the opinions, it has no border and seems to float on the page, although it is somewhat anchored by the caption immediately beneath.<sup>142</sup>



The second picture appears toward the bottom of the next page: Warhol's purple silkscreen portrait of Prince, created in 1984, as it appeared in the issue of *Vanity Fair* magazine.<sup>143</sup> In fact, the photo in landscape format shows the magazine open to the first page of the article (verso) and *Purple Prince* (recto). The edges of the partly yellowed pages visible to the left of the verso indicate that this image originated as a photograph of the actual analog magazine. A thinner gray border across the bottom of both magazine pages may also indicate the physical magazine or simply the cropping of the source image. Warhol, in making his print, has cropped his own source image (Goldsmith's photo) just below the subject's neck, so that we see only Prince's head filling the entire page.<sup>144</sup> In contrast to the three-dimensionality implied in the Goldsmith photo by the longer view of Prince's body and the photo's lighting, the silkscreen

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141. *Id.* This and the following descriptions of where the pictures appear in the pages of the opinion refer to the PDF versions of the slip opinions accessed through the SCOTUS website. *Opinions of the Court - 2022*, SUP. CT. OF THE U.S. <https://www.supremecourt.gov/opinions/slipopinion/22> [<https://perma.cc/37BG-YP89>] (scroll down and click "more," then find the entry for *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith for the PDF*). The pictures appear differently in the Westlaw and LEXIS versions of the opinions, where there are no discrete pages as in printed texts. On Westlaw, the left edges of the pictures (or the left-most pictures, if more than one is presented at once) are aligned with the left margin of the text. See *Andy Warhol*, 598 U.S. at 508–93, as seen on Westlaw [<https://perma.cc/C3JV-LVQC>]. On LEXIS, some of the pictures are left-justified, and some are in the middle of the portion of the screen containing the text of the opinion. *Andy Warhol*, 598 U.S. at 508–93, as seen on Lexis [<https://perma.cc/P2K9-2EHF>]. (This is more apparent in "reading mode.") Thus, readers' experiences of the pictures may differ depending on the format in which they encounter the opinions, and any inferences to be drawn from the pictures' locations on the page in the PDF versions may not apply to the Westlaw and LEXIS versions.

142. *Id.*

143. *Andy Warhol*, 598 U.S. at 518.

144. For more on this, see *infra* notes 159–73 and accompanying text.

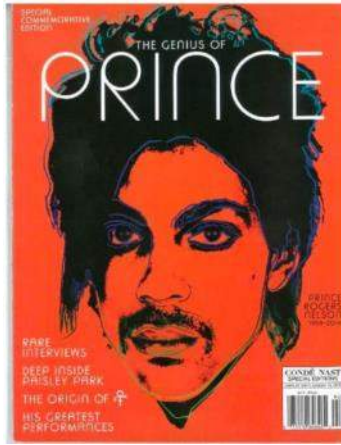
depicts its subject in a flatter, two-dimensional fashion. By zooming in (if we are reading on digital devices and not in hard copy), we can discern several features of Warhol's rendition that are less apparent if we merely read the opinion at ordinary scale, such as the fact that the work includes drawn outlines as well as the garishly colored areas. As printed and reproduced in the opinion,<sup>145</sup> the outlines range from yellowish green to orange to hot pink, somewhat tracing Prince's facial features and loosely demarcating his purple face and black coiffure from the orangey-red background.



On the next page, the third picture appears in the same location toward the bottom of the page: this is Warhol's *Orange Prince* as it was reproduced on the cover of the special commemorative edition, *The Genius of Prince*, published by Condé Nast in 2016.<sup>146</sup> Prince's face and the background are in the same arresting bright orange; his hair, his eyes, and his other facial features are in black, loosely bordered by outlining varying from royal blue to light green. Aside from the changes in color, what we see of Prince looks very similar to *Purple Prince*, down to the tracery of the outline. The image, like Goldsmith's photo, is shown in portrait format, but, representing the dimensions of the analog magazine, it's shorter and wider than the image of the original photo.

145. *Andy Warhol*, 598 U.S. at 518–19, 521–22, 539, 552.

146. *Id.* at 519.



The fourth picture appears in the same position on the following page, toward the bottom.<sup>147</sup> It is a different Goldsmith photograph of Prince as it was featured on the cover of the September 1983 issue of *Musician* magazine.<sup>148</sup> Prince is wearing the same outfit as in the original Goldsmith photo and his hair is done in the same way, so it would seem that this photo was taken during the same shoot, but the image is in color, and the subject has shifted his pose slightly to the left, or perhaps the photo has been shot from slightly to the left, in relation to the first photo. This photo has also been cropped slightly higher so that we see a little less of the torso.



The fifth picture, on the next page,<sup>149</sup> is different. It's an array of photos of four magazine covers featuring Prince, all from special commemorative editions

147. *Id.* at 520.

148. *Id.* at 521.

149. *Id.*

published soon after Prince's death in 2016.<sup>150</sup> The four photos are identically sized, separated from one another by vertical and horizontal white space. Starting in the upper left and moving clockwise, we see *People* (a black-and-white photo of Prince in left profile, eyes quietly downcast, wearing what appears to be a black turtleneck and a braided necklace); *Rolling Stone* (a full-color photo of a shirtless Prince staring out beyond the viewer, left arm lifted and raised behind his head, chest and underarm hair prominent); *Time* (a black-and-white photo of Prince, wearing an open-necked, high-collared white shirt and striped jacket, touching the brim of his fedora with the third and fourth fingers of his left hand and staring with what appears to be quiet confidence directly at the viewer); and finally the same Condé Nast cover we have already seen.<sup>151</sup> Together the pictures occupy two-thirds of the page.



The sixth and last picture in this sequence of illustrations, toward the bottom of the next page of the opinion,<sup>152</sup> immediately strikes us as different in yet another way. It shows two images. On the left is the original Goldsmith photo, smaller than when first encountered.<sup>153</sup> On the right is a duplicate of that photo onto which *Orange Prince* has been superimposed.<sup>154</sup> *Orange Prince* has

150. *Id.*

151. *Id.* at 521. The intersection of the white bands separating the pictures creates the illusion of a faint gray circle (the Hermann grid illusion). See *Grid Illusion*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Grid\\_illusion](https://en.wikipedia.org/wiki/Grid_illusion) [<https://perma.cc/PL7P-W6YT>].

152. *Andy Warhol*, 598 U.S. at 522.

153. *Id.*

154. *Id.*



been resized and tilted so that Prince's head appears in the same size, location, and orientation in both pictures.



Much later in the opinion, a lone illustration appears: a photograph of one of Warhol's famous silkscreen prints of a Campbell's soup can.<sup>155</sup> Like the pictures of Prince, it's in portrait format (the can is upright, after all). The slight differentiation between the grayish white in the immediate background of the can and the lighter off-white surrounding it suggests that the depicted artwork is mounted on a mat. A darker gray border surrounds this, further setting the image off from the page.



Finally, in the Appendix to the opinion, we see the entire *Prince Series*, which Warhol made based on the original Goldsmith photograph.<sup>156</sup> This consists of sixteen separate artworks—fourteen silkscreen prints and two pencil drawings—arrayed here in a 4 x 4 grid.

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155. *Id.* at 539.

156. *Id.* at 552.



## 2. *The Pictures' Functions in the Opinion*

The pictures in Justice Sotomayor's opinion, even without reference to her text, serve multiple rhetorical purposes. They tell the story of the case from Goldsmith's, the respondent's, point of view: Goldsmith had valuable intellectual property rights in her Prince photo, for which she initially gave a limited-use license to *Vanity Fair*; three decades later the Andy Warhol Foundation and Condé Nast came along and ripped her off. The pictures also provide visual support for the majority's two-pronged theory of the case: Warhol's *Orange Prince* is in all important respects just a copy of Goldsmith's original photo, and the purpose for which the Foundation used *Orange Prince* was precisely the same purpose for which Goldsmith's photo of Prince was used: both were "portraits of Prince used in magazines to illustrate stories about Prince."<sup>157</sup> The final picture in the text of the opinion, the *Campbell's Soup Cans* print,<sup>158</sup> then offers an iconic exemplar of permissible copying from Warhol's own oeuvre, which contrasts starkly with the impermissible copying that *Orange Prince* represents.

The story of the case is established in the sequence of the first four pictures. We begin with Goldsmith's photo,<sup>159</sup> followed by the licensed use of *Purple Prince in situ*, inside the issue of *Vanity Fair*.<sup>160</sup> Then the offending picture, *Orange Prince*, enters the visual narrative,<sup>161</sup> countered by Goldsmith's placement of

157. *Id.* at 535.

158. *Id.* at 539.

159. *Id.* at 517.

160. *Id.* at 518.

161. *Id.* at 519.

another photo of Prince on another magazine cover.<sup>162</sup> The protagonist of the story is introduced in the form of Goldsmith's photo, a metonym for Goldsmith herself. The antagonist makes its appearance in the form of the spooky *Purple Prince*, a metonym for Warhol and later his Foundation, but the real danger is not yet fully evident. That occurs only in the next scene, with the offending *Orange Prince* cover. The *Musician* cover featuring another Goldsmith photo of Prince from the same photo session provides an interlude of sorts, reminding us that Goldsmith was continuously in the business of licensing her photos for use by magazines, and thus that there was a market for her work, with which the Foundation's and Condé Nast's reuse of her work in the form of Warhol's adaptation interfered.

The next two illustrations—the array of four covers of special editions of magazines commemorating Prince,<sup>163</sup> all of which (except for Condé Nast's) used copyrighted photos and credited the photographers, followed by the juxtaposition of the Goldsmith photo and the photo with *Orange Prince* resized, reoriented, and superimposed on it<sup>164</sup>—together visualize several important aspects of both the majority's story and its theory of the case. The gist of the array can be taken in at a glance: we see four magazine covers all featuring pictures of Prince. This implies that the offending use to which Condé Nast—thanks to the Foundation—put Warhol's artwork was, in one sense, nothing special: it wasn't being shown in a gallery or projected on a screen during an art-history course but was simply one more magazine cover among many. So the artwork was being put to the same commercial use to which Goldsmith devoted her photos, just another “portrait[] of Prince used in magazines to illustrate stories about Prince.”<sup>165</sup> At the same time, we see that the Warhol print, and by extension, the Foundation's and Condé Nast's use of it, is deviant; it's the only nonphotographic image of the four. This deviance stands in for the legally significant deviance explained in the text: the other three magazines—but not Condé Nast—credited the photographer.<sup>166</sup>

A closer examination of the array is likely to begin at the top left. That most prominent location is occupied by the cover of the *People* magazine special edition, which features another Goldsmith photo of Prince.<sup>167</sup> Once again, Goldsmith's work anchors the story. In contrast, the placement of the photo of the Condé Nast cover in the lower left of the array makes it the last (or next-

162. *Id.* at 520.

163. *Id.* at 521.

164. *Id.* at 522.

165. *Id.* at 535.

166. *Id.* at 521.

167. *Id.*

to-last) one at which viewers would tend to look more carefully,<sup>168</sup> implicitly diminishing both its importance and its originality.

The two juxtaposed images in the opinion's next figure—the Goldsmith photo without and with its Photoshopped overlay<sup>169</sup>—stand out as the closest thing to an overt visual argument. While all of the pictures in both opinions have been manipulated in the sense of being copied, resized, in some cases cropped, and relocated to their respective places in the opinions, the Photoshopped picture on the right of this pair is the one most obviously manipulated by an advocate, and its placement next to the original photo is the most plainly rhetorical. A side-by-side comparison is precisely the kind of visual examination of the works that the lower courts had prescribed in reaching their opposing conclusions that *Orange Prince* was (according to the district court) or was not (according to the Second Circuit) transformative.<sup>170</sup> Justice Sotomayor's side-by-side comparison visualizes what we are supposed to see when we make that comparison: *Orange Prince* is for all intents and purposes the same image as Goldsmith's original portrait, or at any rate, similar enough not to qualify as transformative.<sup>171</sup> Without the help of words, the juxtaposed pictures do the work for us.

It is more difficult to understand the function of Justice Sotomayor's last picture in the body of her opinion—Warhol's silkscreen from his *Campbell's*

168. The last if they proceed clockwise around the array; next-to-last, if they read the four images across the top row left to right and then across the second, the “Z-path” often assumed to be the default reading order for the panels on the page of a comic book. See, e.g., Neil Cohn, *Navigating Comics: An Empirical and Theoretical Approach to Strategies of Reading Comic Page Layouts*, FRONTIERS IN PSYCH., Apr. 18, 2013, at 1, 10.

169. *Andy Warhol*, 598 U.S. at 522.

170. The district court: “[T]he Prince Series works are transformative, and therefore the import of their (limited) commercial nature is diluted[, ]if ‘looking at the [works] side-by-side,’ the secondary work ‘ha[s] a different character, . . . a new expression, and employ[s] new aesthetics with creative and communicative results distinct’ from the original, the secondary work is transformative as a matter of law.” *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 325–26 (S.D.N.Y. 2019), *rev’d*, 11 F.4th 26 (2d Cir. 2021).

The Second Circuit: “[T]he judge must examine whether the secondary work’s use of its source material is in service of a ‘fundamentally different and new’ artistic purpose and character, such that the secondary work stands apart from the ‘raw material’ used to create it. . . . [T]he secondary work’s transformative purpose and character must, at a bare minimum, comprise something more than the imposition of another artist’s style on the primary work such that the secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material. With this clarification, viewing the works side-by-side, we conclude that the Prince Series is not ‘transformative’ within the meaning of the first factor.” *Andy Warhol*, 11 F.4th at 42 (quoting *Cariou*, 714 F.3d at 706).

171. Cf. Justice Kagan’s remarks, *Andy Warhol*, 598 U.S. at 566 n.3 (Kagan, J., dissenting) (“The majority attempts to minimize the visual dissimilarities between Warhol’s silkscreen and Goldsmith’s photograph by rotating the former image and then superimposing it on the latter one. But the majority is trying too hard: Its manipulated picture in fact reveals the significance of the cropping and facial reorientation that went into Warhol’s image. And the majority’s WarGold combo of course cannot obscure the other differences, of color and presentation, between the two works.” (citations omitted)).

*Soup Cans* series<sup>172</sup>—without the accompanying text. I will, therefore, defer that discussion until the next Part.<sup>173</sup>

B. *Justice Kagan’s Dissenting Opinion: Pictures as Narrative and Argument*

1. *The Pictures*

The illustrations in Justice Kagan’s opinion comprise two sequences, one of four color photos and the other of five, each on four consecutive pages.<sup>174</sup> The first picture appears five pages in, centered and just below the middle of the page.<sup>175</sup> It is a photo of what looks like a proof of a famous Marilyn Monroe publicity portrait. It’s a black-and-white photo but has a bluish-gray tint, and (like the *Campbell’s Soup Cans* photo in the majority opinion) it is doubly bordered: first by the paper on which it was printed, bent at the corners, possibly after having been cut from a larger sheet, and around that by the same sort of border (although here bluish gray) that surrounds the *Campbell’s Soup Cans* print. The print bears markings in black ink and black marker: a thin, crisp rectangle taller than wide, drawn with a straight edge and framing Monroe’s head and neck, to indicate where the image was to be cropped;<sup>176</sup> then, paralleling the right and bottom of that frame, broader, more painterly marker strokes, at least the bottom one on top of another straight-edge line. On the paper just above the print, the words “ENLARGE TO,” followed by something now unreadable, have been written, possibly in pencil. The photo shows Monroe from the bust up, very similar to what we see of Prince in the first Goldsmith photo; Monroe’s strapless black top even has a high white collar, echoing Prince’s appearance. The rectangle indicates that the photo was to be cropped much as Goldsmith’s photo would be later, at the neck and tightly framing the hair on the other three sides.

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172. *Id.* at 539 (majority opinion).

173. *See infra* notes 300–02 and accompanying text.

174. *Andy Warhol*, 598 U.S. at 562–65, 587–90 (Kagan, J., dissenting).

175. Again, the descriptions of where the pictures appear on the page refer to the PDF versions of the slip opinions accessed through the SCOTUS website. *See supra* note 141.

176. *Andy Warhol*, 598 U.S. at 562 (Kagan, J., dissenting). There is a second straight-edge line parallel to and just below the bottom of this rectangle. *Id.*



The second picture, in the middle of the following page, is a photo of one of the silkscreen *Marilyn* prints Warhol made from the previous photo.<sup>177</sup> The subject's head is even more tightly cropped than the markings on the photo indicated: the print is a square, cutting off the top of the coiffure and the neck from just below the chin. The gradated shadings of the photo have been reduced to high-contrast patches of shadow on Marilyn's left cheek, beneath her chin and nose and through her hair; her eyebrows and eyelashes are slashes of black. Her ruby-red lipstick slightly exceeds her upper lip, as if hastily printed; her eyelids are swathed in blue swooshes, leading our eyes to the lighter blue of the earrings, especially below her left ear and the bit of collar below that. The famous face is crowned by yellow-gold hair. All is set against a bright orange background (slightly browner and less red than the orange in *Orange Prince*).



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177. *Id.* at 563.

The third picture, on the next page, is the Goldsmith photo of Prince with which we are already familiar, centered but toward the bottom of the page.<sup>178</sup> Then, concluding this initial sequence of pictures, toward the bottom of the following page, we see photos of *Purple Prince* and *Orange Prince* side by side, and together stretching the width of the text.<sup>179</sup>



The second sequence of pictures begins twenty-one pages later with a photo of Giorgione's painting, *Sleeping Venus*.<sup>180</sup> It appears at the bottom of the page and is the width of the text. In the middle of the following page we see a reproduction of Titian's painting, *Venus of Urbino*,<sup>181</sup> also the width of the text, followed toward the top of the next page by a photo of Manet's painting,

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178. *Id.* at 564.

179. *Id.* at 565.

180. *Id.* at 587.

181. *Id.* at 588.

*Olympia*, again the width of the text.<sup>182</sup> All are in landscape format, dictated by the figures of the reclining nudes, and all are about the same size. This sequence of pictures concludes with a pair of photos of painted portraits at the top of the following page (which, again, together span the width of the text): Velasquez's *Pope Innocent X* and Francis Bacon's *Study After Velasquez's Portrait of Pope Innocent X*.<sup>183</sup>



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182. *Id.* at 589.

183. *Id.* at 590.





## 2. *The Pictures' Functions in the Opinion*

Justice Kagan's first set of pictures tells a very different story of the case than Justice Sotomayor's. The protagonist is not Goldsmith but Warhol. The foundational activity that forms the baseline for our understanding of how things should go is not Goldsmith licensing her photos for use in magazines but Warhol making his transformative art. Thus, the sequence begins with an image that stands in, metonymically, for the *process* of Warhol's work: the marked-up black-and-white photo of Marilyn signifies that Warhol is no mere copyist but an artist who takes his materials (which in this case include a photograph by someone else) and from them thoughtfully and laboriously crafts something new. Justice Kagan then reveals that something new on the very next page: the familiar but still stunning *Marilyn* silkscreen print.<sup>184</sup> The two-beat account of Warhol's creative process is as compact as can be.<sup>185</sup>

The immediately obvious visual differences between Warhol's *Marilyn* silkscreen print and the underlying photo, and the conceptual differences those

184. *Id.* at 563.

185. Other pictures available to the Justices depicted Warhol's creative process more explicitly, showing Warhol himself at work. See *infra* notes 327–31 and accompanying text. Justice Kagan chose not to belabor the point. See *Andy Warhol*, 598 U.S. at 558–93 (Kagan, J., dissenting).

visual divergences implicate, make salient the point that Warhol's use of the photo "alter[s] the first [work] with new expression, meaning, or message," as *Campbell* requires for a use to be transformative.<sup>186</sup> The choice of the *Marilyn* print to exemplify Warhol's art also conveys, in a single splash of colors, two other important features of Justice Kagan's theory of the case. First, at least as much as the *Campbell's Soup Cans* series, the *Marilyn* prints are among Warhol's signature works, so putting this image at the very beginning of the story underscores the artist's cultural heft: it is a work *by* a celebrity *of* a celebrity that takes the *concept* of celebrity as its theme. Indeed, it's the creative and critical exploration of this theme that occupied Warhol throughout the mid-1960s and that established his own worldwide fame.<sup>187</sup> Second, as a portrait of a celebrity, adapted from a photo taken by someone else, which implicitly comments on celebrity, the Marilyn portrait prefigures Warhol's portraits of Prince—perhaps especially *Orange Prince* with its similar dominant color.<sup>188</sup>

The last two illustrations in this opening sequence continue the story. The Goldsmith photo with which Justice Sotomayor began her visual account is now relegated to a mere episode in the story of Warhol's artmaking, the third of the four illustrations.<sup>189</sup> (In a four-person relay race, the slowest participant typically goes third.)<sup>190</sup> The sequence then concludes with *Purple Prince* and *Orange Prince* side by side, constituting them as roughly equivalent in creativity and aesthetic value—as indeed they were, being two of the sixteen artworks in the *Prince Series*, all made from the same underlying photo.<sup>191</sup> And while the images appeared in magazines thirty-two years apart, by displaying them next to each other, making them simultaneously available to the viewer of the opinion, Justice Kagan emphasizes that whenever publishers chose to illustrate their magazines with a portrait by Warhol, they did so because they recognized that a Warhol conveys a distinctive message (or set of messages) that's nothing like what anyone else's picture of the same subject conveys.<sup>192</sup> Yet, by

186. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

187. This emphasis on Warhol's paradigmatic work, however, also invites the counterargument that Justice Kagan's approach would, in the words of the Second Circuit Court of Appeals, create a "celebrity-plagiarist" exemption from infringement liability: "[W]e feel compelled to clarify that it is entirely irrelevant to this analysis that 'each Prince Series work is immediately recognizable as a "Warhol.'" Entertaining that logic would inevitably create a celebrity-plagiarist privilege; the more established the artist and the more distinct that artist's style, the greater leeway that artist would have to pilfer the creative labors of others." *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 41 (2d Cir. 2021) (citations omitted), *aff'd*, 598 U.S. 508 (2023).

188. There is also rhetorical value in assimilating the challenged work to Warhol's widely recognized earlier works like the *Marilyn* and thus helping to maintain the idea that the Warhol of the *Prince Series* was still a great artist and not a mere hack, cranking out silkscreen portraits for well-heeled customers. *See* Davis, *supra* note 14; *see also supra* notes 185, 187.

189. *Andy Warhol*, 598 U.S. at 564 (Kagan, J., dissenting).

190. At least according to *Relays in Swimming*, subsection of *Relay Race*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Relay\\_race](https://en.wikipedia.org/wiki/Relay_race) [<https://perma.cc/U73K-ATAR>].

191. *Andy Warhol*, 598 U.S. at 565 (Kagan, J., dissenting).

192. *See id.* at 567–68.

presenting the artworks as they appear in the *Prince Series* and not as they were reproduced inside *Vanity Fair* or on the cover of *The Genius of Prince*, Justice Kagan further keeps our visual attention focused on Warhol's art and not on the particular commercial uses to which it was put.<sup>193</sup>

The second sequence unfolds with the same visual rhythm as the first: one picture on each of three successive pages followed by a concluding pair of pictures on the next.<sup>194</sup> The first three pictures are reproductions of three of the most well-known paintings of reclining female nudes in all of Western art.<sup>195</sup> Their similarities make the point that great artists have always borrowed from earlier ones. Indeed, part of artists' classical training has long consisted of going to galleries and copying the work of their predecessors.<sup>196</sup> The differences between these three works reflect, among other things, how each successive artist adapts the model to convey new forms of expression and new meanings.

Why did Justice Kagan choose these works? Presumably, she thought they would be familiar to much of her audience so that viewers would not have to expend much, if any, cognitive effort in identifying or absorbing the works and could instead go directly to the purposes of the illustrations in her argument. By offering viewers masterpieces by Giorgione, Titian, and Manet, Justice Kagan invites them to regard Warhol as equally a master, a member of the same echelon. She has hung his works in the same virtual gallery. And I suspect she simply enjoyed looking at even these small reproductions of such gorgeous paintings<sup>197</sup> and relished the prospect of giving her audience some of that same pleasure. Why three paintings? Two would show but a single instance of creative adaptation; three, however, indicate a common practice extending over a significant span in the history of Western art across artists as diverse as Titian and Manet, and hence a way of making art into which Warhol's adaptation of prior works neatly fits.

But that's not quite the end of the sequence. From reclining female nudes, Justice Kagan shifts to portraits of two seated men, or rather, one subject portrayed in two very different ways: Pope Innocent X first by his contemporary, the Spanish master Velasquez, and then in the 20th century by

193. See also *infra* notes 226–29 and accompanying text (discussing this shift of focus through text as well as pictures). Placed next to each other, the two prints also allude to the many famous works Warhol composed by arraying multiple, differently processed silkscreen prints of the same subject—including, from the record in the case, Marilyn Diptych, Declaration of Neil Printz in Joint Appendix at 159, *Andy Warhol*, 598 U.S. 508 (2023) (No. 21-869), 32 *Campbell's Soup Cans*, *id.* at 155, and 200 *One Dollar Bills*, *id.* at 156—and thus signify Warhol's art in yet an additional way.

194. *Andy Warhol*, 598 U.S. at 587–90 (Kagan, J., dissenting).

195. See *id.*; Sarah Dotson, "Venus of Urbino," *Titian's Iconic Painting, Explained*, ARTSY.NET (Aug. 27, 2020, 10:26 AM), <https://www.artsy.net/article/artsy-editorial-london-gallerist-india-rose-james-sohos-eme-rging-art-scene> [<https://perma.cc/JPZ9-MBFJ>].

196. See *Andy Warhol*, 598 at 587–92.

197. See *supra* note 61 and accompanying text (describing Justice Kagan's analytically gratuitous appending of two photos of the Pissarro painting at issue in *Cassirer*).

the British artist Francis Bacon.<sup>198</sup> The visual strategy of juxtaposition here serves a purpose nearly opposite from Justice Sotomayor's setting side by side Goldsmith's photo and the photo with an adjusted *Orange Prince* superimposed on it. Here, the juxtaposed pictures allow us to compare and contrast—to see at a glance how dramatically different Bacon's painting is from his predecessor's even while so overtly copying some aspects of it (e.g., the subject's seated pose) that it is easy to see<sup>199</sup> that Bacon intends us to know that he is referring to his source. And by concluding her art-historical survey with a modern work of art, Justice Kagan carries the lesson—creative artists copy *and transform* their models; it's what they've always done—up to Warhol's own time.<sup>200</sup>

Both Justice Sotomayor and Justice Kagan, then, are doing more with pictures than in any previous SCOTUS opinion. By incorporating so many images into their opinions and arranging them so purposefully, the Justices are *writing with pictures* in the sense described some years ago: taking advantage of digital technology to use images as fluidly as words in conveying ideas, constructing stories, and making arguments.<sup>201</sup> The pictures by themselves carry explanatory and rhetorical value.

Some viewers may not take up the pictures in the way that the Justices intend. The polysemy, or multiplicity of meanings, that almost all images generate makes it possible if not likely that different viewers will draw different implications from the sequences of pictures in these opinions. For instance, one might look at Justice Kagan's sequence of Old Master reclining nudes and conclude that it undercuts rather than supports her argument that Warhol's *Orange Prince* is transformative: Giorgione, Titian, and Manet were pursuing variations within a genre and doing so in dramatically different ways; Warhol, by contrast, took a single work as his model and, while modifying it, left the model visible and identifiable at a glance.<sup>202</sup>

The Justices' deployments of pictures carry doctrinal value as well. The orders in which the two Justices lay out their respective pictures reinforce their divergent understandings of fair use. In general, fair use seeks to mediate between, on the one hand, the rights of original creators to derive exclusive

198. *Andy Warhol*, 598 U.S. at 589–90 (Kagan, J., dissenting).

199. Without referring to the picture captions, that is, which make the reference explicit. *See infra* note 251.

200. Bacon's painting precedes Warhol's *Marilyn* by only a decade.

It's not quite accurate to describe Bacon's as (just) a painting of Innocent X, as his own title indicates; it's actually a painting "after" Velasquez's painting. In that respect, Bacon's painting is more like Warhol's *Campbell's Soup Cans* series than it is like the *Prince Series* because appreciating the Bacon painting requires knowing the model, whereas the meanings of Warhol's Prince portraits do not depend on familiarity with Goldsmith's photo—a distinction that matters to Justice Sotomayor (who, as noted earlier, carves out from the category of otherwise infringing derivative copying artwork that copies earlier work in order to comment on it), although not to Justice Kagan.

201. *See* FEIGENSON & SPIESEL, *supra* note 47, at 3, 19–24. We, in turn, borrowed the phrase from LAWRENCE LESSIG, *FREE CULTURE* 36 (2004).

202. I would like to thank my colleague Steve Gilles for impressing this argument on me.

profit for a (theoretically) limited period from their work and any derivative uses so as to incentivize creation “[t]o promote the Progress of Science and useful Arts”;<sup>203</sup> and on the other, the freedom of later users to draw on existing works in making new work without the need to obtain permission from or make payment to the original creator, also so as to incentivize creative efforts.<sup>204</sup> Justice Sotomayor’s choice and arrangement of her pictures emphasize the original creator: her opening sequence of six visual displays begins and ends with Goldsmith’s original photo.<sup>205</sup> Justice Kagan’s choice and sequencing of her pictures, in contrast, tilt the balance toward the secondary user by pointing outward into the visual surround of fine art. She concludes her visual argument in that portion of the wider visual environment she has chosen to emphasize: the great art that is such a significant part of our cultural inheritance.<sup>206</sup> For her, the creativity that yields these sorts of pictures is the more important value at stake in the case; it is the interest that fair use doctrine should be interpreted to protect.

Of course, the two opinions also contain lots of words, including many words referring to the pictures. I turn now to the relationships between text and image in the two opinions.

#### IV. WRITING, WITH PICTURES

The preceding discussion of the doctrinal and persuasive functions of the pictures in *AWF* already refers or at least alludes to some of the words those pictures accompany. Let’s now undertake a more fine-grained examination of the relationships between pictures and words in the opinions. We move from “writing with pictures” to “writing, with pictures”: the illustrated text as a whole. How should we understand the insertion of particular pictures at particular locations in the text of the opinions and the effects on our reading of interpolating pictures into text? How do the pictures and the words modify each other’s meanings?

I begin with some observations about how people tend to absorb pictures and words when presented together: which they look at first, which occupies more of their attention, and how the presence of multiple pictures affects the experience of the illustrated text. Findings from psychology, communications, literary studies, and other disciplines suggest that the experience of

203. U.S. CONST. art. I, § 8, cl. 8.

204. See, e.g., Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990) (“Fair use . . . is a necessary part of the overall design [of copyright law]. Although no simple definition of fair use can be fashioned, and inevitably disagreement will arise over individual applications, recognition of the function of fair use as integral to copyright’s objectives leads to a coherent and useful set of principles. Briefly stated, the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity.”).

205. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 518, 522 (2023).

206. See *id.* at 591–92 (Kagan, J., dissenting).

encountering pictures together with words is quite different—not just perceptually but cognitively, metacognitively, and emotionally—from the experience of reading words without pictures.<sup>207</sup> An illustrated text prompts a different sort of back-and-forth reading, an ongoing perceptual and cognitive navigation, between the competing pulls of pictures and texts, each modality influencing our uptake of the other.<sup>208</sup> Research on verbal framing shows how reading or hearing words before, during, or after seeing a picture can affect what people think they see (or saw).<sup>209</sup> Conversely, seeing pictures can change what people understand from having only read words about the subject matter the pictures depict.<sup>210</sup>

I then apply these general observations to the opinions in *AWF*. In Justice Sotomayor's opinion, the pictures illustrate the narrative and run alongside it, although, as her story of the case proceeds to its climax, the words become more explicitly rhetorical and the pictures more implicitly argumentative.<sup>211</sup> Pictures also illustrate propositions in Justice Kagan's opinion, but in contrast to the majority opinion, Justice Kagan refers to her pictures using performative language, exhorting her readers to look at them.<sup>212</sup> She thus seeks to engage her audience in experiencing for themselves how meanings emerge from the interaction between viewers and pictures. In both opinions, the pictures and the text referring to or describing those pictures, taken together, advance the Justices' respective arguments in ways that neither the words nor the images alone could.

### A. *Encountering Pictures and Words Together*

At the most general level, reading an opinion with pictures is a very different sort of exercise than reading an opinion without pictures. Perceptually, it hardly needs to be said, the illustrated opinion looks different from the non-illustrated one. Cognitively, the illustrated opinion stimulates both the verbal and pictorial paths of our dual-channel processing of incoming messages.<sup>213</sup> At least some people “learn better from words and pictures than from words alone.”<sup>214</sup> That may be due in part to the *picture superiority effect*: people tend to remember pictures better than they do the corresponding words.<sup>215</sup> Adding

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207. See *infra* notes 239–43, 248–51 and accompanying text.

208. See *infra* notes 239–43, 248–51 and accompanying text.

209. See *infra* notes 239–43, 248–51 and accompanying text.

210. See *infra* notes 239–43, 248–51 and accompanying text.

211. See *Andy Warhol*, 598 U.S. at 548–50.

212. See *id.* at 558–93 (Kagan, J., dissenting).

213. See, e.g., ALLAN PAIVIO, *IMAGERY AND VERBAL PROCESSES* 57 (1971); ALLAN PAIVIO, *MENTAL REPRESENTATIONS: A DUAL CODING APPROACH* 53–54 (Donald E. Broadbent et al. eds., 1986).

214. RICHARD E. MAYER, *MULTIMEDIA LEARNING* 63 (2001).

215. Georg Stenberg, *Conceptual and Perceptual Factors in the Picture Superiority Effect*, 18 *EUR. J. COGNITIVE PSYCH.* 813, 813 (2006).

pictures to text can also create a different emotional experience for readers. Even pictures that are not ostensibly emotive can prompt emotional associations almost immediately, even before we begin to process what they are pictures of.<sup>216</sup>

To articulate the experience of encountering a judicial opinion consisting of writing with pictures, let's start with what happens first: pictures capture our attention in a way that text alone does not. "[T]he attention-capturing capacity of pictures" is well recognized in journalism.<sup>217</sup> That's why our newsfeeds feature thumbnails and why the stories themselves open with pictures (often videos) just above or below the headlines. Pictures accompanying or embedded in text exercise a bottom-up influence on our visual attention; at least initially, our eyes are drawn to them involuntarily. Pictures "pop out" of the visual field because they look different from the blocks of text, and they pop out more the more colorful they are.<sup>218</sup> Pictures of faces particularly attract our attention.<sup>219</sup> And because we see pictures as a whole<sup>220</sup> and can usually get the gist at once<sup>221</sup>—whereas it takes far longer to comprehend a sequence of words<sup>222</sup>—each glance at a picture provides a quick, satisfying burst of understanding, a brief affective uplift in the midst of the longer cognitive task of reading. Having been drawn in by the pictures, we may then be more interested in reading the text.<sup>223</sup>

Once we are inside a text with photographic pictures, how do we read and look? At the most basic physiological level, absorbing illustrated texts is challenging because it requires our eyes to engage in two sorts of movements: the periodic, linear saccades moving in the direction of the text and the much

216. See generally FEIGENSON & SPIESEL, *supra* note 47, at 8.

217. Silvia Knobloch et al., *Imagery Effects on the Selective Reading of Internet Newsmagazines*, 30 COMMUN. RESCH. 3, 4 (2003).

218. E.g., Eric Ruthruff et al., *Attentional Dwelling and Capture by Color Singletons*, 82 ATTENTION, PERCEPTION & PSYCHOPHYSICS 3048, 3048 (2020) ("Numerous studies have provided evidence that salient stimuli can capture attention against our will. These findings support stimulus-driven theories, which assert that visual attention is at the whim of the most salient feature in the environment. The fact that Internet advertisements and marketing billboards routinely feature colorful, moving, or otherwise salient visual images suggests widespread belief that salience guides attention." (emphasis omitted) (citations omitted)). To test how immediately this difference appears and how salient the pictures are in what is otherwise a more or less unbroken flow of text, choose any volume of the U.S. Reports online and scroll rapidly through. You'll see how the pictures pop out of the dense text.

219. E.g., ALEXANDER TODOROV, *FACE VALUE: THE IRRESISTIBLE INFLUENCE OF FIRST IMPRESSIONS* 226 (2017).

220. E.g., WILLIAM M. IVINS JR., *PRINTS AND VISUAL COMMUNICATION* 61 (1st ed. 1953). The observation that we see at least the gist of pictures all at once, in contrast to text (which to be understood must be taken in sequentially over time), goes back at least to the German dramatist and aesthetician Gotthold Ephraim Lessing. See generally GOTTHOLD EPHRAIM LESSING, *LAOCOON: AN ESSAY UPON THE LIMITS OF POETRY AND PAINTING* (Boston, Ellen Frothingham, trans., Roberts Brothers 1887) (1766).

221. The minimum viewing time for comprehending the gist of a photograph can be as short as 1/70th of a second. Mary C. Potter, et al., *Detecting Meaning in RSVP at 13 ms Per Picture*, 76 ATTENTION, PERCEPTION, & PSYCHOPHYSICS 270, 270 (2014).

222. See *infra* note 224 and accompanying text.

223. Knobloch et al., *supra* note 217, at 23.

more highly variable sequences of eye movements by which we take in pictures.<sup>224</sup> We can start anywhere to get the gist of a picture and then proceed in any order should we care to attend to the details, whereas we have to move our eyes along with the text to get the meaning. As a consequence, making sense of hybrid texts “demand[s] and reward[s] mental flexibility and nervous stamina. Consuming them—toggling . . . between the incommensurable functions of reading and looking—is taxing.”<sup>225</sup>

Peoples’ cognitive uptakes of picture books, photographic essays, and other text-and-picture works have been described in many ways, borrowing metaphors from music (“duet” and “counterpoint”), physics (“interference”), and more.<sup>226</sup> Education scholar Lawrence Sipe, drawing on semiotics, traces the cognitive complexity of absorbing texts with pictures to its demand that audiences interpret two systems of signification, the pictorial and the verbal, each on its own terms *and* in relation to the other.<sup>227</sup> That is, “we must oscillate, as it were, from the sign system of the verbal text to the sign system of the illustrations, and also in the opposite direction from the illustration sign system to the verbal sign system.”<sup>228</sup> Sipe continues: “Whenever we move across sign systems, ‘new meanings are produced,’ because we interpret the text in terms of the pictures and the pictures in terms of the text[.]”<sup>229</sup>

That’s all rather abstract. Art historian James Elkins’s recent discussion of the word-and-image novels of W. G. Sebald and other authors offers a concrete example.<sup>230</sup> Elkins writes that “Sebald often anchors images to the narrative by placing them within a line or two of the reference in the text. This anchoring ensures that there is minimal interruption in the flow of reading: the reader can move without pausing up to the image, over it and onward.”<sup>231</sup> Pictures can be placed in a judicial opinion, as in a fictional narrative, so as to minimize the disruption of the exposition or argument. As we’ll see, this is typically where we find the pictures in Justices Sotomayor’s and Kagan’s opinions.

Yet, looking at the pictures is always potentially disruptive of our sequential tracking of the text because pictures call for a very different sort of looking—a

224. See Christina Spiesel, *Reflections on Reading: Words and Pictures and Law*, in *LAW, MIND, AND BRAIN* 391, 394–401 (Freeman & Goodenough eds., 2009) (describing and contrasting eye movements in reading text and looking at pictures).

225. Peter Schjeldahl, *Words and Pictures*, *THE NEW YORKER* (Oct. 9, 2005), <https://www.newyorker.com/magazine/2005/10/17/words-and-pictures> [<https://perma.cc/S5FF-23U6>].

226. Lawrence R. Sipe, *How Picture Books Work: A Semiotically Framed Theory of Text-Picture Relationships*, 29 *CHILD. LITERATURE IN EDUC.* 97, 97–99 (1998).

227. *Id.* at 100–07.

228. *Id.* at 102.

229. *Id.*

230. James Elkins, *Models for Word and Image*, in *W. G. SEBALD’S ARTISTIC LEGACIES: MEMORY, WORD AND IMAGE* 185, 185 (Kovač et al. eds., 2023).

231. *Id.* at 189. Not everyone would agree with this characterization of the experience of reading Sebald’s illustrated narratives, and that experience varies from one of his novels or stories to another.



different perceptual and cognitive activity from reading.<sup>232</sup> One moderating factor that affects how disruptive the pictures are of our reading of the text—in addition to their location relative to their textual description or reference—is how much looking at the pictures the text invites us to do. If the pictures are introduced, explicitly or implicitly, as mere illustrations of verbal content, then viewing them will not likely disturb our reading very much.<sup>233</sup> Nevertheless, there is always the possibility that the pictures will hold our attention, puzzle us, lead us not to go on smoothly with the narrative or argument but perhaps linger or go back to other pictures rather than continue with the text.<sup>234</sup> Thus, if we are at all inclined to devote more than a mere confirmatory glance to the pictures in *AWF*—as we might well want to do because they’re colorful and otherwise intriguing or because (as we’ll see in a moment) the Justice herself instructs us to look at them—then we can expect that our reading of these illustrated texts will be recursive, proceeding and looping back in fits and starts from picture to text and picture to picture.<sup>235</sup> These paths of reading will be partly purposeful—“especially in clearly defined tasks, media users do have a wide-ranging strategic control over their attention and selection processes”<sup>236</sup>—but also partly beyond deliberate control, driven by the pictures’ bottom-up demands on our attention.<sup>237</sup>

Texts alone, of course, allow nonlinear perusal, and dense texts such as SCOTUS opinions may nearly require it, depending on readers’ purposes for reading.<sup>238</sup> I suspect, though, that our experience of these two opinions in *AWF*, with their colorful images involuntarily attracting our visual attention, is different. So let me summarize how, in general, pictures and words may affect

232. See Sipe, *supra* note 226 and accompanying text.

233. See generally Sipe, *supra* note 226.

234. Sipe, *supra* note 226, at 100–01, elaborates: “Because of the primarily spatial nature of the pictures [in a picture book] and our drive to form ‘unified atemporal structures,’ our tendency is to gaze on, dwell upon, or contemplate them. In contrast, the primarily temporal nature of the verbal narrative creates in us a tendency to keep on reading, to keep going ahead . . . . There is thus a tension between our impulse to gaze at the pictures . . . and to not interrupt the temporal narrative flow. The verbal text drives us to read on in a linear way, where the illustrations seduce us into stopping to look. This tension results in the impulse to be recursive and reflexive in our reading of a picture book: to go backward and forward in order to relate an illustration to the one before or after it, and to relate the text on one page to an illustration on a previous or successive page; or to understand new ways in which the combination of the text and picture on one page relate to preceding or succeeding pages.”

235. Hans-Jürgen Bucher & Peter Schumacher, *The Relevance of Attention for Selecting News Content. An Eye-Tracking Study on Attention Patterns in the Reception of Print and Online Media*, 31 COMM’NS 347, 360 (2006) (“Elements on pages – be it a printed or an online newspaper – are perceived in an alternating manner in order to build up an understanding of one element within the context of the other.”) (describing an eye-tracking study of where readers of print vs. online newspapers fixate, as between lead picture, headline, and text).

236. *Id.* at 357.

237. See *supra* note 234 and accompanying text.

238. Another example of how readers often go back and forth within an unillustrated text is when they leave the main text to consult a footnote and then return. (I would like to thank Nancy Marder for reminding me of this.)

each other's meanings, and then apply these observations to the opinions in *AWF*.

Extensive research has found that words presented before, during, or after viewing pictures can affect what people think they see in those pictures and how they interpret what they see.<sup>239</sup> These *verbal framing* effects on people's uptake of pictures may be unconscious or conscious.<sup>240</sup> The prototypical example of unconscious verbal framing effects is verbal priming.<sup>241</sup> Brief verbal primes can enable people to notice and identify objects that would otherwise remain invisible to them.<sup>242</sup> Unconscious verbal priming can also affect what people recall having seen when they are exposed to task-relevant verbal information *after* they see the picture.<sup>243</sup> Because readers of judicial opinions may, as discussed earlier, move back and forth from text to pictures—often reading the words pertaining to the picture first but sometimes first noticing the picture and then returning to reading the text—both sorts of effects are relevant.

Broader narrative framing of the sort labeled “story framing” or “issue framing” in media studies, communication studies, sociology, and other disciplines<sup>244</sup> can also bias people's judgments of images. In one study of the effects of this broader framing on the uptake of video evidence, for instance, people read a brief paragraph presented as media coverage of a police-citizen altercation and its aftermath, emphasizing either the citizen's violent behavior (“law-and-order frame”) or the police officer's (“police-brutality frame”).<sup>245</sup> All of them then watched the same dashboard camera video of the incident.<sup>246</sup> Those who had been exposed to the law-and-order frame were significantly more likely than those exposed to the police-brutality frame to indicate support for the police officer's actions.<sup>247</sup>

239. Gary Lupyan & Emily J. Ward, *Language Can Boost Otherwise Unseen Objects into Visual Awareness*, 110 PROC. NAT'L ACAD. SCI. 14196, 14196 (2013).

240. *Id.*

241. *Id.*

242. *Id.* One example: people who hear verbs conveying upward or downward motion, respectively, can detect motion in a visual array more accurately and faster when the motion is congruent as opposed to incongruent with the direction the words convey. Lotte Meteyard et al., *Motion Detection and Motion Verbs: Language Affects Low-Level Visual Perception*, 18 PSYCH. SCI. 1007, 1007 (2007).

243. E.g., Elizabeth F. Loftus, *Leading Questions and the Eyewitness Report*, 7 COGNITIVE PSYCH. 560, 560, 570 (1975); Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAV. 585, 588 (1974); see Jacqueline E. Pickrell et al., *Misinformation Effect*, in COGNITIVE ILLUSIONS: INTRIGUING PHENOMENON IN THINKING, JUDGMENT, & MEMORY 406, 419 (Rüdiger F. Pohl, ed., 2016).

244. See, e.g., L. David Ritchie & Lynne Cameron, *Open Hearts or Smoke and Mirrors: Metaphorical Framing and Frame Conflicts in a Public Meeting*, 29 METAPHOR & SYMBOL 204, 205–06 (2014).

245. Kim Fridkin et al., *Race and Police Brutality: The Importance of Media Framing*, 11 INT'L J. COMMUN. 3394, 3395 (2017).

246. *Id.* at 3397.

247. *Id.* at 3406.

The common thread in all of the studies where exposure to the words precedes the image is that the verbal frame creates expectations, which in turn shape what viewers make of what they see.<sup>248</sup> Narrative framing would seem to be especially relevant in fostering expectations about the pictures in judicial opinions because readers will likely have gleaned from the syllabus or headnotes (as well as from the introduction to the opinion) each judge's position on the issues to be decided. They will then have these broad frames in mind when they encounter the pictures the judges have included.

Finally, conscious verbal framing effects may be produced by explicit task instructions. Our personal goals for acting in natural environments guide what we look at; the same is true for what we visually attend to in videos and still images.<sup>249</sup> Task instructions can supply those goals, directing viewers' attention toward certain persons, events, or other features of the picture and making those features more salient in viewers' perceptions and consequent judgments.<sup>250</sup> Task instructions may also, rather than explicitly directing participants' attention to particular features of the image itself, invite people to think about their viewing task in specific ways that can affect how they see what they see.<sup>251</sup>

While the words influence readers' uptake of the pictures in an illustrated text, the pictures also influence their understandings of the words. Probably the most straightforward relationship between pictures and words in judicial opinions is when the pictures are offered to illustrate the words, as has often

248. E.g., Floris P. de Lange et al., *How Do Expectancies Shape Perception?*, 22 TRENDS COGNITIVE SCI. 764, 764 (2018); see also Edward R. Hirt et al., *Expectancies and Memory: Inferring the Past from What Must Have Been*, in HOW EXPECTANCIES SHAPE EXPERIENCE 93, 93 (I. Kirsch ed., 1999) ("Expectancies guide perception, so that people tend to focus on events that are congruent with their expectations. Expectancies also guide interpretations of perceived events. . . . [T]he influence of expectancies at both the attention and interpretation stages of information processing has proved to be consistent and robust." (citation omitted)).

249. See, e.g., Mary Hayhoe & Dana Ballard, *Eye Movements in Natural Behavior*, 9 TRENDS COGNITIVE SCI. 188, 188 (2005) (demonstrating "the pervasive role of the task in guiding when and where to fixate"); see also George L. Malcom et al., *Making Sense of Real-World Scenes*, 20 TRENDS IN COGNITIVE SCI. 843, 852 (2016) (reviewing studies and explaining interplay of observer goals (top-down processing) and scene properties (bottom-up processing) in accounting for visual attention).

250. E.g., Monica S. Castelano et al., *Viewing Task Influences Eye Movement Control During Active Scene Perception*, 9 J. VISION 1, 12 (2009); Marianne DeAngelus & Jeff B. Pelz, *Top-Down Control of Eye Movements: Yarbus Revisited*, 17 VISUAL COGNITION 790, 790 (2009); ALFRED L. YARBUS, EYE MOVEMENTS AND VISION 192–93 (1967). In Yarbus's classic study, more recently replicated by DeAngelus and Pelz, DeAngelus & Pelz, *supra*, people shown a painting of a family in domestic setting scrutinized the painting differently (that is, the scanpaths of their eye movements varied) depending on whether they were allowed to look freely at the picture or instructed to "give the ages of the people," "estimate the material circumstances of the family," or follow other prompts. *Id.*

251. Melinda S. Jensen & Kyle E. Mathewson, *Simultaneous Perception of Both Interpretations of Ambiguous Figures*, 40 PERCEPTION 1009, 1010 (2011); Jay Kosegarten & Gary Kose, *Seeing Reversals in Ambiguous Images: To Know or Not to Know?*, 119 PERCEPTION & MOTOR SKILLS 228, 229 (2014). For instance, most people who see a pair of the classic "duck-rabbit" ambiguous figures next to each other see them the same way as both ducks or both rabbits. Jensen & Mathewson, *supra*. If instructed to "try hard" to see them differently (one duck and one rabbit), about half can. *Id.* And if prompted by a relational phrase, "imagine the duck is about to eat the rabbit," two-thirds can. *Id.*

been the case in SCOTUS opinions in the past.<sup>252</sup> Pictures offered to illustrate verbal descriptions or references can provide readers of the opinion with a specific, vivid sensory experience which the words alone cannot.<sup>253</sup> Photos accompanying words may also serve to authenticate them, tethering the text to a reliable record of reality outside the opinion and thus bolstering the belief of readers who may be inclined to insist on “pics or it didn’t happen.”<sup>254</sup>

Thus, the relationship between words and pictures in an opinion is bidirectional, and there are more than enough pictures in Justices Sotomayor’s and Kagan’s opinions to “generat[e] a dialogue between [the] different modalities.”<sup>255</sup> The words inspire us to look at the pictures, which—especially if the pictures are photographic<sup>256</sup>—connect those words to the world beyond the case. At the same time, “photographs, because they almost all amount to incomplete accounts of events, inspire a search for additional information to provide more complete comprehension of the events at issue.”<sup>257</sup> That is, the pictures motivate further recourse to the text in the hope that the text will disambiguate and clarify the meanings to be taken from the pictures.

That’s at the most general level. In any given opinion, the particular ways in which words and pictures affect each other’s meanings depend on the content of the words and pictures—the specific words used to refer to, describe, and construe the pictures, as well as what there is to be seen in the pictures—and the placement of those pictures in the pictorial sequence and in relation to the text as a whole. Let’s now look in more detail at how words and pictures mix in the *AWF* opinions.

### B *Pictures and Words in Justice Sotomayor’s Opinion*

Justice Sotomayor integrates her pictures into her account of the facts in a way seemingly intended to cause “minimal interruption in the flow of reading”

252. See *supra* notes 19–23 and accompanying text.

253. See IVINS, *supra* note 220, at 52–53 (“When we try to describe a particular object in such a way as to communicate an idea of its personality or unique character to someone who is not actually acquainted with it, all that we can do is to pile up a selected group of . . . class names, like rings about a peg . . . . But beyond that it is impossible for us to go with words, for the ipseity, the particularity of the object . . . cannot be communicated by the use of class names . . . . The only way that anyone can gain acquaintance with objects, as distinguished from knowledge of them, is through immediate sense awareness of them.”); see also NEAL FEIGENSON, *EXPERIENCING OTHER MINDS IN THE COURTROOM* 24 (2016) (explaining that a verbal description may prompt readers to *imagine* what the object or event looks like, but that’s very different from having a visual perception of it; moreover, the perception may clarify or correct any misimpression that the words may have created).

254. See generally Chris Menning, *Pics or It Didn’t Happen*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/pics-or-it-didnt-happen> [<https://perma.cc/DY5L-976Q>].

255. Katarzyna Biela, *Is This Literature? Words and Images in Sebald’s The Rings of Saturn*, 14 *STUDIA LITTERARIA UNIVERSITATIS IAGELLONICAE CRACOVENSIS* 65, 75 (2019).

256. For a discussion of the indexical value of photographs, see FEIGENSON, *supra* note 253, at 17, 49, 52, 61, 80, 104, 111, 150.

257. Knobloch et al., *supra* note 138, at 8.

so “the reader can move without pausing up to the image, over it and onward.”<sup>258</sup> Having introduced Lynn Goldsmith and recounted that Goldsmith convinced *Newsweek* to hire her to do a photo shoot of the up-and-coming Prince, Justice Sotomayor introduces the real subject of the litigation: “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*.”<sup>259</sup> In the Westlaw version of the opinion, the Prince photo appears immediately after this sentence and the story then continues, flowing around and past the picture.<sup>260</sup> In the official slip opinion—probably because of the long footnote 1 beginning at the bottom of the page<sup>261</sup>—there isn’t enough room to accommodate the picture immediately, and so it is placed prominently at the top of the following page, but only after further text.<sup>262</sup> Reading the text and seeing the pictures to which the text refers are thus relatively intimately connected facets of the audience’s experience of the opinion, although the specifics of the experience differ between formats.<sup>263</sup>

The intended import of this beginning of the text-and-pictures story could not be simpler: Goldsmith took studio photos of Prince, all copyrighted, and here’s the one at issue in the case.<sup>264</sup> Although the full story turns out to be a little murkier,<sup>265</sup> the text of the opinion frames our encounter with the first illustration so that we unquestioningly accept that “this is the picture.” And

258. Elkins, *supra* note 230 at 189.

259. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 516 (2023).

260. *Id.* at 516–17, as seen on Westlaw [<https://perma.cc/C3JV-LVQC>].

261. *See id.* On Westlaw and LEXIS (footnotes are hyperlinked), their content is not visible at all until the reader clicks on the footnote number. *Andy Warhol*, 598 U.S. at 508–93, as seen on Westlaw [<https://perma.cc/C3JV-LVQC>] and Lexis [<https://perma.cc/P2K9-2EHF>].

262. On LEXIS, the picture similarly appears only after that additional text. *Andy Warhol*, 598 U.S. at 516–17, as seen on Lexis [<https://perma.cc/P2K9-2EHF>].

263. On Westlaw, the prompt appearance of the pictures right after the text that refers to them smooths the temporal flow; one could easily imagine viewing the sequence of pictures on a screen while listening to the narrative unfold. In the slip opinion, by contrast, the textual references invite readers to scroll forward to the next page to see the picture, and then back to continue the verbal narrative, the sort of back-and-forth to which readers of legal, academic, and other footnoted texts are accustomed—not quite the same minimal interruption. On LEXIS, the flow of viewing is harder to predict. Upon seeing the reference to “fig. 1, *infra*,” readers may scroll down to see the picture, then back up to continue their reading of the text, or, noticing that a picture is just below, may read until they get to the picture. Oddly, clicking on the “*infra*” takes one not to the referenced picture but to the Second Circuit opinion.

264. *See Andy Warhol*, 598 U.S. at 516–17.

265. Goldsmith took color as well as black-and-white photos of Prince that day in 1981, capturing three-quarter-length views of her subject. *See* Complaint in Joint Appendix at 65, *Andy Warhol*, 598 U.S. 508 (2023) (No. 21-869); Answer to Amended Counterclaim in Joint Appendix at 136, *Andy Warhol*, 598 U.S. 508 (2023) (No. 21-869). When she initially notified the Foundation in 2016 that she believed that one of her photos was the basis of the *Orange Prince* on the cover of the Condé Nast special issue, she sent the Foundation a copy of the color photograph. According to Goldsmith, only later, after seeing that she had licensed a black-and-white image to *Vanity Fair* back in 1984, did she decide that the cropped, black-and-white version would be the basis for her claim of copyright infringement. In fact, no documentation made it clear which photo from Goldsmith’s studio session with Prince had been licensed to *Vanity Fair*. Response to Goldsmith’s Rule 56.1 Statement in Joint Appendix at 355–57, *Andy Warhol*, 598 U.S. 508 (2023) (No. 21-869); Counter-Statement of Material Fact in Joint Appendix at 401–03, *Andy Warhol*, 598 U.S. 508 (2023) (No. 21-869).

when our understanding of the narrative begins with the cropped head-and-torso photo,<sup>266</sup> we are already being primed to see Warhol's head-only portraits as more similar to Goldsmith's original than we otherwise might.

After six sentences describing Goldsmith's licensing of her photo for use as an "artist reference for an illustration"<sup>267</sup> in *Vanity Fair*, Justice Sotomayor introduces the next picture:

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.<sup>268</sup>

Whether we read the text or see the picture first depends on where we are reading the opinion.<sup>269</sup> Either way, after taking in both the picture and the words, readers will have the context for the first Warhol they see in the majority opinion: a pair of commercial transactions—Goldsmith's and Warhol's—with the magazine. This verbal framing, of course, prepares readers to see what Warhol did in 1984 and what the Foundation will do in 2016 as essentially the same thing: creating and then using portraits of Prince to illustrate magazine articles about Prince, thus facilitating readers' acceptance of Justice Sotomayor's conceptualization of the first fair use factor.

This text also frames readers' uptake of the picture (and later pictures) in ways of which they (and possibly the Justice herself) may be unaware. Positing that the magazine paid Warhol an "unspecified amount" for the use of *Purple Prince*<sup>270</sup>—although it likely means simply that no dollar amount appeared in the record—could also be taken to insinuate that Warhol, unlike Goldsmith, is somehow devious, his business dealings a shadowy affair, or perhaps to hint at the vast sums the famous artist earned for his work generally—much greater than what Goldsmith earns for hers. The sentence thus contributes to Justice Sotomayor's suggestively melodramatic construction of the narrative in which Goldsmith is the victim-heroine and Warhol (and the Foundation) the bad guy. (More on melodrama in a moment.) And why tell readers (accurately) that the

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266. *Andy Warhol*, 598 U.S. at 517.

267. *Id.* at 517.

268. *Id.* at 517–18.

269. On Westlaw or LEXIS, ordinary scrolling behavior will bring the startling, garish colors of Warhol's *Purple Prince* into view, almost certainly catching our eyes before we can continue to this passage. In the PDF of the slip opinion, the picture doesn't appear until the next page so we will almost surely read the words first. *Id.* at 518.

270. *Id.*

*Vanity Fair* article “is primarily about the ‘sexual style’ of the new celebrity and his music”<sup>271</sup>—perhaps to vulgarize Warhol’s work by association?

Then comes the text introducing *Orange Prince*<sup>272</sup>:

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*.<sup>273</sup>

Two aspects of this verbal framing of the picture of *Orange Prince*—the allegedly infringing use of which is the motivating force for the entire litigation—are noteworthy. First, the text introduces *Orange Prince* as *something Goldsmith saw* rather than something Warhol made.<sup>274</sup> *Orange Prince* becomes the object of Goldsmith’s agency rather than Warhol’s. As we gathered from Justice Sotomayor’s picture sequence alone, the case for her is about Goldsmith; this text reaffirms that narrative. Second, the rapid-fire pair of references to the pictures,<sup>275</sup> the only place in the opinion where references follow consecutive sentences, is significant because the *Prince Series* is the only illustration relegated to an appendix. By doing this, Justice Sotomayor streamlines her visual-verbal presentation: *Orange Prince* on the cover of the Condé Nast special issue appears fairly promptly after *Purple Prince* inside the *Vanity Fair* issue, with only a short block of text between. This telescopes the thirty-two years between the uses of the two Warhol images. More importantly, putting the *Prince Series* in the appendix means that consumers of the opinion will not immediately see the variety of the sixteen works Warhol created based on the original Goldsmith photo, which might suggest the diversity of expression and creative meaning of his art. Instead they encounter a much tighter narrative: *Orange Prince* is just like *Purple Prince*, and both are just like Goldsmith’s photo.<sup>276</sup>

271. *Id.* The article’s byline names “Tristan Vox” as the author, the pen name under which Leon Wieseltier wrote several articles for the magazine. *Tristan Vox*, MUCK RACK, <https://muckrack.com/tristan-vox> [<https://perma.cc/F2A2-FGTR>]. Wieseltier is a well-known literary critic, author of several books and, for more than thirty years, editor of *The New Republic*. GOOGLE, (search “Leon Wieseltier” on Google) [<https://perma.cc/H3UL-PDSM>]. It is unclear why Wieseltier chose Prince’s “sexual style” as his angle for the *Vanity Fair* piece. Note also, though, that the subtitle continues: “Plus a special portrait for *Vanity Fair* by ANDY WARHOL.” Tristan Vox, *Purple Fame*, VANITY FAIR, Nov. 1984, at 66, 120. We can only speculate as to why Justice Sotomayor did not call attention to this.

272. In the PDF of the slip opinion and on LEXIS, this text appears even before we see *Purple Prince* in *Vanity Fair*, *Andy Warhol*, 598 U.S. at 518; *id.*, as seen on Lexis [<https://perma.cc/P2K9-2EHF>]; on Westlaw, it follows *Purple Prince*. *Id.*, as seen on Westlaw [<https://perma.cc/C3JV-LVQC>].

273. *Id.* at 518–19.

274. *Id.*

275. *Id.*

276. Cognitive psychology studies have found that the shorter the causal chain between an act and a bad outcome, the more inclined people are to hold the person who committed the act responsible for the

From this point in the opinion until the end of the backstory, pictures and text alternate more rapidly, and Justice Sotomayor's verbal references to the pictures become more argumentative. Here is the next one, a little more than a paragraph later:

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*.<sup>277</sup>

The second-person address (“Remember”) and the informally emphatic “[b]ut that was not all” suggest the kind of vernacular voice typically associated more with Justice Kagan.<sup>278</sup> These words serve to heighten readers’ involvement with the picture they’re about to see: an image of Prince on the cover of the September 1983 issue of *Musician*, which is already within their field of vision on Westlaw and LEXIS (although not in the slip opinion).<sup>279</sup> The pace of the narrative is accelerating, and the placement of the picture doesn’t interrupt it.<sup>280</sup>

The next portion of text referring to a picture follows immediately in all three versions of the opinion:

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.<sup>281</sup>

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bad outcome (the causal-proximity bias). Similarly, the shorter the time lapse between act and outcome, the more inclined people are to hold the actor responsible. Joel T. Johnson & Jerome Drobny, *Proximity Biases in the Attribution of Civil Liability*, 48 J. PERSONALITY & SOC. PSYCH. 283, 283 (1985). Indeed, both ideas were enshrined in the common law of torts as part of the “substantial factor” component of the concept of “legal cause.” RESTATEMENT (SECOND) OF TORTS § 433 (AM. L. INST. 1965). Accordingly, by leaving out the *Prince Series* pictures and thus bringing the picture of *Orange Prince* that much closer to the Goldsmith photo—on the space of the pages/scrolling screen and in the time of viewers’ reading experience—Justice Sotomayor’s opinion might incline her audience to think that Goldsmith’s photo “caused” *Orange Prince*, strengthening the argument that *Orange Prince* is merely derivative of the photo, not transformative, for purposes of fair use doctrine.

277. *Andy Warhol*, 598 U.S. at 520.

278. *Id.*; see also *infra* notes 304–65 and accompanying text.

279. See *supra* notes 260–63.

280. *Andy Warhol*, 598 U.S. at 520. The close communion of word and image here is emphasized by the title of the cover story for this issue of *Musician: Prince Talks!* (appropriately in purple), prominently located just below the name of the magazine and just to the left of Prince’s head above his right ear, in larger font than any other type below the magazine’s name. “Talks!” is thus literally superimposed on image. The cover photo of Prince, being the mirror image of the Goldsmith photo at issue in *Andy Warhol*, shows someone seemingly reluctant to talk, hence the ironic surprise of the cover story title.

281. *Id.* at 520–21.



The specific reference to the images (“See fig. 5, *infra*”) is now surrounded by rhetorical devices. The first three sentences employ the scheme of *isocolon*,<sup>282</sup> similarity of structure and length, to emphasize the similarity between the use of Goldsmith’s photo for *People* and the uses of other photographers’ images of Prince on the covers of other magazines’ commemorative Prince issues. Goldsmith, that is, does what other photographers of celebrities do. Her activity, and that of the publishers of the other magazines, is the norm—business as usual. The final three sentences then add another rhetorical scheme, *anaphora*: the repetition of the same word or group of words at the beginning of successive clauses or sentences.<sup>283</sup> All three sentences begin with the phrase, “All of them”<sup>284</sup>—again underscoring the commonality of their behavior—typographically disrupted in the last sentence by the inserted parenthetical, which targets Condé Nast’s deviation from the norm.<sup>285</sup>

The text that refers to the last pair of pictures in the sequence follows directly after the array of magazine covers: “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*.”<sup>286</sup> We have read something very much like the first sentence before, when Justice Sotomayor introduced the picture of *Orange Prince*.<sup>287</sup> What’s new here is that we’re told that *Goldsmith recognized* her work. The text then informs us that Goldsmith said of *Orange Prince* on the magazine cover, “It’s the photograph,” as if Warhol’s work and her photo were *identical*.<sup>288</sup> And, presumably, who would know better than the photographer herself?

Of course, what Goldsmith meant by those words was simply that *Orange Prince*, like *Purple Prince*—as she well knew, and as everyone involved in the litigation acknowledged—was *based on* her photograph. The more literally her words are taken, though, the more the audience would be inclined to see, if not visual identity, then at least visual similarity: a family relationship, if you will. Thus, at the climax of the background narrative (the text that follows this Figure 6 goes on to relate the story of the litigation),<sup>289</sup> Justice Sotomayor’s text reenacts the protagonist’s recognition of the long-lost relative, a staple of melodramatic fiction going back to Melville’s *Pierre* and beyond.<sup>290</sup>

282. *Isocolon*, MERRIAM-WEBSTER DICTIONARY (2024).

283. *Andy Warhol*, 598 U.S. at 521; *Anaphora*, MERRIAM-WEBSTER DICTIONARY (2024).

284. *Andy Warhol*, 598 U.S. at 521.

285. *Id.* A point also emphasized by the “in fact” in the first sentence: *People*, unlike Condé Nast, paid Goldsmith for her contribution to the cover. *Id.* at 520.

286. *Id.* at 522.

287. See *supra* text at note 273.

288. *Andy Warhol*, 598 U.S. at 522.

289. *Id.*

290. HERMAN MELVILLE, *PIERRE, OR, THE AMBIGUITIES* (William Spengemann ed., Penguin Classics 1996) (1852).

Having prepared viewers to see the similarities between *Orange Prince* and Goldsmith's photo, cunningly configured in the juxtaposed pictures immediately following, Justice Sotomayor in the third sentence quoted above frames the viewing more explicitly: "[*Orange Prince*] crops, flattens, traces, and colors the photo but otherwise does not alter it."<sup>291</sup> This isn't subconscious priming; it's more like an explicit task instruction to look for certain things when comparing the Goldsmith photo with the Warhol print. Even on its own terms, though, this characterization of Warhol's work has an "Other than that, Mrs. Lincoln" feel to it, as if cropping, flattening, tracing, and coloring the photo—each of which involves multiple creative decisions and artistic efforts—to create a new work *in an entirely different medium* does not meaningfully alter the model.<sup>292</sup> But it requires deliberate thought to reach that conclusion. The inference viewers draw from their first look at the two pictures, guided by the verbal framing, occurs first and quickly: the two are very similar.

Many pages later, we approach the last picture in the majority opinion.<sup>293</sup> The text introducing it comes seven paragraphs into Justice Sotomayor's analysis of why the Foundation's use of *Orange Prince* fails the first fair use factor.<sup>294</sup> Her doctrinal claim is not only that the use of *Orange Prince* shares substantially the same commercial purpose as Goldsmith's photo but also that it does not offer any criticism of or "artistic commentary" on the underlying work itself that would render it something other than a mere "superseding"<sup>295</sup> of the earlier work. Just above the picture of one of Warhol's *Campbell's Soup Cans* prints, the text reads:

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.'" That suggestion refers to Warhol's works that incorporate advertising logos, such as the Campbell's Soup Cans series. See fig. 7, *infra*.<sup>296</sup>

After the picture, the text goes on to explain, still with reference to the picture, the significance of the difference between these artworks and the Foundation's use of *Orange Prince*:

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 not share that purpose. Rather, the *Soup Cans* series uses Campbell's copyrighted work for an artistic commentary on consumerism, a purpose that is

291. *Andy Warhol*, 598 U.S. at 522.

292. For Justice Kagan's response to this, see *id.* at 558, 574 (Kagan, J., dissenting).

293. *Id.* at 539 (majority opinion).

294. *Id.* at 533–38.

295. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579, 588 (1994).

296. *Andy Warhol*, 598 U.S. at 538 (citation omitted).

orthogonal to advertising soup. The use therefore does not supersede the objects of the advertising logo.<sup>297</sup>

The *Campbell's Soup Cans* print is thus more densely implicated in explicit doctrinal analysis than the previous pictures. Introduced with a quotation from *Google* quoting a leading treatise on copyright law quoting yet another source, the picture, which may very well have caught our eyes before we proceeded with the text, lands in the thickets of fair use law.<sup>298</sup> The argument is this: the *Campbell's Soup Cans* prints copy an advertising logo, not to advertise soup (Campbell's purpose in deploying the logo on its products) but to comment on consumerism. That's a different purpose, and it inclines the first fair use factor in favor of the secondary use. The Foundation's use of *Orange Prince*, in contrast, has the same purpose as the work that Warhol copied: it's just another portrait of Prince licensed for use to illustrate a magazine article about Prince. That should incline courts to find that the first factor does not support fair use.<sup>299</sup>

Justice Sotomayor's doctrinal text, however, can't completely circumscribe the meanings that viewers may derive from the artwork that text surrounds. Look again at the photo of the silkscreen print of the *Campbell's Soup Cans* print.<sup>300</sup> The artwork is simple and stark; everything's on the surface. And this was precisely Warhol's aim in making his *Brillo Boxes* and the *Campbell's Soup Cans* series. They "comment on consumerism," to be sure, but their originality and distinctiveness—the essence of why those who regard Warhol as a revolutionary genius of modern art do so—is that Warhol's work comments on consumerism *in a particular way*.<sup>301</sup> His *Brillo Boxes* and *Campbell's Soup Cans* prints go beyond, say, Richard Hamilton's well-known collage of a few years earlier,

297. *Id.* at 539. Justice Sotomayor continues:

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 everyday 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. 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 546–548, and nn. 20–21.

*Id.* at 539–40.

298. *Id.* at 538.

299. This concluding image arguably enhances Justice Sotomayor's argument in two additional ways. As described earlier, this photo—unlike any of the others—shows the print mounted on a mat and surrounded by a border, which sets it off as a "work of fine art" in contrast perhaps to a merely commercial image, such as a magazine illustration. And by choosing an iconic Warhol artwork with which many readers would be familiar, Justice Sotomayor implicitly differentiates "worthy" Warhol from the "unworthy" (and to some connoisseurs aesthetically inferior) commercial work which predominated his later career, and thus could be understood to suggest that "legitimate" artists have nothing to fear from the opinion. Davis, *supra* note 14.

300. *Andy Warhol*, 598 U.S. at 539.

301. *Id.* at 540.

*Just What Is It that Makes Today's Homes So Different, So Appealing?*,<sup>302</sup> which certainly also comments on consumerism. Warhol performs a deft art-historical move, a kind of transubstantiation, simultaneously presenting the packaging of mass-marketed commodities as art and art as a commodity. Something very similar is, of course, one of the central meanings of Warhol's *Marilyn* prints and his *Prince Series*: celebrity as the commodification of the person.<sup>303</sup> Whether this is the best or most important interpretation of what Warhol was up to is not the point. The point is that the meanings of this picture and the others used in the opinion exceed the words with which Justice Sotomayor has tried to capture them, just as the picture of the red-and-white soup-can label predominates visually over her text.

### C. *Pictures and Words in Justice Kagan's Opinion*

The very first words of the first section of Justice Kagan's dissenting opinion after the introduction—"Andy Warhol is the avatar of transformative copying"<sup>304</sup>—provide a broad narrative frame for her audience's reading and viewing of everything that follows. These words make explicit the storyline we already divined from her choice and sequencing of the pictures: this case is about Andy Warhol, not Lynn Goldsmith.<sup>305</sup> The specific language also establishes what's at stake in the case. If the very personification of transformative copying cannot satisfy the test for fair use when his work is licensed or sold, then *every* artist who borrows from other artists' copyrighted work to create their own (which is to say, many artists, much of the time) is at risk.

302. See Allison Young, *Richard Hamilton, Just What Is It that Makes Today's Homes So Different, So Appealing?*, SMARTHISTORY (Dec. 6, 2021), <https://smarthistory.org/richard-hamilton-just-what-is-it/> [<https://perma.cc/HJ54-WQZL>].

303. Amelia Singh, *Andy Warhol and the Politics of Pop Art*, 1ST ART GALLERY (May 15, 2023), <https://www.1st-art-gallery.com/article/andy-warhol-politics-pop-art/> [<https://perma.cc/25WJ-YPR7>] ("Warhol's art prompted discussions about the commodification of fame and the blurring of lines between celebrity culture and reality?").

304. *Andy Warhol*, 598 U.S. at 561 (Kagan, J., dissenting).

305. Presenting the case as if it were about Andy Warhol the artist as opposed to the Andy Warhol Foundation can also be understood as misdirection on Justice Kagan's part. The litigation arose because Goldsmith challenged the Foundation's commercial licensing of *Orange Prince* to Condé Nast; as Justice Sotomayor insisted, that was the only use alleged to be infringing. *Id.* at 534. Justice Sotomayor continued:

The dissent . . . focuses on a case that is not before the Court. . . . [T]he dissent assumes that any and all uses of an original work entail the same first-factor analysis based solely on the content of a secondary work. This assumption contradicts the fair use statute and this Court's precedents. Had [the Foundation's] use been solely for teaching purposes, that clearly would affect the analysis, and the statute permits no other conclusion. Preferring not to focus on the specific use alleged to infringe Goldsmith's copyright, the dissent begins with a sleight of hand and continues with a false equivalence between [the Foundation's] commercial licensing and Warhol's original creation.

*Id.* at 534 n.10 (citations omitted).

The next paragraph, immediately preceding Justice Kagan's first picture, begins with these words:

To see [Warhol's] 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).<sup>306</sup>

Note five features of this text, all of which typify how Justice Kagan constructs the relationships between words and pictures throughout her opinion. First, the words are in Justice Kagan's recognizably colloquial style.<sup>307</sup> She addresses her audience in the second person (which Justice Sotomayor does not do until introducing the fourth picture in her sequence) and writes in short sentences, the third of which is the crisp vernacular: “And then he went to work.”<sup>308</sup> We are prompted to feel as if we're being spoken to personally, so that when Justice Kagan wants to introduce a picture to illustrate her argument, it will be as if she is *showing* it to us. The tone of the text brings the pictures into a conversation: “Here, look at this.”

This is more or less just what Justice Kagan says, taking us to the second point. She directs our attention to her first picture, as she does to every subsequent picture but one, by exhorting us to “see,” “look,” or (as here) “consider” the picture immediately following. These words frame the pictures as something more than mere illustrations supporting propositions in the opinion's text. In terms of speech-act theory, her words are performative utterances.<sup>309</sup> More specifically, they are illocutionary acts, words asking or directing someone (here, readers of her opinion) to do something.<sup>310</sup> The words configure the pictures as foci of readers' interactive engagement—in fact, as objects of the readers' and Justice Kagan's joint attention. Looking and considering and thinking about these reproductions of art are activities that readers and the Justice undertake together.<sup>311</sup> In contrast, Justice Sotomayor *never* exhorts readers to “look at” or “see” the pictures she incorporates. The only vision verb she uses to refer to her pictures is the “See” in the formulaic

306. *Id.* at 562 (Kagan, J., dissenting).

307. Justice Kagan has observed that Chief Justice Roberts “assigned her to write what both expected would be a classic Kagan opinion. ‘Both he knew and I knew that he was giving me a gift.’” Gerstein, *supra* note 14.

308. *Andy Warhol*, 598 U.S. at 562 (Kagan, J., dissenting).

309. See, e.g., J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 81 (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975).

310. *Id.* at 108–19.

311. See Charles Goodwin, *Action and Embodiment Within Situated Human Interaction*, 32 J. PRAGMATICS 1489 (2000) (discussing how multiple persons carry out meaningful activity together via talk, including indexical words, gestures, and joint looking).

“See fig. 1, *infra*,” “See fig. 2, *infra*,” and so on—a scholastic cross-reference rather than a call to action.<sup>312</sup>

The one exception to Justice Kagan’s practice of involving readers in actively looking at the pictures she deploys occurs when she introduces the Goldsmith photo later in the opinion.<sup>313</sup> Warhol’s source—his “artist reference”—is merely an illustration. Warhol’s own work, on the other hand, as well as the paintings by great artists in the past, which comprise the second sequence of pictures in the opinion, deserve *really looking* at, and Justice Kagan does all she can to ensure that readers will do that.

Third, Justice Kagan frames what we will “see” in the two images of Marilyn Monroe—the marked-up publicity photo and Warhol’s resulting silkscreen print—as Warhol’s “method in action.”<sup>314</sup> Of course, we don’t *see* any action. We are looking at still photographs and *inferring* the activity of which the marking up of the photos was a part. The verbal frame invites us to understand the pictures in a particular way: to imagine the photos as offering a glimpse of a narrative extending in time before and after the moment the shutter snapped, as photos often do.<sup>315</sup> Implicitly, Justice Kagan encourages us to experience for ourselves one way in which artworks can mean much more than they appear on their surface to show—exactly the kind of active, imaginative engagement with art like Warhol’s on which she believes any appreciation of the works’ purpose and character ought to depend.

Fourth, the marked-up photo of Marilyn is followed by five more sentences describing Warhol’s technique for producing silkscreen prints like his *Marilyn*, so that the explanatory text encompasses the picture.<sup>316</sup> Visually, this helps secure the picture to the text and to the world beyond the law in which the original artifact was made. More generally, the text accompanying the picture exemplifies how, throughout her opinion, Justice Kagan tends to use more words in conjunction with the pictures she shows than Justice Sotomayor does.<sup>317</sup> This reflects both her heightened attention to the pictures and her recognition that more words really can help viewers grasp pictorial meaning. Appreciating the nature and character of works of art starts with looking, but it’s not only about looking.

312. *Andy Warhol*, 598 U.S. at 516, 518.

313. *Id.* at 564–65 (Kagan, J., dissenting).

314. *Id.* at 562.

315. See generally GREG BATTYE, PHOTOGRAPHY, NARRATIVE, TIME (2014).

316. *Andy Warhol*, 598 U.S. at 563–64 (Kagan, J., dissenting).

317. Compare, e.g., *id.* at 519 (describing Warhol’s Prince portrait as “[a]n orange silkscreen portrait of Prince on the cover of a special edition magazine published in 2016 by Condé Nast”), with *id.* at 566 (Kagan, J., dissenting) (describing the same portrait with the language: “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. On Warhol’s canvas, Prince emerged as ‘spectral, dark, [and] uncanny’—less a real person than a ‘mask-like simulacrum.’” (citations omitted)).

Fifth, the words on which we draw to understand the meanings of pictures often come from experts. Justice Kagan incorporates into her introduction to the marked-up publicity photo of Marilyn a quotation from an expert statement in the record, articulating the significance of this first step in Warhol's method.<sup>318</sup> The Justice has already invoked expertise four times in the preceding paragraph.<sup>319</sup> It will be a theme of Justice Kagan's approach to the case: she will argue that the meanings and messages that Warhol's work adds to the Goldsmith photo on which it was modeled really matter, and that judges should draw on expertise to identify and elucidate those meanings. Implicitly responding to Justice Gorsuch's concurrence<sup>320</sup> as well as the majority, her opinion exemplifies how judges needn't go at it alone as art critics.<sup>321</sup> Accordingly, we readers and viewers of the opinions can also rely on expert guidance in looking at *Orange Prince* and the Goldsmith photo to gauge the legal significance of the differences between them.

The concluding sentence of the same paragraph of text introduces the second picture Justice Kagan displays, the top of which was already visible as soon as we scrolled down from the first picture to read the rest of the description of Warhol's process: "The result—see for yourself—is miles away from a literal copy of the publicity photo."<sup>322</sup> Again, Justice Kagan invites viewers to use their own eyes, just as she previously suggested we could "see the method in action."<sup>323</sup> Here, she directs their looking, giving them a goal to guide their visual attention: look for the differences. Again, however, she doesn't rely exclusively on what she assumes to be our visual capabilities to grasp her point. Instead, she elaborates that point, which she spells out in the first sentence after the picture—"And the meaning [of *Marilyn*] is different from any the photo had"<sup>324</sup>—with the help of four more citations to professional art criticism and art history. Again, the text implicitly advises viewers that pictorial meaning is not reducible to what we think we see; the words of knowledgeable sources can inform our understanding.<sup>325</sup>

The next picture is the Goldsmith photo.<sup>326</sup> Here are the words that introduce it: "As with Marilyn, similarly with Prince. In 1984, Vanity Fair commissioned Warhol to create a portrait based on a black-and-white

318. *See id.* at 562 (Kagan, J., dissenting).

319. *Id.* at 564–65.

320. Discussed further *supra* note 124 and accompanying text.

321. Discussed further *infra* note 421 and accompanying text.

322. *Andy Warhol*, 598 U.S. at 563 (Kagan, J., dissenting).

323. *Id.* at 562.

324. *Id.* at 563.

325. Thus, while we might be tempted to read into Justice Kagan's "see for yourself," *id.*, the sort of arrogant belief in one's own interpretation of the pictures that Justice Scalia famously exhibited in *Scott v. Harris*, 550 U.S. 372, 378 n.5 (2007), when he remarked that "[w]e are happy to allow the videotape to speak for itself" as if pictures admit of only one possible set of meanings, her immediately following reliance on expertise tempers that inclination.

326. *Andy Warhol*, 598 U.S. at 564 (Kagan, J., dissenting).

photograph taken by noted photographer Lynn Goldsmith.”<sup>327</sup> The framing text here underscores that far from being the protagonist (or the work of the protagonist) of the conflict, the Prince photo becomes an instance of Warhol’s art-making activities. Justice Kagan then follows the black-and-white photo of Prince with several sentences analogizing the printmaking process that produced the *Prince Series* to the process that produced the *Marilyn* print.<sup>328</sup> Once again, the textual description of Warhol’s creative process surrounds the reference photo on the page, verbally configuring that photo as merely one step, albeit an essential one, in Warhol’s signature creative activity.

The rest of the paragraph reads:

Altogether, Warhol made 14 prints and two drawings—the Prince series—in a range of unnatural, lurid hues. See Appendix, *ante*, at 1288. Vanity Fair chose the Purple Prince to accompany an article on the musician. Thirty-two years later, just after Prince died, Condé Nast paid Warhol (now actually his Foundation . . .) to use the Orange Prince on the cover of a special commemorative magazine. A picture (or two), as the saying goes, is worth a thousand words, so here is what those magazines published.<sup>329</sup>

The pair of *Purple Prince* (not, as in the majority opinion, as it appeared in *Vanity Fair*, but by itself) and *Orange Prince* (not, as in the majority opinion, as it appeared on the cover of the Condé Nast issue, but by itself) follow immediately.<sup>330</sup> The last sentence of introductory text, delivered in Justice Kagan’s conversational style, conveys a showman’s sense of timing: a pause while she delivers the cliché—little cognitive effort is needed to absorb those words, as the Justice herself acknowledges with a wink (“as the saying goes”)—and then pulls back the curtain to display, finally, the Warhol print at the heart of the case.<sup>331</sup>

And what words follow the paired Warhols? “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.”<sup>332</sup> We’ve seen these two rhetorical maneuvers before. The first part of this sentence implicitly, rather than explicitly, frames the viewing by guiding readers to compare these images to the Goldsmith photo so as to reach a particular conclusion. It also appeals to readers’ common sense by implying that anyone with open eyes would see things the same way. In the second part of the sentence, Justice Kagan again invokes expertise, this time in the seven following sentences identifying the differences between Warhol’s

327. *Id.*

328. *Id.* at 564–65.

329. *Id.* at 565 (some citations omitted).

330. *Id.*

331. *Id.*

332. *Id.*



silkscreen prints and Goldsmith's photo of the same subject and elucidating the aesthetic and communicative significance of those differences.<sup>333</sup>

I argued earlier that juxtaposing *Purple Prince* and *Orange Prince* emphasized their similarity—their shared quality of being Warhols—and hence the identifiable, valued works that magazine publishers would seek.<sup>334</sup> Two sentences toward the end of the paragraph quoted above create this verbal frame<sup>335</sup>: *Vanity Fair* and then Condé Nast chose Warhols to illustrate stories about Prince. The text two paragraphs later makes the point more explicitly.<sup>336</sup> Publishers plainly didn't want just a "portrait of Prince,"<sup>337</sup> which they could have obtained from Goldsmith or another photographer. They wanted a Warhol depiction of Prince in part because they recognized that "[t]he message [of the print, compared to the photograph] could not have been more different."<sup>338</sup> Indeed, the subtitle of the *Vanity Fair* article proclaimed "a special portrait for Vanity Fair by ANDY WARHOL."<sup>339</sup>

Throughout this first sequence of pictures, Justice Kagan verbally frames our viewing so that we will see Warhol's portrait prints—his *Marilyn*, *Purple Prince*, and especially *Orange Prince*—as distinctive works reflecting artistic originality, creativity, and effort.<sup>340</sup> Justice Sotomayor's words positioned us to see those same pictures of Prince as essentially transcriptions of Goldsmith's photo. With Justice Kagan's text uppermost in our minds, we may be inclined to see them as being "miles away from . . . literal cop[ies] of [that] photo."<sup>341</sup>

Justice Kagan's tone here and beyond, though, is not merely conversational. At times she sounds exasperated, even condescending, when addressing the

333. *Id.* at 566–67.

334. *See supra* notes 169–73 and accompanying text.

335. *Andy Warhol*, 598 U.S. at 565 (Kagan, J., dissenting) ("Vanity Fair chose the Purple Prince to accompany an article on the musician. Thirty-two years later, just after Prince died, Condé Nast paid Warhol (now actually his Foundation . . .) to use the Orange Prince on the cover of a special commemorative magazine. A picture (or two), as the saying goes, is worth a thousand words, so here is what those magazines published." (citations omitted)).

336. *Id.* at 566–67 ("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, some kind of picture. An employee comes to you with two options: the Goldsmith photo, the Warhol portrait. Would you say that you don't really care? That the employee is free to flip a coin? In the majority's view, you apparently would. Its opinion, as further discussed below, is built on the idea that both are just 'portraits of Prince' that may equivalently be 'used to depict Prince in magazine stories about Prince.' All I can say is that it's a good thing the majority isn't in the magazine business. Of course you would care! You would be drawn aesthetically to one, or instead to the other. You would want to convey the message of one, or instead of the other. The point here is not that one is better and the other worse. The point is that they are fundamentally different. You would see them not as 'substitute[s],' but as divergent ways to (in the majority's mantra) 'illustrate a magazine about Prince with a portrait of Prince.' Or else you (like the majority) would not have much of a future in magazine publishing." (citations omitted)).

337. *Id.* at 567.

338. *Id.* at 566.

339. *See* Tristan Vox, *Purple Fame*, VANITY FAIR, Nov. 1984, at 66; *see supra* note 271.

340. *See Andy Warhol*, 598 U.S. at 560–61 (Kagan, J., dissenting).

341. *Id.* at 563.

majority's understanding of the pictures at issue.<sup>342</sup> And with some reason. Andy Warhol was the supreme ironist among artists of his time.<sup>343</sup> By altering, replicating, and mass-producing pictures of celebrities' faces (among other images), Warhol made visible modern consumer culture's commodification of personality.<sup>344</sup> He demonstrated in print after print that representations of faces aren't to be taken at face value. What struck Justice Kagan as the majority's literally superficial comparison of *Orange Prince* to Goldsmith's photo plainly got under her skin.<sup>345</sup> The tone of her words, oscillating between breezy description, incisive analysis, and snark, galvanizes the opinion. It may even prod us to look harder at the pictures and then back again to the text to gauge whether her emotional language seems justified.

Let's turn to the text into which Justice Kagan has placed her second set of pictures, the five color photographs of well-known paintings. These illustrate part of her lengthy argument that the majority "undervalu[es]. . . transformative copying as a core part of artistry" and hence that the Court's decision "operates to constrain creative expression."<sup>346</sup> She offers, in effect, a mini art-historical survey of the theme through three successive reclining nudes (Giorgione, Titian, Manet) and two portraits of a seated pope (Velasquez, Bacon).<sup>347</sup> At the outset of her opinion, Justice Kagan referred to Warhol's place in "every college's Art History 101."<sup>348</sup> Now she invites us to settle into our seats in the lecture hall and watch the slides as she narrates.

342. For instance:

The majority does not see it. And I mean that literally. There is precious little evidence in today's opinion that the majority has actually looked at these images, much less that it has engaged with expert views of their aesthetics and meaning. . . . [A]s for the District Court's view that Warhol transformed Prince from a 'vulnerable, uncomfortable person to an iconic, larger-than-life figure,' the majority is downright dismissive. Vulnerable, iconic—who cares? The silkscreen and the photo, the majority claims, still have the same 'essential nature.' The description is disheartening. It's as though Warhol is an Instagram filter, and a simple one at that (*e.g.*, sepia-tinting). 'What is all the fuss about,' the majority wants to know. Ignoring reams of expert evidence—explaining, as every art historian could explain, exactly what the fuss is about—the majority plants itself firmly in the 'I could paint that' school of art criticism. No wonder the majority sees the two images as essentially fungible products in the magazine market—publish this one, publish that one, what does it matter?

*Andy Warhol*, 598 U.S. at 574 (Kagan, J., dissenting) (citations omitted).

343. William Wilson, *Andy Warhol, Pioneer of '60's Pop Art, Dies*, L.A. TIMES (Feb. 23, 1987, 12:00 AM), <https://www.latimes.com/local/obituaries/archives/la-me-andy-warhol-19870223-story.html> [https://perma.cc/VBD8-SUNT].

344. Singh, *supra* note 303.

345. See *Andy Warhol*, 598 U.S. at 559 (Kagan, J., dissenting) ("[I]t may come as a surprise to see the majority describe the Prince silkscreen as a 'modest alteration[]' of Lynn Goldsmith's photograph—the result of some 'cropp[ing]' and 'flatten[ing]—with the same 'essential nature.' Or more generally, to observe the majority's lack of appreciation for the way [Warhol's] works differ in both aesthetics and message from the original templates. In a recent decision, this Court used Warhol paintings as the perfect exemplar of a 'copying use that adds something new and important'—of a use that is 'transformative,' and thus points toward a finding of fair use. That Court would have told this one to go back to school." (citations omitted)).

346. *Id.* at 581–82.

347. *Id.* at 587–90.

348. *Id.* at 559.

As the first picture comes into view—and we may very well at least glance at the lovely image, so surprising to see in the pages of a SCOTUS opinion, before we attend to the text—we read:

Consider as one example [of the central role of the reuse of imagery in the making of great art] 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[.]<sup>349</sup>

Much as in the text introducing the previous set of pictures, “[c]onsider . . . the reclining nude”<sup>350</sup> begins to direct our attention to the picture within our field of view as we read the words; then, “[h]ere is” focuses that attention, displaying the picture with a kind of flourish.<sup>351</sup> Similarly, just before we come to the third picture in the sequence but when it is already within our field of vision, Justice Kagan says, “For here is Édouard Manet’s Olympia.”<sup>352</sup> In between, referring to the second picture in the sequence, Titian’s *Venus of Urbino*, she says, “You can see the resemblance—but also the difference” from Giorgione’s painting.<sup>353</sup> The invitations to look and the instructions regarding what to look for are the same framing devices Justice Kagan used earlier in the opinion. The pace, however, has picked up.<sup>354</sup>

As an art-history lecturer would, Justice Kagan from time to time alludes to examples beyond the ones she is showing us.<sup>355</sup> And because this is a text, not actually a spoken performance, she includes as she did earlier in her opinion numerous explicit citations to authority. The first three are to Vasari’s *Lives of the Artist*, a reference to *The Concise Oxford Dictionary of Art Terms*, and a modern expert on Francis Bacon.<sup>356</sup> The fourth is the amicus brief for the Robert Rauschenberg, Roy Lichtenstein, and Joan Mitchell Foundations.<sup>357</sup> This brief appears to be the source of Justice Kagan’s three-painting sequence of reclining female nudes,<sup>358</sup> although she has inverted the order so that it proceeds chronologically, and she has left out the reproduction of Colonna’s woodcut.

349. *Id.* at 587.

350. *Id.*

351. *Id.*

352. *Id.* at 588.

353. *Id.*

354. Compared to the first sequence, readers encounter about 40% fewer words before and between each of these pictures. On average, there are ninety-one words before and between pictures in the second sequence, compared to 154 in the first.

355. *Andy Warhol*, 598 U.S. at 587 (Kagan, J., dissenting) (“Giorgione apparently modeled his canvas on a woodcut illustration by Francesco Colonna.”).

356. *Id.* at 587–88, 590.

357. *Id.* at 587.

358. Brief for the Robert Rauschenberg Foundation et al. as Amici Curiae Supporting Petitioner at 7–9, *Andy Warhol*, 598 U.S. 508 (No. 21-869). Justice Kagan would also have found the pairing of the Velazquez and the Bacon in the Rauschenberg Foundation et al. amicus brief. *See id.* at 26.

Interestingly, Justice Kagan doesn't acknowledge her own bit of "transformative copying." She has simplified the original, reoriented it, and interspersed it with jabs at the majority opinion to serve her theory of the case. For instance, after displaying the photos of the *Giorgione* and the *Titian* she states, "The majority would presumably describe these Renaissance canvases as just 'two portraits of reclining nudes painted to sell to patrons.' 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?"<sup>359</sup>

In sum, Justice Kagan hopes to teach her audience something about words and pictures. When she castigates the majority for "not see[ing]" Warhol's "dazzling creativity," for not "actually look[ing]" at the images of his work,<sup>360</sup> she obviously has in mind more than a purported failure of visual perception. She means that when it comes to pictures—maybe not all pictures but at least works of art—one can't properly see without knowing something about what one is looking at. Some of that knowledge comes from looking at other pictures. And some comes from words, as Justice Kagan makes clear in the same passage from which I've just quoted: "There is precious little evidence in today's opinion that the majority has actually looked at these images, much less that it has engaged with expert views of their aesthetics and meaning."<sup>361</sup> Her own uses of words to frame her audience's understanding of the pictures at issue in *AWF* go further, introducing the pictures she displays so as to entice the audience to participate in looking and thinking about those pictures along with her.<sup>362</sup>

Having identified the various ways in which Justice Kagan's words shape our uptake of her pictures, we might spend a moment pondering how seeing those pictures affects our understanding of her text. Some of the pictures, obviously, make visible things we simply could not visualize and thus could not understand without them: for instance, how Titian's *Venus of Urbino* both

359. *Andy Warhol*, 598 U.S. at 588 (Kagan, J., dissenting) (citation omitted).

360. *Id.* at 573–74.

361. *Id.* at 574.

362. Not everyone has been persuaded by Justice Kagan's art-history lesson. Nicholas O'Donnell for *Apollo Magazine* writes:

Justice Kagan's art history is also mediocre. Those famous paintings don't depict the same woman. They aren't offered at the same moment to illustrate a newsworthy event for which they are in competition at the same time. Their commentary on each other (had they been created when each was under copyright) is entirely consistent with the majority's opinion. Rather, the dissent pours meaning into each of those images that its authors obviously read somewhere else. This was highlighted by the Chief Justice's commentary at oral argument: 'You don't say, oh, here are two pictures of Prince. You say that's a picture of Prince, and this is a work of art sending a message about modern society.' This kind of tendentious, conclusion-driven narrative is terrible art history and worse law. The meaning of a work that a judge derived from elsewhere is a useless standard, and the Court's rejection of it is important.

Nicholas O'Donnell, *The Supreme Court Has Saved the Andy Warhol Foundation from Itself*, *APOLLO* (June 9, 2023), <https://www.apollo-magazine.com/andy-warhol-copyright-supreme-court-ruling-lynn-goldmith/> [<https://perma.cc/DH9W-CTSW>].

“resembl[es] [and] differ[s]” from Giorgione’s *Sleeping Venus*.<sup>363</sup> Other pictures lend credibility to textual statements, especially the statements taken from experts. We may think we can understand just from the words that the “misaligned, ‘Day-Glo’ colors” of Warhol’s golden *Marilyn* print “suggest[] ‘artificiality and industrial production,’” thus “portray[ing] the actress as a ‘consumer product,’”<sup>364</sup> but seeing the work persuades us that the expert is at least onto something, whether or not we fully agree. More problematic is the possibility that, with our attention absorbed by the images of Marilyn and the reclining nudes from Giorgione through Manet, not to mention the Warhols at the center of the litigation, we may be diverted from the weaknesses in Justice Kagan’s doctrinal position—for instance, how her valorization of Warhol’s creativity might indeed, as the Second Circuit opinion put it, tend to create a “celebrity-plagiarist” exemption from copyright infringement.<sup>365</sup>

Ultimately, both Justice Sotomayor’s and Justice Kagan’s opinions produce, to borrow from Lawrence Sipe’s description of picture books,<sup>366</sup> a *synergy* of words and pictures “in which the total effect depends not only on the union of the text and illustrations but also on the perceived interactions or transactions” between them.<sup>367</sup> In Justice Kagan’s case, lingering on the pictures, at least for many reader-viewers, fulfills the promise of her words that the pictures are worth really looking at not only because they offer a sensory experience that particularizes what her corresponding words describe<sup>368</sup> but because, by taking in both words and pictures and going back and forth between them, reader-viewers understand that they are enacting the visually literate approach to the pictures that Justice Kagan is urging.

## V. *AWF*, NAÏVE REALISM, AND THE JUDICIAL STANCE TOWARD PICTURES

The words that Justices Sotomayor and Kagan use to talk about pictures reflect different attitudes toward pictorial meaning and different ideas about whether and how judges should address it. Justice Sotomayor’s idea of pictorial meaning is that of the naïve realist, someone who treats pictures as meaning essentially what they show.<sup>369</sup> Justice Kagan’s idea is less naïve; she appreciates that pictorial meaning emerges not only from what we can see in the picture but what we can know about it from other sources, including expert information and other pictures. In part, these contrasting notions are driven by

363. *Andy Warhol*, 598 U.S. at 588 (Kagan, J., dissenting).

364. *Id.* at 563 (alteration in original) (citation omitted).

365. *Andy Warhol Found. for Visual Arts v. Goldsmith*, 11 F.4th 26, 43 (2d. Cir. 2021), *aff’d*, 598 U.S. 508 (2023).

366. Sipe, *supra* note 226, at 98.

367. *Id.* at 98–99.

368. *See* IVINS, *supra* note 220, at 52–53.

369. *See* Feigenson, *infra* note 375 and accompanying text.

their different conceptions of how judges in copyright cases should confront pictures, which in turn derive from their opposing interpretations of the first fair use factor—specifically, whether pictorial meaning beyond the purely denotative matters. It may also, however, be the other way around: their different attitudes toward pictures and pictorial meaning may be partly responsible for their opposing views of fair use doctrine. Neither Justice, however, appears to have considered the picture at the heart of the case—Warhol’s *Orange Prince* as it appeared on Condé Nast’s *Prince*-issue cover—as a *material object*, and thus neither addressed the “expression, meaning, or message”<sup>370</sup> the picture conveyed in the context of its specific use. At least for Justice Kagan, that ought to matter to the analysis of the first fair use factor.

*A. Ideas About Pictures: Naïve and Less Naïve Realism*

When people look at pictures, especially photographic pictures that look like what they think reality looks like, they tend intuitively to believe that the picture just gives them that reality. “People tend . . . to conflate representations with direct perceptions of reality, to ‘look through’ the mediation at what is depicted. To see the picture is to see the real thing, unmediated. . . . [Thus], the meaning of the picture is understood to be identical to its content.”<sup>371</sup> This naïve realism about pictures applies prototypically to photos and videos, which appear to resemble most closely what we think we would have seen had we been standing where the photographer or videographer was at the time and looking in the same direction as the camera was pointed.<sup>372</sup> The concept, however, may apply to any sort of representational image. Naïve realists tend to “look through” a drawing, painting, or silkscreen print, identifying its meaning with its denotation—what it is a drawing or other representation of.<sup>373</sup> They thus downplay or ignore the ways in which their uptake of the picture may be influenced by the picture’s medium and the ways the picture-maker has utilized that medium; by the prior knowledge they bring to the viewing; and by the contexts—including the verbal context—in which they encounter the picture.<sup>374</sup> And because the meaning of a picture for them is just what it shows, naïve realists tend to believe that anyone with open eyes should see what the picture has to offer the same way they do.<sup>375</sup>

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370. *Andy Warhol*, 598 U.S. at 559 (Kagan, J., dissenting) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

371. FEIGENSON & SPIESEL, *supra* note 47, at 9 (alteration in original).

372. *See* Feigenson, *infra* note 375.

373. *See id.*

374. *See id.* at 10–11.

375. *See* Neal Feigenson, *Naïve Realism and Visual Evidence: Theory, Research, and Legal Applications*, PSYCH. PUB. POL’Y & L. (forthcoming 2024).

Justice Sotomayor’s idea of pictorial meaning, however skillful her rhetorical deployment of the pictures in her opinion, conforms to the naïve realist model. She doesn’t, of course, think that what we see in *Orange Prince* looks just like Prince would have looked had we met him in person in 1981. But when she looks at *Orange Prince* and points to its essence as “a portrait of Prince”<sup>376</sup> just like Goldsmith’s photo, she identifies the meaning of Warhol’s work with its content.<sup>377</sup> She looks through the mediation—the particular artifact that Warhol (as Justice Kagan has taken pains to explain) effortfully crafted—to what that artifact depicts. Indeed, Justice Sotomayor’s references to her entire initial sequence of pictures, discussed in Part IV,<sup>378</sup> conceive of those pictures, including *Orange Prince*, as unproblematic illustrations of the corresponding statements in her text. We are not supposed to puzzle over the pictures’ meaning. Her pictures, whether of photos taken by Goldsmith or others or Warhol’s silkscreen prints, mean just what they show, and what they show are Prince in various guises.

Justice Kagan’s ideas about pictorial meaning are less naïve. Pictures—at least Warhol’s and other notable artists’ work—aren’t reducible to what they depict. Their meanings aren’t identical to their content, and we can’t grasp what’s most important about those meanings just by glancing at them. The words of art historians, curators, and other knowledgeable experts can inform our viewing and enhance our appreciation of the pictures’ “expression, meaning, or message.”<sup>379</sup> They can make salient how the picture-maker has used his or her materials to create various effects, and they can explain the cultural and historical contexts in which the work may be better understood. Moreover, different people may reasonably understand those meanings differently: “Of course, meaning in great art is contestable and contested (as is the premise that an artwork is great),” as Justice Kagan writes.<sup>380</sup>

But looking—really looking—is always the essential first step to grappling with pictorial meaning. Paying attention to what is in front of one’s eyes is how one uses perception to grasp the particularity of the object at which one is looking: its distinctiveness from other objects of the same broad class describable by the same general nouns (“pictures of Prince”).<sup>381</sup> By registering what they are actually seeing, viewers can appreciate that transposing a picture into a different medium and “crop[ping], flatten[ing], trac[ing], and color[ing]” it yields a very different picture.<sup>382</sup> Printed words can change their appearance (e.g., font style, color, etc.) and remain the same words; with pictures, however,

376. *Andy Warhol*, 598 U.S. at 545.

377. *Id.*

378. *See supra* Part IV.

379. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994).

380. *Andy Warhol*, 598 U.S. at 563 (Kagan, J., dissenting).

381. *Id.*; *see* IVINS, *supra* note 220, at 52–53.

382. *Andy Warhol*, 598 U.S. at 522; *see also supra* notes 286–92 and accompanying text.

“[e]very difference . . . make[s] a difference” in meaning.<sup>383</sup> Justice Kagan’s repeated exhortations to look at the pictures she puts on display is a way of slowing down our reading and our viewing, affording us the opportunity to attend to the pictures *as pictures*. She does not want to devalue pictures by looking through them and reducing them to the conceptual equivalents of the words that describe their referents.

### B. *Naïve Realism, Fair Use Doctrine, and the Judicial Engagement with Pictures*

What is the connection, if any, between the Justices’ understandings of pictures and pictorial meaning in general and their doctrinal analyses? Are these contrasting attitudes toward pictorial meaning specific to the doctrinal context of *AWF*, or do they reflect more general stances that may, conversely, help account for the Justices’ disagreement about that doctrine? We can’t be sure. Certainly, the Justices’ conflicting interpretations of the first fair use factor offer a ready explanation for their divergent approaches to picturing. If, as Justice Sotomayor contends,<sup>384</sup> what matters most to the application of the first factor is that the commercial use to which the Foundation put *Orange Prince* was substantially the same as that of Goldsmith’s copyrighted photo, there’s little if any need to look at and think about the pictures more intensively to arrive at a more complex understanding of the pictures’ meanings.

Justice Gorsuch agrees. In his concurring opinion, he prefers the majority’s approach to the first fair use factor in part because it avoids imposing on judges the task of interpreting pictures: “Nothing in the law requires judges to try their hand at art criticism and assess the aesthetic character of the resulting work.”<sup>385</sup> The court below had set out this notion of the judicial role at greater length:

[W]hether a work is transformative cannot turn merely on the stated or perceived intent of the artist or the meaning or impression that a critic – or for that matter, a judge – draws from the work. . . . [T]he district judge should not assume the role of art critic and seek to ascertain the intent behind or meaning of the works at issue. That is so both because judges are typically

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383. W.J.T. MITCHELL, *ICONOLOGY* 69 (1986) (discussing Nelson Goodman’s symbolic theory of pictures and words).

384. *Andy Warhol*, 598 U.S. at 537.

385. *Id.* at 554 (Gorsuch, J., concurring). He goes on:

Does Mr. Warhol’s image seek to depict Prince as a “larger-than-life” icon while Ms. Goldsmith’s photograph attempts to cast him in a more “vulnerable” light? Or are the artistic purposes latent in the two images and their aesthetic character actually more similar than that? Happily, the law does not require judges to tangle with questions so far beyond our competence.

*Id.* at 556 (citations omitted).



unsuited to make aesthetic judgments and because such perceptions are inherently subjective.<sup>386</sup>

A proper understanding of the first fair use factor, according to Justice Gorsuch as well as the majority, obviates that dicey aesthetic inquiry:

[T]he first fair-use factor requires courts to assess only whether the purpose and character of the *challenged use* is the same as a protected use. And here, the undisputed facts reveal that the Foundation sought to use its image as a commercial substitute for Ms. Goldsmith’s photograph.<sup>387</sup>

Justice Gorsuch’s attitude toward picturing is consistent with a traditional conception of the judge as an arbiter of words, relying on objective reason rather than on “inherently subjective” perceptions of the meanings of pictures.

Justice Sotomayor, for her part, appreciates that judges may need to look at pictures. In *Kennedy v. Bremerton School District*, she included in her opinion photos of Coach Kennedy leading prayers in a crowd at the fifty-yard line after games in an attempt to convey that the facts of the case were not as Justice Gorsuch described them in his majority opinion.<sup>388</sup> In *AWF*, she compares Goldsmith’s photo of Prince and Warhol’s silkscreen print of Prince and sees two pictures of Prince: “Both are portraits of Prince used in magazines to illustrate stories about Prince.”<sup>389</sup> In both instances, however, she confines herself to the denotative content of pictures—what they are pictures *of*. That’s all that the pictures mean. Beyond that, she agrees with the Second Circuit that, in fair use cases at least, judges “should not assume the role of art critic” and emphasizes: “A court should not attempt to evaluate the artistic significance of a particular work.”<sup>390</sup> For this reason, Justice Sotomayor also believes that it’s not a judge’s job to consult expert commentary on the meaning and value of works of art: “The Lives of the Artists undoubtedly makes for livelier reading

386. *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 41–42 (2d Cir. 2021), *aff’d*, 598 U.S. 508 (2023). For an extended discussion and critique of judges’ traditional avoidance of aesthetic judgments in copyright cases, see Aistars, *supra* note 14.

387. *Andy Warhol*, 598 U.S. at 556 (Gorsuch, J., concurring).

388. See *supra* notes 40, 70 and accompanying text.

389. *Andy Warhol*, 598 U.S. at 511.

390. *Id.* at 544. Justice Sotomayor approvingly quotes Justice Holmes’ statement from *Bleistein v. Donaldson Lithographing Co.*: “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work] . . . .” *Id.* (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)). The Second Circuit had quoted this language as well. *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 42 n.4 (2d Cir. 2021) (citing *Bleistein*, 188 U.S. at 251), *aff’d*, 598 U.S. 508 (2023); see also Dave Fagundes, *Who Is the Bad Art Judge? Aesthetic Nondiscrimination in Andy Warhol Foundation v. Goldsmith*, N.Y.U. L. REV. F. (Dec. 28, 2023), <https://www.nyulawraeview.org/forum/2023/12/who-is-the-bad-art-judge-aesthetic-nondiscrimination-in-andy-warhol-foundation-v-goldsmith/> [<https://perma.cc/Y3R2-BQW3>], which argues that the Supreme Court properly construed *Bleistein* more narrowly than the Second Circuit had, to bar judges from considering the artistic merit or quality of a work but to allow them to consider its content, including its meaning or message, as needed to apply copyright law.

than the U.S. Code or the U.S. Reports, but as a court, we do not have that luxury.”<sup>391</sup>

Justice Sotomayor explains that judges should contemplate pictorial meaning only for a limited purpose: “[T]he meaning of a secondary work, as reasonably can be perceived, should be considered to the extent necessary to determine whether the purpose of the use is distinct from the original, for instance, because the use comments on, criticizes, or provides otherwise unavailable information about the original.”<sup>392</sup> This is an “objective inquiry” that judges are capable of undertaking.<sup>393</sup> Beyond this, judges applying the first fair use factor needn’t engage with pictorial meaning.

Justice Kagan’s dissenting opinion reflects a different conception of the judicial confrontation with pictures, at least in fair use cases. If the determination of whether the secondary use is “transformative” in the sense of “altering the first [use] with new expression, meaning, or message”<sup>394</sup> is critical to the application of that factor, then it’s necessary to look at and think about the pictures carefully, drawing on expert commentary as needed, to uncover any meanings beyond the purely denotative.

Let me quote again a key sentence: “There is precious little evidence in today’s opinion that the majority has actually looked at these images, much less that it has engaged with expert views of their aesthetics and meaning.”<sup>395</sup> The first part of this statement may express Justice Kagan’s frustration that although Justice Sotomayor did, obviously, look at Goldsmith’s photo and Warhol’s *Orange Prince* “side-by-side,”<sup>396</sup> she didn’t *really look* because her comparison was, to Justice Kagan’s mind, so superficial and blinkered.<sup>397</sup> Even more important is the second part of the sentence. Justice Kagan recognizes that precisely because judges are unlikely to feel qualified to grapple with the meanings of artworks and make the sort of aesthetic judgments required to determine

391. *Andy Warhol*, 598 U.S. at 549.

392. *Id.* at 544–45 (citation omitted).

393. *Id.* at 545 (“Whether the purpose and character of a use weighs in favor of fair use is, instead, an objective inquiry into what use was made, *i.e.*, what the user does with the original work.”).

394. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

395. *Andy Warhol*, 598 U.S. at 574 (Kagan, J., dissenting).

396. Brief for Respondents at 18, *Andy Warhol*, 598 U.S. 508 (No. 21-869); *see also supra* note 171 and accompanying text.

397. *Andy Warhol*, 598 U.S. at 574 (Kagan, J., dissenting) (“Apparently, Warhol made only ‘modest alterations.’ Anyone, the majority suggests, could have ‘crop[ped], flatten[ed], trace[d], and color[ed] the photo’ as Warhol did. True, Warhol portrayed Prince ‘somewhat differently.’ But the ‘degree of difference’ is too small: It consists merely in applying Warhol’s ‘characteristic style’—an aesthetic gloss, if you will—to bring out a particular meaning’ that was already ‘available in [Goldsmith’s] photograph.’” (alteration in original) (citations omitted)).

whether or not a work is truly transformative, they should draw on available expertise.<sup>398</sup> As we have seen, she herself does so throughout her opinion.<sup>399</sup>

This understanding of the judicial role is entirely consistent with the law's approach in other domains in which the judgments to be made may initially lie, as Justice Gorsuch shrugs, "beyond our competence" as judges.<sup>400</sup> When scientific or other expert testimony "will help the trier of fact to understand the evidence or to determine a fact in issue," the Federal Rules of Evidence allow the court to consider that testimony as long as the trial judge determines that it is sufficiently reliable.<sup>401</sup> Trial judges must learn enough about subject matter outside the law to perform their "gatekeeping" function properly and, where appropriate, to decide themselves that reliable expertise admits of only one reasonable conclusion about the pertinent facts.<sup>402</sup> And while appellate judges review those decisions deferentially,<sup>403</sup> they, too, can and should draw freely on relevant and reliable expertise—here, "expert views of [the] aesthetics and meaning" of pictures.<sup>404</sup> *AWF*—a case in its essence about picturing—provided an exemplary opportunity for the informed judicial engagement with pictorial meaning. Justice Kagan's dissent, whatever its other strengths or weaknesses, comes closer to that sort of engagement than do either the majority or concurring opinions.

Although the Justices' opposing views of the relevant doctrine may motivate the differing notions of pictorial meaning they express (or imply) in *AWF*, the converse may also be true: their differing approaches to pictures in general may be at least partly responsible for driving their contrasting positions on the law of the first fair use factor and its application. This could be so for at least two reasons.

First, as already noted, copyright law seeks to foster the production of useful works by incentivizing both the creator of the first work, by giving her for a limited period the exclusive right to use her work and derivative works,

398. Note that expert insights into the meaning of artworks need not depend on the artists' subjective intentions, nor need they be problematically subjective in themselves, as Justices Sotomayor and Gorsuch believe. The sorts of generalizations about the art-historical significance of Warhol's major works of the 1960s that I briefly sketched earlier, see *supra* notes 187–88 and accompanying text, for instance, reflecting a rough consensus of many knowledgeable art historians, art critics, and cultural-studies scholars, would be just as accurate (or not) regardless of whether Warhol himself intended his works to achieve those and only those effects. And like many other matters of scholarly judgment in the humanities and human sciences, they are subject to correction and revision, as purely subjective judgments often are not.

399. See *supra* notes 306, 318–21, 325 and accompanying text.

400. *Andy Warhol*, 598 U.S. at 556 (Gorsuch, J., concurring); see also Fagundes, *supra* note 390 (criticizing the majority's (and concurrence's) abjuring of competence to assess the meaning of artworks: "The idea that judges are distinctively bad at analyzing creative work represents an exceptionalism that is not only false but harmful" because it would disable judges from performing necessary aspects of copyright analysis, including copyrightability, substantial similarity, and fair use.).

401. FED. R. EVID. 702.

402. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596–97 (1993).

403. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997).

404. *Andy Warhol*, 598 U.S. at 574 (Kagan, J., dissenting).

and the creators of subsequent works who make fair use of the earlier copyrighted work.<sup>405</sup> The law strives to balance their competing interests. A judge's understanding of the nature of pictorial meaning could well affect how the judge strikes that balance. Someone who, like Justice Sotomayor, sees in pictures largely or only what they denote may be more inclined to protect the party who depicted the "same thing" first.<sup>406</sup> Someone who, like Justice Kagan, appreciates how much more to pictorial meaning there is than denotation might well be more inclined to protect the later creator of new meaning.<sup>407</sup>

Second, although the Supreme Court did not address the substantial-similarity analysis that ought to precede the discussion of fair use,<sup>408</sup> that analysis appears vestigially in the visual comparison in both the majority and dissenting opinions of *Orange Prince* to the Goldsmith photo. Justice Sotomayor concludes that the secondary *use* was substantially the same as the first partly because, when she compares *Orange Prince* to the Goldsmith photo, she sees two very similar images of the same thing: portraits of Prince.<sup>409</sup> That is, her naïve realism supports and may even have helped drive her understanding of the doctrine. Justice Kagan, in contrast, reasons that the transformative potential of new works is critical to the first fair use factor in part because she looks at and thinks about pictures differently.<sup>410</sup> Her less naïve stance toward pictorial meaning drives her assessment that *Orange Prince* and the Goldsmith photo are significantly, substantially different.

About a dozen years ago, legal scholar Rebecca Tushnet incisively analyzed copyright law's problem with pictures:

Copyright oscillates between two positions on nontextual creative works such as images: they are either transparent, or they are opaque. When courts treat images as transparent, they deny that interpretation is necessary, claiming that images merely replicate reality, so that the meaning of an image is so obvious that it admits of no serious debate. When they treat images as opaque, they deny that interpretation is possible, because images are so far from being

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405. See *supra* note 14 and accompanying text.

406. *Andy Warhol*, 598 U.S. at 535.

407. See *supra* text accompanying note 189 (comparing Justice Kagan's selection and arrangement of pictures to Justice Sotomayor's). It also seems plausible that Justice Kagan's willingness to engage with art, especially fine art—recall her appending photos of the Pissarro painting in *Cassirer*—may have inspired her more-informed attitude toward pictures and inclined her to interpret fair use doctrine in a way that was more accommodating to later appropriating artists. See *Cassirer v. Thyssen-Bornemisza Collection Found.*, 596 U.S. 107 (2022).

408. The Court did not address it because the Foundation did not challenge the Second Circuit's finding that the works were substantially similar. See *supra* note 100 and accompanying text. Oddly, the district court had not mentioned substantial similarity either. See *id.* On the importance of the substantial-similarity determination for a complete analysis of fair use in cases involving artworks, see Aistars, *supra* note 14.

409. *Andy Warhol*, 598 U.S. at 535.

410. *Id.* at 571–72 (Kagan, J., dissenting).

susceptible to discussion and analysis using words that there is no point in trying.<sup>411</sup>

Professor Tushnet went on to explain how this contradictory conception of pictures has led to doctrinal incoherence of various kinds.<sup>412</sup> Her main focus was on the protectability of visual works and the substantial-similarity test for gauging infringement,<sup>413</sup> but the problem she identifies is also relevant to the analysis of the first fair use factor, the issue in *AWF*. Her formulation of the problem gives us another way to think about Justice Sotomayor’s (and Justice Gorsuch’s) approach to pictures. Justice Sotomayor treats the Goldsmith photo and the Warhol print as transparent, both merely pictures of Prince; at the same time, Justices Sotomayor and Gorsuch treat these pictures as sufficiently opaque that judges cannot and should not attempt to figure out their meanings or messages.<sup>414</sup> Justice Kagan’s less naïve understanding of pictorial meaning directs her toward a more capacious view of the first fair use factor, or at any rate, one that enables pictorial meaning to be taken more seriously.

### C. *What Both Opinions Miss: Taking Transformative Use Seriously*

Even Justice Kagan’s opinion, however, misses an important dimension of pictorial meaning. The pictures at which the Justices were looking as they pondered the case and the pictures we see in their opinions are obviously not the original pictures. Those originals vary widely in materials, size, and media— analog photos, silkscreen prints, magazine covers, digital images.<sup>415</sup> In the

411. Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 686–87 (2012).

412. *Id.* at 687.

413. *Id.* at 688.

414. Tushnet also anticipates what I said above about Justice Kagan’s conception of the judicial role regarding pictures:

It’s often said that we don’t want our judges to be literary critics. But we do want them to be economists, engineers, risk managers, and so on. It’s no more unreasonable to ask them to learn some art theory to resolve a case in which that theory provides useful analytical tools than it is to ask them to learn some economics to resolve an antitrust case.

Tushnet, *supra* note 411, at 758.

415. The original Goldsmith photo: original print, licensed to *Vanity Fair* “for possible use as an artist reference” appears as an eleven-inch-wide by fourteen-inch-tall photo. Joint Appendix – Volume I, *supra* note 193 at JA-146. The sizes of the black-and-white photo as it appeared in various briefs submitted to the Supreme Court may have varied, but as best as I can tell, for instance, the image in Goldsmith’s brief is about three-and-a-quarter-inches tall and two-and-one-eighths-of-an-inch wide—considerably smaller. If the Justices read any briefs online, the size of the picture would have depended on the size of the screen on which the Justices were reading the briefs (if they were reading them on screens?) and on whether they zoomed in or out. The pictures in the opinions would also vary in size depending on whether the opinions are being read in PDF or on Westlaw or on LEXIS.

The original print of *Orange Prince* is twenty inches by sixteen inches. On the cover of the Condé Nast special issue, it appears as 10.88 inches tall by 8.38 inches wide, with a 0.23-inch depth. *Orange Prince* appeared as a picture about three-and-seven-eighths-of-an-inch tall and about three inches wide in the

record and the amici curiae briefs, and now in the opinions, these pictures are all largely homogenized. *Orange Prince* as it appeared on the cover of the Condé Nast special issue becomes just another digital image on the screen, possibly not much larger than a thumbnail. The Justices appear to presume and invite us to presume that nothing significant has changed in the reproduction process: not in the conversion of analog originals to reproductions on analog magazine covers to digital images, not in the changes in file formats, and not in the resizing and relocations of the pictures into their places in the opinions, to be read on laptops, iPads, or even smartphones.

But something has been lost. The majority's emphasis in its analysis of the first fair use factor on "the specific 'use' of a copyrighted work that is alleged to be 'an infringement'"<sup>416</sup> encourages us to specify how the secondary work was *used*. Yet, the Justices weren't looking at *Orange Prince* as the intended consumers of the secondary use did: as an image on the cover of an analog magazine. The Justices were not considering it as a material object. Moreover, they did not assess that material object in its cultural context.<sup>417</sup>

The specific context of the secondary work shapes its "expression, meaning, or message," which under *Campbell* (which the majority purports to follow) ought to be critical to the first fair use factor: the purpose and character of the secondary use.<sup>418</sup> The specific use of *Orange Prince* at issue wasn't merely a depiction of Prince in a magazine story about Prince. Warhol's work was used on the cover of a hard-copy commemorative magazine issue, a collectors' edition honoring a late celebrity. Those particulars make a difference to the meaning of the image and hence the character, if not also the purpose, of the secondary use.

Thus, Justice Kagan, like Justice Sotomayor, neglects two aspects of *Orange Prince* in context. The first aspect has to do with the materiality of the picture. Justice Kagan assumes that there's no significant difference between looking at

Foundation's Complaint. Joint Appendix – Volume I, *supra* note 193 at JA-77. *Orange Prince* appeared as a picture about two-and-three-eighths-of-an-inch tall and two inches wide in Goldsmith's Answer. Joint Appendix – Volume I, *supra* note 193 at JA-106. The same observations as above apply to the varying picture sizes in briefs and opinions online.

Despite the uncertainties and approximations in the above measurements, it seems a fair generalization to say that the pictures the Justices saw were both smaller and more similar to each other in size than the originals were, and the pictures reproduced in the opinions are, if anything, as small or smaller and at least as similar in size.

416. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 533 (2023) (quoting § 17 U.S.C. § 107).

417. To be fair, neither did the parties or any of the amici.

418. *See* Brief for Robert Rauschenberg Foundation et al. as Amici Curiae Supporting Petitioner, *Andy Warhol*, 598 U.S. 508 (No. 21-869). On the importance of context in understanding photographs, see Allan Sekula, *On the Invention of Photographic Meaning*, in *PHOTOGRAPHY AGAINST THE GRAIN* 3, 4 (2016) ("[T]he meaning of any photographic message is necessarily context determined[.]" (emphasis added)); *id.* at 7 ("[T]he photograph, as it stands alone, presents merely the possibility of meaning. Only by its embeddedness in a concrete discourse situation can the photograph yield a clear semantic outcome. Any given photograph is conceivably open to appropriation by a range of 'texts,' each new discourse situation generating its own set of messages.").

small, digital images in a brief or draft opinion and looking at and holding the pictures as they appeared in the analog magazines in which they originally appeared.<sup>419</sup> The second aspect has to do with the cultural context in which the image appeared. Justice Kagan imbues her looking at the Warhols with insights from art history and aesthetics, but she is still contemplating digital images abstracted from the sites where the Warhols would actually have been encountered—in the case of *Orange Prince*, on the cover of Condé Nast's *The Genius of Prince*.<sup>420</sup> Her interpretations of the meanings of Warhol's work are derived from high culture, responding to his work as art critics do. She is not concerned with the responses that buyers of the special Prince commemorative issue would have had.<sup>421</sup>

In what ways might these aspects of *Orange Prince* as it was actually used affect its expression, meaning, or message? The special Prince editions from various publishers were not composed of digital bits, and their covers were not mere packets of pixels. The magazines were discrete physical objects, intended as keepsakes, not images that would vanish with a swipe or a loss of internet connection. Even the physical acts of finding and selecting a magazine from the newsstand or supermarket display (or later ordering it online), holding it, buying it, and taking it home made the consumer's encounter with the cover and the content more intentional, more embodied, and more lasting in significance. The material object, once possessed, acquires more value for the possessor; that's

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419. As Tushnet writes:

Judicial determinations of the opacity and transparency of images, though opposed, are also linked: both the assumption that the image is the thing it represents and the conclusion that the image lacks meaning that could be analyzed are refusals to deal with the image as a separate thing, an entity with a complicated relationship to the real.

Tushnet, *supra* note 411, at 702. As explained earlier, Justice Sotomayor's opinion treats images as both transparent (that's naïve realism) and opaque (i.e., beyond judicial competence), so it makes sense that she would not properly attend to the pictures in the case (in particular to *Orange Prince* on the cover of the special Condé Nast issue) as material objects—that is, as separate things. It takes more scrutiny to see that Justice Kagan doesn't adequately do so either.

Ignoring the material nature of the thing has antecedents in copyright cases involving works of art. A notorious example is *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), discussed in Tushnet, *supra* note 411, at 721. In *Rogers*, predating *Campbell* and the Court's adoption of the concept of transformative use to construe the first fair use factor, the Second Circuit found that artist Jeff Koons infringed the copyright of photographer Art Rogers in his photograph, *Puppies*, by making a sculpture, *String of Puppies*, which copied the overall conception and many of the details of the photo. Relying on both the visual similarities between Koons's work and Rogers's photo and direct evidence that Koons sought to copy the photograph, the court ignored not only obvious visual dissimilarities (for instance, in the facial expressions of the man and the woman holding the dogs) but also the vast differences between a forty-two-inch by sixty-two-inch by thirty-seven-inch polychromed wood sculpture and a postcard-sized black-and-white photo. The opinion does not provide images of either work.

420. *Andy Warhol*, 598 U.S. at 574, 587 (Kagan, J., dissenting).

421. On popular, emotional responses to pictures throughout the history of Western culture, see DAVID FRIEDBERG, *THE POWER OF IMAGES* (1989).

the endowment effect.<sup>422</sup> Having financially invested in the magazine, the consumer becomes psychologically invested in it.<sup>423</sup>

The materiality of the magazine also alters the relationship between the cover image, the magazine contents, and the consumer. A magazine's cover image is far more than a thumbnail or a header for online content. Printed in full color on glossy paper, artfully staged and retouched, the photo of the star on the cover of a mass-market magazine is the place where the star, whose publicists need to elevate and maintain his celebrity, and the consumer, whose desire is focused on the star's persona, meet.<sup>424</sup> The cover is connected to the rest of the magazine (because glued or stapled to it) in a way that a digital image—instantly separable, reproducible, and transportable to any other device anywhere at all—is not. The cover image brands the magazine<sup>425</sup> and thereby converts paper, print, and glue into a kind of sacramental object. Many of the people who bought the magazine with a picture of Prince on the cover did so to reaffirm an emotional investment in the star,<sup>426</sup> wrapping part of their identities up with what they took to be Prince's identity, in a way that they would not do merely by seeing a small picture of Prince online. It is at this point that the picture of Prince becomes a kind of fetish object, valued not only or even primarily for its denotative content (“a portrait of Prince”) but for its *presence*, a locus of emotional identification. This sense of an almost-living presence, and hence the portrait's power to elicit an emotional response, is at its peak when the person portrayed gazes back at us,<sup>427</sup> as *Orange Prince* does.

And remember that *Orange Prince* adorned the cover of not just an ordinary magazine issue but one of the special issues publishers put out to commemorate Prince's life and work. These hard-copy magazines were collectors' items meant to be kept.<sup>428</sup> Prince fans bought them as a way of maintaining their

422. Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990).

423. *Id.* at 1342.

424. See MEHITA IQANI, CONSUMER CULTURE AND THE MEDIA 88 (2012) (“[O]n a material level, there is a direct relationship between the glossiness of the paper used in magazine cover printing and the representation of celebrities in the mediated world. There is a direct connection between the concept of fame and appearance on and in magazines: ‘popular, mass-circulation magazines . . . largely devoted to glossy photo-journalism’ are a primary site for elevation to celebrity status.” (citation omitted)).

425. The most important location in the magazine for advertising purposes is the cover.

The magazine cover is the beachfront mansion, the penthouse condo, the thousand-acre western ranch: It is the most valuable piece of real estate for any magazine. Like no other medium, magazines rely on this singular page to do two crucial things: one, send a message about the personality and voice of the magazine and two, sell issues.

Ted Spiker, *The Magazine Cover: The Craft of Identity and Impact*, in THE ROUTLEDGE HANDBOOK OF MAGAZINE RESEARCH 377, 377 (David Abramson & Marcia R. Prior-Miller eds., 2015).

426. See generally FREEDBERG *supra* note 421.

427. FREEDBERG, *supra* note 421, at 51–52, 84–87.

428. Consider the words on the four magazine covers Justice Sotomayor displays in her Figure 5 (clockwise from upper left): *People*: “Celebrating Prince,” and in smaller font, “105-Page Tribute,” at top right, in the form of a sticker, “Special Collector’s Edition”; *Rolling Stone*: above the masthead, “Special Collector’s



psychological connection with him and his music after his death.<sup>429</sup> And for collectors of Prince memorabilia, “the cover is everything”: they seek out magazine issues with covers featuring pictures of Prince that are unlike what they’ve seen elsewhere.<sup>430</sup>

The idea that the first fair use factor, the “purpose and character” of the secondary use, should be informed by the meanings of the picture to its intended users had more traction before *AWF*. Earlier decisions sometimes employed a “reader-response” approach to determining whether the meaning and hence the use of a copyrighted work was transformative.<sup>431</sup> This need not have been an entirely subjective inquiry. Rather, courts would try to ascertain what an “ideal reader”—the intended audience for the work—would understand from it.<sup>432</sup> The intended audience for the specific use of *Orange Prince* at issue in *AWF* included Prince fans and collectors of Prince memorabilia for whom wrapping the keepsake in a Warhol may well have meant something different than covering it with a photographic image.<sup>433</sup>

Edition”; *Time*: under the masthead, “Commemorative Edition,” and in smaller font, “Exclusive tributes by” various listed artists; Condé Nast: upper left, “Special Commemorative Edition.” *Andy Warhol*, 598 U.S. at 521.

429. On some of the psychological and sociological complexities of fandom, see, e.g., *THE ADORING AUDIENCE: FAN CULTURE AND POPULAR MEDIA* (Lisa Lewis ed., 1992). Specifically on images of rock stars (including Prince) in magazines and posters as objects of sexual attraction, see Cheryl Cline, *Essays from Bitch: The Women’s Rock Newsletter with Bite*, in *THE ADORING AUDIENCE: FAN CULTURE AND POPULAR MEDIA* 69, 69–76 (Lisa Lewis ed., 1992); see also Vox, *supra* note 339 (using *Purple Prince* as illustration and concluding with ruminations about Prince and sexual fantasy).

430. Telephone Interview with Eric Rogers, Operator of “The Paisley 5 & Dime,” the largest Prince-memorabilia collectors’ site (Aug. 18, 2023) (notes on file with author). To view “The Paisley 5 & Dime,” see *The Paisley 5 & Dime*, FACEBOOK, <https://www.facebook.com/people/The-Paisley-5-Dime/100057603932557/> [<https://perma.cc/Q299-Q7UK>].

431. See, e.g., Madelyn Chen, *An Intentionalist Proposal to Reform the Transformative Use Doctrine*, 30 J. INTELL. PROP. 55, 86–89 (2022) (preferring the intentionalist to the reader-response or other frameworks for interpreting transformative use); Robert Kirk Walker & Ben Depoorter, *Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard*, 109 NW. U. L. REV. 343, 356–57 (2015) (surveying the same three approaches and arguing for a “community of practice” framework).

432. Chen, *supra* note 431, at 86–87. This quasi-objective inquiry seems not dissimilar from the one courts used to conduct when determining, say, whether a “reasonable observer” perceived government action to constitute an endorsement of religion, see, e.g., *Lynch v. Donnelly*, 465 U.S. 668 (1984), or whether a “reasonable woman” would perceive a hostile work environment, see *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991). For a critique of this approach to questions of artistic meaning and transformative use, see Walker & Depoorter, *supra* note 431, at 356–57.

433. I am not claiming that consumers bought the 2016 Condé Nast issue instead of one of the other commemorative issues because of the Warhol portrait on the cover. Anecdotal information does not support that claim. On the contrary, it appears that many fans and especially collectors who bought the Condé Nast issue also bought others. “There are . . . thousands [of] Prince [c]ollectors in the world and they will purchase ANY/EVERY publication that Prince is on the cover as the main image.” Email from Eric Rogers, Operator of “The Paisley 5 & Dime,” the largest Prince-memorabilia collectors’ site (Aug. 14, 2023) (on file with author); see also *Whats Your Favorite Tribute Magazine Thus Far*, PRINCE.ORG (June 13, 2016, 12:50 PM) <https://prince.org/msg/7/427748> [[perma.cc/LEW5-Q6AX](https://perma.cc/LEW5-Q6AX)] (Prince fans’ discussion board with comments indicating that participants bought multiple commemorative issues). Maybe some Prince fans disliked the branding of their special collector’s edition with Warhol’s portrayal of a “mask-like simulacrum of [Prince’s] actual existence” Joint Appendix – Volume I, *supra* note 193, at JA-249 (as one Warhol expert in the record

The *AWF* majority's interpretation of the "purpose" of the secondary use appears to exclude this understanding.<sup>434</sup> But it ought to have mattered to Justice Kagan. While the commercial purpose of the secondary use in this case may have been broadly similar to Goldsmith's (making money from licensing an image of Prince to illustrate a magazine story about Prince), the first fair use factor also includes the "character" of the use.<sup>435</sup> And the character of the secondary use of *Orange Prince* is arguably entirely different, considering the personal and emotional relationship that many buyers of the Condé Nast commemorative issue are likely to have had with the image of Prince on its cover, as well as the meanings the magazine publisher intended to convey by choosing Warhol's portrait of Prince for prospective purchasers to see, buy, and keep. Justice Kagan, of course, understands this. She makes the point emphatically with her "thought experiment" inviting readers to imagine themselves as the editor of *Vanity Fair* or Condé Nast, deciding what picture to use.<sup>436</sup> Yet, her argument that Warhol's *Orange Prince* so "alter[s] the [original] with new expression, meaning, or message"<sup>437</sup> as to be transformative would have been strengthened by considering *Orange Prince* as the material object its intended users experienced.

## CONCLUSION

A decade ago, surveying the increasing use of visual advocacy in briefs and judicial opinions, legal scholar Elizabeth Porter warned of the risk that these images "will vitiate legal discourse by sacrificing depth for flash. . . ."<sup>438</sup> Whatever this risk may be at the trial-court level, the opinions in *AWF* do not present it. Both Justice Sotomayor's and Justice Kagan's opinions feature plenty

put it); maybe others appreciated the appropriateness of using a Warhol print to depict a musical artist who was "in effect, a set of shifting signifiers. . . ." Jack Hamilton, *"Baby I'm a Star": Prince, Purple Rain, and the Audiovisual Remaking of the Black Rock Star*, 14 BLACK CAMERA 77, 84 (2022) (quoting Prince scholars Stan Hawkins and Sarah Niblock). My argument is merely that the differences between a special issue with the Warhol's portrait of Prince on the cover and other publishers' special issues with other pictures of Prince on their covers might be meaningful to Prince fans and other buyers in ways that the side-by-side comparison of small digital images of the cover pictures as they appear in judicial opinions, divorced from their original context, fails to capture.

434. "A court should not attempt to evaluate the artistic significance of a particular work. . . . Nor does the subjective intent of the user (or the subjective interpretation of a court) determine the purpose of the use." *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 544 (2023).

435. As, of course, Justice Kagan recognized. *See id.* at 577 (Kagan, J., dissenting). The majority, unsurprisingly, had a different notion of the "character" component of the first factor. *See id.* at 538 n. 14. For a brief discussion of whether "character" really means anything distinct from "purpose," see Patry, *supra* note 14, at 637–39.

436. *Andy Warhol*, 598 U.S. at 566–67.

437. *Id.* at 559 (Kagan, J., dissenting) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

438. Porter, *supra* note 45, at 1694. On ethical issues raised by the increasing use of images in briefs, at trial, and elsewhere in law practice, see Michael D. Murray, *The Ethics of Visual Legal Rhetoric*, 13 LEGAL COMMUN & RHETORIC: JAWILD 107 (2016).

of conventional legal discourse. I leave it to others to evaluate the cogency of their doctrinal analyses, but neither opinion appears to be more superficially reasoned than are other opinions that they or other Justices have authored in cases without pictures. Our digital-visual culture may well be fostering fragmentation and superficiality of thought in general,<sup>439</sup> but the use of pictures by the Supreme Court and appellate courts generally is not and is not likely to be beset by these problems.

Visual advocacy in appellate courts is altering legal discourse, not undermining it. Judges are putting more images in more opinions, and more lawyers are heeding Judge Posner's advice: "Wherever possible, use pictures . . . and other visual aids, in your brief[s]."<sup>440</sup> The parties and many amici in *AWF* did so, and the persuasiveness of their efforts is indicated by the Justices' adoption of some of those images in their opinions: Justice Sotomayor derived her crucial figure juxtaposing the Goldsmith photo with the photoshopped image of *Orange Prince* mapped onto Prince's head from Goldsmith's initial pleading;<sup>441</sup> Justice Kagan, as noted, adapted from an amicus brief her sequence of paintings meant to show the art-historical pedigree of appropriation.<sup>442</sup>

The striking displays of pictures in *AWF* thus comprise a form of legal rhetoric that is becoming increasingly common. The integration of those pictures into the text of the majority and dissenting opinions both enriches and complicates the Justices' narratives and arguments. Analyzing these opinions enables us to appreciate how, in an ever more pervasively visual culture, lawyers and judges—and not just in copyright cases—need to be as thoughtful as possible about all that pictures and words can do when they are brought together on the page or the screen.

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439. Porter, *supra* note 45, at 1769–70.

440. Posner, *supra* note 48, at 38.

441. Defendants' Amended Answer and Amended Counterclaim at 15, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312 (S.D.N.Y. 2019) (No. 1:17-cv-02532).

442. *Andy Warhol*, 598 U.S. at 587 (Kagan, J., dissenting) (citing Brief for Robert Rauschenberg Foundation et al. as Amici Curiae Supporting Petitioner, *supra* note 358).