

No. 23-01081

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HERMÈS INTERNATIONAL AND HERMÈS OF PARIS, INC.,
Plaintiffs-Appellees,

v.

MASON ROTHSCHILD,
Defendant-Appellant.

*On Appeal from the United States District Court
for the Southern District of New York*

BRIEF OF *AMICI CURIAE* MSCHF, CTHDRL, ALFRED STEINER, JACK BUTCHER, AND AUTHORS ALLIANCE IN SUPPORT OF DEFENDANT-APPELLANT MASON ROTHSCHILD AND REVERSAL

Dated: November 13, 2023

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* MSCHF, CTHDRL, Alfred Steiner, Jack Butcher, and Authors Alliance state that they have no parent corporations. They have no stock, and therefore, no publicly held company owns 10% or more of their stock.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are individual artists, creators, and arts and cultural organizations that represent the interests of creators, including visual artists and authors. They have a strong interest in ensuring that the law reflects the balance between creators' First Amendment rights—including their rights to engage in cultural commentary and criticism—and the rights of trademark owners to protect their marks and brands.^{1, 2}

Amicus **MSCHF** (pronounced “mischief”) is an art collective that engages art, fashion, tech, and capitalism. The collective subverts mass/popular culture and corporate operations as tools for critique and intervention. The renowned Perrotin Art Gallery described MSCHF’s work as “elaborate interventions [that] expose and leverage the absurdity of our cultural, political, and monetary systems.” *MSCHF*, PERROTIN (last visited Nov. 6, 2023), <https://www.perrotin.com/artists/mschf/1181#news>. MSCHF, as a practice and as an entity, manifests the ambition for creative work/entities to wield real tangible

¹ Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* certify that no party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

Amicus CTHDRL has worked in the past with Rothschild’s company Terminal 27.

² Pursuant to Fed. R. App. P. 29(a)(2), *amici curiae* certify that counsel for defendant-appellant Mason Rothschild and counsel for plaintiffs-appellees Hermès have consented to the filing of this brief.

power (in culture; on the world stage; and as measured against the cultural power held by world-straddling companies, celebrities, and media entities).

Amicus **CTHDRL** is a digital design and experience studio located in New York and Los Angeles that uses technology to shape culture. They cultivate ideas at the edge of technology to build the next generation of internet-native consumer brands.

Amicus **ALFRED STEINER** is an artist living and working in New York who often creates works that pose novel aesthetic and legal questions. For instance, in 2016, Mr. Steiner created a parody of a Louis Vuitton boutique, complete with merchandise emblazoned with sloppily hand-drawn versions of the firm's Monogram pattern, to illuminate how Louis Vuitton burnishes its reputation through artist collaborations while it abuses trademark litigation to silence other artists. C. Munro, *These 5 Inspired Installations Make Spring/Break Art Show Unforgettable*, ARTNET NEWS, (Mar. 1, 2016),

<https://news.artnet.com/market/spring-break-art-show-2016-438809>

Amicus **JACK BUTCHER** leads internet-native art practice, Visualize Value—a platform that publishes art exploring the intersection of technology, and culture. Visualize Value exists to challenge convention and provide a unique perspective on the contemporary world. Visualize Value's signature aesthetic

employs hyper-minimalism to distill complex ideas into concise and impactful images.

Amicus **AUTHORS ALLIANCE** is a 501(c)(3) non-profit organization with over 2,300 members. Its mission is to advance the interests of authors who want to serve the public good by sharing their creations broadly. They create resources to help authors understand and enjoy their rights and promote policies that make knowledge and culture available and discoverable.

SUMMARY OF ARGUMENT

This case concerns the fundamental tension between the First Amendment right to free speech and the inherent speech-restrictive body of law that governs trademark and trademark protection. Plaintiffs-appellees Hermès International and Hermès of Paris, Inc. (collectively, “Hermès”) sued defendant-appellant Mason Rothschild for trademark infringement in connection with his “MetaBirkins” series of digital images. In response, appellant responded by asserting his freedom to comment on society, consumerism, and luxury goods.

The Court should take this opportunity to clarify the vital position that its three-decade old decision in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989) plays in protecting creativity and balancing the interests of trademark owners and those who engage with trademarks and trademarked goods or services through art. The *Rogers* test—which established First Amendment exit ramps for trademark

infringement analysis—is critical to ensuring the existence of a thriving artistic society. Cultural commentary and critique are vital to a free society, and the *Rogers* test provides a reliable way to protect these interests. The Court should clarify that *Rogers* remains good law after the United States Supreme Court’s recent decision in *Jack Daniel’s* and that an artist’s intent to sell or otherwise commercialize their art—including art that engages with or references trademarks—is not relevant when balancing trademark owners’ and artists’ rights. *Jack Daniel’s Props. v. VIP Prods. LLC*, 599 U.S. 140 (2023).

ARGUMENT

I. This Court should recognize that cultural commentary and critique are vital components of discourse in a free society.

A. Cultural commentary includes critique of companies and their brands.

Throughout human history, people have been creating and exchanging goods and commodities. Society’s continuous organization around consumption has resulted in a world in which advertisements and products have become an integral part of individuals’ identities. Indeed, people often communicate their identities using symbols—i.e., brand names, logos, and trademarks—that they find around them. By its nature, “[f]reedom of speech is appropriative because it draws on existing cultural resources In a democratic culture people are free to appropriate elements of culture that lay to hand, criticize them, build upon them,

and create something new.” Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 4-5 (2004).

Just as creators borrow from brands to communicate, companies borrow from creators to develop iconic trademarks and add their own sales pitches to leverage meaningful symbols and icons. See Sonia K. Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489, 522 (2006).³ Take Barbara Kruger’s 1987 *I shop therefore I am*, which uses a red box with white text in Futura Bold Oblique font to express her criticism of consumer culture.



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³ *Amicus* MSCHF emphasized and underscored this line of argument in an *amicus* brief that it filed in *Jack Daniel’s Properties, Inc. v. VIP Products LLC*, 599 U.S. 140, 156 (2023).

⁴ Barbara Kruger, *I shop therefore I am*, THE MUSEUM OF MODERN ART (last visited Nov. 9, 2023), <https://www.moma.org/collection/works/64897>.

In 1994, the streetwear and skateboard company Supreme gave its designer a portfolio of Kruger's work to help develop a logo. Nick Matthies, *The Supreme Logo and Barbara Kruger: A History*, STOCKX THE MAGAZINE (Jan. 25, 2019), <http://bit.ly/3IKIOIK>. The resulting, now renowned, logo inverts Kruger's message while borrowing her aesthetic to suggest that Supreme is a rebellious brand "outside fashion." Anonymous J.D. Esq., *Whose Claim Reigns Supreme?* 4 MSCHF MAG 21 (2021).



Similarly, Starbucks borrowed its name from First Mate Mister Starbuck in the novel *Moby Dick*, and the mermaid on the company's iconic coffee cup is Melusine (a mythical siren of medieval Europe). See Ronald Holden, *Mermaid, Siren, Princess: How the Starbucks Logo Evolved*, FORBES (Mar. 4, 2017), <http://bit.ly/3I2n108>; Angelica Calabrese, *The Siren on Your Starbucks Cup Was Born in 7th-Century Italy*, ATLAS OBSCURA (Nov. 10, 2015), <http://bit.ly/3xwGxNO>. While Starbucks references literary and medieval symbols to amplify its own trademark's expressive function, the iconic logo now carries its own independent expressive value. Others may, in turn, use that value to comment

⁵ *Supreme*, SUPREME.COM (last visited Nov. 9, 2023).

upon and critique Starbucks. For instance, variations of the Starbucks logo are used by labor groups to critique Starbucks' own practices:



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As negative consequences of consumerism become clearer, the importance of using branding to criticize the dominant culture and depict everyday life becomes more apparent. As the Ninth Circuit recognized, “[t]rademarks often fill in gaps in our vocabulary and add a contemporary flavor to our expressions.” *Mattel, Inc. v. MCA Records*, 296 F.3d 894, 900 (9th Cir. 2002). The First Amendment must protect the public’s right to use trademarks to comment on and critique the companies that own them and consumerist culture more broadly.

⁶ Starbucks, STARBUCKS.COM, (last visited Nov. 6, 2023) <https://creative.starbucks.com/logos/>.

⁷ Starbucks Workers United, SBWORKERSUNITED.ORG, (last visited Oct. 29, 2023) <https://sbworkersunited.org/>.

⁸ *Starbucks Workers Labor Union Solidarity Brewing Sticker*, REDBUBBLE.COM, (last visited Oct. 29, 2023) <https://www.redbubble.com/i/sticker/starbucks-workers-labor-union-solidarity-brewing-by-StinkPad/95943142.EJUG5>.

Similar to Supreme's and Starbucks' borrowings from art and literature, Hermès took the name of its Birkin bag from British actress and singer Jane Birkin, who—as the bag's inspiration—was often photographed toting a straw basket stuffed with keys, makeup, and assorted paraphernalia. Guy Trebay, *Jane Birkin: Decades of Effortless Elegance*, NEW YORK TIMES (Jul. 16, 2023), <https://www.nytimes.com/2023/07/16/style/jane-birkin-birkin-bag-style-icon.html>. As Hermès used Jane Birkin's name to amplify its own brand's expressive function, Rothschild seeks to do the same as he references the status of a luxury Hermès handbag in his artwork to comment on and critique Hermès's brand and mark.

Artists' use of familiar imagery to both question consumerism and mirror everyday life is not a new phenomenon. Édouard Manet's 1882 painting, *A Bar at the Folies-Bergère*, depicts Bass Ale bottles with their logos prominently displayed on the labels.



Pablo Picasso's 1913 work *Pipe, Glass, Bottle of Vieux Marc*, includes a handwritten label for Vieux Marc, a prized French brandy, to take aim at the Futurist obsession with youth and speed.



⁹ Édouard Manet, *A Bar at the Folies-Bergere* (illustration), THE COURTAULD (1882).

¹⁰ Pablo Picasso, *Illustration of Pipe, Glass, Bottle of Vieux Marc* (illustration), THE GUGGENHEIM MUSEUMS AND FOUNDATION (1913)

Richard Hamilton's 1956 collage, *Just what is it that makes yesterday's homes so different, so appealing?*, showcases a man holding a giant Tootsie pop covering a man's waist.



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Most famously, Andy Warhol's *Campbell's Soup Cans* comprises thirty-two Campbell's cans lined up in rows.



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¹¹ Richard Hamilton, *Just what was it that made yesterday's homes so different, so appealing* (illustration), THE METROPOLITAN MUSEUM OF ART (1956).

¹² Andy Warhol, *Campbell's Soup Cans*, THE MUSEUM OF MODERN ART (1962).

The Dutch painter, Vincent Van Gogh, similarly used familiar imagery to comment on dominant culture. In 1889, Van Gogh created twenty paintings inspired by the art of Jean-François Millet to comment on peasants and their work. Van Gogh wrote in his letters that he had set out to "translate them into another language." He said that it was not simply copying, stating that if a performer "plays some Beethoven he'll add his personal interpretation to it... it isn't a hard and fast rule that only the composer plays his own compositions." Letter from Vincent van Gogh, to Theo van Gogh (on or about Sept. 20, 1889), <https://www.vangoghletters.org/vg/letters/let805/letter.html#translation>.

The ubiquity of brands in everyday life requires that artists, like Rothchild, remain able to reference them in their work, whether or not they first obtain permission from trademark owners. To be more specific, in the Andy Warhol soup can example cited above, Warhol did not obtain permission from the Campbell Soup Company to feature its brand in his artwork.¹³ Despite this, Warhol's work

¹³ Of note, in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023) Justice Sotomayor writes in the majority opinion that Warhol's *Campbell's Soup Cans* series likely falls within the scope of fair use. *Andy Warhol Foundation*, 598 U.S. at 1281. While the case at hand deals with trademarks and not copyrights, it is important to note that the Supreme Court expressly valued the use of logos as a commentary on consumerism. The Court notes, "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

stands as a powerful and prominent example of an artist creating commentary on contemporary culture by referencing brands. The need for the First Amendment to protect such commentary could not be more apparent. Today, the Campbell Soup Company has a *Campbell's Soup Cans* painting hanging in its headquarters, and it produces apparel under license from The Andy Warhol Foundation for the Visual Arts. Alexandra Peers, *Why Campbell Soup Hated, then Embraced, Andy Warhol's Soup Can Paintings*, CNN (July 29, 2022), <https://www.cnn.com/2022/07/09/business/andy-warhol-campbell-soup-painting/index.html>; *Campbell Celebrates Andy Warhol and 50 Years of Pop Culture History*, CAMPBELL SOUP COMPANY (August 29, 2012), <https://www.campbellsoupcompany.com/newsroom/press-releases/campbell-celebrates-andy-warhol-and-50-years-of-pop-culture-history/>.

B. Parody, critique, and commentary, in all media, are crucial aspects of creative expression and civic discourse.

Parody, critique, and commentary—including commentary that engages with brands and marks—are crucial parts of creative expression and civic discourse. The United States Supreme Court has long held that the unpopularity of speech does not affect qualification for First Amendment protection. In *Hustler Magazine*

to be reproduced, and a symbol of an everyday item for mass consumption—that enables the commentary.” *Id.* at 1281.

Inc, v. Falwell, the court deemed parodies of public figures (in that case the televangelist Jerry Falwell) as protected under the First Amendment. *See Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). Crucial to the court’s reasoning was the importance of free expression in a healthy society; the court wrote that “[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.” *Hustler* at 51. In a product disparagement case a few years earlier, the court held that “[t]he freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.” *Bose Corp. v. Consumers Union*, 466 U. S. 485, 503-504 (1984).

The value of cultural commentary and critique transcends the bounds of specific media and clearly extends to Rothschild’s chosen medium of digital art. Indeed, placing art within a different medium does not diminish, and can in fact amplify, the social commentary evoked. After creating her 1987 *I shop therefore I am*, referenced above, Barbara Kruger placed the same phrase on a shopping bag, juxtaposing traditional conceptions of fine art with a mundane object of consumerism. Brief for MSCHF as *Amicus Curiae*, p. 43, *Jack Daniel’s Props. v. VIP Prods. LLC*, 599 U.S. 140 (2023). The *Rogers* court explicitly recognized that a wide variety of media deserve First Amendment protection: “movies, plays,

books, and songs are all indisputably works of artistic expression and deserve protection.” *Rogers*, 875 F.2d at 998. In *Campbell v. Acuff-Rose Music*, the court found that rap songs benefitted from First Amendment protection, determining that “2 Live Crew’s song comprises not only parody but also rap music.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 593 (1994). First Amendment protection has even been held to extend to digital media, such as video games in *Brown v. Entertainment Merchants Association*, which held that video games qualify for First Amendment protection as speech because they communicate ideas. *Brown v. Entm’t. Merchs. Ass’n.*, 564 U.S. 786, 790 (2011). This Court has the opportunity to go beyond paying mere lip service to the proposition that works of art deserve First Amendment protection and should clarify that scope of protection in applying the *Rogers* standard correctly to Rothschild’s works in this case.

II. Trademark infringement analysis must incorporate First Amendment exit ramps to ensure trademark interests are appropriately balanced against free expression.

A. The Second Circuit’s *Rogers* test is vitally important to protect the interests of artists and other creators whose works incorporate trademarks.

Trademark law is inherently speech-restrictive, insofar as it limits the ways in which speakers can use words or phrases. Against that backdrop, the importance of the balancing test established by the Second Circuit in *Rogers v. Grimaldi* cannot be overstated. *Rogers* established important protections—akin to highway

exit ramps—that govern those who use trademarks in the context of creative expression. The district court largely overlooked those protections, and this Court should now take the opportunity to correct that error.

The *Rogers* court made clear that the Lanham Act “should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.” *Rogers*, 875 F.2d at 999. This threshold test has been applied regularly in this Circuit. *See Champion v. Moda Operandi, Inc.*, 561 F. Supp. 3d 419, 435 (S.D.N.Y. 2021); *LMNOPI v. XYZ Films, LLC*, 449 F. Supp. 3d 86, 95 (E.D.N.Y. 2020); *Chooseco LLC v. Netflix, Inc.*, 439 F. Supp. 3d 308, 317 (D. Vt. 2020); *Louis Vuitton Mallatier S.A. v. Warner Bros. Entm’t Inc.*, 868 F. Supp. 2d 172, 178 (S.D.N.Y. 2012); *Syler v. Woodruff*, 610 F. Supp. 2d 256, 262 (S.D.N.Y. 2009). The Second Circuit has long recognized the value of the *Rogers* test and its importance as a strong mechanism to protect creative expression.

B. Failure to ensure that trademark infringement analysis adequately respects First Amendment interests will have a chilling effect on creative expression.

The balance struck by the *Rogers* court—ensuring that trademark infringement analysis respects the value of free expression—is a necessary condition for a society that values art and the free exchange of ideas. Key to the court’s analysis in *Rogers* was the fact that artists, and the public at large, have an

interest in expressing ideas without fear that unfounded, excessive, or overbroad Lanham Act claims will impede their exercise of First Amendment rights. *See Rogers*, 875 F.2d at 999 (that the interest of the filmmakers in question “in freedom of artistic expression is shared by their audience”). The *Rogers* court explained that because the film at issue qualified as a creative, expressive work—like Rothschild’s digital images—the film required more protection than a non-expressive commercial product. *Id.*

The *Rogers* court recognized that the interest in protecting creative expression is so great that it is important to do so even in cases where there is a possibility of confusion. *Id.* at 1000. (noting that “the slight risk that such use of a celebrity’s name might implicitly suggest endorsement or sponsorship to some people is outweighed by the danger of restricting artistic expression”). *Rogers* acknowledges that work involving unauthorized use of another’s mark in the title or content of an expressive work requires strong First Amendment protections. Here, as in *Rogers*, this Court must ensure that creative interests receive the full breadth of protection they merit under the First Amendment. To hold otherwise would undoubtedly chill the creative expression of artists and authors like *amici*. This Court should follow *Rogers* and ensure the interests of creatives, like *amici*, are adequately considered in the context of trademark infringement claims like those asserted by Appellee in this case.

C. The importance of Rogers is especially profound given the unpredictability of the “likelihood of confusion” test for infringement and the complexity of adjudicating trademark cases.

The importance of the concise balancing test laid out in *Rogers* is especially clear when considered against the backdrop of the unpredictable and onerous likelihood of confusion analysis that serves as the hallmark of trademark law. When conducting such analysis, courts apply the factors outlined in *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 496 (2d Cir. 1961). There, this Court outlined a test for likelihood of confusion that looks to a wide variety of factors, including:

the strength of [plaintiff’s] mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant’s good faith in adopting its own mark, the quality of defendant’s product, and the sophistication of the buyers.

Id. This list is long but far from exhaustive. *Id.* (holding that “the court may have to take still other variables into account”).

Adjudication of fact-intensive trademark can be a lengthy and expensive process, and attorneys’ fees and other expenses can quickly reach unbearable heights. Trademark claimants are often large corporations—including fashion houses, like appellee here—with significant resources to support protracted litigation. Such well-funded mark owners often conduct surveys to “prove”

likelihood of consumer confusion. These surveys can be easily manipulated by skilled parties, who often charge high fees for their services. Keegan & Donato Consulting, a New York-based consulting firm, listed \$80,000 as the typical fee for a consumer confusion survey. *See Rates & Fees*, KEEGAN & DONATO CONSULTING, LLC, (last visited Nov. 3, 2023), <https://www.keegandonato.com/#rate>.

Further, courts have warned against extensive reliance on survey data in assessing trademark infringement claims. Concurring in *Jack Daniel's*, Justice Sotomayor cautioned that, particularly in cases involving First Amendment concerns, courts should “treat the results of surveys with particular caution” and that in parody especially, “there is particular risk in giving uncritical or undue weight to surveys.” *Jack Daniel's*, 599 U.S. at 164. This Court has also found that a small ratio of confused survey respondents is enough to support a finding of likelihood of confusion. Fifteen to twenty percent is the historically accepted standard. *See RJR Foods, Inc. v. White Rock Corp.*, 603 F.2d 1058, 1061 (2d Cir. 1979) (holding that fifteen to twenty percent was enough to merit consumer confusion). These percentages are notably low, especially given that, in a perfect illustration of Justice Sotomayor’s warning, surveys have repeatedly found that seventeen to eighteen percent of Americans believe the sun revolves around the Earth. *See* Lawrence Hamilton, *Conspiracy vs. Science: A Survey of U.S. Public Beliefs*, U. OF N.H. (Apr. 25, 2022), <http:bit.ly/3I6oDGt>. Brief for MSCHF as

Amicus Curiae, p. 43, *Jack Daniel's Props. v. VIP Prods. LLC.*, 599 U.S. 140 (2023).

Scholars have noted the unpredictability of the likelihood of confusion test. The “strength of the mark” factor, for example, has been described as a flawed mechanism for determining confusion. This is due to the fact that trademarks often gain recognizability through secondary meaning, yet “the relationship between secondary meaning and likely confusion is also uncertain.” Robert G. Bone, *Taking the Confusion Out of "Likelihood of Confusion": Toward a More Sensible Approach to Trademark Infringement*, 106 NW. U. L. REV. 1307, 1344 (2015).

On the infringement defendant’s side, while the starving artist trope is perhaps a cliché, there is truth in the stereotype. As of 2013, there are approximately two and a half million Americans employed in the arts and creative industries, with the average wage hovering at \$53,859. Statista Research Department, *Average Wage in Artistic Occupations in the U.S.*, (Apr. 8, 2016), <https://www.statista.com/statistics/273486/artistic-occupation-average-salary-in-the-us>. Many artists work second jobs as a means to supplement their income. The lack of economic resources makes it impracticable for artists to defend against trademark infringement claims in court. Additionally, many artists face an enormous opportunity cost when they litigate a claim, as they may not be able to produce work during this period. William McGeeveran defines this as the “resource

imbalance,” writing that the “administrative costs of existing trademark doctrine, particularly the fact-intensive likelihood of confusion analysis, make it difficult to resolve disputes involving trademark parodies quickly and cheaply.” William McGeeveran, *The Imaginary Trademark Parody Crisis (and the Real One)*, 90 WASH. L. REV. 713, 741 (2015). This imbalance is seen in the case at hand: Hermès saw revenue in excess of eleven billion euros in 2022.

It is unreasonable to expect creators to carefully assess all of the *Polaroid* factors before creating expressive works that happen to incorporate or engage with brands and marks. Faced with the threat of trademark infringement, and unable to accurately determine whether their art will be safe from litigious and wealthy opposition, artists’ creative output will be stifled. Overly zealous trademark owners can make exorbitant demands while threatening costly litigation, creating an “environment [where] a legitimate user might well agree to a pro-plaintiff settlement, especially if the user is risk averse and less financially secure than the trademark owner.” Bone, *Taking the Confusion Out of "Likelihood of Confusion"*, at 1336 (2015). To avoid this disastrous outcome for the nation’s artists, it is critical that the Court recognize the importance of *Rogers* to protect expressive works from claims of trademark infringement.

III. The Supreme Court’s *Jack Daniel’s* decision underscores that First Amendment filters for assessing Lanham Act claims remain vital and necessary.

The importance of the *Rogers* test to the protection of First Amendment interests in the trademark context was underscored by the Supreme Court’s decision this year in *Jack Daniel’s*. *Jack Daniel’s* 599 U.S. at 156. There, whiskey manufacturer Jack Daniels’s Inc. Properties (“Jack Daniel’s”) asserted trademark claims against squeaky dog toy seller VIP Products LLC (“VIP”), which sold a “Bad Spaniels” toy that parodied the Jack Daniel’s iconic black-label whisky bottle. *Jack Daniel’s* 599 U.S. at 148. According to VIP, its goal in creating this product was to reflect on the “humanization of the dog in our lives” and to comment on “corporations [that] take themselves very seriously.” *VIP Prods. LLC v. Jack Daniel’s Props.*, 953 F.3d 1170, 1172 (9th Cir. 2020). Jack Daniel’s opposed this satire, and litigation ensued. *Id.*

The Supreme Court in *Jack Daniel’s* left the test established in *Rogers* unchanged. The Court emphasized that *Rogers* does not apply when an alleged infringer uses a trademark as a designation of source for the infringer’s own goods or, in other words, “has used a trademark as a trademark.” *Jack Daniel’s*, 599 U.S. at 151. (VIP admitted that it had used the Jack Daniel’s trademark as a source indicator. *Id.* at 162.) But the Court recognized that *Rogers* has always been understood not to apply in this context, juxtaposing the lack of protection given to

unauthorized trademark use that designates a product's source as compared to the protection given in cases in which trademarks are used for an expressive function. *Id.* at 154. In particular, the Court highlighted the longstanding status of the *Rogers* test as a doctrine, noting that “over the decades, the lower courts adopting *Rogers* have confined it to similar cases.” *Id.* at 154-55.

The *Rogers* test has become one of the dominant speech-protective doctrines that is applied when alleged trademark infringement is defended as expression protected by the First Amendment. Christine Haight Farley & Lisa P. Ramsey, *Raising the Threshold for Trademark Infringement to Protect Free Expression*, 72 AM. U. L. REV. 1225, 1246 (2023). This is evident by the fact that *Rogers* has been adopted by almost all the appellate courts that have considered it. Appellate courts in the Second, Fifth, Sixth, Ninth, and Eleventh Circuits, and federal district courts in the Third and Seventh Circuits, apply this test when trademarks are used in the titles or content of expressive works. *Rogers*, 875 F.2d at 998; *Westchester Media v. PRL USA Holdings, Inc.*, 214 F.3d 658, 664–65 (5th Cir. 2000); *ETW Corp. v. Jireh Publ'g*, 332 F.3d 915, 928 (6th Cir. 2003); *Parks v. LaFace Recs.*, 329 F.3d 437, 451–52 (6th Cir. 2003); *Moore v. Weinstein Co.*, 545 Fed.Appx. 405, 412 (6th Cir. 2013); *Mattel*, 296 F.3d at 902; *MGFB Props., Inc. v. Viacom Inc.*, 54 F.4th 670, 679–80 (11th Cir. 2022); *Univ. of Ala. Bd. of Trs. v. New Life Art, Inc.*, 683 F.3d 1266, 1278 (11th Cir. 2012). *Rogers* surely remains binding precedent in this

Circuit, including, as is the case here, when a defendant references a plaintiff's trademark in defendant's own artistic, expressive speech that does not use the plaintiff's trademark as an indicator of source. The court should apply *Rogers* and thus protect Rothschild's right to comment on and critique Hermès and its products.

IV. An artist's financial motivations are irrelevant to the Rogers test.

A. Throughout history, famous works of art have been produced for profit, and they are no less expressive for it.

The *Rogers* test does not countenance any consideration of an artist's intent in creating an expressive work to determine whether such work is entitled to heightened First Amendment protection. The district court's opinion below thus misstates the law when it suggests that a jury should consider Rothschild's intent behind creating his "MetaBirkins" digital images to determine whether his reference to "Birkins" was explicitly misleading. *Hermès Int'l v. Rothschild*, 603 F. Supp. 3d 98, 105-07 (S.D.N.Y. 2022). Opening such a door would allow courts to consider, for example, an artist's financial incentives to create a particular work. This inquiry could lead courts to classify some works of art as less deserving of First Amendment protection than others in light of their creators' needs (or desires) to make money. This position is antithetical to the history of art production and would condemn untold numbers of famous artworks—works unanimously

considered to have high artistic value—as commercial works that do not qualify for heightened protection under the First Amendment.

For hundreds of years, art was created under a patronage system. Artists such as Michelangelo, Sandro Botticelli, and Leonardo da Vinci worked with the support of wealthy benefactors like the Medici family, among others. JOHN T. PAOLETTI, MICHELANGELO'S *DAVID*: FLORENTINE HISTORY AND CIVIC IDENTITY 3-4 (2015). Individuals and families across the Italian peninsula engaged in art patronage, as did rulers of Italy's nations. MARIA DEPRANO, ART PATRONAGE, FAMILY, AND GENDER IN RENAISSANCE FLORENCE: THE TORNABUONI 1 (2018). As evidence of the importance of these commissions in art production, Michelangelo's career stalled after the death of his main benefactor, Lorenzo the Magnificent. *Id.* at 5.

Indeed, the Medici family commissioned Michaelangelo's *David*, and historians discuss Michelangelo's commission contract in very commercial terms, identifying the work Michelangelo went through to “win” the contract to make the sculpture such as relying on social connections and networks of political elites. *Id.* at 23. Michelangelo received a lucrative contract and was well compensated: he was paid 400 florins, what one art historian calls an astonishing amount and an increase from the original proposed sum of 144 florins. *Id.* at 23. In today's currency, 400 florins could equate up to \$309,200. *See* David Yoon, *How Much is*

That in Dollars?, AMERICAN NUMISMATICS SOCIETY (Oct. 25, 2002), <https://numismatics.org/pocketchange/florin/#:~:text=A%20gold%20florin%20cou>ld%20thus,to%20187%20to%20773%20dollars. Michelangelo was clearly concerned with the funding of his art, and the financial background has no relevance as to whether *David* is considered a highly expressive artistic work. Art patronage in Renaissance Italy was an economic activity meant to satisfy luxury consumption. Richard Goldthwaite, *The Empire of Things: Consumer Demand in Renaissance Italy*, in PATRONAGE, ART, AND SOCIETY IN RENAISSANCE Italy 153, 154 (F.W. Kent & Patricia Simons eds., 1987).

Nearly all artists, including modern ones such as Pablo Picasso, create artwork with the intention of making money; the goal of financial gain, however, does not make their works any less expressive. For example, in 1937, the Spanish Republican government commissioned Picasso to create a work of art for the Spanish pavilion at the 1937 World's Fair in Paris. HERSCHEL B. CHIPP, PICASSO'S *GUERNICA*: HISTORY, TRANSFORMATIONS, MEANINGS 3-4 (1988). The work Picasso created is Picasso's renowned *Guernica*. The painting depicts the aftermath of a two-hour bombing on the Basque town of Guernica and powerfully comments on the brutality and horror of the Spanish Civil War. *Id.* at 38, 43. The painting helped raise awareness about the war and funds for Spanish refugees in the U.S. Margherita Cole, *Picasso and "Guernica": Exploring the Anti-War Symbolism of*

This Famous Painting, MY MODERN MET (Dec. 31, 2021),

<https://mymodernmet.com/pablo-picasso-guernica>. It has been called one of Picasso's greatest paintings. CHIPP, PICASSO'S *GUERNICA* at vi. Yet, Picasso may have never made the painting had the Spanish government not paid him to do so. Despite the financial incentives involved in creating the work, it is treasured by art historians and the public alike—few would say that the work is not deeply expressive and highly artistic because Picasso intended to make money through its creation. The fact that Picasso profited from the painting does not diminish its highly charged message or expressive value.

Mark Rothko's *Seagram Murals* were also created after the artist received a commission. Rothko was commissioned to paint murals for the Four Seasons restaurant in New York City, a highly commercial environment. *Mark Rothko: The Seagram Murals*, TATE (last visited Oct. 14, 2023), <https://www.tate.org.uk/visit/tate-britain/display/jmw-turner/mark-rothko-seagram-murals>. Rothko painted a series of murals in reds, browns, and blacks, which he intended to express basic human emotions and create a connection with the viewer. *Id.* Rothko eventually canceled his contract with the Four Seasons and gave the murals to the Tate Museum. *Id.* However, Rothko began this project due to the financial incentive. Rothko's paintings are widely appreciated and still on display, no less stimulating because they were commissioned for profit.

Andy Warhol, one of the most popular modern artists, was highly commercial and often driven by financial interests. Warhol came to refer to much of his art as Business Art, meaning that the whole process around art production and the sale of art, namely the commercialization of art, could be considered art. Blake Gopnik, *Andy Warhol Offered to Sign Cigarettes, Food, Even Money to Make Money*, ARTNEWS (Apr. 21, 2020), <https://www.artnews.com/art-news/market/andy-warhol-business-art-blake-gopnik-biography-excerpt-1202684403>. In fact, Warhol usually billed his society portraits as a purely financial venture, famously remarking: “Being good in business is the most fascinating kind of art. Making money is art and working is art and good business is the best art.” *Id.* Many of Warhol’s works were made primarily for commercial purposes, yet they still are considered works of art. *Id.* In a documentary about the artist, Warhol stated: “I’m a commercial person. I’ve got a lot of mouths to feed. I’ve gotta bring home the bacon.” *Id.* Warhol was open about his love for money, and profit was clearly on the forefront of Warhol’s mind. *What Was Andy Warhol Thinking?*, TATE (last visited Oct. 14, 2023), <https://www.tate.org.uk/art/artists/andy-warhol-2121/what-was-andy-warhol-thinking>. But this makes him no less of an artist, and his works, like Rothschild’s, are no less valuable and no less expressive because the artist intended to sell them.

Warhol was also known to use trademarks as part of his art, as he did in his *Campbell's Soup Cans*. Just as Rothschild created his digital images to scrutinize the fashion industry, Warhol painted these cans to comment on the repetition of advertising in ordinary American life. *Id.* These works were commercially successful, and in 1985, the Campbell's Soup Company commissioned Warhol to make paintings of their dry-mix soup. *Id.* Warhol is no less a respected and expressive artist for creating art with the intention to make a profit, even though this art referenced a company's trademark.

It would be absurd to suggest that these are not expressive works deserving of First Amendment protection simply because artists hoped to profit from them. Indeed, the *Rogers* test itself was derived from an expressive work that generated income. The Court in *Rogers* held that the movie in question was artistic and expressive and qualified for heightened First Amendment protection from trademark infringement claims. *Rogers*, 875 F.2d at 999-1002. The movie, though, made \$837,623 (\$2,352,291 adjusted for inflation). *Ginger & Fred*, IMDB (last visited Oct. 17, 2023), <https://www.imdb.com/title/tt0091113/>. The fact that the movie had been commercially successful did not stop the court from developing this test.

B. Whether an artist had financial motivations in creating a work of art has no impact on the availability of First Amendment protection.

The *Rogers* test has not before, and should not now, consider artists' financial motivations for creating expressive works, including works that reference brands and marks. Artists may pursue their crafts in ways that allow them to earn a living, and the need for pecuniary gain has no impact on a work's expressive value. Financial motivations do not and cannot have any legal impact on the amount of First Amendment protection that a work of art receives. So adding an intent prong to the *Rogers* test would undermine the entirety of the test by leading to the nonsensical conclusion that works like Michelangelo's *David* or Andy Warhol's *Campbell's Soup Cans* are excluded from heightened speech protection under *Rogers* as commercial, non-expressive works.

In *Jack Daniel's Properties v. VIP Products*, the Supreme Court recognized the *Rogers* test as a response to First Amendment values. *Jack Daniel's*, 599 U.S. at 154-56. However, adding the subjective element of an artist's financial motivation to the *Rogers* test would eliminate the early exit ramps for trademark infringement claims that the Supreme Court recognized in *Jack Daniel's*. The change would unfairly punish artists by excluding them from the very protections the *Rogers* test aimed to provide them. It is not the court's role to determine how meaningful the artistic connection is between a trademark and the artistic creation

(Lynn M. Jordan & David M. Kelly, *Another Decade of Rogers v. Grimaldi: Continuing to Balance the Lanham Act With the First Amendment Rights of Creators of Artistic Works*, 109 TRADEMARK REP. 833, 837 (2019)), and it is similarly not the court's place to decide that financial motivation renders a work commercial and not expressive. Adding such a subjective element to *Rogers* test would rob the test of its protective teeth and be devastating for artists.

CONCLUSION

For the reasons stated above, *amici* respectfully request that this Court reverse the district court's decision in favor of plaintiffs-appellees and remand to the district court with instructions to apply the *Rogers* test without including the subjective element of the artist's financial motivation.

Dated: November 13, 2023

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CERTIFICATE OF COMPLIANCE

Pursuant to the Fed. R. App. P. 32(g), I hereby certify that:

This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(b) and Second Circuit Local Rule 29.1(c) because it contains 6,108 words as calculated by the word count feature of Microsoft Office 365, exclusive of sections exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief of *Amici Curiae* MSCHF, CTHDRL, Alfred Steiner, Jack Butcher, and Authors Alliance in support of Defendant-Appellant Mason Rothschild with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on November 13, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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