

No. 18-321

IN THE
Supreme Court of the United States

TVEYES, INC.,

Petitioner,

v.

FOX NEWS NETWORK, LLC,

Respondent.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Second Circuit

**BRIEF OF *AMICI CURIAE* MEDIA CRITICS,
REBECCA TUSHNET, ELECTRONIC FRONTIER
FOUNDATION, INTERNET ARCHIVE,
ORGANIZATION FOR TRANSFORMATIVE
WORKS, AND WIKIMEDIA FOUNDATION
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICI CURIAE

Amici curiae are nationally recognized individual and organizational media critics and researchers, fair-use advocacy organizations, the leading non-profit archive of internet and news content, and the host of the largest repository of freely accessible knowledge.¹ *Amici* all have long-standing professional interests in ensuring that the tools necessary to conduct meaningful analysis and commentary of news remain protected by fair use.

Amici **Eric Alterman, Brave New Films (“BNF”), and Fairness and Accuracy in Reporting (“FAIR”)** are media critics with several decades of experience. In their media criticism, *amici* have addressed, among other topics, developments in law, money and politics, war and propaganda, freedom of speech, targeted killing, racial bias, police brutality, and economic equality. *Amici* have consistently relied on fair use to fulfill this vital First Amendment function. Their interest in this case is the potential constraints on their ability to monitor, research, and report on the news media in a rapidly changing media landscape.

Amicus **Eric Alterman** is a Distinguished Professor of English and Journalism at Brooklyn

¹ Pursuant to Rule 37.2(a), counsel for both parties received notice of intent to file this brief at least 10 days before its due date. The parties have consented to the filing of this brief; their written consents are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

College, City University of New York (“CUNY”), and a Professor of Journalism at the CUNY Graduate School of Journalism. He is also the “Liberal Media” columnist for *The Nation*. He has served as a senior fellow at the Center for American Progress in Washington, D.C. and at the Nation Institute and the World Policy Institute in New York. He is the author of ten books, including the national bestseller *What Liberal Media? The Truth About Bias and the News*.

Amicus **BNF** is a media company, established by filmmaker Robert Greenwald, that produces progressive feature-length documentaries and investigative videos to educate, influence, and empower viewers to take action on prominent public-policy issues. BNF recently launched Brave New Educators, a program that will provide free films and educational resources to teachers.

Amicus **FAIR** is a national media watchdog group that has been producing criticism of media bias and censorship since 1986. FAIR works to invigorate the First Amendment by advocating for greater diversity in the press and by scrutinizing media practices that marginalize public interest, minority, and dissenting viewpoints. FAIR also publishes *Extra!*, a monthly newsletter featuring analysis of current media bias, censorship, and the effects of media consolidation, and produces the weekly radio program *CounterSpin*, which broadcasts nationally on more than 150 radio stations.

Amicus **Rebecca Tushnet** is the Frank Stanton Professor of the First Amendment at Harvard Law School. Her research focuses on the intersection between intellectual property and free speech, and she has an interest in preserving fair use that prevents

copyright owners who would otherwise only consent to being quoted in ways they deem favorable.

Amicus Electronic Frontier Foundation (“EFF”) is a member-supported, non-profit public interest organization dedicated to protecting civil liberties and free expression in the digital world. Founded in 1990, EFF represents more than 37,000 contributing members. On behalf of its members, EFF promotes the sound development of copyright law as a balanced legal regime that fosters creativity and innovation while respecting individual rights and liberties. EFF has contributed its expertise to many cases applying copyright law to new technologies, as *amicus curiae*, as party counsel, and as court-appointed attorneys *ad litem*. *See, e.g., Fox Broad. Co., v. Dish Network*, 747 F.3d 060 (9th Cir. 2014); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015).

Amicus Internet Archive is a public nonprofit organization that was founded in 1996 to build an “[i]nternet library,” with the purpose of offering researchers, historians, scholars, artists, and the general public permanent access to historical collections in digital format. Located in San Francisco, California, the Internet Archive receives data donations and collects, records, and digitizes material from a multitude of sources, including libraries, educational institutions, government agencies, and private companies. The Internet Archive then provides free public access to its data—which include text, audio, video, software, and archived web pages. Among other ephemeral media, the Internet Archive

collects and preserves television news and political ads, respectively through its Television News Archive and Political Television Ad Archive.

Amicus **Organization for Transformative Works** (“OTW”) is a 501(c)(3) nonprofit organization dedicated to protecting and preserving noncommercial fanworks: works created by fans based on existing works, including television shows, books, and movies. OTW’s nonprofit website hosting transformative noncommercial works, the Archive of Our Own (“AO3”), has over 1.5 million registered users and receives roughly 26 million daily page views. OTW’s fan members rely on fair use to promote free expression, commentary, critique, community, and creative progress by creating expressive works that copyright owners would not or do not make.

Amicus **Wikimedia Foundation** is the nonprofit that hosts Wikipedia and other free knowledge projects. Wikipedia is a free online encyclopedia, offering the world’s largest repository of freely accessible knowledge, which is collaboratively written and edited by volunteers around the world. Articles often include images or illustrations, and sometimes include short sound or video clips where appropriate. In limited circumstances, English Wikipedia allows copyrighted content to illustrate its articles (using fair use). This allows for commentary and encyclopedic discussion of notable copyrighted works or related topics such as articles about current events or the organizations that report on them.

SUMMARY OF ARGUMENT

The Court should grant certiorari in this case because the Second Circuit's decision conflicts with this Court's ruling in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), and with decisions from other circuits. This case is exceptionally important for review because the decision below permits copyright owners to stifle criticism and undermines established fair use principles that are vital for media commentary.

Media criticism is essential to our democracy, especially in today's divided and politicized news landscape. Criticism reveals bias, inaccuracies, and conflicts of interest. It makes news outlets more accountable for their programming. And it helps viewers become more discerning consumers of information. Ultimately, effective media criticism promotes democratic engagement and accountability by making voters better informed.

Researchers need services like TVEyes. Media critics cannot properly analyze television programming without the ability to locate, review and compare broadcasts from thousands of programs aired on hundreds of stations twenty-four hours per day, seven days per week. With TVEyes, researchers can compare simultaneous broadcasts, review political advertising, and analyze editorial decisions like which topics programs choose not to cover. But creating and maintaining comprehensive databases is prohibitively expensive for most non-commercial entities.

Services like TVEyes capture, index, and screen audio and video *exactly* as it aired with accompanying advertising intact. Original video and audio, in particular, are crucial for effective commentary. The

tone of a speaker's voice, his facial expressions and body language, and his general affect cannot be captured in a transcript. Similarly, on-screen text, graphics, background images, and accompanying video can influence viewers in powerful ways.

The Second Circuit's decision undermines effective media analysis. It allows content owners to prevent commentary and criticism of their work in instances where a theoretical licensing market exists, even where the copyright owner is unlikely to authorize that market. The decision below ignores this Court's holding in *Campbell* that "there is no protectible derivative market for criticism." 510 U.S. at 592. But, in this case, many uses of TVEyes services are for criticism. And Fox News Network's ("Fox's") licenses expressly prevent uses of clips in ways that are derogatory or critical of Fox. The Second Circuit's focus on TVEyes' commercial success in a transformative market led the court below to ignore *Campbell's* holding that commercial use by a defendant without a licensing fee does not preclude a fair use defense. *Id.* at 570.

This Court should thus grant the petition for certiorari to resolve the Second Circuit's decision's conflict with *Campbell* and to ensure that essential First Amendment activities, such as media criticism and commentary, are not hampered by an overly narrow interpretation of fair use.

ARGUMENT**I. This Case Is Exceptionally Important Because The Second Circuit's Decision Jeopardizes Essential Analysis, Research, And Criticism Of Broadcast Programming**

Ensuring the proper scope of transformative fair use is critical for effective media criticism and a well-functioning democracy. The Second Circuit's decision below undermines established fair use principles that are vital for criticism and commentary. In today's fast-paced and increasingly polarized media landscape, researchers, commentators, and critics must be able to record, search, watch, and compare the original visual recordings of relevant broadcasts. Such comprehensive tools can only be maintained by commercial services like TVEyes.

The Second Circuit's overly restrictive interpretation of fair use in this case threatens the availability of these essential tools. As this Court has recognized, content owners are not likely to license critical uses. Narrowing fair use rights in this context will permit broadcasters and other copyright owners to stifle criticism by refusing to license uses that enable negative commentary. But media criticism is essential for informing voters and holding broadcasters accountable—activities fundamental to First Amendment interests. The Court should therefore grant certiorari.

A. Today's Media Landscape Presents Special Challenges For News Criticism At A Time When Such Criticism Has Never Been More Important

Media critics and researchers serve a crucial role today in holding broadcasters accountable for errors, bias, and the failure to cover crucial political issues. This criticism is vital because television remains the primary source of news for millions of Americans. Amy Mitchell et al., *Pathways to News*, Pew Research Ctr. (July 7, 2016), <https://perma.cc/XQC8-B6US>.

Faced with a grueling twenty-four-hour news cycle and numerous competing outlets, producers are pressured to create scintillating coverage on tight deadlines. This pressure forces media outlets to quickly report provocative, incomplete, speculative, or biased stories. Howard Rosenberg & Charles S. Feldman, *No Time to Think: The Menace of Media Speed and the 24-Hour News Cycle* (2008). To keep viewers tuned in—despite thousands of news channels and websites competing for their attention—broadcasters have become increasingly polarized. *Partisanship and Cable News Audiences*, Pew Research Ctr. (Oct. 30, 2009), <https://perma.cc/7HUE-PTPG>; Mark Jurkowitz et al., *The Changing TV News Landscape*, Pew Research Ctr. (March 17, 2013), <https://perma.cc/J4ZK-6LPL>.

Sharp divisions between networks along ideological lines can result in reduced fairness, accuracy, and credibility of their reporting and commentary. *See, e.g.*, Press Accuracy Rating Hits Two Decade Low, Pew Research Ctr. (Sept. 13, 2009), <https://perma.cc/WD29-PLTA> (reporting low perception of accuracy in the press, with 60% of survey

respondents expressing the belief that news organizations are politically biased); Nareissa L. Smith, *Consumer Protection in the Marketplace of Ideas*, 40 T. Marshall L. Rev. 223, 238-55 (2015) (documenting numerous instances of misquoting for political effect by Fox, CNN, and MSNBC between 2007 and 2011).

These effects are particularly meaningful because television news disproportionately attracts news consumers who are less likely to turn to other sources. *See Loyalty and Source Attention*, Pew Research Ctr. (Jul. 7, 2016), <https://perma.cc/B8XG-AYFL> (reporting that the majority of very loyal news consumers turn to television for their news); *see also* Natalie J. Stroud, *Niche News: The Politics of News Choice* 8 (2011) (noting viewers fall into the trap of selecting news sources that match their own views).

Differences in media coverage result in a measurable impact on our democracy as evidenced by voting behavior. For instance, one 2007 study showed that the entry of Fox into the news market in 1996-2000 led to gains in vote share for Republicans in towns that broadcast Fox compared to similar towns where Fox was not available. Stefano DellaVigna & Ethan Kaplan, *The Fox News Effect: Media Bias and Voting*, 122 Q. J. Econ. 1187 (2007). For these reasons, rigorous study, analysis, and criticism of media are more vital now than ever.

B. Real-Time Recording, Screening, Indexing, And Archiving Of Television Broadcasts Are Essential For Media Accountability And Public Commentary

The Second Circuit's decision will significantly curtail media researchers' abilities to analyze and

report on news programming. Without services like TVEyes, media critics cannot comprehensively locate, review and critique television broadcasts.² TVEyes “monitors and records all content broadcast”—exactly as it was originally aired—“by more than 1,400 television and radio stations twenty-four hours per day, seven days per week,” compiling it into a complete, searchable, and reviewable database. *Fox News Network, LLC v. TVEyes, Inc. (TVEyes I)*, 43 F. Supp. 3d 379, 392 (S.D.N.Y. 2014).

Absent the mass digitization facilitated by TVEyes’ technology, media critics could not capture and study the thousands of hours of content broadcast to the public each day. In the past, it may have been feasible—though already time-consuming and resource-intensive—for organizations, like *amici* FAIR or BNF, to physically record, log, watch, and analyze daily news broadcasts on ABC, CBS, and NBC. Today, the sheer volume of ephemeral content from many different sources makes comprehensive, after-the-fact research, analysis, and criticism impossible.

Most broadcasts also disappear after they air: they are often no longer available in their original form anywhere. Only 16% of Fox’s broadcasts are made available online. *TVEyes I*, 43 F. Supp. 3d at 386.

² TVEyes creates its own searchable transcript by combining closed-captioning and speech-to-text technology. J.A. A-231. Critics can search “select words or phrases that they wish to monitor on an ongoing basis,” such as “IBM,” “Starbucks,” “Guantanamo,” and “Crimea.” J.A. A-233. Critics can also use advanced searches to filter out words they might not want to see, or to combine multiple words that they want to see in the same clip. J.A. A-234.

And the occasional clips that Fox licenses “do not show the exact content or images that were aired on television.” *Id.* This is a longstanding problem: broadcasters do not typically preserve their footage well and need help from third parties. See e.g. *Super Bowl I to Air After Long-Lost Footage Surfaces*, Fox News (Jan. 11, 2016), <https://fxn.ws/1SKuguG> (recognizing that video footage of the first Super Bowl was lost for nearly 50 years); Richard Porter, *Part of the Conspiracy?*, BBC News (Feb. 27, 2007), <https://bbc.in/2NBYpxc> (noting the BBC World News no longer has any of its original coverage of 9/11).

Despite some ongoing preservation efforts, non-profit entities like public libraries, research institutions, and organizations, such as *amicus* Internet Archive, simply do not have the resources to create and maintain a comprehensive database that tracks thousands of channels and millions of hours of video. And, maintaining the necessary infrastructure for indexing, searching, and storing enormous amounts of television recordings is likely to be prohibitively expensive for individual critics and most public interest organizations.

Through services like TVEyes, however, nonprofits and researchers who wish to search, watch, analyze, and comment on broadcast television after it airs can effectively do so. They can locate far-flung clips and compare coverage across sources or time. For example, critics can search for keywords, such as “Crimea,” or date-and-time periods, such as the hours after an important speech, to see relevant segments of transcripts and view critical video of the relevant broadcasts. J.A. A-231, A-232, A-233, A-243.

Critics can also compare how issues are covered on certain days or in certain geographic areas. J.A. A-234, A-235, A-236. A media critic at the *Huffington Post*, for example, used TVEyes to fact-check Fox’s claim that other media outlets, such as ABC, CBS, NBC, MSNBC, and CNN, failed to cover a Tea Party rally in Washington, D.C., on September 12, 2009. Jason Linkins, *Fox News Newspaper Ad Makes False Claim About Tea Party Coverage*, *Huffington Post* (Nov. 18, 2009, 5:12 AM ET, <https://perma.cc/CY6H-BHKG>). The critic found the claim was false: “No one missed the story.” *Id.*

Media critics also use services like TVEyes to fact-check political advertising and analyze the relationship between advertisers and broadcasters. Video segments posted on Fox’s website do not include the ads aired during live broadcasts. J.A. A-249. But some researchers analyze who advertises on a particular program to glean how much an advertiser spends and how advertising airing between news segments might create conflicts of interest. Watchdog group Free Press, for example, used TVEyes to “scour local newscasts for any mention of groups that purchased political ads on local [television] stations” to review the stations’ subsequent coverage of the groups. Timothy Karr, Free Press, *Left in the Dark: Local Election Coverage in the Age of Big-Money Politics*, 18 (2012), <https://perma.cc/W327-KJ4J>.

Absent a complete video database like TVEyes, media critics also could not say with authority how, or how widely, an issue has been covered—or not covered at all. As the District Court recognized, “TVEyes is the only service that creates a database of *everything* that television channels broadcast, twenty-four hours a

day, seven days a week.” *TVEyes I*, 43 Supp. 3d at 393 (emphasis in original). A research project based on a non-comprehensive database—particularly, one that omits video of the nation’s most popular cable news channel, Fox—will always be less credible and less reliable than an alternative. By reviewing TVEyes’ database, press criticism publication *Columbia Journalism Review* (CJR) found “staggeringly slight coverage” in local broadcasts of candidates in a contentious House of Representatives race in the month leading up to the 2012 election. Ken Knelly, *‘Pittsburgh is getting pounded’ by Ads*, *Columbia Journalism Review* (Oct. 24, 2012), <https://perma.cc/BYB3-4UJG>. CJR found that reporters failed to explain candidates’ policy positions or provide counterbalances to political ads that aired on the shows. *Id.*

Services like TVEyes also can be especially useful for improving the quality of an encyclopedia like that supported by *amicus* Wikimedia Foundation. Wikipedia allows editors to verify statements made by notable figures on television and provide the public with access to the references themselves. Televised news is a major source of information about current events for many Americans, and being able to verify references is a crucial component of Wikipedia’s reliability and trustworthiness.

In addition, limitations on the existence of comprehensive news databases of television content may have serious implications for advanced research methods. For example, machine learning algorithms will enable researchers to examine vast volumes of television content in the future. But algorithmic approaches to media criticism require far more data

and storage than individual researchers, nonprofits, or public institutions can hope to maintain. *See, e.g.,* Alvin Chang, *Nearly 2 Years into the Trump Presidency, Fox News Is Still Obsessed with Hillary Clinton*, Vox (July 11, 2018), <https://perma.cc/7ZGR-CY8B> (finding Fox covered Clinton more than MSNBC or CNN by using algorithmic facial recognition software).

C. Access To Full Video And Audio Are Critical To Meaningful Media Analysis, Commentary, And Criticism

Services like TVEyes are critical for research, analysis, and criticism because of the dramatic differences between audio-visual content and text transcripts alone. Television broadcasters across the ideological spectrum employ powerful visuals to attract viewers and convey their messages in subtle, non-verbal ways. As the District Court explained, “the actual images and sounds depicted on television are as important as the news information itself” because they can “powerfully modify[] the content.” *TVEyes I*, 43 F. Supp. 3d at 392.

Images, video, and sound carry far more information than text. The tone of a person’s voice, their expressions, and their general affect all require significant textual description and interpretation. Such information is conveyed seamlessly through video. Similarly, on-screen text, graphics, and video can convey messages and influence viewers in powerful ways. Critics must have access to complete, original video and audio content for meaningful analysis.

A few simple examples illustrate why access to the “actual images and sound” is imperative for criticism and commentary.

First, consider three 8:00 PM primetime programs—Anderson Cooper 360 (CNN), All In With Chris Hayes (MSNBC), and Tucker Carlson Tonight (Fox)—that aired on February 6-7, 2018. As shown in the images below, each program provided starkly different visual coverage of a single event, namely, White House Chief of Staff, General John Kelly’s comment that:

There are 690,000 official DACA registrants. And the President sent over what amounts to be two and a half times that number - to 1.8 million. The difference between 690 [thousand] and 1.8 million were the people that some would say were too afraid to sign up, *others would say were too lazy to get off their asses*, but they didn't sign up.

All In With Chris Hayes (MSNBC television broadcast Feb. 6, 2018, 8:04PM ET), <https://bit.ly/2QKeaEb> (emphasis added).

The ensuing breaking news headlines displayed on the screen by CNN and MSNBC both attribute parts of the statement directly to Kelly: “KELLY: SOME DREAMERS ‘TOO LAZY TO GET OFF THEIR ASSES’” (CNN) and “JOHN KELLY: SOME DREAMERS ‘TOO LAZY’ FOR DACA” (MSNBC). *Anderson Cooper 360* (CNN television broadcast Feb. 6, 2018, 8:21 PM ET), <https://youtu.be/YKeJvgJNdhM>, *transcript available at* <https://perma.cc/QNL9-Z8VE> (see image below); *All In With Chris Hayes* (MSNBC

television broadcast Feb. 6, 2018, 8:09PM ET),
<https://bit.ly/2QKeaEb>.



On MSNBC, Chris Hayes and his guest discuss the statement and the video shows them both laughing, “You have Kelly saying that Dreamers are – Dreamer's aren't lazy. Trump is lazy. We'll do a shutdown? He hasn't even bothered to learn what happens when that happens or why one might go ahead and do that.” *All In With Chris Hayes* (MSNBC television broadcast Feb. 6, 2018, 8:13PM ET) (see image below).



Meanwhile, Fox’s coverage focuses on how General Kelly was unfairly “attacked” by the “left that was howling, of course, and jumping up and down like the hyenas they are.” The video displays the powerful headlines, “GEN KELLY UNDER FIRE FOR DACA COMMENTS” and “TAKEN OUT OF CONTEXT.” *Tucker Carlson Tonight* (Fox television broadcast Feb. 7, 2018), <https://youtu.be/T9sWsImbra0> (see images below).



Carlson’s voice and facial expressions appear indignant and are combined with patriotic references and provocative imagery. An American flag billows in

the background behind footage of what appears to be pro-immigration protestors. Carlson sports a suit in front of an image of the Capitol next to an informally dressed guest “immigration activist.” The result is a bundle of information that is more elaborate and layered than the text of General Kelly’s statement. To offer proper analysis and commentary of this bundle, a researcher needs access to the complete video and audio.

The above example is merely one of countless examples representative of television programming, where producers use visuals to tell their particular stories. *See, e.g.*, Washington Post, *CNN and Fox News Hosts React to Trump’s ‘Shithole’ Remark*, YouTube (Jan. 12, 2018), <https://youtu.be/NrynNeqx48I> (contrasting CNN’s and Fox’s coverage of President Trump’s comment about Haiti and African nations); The Daily Show with Jon Stewart, *Inauguration Media Coverage* (Jan. 21, 2009), <https://on.cc.com/2ILLrfq> (comparing CNN, MSNBC, and Fox coverage of President Obama’s 2009 inauguration); Jonathan McIntosh, *Too Many Dicks on the Daily Show* (Sept. 9, 2011), <https://perma.cc/ZS9U-WGTJ>, *embedded video available at* https://youtu.be/uzU1_CsOnJA (discussing gender imbalance on the Daily Show by juxtaposing video clips from more than 100 episodes).

These examples demonstrate why researchers need complete original broadcasts—video and audio included—to understand and critique inaccuracies, bias, and slanted coverage.

D. The Second Circuit Is Particularly Influential In The Media Industry And Has Nationwide Influence Over Copyright Jurisprudence

The decision below requires review because the Second Circuit has an outsized impact on the media industry and its critics. Many media companies and organizations are located in New York. For example, the traditional broadcast networks—ABC CBS, and NBC—and the three largest cable news networks—CNN, Fox, and MSNBC—all broadcast from New York City. All are headquartered in New York except CNN.

New York is also a center for both the publishing industry and journalism as a whole. “Employment in newspaper, periodical, and book publishing is almost six times more concentrated in New York City than the rest of the nation.” New York City Labor Market Information Service, *Employment in New York City Publishing* 8 (2009), <https://perma.cc/4Z7E-HHDB>.

The Second Circuit, moreover, has an outsized impact in copyright jurisprudence. “There is no question that the Second Circuit has had a significant influence on the development of U.S. intellectual property law, especially copyright law.” Kenneth A. Plevan, *The Second Circuit and the Development of Intellectual Property Law: The First 125 Years*, 85 *Fordham L. Rev.* 143, 143 (2016). Numerous landmark copyright decisions and casebook staples have been issued by the Second Circuit. *See, e.g., Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015); *Authors Guild v. Hathitrust*, 755 F.3d 87 (2d Cir. 2014); *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013); *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *Bill Graham Archives v. Dorling Kindersley*, 448 F.3d 605 (2d Cir. 2006); *Castle*

Rock Entertainment, Inc. v. Carol Publishing Group Inc., 150 F.3d 132 (2d Cir. 1998); *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992).

Therefore, an erroneous decision by the Second Circuit on the appropriate test for fair use not only affects those industries which are shaped by copyright and fair use, but will likely also influence interpretations of copyright law elsewhere in the country. Because the Second Circuit's decision conflicts with this Court's decision in *Campbell* and with subsequent decisions by other circuits following *Campbell*, it is crucial that this Court review the decision below.

E. The Ruling Below Demands Review Because It Undermines The First Amendment Principles Implicit In Fair Use And Harms The Vital National Interest In An Informed Public

This case implicates core First Amendment interests underlying fair use and copyright law as a whole. Copyright is a restriction on speech that must be balanced against the First Amendment. This balancing is operationalized through codified limitations on copyright protection, such as fair use, that serve as "built-in free speech safeguards." *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

Fair use is critical to ensure that copyright does not unduly impede free speech. It serves explicitly to encourage core First Amendment "purposes such as criticism, comment, news reporting, . . . scholarship, or research." 17 U.S.C. § 107. In other words, fair use is an "internal safety valve[]" that ensures copyright protections do not interfere with First Amendment protections. Neil Weinstock Netanel, *Locating*

Copyright Within the First Amendment Skein, 54 Stan. L. Rev. 1, 4 & n.11 (2001). Fair use also protects robust public debate, which is one of the primary functions of the First Amendment. See *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J. concurring).

Media criticism, commentary, and analysis are essential expression necessary for a well-functioning democracy. They enable viewers to become more discerning and make informed choices about news sources. For instance, researchers have found that voters become more skeptical of political ads when informed about the falsehoods in them. Kim Fridkin, *Liar, Liar, Pants on Fire: How Fact-Checking Influences Citizens' Reactions to Negative Advertising*, 32 Pol. Comm. 127 (2015). Even when viewers do not directly respond to differences in coverage, networks are frequently sensitive to outside criticism and will issue retractions or modify their future coverage. Volunteer editors can also fact-check current events and media coverage on projects like Wikipedia.

Media critics are themselves members of the press: coverage of the news is news too. They need services like TVEyes to fully analyze and report on *how* the news is covered, not just *what* is covered. How news outlets cover current events can significantly impact viewers' reactions and political opinions. Viewers of political debates often determine who 'wins' based largely on news analysis of the debate. Kim L. Fridkin et al., *Capturing the Power of a Campaign Event: The 2004 Presidential Debate in Tempe*, 69 J. Pol. 770 (2007). And, coverage of political debates varies widely among news channels. See, e.g., Andrew McGill, *The Different Ways Fox, MSNBC, and CNN*

Recapped Monday's Debate, The Atlantic, Sept. 29, 2016, <https://perma.cc/QL4N-W3AB>; Adam Epstein, *Who Won the Debate Depends on Which Network You Watched*, Quartz, Sept. 28, 2016, <https://perma.cc/GC67-QU39>, *embedded video available at* <https://youtu.be/reTHOP3SOdQ>. Accordingly, when reporting on presidential debates, media outlets not only evaluate candidates, but also scrutinize moderators' questions for bias and accuracy in post-debate analysis. Michael M. Grynbaum, *Matt Lauer Field Storm of Criticism Over Clinton-Trump Forum*, N.Y. Times, Sept. 8, 2016, <https://nyti.ms/2cm8OOR>.

As the District Court noted, “[d]emocracy works best when public discourse is vibrant and debate thriving. But robust debate cannot thrive when the message itself (in this case, the broadcast) disappears after airing into an abyss.” *Fox News Network, LLC v. TVEyes, Inc. (TVEyes II)*, 124 F. Supp. 3d 325, 334 (S.D.N.Y. 2015). Because media criticism is speech that fosters democratic engagement and governance, such criticism implicates important First Amendment concerns and deserves exacting fair use review.

II. The Second Circuit's Fair Use Analysis Conflicts With This Court's Decision In *Campbell* And With Other Circuits' Precedents

This Court should grant certiorari because the Second Circuit decision below conflicts with this Court's precedent and those of other circuits. This Court's analysis of the fourth fair use factor—market harm—is clear: the factor does not favor the copyright owner merely because the defendant used the work for commercial gain. *See Campbell v. Acuff-Rose Music*,

Inc., 510 U.S. 569, 570 (1994) (holding that 2 Live Crew’s commercial use of Roy Orbison’s “Oh, Pretty Woman” without a license was fair use). The Second Circuit ignored this crucial holding by concluding that Fox suffered harm simply because TVEyes is a commercial product. *Fox News v. TVEyes (TVEyes III)*, 883 F.3d 169, 180 (2nd Cir. 2018).

The fact that the defendant made money can only be a part, not the end, of the analysis. Similarly, it is not enough that the defendant *might* have paid a licensing fee. “By definition, every fair use involves some loss of revenue because the secondary user has not paid royalties.” Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1124 (1990). If this loss of licensing revenue automatically showed market harm, the fourth factor would favor the copyright owner in all cases. *See id.*

The Second Circuit ignores *Campbell* and subsequent cases in its analysis of the fourth factor. In its brief discussion of market harm, the Second Circuit wrote:

Since the ability to re-distribute Fox’s content in the manner that TVEyes does is clearly of value to TVEyes, it (or a similar service) should be willing to pay Fox for the right to offer the content. By providing Fox’s content to TVEyes clients *without* payment to Fox, TVEyes is in effect depriving Fox of licensing revenues from TVEyes or from similar entities.

TVEyes III, 883 F.3d at 180. The panel opinion wholly embraces an improper logic—that commercial use together with failure to pay a license entails market harm—rejected by this Court.

But, as this Court has made clear, to leap directly from commercial use (or failure to pay licensing fees) to market harm would not provide adequate protection for core fair uses, including those listed in the preamble of § 107 such as news reporting, commentary, and criticism. *See* 17 U.S.C. §107; *Campbell*, 510 U.S. at 584. It is now well-established that market harm cannot be established solely on the basis of either (1) commercial use by the defendant or (2) the defendant's failure to pay a licensing fee. *See, e.g., Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1319 n.37 (11th Cir. 2008); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994).

Since courts cannot simply assume market harm from commercial use or revenue, they must look deeper at the challenged use and at the market that is claimed to be harmed. As part of this inquiry, courts consider whether the market is one that the copyright owner is likely to develop. *See Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 91 (2d Cir. 2014); *Am. Geophysical Union*, 60 F.3d at 930 (2d Cir. 1994) (holding that courts need only consider “traditional, reasonable, or *likely to be developed* markets when examining and assessing a secondary use’s ‘effect upon the potential market for or value for the copyrighted work’” (emphasis added)); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1179 (9th Cir. 2013).

In order to conduct this analysis, courts must consider not only whether there is some market for the material at issue, but also whether there is a viable market for the *use* at issue. If a copyright holder would not be willing to grant a license for the accused use,

there is no practical licensing market that the use could harm.

This inquiry is essential to protect the kinds of criticism, parody, and analysis that copyright owners would prefer to silence and are unlikely ever to license. *See Campbell*, 510 U.S. at 592 (explaining that “there is no protectable derivative market for criticism”). Indeed, in this case, Fox’s licenses expressly condition access to clips of its content upon a “covenant that they will not show the clips in a way that is *derogatory* or *critical* of Fox News.” *TVEyes I*, 43 F. Supp. 3d at 387 (emphasis added). There simply is no market that is being harmed by the use in this case. Instead, TVEyes participates in a different market than original broadcasts.

The Second Circuit further failed to consider the critical difference in market functions between TVEyes’ research services and the viewer-informing purposes of the original broadcasts. It did so despite acknowledging that TVEyes is a “transformative” service. *Fox News III*, 883 F.3d at 178. As this Court stated in *Campbell*, when a use is transformative it generally “serve[s] different market functions” than the original. 510 U.S. at 591. Since this Court has not reviewed fair use in more than twenty years, circuits differ about the role of “transformative use” in applying the four-factor statutory test. *See Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (expressing “skepticism” towards the Second Circuit’s fair use jurisprudence).

By adopting the flawed analysis that this Court explicitly rejected in *Campbell*, the Second Circuit effectively overwrites current fair use law and leaves a wide range of criticism, analysis, and parody

vulnerable to suppression by content owners who refuse to license broadcast clips in order to avoid negative news coverage and critique.

CONCLUSION

This Court should grant the petition for certiorari to resolve the Second Circuit's decision's conflict with *Campbell* and ensure that essential First Amendment activities, such as media criticism and commentary, are not hampered by an overly narrow interpretation of fair use.

Respectfully submitted,

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