22-1006-cv

United States Court of Appeals
for the Second Circuit

VANS, INC. & VF OUTDOOR, LLC,

Plaintiffs-Appellees,

v.

MSCHF PRODUCT STUDIO, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF AMICI CURIAE EMMANUEL PERROTIN AND JEAN-PAUL ENGELEN IN SUPPORT OF DEFENDANT-APPELLANT

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CERTIFICATE OF INTEREST AND CORPORATE DISCLOSURE[1]

Counsel for amici curiae Emmanuel Perrotin and Jean-Paul Engelen certifies the following:

1. The full name of every party or amicus curiae represented by me is:

   Emmanuel Perrotin and Jean-Paul Engelen.

2. The name of the real parties in interest (if the party named in the caption above is not the real party in interest) represent by me are:

   Perrotin gallery and Phillips auction house.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

   None.

4. The names of all law firms and the partners or associates appearing for the party or amicus curiae now represented by me in the trial court or are expected to appear in this Court are:

[1] In accordance with FRAP 29(a)(4)(E), *amici curiae* state that no part of this brief was authored by counsel to a party. No party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* and its counsel made such a monetary contribution to its preparation or submission.

The undersigned.

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AMICUS CURIAE FILED ON CONSENT

The undersigned for amici curiae Emmanuel Perrotin and Jean-Paul Engelen certifies that this submission is made on consent of the Appellant and Appellee.

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STATEMENT OF THE INTERESTS OF *AMICI CURIAE*

Amicus Emmanuel Perrotin founded Galerie Perrotin in Paris in 1990 to exhibit artworks by the world's most innovative contemporary artists. Perrotin has since grown into one of the most renowned art galleries in the world, with locations in Paris, Hong Kong, New York, Seoul, Tokyo, Shanghai, and Dubai. Emmanuel Perrotin and his galleries have been profiled hundreds of times in publications such as *Vogue*, *The New Yorker*, The New York *Times*, *Harper's Bazaar*, *Forbes*, *The Wall Street Journal*, *Le Journal Des Arts*, Bloomberg, *The Financial Times*, *Elle*, *Architectural Digest*, *Artpress*, *Artnews*, *Le Point*, The Japan *Times*, *Le Monde*, *Numéro*, *Modern Magazine*, *Bazarre Art*, Frankfurter *Allgemeine Zeitung*, and *W* Magazine. Perrotin galleries exhibit art in diverse styles and diverse mediums, highlighting the work of both established and influential artists such as Damien Hirst, Takashi Murakami, and Maurizio Cattelan and emerging artists.

Perrotin has invited MSCHF to curate a solo art exhibition at Perrotin's New York City gallery from November–December 2022, consisting of MSCHF's earlier projects, in addition to inaugurating new ones. From the perspective of Perrotin, MSCHF has become well known in the artworld and is considered one of the most provocative and innovative art groups working today, making MSCHF's work an ideal fit for Perrotin gallery. Many of MSCHF's artworks, such as *Wavy Baby*,

employ a unique approach to a century-old tradition in art, by transforming consumer objects into art objects and infusing those objects with incisive commentary on consumer culture and brand identity. In doing so, Perrotin believes that MSCHF's art pushes the boundaries within the artworld and in society at large. Perrotin expects MSCHF to display a wide range of artworks at its solo exhibition—including *Wavy Baby* and MSCHF's other shoe-related artworks. The district court's order, if not reversed, will make this artistic exhibition, and the expression behind it, impossible.

Jean-Paul Engelen is President, Americas and Worldwide Co-Head of 20th Century & Contemporary Art at the Phillips auction house. Harry Phillips founded the auction house in 1796 in Westminster, London. Phillips gained international recognition by selling paintings from the estate of Queen Marie Antoinette and household items from Napoleon Bonaparte, and it remains the only auction house to have ever held a sale inside Buckingham Palace. Harry Phillips was an innovator who combined business acumen with showmanship, introducing elaborate evening receptions before auctions, a standard practice in the auction business today.

Today Phillips is where international collectors buy and sell the world's most important twentieth-century and contemporary works of art, design, jewels, watches, photographs and editions. By focusing specifically on the defining

aesthetic movements of the last century, including the Readymade movement—typified by the work of MSCHF—Phillips has set itself apart as a dynamic and forward-thinking auction house among the leading auction houses in the world. The Phillips team is composed of specialists from auction houses, museums, galleries and other leading arts institutions. In addition to conducting auctions in our New York, London, Hong Kong and Geneva salerooms, Phillips holds private sales and curated selling exhibitions around the world. Outside of the opportunities Phillips provides to consign or buy through auctions and private sales, it consults with museums, advises private estates and corporate clients and offers appraisals, valuations and other financial services.

From October 2021 to January 2022, Phillips displayed MSCHF's innovative and provocative artwork entitled *Bigger Blur* in the lobby of its New York City galleries. *Bigger Blur* is a continuation of MSCHF's *Blur* series of artworks, where MSCHF advertised a product for sale using what appeared to be a blurred image of a stack of $20 bills. Upon purchasing and receiving the product, it became clear that the image of the bills was not blurry; rather, it was a sharp image of a blurry three-dimensional object that was delivered to purchasers. *Bigger Blur* is a large version of the blurry three-dimensional object that MSCHF sold, and like the entire *Blur* series, *Bigger Blur* interrogates both the tantalization of the unknown and our desire to read value into objects. Exhibiting such innovative

contemporary artworks is central to Phillips' mission to be at the forefront of the contemporary art market and discourse.

Phillips has an interest in the existence of a thriving art market. The art market, like any cultural market, is dependent on innovation, evolution, and progress to survive. Phillips' art auction business thus depends on the creation and sale of provocative and innovative works, like those of Basquiat, Andy Warhol, Jeff Koons, and MSCHF. The view of Phillips is that MSCHF stands solidly in the Readymade art tradition . Phillips believes that MSCHF is using the artists' language and tools—and the post-modern version of "ordinary"—of 2022 in the way Duchamp and Warhol used the cultural vocabulary of their times to make expressive, important cultural statements through art. By using today's language, Phillips believes that artists such as MSCHF strike a chord with its creators' own generation and that, given its success, MSCHF is clearly doing something right. It is the position of Phillips, as an art gallery, that the policy and purpose of the First Amendment is to encourage creators such as MSCHF to continue doing what it does, and that the district court's injunction is as antagonistic to those values as can be imagined.

SUMMARY OF ARGUMENT

Wavy Baby is an expressive work in the "Readymade" tradition.

Because *Wavy Baby* is an expressive work, Vans' claims are precluded by the First Amendment and the injunction issued by the district court constitutes an unconstitutional prior restraint on MSCHF's right to engage in artistic expression, including its right to display its artwork in art exhibitions. While it is undisputed that this Court held in *Rogers v. Grimaldi*, 875 F.2d 994 (1989) that the Lanham Act must be "construe[d] . . . narrowly" to expressive works to prevent the Act from encroaching on the First Amendment interests of artists and brands—and that the First Amendment use of a trademark that is relevant to artistic expression is and not explicitly misleading—the district court erred in holding that *Wavy Baby* is not itself a work of artistic expression. *Wavy Baby* critiques the Vans Old Skool, the prototypical skate shoe makes an entirely transformative use of Vans' marks.

The key to the district court's error, as explained in Appellant's brief, was dispensing with a First Amendment analysis because, it held, *Wavy Baby* was an "unsuccessful parody." In fact, it is just such a circumstance where such an analysis is required. And under such an analysis, it is clear that *Wavy Baby*'s allusions to Vans' marks are part of an overall work of protected artistic expression in the nature of what art scholars call "Readymades," a Contemporary Art movement in which everyday objects are wrenched from their expected contexts to

become satirical, and often poetic, symbols of critical conversations between the artist and the art world, society and history. In Contemporary Art, Readymades often comment on consumerism and the post-modern world, just as *Wavy Baby* does.

The district court erred not only by failing to recognize *Wavy Baby* as a form of art but by refusing entirely to grapple with whether it is. The purpose of this submission is to help establish the bona fides of what has unquestionably become a recognized and respected school of artistic expression—one that the First Amendment protects, whether a district court judge "gets" it or not.

ARGUMENT

I. *Wavy Baby* is an Expressive Work under the Rubric of "Readymade Art."

Wavy Baby is a "Readymade," a kind of art that comes out of the Dadaist movement and connects with surrealism, as well as more modern forms of art including Pop Art, performance art and conceptualism.

Figure 1 - Taken from: W. Gompertz, What are you Looking at? The Shocking, and Sometimes Strange Story of 150 Years of Modern Art *(2012).*

A. The Readymade Movement

The Readymade movement began with Marcel Duchamp, two of whose pioneering Readymades, *Bicycle Wheel* and *Fountain*,are shown below in Figures 2 and 3.

Figure 2 - Bicycle Wheel, *1913; 1951 copy currently in the Museum of Modern Art*

Figure 3 – Fountain, *1917; 1964 copy currently in the Tate Gallery*

According to the Museum of Modern Art, "*Bicycle Wheel* is the first of Duchamp's Readymades—objects (sometimes manufactured or mass-produced) selected by the artist and designated as art. Most of Duchamp's Readymades were individual objects that he repositioned or signed and called art, but Bicycle Wheel

is what he called an 'assisted Readymade,' made by combining more than one utilitarian item to form a work of art." MoMALearning: Bicycle Wheel, found at https://www.moma.org/learn/moma_learning/marcel-duchamp-bicycle-wheel-new-york-1951-third-version-after-lost-original-of-1913/. *Fountain* is "widely seen as an icon of twentieth-century art. . . . a quintessential example . . . of what he called a "Readymade', an ordinary manufactured object designated by the artist as a work of art (and, in Duchamp's case, interpreted in some way)." Tate Gallery, "Marcel Duchamp, Fountain," found at https://www.tate.org.uk/art/artworks/duchamp-fountain-t07573.

The Readymade movement continued as a form of Pop Art, the school pioneered by Andy Warhol, perhaps best exemplified by his famous "Brillo" installation, shown at right as Figure 4.

Figure 4 - Warhol's Brillo Boxes. *Philadelphia Museum of Art.*

As the Philadelphia Museum of Art, the current home of Brillo Boxes, explains,

> Andy Warhol's Brillo Boxes are precise copies of commercial packaging. While they fulfill the idea that art should imitate life, they also raise questions about how we identify and value something as art. If Warhol transformed a mundane commercial product into a work of art, how did that transformation happen? Considering Warhol made numerous Brillo Boxes and sold them to art collectors and museums, his can also be considered mass-produced consumer goods.

Philadelphia Museum of Art: Collection – Brillo Boxes, found at https://philamuseum.org/collection/object/89204. Brillo, of course, is a "brand of" a company called Armaly Brands, which sells sponges and cleaning implements. Brillo was, in the middle of the twentieth century, an icon of modernity—a breakthrough in home cookware that solved the problem current in the first decade of the century of getting newfangled aluminum cookware clean. Patented in 1913, Brillo® went on to become one of America's most recognizable brands, featured in modern art, songs, movies—and of course, households nationwide. Brillo.com: About Us – "From Bright Idea to Iconic Brand," found at https://www.brillo.com/about-us/brillo-brand-history.

Ironically, when an interviewer asked Warhol, in a 1964 interview, whether his Brillo boxes could be described as art, Warhol seemed to have his doubts, noting that his Brillo box sculpture was "not original." E. Kinsella, "The Brillo Box Scandal," ArtNews.com (Nov. 1, 2009), found at https://www.artnews.com/art-news/news/the-brillo-box-scandal-252/. Warhol, as it turns out, was wrong, by all contemporary lights:

> Of course Warhol's sculptures are original in the sense that he conceived them and had a hand in their execution, although he had considerable help from the studio assistants and other insiders he relied on to produce his prodigious output of paintings, prints, and sculptures. Not only did Warhol toy with notions of what constitutes art, he also frequently eschewed artistic practices that are crucial to establishing authenticity—such as signing each work or numbering works produced as multiples or in large editions. As a result, figuring out what constitutes a "true" Warhol is ultimately a subjective and convoluted task.

Id. In fact, Warhol's doubt was not based on the fact that he had recreated Brillo boxes—it was because he had appropriated a creation by an Abstract Expressionist painter named James Harvey. *Id*. Brillo, of course, never "came after" Andy Warhol claiming infringement. See, R. Coleman, "The Soupy IP Legacy of Andy Warhol," LikelihoodofConfusion.com (Nov. 30, 2016), found at https://www.likelihoodofconfusion.com/the-soupy-ip-legacy-of-andy-warhol/.

Readymades have since become staples of contemporary art through creators such as Ai Weiwei and Banksy. Phillips.com, "Banksy, Duchamp, Warhol, and the Readymade," found at https://www.phillips.com/article/71933868/banksy-duchamp-warhol-and-the-Readymade-twentieth-century-art-london-auction; see; *see also*, "Readymade," National Galleries of Scotland, found at https://www.nationalgalleries.org /art-and-artists/glossary-terms/Readymade (Readymade is a "term coined by Marcel Duchamp in 1913 to describe an existing object that is taken from its original context and regarded as a work of art. The

term is broadly applied today to any art that transforms ordinary objects into artworks through a variety of means").

Although Duchamp was a modern artist, art scholars call our present time the era of contemporary art, which emphasizes experimentation and freedom and consists of art that comments on society. "Modern Art VS Contemporary Art. What Is the Difference?," DaneFineArt.com (April 2, 2020), found at www.danefineart.com/modern-art-vs-contemporary-art-what-is-the-difference. One contemporary form of Readymade art, called "cultural Readymade," is created by taking an object of cultural significance that serves an ordinary purpose and repurposing or recontextualing it to create art. K. Sorenson-Jarret, "Unpacking the Cultural Readymade" (Oct. 15, 2021), Confluence.com, found at https://confluence.gallatin.nyu.edu/ context/independent-project/unpacking-the-cultural-Readymade.

Cultural Readymades imbue a work with an entry point—an object of readily recognizable cultural significance. Creators, scholars and curators of such art maintain that this use of the ordinary makes it easier for viewers to engage with the work, permitting the commentary to arise from a novel juxtaposition of the recognizable with an unexpected context or presented in an unexpected fashion. D. Daniels, "The Second Half of the Readymade Century (1964-)", *The Nordic Journal of Aesthetics*, No. 57-58 (2019) at 141-157, found at

https://www.academia.edu/70513752/The_Second_Half_of_the_Readymade_Century_1964_.

Thus, in contemporary art, Readymades "recontextualize" everyday objects, making them satirical, and often poetic, symbols of critical conversations between the artist and the art world, society and history. *See*, A. Meleca, "What is Readymade Art?," Artlex.com, found at https://www.artlex.com/art-movements/readymade/. And, in an era of mass production, branding and digital transformation, there are so many readily accessible examples of ordinary or conventional entry points, and thus such conversations often center on consumerism and the nature of the post-modern world. Daniels, *id.*

Like Warhol, MSCHF made their Readymade themselves; and like Warhol's Brillo boxes, MSCHF presents them to the world as if they were real sneakers—except for the fact that they have practically been stripped of their utilitarian purpose. MSCHF is not the first creator to use shoes as a medium for Readymade expression. For example, Sherri Levine sold 75 pairs of "ready-made" shoes in 1977 and revisited the concept in 1992 when she manufactured 135 pairs of her own children's shoes. Daniels, *id*. And the gallery of one of the amici, Phillips, will be featuring 20 sneaker designs in an exhibition called "Tongue + Chic Sneakers x

Artists" in July and August of this year. *See* Figure 5 below, found at https://www.phillips.com/detail/theheyyman/NY011118/8.

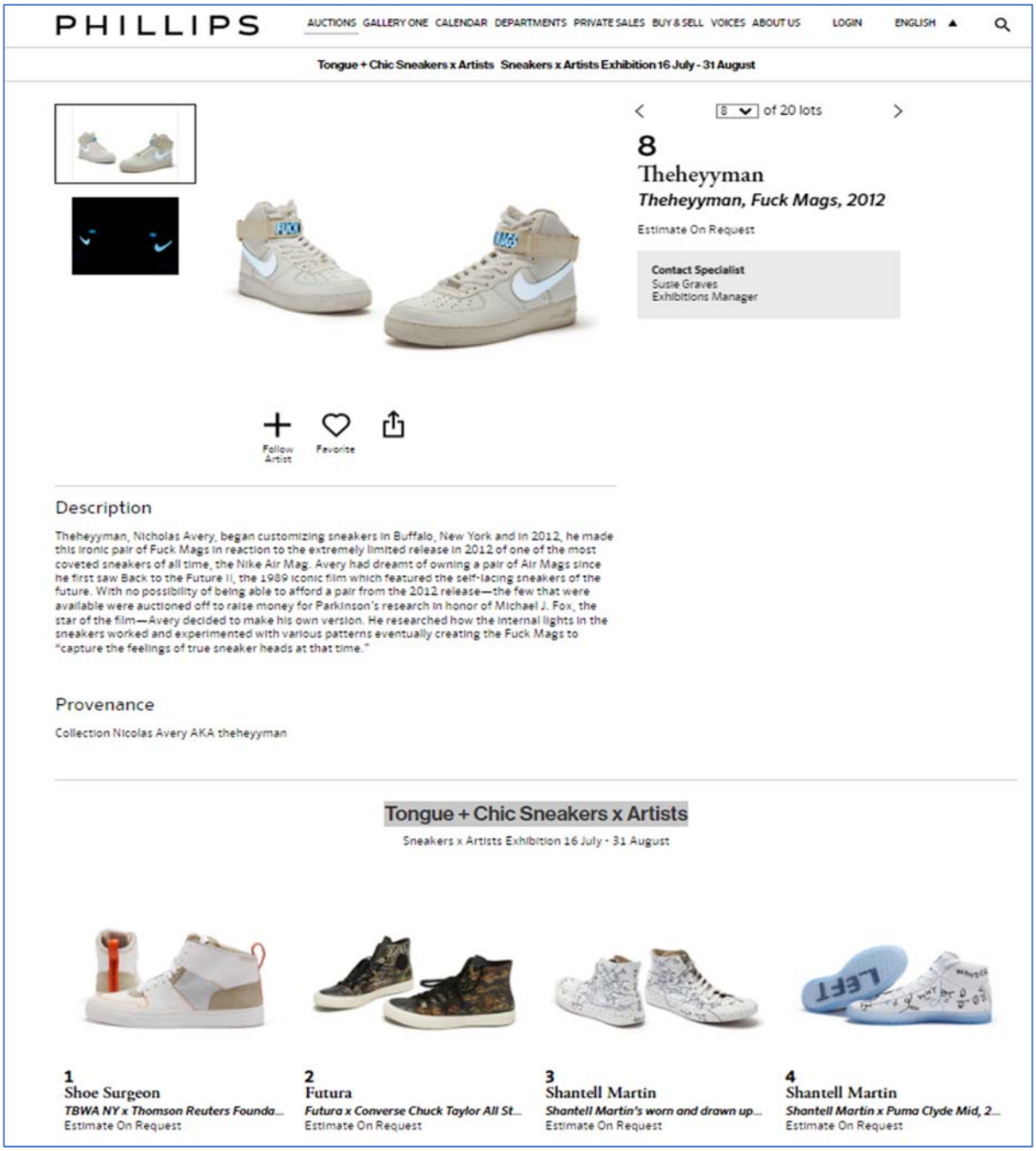

Figure 5

B. MSCHF's *Wavy Baby* is Culturally Significant Artwork

MSCHF's art is widely discussed and displayed in art exhibitions, as set forth in the Wiesner and Whaley Declarations, *see* A-503-06, because it is expressive and critiques consumerism and the modern world. In 1967 the artist Bruce Nauman created a neon wall sign that said, "The True Artist Helps the World by Revealing Mystic Truths." More than half a century later, MSCHF is doing just that, revealing Mystic Truths. In a world seemingly driven by "market forces" and the acquisition of wealth, MSCHF is asking questions about our behavior as a society. These questions throw us off balance—what the best of contemporary art does—and make us stop, reflect and reveal the truths which, hopefully, give us a better understanding of who we are.

From their very presentation, form and packaging, it is clear to any reasonable observer that MSCHF is not trying to recreate, compete with or cause confusion with Vans. *Wavy Baby* is a comment on consumerism and the economic structures big brands have created, an utterly apt subject for commentary through artistic expression, and an acutely ironic one considering that this comment is, under the district court's disposition, being repressed precisely under the rubric of brand protection.

Andy Warhol in essence made the same commentary in 1962 when he created 32 panels of Campbell's soup cans. He sold one. But today, the entire

series constitutes one of the most important works in the collection of New York's Museum of Modern Art and in 20th century art in general. Jeff Koons did the same in 1986 with his series "Luxury & Degradation," which used, among others, advertising material from distillers Jim Beam and Hennessy to comment on consumer society.

MSCHF stands solidly in this tradition, and, conceptually, is doing nothing new. It is simply using the artists' language and tools—and the post-modern version of "ordinary"—of 2022. By using today's language, MSCHF strikes a chord with its creators' own generation. Given its success, MSCHF is clearly doing something right. The policy and purpose of the First Amendment is to encourage creators like MSCHF to continue doing so, and the district court's injunction is as antagonistic to those values as can be imagined.

II. Works of Expression Such as *Wavy Baby* Are Protected by the First Amendment against Claims of Trademark Infringement.

The decision of the Second Circuit in *Rogers v. Grimaldi*, 875 F.2d 994 (1989) established that if an infringing trademark use is expressive, the Lanham Act must be "construe[d] . . . narrowly" because of the First Amendment interests of artists and brands. *Rogers*, 875 F.2d at 998. Under the First Amendment, as explained in *Rogers*, even where there is a likelihood of consumer confusion, expressive works like *Wavy Baby* cannot give rise to Lanham Act liability if the

use of the plaintiff's mark is both relevant to the expression and not explicitly misleading as to the source of the works. *Rogers*, 875 F.2d at 999. *Rogers* is broadly applicable to "Lanham Act claims against works of artistic expression." *Cliffs Notes v. Bantam Doubleday Dell Pub. Group*, 886 F.2d 490, 495 (2d Cir. 1989). See, *Hermes Int'l v. Rothschild*, No. 22-CV-384 (JSR), 2022 WL 1564597, at *4 (S.D.N.Y. May 18, 2022) ("Because Rothschild is selling digital images of handbags that could constitute a form of artistic expression, balancing the First Amendment concerns with Lanham Act protection requires applying the *Rogers* test; declining to make "factual determination" at the pleadings stage).

III. Expressive Works Are Protected under the First Amendment Regardless of Whether the Viewer Understands the Message.

The district court in this case found that *Wavy Baby* is not subject to First Amendment protections, "[w]hatever the[ir] actual artistic merits." (SPA-12). The court also ruled that *Wavy Baby* "do[es] not meet the requirements for a successful parody" under a traditional trademark law analysis. *Id.* These two statements, though they sound complementary, are actually at odds with each other under the relevant constitutional test as enunciated by the Supreme Court and this Circuit. For if, in the district court's own framing, Appellant's attempt at parody was "not successful," it is axiomatic that at the very least Appellant meant to express a message—parodic, artistic or otherwise—and this, not the viewer's appreciation or

comprehension of that message, is the sole determinant of whether such expression is entitled to First Amendment protection.

One key development since *Rogers* in this area of constitutional law has been the Supreme Court's teaching that it is not necessary for a court, or anyone, to "get" the expressive message expressed by a creative work for it to be protected as free speech under the Constitution. As the Third Circuit explained in *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002):

"I said, 'I wonder what it means,' not 'Tell me what it means.'"

> Until 1995, the Supreme Court determined whether speech is "sufficiently imbued with elements of communication" by asking "whether '[a]n intent to convey a particularized message was present, and [whether] in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.'" *Texas v. Johnson*, 491 U.S. 397, 404 (1989) . . .
>
> The Supreme Court's unanimous 1995 opinion, *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), modified somewhat the test for determining when conduct

> constitutes "speech." In *Hurley*, . . . the Supreme Court explained that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollak, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Id*. at 569 . . .
>
> By establishing that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech," *Hurley* eliminated the "particularized message" aspect of the *Spence–Johnson* test. Id. at 569–70. . . . Thus *Hurley* left open how courts should evaluate symbolic speech claims.

309 F.3d at 158-160. Thus, post-*Hurley*, courts ask "whether the reasonable person would interpret [the conduct] as some sort of message, not whether an observer would necessarily infer a specific message." *Burns v. Town of Palm Beach*, 999 F.3d 1317, 1336–37 (11th Cir. 2021), *cert. denied*, __ U.S. __, 142 S. Ct. 1361, 212 L. Ed. 2d 322 (2022) (design of mansion that violated guidelines of architectural review commission was not protected expression).

The fact, then, that the "interpretation" or reception of an intended expressive message is good, bad, or indifferent; muddled, clear or confusing; "successful" or a failure, is irrelevant. If a work, object, or other creation, concatenation, or juxtaposition can be (and certainly if it is acknowledged by the fact-finder to be) an utterance **intended as expression**—as it was by the district court in its determination that *Wavy Baby* was an unsuccessful parody—it qualifies as being sufficiently expressive that it must be afforded a full First Amendment analysis to determine if it is therefore exempt from leading to legal liability.

IV. The First Amendment Affords Protection to Broad Categories of Artistic Expression

Needless to say, a urinal is not typically expressive—unless an artist turns it on its side, writes "R. Mutt" on it, and it is displayed it in a gallery. So too with Brillo boxes. With Readymade art, the immediate context is usually what signals that the work is expressive, and even then, the specific message intended by the artist is not always apparent. As the case law makes clear, however, it is the fact of the message, not its content, that entitles it to First Amendment protection.

Wavy Baby is no different. A shoe is not always expressive, but it is expressive when it is created by an art collective, given an exaggerated sole and other expressive features, stripping it of its utilitarian purpose, and accompanied by a manifesto. What is being expressed? From the point of view of art, culture and

even commerce, this is a question worth pondering. But from the perspective of the First Amendment, it is irrelevant—precisely because, under the law, the only thing that need be understood by the viewer is that **there is** a message. If this were not the case, much of what we consider art, from Bosch (or earlier) to Dali to Warhol to Pollock to Ligeti, would not be protected by the First Amendment.


"But is it content?"

Still, it is one thing to say that artistic expression is entitled to special protection against Lanham Act claims. It is quite another to draw a line at what does and does not qualify as art for First Amendment purposes. But this Court has made it clear that the category of constitutionally-protected artistic expression is broad indeed:

> Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection. . . . The ideas and concepts embodied in visual art have the power to transcend these language limitations and reach beyond a particular language group to both the educated and the illiterate. As the Supreme Court has reminded us, visual images are "a primitive but effective way of communicating ideas ... a short cut from mind to mind." *West Virginia State Board of Education [v. Barnette]*, 319 U.S. [624,] 632 [(1943)]. Visual images and symbols, for example, are used in the Third World

> so that individuals who are unable to read may readily recognize the party or candidate they wish to vote for. One cannot look at Winslow Homer's paintings on the Civil War without seeing, in his depictions of the boredom and hardship of the individual soldier, expressions of anti-war sentiments, the idea that war is not heroic.
>
> . . .
>
> Visual artwork is as much an embodiment of the artist's expression as is a written text, and the two cannot always be readily distinguished.

Bery v. City of New York, 97 F.3d 689, 695 (2d Cir. 1996). And as the Southern District of New York explained in *Hoepker v. Kruger*, 200 F. Supp. 2d 340 (S.D.N.Y. 2002):

> [M]annequins and pencil sharpeners and other such products can also qualify as art, and museums sometimes collect and display them as such. And case law makes clear that "First Amendment doctrine does not disfavor nontraditional media of expression." *Comedy III Productions,* 106 Cal.Rptr.2d 126, 21 P.3d at 804; *see also Cardtoons, L.C. v. Major League Baseball Players Association,* 95 F.3d 959 (10th Cir.1996) (trading cards containing caricatures of baseball players provided social commentary, and therefore were entitled to First Amendment protection) . . . Courts should not be asked to draw arbitrary lines between what may be art and what may be prosaic as the touchstone of First Amendment protection.

200 F. Supp. at 352. Similarly, the Ninth and Eleventh Circuits have deemed tattoo art constitutionally-protected expression. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1055 (9th Cir. 2010); *Buehrle v. City of Key W.*, 813 F.3d 973, 976 (11th Cir. 2015). Other creations found to be sufficiently expressive under the First Amendment test include "Humvee" vehicles depicted in video games, *AM Gen. LLC v. Activision Blizzard, Inc.*, 450 F. Supp. 3d 467, 479

(S.D.N.Y. 2020); a "garden" of retired toilet bowls, *Robar v. Vill. of Potsdam Bd. of Trustees*, 490 F. Supp. 3d 546, 565 (N.D.N.Y. 2020); and a front-yard installation of junk cars, *Kleinman v. City of San Marcos*, No. A-08-CA-058-SS, 2008 WL 11429401, at *4 (W.D. Tex. Apr. 30, 2008).

Unsurprisingly, clothing and garments, even where functional, have been found to qualify as protected expression as well, including by this Court in *Mastrovincenzo v. City of New York*, 435 F.3d 78, 96 (2d Cir. 2006) ("While plaintiffs' [clothing] items clearly have non-expressive uses, we conclude that these non-expressive uses are secondary to the items' expressive or communicative characteristics"). Whether *Wavy Baby* shoes can, as a practical matter, really be worn for any significant period of time, therefore, is beside the point. They are a form of artistic expression—or, if one is steadfast in the position that he does not know much about art, but he knows what he likes, and does not much like *Wavy Baby*—they are, under the clear law of this Circuit, expression protected by the First Amendment all the same. For that reason, the ruling of the district court should be reversed.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's injunction, and the case should be remanded to the District Court for further proceedings acknowledge the expressive and constitutionally privileged nature of *Wavy Baby*.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Second Circuit Local Rule 32.1(a)(4)(A) because it contains 4,524 words, excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

By: 
Ronald D. Coleman

Dated: June 24, 2022

CERTIFICATE OF SERVICE AND FILING

I certify pursuant to Fed. R. App. P. 25(d) that, on June 24, 2022, electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the Court's CM/ECF system, and thereby caused the foregoing Brief to be served upon all counsel of record by electronic mail generated by the Court's CM/ECF system in accordance with Local Rule 25.1(h).

I further certify that, in accordance with Local Rule 31.1, I caused six paper copies of the foregoing Brief to be filed with the Court by overnight delivery on this 24th day of June, 2022 to:

Clerk of Court
United States Court of Appeals, Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

By: 
Ronald D. Coleman

Dated: June 24, 2022