



THE THIRD BRANCH:
The Supreme Court
of the United States (SCOTUS)
Week 1

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Fall 2023, Jefferson County Library

JUSTICES OF THE U.S. SUPREME COURT

October Term 2022



October Term 2023





SCOTUS OT 2022 OVERVIEW

Co-sponsored by the National Constitution Center
& the Anti-Defamation League

Hosted by SCOTUSblog co-founder & Journalist Amy Howe

<https://www.youtube.com/watch?v=JRaGkkWNAKU>

Erwin Chemerinsky, Dean, U.C. Berkeley School of Law
(6:30→12) characterizes this term:

- John Roberts Court Again; wrote most of significant decisions
- Era of Judicial Supremacy – SCOTUS deferred to no one
- Lowest Approval Rating – Out of sync with society



OT 22 - SCOTUS by the NUMBERS

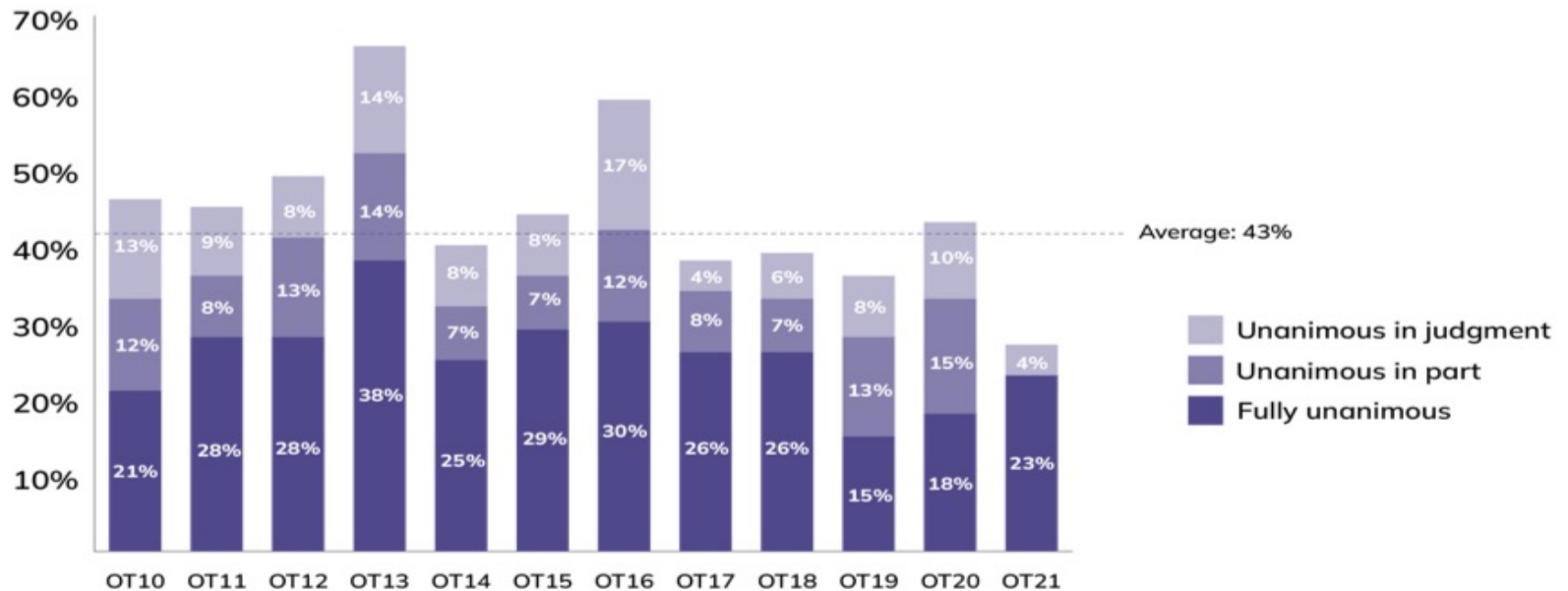
SCOTUSBLOG STAT PACK is NO LONGER PUBLISHED!!!!

58 MERITS CASES – same as last year

- ▶ Court seems to have stabilized at ~50 cases
- ▶ 1st decade of Roberts Court averaged >70 cases
- ▶ Last year of Rehnquist Court (2004) - 80 Cases
- ▶ 1980s average – 160 cases/yr.

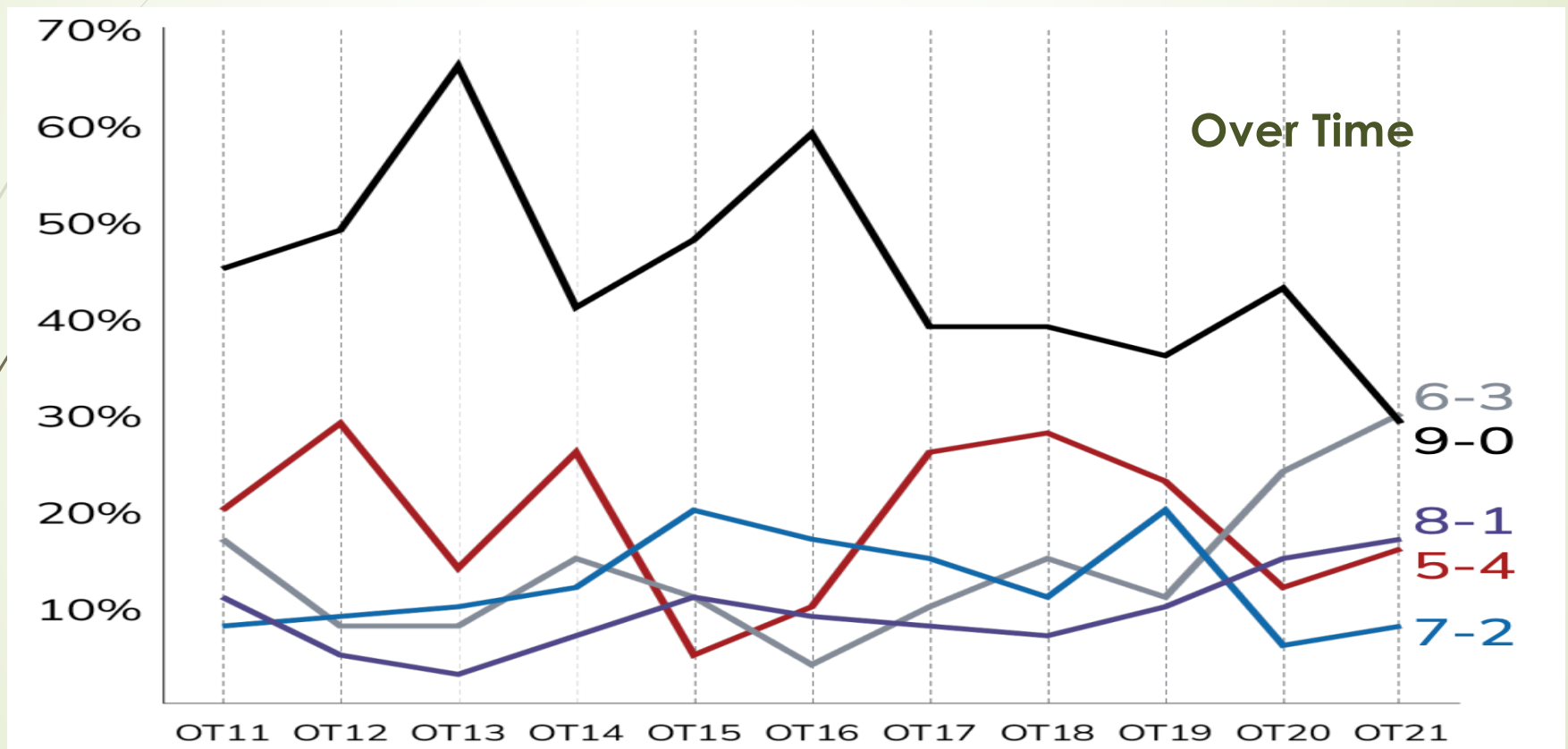
OT 22 - SCOTUS by the NUMBERS (cont.)

27/58 (47%) cases decided unanimously



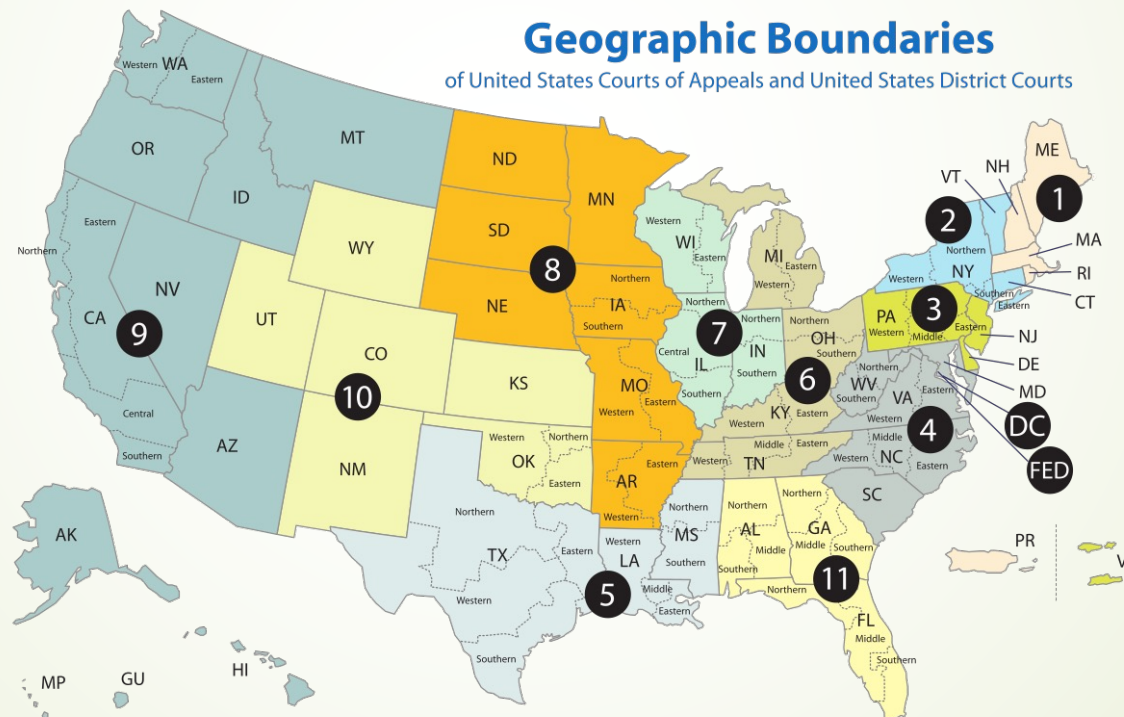
SCOTUS by the NUMBERS (cont.)

11 (19%) 6:3 decisions, 6 (10%) 5:4 decisions



SCOTUS OT 2022 OVERVIEW (cont.)

Dahlia Lithwick, Contributing editor at *Newsweek*
(1:26:53→1:27:52) –Shadow Docket cases



SCOTUS OT 2022 OVERVIEW (cont.)

Miguel Estrada, Honduran-American Attorney
(1:27:52→1:28:33) – Cert before Judgment

A petition to the Supreme Court of the United States for “**cert before judgment**” is a petition in which the Supreme **Court is asked to immediately review the decision of a United States District Court**, without an appeal having been decided by a United States Court of Appeals.

Such petition will be **granted “only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.”**

from SCOTUS Rule 11

SCOTUS OT 2022 OVERVIEW (cont.)

Cert before judgment is **on the rise**, and it's **not at all clear why**.

The Justices have granted it **14 times since February, 2019**, after having gone more than 14 years without granting it once.

- **UNC/Affirmative Action** - Court had already granted Cert to the Harvard case (a private university), and this case of a public university was a reasonable companion for review.
- **Citizenship Question on Census** – Time sensitive & important
- **Challenge to Texas Anti-Abortion Law** – Ruled to have been “Improvvidently Granted.” Troubling, as it appeared to be a means of mitigating the number of “shadow docket” emergency rulings.

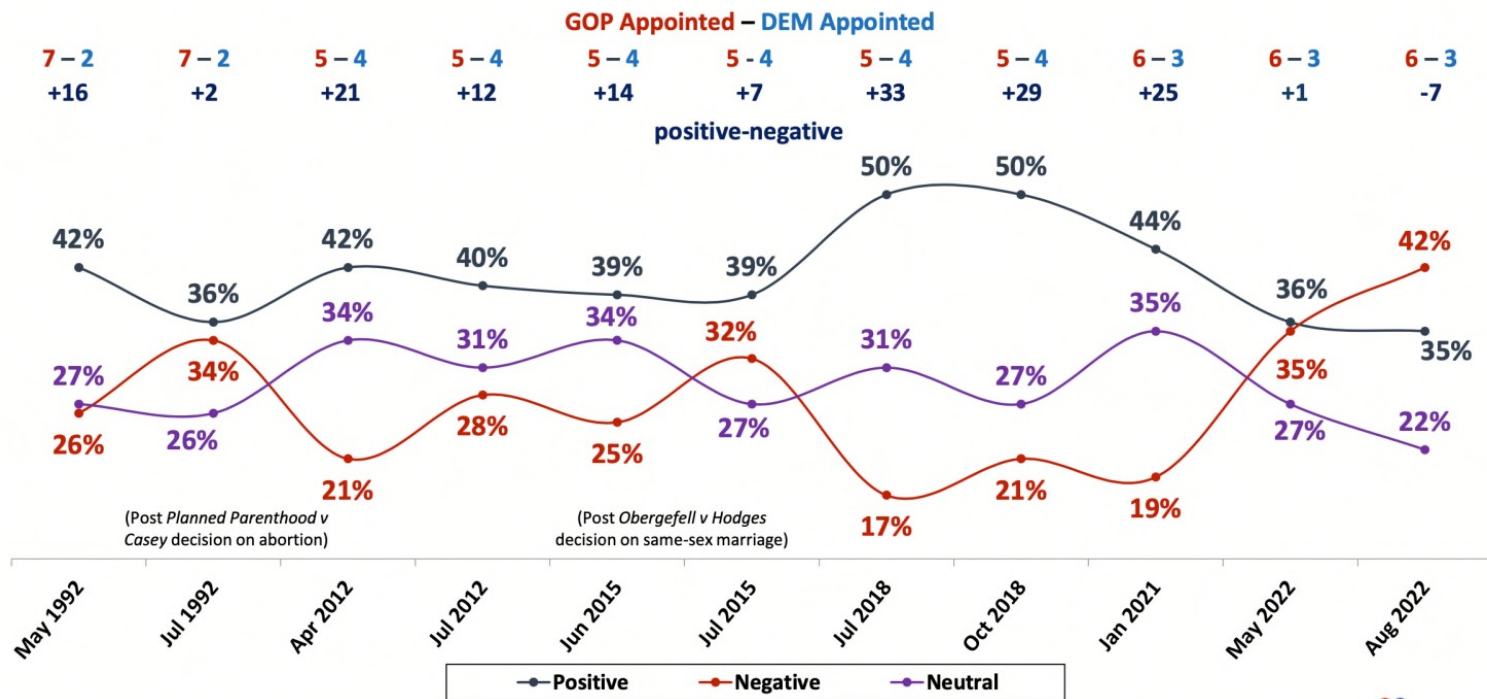
Steve Vladeck, “The rise of Certiorari before judgement, SCOTUSblog”

<https://www.scotusblog.com/2022/01/the-rise-of-certiorari-before-judgment/>

SCOTUS by the NUMBERS (cont.)

30% Positive ★ **59% Negative** ★ **11% Neutral**

The United States Supreme Court Image





A Summary of the Supreme Court Ethics Scandal

Allegations of Ethical Impropriety:

- ▶ **Clarence Thomas** – Accepted gifts from **Harlan Crow**, a wealthy Dallas-based real estate investor and prominent Republican donor.
- ▶ **Samuel Alito** – Accepted trips from Paul Singer, a big Republican donor. Singer has had cases come up in front of the Supreme Court, and Alito has not recused himself. (Recusal generally means that a justice takes no part in the case, including argument and decision making.)
- ▶ **Scalia** and **Gorsuch** faced disclosure 'scandals,' and others have initially failed to make required disclosures but later corrected the record.
- ▶ **Sotomayor** didn't disclose transportation and lodging from various law schools but amended her records in 2021.
- ▶ **Ginsburg** amended her disclosure documents in 2017 to include a \$4,500 opera costume. All have escaped punishment.







A Summary of the Supreme Court Ethics Scandal (cont.)

Disclosure Requirement:

- ▶ Watergate caused Congress, to enact the **Ethics in Government Act of 1978**.
- ▶ The law established financial interest reporting requirements for high-level government officials, including Supreme Court justices, and the responsibility to make these documents available to the public. The ethics law established clear-cut rules for financial behavior and consequences for violations.
- ▶ A decade later, the **Ethics Reform Act of 1989** expanded those requirements.
- ▶ Federal officials subject to disclosure requirements must report income, dividends, most capital gains, significant debts, the purchase or sale of land, and gifts, among other things.
- ▶ There is an exception to the required disclosure of gifts known as the “personal hospitality clause.”

A Summary of the Supreme Court Ethics Scandal (cont.)

The Judicial Conference

- ▶ The **Judicial Conference** is an administrative body established by Congress to administer the judicial branch and is responsible for obtaining, reviewing, and publishing financial disclosure documents of justices and judges.
- ▶ The justices, however, are not subject to the Judicial Conference's interpretations of the ethics law — that is, the specific interpretations that the Judicial Conference imposes on lower court judges **do not apply to the Supreme Court**:

“All officers and employees of the judicial branch hold appointive positions. Title III of the Ethics Reform Act of 1989 (5 U.S.C § 7351 and 7353) thus applies to all officers and employees of the judicial branch. However, the Judicial Conference has delegated its administrative and enforcement authority under the Act for officers and employees of the Supreme Court of the United States to the Chief Justice of the United States and for employees of the Federal Judicial Center to its Board.”



A Summary of the Supreme Court Ethics Scandal (cont.)

- ▶ In 1991, the **justices publicly agreed to follow the Judicial Conference** interpretations that apply as a matter of law to lower court judges.
- ▶ However, the justices do so voluntarily rather than by legal obligation, so there is a legal grey area: If a justice disagrees with the Judicial Conference's interpretation of the statute — or, more likely, simply thinks that a Judicial Conference rule doesn't apply to the specific financial interest at issue, even if the Judicial Conference or others would disagree — **there would be no way for anyone except the chief justice to overrule that decision.**
- ▶ **The Personal Hospitality Clause** does not require an official, including a federal judge, to disclose gifts of food, lodging, or entertainment “received as personal hospitality of an individual.”
- ▶ **Supreme Court justices have relied on this clause** to justify not disclosing gifts that it appears they would otherwise have to. Justices Alito and Thomas each alluded to this clause in their responses to the ProPublica reports.



A Summary of the Supreme Court Ethics Scandal (cont.)

- ▶ The Judicial Conference has stated that the **personal hospitality exemption does not apply to transportation.**
- ▶ **The individual extending the hospitality must be the one paying for it**, not an entity or other individual. Any gift or favor that is extended at a property owned by a company, even if the individual who is extending the gift wholly or partly owns it, must be disclosed.
- ▶ Two aspects demonstrate the **problems with the financial disclosures of Clarence Thomas** in particular.
 - ▶ The regulations explicitly state that a personal hospitality gift must come from an individual's own pocket — not from a company or entity. **(Crow's jet is likely owned by an LLC).**
 - ▶ **Transportation, e.g., private jet travel or yachting adventures, must be disclosed.** If ProPublica's reporting is accurate, Thomas should amend his financial disclosures to show his travel on Crow's yacht and plane, as well as any other benefits that Crow did not personally fund.

A Summary of the Supreme Court Ethics Scandal (cont.)

- ▶ 2022 **Courthouse Ethics and Transparency Act** mandated the creation of an online **database** for the financial disclosure documents of federal judges and Supreme Court justices, bringing greater public transparency.
- ▶ Rep. Hank Johnson (D-GA) and Sen. Sheldon Whitehouse (D-RI) reintroduced the **Supreme Court Ethics, Recusal, and Transparency Act**, and Rep. Pramila Jayapal (D-WA) and Sen. Elizabeth Warren (D-MA) reintroduced the **Judicial Ethics and Anti-Corruption Act**. Both bills contain ideas for strengthening financial disclosure procedures. It appears that the future of financial disclosure rules for Supreme Court justices will be part of the broader conversation about court reform.
- ▶ In **Alito's** case, in the years after his fishing trip, **Singer's hedge fund came before the court at least 10 times** in cases where his role was often covered by the legal press and mainstream media. In 2014, the court agreed to resolve a key issue in a decade-long battle between Singer's hedge fund and the nation of Argentina. Alito did not recuse himself from the case and voted with the 7-1 majority in Singer's favor. The hedge fund was ultimately paid \$2.4 billion.



A Summary of the Supreme Court Ethics Scandal (cont.)

What power does the Chief Justice have over fellow justices?

The Chief Justice's most prominent role is that of presiding officer of the Court. In this capacity, the Chief Justice:

- ▶ presides at the private conference during which the Court decides which lower court decisions to accept from the large number received on appeal,
- ▶ presides over the public sessions, or hearings of cases, that come before the Court,
- ▶ chairs the private conference at which cases are discussed among the nine members of the Court and eventually decided by a vote of the Justices, and
- ▶ assigns, when in the majority, the writing of the Court's opinion on the case either to himself or to one of the Associate Justices.

A Summary of the Supreme Court Ethics Scandal (cont.)

US Constitution, Article II, Section 1:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, ***shall hold their Offices during good Behaviour...***

- ▶ Life-time appointment
- ▶ Impeachment
- ▶ Fifteen federal judges have been impeached. Of those fifteen: eight were convicted by the Senate, four were acquitted by the Senate, and three resigned before an outcome at trial.
- ▶ The last of these was in 2010: Thomas Porteous of the United States District Court for the Eastern District of Louisiana was accused of accepting bribes and making false statements under penalty of perjury. He was convicted by the Senate and removed from office on December 8, 2010.
- ▶ The only Supreme Court justice to be impeached was **Samuel Chase** in 1804. He was charged with 'arbitrary and oppressive conduct of trials' but was **acquitted** by the United States Senate.

Andy Warhol Foundation v. Goldsmith

- ▶ The work on the right is an original photograph by Lynn Goldsmith from 1981.
- ▶ The work on the left was made by Vanity Fair & Andy Warhol (sort of) under license from Goldsmith in 1984.
- ▶ Conde Nast (owns Vanity Fair) used the 'Orange Prince' version on the left in a commemorative publication in 2016.



Andy Warhol Foundation v. Goldsmith

- ▶ The 2016 publication exceeded the license that was originally granted, which was just for the Vanity Fair article.
- ▶ Goldsmith sued the Andy Warhol Foundation, successor to Warhol's copyright in the Prince Series, for copyright infringement.
- ▶ The Foundation argues 'fair use' as a defense.
- ▶ The **district court granted summary judgment** for the Foundation, concluding that Warhol had **"transformed"** the original photograph by giving it a new "meaning and message."
- ▶ The **U.S. Court of Appeals for the Second Circuit**, holding that **because the Prince Series remained "recognizably derived" from the original, it failed to transform and was thus not fair use.**



Andy Warhol Foundation v. Goldsmith

- ▶ **Fair use** is a copyright doctrine which permits limited use of copyrighted material without having to first acquire permission from the copyright holder.
- ▶ The doctrine is intended to balance the interests of copyright holders with the public interest in the wider distribution and use of creative works by allowing certain limited uses.
- ▶ Classic 'fair use' is for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research. That is how I get away with copying both of these images here 😊.
- ▶ A recent and key consideration in 'fair use' analysis is whether the later work is **'transformative.'** A transformative work transcends, or places in a new light, the underlying work on which it is based.



Andy Warhol Foundation v. Goldsmith

- ▶ Oral Argument was held October 12, 2022 with wide ranging discussion about what makes a work transformative.
- ▶ A pro-AWF decision could make it impossible for photographers to enforce licenses for artistic reproductions of the sort that Goldsmith originally sold to *Vanity Fair*.
- ▶ A less extreme opinion could find **fair use** in the fact that this was not just any artist's modification, but Andy Warhol's — but that risks furthering an already troubling trend in fair use cases — **extending greater fair use solicitude to the well known and wealthy, and less to the poor and obscure.**
- ▶ A pro-Goldsmith decision risks, as many amicus briefs have observed, “a whole generation of artists working today who will be chilled were this ruling to stand.”



Andy Warhol Foundation v. Goldsmith



Decision:

- ▶ In May 2023, the Court ruled 7–2 that AWF's use of Goldsmith's photographs was **not** protected by fair use.
- ▶ **Justice Sonia Sotomayor** wrote for the majority that ***the works shared a similar purpose in the depiction of Prince in magazine articles and are both a commercial product.***
- ▶ Her opinion contained many footnotes disparaging ***Justice Elena Kagan's combative dissent***, which was equally harsh on the majority as she defended the value of transformation in art.
- ▶ Commentators in the art world feared for the future of **appropriation art**, popular with artists inspired by Warhol, like Richard Prince and Jeff Koons, if artists are deterred from creating works by fear of litigation or prohibitive license fees.

Andy Warhol Foundation v. Goldsmith



- ▶ **Decision:**

- ▶ For a work to be **transformative**, it must be productive and must employ the underlying work in a different manner or for a different purpose than the original. A use of copyrighted material that either repackages or republishes the original is unlikely to pass the test. If, on the other hand, the secondary use adds value to the original—if the underlying work is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understanding—this is the very type of activity that fair use doctrine intends to protect for the enrichment of society.
- ▶ The Supreme Court accepted this aspect of fair use of copyrighted works in a holding that rap group **2 Live Crew's** parody of **Roy Orbison's "Oh, Pretty Woman"**, which the publisher had refused to license to them, was not an infringement.
- ▶ It was noted that there was a bit of a split between the 2nd Circuit (the CA in this case) and the 9th Circuit (our CA, also California's) on 'transformative' works.

Andy Warhol Foundation v. Goldsmith



- **Decision:**
- **Sotomayor:** The use of a copyrighted work may nevertheless be fair if, among other things, the use has a purpose and character that is sufficiently distinct from the original. In this case, however, **Goldsmith's original photograph of Prince, and AWF's copying use of that photograph in an image licensed to a special edition magazine devoted to Prince, share substantially the same purpose, and the use is of a commercial nature.** AWF has offered no other persuasive justification for its unauthorized use of the photograph.
- **Gorsuch** wrote a concurring opinion in which he said that if the AWF displayed the Prince series "in a nonprofit museum or a for-profit book commenting on 20th-century art, the purpose and character of that use might well point to fair use."
- **Kagan** dissented in what, for the Supreme Court, became a bit of a pissing contest between Sotomayor and Kagan.

Andy Warhol Foundation v. Goldsmith



- ▶ **Dissent:**
- ▶ Kagan accused the majority of having wrongly mooted the question of what value, if any, Warhol's work had added to Goldsmith's because of the commercial purpose. If Warhol had added nothing to Goldsmith's photo, why, would the editors of *Vanity Fair* have chosen his work over hers?
- ▶ 'All I can say is that it's a good thing the majority isn't in the magazine business. Of course you would care! You would be drawn aesthetically to one, or instead to the other ... The point is that they are fundamentally different.'
- ▶ Kagan argues that "the more transformative the work, the less commercialism matters" and was especially critical of the majority's conclusion that the two works had the same "essential nature."



Preview of Cases for Week 2

FEDERAL ELECTION LAWS/REDISTRICTING

- ▶ *Moore v. Harper* – Independent Legislature Theory
- ▶ *Allen v. Milligan* – Alabama Redistricting

AFFIRMATIVE ACTION IN COLLEGE ADMISSIONS

- ▶ *Students for Fair Admissions v. UNC & Harvard*

STUDENT LOAN FORGIVENESS

- ▶ *Biden v. Nebraska*

Hope to see you next week!