No. 15-849

In The

Supreme Court of the United States

THE AUTHORS GUILD, ET AL,

Petitioners,

v.

GOOGLE INC.,

Respondent.

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

BRIEF FOR ELSEVIER INC. AND HACHETTE BOOK GROUP, INC. IN SUPPORT OF PETITIONERS

CHARLES S. SIMS,
Counsel of Record
PROSKAUER ROSE LLP
ELEVEN TIMES SQUARE
NEW YORK, NY 10036
csims@proskauer.com
212-969-3950
Counsel for Amici Curiae

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are among the nation's leading publishers. Each of them owns copyrights (in some works) and exclusive rights under copyright (in others), obtained through contracts to pay authors upon sales of copies or licenses of various rights (or both).

The practical ability of authors to create and of publishers to publish depends on the "exclusive rights" authorized by the Copyright Clause and implemented by successive congresses. Copyright – the engine of free expression, as the Court wrote in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985) – runs only on fuel provided by a robust set of exclusive rights. *Amici* submit this brief to show the Court that the Second Circuit's decision misconceives and misapplies the fair use doctrine so profoundly that the Court should grant the writ to consider on the merits the proper scope of fair use as applied to Google's verbatim copying of over four million copyrighted books – almost certainly the largest concerted copyright infringement in United States history.

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[1] Blanket consent from the parties is reflected on the docket. 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 the preparation or submission of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

A properly balanced application of the fair use doctrine is vitally important to publishers. They are frequent *users* of fair use on the demand side, relying on it extensively in their publication of works of criticism, comment, news reporting, teaching, scholarship (in works such as histories and biographies), and research. But equally importantly publishers are *suppliers* of works fairly used, for whom it is especially important that fair use is properly limited, because an overly expansive fair use doctrine is incompatible with the exclusive rights on which copyright incentives depend. Being on both sides of the fair use relationship gives publishers a uniquely nuanced appreciation of the issue and the importance of that balance.

Amici agree without reservation on petitioners' questions presented. *Amici* focus here on the mistakes in the Second Circuit's opinion and its departure from previously settled fair use doctrine, especially its overly expansive view of the meaning and consequences of transformativeness, which displaces the statutory full factorial analysis Congress intended.

Review should be granted because of the conflict between the Second Circuit's decision – which will greatly harm copyright owners in their core and expectable markets – and fair use law as applied by this Court and other courts generally.

The scale of the fair use decision is unprecedented, applying on its face to the wholesale

copying – the mass digitization – of all the copyrighted works in one of the nation's great research libraries. The statute's express application to the fair use of particular works (as distinct from the wholesale copying and distribution of all books) is in considerable tension with the Second Circuit's decision, and that decision renders § 108, which reflects carefully worked out industry compromises, a dead letter.

The court of appeals subordinated the very right that lies at the heart of copyright – the exclusive right to reproduce. Instead, it ignored the wholesale copying, and focused its fair use analysis on the two uses Google is presently making of its digital corpus, notwithstanding that the statute gives owners an "exclusive right" to make copies, regardless of present uses.

The harm to owners from the Second Circuit's analysis stem largely from its expansive redefinition of "transformative use" to require not a new work, but only a new business idea. Because tech companies are always pursuing new ideas to use old content, the panel's approach will inevitably result in fair use determinations, and divert revenues from creators to tech companies. The court of appeals also erred in attending not to the intentions of the defendant commercial copier, but instead to those of remote end-users, an approach that creates a broad loophole for infringing intermediaries in direct disregard of Congress's express intentions.

If Google may copy every book in our great libraries, so may others, eliminating the "exclusive

right" which affords the incentives to create provided by the Framers and Congress. Far from securing exclusive rights to authors, the panel's decision goes far to eliminating them, and by providing digital copies to libraries renders copyright in books radically insecure.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S APPROACH TO TRANSFORMATIVE USE INCORRECTLY PERMITS A COMMERCIAL ENTERPRISE TO ENGAGE IN THE VERBATIM DIGITAL COPYING OF THE ENTIRETY OF EVERY BOOK IN LIBRARY COLLECTIONS.

A. Subordination of the Exclusive Reproduction Right

Among the doctrinal changes that the Second Circuit's approach entails is a significant dilution of the value of the core, namesake copyright right – the reproduction right.

The panel's decision focused exclusively on two particular "functions" – uses – that it considered Google to be undertaking after it copied every book then in the University of Michigan's and other libraries: a "search function" and a "snippet view function." That post-copying approach discounted, and indeed effectively ignored, Google's infringement of the exclusive right to reproduce the works for whatever future uses it might eventually choose to pursue. Google's infringement was complete upon its extraordinary copying, and existed regardless of any further use of the four million copyrighted works by Google (or its downstream

customers or users). But the panel appears not to have considered whether that copying of over four million books under copyright itself, without more, created any infringement to be considered and adjudicated.

The implications and consequences of the Second Circuit's subordination of the exclusive reproduction right by its expansive definition of "transformativeness" can be seen in *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (S.D.N.Y. 2014), which in reliance on recent Second Circuit decisions held that regular copying of complete, 24/7 news programming is transformative and thus fair use: "By indexing and excerpting all content appearing in television, every hour of the day and every day of the week, month, and year, TVEyes provides a service that no content provider provides." *Id.* at 392.

What the Second Circuit authorized as fair use is fairly characterized as a "redistribution of wealth from the creative sector to the tech sector."[2] Google is a company centered on search. Whatever its future as-yet-unplanned or at least as-yet-unannounced uses of the corpus, the fact is that even in the short run, copying verbatim the content of the 4 million copyrighted books and ingesting that corpus into its search engines has already improved the Google search algorithm and is a

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[2] The phrase is Richard Russo's. *See Richard Russo on Authors Guild v. Google,* THE AUTHORS GUILD (Jan. 6, 2016), https://www.authorsguild.org/industry-advocacy/richard-russo-on-authors-guild-v-google/.

concrete, immediate commercial benefit from which Google is already benefitting, while depriving copyright owners of the license fees that would otherwise be available for copying a work in which the owner has the exclusive right to copy.

The failure to consider such mass digitization and copying independently, and on the assumption that comparable copying will be undertaken widely by others, is particularly unwarranted given the requirement that courts consider "not only the extent of market harm caused by the particular actions of the alleged infringer, but also" the impact of "unrestricted and widespread conduct" by others "of the sort engaged in by the defendant . . . ." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (citing authorities). So far as the Second Circuit's opinion goes, Microsoft, Yahoo, Apple, and Amazon could undertake copying of those same four million works next month, without firm plans in hand as to what to do with them once the copies were made, without any infringement at all.

The panel's decision ignores that Congress gave copyright owners "exclusive rights" not only to use copyrighted works and to distribute them in copies, but also to "reproduce" copies in the first place. The panel offered no rationale whatsoever as to why Google's conduct in copying every book under copyright in the collection of the University of Michigan and other libraries (creating what we refer to below as "Google's corpus") was not a completed, freestanding infringement once it was undertaken, quite apart from the particular uses of its new asset that Google began indulging in, or

might choose to undertake in the future. And there is no doubt as to the market value of the opportunity to copy on that scale: indeed, the director of the University of Michigan library, shortly before the project commenced, told a copyright symposium at Columbia Law School that "If I'm paid enough money I will make my library available for copying."[3]

The very structure of the copyright statutes – affording independent exclusive rights of reproduction, distribution, display, and derivative use – renders mass verbatim copying a completed free-standing infringement, especially when undertaken by a defendant with Google's protean capabilities and interests. Certainly it could not be clearer that Google's investment in digitally copying every book in the University of Michigan and other large research libraries (including every book under copyright) was undertaken not solely for the two particular uses that were addressed by the panel – which Google chose to implement while the lawsuit was threatened and underway – but rather to create a permanently valuable asset available for any of the protean uses as might arise from time to time. (Google has never given any undertaking to limit its uses to those focused on by the panel). As the Register of Copyright's recent report on Orphan Works and Mass Digitization noted after reviewing

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[3] Quoted in Gloria C. Phares, Symposium, *To What Extent Should Libraries Be Permitted to Engage in Mass Digitization of Published Works, and for What Purposes?*, 36 COLUM. J.L. & ARTS 567, 583 (2013).

comments by libraries and user groups, once works are digitized without involvement by copyright owners, copies are inevitably "available for a variety of purposes to intermediaries, end-users, or the general public."[4]

The failure to consider at this juncture Google's copying as an independent wrong has serious consequences. When Google undertakes further uses of its corpus, it is not at all clear that a challenge to such further uses could, at that stage, include a challenge to the foundational reproduction infringement on which such new uses would depend. Since the massive reproduction of millions of copyrighted works should be at the core of any challenge to Google's conduct regardless of the various uses tacked on in the future, now is the best, and perhaps the only, proper time for this Court to consider whether Google's wholesale verbatim copying – which under the Second Circuit's rationale Google's competitors would be free to undertake as well – is fair use in the first place.

B. Displacement of Full Factorial Analysis by a Swollen Doctrine of Transformative Use

The Court should also consider whether the Second Circuit has so expanded the concept of

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[4] U.S. COPYWRIGHT OFFICE, ORPHAN AND MASS DIGITIZATION 76 (June 2015), http://copyright.gov/orphan/reports/orphan-works2015.pdf.

"transformative use" as to have slipped its essential bounds.

Campbell asked whether defendants had taken portions of an old work and used them to create a "new work" that transformed plaintiff's copyrighted work. *See Campbell*, 510 U.S. at 579 (the question is "whether and to what extent the new work is 'transformative'"); *id.* ("the goal of copyright . . . is generally furthered by the creation of transformative works . . . the more transformative the new work, the less will be the significance of other factors"). That was the Second Circuit law before *Google* and its predecessor decision, *HathiTrust.*[5]

The panel not-so-subtly altered the inquiry employed in *Campbell* and these other cases. It asked not whether Google transformed the existing

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[5] *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014). In *Infinity Broadcasting Corp. v. Kirkwood,* 150 F.3d 104, 108 (2d Cir. 1998), the Second Circuit had held that there is no transformativeness (and no fair use) where the defendant's copying "leave[s] the character of the original . . . unchanged," and that verbatim copying reflects "the total absence of transformativeness". *Id.* at 109. *See also Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 143 (2d Cir. 1988) (verbatim copying "without substantial alteration, is far less transformative than other works we have held not to constitute fair use"); *Am. Geophysical Union v. Texaco Inc.,* 60 F.3d 913, 923 (2d Cir. 1994) (verbatim copying "cannot properly be regarded as a transformative use of the copyrighted material").

work to create a new work – as this Court noted that Two Live Crew did, and which the Second Circuit had previously found *in Bill Graham Archives v. Dorling Kindersley Limited*, 448 F.3d 605, 610 (2d Cir. 2006) – but whether Google had some "transformative purpose" for copying four million books under copyright. That is a very different inquiry, and a standard enormously easier for copiers to satisfy: it looks to not whether a defendant used the plaintiff's work in creating a new work, but to whether the defendant mass digitizer has a new business idea.

Tech companies are always coming up with new business ideas, new plans for utilizing and obtaining revenues for content.[6] That is what they do. Under the Second Circuit's approach, those uses will always (or virtually always) be "transformative," automatically swinging the first, second, and third fair use factors to the new tech use. The existing statutory right of creators to enjoy the fruits of new uses and derivative works will be severely limited (if not entirely eviscerated) by an endless series of "transformative" new ideas.

Note that the Second Circuit did not ask whether the principal "transformative purpose" it

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[6] *See, e.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (copying music); *Perfect 10, Inc. v. Amazon.com, Inc.* 508 F.3d 1146 (9th Cir. 2007) (copying photographs); *Fox News Network, LLC v. TVEyes, Inc.*, No. 13 Civ. 5315 (AKH), 2015 WL 5025274 (S.D.N.Y. Aug. 25, 2015) (copying the entirety of Fox's news programming).

addressed – "search function," enabling unknown scholars to search for "books containing a term of interest to the searcher" – in fact motivated Google's investment (which seems extremely unlikely), but only whether it was a purpose that might reasonably be furthered by the copying in question.

Campbell and *Harper & Row* stressed the importance of addressing all four factors, as well as any others that seem pertinent under the particular circumstances presented. "All are to be explored, and the results weighed together, in light of the purposes of copyright." *Campbell*, 510 U.S. at 578. The Second Circuit's opinion does not fairly do so; rather, it so expanded both the meaning and consequence of "transformativeness" that it essentially held that mass digitization – the wholesale verbatim digital copying of books in libraries – always hands the first and fourth factors to the user, and leaves the second and third factors categorically and uniformly unable to help the owner, no matter the creative or other qualities of the book copied.

C. Whose Use Matters?

It is a long-established principle that in a case of direct infringement, a commercial user (copier) cannot justify its actions by downstream fair use by its patrons or customers, since it is the defendants' conduct "not the acts of [remote] end-users, that is at issue . . . ." *Infinity Broad. Corp.*, 150 F.3d at 108. *See also, e.g., Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1386 n.2 (6th Cir. 1996) (rejecting the argument that a "copyshop

merely stands in the shoes of its customers and makes no 'use' of copyrighted materials that differs materially from the use to which the copies are put by the ultimate consumer"); *Am. Geophysical Union*, 60 F.3d at 921-25 (looking to the use by Texaco, the copying party, rather than the use of individual researchers); *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1496 (11th Cir. 1984) (fair use analysis of copying of news clips for sale should look to the copier's purpose, not the purposes of its customers); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1531-32 (S.D.N.Y. 1991) (copying of student course-packs by commercial copy shop should consider the copy shop's purpose, not the purposes of its customers).

The Second Circuit's decision takes the opposite approach. It ignores that Google is a commercial enterprise focused on search that engaged in wholesale verbatim copying of over 4 million copyrighted books without thereby creating any new works, and whose own purpose was obviously to construct an enormously valuable corpus which it could use permanently for whatever purposes it chooses to engineer and pursue. It considered instead the hypothesized purposes of certain of Google's downstream users ("searchers") who are engaged in activity which the panel considered useful. The panel made a doctrinal change that excuses, permits, and thereby encourages the establishment and growth of intermediate copy service businesses. The consequence is a broad loophole for infringing intermediaries.

Looking to the purposes of Google's ultimate customers (engaged in the two uses released so far) has the odd result of proceeding as if Google had no purpose of its own for the copying four million books. Nor can the commerciality of Google's project be analogized to the for-profit motive accompanying much core copyrighted creation, such as the networks' creation of newscasts, or publishers' publishing operations. Google's book project is not fairly analogized to those for profit endeavors; unlike newspapers and other news operations, it is not creating content for profit, but only copying it verbatim for profit. Yet in the Second Circuit's analysis, that Google copied four million books not to create new works – but for whatever lawful purposes might recommend themselves in the future – is not factored into the analysis at all.

Industrial copiers like Google are investing enormous amounts on digitizing and copying millions of books, on the understanding that the investments are likely to spawn huge quantities of copying for as yet unknown but protean purposes. An analysis that looks at the interests of ultimate end-users, rather than at the interests of commercial copiers like Google and its competitors, deprives creators of the opportunity to share in the value that new technologies bring to existing creative works.

II. THE SECOND CIRCUIT'S DECISION ELIMINATES THE EXCLUSIVE RIGHTS TO COPY AND DISTRIBUTE COPIES AND RENDERS COPYRIGHTED WORKS RADICALLY INSECURE.

In an insufficiently noticed word-choice, the Copyright Clause empowers Congress to promote literary production by "*securing* . . . to Authors" – not just granting them – "the exclusive Right to their respective Writings . . . ." U.S. CONST. art. I, § 8, cl. 8. And Congress has exercised that power by putting at the center of each succeeding copyright law the "exclusive rights" to "reproduce the copyrighted work in copies," and "to distribute copies . . . of the copyrighted work to the public." *See, e.g.,* 17 U.S.C. § 106.

The Second Circuit's decision does not "secure" those rights, but infringes and jeopardizes them, by eliminating the exclusive reproduction and distribution right for books purchased by libraries. Publishers and copyright owners generally no longer enjoy an exclusive right to make copies, but one shared by Google (and its competitors). Google – and by inescapable inference every other person or enterprise that chooses to engage in a competing business – now possesses (in common with copyright owners) both the previously exclusive right to reproduce books in copies, and the previously exclusive right to distribute copies to the hosting libraries – the publishers' core market! – by delivering them in payment for the access thus afforded.

Moreover, the Second Circuit's decision not only partially eliminates the heretofore statutorily exclusive rights to copy and distribute; it renders even the remaining shared rights radically insecure. That is because among the libraries to which Google is permitted to distribute multiple digital copies it has made for them are those shielded by Eleventh Amendment immunity – and therefore free of the deterrents to infringing copying that would apply to libraries not so comprehensively insulated from suit and liability. The Second Circuit's suggestion that if the libraries "use the digital copies Google created for them in an infringing manner," they "may be liable to Plaintiffs for their infringement" is thus no answer at all. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 229 (2d Cir. 2015).[7]

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[7] *See, e.g., Chavez v. Arte Publico Press*, 204 F.3d 601, 603 (5th Cir. 2000) (directing dismissal of copyright infringement claims against a state entity clothed with Eleventh Amendment immunity, and holding unconstitutional the Copyright Remedy Clarification Act, which sought to abrogate the state's Eleventh Amendment immunity to suit for copyright infringement); *cf. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647-48 (1999) (Eleventh Amendment bars suits against State entities for patent infringement). In 2000, former Register of Copyrights Marybeth Peters testified in the wake of *Chavez* that the *Ex Parte Young* doctrine "provides only limited relief . . . because it provides no compensation for the damages already inflicted upon a copyright owner due to past infringement by a State." *State Sovereign Immunity and Protection of Intellectual*

It is not a fair response to this argument that the Second Circuit's decision was only a garden variety application of fair use, not the effective elimination of two exclusive rights. That might be so if the decision were limited to a particular book, or perhaps to a narrow category of books. But the decision was written far more broadly than that. It applies to every book in the nation's leading research libraries, categorically, so that the same result obtains for every single book regardless of its contents. That amounts to a fundamental statutory revision, not an instance of fair use.

Like the rest of us, publishers and authors live in a world in which even the government's classified secrets are exposed to widespread digital distribution. The hope that digital copies of books that financially strapped students are required to obtain and read will remain secure from digital distribution is far too slender a reed on which to rest the security of copyright owners and the revenue streams that induce further discovery and creation. At a minimum, that risk is sufficiently real so that it should be considered by this Court.

Property: Hearing Before the Subcomm. On Courts & Intellectual Prop. of the H. Comm. On the Judiciary, 106th Cong. 55 (2000) (statement of Marybeth Peters, Register of Copyrights).

III. THE UNPRECEDENTED SCALE OF THE SECOND CIRCUIT'S FAIR USE DOCTRINE SUPPORTS REVIEW.

The statutory provision codifying fair use, 17 U.S.C. § 107, provides for fair use analysis on a retail, occasional basis. It speaks in the singular of "the fair use of a copyrighted work," looks to "the use made of a work in any particular case," and requires analysis of "the use" of "the [particular] copyrighted work" and "the potential market for or value of the copyrighted work." *Id.* (emphasis added). In *Campbell*, 510 U.S. at 582-94, Justice Souter's opinion for the unanimous Court focused on the particular song used, and even when the Court discussed the problem of parodies categorically, it was careful to note that different results might well result from differences in particular works copied or created as new works. *See also Harper & Row, Publishers, Inc.*, 471 U.S. 560-69 (analyzing the particular work in suit).

By contrast, the Second Circuit's decision treats every book in the nation's great research libraries as fungible, ignoring the longstanding book-by-book approach to determining when a work is used fairly. The panel's analysis is scaled not to particular books but broadly to Google's mass digitization of over four million books under copyright; its obtaining the works by providing the libraries that supplied them for copying with multiple copies for their own internal use; and its use of those copies to enhance its search functionality. Indeed, the decision below concerns – and will readily be applied to – the massive,

regular, repeated, concerted, enterprise-level copying of millions of copyrighted works.

The scale of the panel's fair use decision is thus unprecedented, as comparison with *Harper & Row* and *Campbell* make plain.[8] The move from work-specific fair use assessment to broad scale approval of a mass digitization project at some of the nation's largest research libraries – on the theory that Google's copying of four million books was fair regardless of the particular books involved – looks and feels more legislative than judicial, since it is not limited to particular works (or even particular kinds of works). The Second Circuit never paused to consider whether the application of fair use to regular, focused, enterprise-level takings – a world away from the individual, ancillary (albeit important) uses usually involved in fair use cases – was consistent with the balance worked out judicially over generations and ratified by Congress in the 1976 copyright revision.

That broad extent of copying held fair by the Second Circuit in a single stroke is a prime reason for granting the writ. This is not a typical fair use case addressing a single use of a single work; it entailed the wholesale copying of millions of books, by one of the largest corporations in the nation, supported by libraries whose needs were legislatively addressed by 17 U.S.C. § 108. Section

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[8] *See also Am. Geophysical Union*, 60 F.3d at 918 (work-by-work consideration); *Princeton Univ. Press*, 99 F.3d at 1386 (same); *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1259-60 (11th Cir. 2014) (same).

108's bounds reflect the carefully-considered compromises in the 1976 Act, which the decision here entirely ignores and effectively renders a dead letter.[9]

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[9] The scope of copying permitted by § 108 is much narrower than the copying authorized by the Second Circuit, as a result of statutory text which reflects the negotiated industry compromise that Congress implemented in § 108. Among other grounds, § 108 authorizes only copying by "a library or archives, or any of its employees," not by a commercial enterprise like Google; only copying "made without any purpose of direct or indirect commercial advantage," which cannot be said of Google's copiers; only upon the provision of certain notices, *see* § 108(a)(3), which were not provided by Google; and only if the library "has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price . . . . " *See generally* Laura N. Gasaway, *Libraries, Digital Content, and Copyright*, 12 VAND. J. ENT. & TECH. L. 755 (2010). Under § 108(a)(1), a library may not contract out copying to a commercial organization, even if the library would be allowed to perform the same activities. *See* H.R. Rep. No. 94-1476, at 74-75 (1976).

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES S. SIMS,
Counsel of Record
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036
212.969.3950

Attorneys for Amici Curiae

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