

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNICOLORS, INC.,)

4 Petitioner,)

5 v.) No. 20-915

6 H&M HENNES & MAURITZ, L.P.,)

7 Respondent.)

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9

10 Washington, D.C.

11 Monday, November 8, 2021

12

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 12:10 p.m.

16

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1 P R O C E E D I N G S

2 (12:10 p.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 20-915, Unicolors versus
5 H&M Hennes & Mauritz.

6 Mr. Rosenkranz.

7 ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

8 ON BEHALF OF THE PETITIONER

9 MR. ROSENKRANZ: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 The question here is what state of
12 mind a copyright infringer must prove to
13 establish that an applicant included inaccurate
14 information "with knowledge that it was
15 inaccurate."

16 The answer is that it requires
17 subjective awareness of what -- of the
18 inaccuracy itself. The same standard applies
19 whether the inaccuracy was because the applicant
20 misunderstood the law or misunderstood the facts
21 or included a typo. Simply put, you don't have
22 information -- you don't -- excuse me -- you
23 don't know that information is inaccurate if you
24 honestly believe it to be accurate.

25 The safe harbor of Section 411(b) does

1 not suggest an exception when that belief exists
2 because you did not predict where the law would
3 go or you did not know how the law applies to
4 the facts.

5 This Court can get to that result
6 through two separate routes. The first is the
7 plain text, and the second is a presumption. No
8 court in a century had invalidated a copyright
9 registration based upon an innocent legal error.

10 And Congress is presumed not to have
11 radically changed that rule by hiding that
12 change in the word "knowledge." Like the
13 courts, Congress considered it more important to
14 give authors and artists an effective remedy
15 against IP thieves than it was to demand perfect
16 compliance with complex legal requirements in a
17 form.

18 The Ninth Circuit's rule will wreak
19 havoc. Every time a court decides an unsettled
20 question of law, it would cast doubt on the
21 validity of countless registrations.

22 Now there are three specific points to
23 make about the text here. The first is that
24 Section 411(b) starts with a default rule that a
25 registration is valid "regardless of any" --

1 "any inaccurate information." So that means
2 without regard to whether that information is a
3 fact or a legal conclusion.

4 Second, Section 411(b) is pretty
5 unique among the statutes that this Court has
6 encountered in the past in that it's not
7 requiring knowledge of several elements and all
8 you have to do is figure out which one needs to
9 be knowing, but, here, it requires knowledge of
10 very -- something very specific.

11 It inquires knowledge that the
12 information reflected in the application is
13 wrong, not knowledge of what happens to be right
14 or wrong in the world outside the application,
15 not knowledge of things that might help you
16 figure out that the application is wrong, not
17 the ability with reasonable diligence to figure
18 out whether the application is wrong, but
19 knowledge that there is wrong information on the
20 application.

21 If you don't have that knowledge, the
22 belief of a wrong thing on the application, you
23 don't have what Section 411(b) requires, period.
24 Nothing in this statute suggests that it matters
25 one bit why you don't have that knowledge.

1 CHIEF JUSTICE ROBERTS: Well -- well,
2 but at the beginning -- I'm looking at page 30
3 to 31 of your -- your brief, and you're talking
4 about the Copyright Office, and you say this
5 good faith has to be based on -- or they say the
6 good faith has to be based on a reasonable
7 interpretation of the law.

8 MR. ROSENKRANZ: So, Your Honor, the
9 government, of course, will respond to what the
10 Copyright Office meant there. We were quoting
11 it for the rejection of the legal -- of the rule
12 that there's a -- an exception for law, not for
13 that reasonableness insert. They weren't doing
14 an exegesis of 411(b). They were just rejecting
15 the proposition that there is a carveout for
16 reasonableness or a constructive -- a -- a
17 constructive knowledge requirement.

18 I was saying there were three points.
19 Let me just get to the --

20 JUSTICE KAVANAUGH: Can I follow up on
21 that point too?

22 MR. ROSENKRANZ: Of course, Your
23 Honor.

24 JUSTICE KAVANAUGH: In the SG's brief,
25 page 21, Footnote 3, the last sentence, they

1 deal with reasonableness and say, "although
2 Section 411(b) does not impose a freestanding
3 reasonableness requirement, the unreasonableness
4 of a registrant's purported view of the law may
5 support an inference that the view was not
6 sincerely held."

7 Do you agree with that?

8 MR. ROSENKRANZ: I do, Your Honor, in
9 two ways.

10 First, knowledge always in a statute
11 incorporates willful blindness. That's the --
12 that's the backdrop. So, if you demonstrate
13 that the position is so ridiculously
14 unreasonable that the copyright applicant is
15 going to be treated as if he had known the law,
16 that is, they -- he was blind himself to what
17 the rule is, absolutely.

18 But, secondly, you can prove knowledge
19 through circumstantial evidence, and that is
20 really a stark difference between -- excuse
21 me -- it -- it -- it provides sort of a bridge
22 between the constructive knowledge requirement
23 that my friends on the other side are suggesting
24 and what the law already interprets knowledge to
25 be.

1 But I was going to mention the third
2 textual indication of what knowledge means here,
3 and that is Congress understood the word
4 "information" to include conclusions of law. We
5 know that because Section 409, two sections
6 earlier, provides a list of items that an
7 application must include.

8 It describes in paragraph 10 all of
9 those items as information. The list includes a
10 whole bunch of legal conclusions. Paragraph 4,
11 is it a "work made for hire"? Paragraph 9, is
12 it a "compilation or a derivative work"? Which
13 befuddles even the -- the greatest experts.
14 Paragraph 5, "how the claimant obtained
15 ownership of the copyright."

16 I would also add that it is telling
17 that H&M does not deny that our reading comports
18 with normal parlance. It also happens to be the
19 way Black's Law Dictionary and the Model Penal
20 Code define knowledge.

21 JUSTICE ALITO: Mr. Rosenkranz, these
22 are all interesting arguments about the question
23 that you and the SG have now decided to address.
24 It's not exactly the question on which you
25 sought cert and that we agreed to review.

1 And I found dealing with decisions in
2 this case and the briefs in this case
3 extraordinarily frustrating. The question
4 concerns an inaccuracy, an alleged inaccuracy,
5 in the application, so I thought maybe I would
6 take a look at the application.

7 Where can I find it?

8 MR. ROSENKRANZ: Your Honor, the --
9 the other side has alleged and the Ninth Circuit
10 found below that the inaccuracy inheres --

11 JUSTICE ALITO: Well, where is the
12 actual application?

13 MR. ROSENKRANZ: Well, the --

14 JUSTICE ALITO: Is it anywhere in the
15 record of this case?

16 MR. ROSENKRANZ: It's not in the
17 record of this case, Your Honor. It's in the
18 back of the brief. Now bear in mind that this
19 issue came up on the last day of trial. H&M had
20 never raised this issue before. And only on the
21 basis of testimony that it elicited without even
22 telling us what the testimony would be about did
23 they move to invalidate the registration.

24 JUSTICE ALITO: Well, it does seem to
25 me there must be -- that there is a -- it

1 appears that there's a very glaring inaccuracy
2 in the application insofar as it supposedly
3 stated that all of these designs were published
4 on January 15, 2011, I believe is the date.

5 Were they published at all?

6 MR. ROSENKRANZ: Yes, Your Honor. The
7 publication includes conveying to an individual
8 customer. So -- so, if they were -- so -- so
9 the answer is yes, they were -- they were
10 published.

11 But I do --

12 JUSTICE ALITO: Well, I don't know.
13 Section 101 of the Copyright Act defines
14 publication as "the distribution of copies or
15 phono records" -- we don't -- we're not dealing
16 with phono records here -- "copies of a work to
17 the public by sale or other transfer of
18 ownership or by rental, lease, or lending."

19 Did that occur here?

20 MR. ROSENKRANZ: Yes, Your Honor.
21 With respect to all of them, if you're speaking
22 about the confined designs, all of them were
23 published to a member of the public on that
24 publication date.

25 JUSTICE ALITO: And -- and what --

1 MR. ROSENKRANZ: And, by the way,
2 there are cases --

3 JUSTICE ALITO: -- what was done with
4 them at -- on that publication date?

5 MR. ROSENKRANZ: So the record --

6 JUSTICE ALITO: They were shown --
7 they were shown to the public?

8 MR. ROSENKRANZ: The record doesn't
9 reflect precisely how they got into the hands of
10 those individual customers. Again --

11 JUSTICE ALITO: But --

12 MR. ROSENKRANZ: -- the gaps in the
13 record --

14 JUSTICE ALITO: -- but does that --
15 does that constitute publication? Here, I have
16 some designs. I'm showing them to you.

17 MR. ROSENKRANZ: Oh, yes, Your Honor.
18 Yes. And there are lots --

19 JUSTICE ALITO: That constitutes
20 publication?

21 MR. ROSENKRANZ: There are cases, in
22 fact, that have -- that have -- in which courts
23 have addressed whether a registration is invalid
24 because someone did not realize that giving to
25 just an individual who is outside the four

1 corners of the company entails publication. So,
2 yes, showing to a member of the public to offer
3 for sale is showing to the public. But I do
4 want to get to Your Honor's original question,
5 which is about the question presented.

6 The question presented has always been
7 about the state of mind under 411(b)(1)'s text,
8 read against the backdrop of the historical
9 context. And I think --

10 JUSTICE ALITO: Well, yeah, it's about
11 the state of mind. But, in the petition, it was
12 about indicia of fraud or material error. And
13 now it's been changed into something else.

14 MR. ROSENKRANZ: Your Honor, indicia
15 of fraud includes -- I mean, what is the core
16 indicia of fraud? A knowing misstatement of
17 material fact.

18 But knowing misstatement is an indicia
19 of fraud. And I would -- I would -- I would
20 hasten to add it's important that you
21 underscored indicia of fraud because H&M's
22 entire argument was that we change the question
23 presented because the original question was
24 about intent.

25 The original question was not about

1 intent, and the petition repeatedly refers to
2 knowledge and subjective awareness. Look at
3 page 8, which is the first paragraph of the
4 reasons for granting the writ. It's -- it
5 complains: "There was no evidence that
6 Unicolors knew" -- "knew," language directly out
7 of 411(b) -- "that it was making an error when
8 registering its group of designs, as required by
9 the Pro IP Act."

10 We said it again at petition page 5.
11 We talked about intent to defraud or knowing
12 falsehood. We said it again in petition page
13 15, Note 9, and petition page 13.

14 And I would note that -- that H&M does
15 not dispute that the -- that the position we
16 articulated in our reply brief is exactly the
17 same as the merits position we took before the
18 Court.

19 JUSTICE ALITO: I mean, I understood
20 the Ninth Circuit to find that the inaccurate
21 statement was an implicit representation that
22 all of these designs constituted a single unit
23 of publication.

24 MR. ROSENKRANZ: Yes. Correct, Your
25 Honor. That is what the Ninth Circuit found.

1 JUSTICE ALITO: And did -- do you
2 understand that the completion of this form in
3 the way that it was completed to constitute an
4 implicit statement about that?

5 MR. ROSENKRANZ: I -- I personally do
6 not. But, as this case got to this Court, both
7 parties assumed for purposes of argument before
8 this Court that the Ninth Circuit got that
9 right. We did not appeal that piece of it. We
10 appealed the logic that the Ninth Circuit
11 applied once it had -- it -- it had drawn that
12 conclusion.

13 I did want to make sure to address the
14 second route to get to the same result, which is
15 to invoke the presumption that Congress --

16 JUSTICE KAVANAUGH: Before you do, can
17 I ask a few?

18 MR. ROSENKRANZ: Of course.

19 JUSTICE KAVANAUGH: If we agree --
20 agree with you on this argument, just to be
21 clear on the roadmap, the Ninth Circuit, on
22 remand, would have to decide whether, in fact,
23 you did have knowledge or not. Is that correct?

24 MR. ROSENKRANZ: No, Your Honor. The
25 district court already found that in an

1 undisturbed --

2 JUSTICE KAVANAUGH: So you think
3 that's not open to the -- the Ninth Circuit
4 hasn't reviewed that, correct?

5 MR. ROSENKRANZ: And -- and H&M -- H&M
6 -- so H&M appealed that. Whether, in fact, we
7 had subjective knowledge of --

8 JUSTICE KAVANAUGH: It just seemed to
9 me the SG says vacate. You say reverse. I
10 think the vacate and remand, because it seems to
11 me that issue is still open, you know, I don't
12 know if there's anything to it.

13 MR. ROSENKRANZ: Sure --

14 JUSTICE KAVANAUGH: But, technically,
15 it seems open.

16 MR. ROSENKRANZ: Sure -- sure enough.
17 I mean, the -- H&M's primary argument below was
18 that we lied when -- when we said that it was a
19 -- that -- that it -- it was not a single unit
20 of publication, and that lie would have to
21 entail that the applicant did not have the
22 subjective knowledge that that was not the law
23 at the time. So, sure, the Ninth Circuit would
24 have to decide that.

25 But I did want to address the common

1 law way of getting to the same result, which is
2 the presumption that Congress would not have
3 hidden in the word "knowledge" an intention to
4 override a century of common law.

5 Common law had a clear answer to the
6 core question here. You don't strip IP rights
7 for a misunderstanding that is based -- that is
8 based on a legal misunderstanding. We cited
9 many cases excusing all sorts of legal errors,
10 and H&M does not address any of them.

11 Courts, sure. They had different
12 formulations, but they all got to that one
13 answer in different ways. They all got to that
14 same answer.

15 At -- at -- an irreducible minimum,
16 the doctrine required subjective knowledge of an
17 inaccuracy. Honest legal errors were not a
18 basis under common law for invalidating
19 copyright registrations.

20 And it's telling that H&M could not
21 find a single common law case in which a court
22 distinguished inadvertent legal mistakes from
23 inadvertent mistakes of fact, nor anyone that
24 was applying -- any common law case that was
25 applying H&M's proposed constructive knowledge

1 standard. Some courts may have added additional
2 elements, but those additional elements never
3 subtracted from that bare minimum.

4 And the last thing I would say is that
5 it makes no sense that Congress would ever have
6 wanted to do this. Why would Congress have
7 wanted to punish lay people for legal mistakes
8 and not punish them for factual mistakes,
9 especially since lay people are way more likely
10 to understand the facts and know them than the
11 law.

12 Congress made a sensible decision not
13 to strip authors of a --

14 JUSTICE SOTOMAYOR: How do we -- I
15 understand you want to make this about lay
16 people, artists and poets. But there's an
17 argument here that your client is not an artist
18 or poet, that your client is a patent troll.

19 I'm not making the allegation. But,
20 if I have a concern about patent trolls, how do
21 I describe a truly innocent mistake of law from
22 one in which a sophisticated party with the
23 capacity to confer with lawyers makes a mistake
24 that they could have easily checked?

25 MR. ROSENKRANZ: Well, Your Honor, so

1 I think --

2 JUSTICE SOTOMAYOR: Now that's -- the
3 premises there are all subject to attack because
4 this is the first time that the single
5 publication rule was announced, so -- but let's
6 talk about the trolls.

7 MR. ROSENKRANZ: So -- so I do want to
8 talk about the trolls, both the allegation and
9 -- but I will start with the core legal question
10 that you're asking. That's the beauty of
11 willful blindness. A constructive -- if I may
12 finish the answer, Your Honor.

13 The -- the constructive -- the
14 constructive knowledge, reasonable person test
15 would apply across the range of every possible
16 person. It's not a good fit for the wide range
17 and variability of the sorts of applicants that
18 file copyright applications.

19 If -- if Unicolors -- excuse me -- if
20 H&M had evidence that our client was willfully
21 blind to the truth about what the single unit
22 publication rule meant when we were following
23 guidance that was actually pretty clearly on our
24 -- our side but, at worst, ambiguous, they can
25 present it, but they had none.

1 I do have to get to the question of --
2 if I may, Your Honor?

3 CHIEF JUSTICE ROBERTS: Maybe --

4 MR. ROSENKRANZ: Of course.

5 CHIEF JUSTICE ROBERTS: -- in a second
6 round there. Thank you, counsel.

7 Justice Thomas?

8 JUSTICE THOMAS: Yes. Mr. Rosenkranz,
9 I -- I'm still stuck a bit on the question
10 presented. In your question presented in your
11 cert petition, you refer to -- you -- whether or
12 not 411 requires a referral to the Copyright
13 Office where there is no indicia of fraud.

14 In your new question presented, you
15 focus on whether that knowledge -- referred to
16 in the previous paragraph, whether that
17 knowledge element precludes a challenge to a
18 registration where there -- the inaccuracy from
19 the applicant's good-faith misunderstanding of a
20 principle of copyright law.

21 Those are two different questions. If
22 you -- why shouldn't we dismiss this as
23 improvidently granted since the focus in the
24 initial QP is on the -- is on fraud, not on
25 knowledge?

1 MR. ROSENKRANZ: Well, so, Your Honor,
2 there -- there are two pieces to the question.
3 The first is you asked about requiring referral.
4 Nothing in the petition or the brief in
5 opposition or the reply talks about requiring
6 referral. We were -- we were debating the basis
7 on which a referral was made, which is the state
8 of mind.

9 The second piece, Your Honor, was
10 requiring indicia of fraud. It was called the
11 doctrine of fraud on the Copyright Office. We
12 have in 411(b) all of the core elements of
13 fraud, a knowing misstatement of -- of fact that
14 is material. So the fact that 411(b) doesn't
15 specifically use the -- the word "fraud" doesn't
16 mean we change the question presented. And the
17 entire petition was about that state of mind.

18 JUSTICE THOMAS: Well, if -- if you
19 were accurate then, why didn't you simply retain
20 your question presented?

21 MR. ROSENKRANZ: Your Honor, we did
22 what -- what advocates do before this Court all
23 the time and what's -- what's permitted under
24 Rule 24.1. We focused the question presented
25 more directly on the key vulnerabilities of the

1 Ninth Circuit's opinion rather than -- which was
2 reflected in the byplay between the cert
3 petition and the brief in opposition as to what
4 the question presented was. And, certainly, by
5 the time this Court got to the reply brief, it
6 was very, very clear on page 1 of that cert
7 reply we were talking about the fundal -- the --
8 the critical -- what we called the critical
9 legal issue, which was the Ninth Circuit's
10 holding carving out mistakes of law from
11 411(b)'s safe harbor.

12 CHIEF JUSTICE ROBERTS: Justice
13 Breyer, anything?

14 JUSTICE BREYER: No.

15 CHIEF JUSTICE ROBERTS: Justice Alito?

16 JUSTICE ALITO: Well, in your
17 petition, you said that "the Ninth Circuit's
18 misinterpretation of Section 411(b) widened a
19 dire circuit division that must be addressed."

20 If you had framed your question in the
21 petition the way you framed it in your brief,
22 could you have alleged that there was a dire
23 circuit split?

24 MR. ROSENKRANZ: Yes, Your Honor. The
25 circuit split alleged in the petition was the

1 Ninth Circuit against the Eleventh Circuit.
2 That was -- that was it. The Seventh Circuit
3 had some good language as well.

4 It is the same exact disagreement.
5 The Ninth Circuit says knowledge of the law is
6 an exception to 411(b). The Eleventh Circuit,
7 in Roberts versus Gordy, the case that we
8 featured, said very clearly that knowledge of
9 the law is not an exception. It said rappers
10 understand lyrics and poetry; they don't
11 understand copyright law. And all three legal
12 issues that were -- excuse me -- all three
13 issues that were the basis for the misstatement
14 in Roberts were legal issues.

15 JUSTICE ALITO: All right. One -- one
16 other question. In what way could you have been
17 benefited by attempting to register all of these
18 designs on one application as opposed to using a
19 separate application for each design?

20 Now it reduced the fee that you had to
21 pay. Could it have helped you in any other way?

22 MR. ROSENKRANZ: It could not have
23 helped us in any other way, Your Honor. And
24 that's exactly why Congress wrote the statute
25 the way it did, because there's very little

1 benefit in litigation from -- from anything that
2 ends up being wrong on an application. But, in
3 this one in particular, let's just be clear,
4 under the Ninth Circuit's theory, we saved \$65
5 by not dividing the confined from the
6 unconfined. But -- but we didn't win any
7 litigation advantage or any other advantage.

8 CHIEF JUSTICE ROBERTS: Justice
9 Sotomayor?

10 Justice Gorsuch?

11 Justice Barrett? No?

12 Thank you, counsel.

13 MR. ROSENKRANZ: Thank you, Your
14 Honor.

15 CHIEF JUSTICE ROBERTS: Ms. Patterson.

16 ORAL ARGUMENT OF MELISSA N. PATTERSON
17 FOR THE UNITED STATES, AS AMICUS CURIAE,
18 SUPPORTING THE PETITIONER

19 MS. PATTERSON: Mr. Chief Justice, and
20 may it please the Court:

21 Congress has set out a default rule to
22 preserve the validity of copyright registrations
23 even if they contain some inaccurate
24 information. Under Section 411(b), such a
25 registration remains adequate to support an

1 infringement action unless the registrant has
2 included inaccurate information in its
3 application to the Copyright Office with
4 knowledge that it was inaccurate.

5 Now, with respect to that key
6 knowledge condition, the Ninth Circuit has set
7 out an unprecedented rule that could jeopardize
8 many thousands of copyright registrations under
9 conditions never before thought to give rise to
10 a risk of invalidation, and that's because the
11 Ninth Circuit has decided that a registrant's
12 knowledge of an inaccuracy is decided by looking
13 solely at that registrant's factual knowledge,
14 even if the inaccuracy at issue arises solely
15 because of a law.

16 And that was error. We think that in
17 order to risk invalidation of your registration,
18 a registrant needs to actually be aware that
19 it's submitting an inaccuracy and that that is
20 just as true of legal inaccuracies as it is of
21 factual ones.

22 I welcome the Court's question, or I'd
23 like to turn first to the Ninth Circuit's rule
24 as actually applied in this case.

25 I think there is some suggestion by

1 Respondent of an alternate rule, a constructive
2 knowledge standard rule, and, in fact, that
3 appears to be the sort of front-line defense of
4 what the Ninth Circuit did here.

5 That standard appears nowhere in the
6 Ninth Circuit's decision. The Ninth Circuit did
7 not say: Well, we think Unicolors should have
8 known the correct requirements to submit a
9 single unit of publication and flouted them,
10 and, therefore, we are going to hold them to
11 their error.

12 The Ninth Circuit said that it was
13 irrelevant whether they knew what the
14 requirements to submit that type of application
15 were, whether it knew of the bundling
16 requirement that the Ninth Circuit decided
17 exists under the regulation.

18 So, even if this Court decides that
19 some form of constructive knowledge is
20 necessary, that would require a remand.

21 JUSTICE KAGAN: Well, but what do you
22 think of the constructive versus actual debate?

23 MS. PATTERSON: We think it needs to
24 be actual knowledge, Your Honor, and that's for
25 essentially three reasons: the text of 411(b)

1 itself, the text of the rest of Title 17, and
2 the context in which Congress enacted Section
3 411(b).

4 So just looking at the word here, it
5 -- it's -- it's just "knowledge." It's
6 unadorned by any constructive knowledge
7 standard. Now, in the rest of Title 17, when
8 Congress wanted to impose a constructive
9 knowledge standard, it did so very carefully.
10 We -- we've cited a list, and I think Petitioner
11 added to it, of various provisions where
12 Congress had said things like "knew or should
13 have known," "had reasonable grounds to know,"
14 "acted in deliberate disregard or recklessness."

15 We think that shows that if Congress
16 had wanted to have a constructive knowledge
17 standard here, it would have said so. And --
18 and that's not only because it didn't have an
19 indicia of a constructive knowledge standard but
20 because, in the copyright context, Congress has
21 carefully calibrated the type of construction --
22 constructive knowledge standard it wants.

23 You know, having reasonable grounds to
24 know, being aware of actual facts or
25 circumstances, which are written into some of

1 these standards, is quite different than acting
2 in deliberate disregard or -- or recklessness or
3 ignorance.

4 So we think --

5 JUSTICE ALITO: Willful blindness
6 wouldn't be sufficient?

7 MS. PATTERSON: We do think willful
8 blindness is a form of actual knowledge. So
9 that by using the word "knowledge," we think
10 Congress meant the real sort of knowledge,
11 actual knowledge.

12 And that would, under the principles
13 announced in cases like Global Tech and Intel,
14 of course, carry with it willful blindness.

15 JUSTICE KAGAN: On -- on the theory
16 that willful blindness you really do know?

17 MS. PATTERSON: Yeah, I think --

18 JUSTICE KAGAN: And that's why you're
19 not looking? That's the theory?

20 MS. PATTERSON: Yes, Your Honor. And
21 I think that there's some -- I think it's in
22 Global Tech the Court, you know, posits that you
23 can think of it as an exception to actual
24 knowledge or you can actually think of it as a
25 form of knowledge. Of course, to reach willful

1 blindness, you have to be aware that there is a
2 high probability that a certain fact or -- or
3 condition is out there and take some steps to
4 avoid coming into, you know, present awareness
5 of it.

6 So I think regardless of how you
7 conceive of it, willful blindness, if -- if a --
8 if a defendant could show that a registrant had
9 willfully blinded themselves to either the legal
10 requirements or the underlying facts of its
11 conduct, yes, I think that you could satisfy
12 411(b)(1)(A).

13 JUSTICE SOTOMAYOR: How about
14 unreasonableness?

15 MS. PATTERSON: Pardon?

16 JUSTICE SOTOMAYOR: How about
17 unreasonableness?

18 MS. PATTERSON: No, Your Honor. I
19 think that's where the Respondent suggests a
20 constructive knowledge standard that you have to
21 have a reasonable basis for your subjective
22 belief.

23 We don't think that's the right
24 standard. We think that the -- if you honestly
25 believe or are honestly just ignorant of the

1 exact definition of, say, publication or single
2 unit of publication registration requirements,
3 that simply being sloppy or negligent in filling
4 out your application should not give rise to a
5 risk of your registration being invalidated --

6 CHIEF JUSTICE ROBERTS: Is that --

7 MS. PATTERSON: -- which does carry --

8 CHIEF JUSTICE ROBERTS: -- is that the
9 interpretation that the Copyright Office has
10 adopted? It talks -- it talks about a
11 reasonable interpretation of the law.

12 MS. PATTERSON: I think you're
13 referring to its response in the Fashion Avenue
14 case, and I -- I think, if you just read the
15 last few pages where that reference comes up,
16 it's clear that the Copyright Office was not
17 trying to explore the parameters of what
18 "knowledge" might mean.

19 It was simply referring -- it -- it
20 comes right after the reference to the Gold
21 Value case. That's the Ninth Circuit's
22 predecessor decision to this one.

23 I think Respondent is probably correct
24 that, under Gold Value, the Ninth Circuit left
25 itself some wiggle room for the type of

1 constructive knowledge standard that the
2 Respondent is pressing here. And so, when the
3 Copyright Office there referred to a -- a
4 reasonable basis, I think it was just echoing
5 what the Ninth Circuit had already said.

6 JUSTICE KAVANAUGH: Ms. Patterson, I
7 had read earlier, page 21, Footnote 3, the last
8 sentence of your brief, where I thought you did
9 a nice job of bridging the reasonableness into
10 the knowledge requirement. So I hope you still
11 agree with the last sentence of Footnote 3.

12 MS. PATTERSON: Absolutely, Your
13 Honor. We think, if somebody is adopting just a
14 manifestly unreasonable interpretation of copy
15 -- of either copyright law or -- or a story
16 about what their own conduct was or what they
17 meant it to be, of course, an infringer can say
18 -- you know, can -- can tell a fact-finder, you
19 know, that's evidence that they either actually
20 had knowledge and they're just lying about it or
21 that they were willfully blinding themselves to
22 the truth of either the facts or the law.

23 And it -- and it is important to
24 remember that these types of scienter
25 determinations are going to be made by a

1 fact-finder. You are free to make your
2 arguments that someone is not telling the truth
3 when they disclaim knowledge of including
4 inaccuracies.

5 The only question is, what standard
6 should we apply when we're looking at that
7 scienter requirement? And, here, where Congress
8 has specified very precisely the thing that you
9 need to know, you know, knowledge that the --
10 that the information included in your copyright
11 application was inaccurate, we don't think it
12 makes any sense to take the law into account in
13 what it means to be inaccurate, to take the law
14 into account in what it means to be information,
15 but then all of a sudden, at the knowledge
16 inquiry, to look only at the facts.

17 That just does not make sense, and it
18 has never been the law throughout many decades
19 under what was often called somewhat
20 colloquially the fraud-on-the-Copyright-Office
21 doctrine, you know, there are variations on how
22 courts applied this doctrine, but the sort of
23 through line are the two that ended up in
24 411(b), a knowing misstatement and materiality,
25 that it actually could have affected the

1 registration process.

2 So never before could a court
3 invalidate your registration and not even let
4 you get in the courthouse door because they
5 thought you should have known the law that it
6 has now announced when you were filling out and
7 checking boxes about publication -- published or
8 unpublished, derivative work, not derivative
9 work, works for hire, not works for hire.

10 These are not self-evident concepts to
11 say the least.

12 JUSTICE ALITO: Just for my own
13 edification, what is required for the
14 publication of a design?

15 MS. PATTERSON: Under 101, the -- the
16 basic rule is that if you distribute it to the
17 public by sale or other transfership of
18 ownership or you distribute it to a group of
19 persons for the purposes of further distribution
20 or sale, that will constitute publication.

21 JUSTICE ALITO: And what if you just
22 show it to potential customers? That's all you
23 do. You just show it to potential customers or
24 potential salespeople. Is that publication?

25 MS. PATTERSON: We are wading into the

1 depths of Chapter 1900 of the Compendium of
2 Copyright Law, which is devoted entirely to the
3 various scenarios that can constitute
4 publication or not constitute publication.

5 I don't know the answer to Your
6 Honor's question, and the answer might depend on
7 other facts not in the hypothetical, like
8 whether or not ready copies were -- were
9 available to distribute if somebody took you up
10 on your offer to sell the design.

11 And so I think this just highlights
12 that it's often not going to be self-evident to
13 a registrant whether or not they have
14 unwittingly entrenched a -- a legal inaccuracy
15 in their doctrine.

16 JUSTICE ALITO: What do you understand
17 to have been the inaccuracy in the application
18 here?

19 MS. PATTERSON: I understand there to
20 be two possible inaccuracies. One is the
21 publication date, whether or not all 31 designs
22 were actually published on that date. We
23 understand there to be something of a factual
24 dispute as to whether or not all of the designs
25 were placed in the showroom and some were pulled

1 back later, what exactly a confined design
2 meant. And we're not prepared to opine on -- on
3 that question. We leave that to the parties.

4 The second is an implicit
5 representation -- and this is the one that the
6 court of appeals focused on -- that the group
7 met the requirements for the group registration
8 option encompassed in the single unit of
9 registration regulation.

10 JUSTICE ALITO: Do you think it's fair
11 to infer that from having filled out the form
12 the way it was filled out?

13 MS. PATTERSON: I think it's fair to
14 infer that they thought they could register them
15 all as a group, as a single unit, yes.

16 JUSTICE ALITO: What do you -- last
17 question. I'm sorry for these technical
18 questions, but we do have a concrete case before
19 us, in addition to this interesting legal issue.

20 What would be required for designs to
21 constitute a single unit of publication?

22 MS. PATTERSON: I think, if all -- all
23 of the designs had the same copyright claimant,
24 here Unicolors, and they all had been published
25 on the same date, published together, that's --

1 that's a start.

2 As of 2014, the Copyright Compendium
3 has clarified that to avail yourself of that
4 group registration option, it actually needs to
5 be bundled together as a physical unit. The
6 example given is something like a board game.

7 If it had independently copyrightable
8 elements within the board game, you know, the
9 design of a board, an instruction booklet,
10 figurines, you could accomplish a -- a
11 registration of all of those potentially
12 severable copyrights through one registration.

13 I will note that in 2011, when these
14 registrations were made, the bundling
15 requirement, which we agree exists and which the
16 Ninth Circuit found and which is now entrenched
17 in our compendium, had not been written into the
18 guidance that we give registrants.

19 JUSTICE KAVANAUGH: In your brief, you
20 say that the case should be vacated and remanded
21 for further proceedings. Does that include
22 proceedings in the Ninth Circuit on whether they
23 agree with the district court, I guess, that
24 there was or was not knowledge here?

25 MS. PATTERSON: Yes, Your Honor. We

1 think the Ninth Circuit has not yet had an
2 opportunity to apply the correct scienter
3 standard and that it would need to look back at
4 the district court, look at any findings the
5 district court may or may not have -- have made
6 -- I understand that's the subject of some
7 dispute -- and decide whether or not the record
8 here supported a finding of the requisite
9 scienter.

10 JUSTICE BARRETT: Ms. Patterson, does
11 the government have a position on H&M's DIG
12 arguments?

13 MS. PATTERSON: Not a bottom-line
14 position, Your Honor. I will note that we at
15 least were not surprised by the contents of
16 Petitioner's opening brief.

17 And we do think there is a circuit
18 split here. This case would have come out
19 differently in the Eleventh Circuit. And we do
20 think that the Ninth Circuit's rule is wrong and
21 wrong in a way of significant practical
22 importance to the registration system.

23 We want registrants, we want copyright
24 holders, to be able to sue for infringement, to
25 not be turned away from the courthouse door

1 because -- because they got a complicated legal
2 concept wrong, even if they were proceeding in
3 good faith, even if they were a little sloppy in
4 filling out their application.

5 That type of error can be rebutted
6 during the substance of the litigation. You're
7 not stuck with all of those facts listed in the
8 copyright registration. We just think that they
9 should get a chance to make out their case of
10 infringement.

11 So we do think there's a split. We
12 think it's important, but we presume the Court
13 knows best the parameters of the question on
14 which it granted certiorari. So we would leave
15 that decision to the Court.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas?

19 Okay. Thank you, counsel.

20 Mr. Stris.

21 ORAL ARGUMENT OF PETER K. STRIS

22 ON BEHALF OF THE RESPONDENT

23 MR. STRIS: Thank you, Mr. Chief
24 Justice, and may it please the Court:

25 When the Copyright Office registers a

1 claim, it takes information from the application
2 and puts it on an official certificate. That
3 certificate confers litigation privileges,
4 including access to statutory damages and
5 attorneys' fees.

6 If information provided by the
7 applicant turns out to be inaccurate, those
8 litigation privileges are not revoked, subject
9 to one important exception. The exception
10 applies only if the inaccurate submission caused
11 the Copyright Office to register a claim that
12 would otherwise have been refused. And even
13 then, the copyright owner only loses litigation
14 privileges if it included the inaccurate
15 information knowingly.

16 In this case, Unicolors convinced the
17 Copyright Office to register an ineligible
18 collection by inaccurately listing a single date
19 of publication for 31 unrelated designs that
20 were published separately on different dates.

21 Yet, here, Unicolors insists that it
22 should retain its litigation privileges because
23 its inaccuracies were allegedly the result of
24 its mistaken understanding of the law.

25 Even if that argument were properly

1 presented -- it's not, and I -- I'd like to
2 address that a little bit later -- it's wrong on
3 the merits. Section 411(b) doesn't excuse
4 mistakes of law at all. Mistake or ignorance of
5 law is no defense unless a statute explicitly
6 indicates otherwise. Section 411(b) does not
7 and for good reason. It would remove the
8 incentive for applicants to engage diligently
9 with the Copyright Office.

10 At a minimum, 411(b) doesn't excuse
11 unreasonable mistakes. Courts regularly
12 interpret knowledge to include constructive
13 knowledge, and context compels that reading
14 here.

15 I welcome the Court's questions.
16 Otherwise, I will begin with our argument on the
17 object of knowledge in 411(b), that it extends
18 only to the facts that render the information
19 inaccurate.

20 JUSTICE THOMAS: Could you go back to
21 the change in the question presented and comment
22 on Mr. Rosenkranz's argument?

23 MR. STRIS: Certainly, Justice Thomas.
24 So I -- I want to comment on two levels. One
25 has to do with what are the inaccuracies, what

1 was argued, and what happened, and then the
2 other is what was fairly included in the
3 question presented. So I think I'm going to
4 take them in that order because I -- I think it
5 will be -- be -- be clearer, I hope.

6 So we alleged -- and I don't think
7 this is controversial -- that Unicolors -- it's
8 not controversial that we alleged it -- that
9 Unicolors knowingly misrepresented that all 31
10 designs were published on January 15, 2011. You
11 see that in our red brief. We cite where we
12 alleged it, Pet App 9a. That's what the -- the
13 court of appeals said.

14 Unicolors responded that it did
15 publish all of the designs on that date as a
16 matter of fact because that's when they placed
17 them in their showroom.

18 The district court agreed with
19 Unicolors. The Ninth Circuit agreed with us.
20 You don't need to take my word for it because
21 it's in the petition. If you look at page 5 and
22 6 of the petition -- this is very important --
23 what my friend wrote was that "Unicolors'
24 registration indicated the 31 designs were first
25 published on January 15, the date on which the

1 group was placed in Unicolors' showroom for --
2 for customer viewing."

3 Then it continues: "There's no
4 evidence in the record that any of the designs
5 were not published with the rest of the group,"
6 in other words, put on the showroom on that
7 date. Factual point.

8 It continues: "Despite a lack of any
9 evidence, the panel concluded that the designs
10 were not -- the confined designs were not placed
11 in the showroom for sale at the same time."
12 This was a factual dispute where the Ninth
13 Circuit agreed with us.

14 Now I admit the Ninth Circuit also
15 found a second inaccuracy. It found that to
16 register a collection, they have to be all
17 published on the same date. No one disputes
18 that. But they also have to be published
19 together. That's this bundling issue.

20 For the life of me, I can't figure out
21 how it's implicated by this case because they
22 just weren't published on the same date. This
23 alleged mistake of law, I don't see how it's
24 implicated. But, yes, there are -- there -- it
25 is true that they were not published together.

1 So now Unicolors claims that they
2 misunderstood the bundling requirement. They've
3 never claimed that they misunderstood the
4 requirement that everything has to be published
5 on the same date or the criteria for it. That
6 was a pure factual fight.

7 So, to your question, Justice Thomas,
8 we get the cert petition. The cert petition
9 cannot be fairly read, with all due respect, as
10 encompassing this knowledge question for a
11 number of reasons.

12 First, the circuit division, the dire
13 circuit division, was only about intent. Please
14 go look at the Eleventh Circuit's decision in
15 Gordy. It made clear that an intent-to-defraud
16 requirement requires more than subjective
17 knowledge of inaccuracy. It relies on a
18 pre-2008 case, Original Appalachian, that takes
19 a intent to deceive, you have to have the
20 purpose of misleading. None of the other cases
21 cited in the petition, none of them, on the
22 circuit split had anything to do with knowledge
23 or awareness. That's number one.

24 Number two, all of the few mentions of
25 knowledge or --

1 JUSTICE KAGAN: Can I interrupt you on
2 number one?

3 MR. STRIS: Please.

4 JUSTICE KAGAN: I mean, I'm -- I'm not
5 sure how much of a difference there really is in
6 this context. There might be a difference
7 between knowledge and intent to defraud in other
8 contexts. But, in this context, I mean, how is
9 it that a registrant knowingly misrepresents
10 information on the application and does not
11 intend to defraud?

12 MR. STRIS: So I think there's a big
13 difference. I want to be clear about our
14 position on this.

15 So whether or not the intent to
16 deceive is a separate requirement has tremendous
17 practical significance because, if it exists as
18 a standalone, separate requirement, you have
19 what Unicolors argued here and what they have
20 argued respectfully in many other cases. They
21 can say, well, even if you prove that we were
22 subjectively aware that it was wrong, you know,
23 we -- we didn't think it mattered. You know, we
24 -- we didn't think it was material, so we didn't
25 have the intent to deceive. That's essentially

1 what they argued in the Burlington case when
2 they didn't put the leopard print in.

3 So I agree that it doesn't matter in
4 the sense that you described, Justice Kagan, but
5 it matters in a very important other sense,
6 which is, if it's a standalone requirement, it
7 gives a very powerful argument to plaintiffs.

8 And Unicolors always argued that this
9 was a standalone requirement. This is why you
10 won't find a single word -- a single word in any
11 lower court brief about the object of knowledge,
12 the scope of knowledge. This was never being
13 disputed. All of the fights about fraud on the
14 office, whether -- whether there's an intent
15 requirement, they -- they assumed that knowledge
16 was done. It was, apart from knowledge, do you
17 also have to have the purpose of defrauding?

18 JUSTICE KAVANAUGH: How -- I guess I'm
19 not understanding that. If you know that
20 there's a material misstatement of law in an
21 application you're submitting to the office, how
22 do you not have an intent to deceive?

23 MR. STRIS: You may not believe it's
24 material. In other words, you include something
25 that's wrong. It is material, but you don't

1 think so. Turns out it was material. The
2 office would not have registered your -- your
3 claim if they had known.

4 If they are under the Eleventh Circuit
5 rule -- this is the circuit split -- the
6 Eleventh Circuit would say: Well, maybe you
7 knew, but you -- you -- you weren't intending to
8 defraud, you didn't have the purpose of trying
9 to deceive.

10 If you look at the Gordy case, at
11 1030, it says "the applicant must have the
12 required scienter of purposeful concealment."
13 Appellees have never proffered an argument as to
14 why appellants would attempt to deceive the
15 Copyright Office. While all of these
16 inaccuracies are not insignificant, none appear
17 to have been made with the scienter as outlined
18 in Original Appalachian.

19 JUSTICE KAVANAUGH: In -- in usual
20 mens rea, when you have knowledge that the
21 certain consequences are practically certain to
22 ensue, that is viewed as equivalent to intent.

23 MR. STRIS: I -- I think the -- the --
24 that's -- that points up at the fundamental
25 problem with a good faith or subjective

1 standard, right? There is enormous daylight
2 between whether it's willful blindness or
3 whether it's the point that you just made, a
4 situation where it's obvious that you should
5 have known.

6 JUSTICE KAVANAUGH: Well, I guess I'm
7 not -- this is -- seems a little out there to me
8 just speaking for myself. There's a circuit
9 split. It's how to interpret the statutory
10 language, it's a mens rea question, knowledge
11 and intent when you know that something is
12 certain to result, kind of the same thing
13 usually, and I don't think you disputed that
14 just now.

15 It's a really important question.
16 We've got everything in front of us. I mean, it
17 just seems far-fetched to me.

18 MR. STRIS: So I will -- I will end
19 this thread by saying the following because, if
20 it doesn't move you, then we'll have to agree to
21 --

22 JUSTICE KAVANAUGH: Well, I'm just
23 speaking for myself.

24 MR. STRIS: Understood. But I think
25 that what -- what would encapsulate my position

1 is the Eleventh Circuit relied on a common law
2 case that has a requirement that everyone
3 agrees, including the government, is not in this
4 statute. It relied on a -- on a case that said
5 there is a freestanding additional intent
6 requirement. You go look at that and you tell
7 me if you honestly believe that that's the same
8 thing, that's the same issue, I -- I just don't
9 see how you can --

10 JUSTICE BREYER: There -- there --
11 that -- that goes to whether there really was a
12 split or not. The case is here. Now, and what
13 they said was there is no indicia of fraud,
14 okay?

15 Now fraud may have a bunch of elements
16 of it, but one of the things is, if you don't
17 know that what you're saying or doing is false,
18 it's not fraud.

19 MR. STRIS: So I'll say --

20 JUSTICE BREYER: So now they're
21 saying, well, that's the part of it that the
22 Ninth Circuit expressed a view about, and the
23 view that they expressed about it was wrong,
24 okay? That is what I take as their argument
25 basically to be.

1 And you say in response to that what?
2 That the Ninth Circuit didn't do that or that --
3 that it has nothing to do with this case or
4 what?

5 MR. STRIS: Well, I'll say a couple
6 things. So, on the issue of -- because my
7 response is different depending on the context.

8 So, as to fairly presented, what I
9 would say is that's just not true. Yes, it is
10 -- yes, indicia of fraud could mean that, but it
11 wasn't used that way here.

12 If you look at the reference to
13 knowing falsehood that my friend mentions, it
14 was used as a synonym for intent to defraud.
15 And that's hardly surprising because, if you
16 look up falsehood, it means lie. And lie is
17 defined in the dictionary as a statement with
18 intent to deceive. So that's my argument as to
19 why it's not fairly included.

20 Now, as to the merits, because you
21 asked a different question, which is what did
22 the Ninth Circuit do here, my response is the
23 Ninth Circuit, in the short portion of its
24 opinion, when it said there is no intent to
25 defraud, didn't talk about knowledge at all.

1 It was clearly treating it as a
2 freestanding issue. And it said, just like the
3 law professors who are on our side, there is --
4 Congress did not codify that aspect of -- of --

5 JUSTICE BREYER: I'll look at it.
6 I'll look at it and see.

7 MR. STRIS: So -- so that's my --

8 JUSTICE BREYER: Okay. I have a
9 question on the merits too.

10 MR. STRIS: Okay.

11 JUSTICE BREYER: And sometimes you
12 have to forgive what -- sometimes I get carried
13 away in my examples.

14 MR. STRIS: Me too.

15 JUSTICE BREYER: But the -- the
16 example I'm thinking of is -- and the reason I
17 ask it is because this, to me, is a rare case,
18 not to others, but it is a rare case where the
19 language and linguistics actually resolve it.
20 All right? Now you --

21 (Laughter.)

22 JUSTICE BREYER: All right. The --
23 the -- the -- all right. Here, now, imagine --

24 MR. STRIS: On object of knowledge or
25 on scope or both?

1 JUSTICE BREYER: You'll see.

2 MR. STRIS: Okay.

3 JUSTICE BREYER: You'll see. It gets

4 --

5 MR. STRIS: Okay. I'm ready, raring
6 to go.

7 JUSTICE GORSUCH: Don't argue. This
8 is a good day.

9 (Laughter.)

10 JUSTICE BREYER: Maybe you shouldn't
11 -- maybe I shouldn't ask it.

12 CHIEF JUSTICE ROBERTS: Stand back.

13 JUSTICE BREYER: Suppose we looked
14 around and a bird flew back there.

15 MR. STRIS: Yeah.

16 JUSTICE BREYER: And I say: My God,
17 it's a Scarlet Tanager. And you say: No, it
18 isn't. It's a Northern Oriole.

19 I have made a mistake. You are right.
20 Okay?

21 Now there are two reasons I might have
22 made a mistake. One, I saw a flash of yellow,
23 but it wasn't yellow. It was red. And you saw
24 it.

25 The second reason is we both saw

1 exactly the same thing, but I don't understand
2 the right use of the label. We made a mistake
3 of whether it's a Tanager or an Oriole. I made
4 that mistake, not a mistake in what I saw.

5 How would we resolve our differences?
6 We would call in an ornithologist, I guess.

7 Now I raise that example because this
8 seems exactly the same thing. It isn't a bird.

9 (Laughter.)

10 JUSTICE BREYER: But it is the words
11 "single unit of publication." And we could make
12 a mistake, you see, in what happened in the
13 world, or we could make a mistake in how we
14 apply the label.

15 And in this instance, if we make a
16 mistake as to how we apply the label, we call in
17 a lawyer or a judge. So the difference really
18 is between calling an ornithologist and calling
19 a lawyer or a judge.

20 And, of course, my question is, who
21 cares? And why should the fact that we call the
22 latter thing a question of law but not the
23 former thing make any difference whatsoever to
24 the proper solution to this case?

25 MR. STRIS: So, as I understand all of

1 the birds and the structure there, that largely
2 goes to what I'm calling the object of
3 knowledge, so I want to take that first. But I
4 -- I -- I think scope of knowledge is -- is a
5 separate issue because, first, you have to
6 assess what is it that you need to be aware of.
7 And your two buckets go to that. And then
8 there's a question of what type of awareness.
9 So I think they're separate.

10 So the reason why I think it matters
11 is there is a -- a long-standing background
12 presumption that unless there's something in the
13 text of the statute that indicates that you're
14 supposed -- that -- that, to your example,
15 you're in the second world, that you're supposed
16 to apply the fact to law and that's the thing
17 you're supposed to know, that's not the rule.

18 Congress legislates against that. And
19 there are tons of civil and criminal cases that
20 apply this. I think the best one for us
21 probably is Jerman, okay? So let's take a look
22 at Jerman.

23 Whether something's a bona fide error,
24 obviously, that turns on subjective knowledge,
25 right? You can't -- an error is you believe

1 something is -- is true when it's false. Bona
2 fide is did you hold that belief?

3 The only question before this Court in
4 Jerman was knowledge of what? Is it a bona fide
5 legal error, does that count, or is it only a
6 bona fide factual error, which is in a sense a
7 variant of the -- it's not exactly the same
8 because they're discrete categories, but it --
9 in -- on one level, it's a variant of what you
10 ask.

11 And as the dissent pointed out, the
12 statute talked in terms of a violation, which
13 denotes a legal infraction. But seven Justices
14 said, nope, it doesn't excuse legal errors
15 because of the background presumption.

16 I would submit, if that text wasn't
17 enough to override the presumption that we're in
18 one category as opposed to the other, this text
19 certainly doesn't.

20 JUSTICE KAVANAUGH: What about the
21 word "information"?

22 MR. STRIS: So --

23 JUSTICE KAVANAUGH: That -- I mean,
24 that encompasses legal information and factual
25 information, right?

1 MR. STRIS: Absolutely. But --

2 JUSTICE KAVANAUGH: Okay.

3 MR. STRIS: -- our position on that is
4 that merely requiring knowledge of something
5 that can turn on a legal definition is
6 insufficient to overcome the presumption.
7 That's McFadden. If you look at -- in -- in
8 McFadden --

9 JUSTICE KAVANAUGH: Well, we have
10 cases like Liparota and the others cited in the
11 brief where the legal part is folded into the
12 statute and their argument is, here, the word
13 "information" does the same thing.

14 And I take your point, "ignorance of
15 the law is no defense" is an old principle.
16 It's -- it's got a lot less force in regulatory
17 areas, number one. But it especially has less
18 force when the statute itself, like Liparota,
19 folds the legal portion in. So --

20 MR. STRIS: Right. So --

21 JUSTICE KAVANAUGH: -- I'll take your
22 response on information.

23 MR. STRIS: -- so a few responses to
24 that. So the first is you said Liparota and the
25 other cases. There are no other cases, okay?

1 JUSTICE KAVANAUGH: Well, no, no, they
2 cite -- they cite --

3 MR. STRIS: They cite --

4 JUSTICE KAVANAUGH: -- Safeco,
5 McLaughlin, Rehaif.

6 MR. STRIS: Let -- let -- let me take
7 them one by one because --

8 JUSTICE KAVANAUGH: Commil.

9 MR. STRIS: Right.

10 JUSTICE KAVANAUGH: Yeah.

11 MR. STRIS: Liparota is different.

12 And your question, I want to answer about
13 Liparota. The other cases don't help them at
14 all.

15 Let's take Safeco. The statute in
16 Safeco imposed liability on any person who
17 willfully fails to comply with any requirement
18 under the subchapter. You obviously can't
19 willfully comply with specifically identified
20 laws if you thought you were in compliance.
21 That's the whole point.

22 And we -- we argued this. We
23 explained, if you look through the Copyright
24 Act, you'll see many examples where -- where
25 Congress used the word "willful." You'll see

1 many examples where they specifically identified
2 the law or the application of law to fact that
3 you needed to know.

4 I want to get to Liparota, though,
5 because what I'm saying now doesn't --

6 JUSTICE KAVANAUGH: That's a problem.

7 MR. STRIS: Well, I -- I don't think
8 it's a problem. I think that case is different.
9 But -- so -- so Safeco, totally different.
10 McLaughlin, same thing. The opening sentence of
11 that opinion, the question presented concerns
12 the meaning of the word "willful."

13 Rehaif, it's a statute that required
14 knowledge that you were unlawfully or illegally
15 in the United States. None of those cases help.
16 They have Liparota. Here's what I would say
17 about Liparota --

18 JUSTICE KAVANAUGH: Can we just pause
19 on Rehaif? Why doesn't that help them?

20 MR. STRIS: Because it did one of the
21 two -- it had one of the two textual cues that
22 we explain evinces this. It specifically
23 applied "knowledge" to "that you were unlawfully
24 or illegally in the United States." That's not
25 what happened -- that's not what's happening

1 here.

2 Even in a case like Intel that -- that
3 this Court had a few terms -- two terms ago, the
4 statute there said you had to have actual
5 knowledge of the breach or violation. And the
6 government came in, and in an exchange with you,
7 Justice Kagan, when you asked, well, what does
8 it mean? Do you have to know the law? They
9 said no, no, every circuit has agreed that
10 knowledge of the breach or violation just means
11 you need to know the constituent facts.

12 JUSTICE GORSUCH: Counsel, I'm -- I'm
13 -- I'm -- I'm confused. Do you agree that
14 Congress can make a mistake of law, lack of it,
15 some sort of defense --

16 MR. STRIS: So --

17 JUSTICE GORSUCH: -- or part of an
18 element?

19 MR. STRIS: Yeah. Either they can
20 make it a defense or they can make it an element
21 so it would negate mens rea.

22 JUSTICE GORSUCH: So -- so they can do
23 this?

24 MR. STRIS: And -- and they didn't
25 here --

1 JUSTICE GORSUCH: Okay.

2 MR. STRIS: -- is our position.

3 JUSTICE GORSUCH: And I guess I'm
4 still -- I'm still stuck where Justice Kavanaugh
5 is, is Rehaif. Why isn't this more or less
6 identical to Rehaif? The knowledge of the
7 information contained in the application, or
8 whatever the exact formation, is false. And
9 some of that is legal. Some of it's factual.
10 And, you know, I -- I -- Justice Breyer's bird
11 example is a delightful one.

12 MR. STRIS: So there's a line. This
13 is the position we would take. And certain
14 things are obviously on one side of the line.
15 And I'll give you examples from the Copyright
16 Act.

17 So Section 109(d)(3) says the violator
18 was not aware that its acts constituted a
19 violation of Section 1002. That obviously is
20 Congress displacing the presumption.

21 Our point is this is not on that side
22 of the line. And you asked, well, why is it
23 different from Rehaif?

24 JUSTICE GORSUCH: Yeah, I'm -- I still
25 -- I still haven't really heard an explanation

1 that I understand at least on that one.

2 MR. STRIS: Well, so Rehaif required
3 that you -- that you know that you were
4 unlawfully in the United States. That can only
5 mean one thing, which is you -- you -- you had
6 broken a specific law.

7 And so information being -- being
8 inaccurate, it could be inaccurate for many
9 reasons.

10 JUSTICE GORSUCH: Exactly. It could
11 be inaccurate for reasons of -- of mistake of
12 fact or mistake of law. We -- we don't know
13 what an Oriole looks like or we -- we saw the
14 wrong -- something different.

15 MR. STRIS: And so our core position
16 is not that it couldn't mean what my friend says
17 but that it's not sufficiently clear given the
18 --

19 JUSTICE GORSUCH: Okay. So it could
20 mean this, Congress can do this, and now we're
21 just arguing about how -- the clarity with which
22 Congress needs to do this?

23 MR. STRIS: Yeah. Well, it -- it --
24 it's a textual --

25 JUSTICE GORSUCH: Is there a

1 heightened -- is there a heightened clarity
2 requirement you'd have us impose here?

3 MR. STRIS: I don't think heightened
4 clarity is required. I think we look at -- at
5 what Congress typically does, including in the
6 Copyright Act. We see many examples of
7 willfulness. We see many examples where the
8 specific law is -- is described. This looks
9 like McFadden. And I want -- I -- I know --
10 let's talk about McFadden for a second.

11 Same thing. Application of law to
12 fact. The Controlled Substance Act required
13 knowledge that something is a controlled
14 substance. This Court distributed the word
15 "knowledge" to all of the elements. Yet, this
16 Court held that if the defendant knew the
17 identity of the substance that he possessed,
18 say, heroin, that was enough because ignorance
19 of the law is typically no defense.

20 This, we submit, is on this side of
21 the line, and I want to explain why, but I want
22 to talk about Liparota first.

23 So Liparota is really not a
24 particularly powerful case, I think, for them,
25 because not only did it specifically mention the

1 law, but it invoked the Rule of Lenity.

2 Liparota --

3 JUSTICE KAVANAUGH: That's -- that's
4 after it goes through the -- the full textual
5 analysis, however, kind of an icing on the cake
6 for us.

7 MR. STRIS: I don't -- I mean, I don't
8 know how much of it is icing and how much of it
9 is kind of core --

10 JUSTICE KAVANAUGH: Okay. I'll --
11 but it goes through the analysis pretty
12 carefully, and there is a dissent. Justice
13 Brennan wrote the majority. It's -- it's pretty
14 careful.

15 MR. STRIS: Well, so let me -- let me
16 point up a big picture as you think through,
17 because I -- I think one thing that is pretty
18 much indisputable is there is a line, Congress
19 can do it, and the question is did they here.

20 And so I would say two things as to
21 why I think we're on the right side of the line.
22 So the first one is my friends offer no example
23 of a statute with text that looks anything like
24 this where the presumption was displaced.

25 I think that if we -- if we look for

1 examples, I'll give them Liparota. If you want,
2 I'll give them Rehaif. But you look at example
3 after example in the Copyright Act, and it's
4 very different language that applies.

5 JUSTICE KAVANAUGH: Can we talk about
6 then the real-world implications of your
7 position?

8 MR. STRIS: Yeah.

9 JUSTICE KAVANAUGH: Because I think
10 that helps get at some of this dissection of the
11 precedent.

12 MR. STRIS: Yeah.

13 JUSTICE KAVANAUGH: So your -- your
14 position is even if someone is confused about
15 the legal requirement of what unit of
16 publication is, honestly confused, truly
17 confused, so there's no -- no issue of lying,
18 that they -- when their copyright's infringed,
19 they lose their ability to recover simply
20 because they were honestly confused about a
21 legal requirement and lose, in this case, you
22 know, some hundreds of thousands of dollars?

23 MR. STRIS: So I'd say a couple --

24 JUSTICE KAVANAUGH: And -- and the
25 question is, what sense does that make if we're

1 in the realm of gray area?

2 MR. STRIS: I think it makes a lot of
3 sense in two ways, in both directions, so let me
4 take each of them. In terms of why Congress
5 would want it, it makes sense, and in terms of
6 why it shouldn't trouble you, it makes sense.
7 I'll take them in that turn.

8 So Congress, we submit, because this
9 is going to apply to constructive knowledge -- I
10 don't know how much time I'll have to get to
11 it -- retained this presumption and intended
12 constructive knowledge to incentivize diligence
13 and full candor because, as our amici explained,
14 there are serious systemic harms that come from
15 materially inaccurate registrations.

16 This -- this statute is only triggered
17 when it's materially inaccurate. It floods the
18 public record with misinformation. Bundling --
19 chronically bundling group registrations without
20 paying the fees deprives the office of money to
21 run. It -- this chills creators. There's a lot
22 of reasons to want to do it.

23 So let me get to the core part of your
24 question, which is, oh, but is it fair? What
25 about someone who had this belief?

1 I would say two things. First, as a
2 practical matter, diligent applicants don't face
3 any meaningful risk of this because this is an
4 interactive process where there are specialists
5 at the office ready to answer questions and
6 provide written guidance on almost every aspect
7 of the form. If you provide relevant facts and
8 correspond --

9 JUSTICE GORSUCH: Counsel, I'm sure
10 there are probably two sides to this story about
11 that and how useful and how -- the -- the
12 information you might get, and the other side of
13 the story, of course, is, boy, this is a
14 complicated process, there are volumes of -- of
15 important questions here that even the Solicitor
16 General can't fully, understandably --
17 understandably, no human alive can probably
18 understand the whole of this chapter.

19 MR. STRIS: Well --

20 JUSTICE GORSUCH: And in that world,
21 in a world of intense regulation, why -- I think
22 what Justice Kavanaugh is getting at is, how
23 would it be unreasonable or untoward to read
24 Congress's -- to -- to mean what it said here?

25 MR. STRIS: Well, so --

1 JUSTICE GORSUCH: I understand that
2 there are good policy arguments on your side. I
3 -- I'm not disparaging that.

4 MR. STRIS: I think that it --

5 JUSTICE GORSUCH: But, if there -- if
6 there are good policy arguments on both sides
7 and one might take a different view than you
8 about the helpfulness of and ready availability
9 of legal advice from the government to -- to
10 affected individuals, then what?

11 MR. STRIS: So I'll say three things.

12 So the first is I don't know that I
13 accept the premise this is what they said, and I
14 want to get to the text in a minute.

15 But the second thing I'll say is
16 there's a materiality protection here that I
17 think is important. You can -- I can spot you
18 everything that you just said, that it's
19 complicated, maybe we don't know, et cetera.

20 If you fully disclose facts to the
21 Copyright Office, it is inconceivable to me that
22 if they don't deny your application, which they
23 regularly do, they regularly ask questions and
24 say, oh, we don't think it was published, et
25 cetera, that when they're asked, well, was it

1 material, would we have behaved differently,
2 that they are going to say it was.

3 So I think there's a meaningful
4 protection. But the more -- if you disagree
5 with that, though, the -- my more core answer is
6 this is exactly the same that -- that this
7 operates in a number of settings, including
8 Jerman. Take Jerman. Jerman was a case where
9 there was a circuit split. There was on-point
10 circuit authority of the position that the
11 defendant took.

12 And the Court still had no trouble
13 finding that mistakes of law don't count because
14 it was looking at the overall context of the
15 statute. And so that kind of takes me to the --
16 the first part of your question that I wanted to
17 answer, which is what did Congress say?

18 Let's look at 411(b)(1) and the word
19 "knowledge." Our position is that you have to
20 look at this in context. My friends say: Well,
21 it has ordinary meaning. "Knowledge" means
22 actual awareness.

23 I don't agree with that. Knowledge is
24 a legal term that court after court have held
25 always requires context to determine what's

1 included on the continuum from actual to
2 constructive.

3 The context here is incredibly
4 powerful. 411 is one of five registration
5 provisions. These are Sections 408 to 412. If
6 you look at how they work, they -- they
7 establish a formal process that's not just to
8 protect copyright owners, not just to protect
9 litigants, but to promote systemic objectives.
10 You have to seek approval. That promotes
11 copyright quality. Well, if a material
12 inaccuracy caused something that wasn't
13 appropriately registrable to be registered, that
14 deteriorates copyright quality. You have to
15 deposit a copy of your work that builds a public
16 library. You have to pay a fee.

17 And if you do all of those things
18 promptly and correctly, you get a litigation
19 privilege. And so our -- our position in terms
20 of looking at that context, when you have a word
21 like "knowledge" that does not have, I would
22 submit, the ordinary meaning that it's what you
23 subjectively think, why would the government in
24 that regime confer those privileges on an
25 unreasonable error? So this is --

1 CHIEF JUSTICE ROBERTS: Well, one of
2 the things Mr. Rosenkranz says is that this is a
3 system that is -- is meant for people to be able
4 to do it themselves, right? You don't want to
5 have to hire some large law firm if you think
6 you've got a, you know, clever -- I don't know,
7 but, you know, something that should be
8 copyrighted. You can do that yourself.

9 MR. STRIS: But it's a system that
10 relies on the honor system, where the office
11 doesn't independently verify information, and it
12 -- and it's a system where, when you have a
13 constructive knowledge rule, that just means
14 reasonable under the circumstances.

15 So all a constructive knowledge rule
16 would say is, if a reasonable applicant --
17 obviously, Google is treated differently than a
18 poet or artist because that's an applicant with
19 heightened knowledge, et cetera.

20 If a reasonable, regular copyright
21 applicant would not have believed -- assuming
22 you reject my -- my object argument, would not
23 have believed that the ultimate representation
24 was accurate, they don't get these special
25 privileges.

1 CHIEF JUSTICE ROBERTS: So a lay
2 person who doesn't really know much about
3 copyright but knows how to, you know, write a
4 book or whatever it is that's going to be
5 copyrighted, they don't have to know anything?

6 Is -- is it simply a knew or should
7 have known?

8 MR. STRIS: It's knew or should have
9 known. And it's very important here, Mr. Chief
10 Justice, because the -- half a million claims
11 are being registered each year. And you don't
12 register a work. You register a claim, meaning
13 you -- the office relies on you as the applicant
14 to pick the work.

15 This goes to some of the questions you
16 were asking, Justice Alito, of, oh, does it
17 matter that it's a group or not a group? Of
18 course, it matters. Registering a collection
19 has a different criteria. You get different
20 rights. You get different --

21 JUSTICE BREYER: Well, all that's
22 true. But just to go back for a second to the
23 Chief Justice's question. Looking at your amici
24 briefs, I mean, they're worried about copyright
25 trolls.

1 I -- I'm worried about that. That's a
2 problem. But, if you think about it, Joe Smith,
3 who's been down in the basement for 40 years
4 writing the history of his dog's life, you see,
5 is likely to be much more able to legitimately
6 claim that he didn't know the law, you know, on
7 something than a copyright troll.

8 If there's one group of people that
9 it's going to be tough to make out a claim that
10 they didn't really know the law, it will be the
11 real copyright trolls because they stay abreast
12 of everything.

13 MR. STRIS: So --

14 JUSTICE BREYER: So -- so if -- if
15 that was Congress's effort, that would argue
16 that they really -- didn't really -- the
17 opposite of what you're saying.

18 MR. STRIS: Well, as a practical
19 matter, I don't know that I agree with you, and
20 -- and here is why.

21 JUSTICE BREYER: Trolls know less?

22 MR. STRIS: So I -- I -- I -- I -- I
23 don't think it matters whether they know less or
24 more. Here is what I think matters. This has
25 only been used 23 times in 13 years. If you go

1 look at those 411(b) referral letters, look to
2 see whether it's being used against repeat
3 players.

4 Repeat players have a number of
5 techniques that they can use to try and game the
6 system. And when the law is changing or when
7 things are complicated, a constructive -- an
8 actual knowledge, willful blindness standard, is
9 very hard to satisfy.

10 It's putting a burden on defendants to
11 say: Oh, you -- you -- you concoct as a
12 sophisticated plaintiff any argument as to why,
13 oh, I thought I could group things together
14 because of that, and you lose. Okay, you lose
15 one. You come up with something better the next
16 time.

17 JUSTICE KAVANAUGH: Well --

18 MR. STRIS: And I think that's what
19 our amici, you know, whether it's nationally,
20 the National Retail Federation, or in California
21 or the law professors, are explaining, this --
22 this is a real problem in a narrow segment of
23 the market. But, if you, either by rejecting
24 the -- the -- the object presumption or by
25 refusing a constructive knowledge standard, if

1 you don't allow it to proceed in this fashion,
2 what it's doing is taking away a very powerful
3 tool. And this is not a policy argument.

4 I think the -- the -- the -- the text
5 in context, the word "knowledge" alone, as part
6 of a regime that is talking about a litigation
7 privilege, is absolutely critical. This isn't
8 --

9 JUSTICE KAVANAUGH: Two questions.
10 Sorry.

11 MR. STRIS: Pardon me.

12 JUSTICE KAVANAUGH: Two questions.

13 One, doesn't the SG's blending -- or
14 not blending, but bridging of the reasonableness
15 requirement with the knowledge requirement in
16 the footnote I keep mentioning -- doesn't that
17 give you half a loaf at least?

18 MR. STRIS: I mean, I didn't quite
19 understand how the blending operates because --

20 JUSTICE KAVANAUGH: I thought -- I
21 thought it -- well, never mind.

22 MR. STRIS: I'll tell -- well, I'll
23 tell you my view and -- and --

24 JUSTICE KAVANAUGH: Yeah.

25 MR. STRIS: -- so for what it's worth.

1 You know, there are a whole bunch of tools in
2 the toolkit to ascertain whether someone is
3 lying. I agree. Willful blindness is one of
4 them. But there -- there's enormous daylight --

5 JUSTICE KAVANAUGH: But it's -- it's
6 broader than willful blindness. Their --

7 MR. STRIS: Other tools --

8 JUSTICE KAVANAUGH: -- their footnote,
9 it is -- you know, it's ridiculous to think that
10 for --

11 MR. STRIS: Circumstantial evidence,
12 of course.

13 JUSTICE KAVANAUGH: Yeah.

14 MR. STRIS: I -- I -- all of that I
15 understand and I agree with. My point is there
16 is still enormous daylight between -- maybe your
17 point is, with trolls or people who are not
18 sophisticated, that will work. I don't know.

19 But I can tell you at a broad level
20 there is enormous -- there's enormous daylight
21 between I had a position and it was honestly
22 held and it was totally unreasonable either
23 because I -- I didn't -- I didn't -- I'm an
24 idiot, I -- I didn't do the investigation I
25 should, but well short of willful blindness, and

1 what the government and Unicolors' rule would --
2 would sweep in.

3 And so I think, in trying to assess
4 what Congress meant, that daylight is important.
5 If you think the statute was intended only to
6 catch liars, then we should lose.

7 JUSTICE KAVANAUGH: Second question:
8 The policy arguments back and forth, Solicitor
9 General has come in on the side opposite you.

10 What do you make of that?

11 MR. STRIS: Well, what I make of that
12 is there's -- there are first principles on
13 questions of -- it may not feel sexy to a lot of
14 people, copyright, IP, but there are very
15 strongly held views on questions of formality
16 and whether it makes sense.

17 And if you look from administration to
18 administration, like, the views of the United
19 States have changed dramatically. And so it's
20 not at all surprising to me that an
21 administration and a copyright -- current
22 copyright registerer, who has been a tremendous
23 proponent of reducing formalities, believes, you
24 know, I'm sure honestly, that, you know, if --
25 if you're a hammer, everything looks like a

1 nail. If you're an anti-formalist, every --
2 Congress couldn't possibly have meant this.

3 But prior administrations, including
4 in the Fourth Estate case, if you look at the
5 position the government took there on a lot of
6 these what you're calling policy issues, is
7 precisely backwards.

8 So I think, ultimately, it's the text.
9 It's the context. That's what should guide this
10 Court. Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel. You need to get back up.

13 MR. STRIS: I forgot they're going
14 down the line.

15 CHIEF JUSTICE ROBERTS: Yeah. You say
16 there's only been 23 of these referrals. That
17 really surprised me, because how many millions
18 of copyright applications do you have?

19 MR. STRIS: Well, there's 500,000
20 claims that are registered a year.

21 CHIEF JUSTICE ROBERTS: Okay.

22 MR. STRIS: I think it's not
23 surprising at all because think about how it
24 plays out. This only applies when there's
25 litigation. It only applies when a defendant,

1 through discovery or something in the
2 litigation, like, learns that there was an
3 inaccuracy.

4 And it only applies when the defendant
5 has some incentive to do something about it. It
6 would only make sense as a defendant to press
7 this if you thought it was material because,
8 otherwise, you're going to make this point, even
9 if you can get referral to the office, they're
10 going to say it was immaterial, it doesn't help
11 you.

12 So it's not at all surprising that it
13 only happens a few times, but it happens in the
14 instance -- instances where it matters.

15 CHIEF JUSTICE ROBERTS: Justice
16 Thomas?

17 JUSTICE THOMAS: Nothing from me,
18 Chief.

19 CHIEF JUSTICE ROBERTS: Justice
20 Breyer? No more birds?

21 Justice Kavanaugh?

22 JUSTICE KAVANAUGH: No.

23 CHIEF JUSTICE ROBERTS: Okay. Thank
24 you, counsel.

25 Rebuttal, Mr. Rosenkranz?

1 REBUTTAL ARGUMENT OF E. JOSHUA ROSENKRANZ

2 ON BEHALF OF THE PETITIONER

3 MR. ROSENKRANZ: Yes. Thank you, Mr.
4 Chief Justice.

5 First, on the merits, Mr. Stris says
6 pretty forthrightly that the statute is
7 ambiguous. I don't think it is. I think it's
8 pretty clear, especially the structure of the
9 statute. But what he hasn't talked about is how
10 you break the tie.

11 There is a presumption. He hasn't
12 said almost anything about a hundred years of
13 common law in which no court ever did what H&M
14 is asking this Court to do.

15 Mr. Stris says: Oh, but those cases
16 didn't involve knowledge of the law. Almost
17 every one of the cases -- we laid them out for
18 seven pages of our brief -- are about mistakes
19 of law: Lamps Plus, Eckes, Masquerade, Bouchat,
20 Advisers, and Taylor.

21 Second, Mr. Stress -- Mr. Stris cites
22 cases about other statutes with other language.
23 He barely looks at this statute with this
24 language. I -- I agree with Justice Kavanaugh
25 and Justice Breyer, look at this statute, it's

1 so much clearer than all of the other ones.

2 Justice Gorsuch is right about Rehaif.
3 That statute did not apply knowledge to the
4 particular element, it -- it -- which was about
5 the status of the individual. It said
6 "knowingly violating a prohibition," and then
7 you've got to go look at the status of the
8 individual who's not allowed to possess a gun.

9 Chief Justice, you asked about the 23
10 referrals. Those 23 referrals are going to be
11 23,000 or -- or -- or hundreds of thousands if
12 the rule is what H&M says it is.

13 Now, all of a sudden, it will be a
14 sport for infringers to try to find legal errors
15 or any other sorts of errors in copyright
16 applications, especially willful infringers who,
17 like H&M, actually have no other defense.

18 There were a couple of questions,
19 including Justice Sotomayor's question early on
20 about copyright trolls. I'll just -- I just
21 have to say, for reasons that Justice Breyer
22 gave, this case has nothing to do with
23 disciplining trolls. H&M has no evidence that
24 trolls are especially likely to make mistakes on
25 copyright applications. I agree with Justice

1 Breyer that, if anything, they would be less
2 likely to make mistakes.

3 Now, if there is a problem with
4 baseless infringement suits, defendants have all
5 the tools they could possibly want, whether by
6 showing that the design is unoriginal -- excuse
7 me -- is unoriginal, that the defendant did not
8 actually copy, or that the accused design is not
9 substantially similar. And for bad-faith suits,
10 they will get attorneys' fees.

11 I mean, at the end of the day,
12 Congress followed a century of -- oh, sorry, if
13 I could finish my sentence --

14 CHIEF JUSTICE ROBERTS: Finish your
15 sentence.

16 MR. ROSENKRANZ: -- of precedent in
17 making a clear policy choice as -- as to who
18 should win in a competition between an artist
19 who, as the district court here found, made a
20 good-faith mistake and a serial and willful
21 infringer.

22 If the Court has no further
23 questions --

24 CHIEF JUSTICE ROBERTS: Even if they
25 do --

1 (Laughter.)

2 MR. ROSENKRANZ: -- we respectfully
3 request that the Court reverse.

4 CHIEF JUSTICE ROBERTS: -- thank you,
5 counsel. The case is submitted.

6 (Whereupon, at 1:29 p.m., the case was
7 submitted.)

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