

No. 20-915

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IN THE  
**Supreme Court of the United States**

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UNICOLORS, INC.,

*Petitioner,*

*v.*

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

*Respondent.*

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ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**REPLY BRIEF FOR PETITIONER**

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## INTRODUCTION<sup>1</sup>

This case is about statutory text and historical context, but H&M ignores both. It concedes that “knowledge” means “the fact or condition of being aware of something.” RB24 (quotation marks omitted). But H&M never parses § 411(b)(1)(A)’s text to explain why subjective awareness is not what Congress meant with the phrase “included ... with knowledge that it [i]s inaccurate.” And H&M found no common-law case, from the century before Congress enacted § 411(b), applying anything less than subjective awareness, or finding that standard satisfied when an applicant made a good-faith mistake, legal or factual.

Tacitly conceding the key legal points, H&M resorts to a dodgy strategy: The best offense is a good denunciation. But its accusations are wrong and irrelevant.

H&M accuses us of a “bait-and-switch” on the question presented. It argues that our cert. petition asked about “intent to defraud,” whereas our merits brief focused on subjective knowledge. But the petition’s question presented was about “indicia of fraud,” which plainly include subjective knowledge of an inaccuracy. When H&M’s opposition tried to narrow the question presented to “intent to defraud,” we resisted. In any event, as we said then, the distinction between intent and subjective knowledge is pure semantics in

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<sup>1</sup> We abbreviate Brief for Petitioner “OB,” Brief for Respondent “RB,” Brief for the United States “U.S. Br.,” and other amicus briefs as “\_\_ Br.,” according to the lead amicus.

this context. You can't include a known inaccuracy on a copyright registration form without intent. That is why H&M found no fraud-on-the-Copyright-Office case turning on its academic distinction between intent and subjective knowledge.

H&M also accuses us of misstating the basis for the Ninth Circuit's ruling. It repeatedly says that the inaccuracy at issue is an incorrect publication date, not the murky legal question of single-unit registration. But that is demonstrably wrong: The Ninth Circuit discussed the unsettled issue of single-unit registration for five pages and devoted not a word to H&M's publication-date argument. It is also irrelevant, since H&M concedes that publication, too, turns on both facts and legal judgments.

Finally, H&M abandons the law and record to sling mud. It calls Unicolors a "prolific copyright troll." RB6. Yet this very case concerns registration requirements for Unicolors fabrics that are so valuable that its customers clamored for an exclusivity period—hardly the profile of a troll. Unicolors has every right to defend its intellectual property against attack by a recidivist—and willful—infringer in a fast-fashion industry notorious for stealing designs. Not that name-calling matters. This Court resolves questions of law, not ad hominem squabbles. If H&M had good arguments on the former, it would not have devoted swaths of its brief to the latter.

The Ninth Circuit should be reversed.

## ARGUMENT

### **I. The Question Presented Is (And Always Has Been) The Appropriate Scierter Standard Under § 411(b).**

The question presented in this case has always been the appropriate scierter standard under § 411(b)(1)(A). H&M's attempt to avoid this question is meritless.

**A.** The only way H&M can suggest that we changed the question presented is by itself rephrasing the question presented in the petition. H&M repeatedly asserts that the petition asked “whether 17 U.S.C. § 411(b) requires *intent* to defraud.” RB1 (emphasis added); *see* RB22-28. But the question presented did not even mention “intent.” It asked whether “§ 411 requires referral to the Copyright Office where there is no *indicia* of fraud.” Pet. i (emphasis added).

What are the “*indicia* of fraud”? The rest of the petition confirms that the phrase encompasses all the varying common-law formulations of the longstanding *fraud-on-the-Copyright-Office* doctrine. H&M concedes that the doctrine embraced more than just “inten[t] to defraud”; it covered also “knowledge” of inaccuracy and conversely excluded “inadvertent and innocent” conduct. RB5; *accord* OB33-34; U.S. Br. 24-25 & n.4. In short, “*indicia* of fraud” includes exactly what H&M characterizes as the “new question”: whether “Section 411(b) turns on a copyright applicant’s *subjective awareness*” of inaccuracy. RB26 (emphasis added).

Without support from the question’s actual text, H&M retreats to the more modest assertion that the rest of the petition “*focused on ... ‘fraudulent intent.’*” RB26 (emphasis added). But H&M cites only two instances of the petition using the word “intent.” RB26. It ignores repeated invocation of the “circuit split” concerning the broader fraud-on-the-Copyright-Office doctrine. Pet. 7-16. The petition complained that the Ninth Circuit rejected a “‘knowing falsehood’ requirement.” Pet. 5. It cited a Seventh Circuit decision asking “if there was a knowing misrepresentation.” Pet. 15 n.9 (citing *DeliverMed Holdings, LLC v. Schaltenbrand*, 734 F.3d 616, 625 n.3 (7th Cir. 2013)). And it cited cases using the “innocent misstatement,” “inadvertent mistake[],” and “mere inadvertence” formulations. Pet. 13, 15 n.9.

H&M’s effort to narrow the petition to “intent” is especially perplexing because its cert. opposition already tried—and failed—to do exactly that. H&M’s opposition rewrote the question to ask if “the test for invalidation is whether the registrant had ‘knowledge that it was inaccurate.’” Opp. i. (Which, incidentally, confirms there is nothing untoward about rephrasing a question. *See* Sup. Ct. R. 24.1(a).) And it characterized the petition as limited to an argument “that the court of appeals committed error” in holding that “§ 411(b)(1) does not require a showing of intent-to-defraud.” *E.g.*, Opp. 10.

On reply, we rejected the narrowing. The first page explained that the “critical legal question” is “how to interpret [§ 411(b)] when it comes to a registration that is inaccurate only because the applicant made an innocent, but reasonable, mistake of law.”

Reply 1. We targeted there, as here, the Ninth Circuit’s holding “that the statute’s ‘knowledge’ language requires knowledge only of the underlying facts, and not ‘knowledge of the law.’” Reply 3. And we rejected H&M’s attempted reframing as “just semantics,” explaining that the only relevant distinction is “between ‘knowing’ errors versus errors that were ‘innocent,’ ‘inadvertent,’ or ‘unintentional.’” Reply 6.

H&M suggests no daylight between our cert. reply and merits brief. It just urges this Court to ignore the cert. reply. RB27. But H&M does not explain how Unicors can be guilty of “gam[ing]” the system, not “be[ing] honest,” and executing a “bait-and-switch,” RB1, 32, when our cert. papers previewed our exact merits argument. No amount of vitriol changes the fact that this Court granted the petition after we clarified what the question presented meant.

**B.** In any event, H&M still does not explain why its distinction between intent and knowledge is anything other than “semantics” in this context. Reply 6. When would an applicant consciously include in a copyright form information that it *knew* to be *false* and yet *not* intend to mislead the Copyright Office? It is pathological to include a knowing inaccuracy (on penalty of perjury) expecting that the Copyright Office would realize it is inaccurate (and therefore not be misled). While H&M notes other contexts in which the difference between knowledge and intent matters, RB25, it points to no case in this context—in a century of doctrinal development—where it ever has. Rather, the fraud-on-the-Copyright-Office cases toggle between asking whether the applicant lied or whether the inaccuracy was inadvertent. *See* OB8, 32-34. They

are flip sides of the same coin. So, there aren't two questions here—there is only one.

C. This Court should reject H&M's bid to dismiss the case as improvidently granted. Contrary to H&M's suggestion (RB24), we have not conceded anything with respect to whether "intent" is required. *Infra* 19-20. And even if the broader scienter question was not evident in the petition, there is no good reason to leave it unresolved now.

H&M erroneously asserts that the argument "that a misunderstanding of law" does not satisfy § 411(b) "was not raised or resolved below." RB28 (quotation marks omitted). As discussed (OB41), the Ninth Circuit held that "the knowledge inquiry is not whether Unicolors knew that including a mixture of confined and non-confined designs would run afoul of the single-unit registration requirement[]." Pet. App. 14a. It cited a prior Ninth Circuit case that held that "factual knowledge as distinguished from knowledge of the law" was all that mattered, *Gold Value Int'l Textile, Inc. v. Sanctuary Clothing, LLC*, 925 F.3d 1140, 1147 (9th Cir. 2019). H&M offers no alternative reading of that passage. Since the issue was "addressed by the court below," *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995), it does not matter whether or how it was raised.

Anyway, Unicolors argued below that "*innocent errors ... affecting virtually every material aspect of a copyright registration application*" are insufficient under § 411(b)(1)(A). C.A. Dkt. 19 at 10-13 (quotation marks omitted; emphasis added). Unicolors had no need to be more specific about mistakes of law. On ap-

peal, H&M's argument was that "[t]his is not a case of inadvertent mistake, as all elements of fraud are present." C.A. Dkt. 9-1 at 29. H&M concedes that "nobody made" a specific mistake-of-law argument. RB28. It was the Ninth Circuit's innovation.

H&M next calls for more "percolat[ion]," asserting that the issue of "subjective knowledge of the law" has "barely been addressed by *any* court." RB29. That is an oblique way of conceding that "no circuit [has] so much as suggested ... that an innocent mistake of law could be grounds for challenging a registration." OB35. That the Ninth Circuit broke from a century of case law hardly forecloses review. Indeed, H&M does not contest that this rule conflicts with the Eleventh Circuit's standard, under which an inaccuracy resulting from a good-faith mistake of law could never lead to invalidation. OB30.

Finally, H&M argues that "this appeal is a terrible vehicle to decide if Section 411(b) excuses mistakes of law." RB31. It is actually perfect. The Ninth Circuit laid out H&M's challenge to Unicolors' use of the single-unit-registration rule, Pet. App. 8a-9a; resolved that legal question against Unicolors, Pet. App. 9a-13a; and then held that Unicolors' lack of knowledge of that legal rule was irrelevant, Pet. App. 14a.

H&M points out that Unicolors' CEO, Pazirandeh, did not testify to "any legal understanding, much less an understanding reached in good faith." RB31. That is no vehicle problem. Pazirandeh signed the application and attested to its veracity. OB16; Add. 41a. And H&M does not dispute that it

bore the burden of overcoming that attestation. *See* OB18. So all H&M has pointed out is its own failure of proof.

**II. Under § 411(b), An Applicant Who Makes An Innocent Mistake Of Law Does Not Have “Knowledge” That The “Information” Is “Inaccurate.”**

**A. Common law confirms that an inadvertent inaccuracy—legal or factual—cannot bar an infringement action.**

We start with § 411(b)’s common-law backdrop, because H&M’s three-paragraph response (RB40-41) essentially concedes the outcome of the case.

H&M does not dispute our statement of either bedrock rule of statutory construction: (1) “When Congress codifies a judicially defined concept, it is presumed ... that Congress intended to adopt the interpretation placed on that concept by the courts,” OB31 (quoting *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 813 (1989)); and (2) “When a statute covers an issue previously governed by the common law,” it is presumed “that Congress intended to retain the substance of the common law,” OB37 (quoting *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 538 (2013)). Yet H&M fails to overcome those presumptions by proving either “an express statement to the contrary,” *Davis*, 489 U.S. at 813, or that a “statutory purpose to the contrary is evident,” *Samantar v. Yousuf*, 560 U.S. 305, 320 n.13 (2010). Instead, it all but concedes the issue by acknowledging that *our*

reading of the statute easily comports with “everyday speech.” RB34.

H&M’s only argument is that the two presumptions do not apply because “[t]he lower courts ... adopted various formulations of the ‘fraud on the Copyright Office’ doctrine.” RB40. But what matters is whether the courts had a consistent understanding of what “knowledge” entails. We and several amici have demonstrated that the answer is yes: The “overwhelming” common-law view was “that inadvertent mistakes on registration certificates d[id] not ... bar infringement actions,” *Billy-Bob Teeth, Inc. v. Novelty, Inc.*, 329 F.3d 586, 591 (7th Cir. 2003) (citation and quotation marks omitted). OB33-36; U.S. Br. 23-25; IP Law Profs. Br. 10-11.

H&M could not find a single fraud-on-the-Copyright-Office case in which a court distinguished inadvertent factual mistakes from legal ones. Nor one applying H&M’s proposed “constructive knowledge” standard. And it does not dispute our portrayal of numerous common-law cases rejecting those positions. OB35-36. *This* is the understanding that Congress is presumed to have codified. IP Law Profs. Br. 10-14.<sup>2</sup>

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<sup>2</sup> H&M proves nothing with the assertion that some courts “required only that the error be material without regard to intent.” RB41. The question here is what “knowledge” means. And the only appellate authority H&M cites is dicta musing that “the effect of a misstatement that is material but inadvertent” is “[l]ess clear.” *Raquel v. Educ. Mgmt. Corp.*, 196 F.3d 171, 177 (3d Cir. 1999). The dissent disputed that dicta, *id.* at 184-85 (Alito, J., dissenting), and this Court subsequently vacated the opinion, 531 U.S. 952 (2000).

That uniformity distinguishes this case from circumstances where there was no “judicial consensus” on the relevant question, *Rehaif v. United States*, 139 S. Ct. 2191, 2199 (2019), or where the asserted common-law rule “was an exception to an exception, recognized by only a few courts,” *United States v. Ron Pair Enters.*, 489 U.S. 235, 246 (1989).

**B. Both the plain text and customary legal meaning of “knowledge” require subjective awareness of the inaccuracy—and H&M’s unpreserved alternative would at most require remand.**

H&M’s lead argument on “knowledge” is that § 411(b)(1)(A) encompasses “constructive knowledge.” RB33-39. This is meritless.

1. On the question of what “knowledge” means in § 411(b)(1)(A), H&M’s brief is one big contradiction. Point I insists that it is “plain” that “knowledge” means “the fact or condition of being aware of something,” RB24 (quotation marks omitted)—i.e., subjective awareness. Point III says the opposite: “[W]hat matters is not the applicant’s subjective belief, but whether that belief [i]s reasonable”—i.e., “constructive knowledge.” RB33.

By the time it gets to the contradiction, H&M ignores almost all our textual arguments in support of the subjective reading of “knowledge.” H&M concedes that our reading comports with normal English usage, as confirmed by English dictionaries. RB34. H&M rejects “everyday speech” here because “the law ... treat[s]” the “word[] [knowledge] differently.” *Id.*

Yet, H&M does not dispute that *Black's* and the Model Penal Code's respective legal definitions of "knowledge" similarly require subjective knowledge. OB25-26.

H&M also points to no textual distinction between inaccuracies resulting from mistakes of fact versus mistakes of law. *See* OB27-29. Nor does it contest that its construction would yield criminal liability for innocent mistakes. *See* OB29.

H&M's only textual argument is that "Congress knows how to penalize what nonlawyers call 'lying'" by "us[ing] language of deceit and scienter," such as "knowingly and willfully." RB35. But H&M also acknowledges that Congress knows how to say "knew or should have known it was inaccurate," or simply, "constructive knowledge," RB34, as it did elsewhere in the Copyright Act. Beyond the examples we already cited (OB26 n.3), Congress did that three times in § 512 by specifying a circumstance where a party "has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent." § 512(c)(3)(B); *see* § 512(c)(1)(A), (d)(1). Paradoxically, H&M cites these provisions as proof that Congress sometimes specifies "actual knowledge" when it wants to "exclude ... constructive knowledge." RB34. But § 512 uses the phrase only as *part of* the definition of (and in contrast to) a constructive knowledge standard.

2. H&M nevertheless persists with its lead argument that while "'knowledge' may be actual, ... the law also may impute awareness" with a constructive-

knowledge standard. RB34. It asks, “how to break the logjam?” *Id.*

The obvious way is to parse “the text” of *this* statute “as a whole,” *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016), which H&M doesn’t even attempt. Another obvious way is to apply the presumption, discussed above (at 8-9), that Congress did not intend to depart from the common law. H&M abdicates there, too. *Supra* 8-9.

Instead, H&M advances a default rule: “[C]ourts interpret knowledge to include both actual and constructive knowledge where Congress has not stipulated one or the other.” RB34. But it offers no case that has ever adopted that default.

H&M concedes that *Intel Corp. Investment Policy Committee v. Sulyma*, 140 S. Ct. 768 (2020), did not, saying only that it “suggests” H&M’s rule. RB34. Even that is wrong. *Intel* concerned an ERISA statute of limitations triggered by “actual knowledge.” 140 S. Ct. at 776. The Court recognized the same ordinary definition of knowledge we advance: “the fact or condition of being aware of something.” *Id.* (quotation marks omitted). The only default rule *Intel* suggests is “that the word ‘*discovery*,’ when used in a *statute of limitations* without qualification,” encompasses constructive knowledge. *Id.* (emphasis added). That says nothing about how to read “knowledge” in this context.

H&M similarly cites another ERISA case, noting that this Court “interpreted” the phrase “‘knowing participation’ in a fiduciary breach or violation ... to

require ‘actual or constructive knowledge of the circumstances that rendered the transaction unlawful.’” RB34-35 (quoting *Harris Tr. & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 251 (2000)). But *Harris Trust* applied no default rule. It interpreted the text of the provision in light of “[t]he common law of trusts, which offers a starting point for analysis [of ERISA] ... [unless] it is inconsistent with the language of the statute, its structure, or its purposes.” 530 U.S. at 250 (citation and quotation marks omitted). It thus supports our text-and-context approach.

**3.** H&M is also wrong to say (RB33) that its constructive-knowledge standard would justify affirmance. H&M did not advance that standard below (or in its brief in opposition, for that matter), and neither the Ninth Circuit nor the district court applied it. The district court found that Unicolors was correct about single-unit registration. J.A. 181. And far from finding unreasonableness, the Ninth Circuit acknowledged the issue was unsettled. Pet. App. 11a.

That is one of the reasons H&M insists on discussing a different purported error, “H&M’s consistent allegation that Unicolors included the wrong publication date.” RB41. As demonstrated (OB44-47), what qualifies as publication is its own legal morass. And in any event, the Ninth Circuit did not address this issue either. So, the most H&M could hope to achieve is a remand for the district court to apply H&M’s new favored standard to its new favored inaccuracy.

**C. When a statute requires “knowledge” of a circumstance with factual and legal components, a mistake of law is a defense.**

H&M’s fallback argument is that § 411(b) never excuses a legal misunderstanding, no matter how reasonable—and indeed even if the applicant’s understanding was correct under then-prevailing law. It incants the maxim that “ignorance of the law” is not a defense. RB41 (citation omitted). This more extreme outcome fails for the same reason as H&M’s primary argument.

First, while portraying this as an issue of statutory construction, RB41, H&M (again) ignores the text and (still) has no response to our key textual points. We explained (OB27-29) how the statute affirmatively embraces knowledge of the law. Section 411(b)(1) sets a baseline rule of validity “regardless of ... any inaccurate *information*.” (Emphasis added.) The “information,” in turn, is the list of required matter that must be “include[d]” in the “application for copyright registration” per § 409. Indisputably, the accuracy of much of that information turns on both legal and factual understandings. U.S. Br. 21-22. And § 411(b)(1)(A) then refers to “information ... included” with “knowledge that it was inaccurate”—with the “knowledge” requirement attaching to the inaccuracy, without regard to why it was inaccurate. Thus, as H&M concedes, the “information” an applicant must know to be “inaccurate” under § 411(b)(1)(A) “contains both legal and factual components.” RB43.

H&M’s only response to the text Congress did write is (again) to point out the text Congress did *not* write. It repeats that Congress could have used other words, such as “willful,” or “specifically invoke[d] knowledge of the law.” RB42. Same answer: As the numerous cases discussed in our opening brief (and summarized immediately below) confirm, Congress was not required to use those formulations to excuse mistakes of law.

Second, H&M (again) abandons text in favor of another fictitious default rule: “that statutes imposing a ‘knowledge’ standard do not excuse mistakes of law.” RB33. But H&M relies mainly on cases interpreting statutes with no “knowledge” element and ignores the cases and treatises—featured prominently in our opening brief—addressing the situation where a mistake of law negates “knowledge.”

To start, we explained *Safeco*’s holding: “Where ... the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a *knowing* or reckless violator.” *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 n.20 (2007) (emphasis added); see *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132-33 (1988). We cited both LaFave and the Model Penal Code, moreover, for the proposition that “[i]gnorance or mistake as to a matter of fact or law is a defense” when the “ignorance or mistake” negates the “knowledge ... required to establish a material element of the offense.” Ignorance or Mistake, Model Penal Code § 2.04(1)(a) (Am. L. Inst. 2021); see Wayne R. LaFave, *Substantive Criminal*

*Law* § 5.6(a) (3d ed. 2020). We noted that both *Rehaif*, 139 S. Ct. at 2200, and *Liparota v. United States*, 471 U.S. 419, 425 n.9 (1985), apply that rule.

If there are “normal” rules about how to interpret “knowledge,” RB43, they are the ones described in black-letter treatises and consistent with “history and current thinking,” *Safeco*, 551 U.S. at 70 n.20. H&M ignores nearly all these authorities. It brushes them aside in a single paragraph, claiming they apply only “if the statute *says* you need to know the law in order to suffer consequences.” RB46.

H&M cannot accomplish anything with its invented limitation, having conceded that, by the very text of § 411(b)(1)(A), determining whether “information” is “inaccurate” entails “both legal and factual” judgments. RB43. So the required state of mind in § 411(b)(1)(A) *does* refer to legal aspects of the information that must be included on an application form. And the statute therefore *does* “say[] you need to know the law in order to suffer consequences.” If H&M is suggesting that Congress must explicitly use magic words, such as “knowledge of the facts or law,” or refer to a specified legal rule, it is mistaken. H&M cites no case supporting that view.

That is because what H&M trivializes as the “collateral matter” rule is the fundamental principle that where a mistaken understanding negates a statute’s required state of mind, that state-of-mind element is not satisfied. The word “collateral” captures the distinction between two scenarios:

***Ignorance-of-law-maxim scenario:*** “I can’t be liable under *this* law because I didn’t know I was violating *this* law.”

***Negated-mens-rea scenario:*** “I lacked the required state of mind as to X under *this* law because I misunderstood how *some other* law applies to X.”

Unicolors is not arguing, “Our registration should not be invalidated under § 411(b) because we never read § 411(b) and therefore did not know that lying on the application could lead to invalidation.” Instead, this is the negated-mens-rea scenario: Section 411(b)(1)(A) requires “knowledge” of an inaccuracy, which in turn depends on knowing the way *other* laws—laws collateral to § 411(b)—apply to yield an inaccuracy.

H&M relies almost exclusively on cases within the former scenario. RB41-42. For example, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010), is a classic case where the defense was, “I did not know I was violating the law.” The FDCPA provided a defense to a violation where “the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.” *Id.* at 576. The accused party argued that its violation could not be “intentional” because it “lacked actual knowledge that [its] conduct violated the law.” *Id.* at 582-83. That was wrong because the violation was not defined in terms of “knowledge” of any circumstance, much less knowledge of a circumstance with a legal component, as § 411(b)’s safe harbor is. *See id.* at 578.

Same for *Staples v. United States* 511 U.S. 600 (1994), and *Rogers v. United States*, 522 U.S. 252 (1998), but the statute in those cases did not even *have* a mens rea, let alone revolve around “knowledge” of something with “factual and legal components,” as H&M contends, RB43. The provision made it “unlawful for any person ... to receive or possess a firearm which is not registered.” 26 U.S.C. § 5861(d). Because this provision specified no mens rea at all, this Court felt a need to infer some minimal level of scienter. *Staples*, 511 U.S. at 605. Since Congress did not specify a knowledge element, as it did in § 411(b), this Court unsurprisingly concluded that the defendant need not “kn[o]w that his possession was unlawful, or that the firearm was unregistered.” *Rogers*, 522 U.S. at 255.

H&M relies on only one case interpreting a statute with an element of “knowing.” *McFadden v. United States* examined a statute that makes it “unlawful for any person knowingly or intentionally ... to manufacture, distribute, or dispense ... a controlled substance.” 576 U.S. 186, 191 (2015). The question was how that mental-state requirement “applies when the controlled substance is in fact an analogue,” under the Analogue Act. *Id.* at 193-94. This Court held that a defendant could be guilty if he “knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue.” *Id.* at 194. That was so because “[t]he Analogue Act defines a controlled substance analogue by its features, as a substance,” such as whether it “has a stimulant, depressant, or hallucinogenic effect.” *Id.* As a result, “[a] defendant who possesses a substance with knowledge of those features knows all of the facts that make his

conduct illegal.” *Id.* at 194-95. Again, far from proving some default rule, *McFadden* merely shows that the precise wording and structure of the statute matter.

Which brings us full circle to where this discussion started (at 14): What matters is that the object of “knowledge” in § 411(b)(1)(A) is “inaccurate information,” and the “information” in question concededly covers both facts and legal conclusions.

### **III. H&M Cannot Prevail Even Under Its Version Of The Question Presented.**

Rewriting the question presented to focus on “intent to deceive” does not change the answer. RB23. A defendant cannot satisfy § 411(b) without proving intent, either. As already demonstrated (at 5-6), any distinction between intent and knowledge is pure semantics here.

H&M’s one-page argument boils down to the simplistic proposition that Congress did not use the word “intent” and that “ends the matter.” RB25. But Congress achieved the same result in a different way. Section 411(b) requires the defendant to prove: (1) that “information” was “inaccurate”; (2) that the applicant had “knowledge that it was inaccurate”; and (3) that the inaccuracy was material to the Copyright Office. Anyone who proves all that *has* proven that the applicant included the information on purpose—i.e., with intent. Even H&M’s amici agree that “intent is implicit where Section 411(b) is satisfied.” NYIPLA Br. 8 (capitalization omitted).

H&M’s assertion that intent is not required is wrong for many of the same reasons already recited. First, as explained (at 11, 15), it does not matter what language “Congress ... could have [written].” RB25. Second, although the common law embraced “various formulations” of the doctrine, RB25 (quotation marks omitted), no appellate court ever held that an applicant could lose its copyright registration even though its error was unintentional. Courts thus routinely equated intent with knowledge in this context. *See, e.g., Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1161 n.24 (1st Cir. 1994) (characterizing the “knowing failure” standard as “requir[ing] proof that an *intentional* error, if discovered by the Copyright Office, would have been *material* to the registration decision” (first emphasis added)). And, here again, Congress indicated no clear intention to override that uniform view.

Third, any other conclusion would gut § 411(b) by stripping protection from even the classic mistakes it was designed to excuse. Imagine an applicant who mistypes the work’s creation date. The applicant had “knowledge” of the correct date. But no reasonable court would say the error satisfies § 411(b), because the mistake was innocent. When you put the elements together, you exclude unintentional errors as a basis for invalidation.

#### **IV. Congress Could Not Have Intended The Negative Consequences Of The Ninth Circuit’s Rule.**

A. H&M does not dispute that legal mistakes inevitably abound on copyright registrations, because

the laypersons who fill them out have not mastered a complex and ever-changing body of law. OB44-48. H&M urges the Court to overlook that inevitability merely because courts have made only 23 referrals under § 411(b). RB39. But that only proves the wisdom of the longtime consensus from which the Ninth Circuit has departed.

H&M and its amici minimize all this by suggesting that the only consequence of invalidating a registration is that copyright holders will refile cases “without the benefit of certain statutory remedies.” *E.g.*, RB47; NRF Br. 25-26. Even if true, that is no trivial consequence. Statutory damages play a critical role in “discourag[ing] wrongful conduct” and ensuring an appropriate remedy where “the amount of damages suffered [is] not computable.” *F.W. Woolworth Co. v. Contemp. Arts, Inc.*, 344 U.S. 228, 233 (1952). But H&M’s argument is also not true. H&M ignores the point (OB48-49) that new claims may be time-barred where infringement began years before the defendant invoked § 411(b).

H&M also incorrectly asserts that the materiality requirement adequately protects applicants who make innocent mistakes. There is no reason to believe that innocent mistakes are likely to be immaterial. A mistake is material if the Register would have rejected the application and directed the applicant to file a new one. For example, stating the incorrect creation date or omitting publication information for a published work are both material errors. *Roberts v. Gordy*, 877 F.3d 1024, 1027 (11th Cir. 2017); *Gold Value*, 925 F.3d at 1143. And in resolving that mate-

riality question, the Register has no power to forgive innocent mistakes. U.S. Br. 27-28.

H&M’s only other mitigating argument is the non sequitur that Congress has aided “small creators” by creating a small-claims process. RB39-40. Congress created these proceedings to cover low-value claims—under \$30,000, § 1504(e)(D)—not as a booby prize for victims of large-scale infringement who made innocent mistakes on their applications. Besides, proceeding in small-claims court is subject to the infringer’s veto because the forum is purely “voluntary.” § 1504(a).

**B.** H&M invites this mischief with little countervailing benefit. H&M claims its rule is necessary to deter applicants from making “unreasonable” errors. RB37. The subjective-knowledge standard, however, will rarely forgive unreasonable conduct. A defendant can satisfy a knowledge standard by proving willful blindness. *See* OB25-26 (citing *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011)). And a defendant is always free to emphasize the unreasonableness of the applicant’s position as circumstantial evidence that she knew it was wrong.

H&M also worries that a subjective-knowledge standard will “allow unscrupulous applicants to play fast and loose with the process.” RB38. But “unscrupulous applicants” are exactly the ones who *do* satisfy the subjective-knowledge requirement. H&M’s real complaint is about the “difficulty in proving actual knowledge (including willful blindness).” RB38. But Congress *wanted* to make it hard for defendants to invalidate registrations. Its aim was to prevent “intel-

lectual property thieves from exploiting [a] potential loophole.” H.R. Rep. No. 110-617, at 24 (2008).

H&M’s remaining argument is that a subjective-knowledge standard “would seriously weaken the copyright registration system.” RB37. The Government, which administers that system, rejects that view, emphasizing that H&M’s proposed rule is the one that will wreak havoc. U.S. Br. 27. And ultimately, there is a simple, bottom-line answer to all of H&M’s stated concerns: The subjective-knowledge standard (without a carveout for legal mistakes or a formal reasonableness requirement) has been the standard for a century, and the copyright system has worked perfectly fine.

C. Swaths of H&M’s brief are devoted to mud-slinging. H&M starts by declaring that “[t]his case is not about poets and artists.” RB6. If H&M means that § 411(b) is not about protecting poets and artists, it is obviously wrong, as is evident from the chorus of amici supporting Unicolors—photographers, painters, sculptors, architects, creators’ rights organizations, legal clinics, and the leading trade organization representing millions of creators across every industry and medium. If H&M means that it does not consider Unicolors to be an artist, that is irrelevant. But it is also wrong. The Copyright Act treats Unicolors’ designs as art worthy of protection.

H&M and its amici stoop to name-calling, branding Unicolors a “copyright troll.” Their extra-record smearing is not just unseemly and legally improper—it is false. Unicolors is no “troll.” It is a practicing fabric designer with a team of 13 artists who create orig-

inal textile artwork. It designs and sells fabrics to over 200 customers, some of which pay a premium for exclusivity periods. OB9-13; J.A. 50-51, 56-57, 62-63.

Filing multiple lawsuits to assert rights in its own designs does not transform Unicolors into a copyright troll. Nor does suing multiple entities for infringing the same pattern. *Contra* RB12. H&M feigns incredulity at the notion that “numerous unrelated retailers independently ripped off EH101.” RB12. But anyone who understands how so-called fast-fashion retailers like H&M operate would not be surprised. They cultivate a network of unscrupulous plagiarists in foreign lands ready to feed the demand for fast production at low cost. *See* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 Va. L. Rev. 1687, 1692 & n.7, 1705 (2006). H&M and its amici are agitated not because Unicolors is bringing meritless suits, but because it is winning—and holding them and their members accountable for valuing fast profits over IP rights. *See Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 990 (9th Cir. 2017) (upholding six-figure damage award to Unicolors for willful infringement of its designs).

All of which explains why H&M is frequently sued. It is one of the industry’s “major fashion copyists.” Raustiala & Sprigman, *supra*, at 1737. H&M’s only support for its effort to deflect the blame to copyright trolls is an isolated quote from an article in *Fortune* magazine. RB6. H&M neglects to mention that one of the article’s main “sources” is its own lawyer in this very case.

More importantly, though, H&M has not explained what any of this has to do with § 411(b). It posits the need to protect against entities with a “business model [that] relies on submitting inaccurate information to the Copyright Office.” RB6, 8. But that does not sound like a good business model even for a troll, and H&M points to no company that actually deploys it. H&M suggests that Unicolors matches the description because it supposedly was “exploiting” the single-unit-registration rule. RB8. H&M is mistaken. The court below and the Government agree that the requirements for that rule were “not a settled point of law,” U.S. Br. 28, and H&M does not dispute that the only published precedent supported Unicolors’ approach, OB15.

Innocent defendants have numerous ways to defeat baseless infringement lawsuits, including by proving that the plaintiff itself copied from another source. They can then seek fees under § 505. Section 411(b), by contrast, was not enacted as a tool for fighting meritless lawsuits; it was designed as a tool to prevent infringers—and especially willful infringers like H&M—from skating on technicalities. *Supra* 22-23.

**CONCLUSION**

This Court should reverse the Ninth Circuit's judgment.

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