

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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P R O C E E D I N G S

(12:10 p.m.)

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

Mr. Rosenkranz.

ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

ON BEHALF OF THE PETITIONER

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

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

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

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
17 constructive knowledge requirement.

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

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

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, he was blind himself to what the rule
17 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. I would also add
16 that it is telling that H&M does not deny that
17 our reading comports with normal parlance.

18 It also happens to be the way Black's
19 Law Dictionary and the Model Penal Code define
20 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 the decisions
2 in 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 what --

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

3 JUSTICE ALITO: -- what was done with
4 them 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 want
4 to get to Your Honor's original question, which
5 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 A knowing misstatement is an indicia
19 of fraud. And I would -- I would hasten to add
20 it's important that you underscored indicia of
21 fraud because H&M's entire argument was that we
22 change the question presented because the
23 original question was about intent.

24 The original question was not about
25 intent, and the petition repeatedly refers to

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

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

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

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

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

25 JUSTICE ALITO: And did -- do you

1 understand that the completion of this form in
2 the way that it was completed to constitute an
3 implicit statement about that?

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

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

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

17 MR. ROSENKRANZ: Of course.

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

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

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

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

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

12 MR. ROSENKRANZ: So --

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

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

24 But I did want to address the common
25 law way of getting to the same result, which is

1 the presumption that Congress would not have
2 hidden in the word "knowledge" an intention to
3 override a century of common law.

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

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

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

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

1 elements, but those additional elements never
2 subtracted from that bare minimum.

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

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

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

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

24 MR. ROSENKRANZ: Well, Your Honor, so
25 I think --

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

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

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

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

25 I do have to get to the question of --

1 if I may, Your Honor?

2 CHIEF JUSTICE ROBERTS: Maybe --

3 MR. ROSENKRANZ: Of course.

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

6 Justice Thomas?

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

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

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

25 MR. ROSENKRANZ: Well, so, Your Honor,

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

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

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

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

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

11 CHIEF JUSTICE ROBERTS: Justice
12 Breyer, anything?

13 JUSTICE BREYER: No.

14 CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

23 MR. ROSENKRANZ: Yes, Your Honor. The
24 circuit split alleged in the petition was the
25 Ninth Circuit against the Eleventh Circuit.

1 That was -- that was it. The Seventh Circuit
2 had some good language as well.

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

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

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

21 MR. ROSENKRANZ: It could not have
22 helped us in any other way, Your Honor. That's
23 exactly why Congress wrote the statute the way
24 it did, because there's very little benefit in
25 litigation from -- from anything that ends up

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

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 Justice Gorsuch?

10 Justice Barrett? No?

11 Thank you, counsel.

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

14 CHIEF JUSTICE ROBERTS: Ms. Patterson.

15 ORAL ARGUMENT OF MELISSA N. PATTERSON

16 FOR THE UNITED STATES, AS AMICUS CURIAE,

17 SUPPORTING THE PETITIONER

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

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

1 included inaccurate information in its
2 application to the Copyright Office with
3 knowledge that it was inaccurate.

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

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

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

24 I think there is some suggestion by
25 Respondent of an alternate rule, a constructive

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

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

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

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

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

22 MS. PATTERSON: We think it needs to
23 be actual knowledge, Your Honor, and that's for
24 essentially three reasons: the text of 411(b)
25 itself, the text of the rest of Title 17, and

1 the context in which Congress enacted Section
2 411(b).

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

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

22 You know, having reasonable grounds to
23 know, being aware of actual facts or
24 circumstances, which are written into some of
25 these standards, is quite different than acting

1 in deliberate disregard or -- or recklessness or
2 ignorance.

3 So we think --

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

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

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

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

16 MS. PATTERSON: Yeah, I think --

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

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

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

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

12 JUSTICE SOTOMAYOR: How about
13 unreasonableness?

14 MS. PATTERSON: Pardon?

15 JUSTICE SOTOMAYOR: How about
16 unreasonableness?

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

22 We don't think that's the right
23 standard. We think that the -- if you honestly
24 believe or are honestly just ignorant of the
25 exact definition of, say, publication or single

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

5 CHIEF JUSTICE ROBERTS: Is that --

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

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 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 -- it is important to remember
24 that these types of scienter determinations are
25 going to be made by a fact-finder. You are free

1 to make your arguments that someone is not
2 telling the truth when they disclaim knowledge
3 of including inaccuracies.

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

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

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

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

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

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

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

24 MS. PATTERSON: We are wading into the
25 depths of Chapter 1900 of the Compendium of

1 Copyright Law which is devoted entirely to the
2 various scenarios that can constitute
3 publication or not constitute publication.

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

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

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

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

1 meant.

2 And we're not prepared to opine on --
3 on 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
16 the Ninth Circuit found, and which is now
17 entrenched in our compendium, had not been
18 written into the guidance that we give
19 registrants.

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

1 MS. PATTERSON: Yes, Your Honor. We
2 think the Ninth Circuit has not yet had an
3 opportunity to apply the correct scienter
4 standard and that it would need to look back at
5 the district court, look at any findings the
6 district court may or may not have -- have made,
7 I understand that's the subject of some dispute,
8 and decide whether or not the record here
9 supported a finding of the requisite 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. And we do think
17 there is a circuit split here.

18 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. That type of
5 error can be rebutted during the substance of
6 the litigation. You're not stuck with all of
7 those facts listed in the copyright
8 registration. We just think that they should
9 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 should
22 retain its litigation privileges because its
23 inaccuracies were allegedly the result of its
24 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. It continues: "Despite a
8 lack of any evidence, the panel concluded that
9 the designs were not -- the confined designs
10 were not placed in the showroom for sale at the
11 same time."

12 This was a factual dispute where the
13 Ninth Circuit agreed with us. Now I admit the
14 Ninth Circuit also found a second inaccuracy.
15 It found that to register a collection, they
16 have to be all published on the same date. No
17 one disputes that. But they also have to be
18 published together. That's this bundling issue.

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

25 So now Unicolors claims that they

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

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

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

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

25 JUSTICE KAGAN: Can I interrupt you on

1 number one?

2 MR. STRIS: Please.

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

11 MR. STRIS: So I think there's a big
12 difference. I want to be clear about our
13 position on this. So whether or not the intent
14 to deceive is a separate requirement has
15 tremendous practical significance because, if it
16 exists as a standalone, separate requirement,
17 you have what Unicolors argued here and what
18 they have argued respectively in many other
19 cases. They can say, well, even if you prove
20 that we were subjectively aware that it was
21 wrong, you know, we -- we didn't think it
22 mattered. You know, we didn't think it was
23 material, so we didn't have the intent to
24 deceive. That's essentially what they argued in
25 the Burlington case when they didn't put the

1 leopard print in.

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

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

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

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

1 office would not have registered your -- your
2 claim if they had known.

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

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

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

22 MR. STRIS: I -- I think the -- the --
23 that's -- that points up at the fundamental
24 problem with a good faith or subjective
25 standard, right? There is enormous daylight

1 between whether it's willful blindness or
2 whether it's the point that you just made, a
3 situation where it's obvious that you should
4 have known.

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

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

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

20 JUSTICE KAVANAUGH: Well, I'm just
21 speaking for myself.

22 MR. STRIS: Understood. But I think
23 that what -- what would encapsulate my position
24 is the Eleventh Circuit relied on a common law
25 case that has a requirement that everyone

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

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

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

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

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

23 And you say in response to that what?
24 That the Ninth Circuit didn't do that or that --
25 that it has nothing to do with this case or

1 what?

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

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

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

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

23 It was clearly treating it as a
24 freestanding issue. And it said, just like the
25 law professors who are on our side, there is --

1 Congress did not codify that aspect of -- of --

2 JUSTICE BREYER: I'll look at it.

3 I'll look at it and see.

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

5 JUSTICE BREYER: Okay. I have a
6 question on the merits too.

7 MR. STRIS: Okay.

8 JUSTICE BREYER: And sometimes you
9 have to forgive what -- sometimes I get carried
10 away in my examples.

11 MR. STRIS: Me too.

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

18 (Laughter.)

19 JUSTICE BREYER: All right. The --
20 the -- the -- all right. Here, now, imagine --

21 MR. STRIS: On object of knowledge or
22 on scope or both?

23 JUSTICE BREYER: You'll see.

24 MR. STRIS: Okay.

25 JUSTICE BREYER: You'll see. It gets

1 --

2 MR. STRIS: Okay. I'm ready, raring
3 to go.

4 JUSTICE GORSUCH: Don't argue. This
5 is a good day.

6 (Laughter.)

7 JUSTICE BREYER: Maybe you shouldn't
8 -- maybe I shouldn't ask it.

9 CHIEF JUSTICE ROBERTS: Stand down.

10 JUSTICE BREYER: Suppose we looked
11 around and a bird flew back there.

12 MR. STRIS: Yeah.

13 JUSTICE BREYER: And I say: My God,
14 it's a Scarlet Tanager. And you say: No, it
15 isn't. It's a Northern Oriole.

16 I have made a mistake. You are right.
17 Okay?

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

22 The second reason is we both saw
23 exactly the same thing, but I don't understand
24 the right use of the label. We made a mistake
25 of whether it's a Tanager or an Oriole. I made

1 that mistake, not a mistake in what I saw.

2 How would we resolve our differences?

3 We would call in an ornithologist, I guess.

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

6 (Laughter.)

7 JUSTICE BREYER: But it is the word
8 single unit of publication. And we could make a
9 mistake, you see, in what happened in the world,
10 or we could make a mistake in how we apply the
11 label.

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

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

22 MR. STRIS: So, as I understand all of
23 the birds and the structure there, that largely
24 goes to what I'm calling the object of
25 knowledge, so I want to take that first. But I

1 -- I -- I think scope of knowledge is -- is a
2 separate issue because, first, you have to
3 assess what is it that you need to be aware of.
4 And your two buckets go to that. And then
5 there's a question of what type of awareness.
6 So I think they're separate.

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

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

20 Whether something's a bona fide error,
21 obviously, that turns on subjective knowledge,
22 right? You can't -- an error is you believe
23 something is -- is true when it's false. Bona
24 fide is did you hold that belief?

25 The only question before this Court in

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

7 And as the dissent pointed out, the
8 statute talked in terms of a violation, which
9 denotes a legal infraction. But seven Justices
10 said, no, it doesn't excuse legal errors because
11 of the background presumption.

12 I would submit, if that text wasn't
13 enough to override the presumption that we're in
14 one category as opposed to the other, this text
15 certainly doesn't.

16 JUSTICE KAVANAUGH: What about the
17 word "information"?

18 MR. STRIS: So --

19 JUSTICE KAVANAUGH: I mean, that
20 encompasses legal information and factual
21 information, right?

22 MR. STRIS: Absolutely. But --

23 JUSTICE KAVANAUGH: Okay.

24 MR. STRIS: -- our position on that is
25 that merely requiring knowledge of something

1 that can turn on a legal definition is
2 insufficient to overcome the presumption.
3 That's McFadden. If you look at -- in McFadden
4 --

5 JUSTICE KAVANAUGH: Well, in cases
6 like Liparota and the others cited in the brief
7 where the legal part is folded into the statute
8 and their argument is here the word
9 "information" does the same thing.

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

16 MR. STRIS: Right. So --

17 JUSTICE KAVANAUGH: -- I'll take your
18 response on information.

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

22 JUSTICE KAVANAUGH: Well, no, no, they
23 cite -- they cite --

24 MR. STRIS: They cite --

25 JUSTICE KAVANAUGH: -- Safeco,

1 McLaughlin, Rehaif.

2 MR. STRIS: Let -- let -- let me take
3 them one by one because --

4 JUSTICE KAVANAUGH: Camel.

5 MR. STRIS: Right.

6 JUSTICE KAVANAUGH: Yeah.

7 MR. STRIS: Liparota is different.

8 And your question, I want to answer about
9 Liparota. The other cases don't help them at
10 all.

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

18 And we -- we argued this. We
19 explained, if you look through the Copyright
20 Act, you'll see many examples where -- where
21 Congress used the word "willful." You'll see
22 many examples where they specifically identified
23 the law or the application of law to fact that
24 you needed to know.

25 I want to get to Liparota, though,

1 because what I'm saying now doesn't --

2 JUSTICE KAVANAUGH: That's a problem.

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

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

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

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

22 Even in a case like Intel that -- that
23 this Court had a few terms -- two terms ago, the
24 statute there said you had to have actual
25 knowledge of the breach or violation. And the

1 government came in, and in an exchange with you,
2 Justice Kagan, when you asked, well, what does
3 it mean? Do you have to know the law? They
4 said no, no, every circuit has agreed that
5 knowledge of the breach or violation just means
6 you need to know the constituent facts.

7 JUSTICE GORSUCH: Counsel, I'm -- I'm
8 -- I'm -- I'm confused. Do you agree that
9 Congress can make a mistake of law, lack of it,
10 some sort of defense --

11 MR. STRIS: So --

12 JUSTICE GORSUCH: -- or part of an
13 element?

14 MR. STRIS: Yeah. Either they can
15 make it a defense or they can make it an element
16 so it would negate mens rea.

17 JUSTICE GORSUCH: So they can do this?

18 MR. STRIS: And -- and they didn't
19 here --

20 JUSTICE GORSUCH: Okay.

21 MR. STRIS: -- is our --

22 JUSTICE GORSUCH: I guess I'm still --
23 I'm still stuck where Justice Kavanaugh is, is
24 Rehaif. Why isn't this more or less identical
25 to Rehaif? The knowledge of the information

1 contained in the application, or whatever the
2 exact formation, is false. And some of that is
3 legal. Some of it's factual. And, you know, I
4 -- I -- Justice Breyer's bird example is a
5 delightful one.

6 MR. STRIS: So there's a line. This
7 is the position we would take. And certain
8 things are obviously on one side of the line.
9 And I'll give you examples from the Copyright
10 Act.

11 So Section 109(d)(3) says the violator
12 was not aware that its acts constituted a
13 violation of Section 1002. That obviously is
14 Congress displacing the presumption.

15 Our point is this is not on that side
16 of the line. And you asked, well, why is it
17 different from Rehaif?

18 JUSTICE GORSUCH: Yeah, I'm -- I'm
19 still -- I still haven't really heard an
20 explanation that I understand at least on that
21 one.

22 MR. STRIS: Well, so Rehaif required
23 that you -- that you know that you were
24 unlawfully in the United States. That can only
25 mean one thing, which is you -- you -- you had

1 broken a specific law.

2 And so information being -- being
3 inaccurate, it could be inaccurate for many
4 reasons.

5 JUSTICE GORSUCH: Exactly. It could
6 be inaccurate for reasons of -- of mistake of
7 fact or mistake of law. We don't know what an
8 Oriole looks like or we -- we saw the wrong --
9 something different.

10 MR. STRIS: And so our core position
11 is not that it couldn't mean what my friend says
12 but that it's not sufficiently clear given the
13 --

14 JUSTICE GORSUCH: Okay. So it could
15 mean this, Congress can do this, and now we're
16 just arguing about the clarity with which
17 Congress needs to do this?

18 MR. STRIS: Yeah. Well, it -- it's a
19 textual --

20 JUSTICE GORSUCH: Is there a
21 heightened -- is there a heightened clarity
22 requirement you'd have us impose here?

23 MR. STRIS: I don't think heightened
24 clarity is required. I think we look at -- at
25 what Congress typically does, including in the

1 Copyright Act. We see many examples of
2 willfulness. We see many examples where the
3 specific law is -- is described. This looks
4 like McFadden. And I want -- I -- let's talk
5 about McFadden for a second.

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

15 This, we submit, is on this side of
16 the line, and I want to explain why, but I want
17 to talk about Liparota first.

18 So Liparota is really not a
19 particularly powerful case, I think, for them,
20 because not only did it specifically mention the
21 law, but it invoked the Rule of Lenity.
22 Liparota --

23 JUSTICE KAVANAUGH: That's -- that's
24 after it goes through the -- the full textual
25 analysis, however, kind of an icing on the cake

1 for us.

2 MR. STRIS: I don't -- I mean, I don't
3 know how much of it is icing and how much of it
4 is kind of core --

5 JUSTICE KAVANAUGH: Okay. I'll --
6 but it goes through the analysis pretty
7 carefully, and there is a dissent. Justice
8 Brennan wrote the majority. It's -- it's pretty
9 careful.

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

15 So I would say two things as to why I
16 think we're on the right side of the line. So
17 the first one is my friends offer no example of
18 a statute with text that looks anything like
19 this, where the presumption was displaced.

20 I think that if we -- if we look for
21 examples, I'll give them Liparota; if you want,
22 I'll give them Rehaif. But you look at example
23 after example in the Copyright Act, and it's
24 very different language that applies.

25 JUSTICE KAVANAUGH: Can we talk about,

1 then, the real-world implications of your
2 position --

3 MR. STRIS: Yeah.

4 JUSTICE KAVANAUGH: -- because I think
5 that helps get at some of this dissection of the
6 precedent.

7 MR. STRIS: Yeah.

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

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

19 JUSTICE KAVANAUGH: And -- and the
20 question is what sense does that make if we're
21 in the realm of gray area?

22 MR. STRIS: I think it makes a lot of
23 sense in two ways, in both directions. So let
24 me take each of them. In terms of why Congress
25 would want it, it makes sense, and in terms of

1 why it shouldn't trouble you, it makes sense.

2 I'll take them in that turn.

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

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

18 So let me get to the core part of your
19 question, which is, oh, is it fair? What about
20 someone who had this belief?

21 I would say two things. First as a
22 practical matter, diligent applicants don't face
23 any meaningful risk of this because this is an
24 interactive process where there are specialists
25 at the office ready to answer questions and

1 provide written guidance on almost every aspect
2 of the form. If you provide relevant facts and
3 correspond --

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

14 MR. STRIS: Well --

15 JUSTICE GORSUCH: And in that world,
16 in a world of intense regulation, why -- I think
17 what Justice Kavanaugh is getting at is how
18 would it be unreasonable or untoward to read
19 Congress's -- to mean what it said here?

20 MR. STRIS: Well, so --

21 JUSTICE GORSUCH: I understand there
22 are good policy arguments on your side. I'm not
23 disparaging that.

24 MR. STRIS: I think that it --

25 JUSTICE GORSUCH: But if there -- if

1 there are good policy arguments on both sides,
2 and one might take a different view than you
3 about the helpfulness of and ready availability
4 of legal advice from the government to -- to
5 affected individuals, then what?

6 MR. STRIS: So I'll say three things.
7 So the first is I don't know that I accept the
8 premise this is what they said. And I want to
9 get to the text in a minute.

10 But the second thing I'll say is
11 there's a materiality protection here that I
12 think is important. You can -- I can spot you
13 everything that you just said, that it's
14 complicated, maybe we don't know, et cetera. If
15 you fully disclose facts to the Copyright
16 Office, it is inconceivable to me that if they
17 don't deny your application, which they
18 regularly do, they regularly ask questions and
19 say, oh, we don't think it was published, et
20 cetera, that when they're asked, well, was it
21 material, would we have behaved differently,
22 that they are going to say it was.

23 So I think there's meaningful
24 protection. But the more -- if you disagree
25 with that, though, the -- my more core answer is

1 this is exactly the same that this -- this
2 operates in a number of settings, including
3 Jerman. Take Jerman. Jerman was a case where
4 there was a circuit split. There was on-point
5 circuit authority of the position that the
6 defendant took.

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

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

18 I don't agree with that. Knowledge is
19 a legal term that court after court have held
20 always requires context to determine what's
21 included on the continuum from actual to
22 constructive.

23 The context here is incredibly
24 powerful. 411 is one of five registration
25 provisions. These are Sections 408 to 412. If

1 you look at how they work, they -- they
2 establish a formal process that's not just to
3 protect copyright owners, not just to protect
4 litigants, but to promote systemic objectives.
5 You have to seek approval. That promotes
6 copyright quality. Well, if a material
7 inaccuracy caused something that wasn't
8 appropriately registrable to be registered, that
9 deteriorates copyright quality. You have to
10 deposit a copy of your work that builds a public
11 library. You have to pay a fee.

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

21 CHIEF JUSTICE ROBERTS: One of the
22 things Mr. Rosenkranz says is that this is a
23 system that is -- is meant for people to be able
24 to do it themselves, right? You don't want to
25 have to hire some large law firm if you think

1 you've got, you know, clever -- I don't know,
2 but, you know, something that should be
3 copyrighted. You can do that yourself.

4 MR. STRIS: But it's a system that
5 relies on the honor system where the office
6 doesn't independently verify information. And
7 it -- and it's a system where when you have a
8 constructive knowledge rule, that just means
9 reasonable under the circumstances.

10 So all a constructive knowledge rule
11 would say is, if a reasonable applicant --
12 obviously Google is treated differently than a
13 poet or artist, because that's an applicant with
14 heightened knowledge, et cetera.

15 If a reasonable, regular copyright
16 applicant would not have believed, assuming you
17 reject my -- my object argument, would not have
18 believed that the ultimate representation was
19 accurate, they don't get these special
20 privileges.

21 CHIEF JUSTICE ROBERTS: So a lay
22 person who doesn't really know much about
23 copyright but knows how to, you know, write a
24 book or whatever it is that's going to be
25 copyrighted, they don't have to know anything?

1 Is -- is it simply a knew or should
2 have known?

3 MR. STRIS: It's knew or should have
4 known. And it's very important here, Mr. Chief
5 Justice, because the -- half a million claims
6 are being registered each year. And you don't
7 register a work. You register a claim.

8 Meaning you -- the office relies on
9 you as the applicant to pick the work. This
10 goes to some of the questions you were asking,
11 Justice Alito, of, oh, does it matter that it's
12 a group or not a group? Of course it matters.
13 Registering a collection has a different
14 criteria. You get different rights. You get
15 different --

16 JUSTICE BREYER: All that's true. But
17 just to go back for a second to the Chief
18 Justice's question. Looking at your amici
19 briefs, I mean, they're worried about copyright
20 trolls.

21 I -- I'm worried about that. That's a
22 problem. But if you think about it, Joe Smith,
23 who's been down in the basement for 40 years
24 writing the history of his dog's life, you see,
25 is likely to be much more able to legitimately

1 claim that he didn't know the law, you know, on
2 something than a copyright troll.

3 If there is one group of people that
4 it's going to be tough to make out a claim that
5 they didn't really know the law, it will be the
6 real copyright trolls because they stay abreast
7 of everything.

8 MR. STRIS: So --

9 JUSTICE BREYER: So -- so if -- if
10 that was Congress's effort, that would argue
11 that they really didn't really -- the opposite
12 of what you're saying.

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

16 JUSTICE BREYER: Trolls know less?

17 MR. STRIS: So I -- I -- I -- I -- I
18 don't think it matters whether they know less or
19 more. Here is what I think matters. This has
20 only been used 23 times in 13 years. If you go
21 look at those 411(b) referral letters, look to
22 see whether it's being used against repeat
23 players.

24 Repeat players have a number of
25 techniques that they can use to try and game the

1 system. And when the law is changing or when
2 things are complicated, a constructive -- an
3 actual knowledge, willful blindness standard, is
4 very hard to satisfy.

5 It's putting a burden on defendants to
6 say: Oh, you -- you -- you concoct as a
7 sophisticated plaintiff any argument as to why,
8 oh, I thought I could group things together
9 because of that, and you lose, okay, you lose
10 one. You come up with something better the next
11 time.

12 JUSTICE KAVANAUGH: Well --

13 MR. STRIS: And I think that's what
14 our amici, you know, whether it's nationally,
15 the National Retail Federation, or in California
16 or the law professors, are explaining, this --
17 this is a real problem in a narrow segment of
18 the market. But, if you, either by rejecting
19 the -- the -- the object presumption or by
20 refusing a constructive knowledge standard, if
21 you don't allow it to proceed in this fashion,
22 what it's doing is taking away a very powerful
23 tool. And this is not a policy argument.

24 I think the -- the -- the -- the text
25 in context, the word "knowledge" alone as part

1 of a regime that is talking about a litigation
2 privilege is absolutely critical. This isn't --

3 JUSTICE KAVANAUGH: Two questions.

4 Sorry. Two questions.

5 One, doesn't the SG's blending -- or
6 not blending, but bridging of the reasonableness
7 requirement with the knowledge requirement in
8 the footnote I keep mentioning -- doesn't that
9 give you half a loaf at least?

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

12 JUSTICE KAVANAUGH: I thought -- I
13 thought it -- well, never mind.

14 MR. STRIS: I'll tell -- well, I'll
15 tell you my view and --

16 JUSTICE KAVANAUGH: Yeah.

17 MR. STRIS: -- so for what it's worth.
18 You know, there are a whole bunch of tools in
19 the toolkit to ascertain whether someone is
20 lying. I agree. Willful blindness is one of
21 them. But there -- there's enormous daylight --

22 JUSTICE KAVANAUGH: But it's -- it's
23 broader than willful blindness. Their --

24 MR. STRIS: Other tools --

25 MR. STRIS: -- their footnote, it is

1 -- you know, it's ridiculous to think that
2 for --

3 MR. STRIS: Circumstantial evidence,
4 of course.

5 JUSTICE KAVANAUGH: Yeah.

6 MR. STRIS: I -- I -- all of that I
7 understand and I agree with. My point is there
8 is still enormous daylight between -- maybe your
9 point is, with trolls or people who are not
10 sophisticated, that will work. I don't know.

11 But I can tell you at a broad level,
12 there is enormous -- there's enormous daylight
13 between I had a position and it was honestly
14 held and it was totally unreasonable either
15 because I -- I didn't -- I didn't -- I'm an
16 idiot, I -- I didn't do the investigation I
17 should, but well short of willful blindness, and
18 what the government and Unicolors' rule would --
19 would sweep in.

20 And so I think, in trying to assess
21 what Congress meant, that daylight is important.
22 If you think the statute was intended only to
23 catch liars, then we should lose.

24 JUSTICE KAVANAUGH: Second question:
25 The policy arguments back and forth, Solicitor

1 General has come in on the side opposite you.

2 What do you make of that?

3 MR. STRIS: Well, what I make of that
4 is there's -- there are first principles on
5 questions of -- it may not feel sexy to a lot of
6 people, copyright, IP, but there are very
7 strongly held views on questions of formality
8 and whether it makes sense.

9 And if you look from administration to
10 administration, like, the views of the United
11 States have changed dramatically. And so it's
12 not at all surprising to me that an
13 administration and a copyright -- current
14 copyright registerer, who has been a tremendous
15 proponent of reducing formalities, believes, you
16 know, I'm sure honestly, that, you know, if --
17 if you're a hammer, everything looks like a
18 nail. If you're an anti-formalist, every --
19 Congress couldn't possibly have meant this.

20 But prior administrations, including
21 in the Fourth Estate case, if you look at the
22 position the government took there on a lot of
23 these what you're calling policy issues, is
24 precisely backwards.

25 So I think, ultimately, it's the text.

1 It's the context. That's what should guide this
2 Court. Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel. You need to get back up.

5 MR. STRIS: I forgot you're going down
6 the line.

7 CHIEF JUSTICE ROBERTS: Yeah. You say
8 there's only been 23 of these referrals. That
9 really surprised me because how many millions of
10 copyright applications do you have?

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

13 CHIEF JUSTICE ROBERTS: Okay.

14 MR. STRIS: I think it's not
15 surprising at all because think about how it
16 plays out. This only applies when there's
17 litigation. It only applies when a defendant,
18 through discovery or something in the
19 litigation, like, learns that there was an
20 inaccuracy.

21 And it only applies when the defendant
22 has some incentive to do something about it. It
23 would only make sense as a defendant to press
24 this if you thought it was material because,
25 otherwise, you're going to make this point, even

1 if you can get referral to the office, they're
2 going to say it was immaterial, it doesn't help
3 you.

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

7 CHIEF JUSTICE ROBERTS: Justice
8 Thomas?

9 JUSTICE THOMAS: Nothing from me,
10 Chief.

11 CHIEF JUSTICE ROBERTS: Justice
12 Breyer? No more birds?

13 Justice Kavanaugh?

14 JUSTICE KAVANAUGH: No.

15 CHIEF JUSTICE ROBERTS: Okay. Thank
16 you, counsel.

17 Rebuttal, Mr. Rosenkranz?

18 REBUTTAL ARGUMENT OF E. JOSHUA ROSENKRANZ
19 ON BEHALF OF THE PETITIONER

20 MR. ROSENKRANZ: Yes. Thank you, Mr.
21 Chief Justice.

22 First, on the merits, Mr. Stris says
23 pretty forthrightly that the statute is
24 ambiguous. I don't think it is. I think it's
25 pretty clear, especially the structure of the

1 statute. But what he hasn't talked about is how
2 you break the tie.

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

7 Mr. Stris says: Oh, but those cases
8 didn't involve knowledge of the law. Almost
9 every one of the cases -- we laid them out for
10 seven pages of our brief -- are about mistakes
11 of law: Lamps Plus, Eckes, Masquerade, Boocock,
12 Advisors, and Taylor.

13 Second, Mr. Stress -- Mr. Stris cites
14 cases about other statutes with other language.
15 He barely looks at this statute with this
16 language. I -- I agree with Justice Kavanaugh
17 and Justice Breyer, look at this statute, it's
18 so much clearer than all of the other ones.

19 Justice Gorsuch is right about Rehaif.
20 That statute did not apply knowledge to the
21 particular element, which was about the status
22 of the individual. It said knowingly violating
23 a prohibition, and then you've got to go look at
24 the status of the individual who's not allowed
25 to possess a gun.

1 Chief Justice, you asked about the 23
2 referrals. Those 23 referrals are going to be
3 23,000 or -- or -- or hundreds of thousands if
4 the rule is what H&M says it is.

5 Now all of a sudden it will be a sport
6 for infringers to try to find legal errors or
7 any other sorts of errors in copyright
8 applications, especially willful infringers who,
9 like H&M, actually have no other defense.

10 There were a couple of questions,
11 including Justice Sotomayor's question early on
12 about copyright trolls. I'll just -- I just
13 have to say, for reasons that Justice Breyer
14 gave, this case has nothing to do with
15 disciplining trolls. H&M has no evidence that
16 trolls are especially likely to make mistakes on
17 copyright applications. I agree with Justice
18 Breyer that, if anything, they would be less
19 likely to make mistakes.

20 Now, if there is a problem with
21 baseless infringement suits, defendants have all
22 the tools they could possibly want, whether by
23 showing that the design is unoriginal -- excuse
24 me -- is unoriginal, that the defendant did not
25 actually copy, or that the accused design is not

1 substantially similar. And for bad faith suits,
2 they will get attorneys' fees.

3 I mean, at the end of the day,
4 Congress followed a century of -- oh, sorry, if
5 I can finish my sentence --

6 CHIEF JUSTICE ROBERTS: Finish your
7 sentence.

8 MR. ROSENKRANZ: -- of precedent in
9 making a clear policy choice as -- as to who
10 should win in a competition between an artist
11 who, as the district court here found, made a
12 good faith mistake and a serial and willful
13 infringer.

14 If the Court has no further
15 questions --

16 CHIEF JUSTICE ROBERTS: Even if they
17 do.

18 (Laughter.)

19 MR. ROSENKRANZ: -- we would
20 respectfully request that the Court reverse.

21 CHIEF JUSTICE ROBERTS: The case is
22 submitted.

23 (Whereupon, at 1:29 p.m., the case was
24 submitted.)

25

Official - Subject to Final Review

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