# SUPREME COURT
# OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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UNICOLORS, INC., )

Petitioner, )

v. ) No. 20-915

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

Respondent. )

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Pages: 1 through 80

Place: Washington, D.C.

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Washington, D.C.
Monday, November 8, 2021

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

APPEARANCES:
E. JOSHUA ROSENKRANZ, ESQUIRE, New York, New York; on behalf of the Petitioner.
MELISSA N. PATTERSON, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Petitioner.
PETER K. STRIS, ESQUIRE, Los Angeles, California; on behalf of the Respondent.

C O N T E N T S

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

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

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

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

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

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

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

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

It inquires knowledge that the information reflected in the application is wrong, not knowledge of what happens to be right or wrong in the world outside the application, not knowledge of things that might help you figure out that the application is wrong, not the ability with reasonable diligence to figure out whether the application is wrong, but knowledge that there is wrong information on the application.

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

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

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

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

JUSTICE KAVANAUGH: Can I follow up on that point?

MR. ROSENKRANZ: Of course, Your Honor.

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

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

Do you agree with that?

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

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

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

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

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

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

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

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

Where can I find it?

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

JUSTICE ALITO: Well, where is the actual application?

MR. ROSENKRANZ: Well, the --

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

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

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

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

Were they published at all?

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

But I do --

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

Did that occur here?

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

JUSTICE ALITO: And what --

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

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

MR. ROSENKRANZ: So the record --

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

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

JUSTICE ALITO: But --

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

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

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

JUSTICE ALITO: That constitutes publication?

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE ALITO: And did -- do you

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

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

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

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

MR. ROSENKRANZ: Of course.

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

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

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

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

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

MR. ROSENKRANZ: So --

JUSTICE KAVANAUGH: But, technically, it seems open.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I do have to get to the question of --

if I may, Your Honor?

CHIEF JUSTICE ROBERTS: Maybe --

MR. ROSENKRANZ: Of course.

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

Justice Thomas?

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

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

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

MR. ROSENKRANZ: Well, so, Your Honor,

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice Breyer, anything?

JUSTICE BREYER: No.

CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

Justice Gorsuch?

Justice Barrett? No?

Thank you, counsel.

MR. ROSENKRANZ: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Ms. Patterson.

ORAL ARGUMENT OF MELISSA N. PATTERSON

FOR THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

in deliberate disregard or -- or recklessness or ignorance.

So we think --

JUSTICE ALITO: Willful blindness wouldn't be sufficient?

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

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

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

MS. PATTERSON: Yeah, I think --

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

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

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

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

JUSTICE SOTOMAYOR: How about unreasonableness?

MS. PATTERSON: Pardon?

JUSTICE SOTOMAYOR: How about unreasonableness?

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

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

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

CHIEF JUSTICE ROBERTS: Is that --

MS. PATTERSON: -- which does carry --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

meant. And we're not prepared to opine on -- on that question. We leave that to the parties.

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

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

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

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

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

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

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

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

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

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

MS. PATTERSON: Yes, Your Honor. We think the Ninth Circuit has not yet had an

opportunity to apply the correct scienter standard and that it would need to look back at the district court, look at any findings the district court may or may not have -- have made -- I understand that's the subject of some dispute -- and decide whether or not the record here supported a finding of the requisite scienter.

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

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

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

We want registrants, we want copyright holders, to be able to sue for infringement, to not be turned away from the courthouse door because -- because they got a complicated legal

concept wrong, even if they were proceeding in good faith, even if they were a little sloppy in filling out their application.

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Okay. Thank you, counsel.

Mr. Stris.

ORAL ARGUMENT OF PETER K. STRIS

ON BEHALF OF THE RESPONDENT

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

When the Copyright Office registers a claim, it takes information from the application

and puts it on an official certificate. That certificate confers litigation privileges, including access to statutory damages and attorneys' fees.

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

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

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

Even if that argument were properly presented -- it's not, and I -- I'd like to

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

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

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

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

MR. STRIS: Certainly, Justice Thomas. So I -- I want to comment on two levels. One has to do with what are the inaccuracies, what was argued, and what happened, and then the

other is what was fairly included in the question presented. So I think I'm going to take them in that order because I -- I think it will be -- be -- be clearer, I hope.

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

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

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

for customer viewing."

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

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

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

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

So now Unicolors claims that they

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

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

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

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

JUSTICE KAGAN: Can I interrupt you on

number one?

MR. STRIS: Please.

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

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

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

didn't put the leopard print in.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. STRIS: Understood. But I think that what -- what would encapsulate my position is the Eleventh Circuit relied on a common law

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

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

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

MR. STRIS: So I'll say --

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

And you say in response to that what? That the Ninth Circuit didn't do that or that --

that it has nothing to do with this case or what?

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

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

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

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

It was clearly treating it as a freestanding issue. And it said, just like the

law professors who are on our side, there is -- Congress did not codify that aspect of -- of --

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

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

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

MR. STRIS: Okay.

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

MR. STRIS: Me too.

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

(Laughter.)

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

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

JUSTICE BREYER: You'll see.

MR. STRIS: Okay.

JUSTICE BREYER: You'll see. It gets --

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

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

(Laughter.)

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

CHIEF JUSTICE ROBERTS: Stand down.

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

MR. STRIS: Yeah.

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

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

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

The second reason is we both saw exactly the same thing, but I don't understand the right use of the label. We made a mistake

of whether it's a Tanager or an Oriole. I made that mistake, not a mistake in what I saw.

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

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

(Laughter.)

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

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

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

MR. STRIS: So, as I understand all of the birds and the structure there, that largely goes to what I'm calling the object of

knowledge, so I want to take that first. But I -- I -- I think scope of knowledge is -- is a separate issue because, first, you have to assess what is it that you need to be aware of. And your two buckets go to that. And then there's a question of what type of awareness. So I think they're separate.

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

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

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

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

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

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

JUSTICE KAVANAUGH: What about the word "information"?

MR. STRIS: So --

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

MR. STRIS: Absolutely. But --

JUSTICE KAVANAUGH: Okay.

MR. STRIS: -- our position on that is

that merely requiring knowledge of something that can turn on a legal definition is insufficient to overcome the presumption. That's McFadden. If you look at -- in McFadden --

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

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

MR. STRIS: Right. So --

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

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

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

MR. STRIS: They cite --

JUSTICE KAVANAUGH: -- Safeco, McLaughlin, Rehaif.

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

JUSTICE KAVANAUGH: Commil.

MR. STRIS: Right.

JUSTICE KAVANAUGH: Yeah.

MR. STRIS: Liparota is different. And your question, I want to answer about Liparota. The other cases don't help them at all.

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

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

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

JUSTICE KAVANAUGH: That's a problem.

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

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

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

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

Even in a case like Intel that -- that this Court had a few terms -- two terms ago, the statute there said you had to have actual

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

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

MR. STRIS: So --

JUSTICE GORSUCH: -- or part of an element?

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

JUSTICE GORSUCH: So they can do this?

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

JUSTICE GORSUCH: Okay.

MR. STRIS: -- is our --

JUSTICE GORSUCH: I guess I'm still -- I'm still stuck where Justice Kavanaugh is, is Rehaif. Why isn't this more or less identical

to Rehaif? The knowledge of the information contained in the application, or whatever the exact formation, is false. And some of that is legal. Some of it's factual. And, you know, I -- I -- Justice Breyer's bird example is a delightful one.

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

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

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

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

MR. STRIS: Well, so Rehaif required that you -- that you know that you were unlawfully in the United States. That can only

mean one thing, which is you -- you -- you had broken a specific law.

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

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

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

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

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

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

MR. STRIS: I don't think heightened clarity is required. I think we look at -- at

what Congress typically does, including in the Copyright Act. We see many examples of willfulness. We see many examples where the specific law is -- is described. This looks like McFadden. And I want -- I -- let's talk about McFadden for a second.

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

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

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

JUSTICE KAVANAUGH: That's -- that's after it goes through the -- the full textual

analysis, however, kind of an icing on the cake for us.

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

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

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

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

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

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

MR. STRIS: Yeah.

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

MR. STRIS: Yeah.

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

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

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

MR. STRIS: I think it makes a lot of sense in two ways, in both directions, so let me take each of them. In terms of why Congress

would want it, it makes sense, and in terms of why it shouldn't trouble you, it makes sense. I'll take them in that turn.

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

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

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

I would say two things. First, as a practical matter, diligent applicants don't face any meaningful risk of this because this is an interactive process where there are specialists

at the office ready to answer questions and provide written guidance on almost every aspect of the form. If you provide relevant facts and correspond --

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

MR. STRIS: Well --

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

MR. STRIS: Well, so --

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

MR. STRIS: I think that it --

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

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

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

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

If you fully disclose facts to the Copyright Office, it is inconceivable to me that if they don't deny your application, which they regularly do, they regularly ask questions and say, oh, we don't think it was published, et cetera, that when they're asked, well, was it material, would we have behaved differently, that they are going to say it was.

So I think there's meaningful protection. But the more -- if you disagree

with that, though, the -- my more core answer is this is exactly the same that -- that this -- this operates in a number of settings, including Jerman. Take Jerman. Jerman was a case where there was a circuit split. There was on-point circuit authority of the position that the defendant took.

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

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

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

The context here is incredibly powerful. 411 is one of five registration

provisions. These are Sections 408 to 412. If you look at how they work, they -- they establish a formal process that's not just to protect copyright owners, not just to protect litigants, but to promote systemic objectives. You have to seek approval. That promotes copyright quality. Well, if a material inaccuracy caused something that wasn't appropriately registrable to be registered, that deteriorates copyright quality. You have to deposit a copy of your work that builds a public library. You have to pay a fee.

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

CHIEF JUSTICE ROBERTS: One of the things Mr. Rosenkranz says is that this is a system that is -- is meant for people to be able to do it themselves, right? You don't want to

have to hire some large law firm if you think you've got a, you know, clever -- I don't know, but, you know, something that should be copyrighted. You can do that yourself.

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

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

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

CHIEF JUSTICE ROBERTS: So a lay person who doesn't really know much about copyright but knows how to, you know, write a book or whatever it is that's going to be

copyrighted, they don't have to know anything?

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

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

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

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

I -- I'm worried about that. That's a problem. But, if you think about it, Joe Smith, who's been down in the basement for 40 years writing the history of his dog's life, you see,

is likely to be much more able to legitimately claim that he didn't know the law, you know, on something than a copyright troll.

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

MR. STRIS: So --

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

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

JUSTICE BREYER: Trolls know less?

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

Repeat players have a number of

techniques that they can use to try and game the system. And when the law is changing or when things are complicated, a constructive -- an actual knowledge, willful blindness standard, is very hard to satisfy.

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

JUSTICE KAVANAUGH: Well --

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

I think the -- the -- the -- the text

in context, the word "knowledge" alone, as part of a regime that is talking about a litigation privilege, is absolutely critical. This isn't --

JUSTICE KAVANAUGH: Two questions. Sorry.

MR. STRIS: Pardon me.

JUSTICE KAVANAUGH: Two questions.

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

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

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

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

JUSTICE KAVANAUGH: Yeah.

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

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

MR. STRIS: Other tools --

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

MR. STRIS: Circumstantial evidence, of course.

JUSTICE KAVANAUGH: Yeah.

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

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

And so I think, in trying to assess what Congress meant, that daylight is important.

If you think the statute was intended only to catch liars, then we should lose.

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

What do you make of that?

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

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

But prior administrations, including in the Fourth Estate case, if you look at the

position the government took there on a lot of these what you're calling policy issues, is precisely backwards.

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Okay.

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

And it only applies when the defendant

has some incentive to do something about it. It would only make sense as a defendant to press this if you thought it was material because, otherwise, you're going to make this point, even if you can get referral to the office, they're going to say it was immaterial, it doesn't help you.

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

CHIEF JUSTICE ROBERTS: Justice Thomas?

JUSTICE THOMAS: Nothing from me, Chief.

CHIEF JUSTICE ROBERTS: Justice Breyer? No more birds?

Justice Kavanaugh?

JUSTICE KAVANAUGH: No.

CHIEF JUSTICE ROBERTS: Okay. Thank you, counsel.

Rebuttal, Mr. Rosenkranz?

REBUTTAL ARGUMENT OF E. JOSHUA ROSENKRANZ

ON BEHALF OF THE PETITIONER

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

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

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

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

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

Justice Gorsuch is right about Rehaif. That statute did not apply knowledge to the particular element, which was about the status

of the individual. It said knowingly violating a prohibition, and then you've got to go look at the status of the individual who's not allowed to possess a gun.

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

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

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

Now, if there is a problem with baseless infringement suits, defendants have all

the tools they could possibly want, whether by showing that the design is unoriginal -- excuse me -- is unoriginal, that the defendant did not actually copy, or that the accused design is not substantially similar. And for bad-faith suits, they will get attorneys' fees.

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

CHIEF JUSTICE ROBERTS: Finish your sentence.

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

If the Court has no further questions --

CHIEF JUSTICE ROBERTS: Even if they do --

(Laughter.)

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

CHIEF JUSTICE ROBERTS: -- thank you,

counsel. The case is submitted.

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

## Y