

No. 20-915

In the Supreme Court of the United States

UNICOLORS, INC., PETITIONER

v.

H&M HENNES & MAURITZ, L.P.

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

A registration certificate entitles its holder to sue for infringement and seek special remedies. 17 U.S.C. 411(a), 412. A certificate with “inaccurate information” will not suffice, however, if “(A) the inaccurate information was included on the application for copyright registration with knowledge that it was inaccurate” and (B) the Register of Copyrights would have refused registration had it known of the inaccuracy. 17 U.S.C. 411(b)(1). When a defendant “allege[s]” the “inaccurate information described under paragraph (1),” the court “shall” ask the Register whether she would have refused registration. 17 U.S.C. 411(b)(2).

In this case, H&M sought referral under Section 411(b)(2), alleging that “Unicolors knowingly represented to the Copyright Office that all of the designs in [its application] had been published concurrently, fully aware that this was not the case.” J.A.171-172. The district court refused to refer. In its view, there was no evidence that (i) “Unicolors intended to defraud the Copyright Office” or that (ii) the “various works included in [its] Registration . . . were not first made available to the public—i.e., published—on the same day.” Pet. App. 9a.

The Ninth Circuit reversed, holding that “[b]oth the district court’s reasons [were] flawed.” *Ibid.* Unicolors filed a petition for certiorari raising two questions, but this Court agreed to decide only the first. To quote the petition, that question is:

“Did the Ninth Circuit err in breaking with its own prior precedent and the findings of other circuits and the Copyright Office in holding that 17 U.S.C. § 411 requires referral to the Copyright Office where there is no indicia of fraud or material error as to the work at issue in the subject copyright registration?” Pet. i.

II

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, respondent H&M Hennes & Mauritz LP certifies that it has no parent company and that no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Unicolors is a serial copyright plaintiff with a long history of gaming the registration process. Now, it hopes to game the certiorari process as well.

The answer to the question in Unicolors' petition—whether 17 U.S.C. 411(b) requires intent to defraud—is plainly no. “Knowledge” means, well, knowledge, not fraudulent intent. That answer is so obvious that Unicolors cannot even bring itself to acknowledge the issue, let alone defend its previous position.

Instead, “having persuaded” the Court “to grant certiorari on” the intent-to-defraud question, Unicolors “chooses to rely on a different argument in its merits briefing.” *Visa v. Osborn*, 137 S. Ct. 289, 289 (2016) (cleaned up). It now wants the Court to address what “th[e] ‘knowledge’ element” in Section 411(b) means. Br. i. And it admits that the intent-to-defraud issue is irrelevant to that question. Br. 33-35.

Unicolors' position is improper three times over. First, it “change[s] the substance” of the question presented in the petition, in violation of Rule 24.1(a). Second, it rests on a reading of the decision below that is far from clear—hardly surprising, given that the new question was never litigated below. And, finally, it depends on gross misrepresentations of the record. In particular, H&M has *always* alleged that Unicolors included inaccurate information “fully aware” it was inaccurate. J.A.171-172. So H&M would win even under Unicolors' new proposed standard.

For its part, the government agrees with H&M, not Unicolors, on the *actual* question presented. See U.S. Br. 25 n.5. Yet in a change from just a few months ago (*infra* p.30), it now agrees with Unicolors on the newly minted question. The government is free to change its mind, but

it cannot change the fact that the new question is not properly before the Court. Cf. *Emulex Corp. v. Varjabedian*, 139 S. Ct. 1407 (2019). This Court should go no further than answering the actual question presented. Section 411(b) requires knowledge, not intent.

If the Court reaches the new question, however, it should reject the shifting positions offered by Unicolors and the government. They misread the statutory text, ignoring the long-settled treatment of the term “knowledge” in similar contexts. And they would dramatically weaken the registration system—allowing precisely the type of abusive practices for which Unicolors has previously been caught and penalized under Section 411(b).

The Court should affirm.

STATEMENT

A. Statutory background

1. The Copyright Act provides for registration of works by the Register of Copyrights. 17 U.S.C. 408(a).

Section 409 provides that “[t]he application for copyright registration . . . shall include” ten categories of information, such as “the title of the work,” “the date and nation of its first publication,” and “an identification of any preexisting work or works that it is based on or incorporates.” 17 U.S.C. 409(6), (8), (9).

Section 410 governs the registration decision. The Register must “register the claim” if she determines “the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met.” 17 U.S.C. 410(a). The Register must “refuse registration” if she determines “the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason.” 17 U.S.C. 410(b).

2. “[R]egistration is not a condition of copyright protection.” 17 U.S.C. 408(a). But Congress included powerful incentives to register, notably the right to sue for infringement. See 17 U.S.C. 411. With few exceptions, Section 411 requires that a copyright owner receive a formal decision on her application before filing suit. 17 U.S.C. 411(a); *Fourth Estate Pub. Ben. Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 888 (2019).

Congress incentivized registration for good reason. Registration increases information available to the public, allows the Copyright Office to enforce other requirements of copyright law, gives authors a permanent record of their claims, expands the Library of Congress’s collection of works, weeds out improper claims, and assists courts should litigation arise. See, e.g., *Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 72-73* (Comm. Print 1961) (“1961 Report”); Benjamin Kaplan, *Study No. 17: The Registration of Copyright 41-45* (1958) (the “Kaplan Study”); Dotan Oliar, Nathaniel Pattison & K. Ross Powell, *Copyright Registrations: Who, What, When, Where, and Why*, 92 *Tex. L. Rev.* 2211, 2216-2220 (2014).

3. Section 411 reflected a compromise between those who wanted mandatory registration and those who wanted to eliminate all copyright formalities. See generally Kaplan Study; Caruthers Berger, *Study No. 18: Authority of the Register of Copyrights to Reject Applications for Registration* (1959); 1961 Report at iii-iv, 73-75.

Nonetheless, since its enactment in 1976, anti-formality stakeholders have vocally advocated for repeal of the registration system. In the words of one leading proponent (who now is the Register of Copyrights), “[i]t is time for the United States to complete its long and tortuous journey toward eliminating from its copyright system all

formal prerequisites for the enjoyment of rights or remedies.” Shira Perlmutter, *Freeing Copyright from Formalities*, 13 *Cardozo Arts & Ent L.J.* 565, 565 (1995).

Their efforts have been unsuccessful. For instance, in 1988, Congress considered but declined to eliminate Section 411(a)’s registration prerequisite. See S. Rep. No. 352, 100th Cong., 2d Sess. 11-26 (1988). And the Copyright Reform Act of 1993 would have repealed that requirement as a “vestige[] of the formality-based approach to” copyright law. H.R. Rep. No. 388, 103d Cong., 1st Sess. 4, 9 (1993). It likewise was not enacted.¹

4. For the registration system to serve its purpose, the Copyright Office must receive complete and accurate information about the applications it is evaluating. *E.g.*, *Russ Berrie & Co. v. Jerry Elsner Co.*, 482 F. Supp. 980, 988 (S.D.N.Y. 1980) (“The presumption of validity attaching to copyright registration is of course a function of judicial deference to the agency’s expertise. Here, however, the Copyright Office had no opportunity to pass on plaintiff’s claim accurately presented.”).

The Office, however, “generally ‘accepts the facts stated in the registration materials, unless they are contradicted by information provided elsewhere in the registration materials or in the Office’s records.’” Response of Register 2 n.3, *Roberts v. Gordy*, No. 1:13-cv-24700-KMW (S.D. Fla. Jan. 27, 2016), available at <https://www.copyright.gov/rulings-filings/411/> (quoting U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 602.4(D) (3d ed. 2014) (“*Compendium*”)); see also *ibid.*

¹ Anti-formality stakeholders—including most of Unicolors’ amici here—have also tried to circumvent the registration prerequisite through litigation. See, *e.g.*, *Fourth Estate*, 139 S. Ct. 881 (rejecting the position, embraced by many courts for years, that merely applying for registration satisfied Section 411).

(“the Office generally does not conduct searches to determine whether previous registration or publication has occurred”). The process is therefore easily abused.

For years, courts confronted a question that arises from that setup: what happens when someone included inaccurate information on their copyright application? A variety of answers emerged.

Some courts said the applicant retained the benefits of registration unless it intended to defraud the Copyright Office. *E.g.*, *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 828 (11th Cir. 1982). Some thought the registration held up as long as the inaccuracy was “inadvertent and innocent.” *Eckes v. Card Prices Update*, 736 F.2d 859, 861-862 (2d Cir. 1984). Some imposed a knowledge requirement to trigger consequences. *E.g.*, *Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d 663, 667 (3d Cir. 1990). Others added a prejudice requirement to the mens rea requirement. *E.g.*, *Harris v. Emus Recs. Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984). And still others thought the applicant’s mental state was irrelevant—all that mattered was whether the error was material. See 5 William F. Patry, *Patry on Copyright* § 17:126 & n.5 (2021).

5. Eventually, Congress provided an answer in the Prioritizing Resources and Organization for Intellectual Property Act, Pub. L. No. 110-403 (2008) (PRO IP Act). One section, titled “Limitation to Civil Actions, Harmless Error,” amended Section 411 to address how courts should treat errors in an application for copyright registration.

As its title suggests, the new Section 411(b) established a process to ensure that “harmless” errors will not affect the litigation rights of copyright holders. The procedure is straightforward:

Paragraph (1) provides that the rights to sue under Section 411(a) and to recover the special remedies under Section 412 are available to a plaintiff even if there is “inaccurate information” on her certificate, “unless (A) the inaccurate information was included on the application . . . with knowledge that it was inaccurate” and (B) the Register would have refused registration had she known of the inaccuracy. 17 U.S.C. 411(b)(1).

Paragraph (2) then provides that where “inaccurate information described under paragraph (1) *is alleged*, the court *shall*” ask the Register “whether the inaccurate information, if known, would have caused [her] to refuse registration.” 17 U.S.C. 411(b)(2) (emphases added).

After the Register responds, the court must decide whether the application can support the action despite any inaccuracy. See *DeliverMed Holdings, LLC v. Schaltenbrand*, 734 F.3d 616, 624-625 (7th Cir. 2013).

Section 411(b) has not proven onerous to copyright plaintiffs or the Register. Since its adoption in 2008, the Register has responded to a meager 23 inquiries—barely two a year. U.S. Copyright Office, *Copyright Office Filings Under Section 411*, <https://www.copyright.gov/rulings-filings/411/> (links to all 23 responses).

B. Factual background

1. This case is not about “poets and artists.” Br. 2. It is about a prolific copyright troll who has sued virtually every major clothing retailer in America, and its attorneys who have “pioneered these lawsuits over the past decade.” Noah Smith, *Are copyright trolls taking over the fashion industry?*, *Fortune* (Oct. 7, 2015), <https://fortune.com/2015/10/07/patent-trolls-fashion/> (profiling Doniger/Burroughs and its clients, including Unicolors).

As the Seventh Circuit recently explained: “a cottage industry of opportunistic copyright holders . . . has

emerged, in which a troll enforces copyrights not to protect expression, but to extract payments through litigation.” *Design Basics, LLC v. Kerstiens Homes & Designs, Inc.*, 1 F.4th 502, 503 (7th Cir. 2021).

In *Design Basics*, the plaintiff was a “residential design firm [that] markets the thousands of [single-family home] plans it holds copyright to through [various channels].” *Ibid.* “[T]he firm has a thin copyright in its plans because they consist largely of standard features found in homes across America.” *Ibid.* Yet it “has become a serial litigant,” having “brought over 100 infringement suits against home builders in recent years.” *Ibid.* “While holding itself out as a home designer, it is a copyright troll that seeks to extract rents from market participants who must choose between the cost of settlement and the costs and risk of litigation.” *Ibid.* (cleaned up).

Unicolors is no different. It is a “Los Angeles fabric designer” (Pet. 3) that has thin copyrights in generic prints for use on clothing—*i.e.*, variations on floral, geometric, or animal patterns in the public domain. By developing countless variations, Unicolors can ensure that virtually every clothing retailer will find itself selling products with similar public-domain adaptations by designers who never saw or had access to Unicolors’ works. And by registering *tens of thousands* of those barely original works, Unicolors can then threaten and—absent settlement—sue any such retailer for willful infringement.

A cursory PACER search shows that Unicolors has filed literally hundreds of these lawsuits. Its victims include Amazon, Bass Pro, Bloomingdale’s, Burlington Stores, Century 21, Dillard’s, The Dress Barn, JCPenney, Kmart, Kohl’s, Lord & Taylor, Macy’s, Neiman Marcus, Nordstrom, Ross, Saks, Sears Roebuck, The TJX Companies, Urban Outfitters, and Walmart.

2. This case is certainly not about “penalizing . . . innocent mistakes in copyright registrations.” Br. 2. To the contrary, Unicolors’ business model relies on submitting inaccurate information to the Copyright Office.

A review of public Copyright Office records shows that since 2002, Unicolors has obtained over 4,500 copyright registrations (about 20 per month for two decades). Normally, each registration would cover just one work. See U.S. Br. 4-5 (citing *Compendium* § 607 (2d ed. 1988)). But Unicolors’ 4,500 registrations cover an enormous multiple of that figure. That’s because Unicolors batches many works into single “collections,” exploiting a rule meant for truly related works (like the different elements of a board game) published together on the same date. See 17 U.S.C. 408(c)(1); 37 C.F.R. 202.3; U.S. Copyright Office, *Copyright Basics (Circular 1)* 8 (Aug. 2010); U.S. Copyright Office, *Copyright Registration for Pictorial Graphic, & Sculptural Works (Circular 40)* 4 (Nov. 2010).

The main reason Unicolors does this, in the words of its CEO, is “[f]or saving money” (J.A.54)—likely millions of dollars. But that’s not the only reason. By exploiting the group registration process, Unicolors can obtain registrations that facially cover non-copyrightable works. As the Copyright Office has explained, “a registration will issue as long as any one work within the deposit is copyrightable,” and the Office does “not specify which works within a large filing are copyrightable and not copyrightable.” Response of Register Ex. B, *Jeon v. Anderson*, No. 8:17-cv-01709-JVS, Dkt. 52-1 (C.D. Cal. Mar. 6, 2019), available at <https://www.copyright.gov/rulings-filings/411/>; see *Compendium* § 606 (3d ed. 2021).

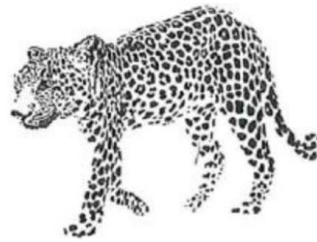
3. It is well documented that Unicolors also misuses the registration process to obscure the extent to which its

works are actually protectable. In fact, one of only 23 previous Section 411(b) referrals involved Unicolors attempting this very tactic and getting caught.

In that case, Unicolors sued Burlington Stores, alleging infringement of a leopard print design. See *Unicolors v. Burlington Stores*, No. 2:15-cv-3866-DMG, Dkt. 32 at 3 (C.D. Cal. Dec. 10, 2015). During litigation, it became clear that Unicolors derived its design from a public-domain photograph, but improperly omitted that information from its registration application:



August 12, 2006 photograph of a leopard entitled "Namibie Etosha Leopard" by Patrick Giraud



Picture of a Leopard in Unicolors' December 14, 2012 Copyright Registration No. VA 1-851-115

Ibid.; see 17 U.S.C. 409(9) (requiring applicant to include “an identification of any preexisting work or works that [its work] is based on or incorporates”).

The application was signed by Unicolors’ CEO, Nader Pazirandeh, who claimed his submission was accurate because, in his mind, “the leopard pattern is an original work containing creative elements, not a derivative work based upon the leopard photograph.” *Burlington Stores*, No. 2:15-cv-3866-DMG, Dkt. 32 at 6.

And when Burlington sought referral under Section 411(b), Unicolors insisted that referral was inappropriate because it had no intent to deceive. According to Pazirandeh, “the omission of the leopard photograph was not in bad faith because it was not done out of the belief

that including the photograph would lead to the Register’s refusal of its copyright application.” *Id.* at 6-7.

Rejecting Unicolors’ “intent to deceive” requirement, the court referred the matter to the Copyright Office, which confirmed that it would have refused registration had it known the truth. That’s because only the *new* parts of a derivative work are subject to protection, so the applicant must identify the preexisting work and “the unclaimable material.” See Response of Register 5, *Burlington Stores*, No. 2:15-cv-3866-DMG, Dkt. 40 (C.D. Cal. Mar. 8, 2016), available at <https://www.copyright.gov/rulings-filings/411/>. By failing to do so, Unicolors had taken credit for (and tried to sue over) the entire leopard print, when its registration should have been limited to whatever modifications it had made.

In another case, Unicolors registered a floral pattern and sued a group of companies. But Unicolors had lifted the design from “The Album of China Textile Patterns Vol. 13.” *Unicolors, Inc. v. Charlotte Russe, Inc.*, No. 2:15-cv-1283-CAS, Dkt. 33 at 3 (C.D. Cal. June 1, 2015).



Public Domain

Unicolors

Id. Dkt. 24-1 at 2. There, no referral to the Copyright Office occurred. Once it became clear that Unicolors' design was not an original work, the court granted summary judgment to the defendants. See *id.* Dkt. 33.

C. This lawsuit and trial

1. H&M is a renowned clothing retailer that operates hundreds of stores and employs thousands of people across the United States. H&M is not a designer or manufacturer; it sells clothing designed by others. C.A. Excerpts of Record 431, C.A. Dkt. 8 ("E.R.").

One of the many garments H&M sold was a black-and-white jacket. J.A.232 (photo). The pattern on that jacket was purchased from a vendor in China who had designed it and obtained a Chinese copyright registration. E.R.408-419; E.R.1792. In that Chinese copyright registration, the design was named Xue Xu. E.R.414.

H&M received a letter from Unicolors accusing it of copyright infringement. E.R.68. The letter identified a copyright registration (No. VA-1-770-400) held by Unicolors. J.A.227-229 (the '400 Certificate).

The '400 Certificate covers 31 patterns registered as a single collection. J.A.227-229. The 31 patterns are not related in any way: 19 are described as "floral" and 12 as "ethnic." J.A.227-229. One of the "ethnic" patterns, which Unicolors named EH101, resembles many geometric designs in the public domain. J.A.230 (EH101.tif file).

Nobody at H&M had ever seen EH101. E.R.208. Yet, according to Unicolors, the pattern on H&M's jacket was strikingly similar to EH101 and, thus, could only be explained by copying—as opposed to multiple designers engaging in the ubiquitous process of modifying the same public domain works. E.R.55.

2. H&M was hardly the only target of this accusation. If Unicolors is to be believed, numerous unrelated retailers independently ripped off EH101 by, say, putting black-and-white versions of the pattern on jackets.

For example, here is H&M's jacket next to EH101:



J.A.232 (left); J.A.230 (right).

And here is an Ivanka Trump brand jacket sold by TJ Maxx (also sued by Unicolors) next to EH101:



The Hollywood Reporter, Ivanka Trump Brand Settles Lawsuit Over Use of Trademarked Fabric (Oct. 17, 2017),

<https://tinyurl.com/fmbw5vb4> (Unicolors “has filed more than 200 cases . . . with 40 alone pertaining to [EH101]”).

3. Given, among other things, the Chinese registration certificate for the Xue Xu design, H&M refused to pull the accused clothing or accede to Unicolors’ payment demands. This lawsuit followed, and the litigation was, put lightly, marked by irregularities:

a. H&M sought a Rule 30(b)(6) deposition about how EH101 was created. Unicolors produced Pazirandeh, who claimed he wasn’t the right person to testify on this subject but nonetheless said EH101 had been created based on artwork purchased from a company called Milkprint. E.R.1778; see also E.R.1252. That supposed inspiration, puzzlingly, featured a series of shapes that look nothing like the geometric pattern in EH101. See D. Ct. Dkt. 241 at 39-41 (discussing Milkprint designs, Trial Exhibit 120).

Days before the close of discovery, H&M learned the name of the designer who created EH101—Hannah Lim. She told an entirely different creation story. According to Lim, EH101 was inspired by “an Aztec art style I had become familiar with by visiting the Natural History Museum.” E.R.1853, 1872. But when H&M asked for the files that would have contained Lim’s source materials, “counsel for Unicolors claimed [they] did not exist, partially due to a computer virus” that had conveniently destroyed the evidence. E.R.1778, 1844.

b. Although it had the Chinese registration for Xue Xu, H&M had little information about how its own vendor created the accused design. When it investigated, the designer told H&M she was inspired by “various ethnic images” and had never seen Unicolors’ design nor heard of the company. H&M submitted the designer’s sworn affidavit and the Chinese registration certificates at summary judgment. E.R.1788-1829. Because the designer

could not be subpoenaed to trial, however, H&M could not introduce her testimony, and the district court refused to instruct the jury to afford a presumption of validity to the Chinese copyright. E.R.152, 943-947, 1100, 1107.

c. H&M designated an expert, Professor Robin Lake, who prepared a report explaining why Xue Xu was likely an independent creation adapted from public-domain art. E.R.1685-1746. She also explained that “Ms. Lim [Unicolors’ designer] appears to have implemented very little modification from the public domain shapes, images, and patterns that preexist her work.” E.R.1694. Those public-domain sources included “pattern ‘idea’ books”—like *The Album of China Textile Patterns* that Unicolors copied in *Charlotte Russe*. E.R.1694.

Predictably, Unicolors denied that EH101 came from such pattern books—just as it did in *Charlotte Russe*, see Pazirandeh Decl. ¶¶ 3-4, No. 2:15-cv-01283-PJW, Dkt. 31-1 (“Unicolors has a strict policy forbidding the taking of material from design books.”). And Professor Lake was prepared to explain why that denial was just as hollow here. E.R.1694-1695. But the court excluded her. E.R.91.²

d. Then, on the eve of trial, Unicolors disclosed a special black-and-white version of its own design, prepared specifically for use at trial. E.R.155. The new exhibit was flagrantly inadmissible: it wasn’t on the exhibit list; it had never been mentioned at any pretrial conference; there

² H&M had to obtain a report from Professor Lake after Pazirandeh offered expert opinion testimony in his deposition (and Lim in a declaration) about Xue Xu’s similarity to EH101. E.R.1665-1666, 1201. This happened only *after* the deadline to disclose experts had passed. See *ibid.* Given that Lim and Pazirandeh were never disclosed as experts, yet the court let them testify to similarity before the jury (over H&M’s objection), it was prejudicial error to exclude Professor Lake’s testimony. See C.A. Dkt. 9-1 at 42-45.

was no evidence it had even been displayed to any customers; and Unicolors' *own designer and counsel* admitted it looked different from the actual Unicolors pattern. E.R.155, 175-178; D. Ct. Dkt. 283 at 60-63. Yet, over H&M's objection, the court let Unicolors show the altered version of EH101 to the jury. E.R.171-173, 178.

The jury found for Unicolors, awarding \$800,000 in "profit disgorgement" damages (which the district court later reduced to \$266,209.33). J.A.202. And because H&M had not pulled the accused clothing after being sued, the jury also found the infringement to be willful.

4. During the trial, however, H&M uncovered one critical new piece of evidence: Unicolors had made knowing misstatements in its copyright application. Pazirandeh admitted that the 31 works were not all published on January 15, 2011, as the application represented. As far as he knew, 9 of the designs were embargoed by Unicolors on January 15 (and thus not published *at all*). The key trial testimony is as follows:

a. Lim testified that the "C" prefix (on 9 of the 31 patterns) denotes what Unicolors calls a "confined" design. J.A.77. And she explained that confined designs are not presented to the public at the same time as the other designs. *Ibid*. Instead, they are "given exclusiv[ely] to certain customer[s]" for a period of "two months to six months." *Ibid*.

b. Pazirandeh confirmed that confined designs are not published simultaneously with non-confined ones. Generally, Unicolors puts a group of designs in the showroom "the same day" the designs are shown to the salespeople. J.A.58. Confined designs, however, are not put in the showroom: "I have a manager for my design room. He—when we create a design for the specific customers, he's the one who is holding those designs back, and he

doesn't give it to the—*he doesn't put it on the shelf.*" J.A.67-68 (emphasis added).³

c. When asked how the 31 designs "were first published together," Pazirandeh said January 15, 2011 (the Saturday of Martin Luther King Jr. weekend) was the date Unicolors "present[ed] [the designs] to our salespeople"—not when they are offered to the public. J.A.54.

d. Although he personally signs Unicolors' copyright applications, Pazirandeh admitted he does no independent investigation and lacks personal knowledge of the information provided. J.A.52-53. He "guess[ed]" this collection was registered because someone "thought . . . those are the designs that are going to be successful." J.A.53. And asked why the designs "were combined into the same copyright registration," his answer was unequivocal: "For saving money." J.A.54.⁴

5. Pazirandeh's testimony came on the last day of trial. From that moment on, H&M argued that the application contained "false material information, that [Unicolors] knew to be false," namely, a "false first publication

³ Unicolors' opening merits brief in this Court is Unicolors' sixth post-trial brief that omits this testimony. In fact, Unicolors now claims that the confined designs actually *were* placed in the showroom on January 15, but were removed later on that same day. Br. 14, 15-16. Unicolors offers no support for this theory. And the Ninth Circuit expressly found the opposite—the confined designs were *not* placed in the showroom with the non-confined designs, just as Pazirandeh admitted at trial. Pet. App. 5a-6a; J.A.67-68.

⁴ Unicolors notes that "the contents of the application are undisputed." Br. 11 n.2. But it also claims that "[i]n challenging the registration, H&M did not make the application form part of the record." *Ibid.* That accusation is rich, considering that Unicolors failed to produce it—at any time during the lower-court proceedings—even though it was expressly requested by H&M in discovery.

date of January 15, 2011 for all the designs.” E.R.678-680; J.A.171-172.

Unicolors misrepresents the record when it says that “[o]nly after the jury found H&M to be a willful infringer did H&M challenge the registration’s validity in a post-trial motion.” Br. 13. H&M made this argument *during* Pazirandeh’s testimony. J.A.71. And hours later—while the jury was deliberating—H&M orally moved for judgment on this basis. See, *e.g.*, D. Ct. Dkt. 239 at 112.

H&M then promptly filed a written post-trial motion, reiterating that the application contained “false material information, that [Unicolors] knew to be false”—a “false first publication date of January 15, 2011 for all the designs.” E.R.678-680; J.A.171-172. That was enough, H&M argued, for referral to the Copyright Office. E.R.680 n.11.

Unicolors did not respond that it supplied inaccurate information based on a mistaken legal interpretation. Instead, Unicolors maintained that H&M could rebut the presumption of validity only by “proving that H&M defrauded the Copyright Office.” J.A.138; see also J.A.82. Unicolors also claimed that H&M did not present any evidence of inaccurate information on the application, insisting (despite Pazirandeh’s testimony) there was no evidence the confined designs were held back. J.A.82.

The court accepted both of Unicolors’ arguments and refused to refer. In so doing, it did not adopt (or even consider) any “mistake of law” or “subjective knowledge” arguments, as no such arguments were made.

D. Ninth Circuit proceedings

1. H&M appealed, challenging the numerous procedural and evidentiary errors that prejudiced its case and led to the adverse verdict. C.A. Dkt. 9-1 at 1-4.

The first of those grounds is what the Ninth Circuit described as the “threshold issue [of] whether Unicolors

has a valid copyright registration for its 2011 design, which is a precondition to bringing a copyright-infringement suit.” Pet. App. 4a. On that question, H&M reiterated that Unicors knew the publication date was wrong:

Unicors knowingly misrepresented to the Copyright Office that all of the designs in the group had been published concurrently, *fully aware that this was not the case*, and it did so to save registration costs. *This is not a case of inadvertent mistake*

C.A. Dkt. 9-1 at 28-29 (emphases added).

Unicors repeated the same two arguments it pressed in the district court: H&M had to prove intent to deceive, and, in any event, the registration contained no inaccuracy. C.A. Dkt. 19 at 12-13. On the latter point, Unicors again ignored Pazirandeh’s testimony and claimed, inexplicably, there was no testimony that the “confined designs were not *first* put into the showroom to be shown to customers (and thus ‘published’) contemporaneous with the other designs.” *Id.* at 12-13.

Unicors did not argue it made a legal error in its application, nor did it contend that Section 411(b)’s “‘knowledge’ element precludes a challenge to a registration where the inaccuracy resulted from the applicant’s good-faith misunderstanding of a principle of copyright law.” Br. i.

2. The Ninth Circuit reversed on the “threshold” Section 411(b) issue. Pet. App. 14a-15a. Although it did not reach “the many other questions presented on appeal,” the panel “retain[ed] jurisdiction over any subsequent appeal to review [the district court’s remand] determination and, if necessary, to decide remaining questions presented in this appeal.” *Id.* at 15a.

The court did not address the significance of any “good-faith misunderstanding” of the law, because it was not asked to do so. Instead, it focused on the two issues the parties disputed: whether Section 411(b)(1) codifies a fraud standard, and whether the evidence showed that Unicolors “includ[ed] known inaccuracies in its application for registration.” Pet. App. 8a.

On the first issue, the Ninth Circuit readily concluded, citing its recent decision in *Gold Value Int’l Textile, Inc. v. Sanctuary Clothing*, 925 F.3d 1140, 1147 (9th Cir. 2019), that “there is no such intent-to-defraud requirement” in Section 411(b). Pet. App. 10a.

Regarding the accuracy of Unicolors’ application, the Ninth Circuit carefully summarized the record evidence. Confined works are created for “specific customer[s],” who are “granted the right of exclusive use . . . for at least a few months.” *Id.* at 4a. Unicolors’ “staff follows instructions not to offer confined designs for sale to customers generally, and Unicolors does not even place confined designs in its showroom until the exclusivity period ends.” *Id.* at 5a.

In light of this evidence, the panel held that the district court erred in concluding all 31 designs had been published on the same day. *Id.* at 10a-11a. The court explained that publication happens when a work is offered to the general public. “The confined designs, however, were not placed in the showroom for sale at the same time” as the other designs. *Id.* at 11a. They accordingly had not all been published at the same time.

3. The panel could have stopped there. H&M has always argued that the relevant inaccuracy was the publication date, and the Ninth Circuit agreed. The court indeed went on to hold that “Unicolors admitted to having

. . . knowledge” that “certain designs included in the registration were confined and, therefore, were each published separately to exclusive customers.” Pet. App. 14a.

But the Ninth Circuit also addressed what the government calls “a second potential inaccuracy” (U.S. Br. 16) in Unicolors’ application: that because the confined and non-confined designs were not published together as a “singular, bundled collection,” they did not qualify as a “single unit” under 37 C.F.R. 202.3(b)(4)(i)(A). Pet. App. 10a-13a. In addressing this second issue, the court explained that the “knowledge inquiry” did not turn on Unicolors’ understanding of these single-unit registration requirements. *Id.* at 14a.

Both Unicolors and the government seize on this statement as announcing a categorical rule that mistakes of law are irrelevant under Section 411(b). *E.g.*, Br. 22; U.S. Br. 14. But the Ninth Circuit did not even discuss the difference between mistakes of fact and mistakes of law. The term “mistake of law” appears nowhere in the opinion—because Unicolors did not argue that it made a mistake of *any kind* or that Section 411(b) excuses mistakes of law.

As the issue was not presented, it is unfair to attribute to the Ninth Circuit the all-encompassing holding that Unicolors and the government suggest. That’s especially true when the very passage at issue approvingly cites a prior Ninth Circuit case *affirmatively acknowledging* that good-faith mistakes of law might fall outside of Section 411(b). Pet. App. 14a (citing *Gold Value*, 925 F.3d at 1147). Unicolors and the government simply overread the court’s decision.

4. In any event, concluding that “Unicolors’s application for the [’]400 Registration contained known inaccuracies” (plural), the panel reversed, remanded, and directed

the district court to ask the Register whether the inaccurate information would have caused her to refuse registration. Pet. App. 14a.

The court did not invalidate Unicolors' registration or direct entry of judgment in H&M's favor. *Ibid.* In fact, the decision notes that the district court might dismiss Unicolors' claims *or* determine that "Unicolors has a valid copyright registration." *Id.* at 14a-15a.

Unicolors petitioned for rehearing, which the court denied. On remand, the district court posed the required inquiry to the Register, but later stayed that request pending this Court's decision. D. Ct. Dkt. 309 at 2.

E. Proceedings on certiorari

Unicolors petitioned this Court, seeking review of two questions: (1) does Section 411 require referral "where there is no indicia of fraud or material error as to the work at issue in the subject copyright registration," and (2) "did the evidence [regarding the publication date] support referral to the Copyright Office?" Pet. i.

On the first question, Unicolors' principal basis for seeking review was a "circuit division" between the Ninth and Eleventh Circuits over whether Section 411(b) imposes an intent-to-defraud requirement. Pet. 8; see Pet. 8-14. Unicolors argued that pre-PRO-IP Act decisions "nearly uniformly stood for the proposition that one cannot seek to invalidate a registration absent a showing of fraud." Pet. 13. Citing *Roberts v. Gordy*, 877 F.3d 1024, 1029 (11th Cir. 2017), Unicolors insisted the Ninth Circuit had "deepened" a circuit split by holding that "scienter or fraud . . . is not required for invalidating a copyright registration." Pet. 14-16.

On the second question, Unicolors argued that the panel had misconstrued the evidence from trial. Pet. 6

("[T]here was no evidence supporting the panel's conclusion that the designs were separately published . . ."); see Pet. 19-20.

This Court agreed to review only the first question: whether Section 411(b) requires intent to defraud.

SUMMARY OF ARGUMENT

In its petition, Unicolors asked this Court to decide whether Section 411(b) requires a showing of intent to deceive. It argued that, in direct conflict with the Ninth Circuit, the Eleventh Circuit properly construed the statute to require not just knowledge, but "intentional or purposeful concealment of relevant information." Pet. Reply 6. In its merits brief, however, Unicolors no longer asks the Court to address that question. For good reason. The statute says nothing about fraud, and the Ninth Circuit properly rejected any "intent-to-defraud" requirement. See *infra* Part I.

Unicolors now wants the Court to answer a different question: What kind of knowledge does Section 411(b) require? That new question, however, is not properly before the Court. See *infra* Part II.

On the *actual* question presented, the United States agrees with H&M. See U.S. Br. 25 n.5. But in what appears to be a recent conversion, it agrees with Unicolors on the new question. The government's change of heart cannot change the fact that the new question is not properly before the Court. Cf. *Emulex Corp. v. Varjabedian*, 139 S. Ct. 1407 (2019) (dismissing petition as improvidently granted after the United States agreed with respondent on the actual question presented yet urged reversal on the basis of a different, improperly presented question).

If the Court does address the new question, it should reject the mistaken interpretation of Section 411(b) advanced by Unicolors and the government—limiting “knowledge” to subjective awareness of facts and law *even if* the applicant’s misunderstanding is manifestly unreasonable. At a minimum, the Court should hold that “knowledge” includes constructive knowledge of the law. See *infra* Part III.A. But, more fundamentally, there is no reason to think Congress intended to depart from the principle that “knowledge” refers to operative facts, not legal knowledge. See *infra* Part III.B.

Affirmance is warranted.

ARGUMENT

I. H&M, THE GOVERNMENT, AND NOW UNICOLORS ALL AGREE SECTION 411(b) REQUIRES KNOWLEDGE, NOT INTENT TO DECEIVE

A. The courts below both decided the same question regarding the meaning of Section 411(b): does it require intent to deceive? The district court held yes (J.A.181), but the Ninth Circuit disagreed. It focused on the plain language of the statute to conclude “that there is no such intent-to-defraud requirement.” Pet. App. 9a-10a.

In its petition, Unicolors seized on this holding as evidence of a “circuit split” with the Eleventh Circuit. Pet. 9, 14-15 (citing *Roberts*, 877 F.3d at 1029). Unicolors asked this Court to resolve that split and establish that Section 411(b) should “be read to codify the fraud requirement.” Pet. 11. Unicolors also asked the Court to address a second, fact-bound question, namely: “did the evidence support referral to the Copyright Office?” Pet. i.

This Court granted review only on the first question. It agreed to decide whether Section 411(b) requires fraudulent intent—but not whether the record here otherwise satisfied Section 411(b).

In its merits brief, Unicolors has jettisoned the question on which certiorari was granted and abandoned its argument that Section 411(b) requires “intentional or purposeful concealment of relevant information.” Pet. Reply 6 (quoting *Roberts*, 877 F.3d at 1029-1030). Nowhere in its merits brief does Unicolors defend an “intent-to-defraud” requirement. Its description of the Ninth Circuit’s opinion (Br. 17-18) does not even mention that part of the court’s holding. Pet. App. 10a. The once-“dire” circuit split about the existence of a deceptive-intent requirement, Pet. 14, is now irrelevant, see Br. 34-35. Instead, Unicolors tries to draw this Court into deciding whether the false statement on its copyright application was “innocent” or made “with knowledge.” Br. 3.

There’s no mystery about why Unicolors wants to change its argument. By defending *Roberts* and the intent-to-defraud requirement in its petition, Unicolors portrayed a circuit split on a pure question of law. As a merits argument, however, “intent-to-defraud” is far less appealing. Even the most creative lawyer would have a hard time explaining why a statute that says “knowledge” should be construed to require “fraudulent intent.”

Unicolors’ merits brief contravenes this Court’s rules. *E.g.*, S. Ct. R. 14.1(a), 24.1(a). Either the Court should dismiss the writ as improvidently granted, or its review should start—and end—with the question on which the Court granted review.

B. On that question, the Ninth Circuit correctly rejected Unicolors’ intent-to-defraud argument. Congress wrote “knowledge,” not intent or purpose or fraud. “Knowledge” is not an esoteric term of art unique to copyright law. Its meaning “is plain”—“the fact or condition of being aware of something.” *Intel Corp. Investment Policy Committee v. Sulyma*, 140 S. Ct. 768, 776 (2020).

Sometimes that awareness might be actual and other times it might be imputed. *Id.* at 776-777. But it is well established that knowledge, as a mental state, does not connote purpose or intent. See, *e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16-17 (2010) (distinguishing between “knowledge” and “specific intent”); *Giles v. California*, 554 U.S. 353, 368 (2008) (“knowledge” not sufficient to show intent); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 445-446 (1978); *United States v. Bailey*, 444 U.S. 394, 403-404 (1980); *Borden v. United States*, 141 S. Ct. 1817, 1823 (2021) (plurality op.).

Had Congress wished to pick a different mental state, it easily could have. It could have required the conduct be “fraudulent” or “deceptive.” See, *e.g.*, 17 U.S.C. 506(c) (targeting actions taken “with fraudulent intent”); 17 U.S.C. 1310(f)(2) (certain error “shall not affect the validity of the registration” unless “the error occurred with deceptive intent”); 15 U.S.C. 1064(3) (providing for trademark cancellation where “registration was obtained fraudulently”). It could have specified the illicit purpose, as does 17 U.S.C. 1327’s penalty for false representations made “for the purpose of obtaining registration.” And, of course, it could have simply picked “intent.” See, *e.g.*, 17 U.S.C. 1202(a), (b)(1). Congress’s decision to use “knowledge” ends the matter. *E.g.*, *Intel*, 140 S. Ct. at 777.

In its petition, Unicolors said the Court should read “intent-to-defraud” into Section 411(b) based on cases that predated its adoption. Pet. 13; see Pet. Reply 6. Unicolors now confesses those decisions “articulated various formulations,” including many that do not mention fraudulent intent. Br. 33-34. Regardless, the Court must interpret the statute Congress adopted, not the inconsistent tests proposed by courts before the statute existed.

The question presented is readily resolved through the “straightforward application” of the statute’s plain meaning. *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1743 (2020). Section 411(b) requires knowledge, not fraudulent intent. The decision below is correct.

II. THE NEW QUESTION ABOUT THE SCOPE OF KNOWLEDGE IN SECTION 411(b) IS NOT PROPERLY BEFORE THE COURT

Having given up on fraudulent intent, Unicolors now wants the Court to decide what Section 411(b)’s “knowledge” requirement means. According to Unicolors, Section 411(b) turns on a copyright applicant’s subjective awareness of the facts and personal beliefs about copyright law. It complains that the Ninth Circuit improperly penalized it for a supposed “mistake of law.” Br. 19.

This new question is not properly before the Court and should be ignored for multiple reasons.

A. Unicolors’ new argument is not fairly subsumed within its petition’s question presented. S. Ct. R. 14.1(a). The petition focused on the issue of fraudulent intent. The first question used the phrase “indicia of fraud.” Pet. i. And throughout the petition, Unicolors used similar language of intent in describing its view of Section 411(b). *E.g.*, Pet. 7 (“fraud,” “bad faith,” “inten[t] to defraud”); Pet. 9 (“proof of fraud or bad faith,” “fraud on the Copyright Office”); Pet. 11, 14 (“fraud requirement”); Pet. 13, 16 (“showing of fraud”); Pet. 15 (“deceptive intent”).

Unicolors did not ask the Court to decide whether Section 411(b) excuses inaccuracies where the applicant claims a subjective misunderstanding of copyright law. Rather, it asked the Court to decide whether the statute “codifies]” a “fraud requirement.” Pet. 11. The only words that overlap its new question presented and the petition’s are “copyright,” “registration,” and “whether.”

The new knowledge “[o]f what” question (see Br. 26) is thus not “fairly included” in the question presented. S. Ct. R. 14.1(a). Although the Court considers “‘subsidiary’” questions that are “‘predicate to’” the question presented or pose “‘threshold’” issues (*Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173 n.1 (2009); *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1656 (2018) (Thomas, J., dissenting)), this is neither. Whether Section 411(b) requires specific intent to defraud does not depend on first determining what type of knowledge satisfies “knowledge.” Rather, the question whether “knowledge” includes “objective or constructive knowledge” of the law (Br. 4) may be a “question *related* to the one [Unicolors] presented, and perhaps *complementary* to the one [Unicolors] presented, but it is not ‘fairly included therein.’” *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 537 (1992).

Unicolors does not even acknowledge its transformation of the question presented. It may respond that its petition-stage reply effectively changed the question by shifting ground to discuss good-faith errors. Pet. Reply 2, 6. But the Court’s review is limited to “the questions set out in the petition, or fairly included therein.” S. Ct. R. 14.1(a). “All contentions in support of a petition . . . shall be set out in the body of the petition.” S. Ct. R. 14.2. A reply may do no more than address “new points raised in the brief in opposition.” S. Ct. R. 15.6. Should Unicolors point to its petition-stage reply, that would only acknowledge that it has abandoned the question presented in its petition.

“[H]aving persuaded [the Court] to grant certiorari” to address the necessity of fraudulent intent, it is inappropriate for Unicolors to “‘rely on a different argument’ in [its] merits briefing.” *Visa*, 137 S. Ct. at 289; see *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). The

Court should follow its normal practice and decline to address Unicolors' new arguments. See, e.g., *Chaidez v. United States*, 568 U.S. 342, 357 n.16 (2013); S. Ct. R. 24.1(a).

B. There's no good reason for the Court to decide Unicolors' new issue—and many good reasons not to. Had Unicolors petitioned for review of the issue it now wants decided, H&M would have explained “why certiorari should not be granted.” *Yee*, 503 U.S. at 535-536.

1. To begin, Unicolors' new issue was “not raised or resolved” below. *Taylor*, 503 U.S. at 646. In the lower courts, Unicolors made two arguments: One, that its application contained no inaccuracy at all; and two, that it did not intend to defraud the Copyright Office. C.A. Appellee's Br. 10-14; D. Ct. Dkt. 250 at 20-21 (E.R.575-576). At no point did Unicolors argue that a misunderstanding of law precluded referral under Section 411(b).

Because Unicolors did not argue the point, it should be no surprise that the Ninth Circuit did not squarely address it. The court had no reason to analyze a “mistake of law” argument because nobody made it.

Both Unicolors and the government nonetheless insist that the Ninth Circuit distinguished between mistakes of fact and mistakes of law in construing what “knowledge” means in Section 411(b). But the Ninth Circuit did not even use those terms, much less address the issue. And the court did not hold that legal errors always fall outside Section 411(b)'s knowledge requirement.

Far from it, the court's citation of *Gold Value* shows that the Ninth Circuit allows for the possibility that reasonable legal errors could defeat “knowledge.” See Copyright Alliance *Amicus* Br. 2, 21-22 (agreeing with this understanding of the court's opinion). The cited page of *Gold*

Value holds that a “plausible explanation for [the applicant’s] position” would “not constitute a knowing inaccuracy.” 925 F.3d at 1147; Pet. App. 14a.⁵

Unicolors and the government assume that the Ninth Circuit’s statement that “the knowledge inquiry is not whether Unicolors knew that including a mixture of confined and non-confined designs would run afoul of the single-unit registration requirements” represents a categorical (though unexplained) holding about mistakes of law. Pet. App. 14a; see Br. 18. But that is far from clear. As H&M has consistently argued, *supra* pp.16-18, Unicolors knowingly and falsely represented to the Copyright Office that all 31 designs were first published on January 15, 2011. The Ninth Circuit agreed with H&M on that point. Pet. App. 5a-6a, 14a. Unicolors did not need any further understanding of the single-unit publication rule to have “knowledge” of the inaccuracy.

2. It’s not just that the courts below did not address Unicolors’ “subjective knowledge of the law” standard—the issue has barely been addressed by *any* court. *Roberts* relied on the absence of fraudulent intent, not any mistake of law. 877 F.3d at 1030. And although Unicolors cites cases that predate the statute, it identifies no body of lower-court precedent addressing the question it now asks this Court to answer. This Court is “a court of review, not of first view.” *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 922 (2017). The Court should allow Unicolors’ new issue to percolate in the lower courts in cases where it might actually make a difference.

⁵ Unicolors trumpets (at 41) *Gold Value*’s statement that “the term ‘knowingly’ does not necessarily have any reference to a culpable state of mind or to knowledge of the law.” 925 F.3d at 1147 (citation omitted). But that was dictum. The court gave the caveat that that principle does not “necessarily” apply.

Indeed, the benefits of further percolation are illustrated by the briefing in this case. Even after abandoning its fraudulent-intent argument, Unicolors still has not managed to advance a consistent interpretation of “knowledge” in this statute. And Unicolors—along with its amici—ignore obvious, difficult questions about their proposed “subjective” standard.

For its part, Unicolors shifts ground within the same brief. It starts by arguing that Section 411(b) requires “subjective awareness.” Br. 24. But a few pages later, it endorses an “unambiguous” reasonableness standard. Br. 31. Along the way, it tests out other formulations, including “good faith” and “innocent,” hoping that a big enough buffet will offer something to please the Court. *E.g.*, Br. 5, 19-20, 21. It has been over three years since H&M invoked Section 411(b) and fourteen months since the Ninth Circuit issued its decision, yet Unicolors still has not figured out what it thinks Section 411(b) demands. One can only wonder what it might say at oral argument.

As for the government: it recently opined that Section 411(b) should not apply “when the application was submitted in good faith based on a *reasonable interpretation* of the law.” Response of Register 18, *Fashion Ave. Sweater Knits, LLC v. Poof Apparel Corp.*, No. 2:19-cv-06302-CJC, Dkt. 129-1 (C.D. Cal. Feb. 8, 2021), available at <https://www.copyright.gov/rulings-filings/411/> (emphasis added). Now, however, it says that what matters is the applicant’s personal “belie[f]” about copyright law. U.S. Br. 16, 19. But it is unclear how much daylight exists between its view of subjective belief and objective reasonableness. U.S. Br. 20-21 (acknowledging circumstances where an applicant’s “unreasonable” belief will not suffice).

And neither Unicolors nor the government explains how their test applies to a corporate applicant. For example, Unicolors proclaims that Pazirandeh, who made no independent investigation, “attested” that everything in the application was “correct to the best of [his] knowledge.” Br. 16. Does Unicolors believe that a corporate applicant can avoid having “subjective awareness” of an inaccuracy by ensuring the person who signs the form asks no questions? Does the government? It is impossible to tell.

3. Finally, this appeal is a terrible vehicle to decide if Section 411(b) excuses mistakes of law, because the answer is clearly not outcome determinative. H&M has always argued that Unicolors had subjective knowledge. J.A.91-92, 171-172. And, as the decision below made clear, the trial evidence confirmed that allegation—which is all that was needed to trigger referral under Section 411(b).

Unicolors’ CEO freely admitted that he grouped the designs together simply “for saving money,” not due to any belief about what the law allowed, reasonable or not. Pet. App. 5a; J.A.54. He did not “make any independent investigation” into the publication date he submitted. J.A.52-53. “I wanted to save money” does not reflect any legal understanding, much less an understanding reached in good faith. If anything, it shows the opposite.

The Ninth Circuit further explained that Unicolors knew that the nine confined designs were not published on January 15, 2011. The confined designs were shown only to Unicolors’ own employees, with “instructions not to offer confined designs for sale to customers generally.” Pet. App. 4a-6a. Showing a work to one’s own employee does not reflect a “plausible” understanding of publication (*Gold Value*, 925 F.3d at 1147), and Unicolors has never argued otherwise. The Ninth Circuit properly concluded that the confined designs were not published on the same

date as the unconfined designs; that fact alone would render the application inaccurate.

At this stage, H&M’s (substantiated) allegation that Unicolors included the wrong publication date fully aware it was wrong is all that matters. See 17 U.S.C. 411(b)(2). Unicolors ignores the procedural posture of this case and Section 411(b)’s referral requirement. The Ninth Circuit did not hold Unicolors’ registration invalid; it ordered referral to the Register under Section 411(b)(2).

Perhaps after receiving the Register’s response, Unicolors can somehow convince the district court that trying to save money based on no “independent investigation” into the application’s publication date was a good-faith or reasonable understanding, or that showing a work to one’s own employees plausibly constitutes publication. But those fights are for another day. Given the parties’ agreement that Section 411 lacks an intent-to-defraud requirement, H&M “alleged” all that is required to warrant referral. 17 U.S.C. 411(b)(2). Unicolors’ new argument, in short, is irrelevant to the outcome here.

* * *

Had Unicolors been honest about the question it wished this Court to answer, its petition would have fallen well short of Rule 10’s standards. The new question is not the subject of a circuit split. It wasn’t raised below. It attacks a supposed holding the Ninth Circuit never clearly reached. And it isn’t even outcome determinative.

The Court should “not reward such bait-and-switch tactics by proceeding to decide the independently ‘uncertworthy’” question. *City & Cty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 620 (2015) (Scalia, J., dissenting); see *id.* at 621 (“The fair course—the just course—is to treat this now-nakedly uncertworthy question the way we treat all others: by declining to decide it. In fact, there is

in this case an even greater reason to decline: to avoid being snookered, and to deter future snookering.”).

III. IF THE COURT REACHES THE NEW QUESTION, IT SHOULD REJECT THE RULE PROPOSED BY UNICOLORS AND THE GOVERNMENT

Even if the Court addresses the new question, it should affirm for two independent reasons.

First, Unicolors and the government are wrong that “knowledge” in Section 411(b) is limited to actual knowledge. In the law, knowledge can mean either “actual” or “actual and constructive” knowledge. And when Congress doesn’t specify between the two, the better view is that it meant to incorporate both. That means, whether you’re talking about facts, law, or application of law to facts, what matters is not the applicant’s subjective belief, but whether that belief was reasonable. And here, Unicolors’ representation that all 31 designs were published on January 15 was not only inaccurate, but unreasonably so.

There is also a second basis to affirm, even if the Court concludes that Section 411(b) requires actual knowledge. It is well settled that statutes imposing a “knowledge” standard do not excuse mistakes of law. Unicolors insists it could not *know* the publication date was inaccurate if it didn’t understand what publication meant. Counterintuitive as Unicolors tries to make it seem, the law is “no stranger to th[is] possibility.” *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 582-583 (2010). For centuries, across a variety of contexts both civil and criminal, this Court has held that “knowledge” means knowledge of the facts, not the law.

A. Section 411(b) is triggered by either actual or constructive knowledge

1. The position advanced by Unicolors and the government falters first on the text. It depends on reading

“knowledge” to mean “actual knowledge.” But this Court explained just last year that the two terms are not synonyms. See *Intel*, 140 S. Ct. at 776. Rather, in legal contexts, “knowledge” may be “actual,” but the law also may impute awareness—“often called ‘constructive knowledge’”—where a person “fails to learn something that a reasonably diligent person would have learned.” *Ibid.* *Intel* thus refutes Unicolors’ folksy “[a]sk anyone” argument. Br. 24. While such arguments based on “everyday speech” might work around the dinner table, “the law will sometimes” treat words differently. *Intel*, 140 S. Ct. at 776. Neither Unicolors nor the government grapples with *Intel*’s recognition that knowledge can be imputed.

Instead, they wrongly insist that because Congress said only “knowledge,” it must have meant an applicant’s subjective “awareness” or personal belief. Br. 24-26; U.S. Br. 13-15. To be sure: Congress does sometimes write statutes that expressly incorporate constructive knowledge. U.S. Br. 22-23. But the same is true for actual knowledge. That phrase is used elsewhere in the Copyright Act (see 17 U.S.C. 512(c)(1)(A), 512(c)(3)(B), 512(d)(1)), and numerous other statutes expressly require “actual knowledge” or “knowing and willful” false statements. *E.g.*, *Intel*, 140 S. Ct. at 776; 15 U.S.C. 78u-5(c)(1)(B); 18 U.S.C. 1001(a), 1542. If Congress wanted to exclude imputed or constructive knowledge, it could easily have said so.

So how to break the logjam? As *Intel* suggests, courts interpret knowledge to include both actual and constructive knowledge where Congress has not stipulated one or the other. For instance, ERISA imposes penalties for the “knowing participation” in a fiduciary breach or violation. 29 U.S.C. 1132(l)(1)(B). This Court interpreted that provision to require “actual or constructive knowledge of the circumstances that rendered the transaction unlawful.”

Harris Tr. & Sav. Bank v. Salmon Smith Barney, Inc., 530 U.S. 238, 251 (2000).

Other courts have construed “knowledge” similarly in a variety of other circumstances. See, e.g., *Carr v. PMS Fishing Corp.*, 191 F.3d 1, 4 (1st Cir. 1999) (“privity or knowledge” as used in admiralty statute “can be actual or constructive” and includes “neglected duty” and conditions that would have been discovered through “reasonable diligence”); *Freeman United Coal Mining Co. v. Fed. Mine Safety & Health Review Comm’n*, 108 F.3d 358, 363-364 (D.C. Cir. 1997) (Mine Act, 30 U.S.C. 820(c): interpreting “knowingly” to include “both actual and constructive knowledge . . . falls well within the range of interpretations given to the term ‘knowingly’ in other contexts”); *Split Rail Fence Co. v. United States*, 852 F.3d 1228, 1243 (10th Cir. 2017) (Immigration Reform and Control Act, 8 U.S.C. 1324a: “[t]he term knowing includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition”) (quoting regulation).

The text and phrasing of Section 411(b) also suggest that Congress intended knowledge to include constructive knowledge. Congress knows how to penalize what nonlawyers call “lying.” Take 18 U.S.C. 1001(a), which uses language of deceit and scienter (“knowingly and willfully,” “falsifies,” “materially false . . . representation”) and proscribes *someone’s* active conduct (“whoever . . . falsifies . . . [or] makes or uses”). Here, Congress used a passive construction and the more neutral terms “inaccurate” and “information.” That phrasing readily aligns with a constructive-knowledge standard.

By contrast, the two cases that Unicolors features prove H&M's point. It argues that *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007), and *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988), show that knowledge should include actual knowledge of the law. Br. 40. But both those decisions interpreted statutes that invoked the mental state "willful." 551 U.S. at 52; 486 U.S. at 129. Congress knows that "willful" is "a term more often understood in the civil context to excuse mistakes of law." *Jerman*, 559 U.S. at 584; see *infra* Part III.B. Yet it instead chose the word "knowledge" without the "actual" limitation.

Unicolors also compares copyright law to patents and trademarks, contending that Congress surely gave "more latitude to copyright applicants." Br. 39-40. Yet Congress obviously chose more restrictive language here. Whereas patent law requires "the specific intent to deceive" and trademark law requires "fraudulent[]" intent (Br. 39), Unicolors concedes that 17 U.S.C. 411(b) specifies the *lower* "knowledge" standard. *Supra* Part I. So Unicolors has refuted its own misguided comparison.

Until a few months ago, the Register herself seemed to construe 17 U.S.C. 411(b) as a constructive-knowledge provision. Response of Register 18, *Fashion Ave.*, No. 2:19-cv-06302-CJC, Dkt. 129-1, available at <https://www.copyright.gov/rulings-filings/411/> (Section 411(b) should not apply "when the application was submitted in good faith based on a *reasonable interpretation* of the law.") (emphasis added). And the government has done the same with other statutes imposing a knowledge standard. In *Freeman United*, for example, it argued that "knowingly" did *not* require actual knowledge. See Br. for the Sec'y of Labor 33, Nos. 96-1185, 96-1186, 1996 WL 34483669 (D.C. Cir. Dec. 16, 1996); see also *infra* p.45 (discussing government's position in *Intel* that "actual knowledge" does not require knowledge of the law).

Unicolors' position is even more contradictory: it simultaneously argues for a "subjective awareness" standard and also says the statute "unambiguous[ly]" supports the Register's "reasonable interpretation of the law" standard. Br. 31. The Register's original view, as Unicolors apparently acknowledges, is the better one.

2. The statutory context also confirms that Congress intended a constructive-knowledge standard. Limiting "knowledge" to "actual knowledge" would seriously weaken the copyright registration system. It would mean that applicants need not understand even the most basic copyright principles, including the simplest instructions on the application form. Even if applicants have an excuse for misconstruing difficult or unsettled legal questions, neither Unicolors nor the government explains why an unreasonable understanding—which would have resulted in refusal of registration—should let the applicant keep all the benefits of a valid registration.

Unicolors' conduct illustrates this point. By signing the application, Pazirandeh affirmed that the January 15 publication date was "correct to the best of my knowledge." Br. Add. 41a. But he made no "independent investigation" (J.A.53)—and of course he didn't, because he grouped the designs together only "for saving money." Pet. App. 5a. That is no excuse for a materially inaccurate application. A "reasonably diligent person" should know better. *Intel*, 140 S. Ct. at 776.

That Pazirandeh signed the application with no personal knowledge of its contents also undercuts Unicolors' argument that its proposed rule is "simple" and knowledge must mean "actual" knowledge. Unicolors' "knowledge" for purposes of Section 411(b) is not Pazirandeh's personal belief; it is the imputed knowledge of the company. The fact that businesses are charged with

imputed knowledge is yet another reason that the Court should not adopt Unicolors' "personal, subjective awareness" standard. Courts applying Section 411(b) will rarely be able to ask merely what one individual knew; they will have to assess what knowledge should be attributed to a corporate entity. The usual rule that "knowledge" means "actual or constructive knowledge" is a better fit for this context.

Unicolors and the government also elide the difficulty in proving actual knowledge (including willful blindness), *e.g.*, whether the applicant is feigning ignorance or confusion. By contrast, a constructive-knowledge standard poses the more straightforward question whether that purported belief was objectively reasonable.

Unicolors' reading thus would allow unscrupulous applicants to play fast and loose with the process to secure registration in circumstances where registration should not issue. That cannot be what Congress intended.

The registration system operates "[f]or the protection of the public itself." H.R. Rep. No. 7083, 59th Cong., 2d Sess. 8 (1907). Yet an application based on false information leaves the registration decision hollow and the public record unreliable. Indeed, the whole reason behind the presumption of validity is that the Copyright Office had the "opportunity to pass on plaintiff's claim accurately presented." *Russ Berrie*, 482 F. Supp. at 988; *Torres-Negron v. J&N Records, LLC*, 504 F.3d 151, 162 (1st Cir. 2007) (registration requirement's "purpose would be undermined if a fraudulent or invalid application could provide a plaintiff entree to the federal courts and, once the defect was discovered, the litigation was allowed to continue without the benefit of the Copyright Office's expertise and consideration."), abrogated on other grounds by

Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010). Unicolors’ rule would undermine that premise.

3. The countervailing policy concerns suggested by Unicolors and the government are misplaced. Construing Section 411(b)’s “knowledge” requirement to include constructive knowledge will not “weaken copyright protection” (U.S. Br. 27) because Section 411(b) applies only to material errors. A court cannot invalidate a registration under Section 411 unless the inaccuracy would indeed “have caused the Register of Copyrights to refuse registration.” 17 U.S.C. 411(b)(1)(B). And a court cannot make that assessment without first asking the Register what she would have done. The Register thus has a statutorily prescribed role to advise courts about the types of errors serious enough to defeat registration. Where appropriate, that guidance can reflect the Register’s concern that minor errors not undermine copyright protection.

Trivial inconsistencies or typographical errors will not meet this standard. That is not supposition: since Section 411(b)’s adoption, there have been only 23 responses filed by the Register. See *Copyright Office Filings Under Section 411*, <https://www.copyright.gov/rulings-filings/411/>. That number barely registers as a fraction of the copyright cases filed in that timeframe.

Congress and the Register have also taken more direct actions to alleviate registration burdens on small creators. The Copyright Alternative in Small-Claims Enforcement Act of 2020 established a claims board to provide “a voluntary, alternative forum to federal court for parties to seek resolution of copyright disputes that have a low economic value.” 86 Fed. Reg. 46119, 46119 (Aug. 18, 2021); see Public Law 116-260, § 212, 134 Stat. 1182, 2176 (2020). Last month the Copyright Office promulgated a rule providing for expedited registration for these small

copyright claims. 86 Fed. Reg. at 46123. These procedures give small creators a “cost-effective, streamlined” avenue to enforce their claims if they otherwise stumbled on the regular registration requirement. *Id.* at 46119. There is thus no need to shortchange the benefits of the registration system to protect “poets and artists.”

At bottom, Section 411(b)’s “knowledge” standard, coupled with the materiality requirement, represents a sensible compromise between preserving the registration system’s reliability and permitting diligent applicants to enforce their rights. Unicolors’ position, however, guts one side of that equation and would make Section 411(b) virtually unenforceable. The Court should reject it.

4. Unicolors and the government also say that “knowledge” means “actual knowledge” because Congress imported the “fraud on the Copyright Office” doctrine from cases predating Section 411(b). Br. 31-38; U.S. Br. 23-25. Yet neither the statute nor the committee report says anything about “fraud on the Copyright Office.”

More fundamentally, Unicolors’ interpretive premise is mistaken. Section 411(b) did not “codify” a consistent, settled judicial construction. The lower courts, as Unicolors admits, adopted various formulations of the “fraud on the Copyright Office” doctrine, and this Court never addressed the issue. While Congress acted against the backdrop of those lower court cases, it imposed a materiality requirement, rejected the “fraudulent intent” and prejudice standards that some courts used, and added the brand-new requirement of referral to the Register. The Court’s task here is to interpret the statute Congress adopted, not to parse decades-old cases for hints about Congress’s intent. See *Rehaif v. United States*, 139 S. Ct. 2191, 2199 (2019); *United States v. Ron Pair Enters.*, 489 U.S. 235, 245-246 (1989).

To the extent the pre-Section 411(b) cases matter, Unicolors and the government substantially overstate the agreement in the caselaw. As the Third Circuit explained, there was “broad consensus in the federal courts” that “an inadvertent and immaterial misstatement will not invalidate a copyright registration.” *Raquel v. Educ. Mgmt. Corp.*, 196 F.3d 171, 177 (3d Cir. 1999), vacated on other grounds, 531 U.S. 952 (2000). But it added: “Less clear, however, is the effect of a misstatement that is material but inadvertent.” *Ibid.* Some courts thus “required only that the error be material without regard to intent.” 5 *Patry on Copyright* § 17:126 (2021); see *Bumgarner v. Hart*, No. 05-3900 (RMB), 2007 WL 2470094, at *6 (D.N.J. Aug. 30, 2007).

In short, if the Court wishes to treat some mistakes of law as a defense to invalidity under Section 411(b), it should limit them to reasonable ones. And here, given H&M’s consistent allegation that Unicolors included the wrong publication date “fully aware” it was inaccurate, Unicolors’ supposed “mistake” was anything but reasonable. Affirmance is warranted.

B. In any event, Section 411(b) does not excuse mistakes of law

Whatever form of knowledge Section 411(b) embraces (actual or constructive), it does not excuse Unicolors’ supposed mistake here. Congress chose “knowledge” as the mental state for Section 411(b), and this Court has traditionally construed “knowledge” to mean knowledge of the operative facts, not the law. Thus, while mistakes of fact may suffice to excuse liability, mistakes of law will not. The same is true of Section 411(b).

1. This Court has “long recognized the ‘common maxim, familiar to all minds, that ignorance of the law will

not excuse any person, either civilly or criminally.” *Jerman*, 559 U.S. at 581 (quoting *Barlow v. United States*, 7 Pet. 404, 411 (1833) (opinion for the Court by Story, J.)). The law is indeed “no stranger to the possibility that an act may be ‘intentional’ for purposes of civil liability, even if the actor lacked actual knowledge that her conduct violated the law.” *Id.* at 582-583. It is accordingly no surprise that this Court holds, absent a good textual reason to think otherwise, “the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law.” *Bryan v. United States*, 524 U.S. 184, 192 (1998).

What, then, does Congress do when it wants to make knowledge of the law a prerequisite to liability? Generally one of two things. It uses a different scienter standard—usually willfulness. *Jerman*, 559 U.S. at 584 (“willful” is “a term more often understood in the civil context to excuse mistakes of law”); *Cheek v. United States*, 498 U.S. 192, 199-200 (1991). Or Congress specifically invokes knowledge of the law in describing what a person must know. *E.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16-17 (2010) (to violate a statute that prohibits “knowingly provid[ing] material support” to a foreign terrorist organization, a person must, *inter alia*, “have knowledge that the organization is a designated terrorist organization,” 18 U.S.C. 2339B(a)(1)).

Congress in fact employed both of those methods elsewhere in the Copyright Act. See, *e.g.*, 17 U.S.C. 504(c)(2) (authorizing enhanced statutory damages where “infringement was committed willfully”); *ibid.* (authorizing reduced statutory damages where “such infringer was not aware and had no reason to believe that his or her acts constituted an infringement”); 17 U.S.C. 506(a)(1) (imposing criminal liability for one “who willfully infringes a cop-

yright”); 17 U.S.C. 1309(c) (providing an exception to certain infringements that occur “without knowledge that a design was protected under this chapter”).

By contrast, in Section 411(b), Congress used none of the normal textual cues that would require knowledge of the law. It instead said that the applicant need only have “knowledge” that the information at issue was inaccurate. There is, accordingly, “not the least reason to suppose that the legislature, in this enactment, had any intention to supersede the common principle.” *Barlow*, 7 Pet. at 410-411 (in case regarding civil liability, where the “only mistake, if there ha[d] been any, [wa]s a mistake of law,” declining to apply exception for violations that “happen[ed] by mistake or accident”).

2. Unicolors and the government try to escape the normal rule by arguing that the “information” that was “inaccurate” here (the date Unicolors published the designs) contains both legal and factual components. Br. 40; U.S. Br. 16. Fair enough, the word “publication” includes a legal aspect. But the exact same can be said of any number of cases where this Court has concluded that knowledge of the law is irrelevant.

Take a statute that prohibits the knowing possession of an unregistered “machinegun.” *Staples v. United States*, 511 U.S. 600, 602 (1994). The word “machinegun” obviously includes factual and legal components; something counts as a “machinegun” only because the statute says so. Yet the Court has repeatedly recognized that the statute requires proof only that the defendant “knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun.” *Ibid.* “It is not, however, necessary to prove that the defendant knew that his possession was unlawful.” *Rogers v. United States*, 522 U.S. 252, 254-255 (1998); see *Bryan*, 524 U.S.

at 193 (same). Thus Unicolors’ refrain—how can it have “knowledge that [information] was inaccurate” when it (supposedly) misinterpreted the meaning of “publication”—would apply equally here. How can someone knowingly possess a machinegun when they didn’t realize that the law considers their weapon to be a “machinegun”?

The same is true in cases involving a “controlled substance”—no less a “mixed statement of law and fact” than “information.” U.S. Br. 13. A person “knows he is dealing with ‘a controlled substance’” if he merely knows the “features of the substance” that bring it within the statutory definition. *McFadden v. United States*, 567 U.S. 186, 188-189 (2015) (cleaned up). He need not know the substance fits the statutory definition of “controlled.” There again, a person knows she possessed “a controlled substance” without realizing that what she possessed is legally classified as a “controlled substance.”⁶

This principle applies equally in civil cases. In *Jerman*, for example, the statute excused from civil liability people who made “bona fide error[s].” 559 U.S. at 581. As the dissent pointed out, “[c]ertainly a mistaken belief about the law is, if held in good faith, a ‘bona fide error’ as that phrase is normally understood.” *Id.* at 613 (Alito, J., dissenting); compare Unicolors Br. 24-25. Yet seven Justices

⁶ Nobody suggests the result would be different if the firearm or drug statutes mirrored the syntax of Section 411(b)—a statute that barred possessing a machinegun “with knowledge that it was a machinegun” still would not require knowledge of the law. Cf. *Rogers*, 522 U.S. at 255. This Court has rejected the idea that Congress overrode the traditional understanding of “knowledge” simply by moving that word to a different part of the sentence. See *Jerman*, 559 U.S. at 585-586; Cf. *Liparota v. United States*, 471 U.S. 419, 428-429 (1985) (rejecting argument that because “the word ‘knowingly’ is placed differently” in one statutory provision compared to another, Congress intended it to mean something different).

concluded that “bona fide errors . . . do not include mistaken interpretations of the [statute].” *Jerman*, 559 U.S. at 587; see also, e.g., *Commil USA, LLC v. Cisco Sys., Inc.*, 575 U.S. 632, 646 (2015).

Similarly, in *Intel*, the statute referred to “actual knowledge of the breach or violation.” 29 U.S.C. 1113(2). That phrasing is stricter than Section 411(b)—it explicitly invokes “actual knowledge” and incorporates a legal term, “breach or violation.” Cf. *Intel*, No. 18-116, Oral Arg. Tr. 61 (U.S. Dec. 4, 2019) (question of Kagan, J.). Yet the government argued that even with that language, “[w]e don’t think you actually have to know that it was a legal violation.” *Ibid.*; see *id.* at 59-60 (agreeing with “every court to examine that has concluded that you do not need to have knowledge that it is a legal violation”).

The same is true of Section 411(b). A person “included” information “with knowledge that it was inaccurate” if they knew the *facts* that made the information inaccurate. That someone can have this knowledge without “knowing” the applicable law should give this Court no more pause here than in any other context. “Our law is . . . no stranger” to such a result. *Jerman*, 559 U.S. at 582.⁷

3. Unicolors also attempts to avoid the usual meaning of knowledge by invoking the “collateral matter” doctrine from criminal law. That doctrine says a defendant lacks

⁷ This quandary has rarely troubled the Court. The only times it has are in criminal cases involving complex statutes where imposing liability on unsuspecting individuals would raise concerns of fundamental fairness. See, e.g., *Liparota v. United States*, 471 U.S. 419, 426 (1985); *Cheek*, 498 U.S. at 199-200; see also *Jerman*, 559 U.S. at 583 n.6. In fact, the primary concern in *Liparota* was that, if “knowingly” did not require knowledge that the conduct was unlawful, then the statute lacked *any* mens rea and would “criminalize a broad range of apparently innocent conduct.” 471 U.S. at 426.

“knowledge” where he “has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct.” Wayne R. LaFave, *Substantive Criminal Law* § 5.6(a) (3d ed. 2020). So, for example, where a statute imposed criminal liability for “knowingly” using food stamps “in any manner not authorized by [the statute] or the regulations,” a person must in fact know the food stamps had been used unlawfully. *Liparota*, 471 U.S. at 420 (alteration in original); see Br. 42-43 (invoking *Liparota*).

True enough, if the statute *says* you need to know the law in order to suffer consequences, you need to know the law, particularly in the criminal context. But that rule does not help Unicolors. Unlike other provisions of the Copyright Act, Section 411(b) does not expressly invoke knowledge of the law. Compare 17 U.S.C. 1309(c). It requires Unicolors to know the “inaccurate” “information,” as other statutes require the defendant to know they possess, say, a “firearm” or a “controlled substance.” Those words equally involve both legal and factual components, yet the defendant’s failure to understand their legal meaning is irrelevant. The word “information” is no more collateral to Section 411(b) than “firearm” is to the National Firearms Act or “controlled substance” to the Controlled Substances Act.

Unicolors protests about the supposedly harsh result of reading Section 411(b) this way. But a person can go to jail for possessing a machinegun without realizing that the weapon they possess is legally classified as a machinegun, or a controlled substance without understanding that their drug is legally classified as a controlled substance. Likewise, a person can face civil liability for making a good-faith error about a statute’s coverage—even though

that statute purports to excuse “bona fide error[s].” *Jerman*, 559 U.S. at 581.

Here, a copyright applicant merely faces referral to the Copyright Office to evaluate materiality. And even then, the applicant doesn’t lose their copyright protection; at worst, they simply must *properly* register the work and start over, perhaps without the benefit of certain statutory remedies.

Unicolors wants a free pass because it (supposedly) thought it published all the designs on the same day when it didn’t. But here, as “[i]n the usual case, ‘I thought it was legal’ is no defense.” *Commil*, 575 U.S. at 646.

CONCLUSION

This Court should affirm or, alternatively, dismiss as improvidently granted.

Respectfully submitted.

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