

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ALREADY, LLC, DBA YUMS, :

4 Petitioner : No. 11-982

5 v. :

6 NIKE, INC. :

7 - - - - - x

8 Washington, D.C.

9 Wednesday, November 7, 2012

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:04 a.m.

14 APPEARANCES:

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16 Petitioner.

17 GINGER D. ANDERS, ESQ., Assistant to the Solicitor

18 General, Department of Justice, Washington, D.C.; for
19 United States, as amicus curiae, supporting vacatur
20 and remand.

21 THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf
22 of Respondent.

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

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first today in Case 11-982, Already, LLC, d/b/a YUMS v.
5 Nike.

6 Mr. Dabney.

7 ORAL ARGUMENT OF JAMES W. DABNEY

8 ON BEHALF OF THE PETITIONER

9 MR. DABNEY: Mr. Chief Justice, and may it
10 please the Court:

11 The Article III question in this case turns
12 on resolution of two issues: First, whether loss of
13 freedom to operate on the part of a direct competitor
14 qualifies as Article III injury in fact; and, second,
15 what party bears the burden of proof of facts that are
16 contended by it to render a claim moot.

17 The counterclaim in this case seeks to
18 extinguish a source of cost, risk, and official
19 restraint on what footwear products the Petitioner can
20 and cannot legally sell. These are classic forms of
21 injury in fact.

22 On the burden of proof point, the proponent
23 of a factual contention always bears the burden of
24 proving this, and this is especially true when the
25 question arises in the context of a claim that a

1 voluntary act has allegedly ousted a Federal court of
2 jurisdiction.

3 Mootness doctrine protects a party seeking
4 relief from the kind of evasive maneuvering that's
5 happened in this case.

6 JUSTICE KENNEDY: If -- if I were to write
7 an -- an opinion indicating that there's a chill here
8 because distributors and retailers will see that there's
9 been this suit against the -- your client and they will
10 be reluctant to distribute, would there -- would I just
11 make that up? Or is there something I can read to find
12 out -- to find that out, or --

13 MR. DABNEY: Injury in fact is a question of
14 fact, and injury in fact is based on evidence.

15 JUSTICE KENNEDY: Well, the -- the evidence
16 here was that they did need investors, and investors
17 were reluctant.

18 MR. DABNEY: That's correct.

19 JUSTICE KENNEDY: It wasn't specific
20 evidence, but then I -- anything besides that?

21 MR. DABNEY: There are three forms of injury
22 in this case. The first is that the Petitioner's cost
23 of operation is increased because the disputed claim was
24 not expunged. When the Petitioner designs and sells new
25 products, it has to go through an incredibly costly

1 process to determine whether or not its next line of
2 shoes might give rise to a plausible claim --

3 JUSTICE KENNEDY: Okay. Is that -- is that
4 in the record?

5 MR. DABNEY: It certainly is. The
6 Petitioner says, through its president, on page 173 of
7 the Joint Appendix, that he's engaged in new --
8 development of new shoe lines, which by definition are
9 outside the scope of the covenant document.

10 JUSTICE KENNEDY: When you said it's
11 incredibly costly to do this and so forth, is that in
12 the record?

13 MR. DABNEY: That specific statement is not
14 in the record.

15 JUSTICE KENNEDY: I mean, it makes sense,
16 but I -- I'm a little reluctant to take judicial notice
17 of the shoe business. I mean --

18 MR. DABNEY: Your Honor, I'm glad you
19 brought that up because, under the mootness doctrine,
20 the burden of proof on that and every other fact
21 relevant to mootness fell on the Respondent. Under this
22 Court's precedents, the Respondent in this case, in
23 order to oust the district court of jurisdiction, had to
24 show two things to a high degree of probability. The
25 first thing the Respondent had to show is that it was

1 absolutely clear that the Petitioner could not
2 reasonably be expected --

3 JUSTICE BREYER: You're right, that's the
4 standard. And so you said that -- I mean, I feel
5 perhaps more calmly about this than I might feel is
6 warranted, but the -- the question is, is there anything
7 here that you -- so you said, by definition, we're going
8 to produce some new shoes, which new shoes are not -- do
9 not have the appearance of any current and/or previous
10 footwear product designs and any colorable imitations
11 thereof.

12 So I would like you to refer me to the
13 record where your president of your client or somebody
14 else says, we are intending to produce some new shoes
15 that fall outside that definition, and of course, I will
16 look at that, because your opponent says we can find no
17 reasonable likelihood that they are going to produce
18 anything or they have any present intent of showing --
19 of producing something that falls outside that
20 definition.

21 But now, you just said, oh, no, we're
22 definitely going to. So just refer me to those pages in
23 the record that shows that because, of course, you win,
24 if that's true.

25 MR. DABNEY: Page 173A of the record, of the

1 Joint Appendix, states that, "The Petitioner is"
2 intending -- "is regularly engaged in the design of new
3 footwear."

4 JUSTICE BREYER: Yes, but that isn't the
5 point. The point is, is the new footwear that you're
6 designing footwear that is not -- does not have the
7 appearance of any current or previous footwear product
8 designs or any colorable imitation thereof? And so to
9 say you are in the business of producing new footwear,
10 at least, to me, suggests nothing because the question
11 is what the footwear looks like, not that you're
12 producing new footwear.

13 MR. DABNEY: Your Honor, in the real world,
14 a business competitor --

15 JUSTICE BREYER: No, I'm not interested in
16 the real world. I am interested in the record.

17 MR. DABNEY: The record does not show that
18 the Petitioner lacks any concrete interest in entering
19 the line of commerce that --

20 JUSTICE BREYER: And does it show anything
21 at all in respect that would support the claim that you
22 are going to produce new footwear that doesn't either
23 resemble, nor is a colorable imitation of anything that
24 you have previously produced or is the subject of the
25 case?

1 MR. DABNEY: Your Honor, what the record
2 shows -- and it is what it is -- is that the petitioner
3 is actively engaged in designing and bringing out new
4 footwear products and --

5 JUSTICE BREYER: Period?

6 MR. DABNEY: Period.

7 JUSTICE BREYER: Okay. So I take it that
8 this case really boils down to should you have -- should
9 they have or you both have another chance to say what
10 the new footwear will be -- look like under a new
11 standard, or is there enough here already to say, well,
12 really, the judges could conclude that there is no real
13 likelihood that you're going to produce something that
14 won't look like what's already been produced.

15 MR. DABNEY: We would respectfully submit
16 that, when you apply the mootness doctrine, since we're
17 not talking about picking a fight here, we're talking
18 about someone who was sued once -- once bitten, twice
19 shy -- that when someone has been sued for alleged
20 infringement has asked for a judgment that would
21 eliminate any need to think about whether or not a new
22 shoe will attract --

23 JUSTICE SCALIA: Yes, and I assume that was
24 your point, that you shouldn't be put through the
25 trouble of figuring out whether the new shoes that you

1 produce are close enough to the old one to be covered or
2 are not. You're at risk --

3 MR. DABNEY: Exactly.

4 JUSTICE SCALIA: -- right?

5 MR. DABNEY: Exactly.

6 JUSTICE KENNEDY: And I would think that you
7 would add this as well, that, for a competitor to demand
8 that the other competitor tell its plans, its marketing,
9 is, to say the least, patronizing, and -- and probably
10 quite injurious, in and of itself.

11 MR. DABNEY: That would itself be --

12 JUSTICE KENNEDY: But, again, there's -- do
13 I just know that because I'm a judge? Or is there
14 someplace I can look for that?

15 MR. DABNEY: The law is that, as I stand
16 here today, the government has registered a claim that
17 the Petitioner is duty-bound not to bring out the shoe
18 shown in the registration, number one, which according
19 to the Respondent is one of the best-selling, most
20 profitable shoe styles of all time; and also, as I stand
21 here today, the law is that Petitioner is at risk if it
22 brings out a shoe that is going to be giving rise to a
23 plausible claim --

24 JUSTICE GINSBURG: But, Mr. Dabney, are you
25 saying that this device of the unilateral covenant is no

1 good, unless it says that you will never be sued for any
2 shoe that you ever produce? Is -- are you saying that
3 the covenant is no good or that this covenant is
4 deficient?

5 MR. DABNEY: I'm saying that the Respondent
6 bore the burden of proving that the covenant completely
7 and irrevocably eradicated all of that.

8 JUSTICE GINSBURG: So -- if -- if you are
9 uneasy about the covenant as it exists, why didn't you
10 say, judge, this covenant doesn't give us adequate
11 protection, it should be amended, and then say what you
12 think you need to be adequately covered?

13 MR. DABNEY: Because the Petitioner asks for
14 judgment in accordance with law, and it would prefer not
15 to be the involuntary licensee of the Respondent that
16 sued it.

17 JUSTICE SOTOMAYOR: Well, does that mean
18 that, if they gave you a covenant that said, vis-à-vis
19 your company, our trademark, the form of this shoe, is
20 invalid, we won't sue you for anything, either an exact
21 duplicate or any colorable imitation thereof with
22 respect to this design; would that be enough for you?

23 MR. DABNEY: Your Honor, again --

24 JUSTICE SOTOMAYOR: I know you want to help
25 everybody else --

1 MR. DABNEY: Not -- no --

2 JUDGE SOTOMAYOR: -- but why wouldn't that
3 be --

4 MR. DABNEY: That's -- that's not actually
5 right. The reason why -- 70 years ago, Learned Hand
6 created the metaphor, "the scarecrow patent." And the
7 reason scarecrows are effective is not because they are
8 likely to climb down from the pole, but because, from a
9 distance and being looked at quickly, the way people in
10 the marketplace have to react to official government
11 records of claims, they're deceptive. So --

12 CHIEF JUSTICE ROBERTS: You get a lot of
13 what this extra stuff -- you know, that you say, well,
14 even if this is all right, they're not going to sue me
15 for that, there's all the collateral damage. You get a
16 significant amount of that by the covenant not to sue.
17 Nike can't go around giving out these covenants left and
18 right because, if they do, they will undermine their own
19 trademark.

20 MR. DABNEY: Your Honor, the -- the covenant
21 actually reasserts the allegation that these shoes
22 infringe. The covenant does nothing more than purport
23 to waive --

24 CHIEF JUSTICE ROBERTS: Where does it --
25 where does it do that?

1 MR. DABNEY: It says it right on the -- on
2 page -- I believe it is 96 of -- of the record, where it
3 says, in the second whereas, "the actions complained of
4 no longer infringe or dilute at a level sufficient to
5 warrant the substantial time and expense." I mean, it
6 libels --

7 CHIEF JUSTICE ROBERTS: Okay. So if you
8 take -- if that were taken out, is your case the same or
9 not?

10 MR. DABNEY: There would be one small little
11 less bit of injury in this case. That's --

12 CHIEF JUSTICE ROBERTS: Well, I guess maybe
13 this is the same question Justice Ginsburg was asking.
14 You're -- you're a lawyer in this area. You want to
15 write a covenant that will satisfy the fellow on the
16 other side, but what does it say? Can you do that? Or
17 do you have to say, the only way this case can be
18 rendered moot is if the trademark is totally
19 invalidated?

20 MR. DABNEY: When someone seeks --

21 CHIEF JUSTICE ROBERTS: No, no, that's kind
22 of a yes or no answer. Can you write a covenant that
23 says something other than the trademark is totally
24 invalidated?

25 MR. DABNEY: No.

1 CHIEF JUSTICE ROBERTS: No.

2 JUSTICE SOTOMAYOR: So --

3 JUSTICE KAGAN: But why?

4 JUSTICE SOTOMAYOR: -- what you're saying is
5 you --

6 CHIEF JUSTICE ROBERTS: So you're saying
7 that, in this case, there's no way -- I mean, I thought
8 it was a practice that was not unprecedented for parties
9 to grant covenants of this sort. You're saying this is
10 unheard of, nobody -- nobody can do this?

11 MR. DABNEY: The practice in this case dates
12 to 1995. This is a totally recent, controversial
13 practice that has never been embraced by this Court at
14 all. In fact, it was articulated in a case two years
15 after --

16 JUSTICE KAGAN: But that's not the question,
17 Mr. Dabney. The question is: Is there any covenant
18 that exists in the world that would make you feel
19 secure? And I suppose I'm having a little bit of
20 difficulty with the answer, with an answer that says,
21 no, there is no covenant that you can write that would
22 make us feel secure.

23 MR. DABNEY: The -- the reason is, Your
24 Honor, that the registration causes informational
25 injury. And what the Respondent is trying to do is to

1 hang on to government action that disadvantages its
2 competitor, while --

3 JUSTICE SOTOMAYOR: But I don't know why --
4 my solution was that they would give you a covenant
5 that I suggested as a possibility that would say,
6 vis-à-vis you, you can imitate, counterfeit, use this
7 design, only vis-à-vis you. Why doesn't that protect
8 you fully? Because what they're saying to you is, copy
9 the design if you want, so long as you're not using
10 another trademark. But that's not the issue. The issue
11 is whether you're infringing this design.

12 MR. DABNEY: The question the trademark
13 practitioners get asked every day is whether something
14 is available. And so long as that question is asked, a
15 covenant that's in the file of a company is not going to
16 prevent deception and confusion of people who look and
17 say, oh, this is a protected design.

18 JUSTICE GINSBURG: Mr. Dabney, that's a
19 different answer than the one you gave me when I asked
20 the same question. You said because we don't want to be
21 an involuntary licensee of Nike.

22 MR. DABNEY: That is a second form of injury
23 that we have now, as Justice Scalia pointed out. Right
24 now, we cannot just ignore the claim and bring out
25 either this -- a YUMS version --

1 JUSTICE GINSBURG: But can you -- can you
2 just explain to me -- you've given a name to this carte
3 blanche that -- that Nike would give you. What is the
4 significance of your being an involuntary licensee?
5 It's not something that -- that you wear as a brand. I
6 mean --

7 MR. DABNEY: What we've substituted is
8 instead of getting a judgment in accordance with law
9 that expunges the allegedly invalid
10 government-registered claim of right to exclude
11 competition and sale of goods in favor of the chance to
12 litigate with our arch rival to see whether they will
13 prove --

14 JUSTICE GINSBURG: Then you're going back to
15 saying the covenant -- no covenant is any good.

16 MR. DABNEY: A covenant that leaves the
17 covenantor in possession of the unreviewed government
18 benefit that it got --

19 JUSTICE BREYER: But that look -- I mean,
20 maybe you could suggest to me that I -- that we should
21 change what the law has been or not follow it here, but
22 where I'm taking the law from is Friends of the Earth.

23 MR. DABNEY: Yes.

24 JUSTICE BREYER: And in Friends of the
25 Earth, it says a defendant -- namely Nike -- claiming

1 its voluntary compliance moots a case, and what they're
2 claiming is that this -- a covenant moots the case,
3 moots the case, the covenant they gave, there's the
4 formidable burden -- you know, it's formidable, you're
5 quite right -- of showing it is absolutely clear,
6 correct, that the allegedly wrongful behavior, namely,
7 their suing, but their suing in respect to this kind of
8 shoe, could not reasonably be expected to recur.

9 And they say, since we promised in an
10 enforceable promise not to repeat this behavior ever --
11 100 years, how could it be expected reasonably to recur?
12 How could our behavior, namely suing for infringement in
13 respect to a shoe like this, be reasonably expected to
14 recur, given our covenant? And your response to that
15 is?

16 MR. DABNEY: The claim the counterclaim
17 seeks to extinguish is not simply the particular rights
18 of action that they have covenanted not to exert. The
19 claim that is sought to be extinguished is the much
20 broader government-registered claim of right to exclude
21 competition in the sale of shoes that embody that design.

22 CHIEF JUSTICE ROBERTS: Mr. Dabney --

23 MR. DABNEY: Yes.

24 CHIEF JUSTICE ROBERTS: -- if you had the --

1 the various interests that you're asserting now -- we're
2 not talking about mootness, but we're talking about
3 Article III standing.

4 MR. DABNEY: Yes.

5 CHIEF JUSTICE ROBERTS: I'm looking at what
6 you're alleging, that you have plans to introduce
7 particular shoes. People are considering investing in
8 your company. Your opponent has intimidated retailers.
9 If you brought a suit by yourself, is that sufficient to
10 establish Article III standings? Are those the sort of
11 concrete and tangible injuries that we've required?

12 MR. DABNEY: I would say we have very
13 distinct and concrete and palpable injury in that --

14 CHIEF JUSTICE ROBERTS: Just because you
15 plan to introduce a particular line of shoes, you can
16 bring a lawsuit?

17 MR. DABNEY: No.

18 CHIEF JUSTICE ROBERTS: No. Okay. Just
19 because people are considering investing -- somebody who
20 came in and said, I've got this company, people are
21 thinking of investing in it, and therefore, you want to
22 proceed with your lawsuit?

23 MR. DABNEY: It is undeniable, by law, that
24 the Petitioner's cost of operation -- the petitioner's
25 Risk of operation is increased because of --

1 CHIEF JUSTICE ROBERTS: Well, that surely
2 would not establish Article III standings. Everybody's
3 cost of operation is increased whenever there's any
4 trademark at all because you have to check and see
5 whether it violates a trademark.

6 MR. DABNEY: Yes, but we're a direct
7 competitor, which we say is currently subject to an
8 unlawful restraint on our freedom to operate.

9 JUSTICE GINSBURG: Mr. Dabney, suppose there
10 had been no infringement claim, could you have -- but
11 you're in the shoe business and you're -- you're
12 worried -- could you have brought a declaratory action
13 or an action for an injunction to have the trademark
14 declared invalid?

15 MR. DABNEY: When our shoes were launched,
16 it obviously never even occurred to the petitioner that
17 they could be deemed an infringement of any rights of
18 this respondent. So the answer is we were not injured
19 at that point. But now, that we've been sued -- once
20 bitten, twice shy -- we now have been told by the
21 respondent that it claims a far-reaching claim of right
22 to exclude competition in the sale of goods.

23 JUSTICE GINSBURG: So you say you could not
24 have brought a suit to -- to cancel?

25 MR. DABNEY: The three-part test of

1 injury-in-fact is universally applicable. So we did not
2 allege -- and I don't believe we had injury-in-fact when
3 our shoes were launched. So, no, of course, there would
4 not have been a suit that could be brought at that time.
5 But since we're in a mootness case and we've been sued
6 and we've been told and have all these defamatory
7 allegations about and dragged our company's name through
8 the mud, the situation is different, as Your Honor has
9 said.

10 JUSTICE KAGAN: But if that's the case -- if
11 the difference is that you've been sued, then it should
12 be adequate protection, if you know that you won't be
13 sued again. And that's why there's the question of what
14 kind of covenant would give you adequate protection that
15 you won't be sued again?

16 MR. DABNEY: If the -- as I said before, if
17 the only injury we were complaining about and trying to
18 extinguish was the injury that flows from being sued
19 again by this Respondent, then I suppose you could --
20 you could conceive of a covenant that would extinguish
21 that injury.

22 But in trademark registration practice, it
23 has been routinely heard by Federal courts -- we cite
24 two on page 8 of our reply brief -- that the kind of
25 injury that Petitioner is complaining about in this case

1 has been heard and adjudicated by Federal courts for
2 decades. We cite two cases, 85 years apart. It is --

3 JUSTICE GINSBURG: But, Mr. Dabney, you told
4 me that you could not bring such an independent suit,
5 you have to be stung once. So you can bring it as a
6 counterclaim, as you did here, once there's an
7 infringement suit, but you -- you did say that you could
8 not just walk into court and say, I want an injunction
9 invalidating the trademark.

10 MR. DABNEY: Well, let me clarify. The
11 Petitioner totally agrees there has to be injury in fact
12 in all cases. And so my answer to your question in this
13 hypothetical question is we would have to allege
14 adequate injury. And the -- the Chief Justice suggested
15 that increased cost of capital might or might not
16 qualify for injury in the -- in the initial standing
17 case where --

18 CHIEF JUSTICE ROBERTS: No, I suggested it
19 might not.

20 MR. DABNEY: Might not. That's right.

21 (Laughter.)

22 MR. DABNEY: So we have increased cost of
23 capital, increased costs of -- of design. And, of
24 course, we have the legal burden and duty to refrain
25 from making shoes now that would give rise to a

1 plausible claim on the part of the Respondent.

2 If there are no further questions, I would
3 like to reserve the rest of my time.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Ms. Anders.

6 ORAL ARGUMENT OF GINGER D. ANDERS,
7 FOR UNITED STATES, AS AMICUS CURIAE,
8 SUPPORTING VACATUR AND REMAND

9 MS. ANDERS: Mr. Chief Justice, and may it
10 please the Court:

11 A trademark holder can moot a declaratory
12 judgment action seeking to invalidate a trademark by
13 offering the plaintiff a sufficiently broad covenant not
14 to sue. Whether the covenant eliminates the controversy
15 between the parties should be analyzed under the
16 voluntary cessation doctrine.

17 The analysis that the government is
18 proposing is both a way of determining whether the
19 covenant has eliminated any concrete dispute between the
20 parties and also a framework for the parties to use to
21 negotiate the appropriate scope of the covenant.

22 JUSTICE SOTOMAYOR: Ms. Anders, what --
23 there is a question about why a competitor should have
24 to produce to its competition its future plans of
25 development. I mean, the marketplace, especially in

1 fashion, importantly, likes to keep quiet what it's
2 doing because what -- it doesn't want other imitators to
3 beat it to the punch.

4 So given that interest, why isn't their
5 claim that they're being inhibited because of the
6 requirement to produce their products -- or their
7 intended products -- enough to establish injury in this
8 case?

9 MS. ANDERS: Well, once the -- once the
10 defendant offers the covenant, then the question becomes
11 whether there is anything that the plaintiff is
12 intending to do, its current activities or its -- its
13 concrete plans for anticipated activities that would
14 fall outside the covenant and potentially be infringing.
15 Because if those activities exist, then the covenant has
16 not --

17 JUSTICE SOTOMAYOR: Well, then what did --

18 JUSTICE KENNEDY: Could we say there is just
19 a presumption, that, if you're in the business, that you
20 probably are interested in future design, period?

21 MS. ANDERS: I don't think that -- I don't
22 think that presumption would establish a concrete
23 interest. The question here is whether --

24 JUSTICE KENNEDY: Wouldn't establish a --

25 MS. ANDERS: It would not establish that the

1 plaintiff has a concrete interest. The question is
2 whether the dispute between the parties is reasonably
3 likely to recur. And if the plaintiff cannot point to
4 anything that it's currently doing or that it's planning
5 to do --

6 JUSTICE SOTOMAYOR: I read this affidavit as
7 saying, we're in the shoe industry, we're going to make
8 new shoes regularly, we want to copy their shoe, we
9 don't think it's protected by trademark, we want to copy
10 it -- they don't say -- and that's something on rebuttal
11 that maybe Petitioner will explain -- that we want to
12 copy it exactly. But what they're saying is, we want to
13 copy it because it's a free form. That's really what I
14 read their affidavit as saying.

15 So if -- why do they have to actually -- do
16 they have to produce their design to prove they're doing
17 that?

18 MS. ANDERS: I think what they have to do is
19 they have to state that they intend to make products
20 that may be outside the covenant. And now --

21 JUSTICE SOTOMAYOR: But saying it is enough?
22 That's what I thought their affidavit said, and I
23 thought the court below said, no, you've got to show us
24 the product.

25 MS. ANDERS: I think the -- the affidavit

1 says that they intend to produce new shoes as a general
2 matter. It doesn't tell us what those shoes may be,
3 whether they -- it doesn't give us a way of knowing
4 whether they might fall outside the covenant.

5 And I --

6 JUSTICE SOTOMAYOR: Please, now go back to
7 my question. Is it enough to just say it? Or do they
8 have to produce the designs, so that the Court and Nike
9 can decide -- it is Nike, right? -- the Court and Nike
10 can decide whether the shoe is a colorable imitation or
11 an exact copy.

12 MS. ANDERS: I think that could depend on
13 the breadth of the covenant. I think, in some cases,
14 for instance, if the covenant doesn't cover any future
15 products, it may be enough for the plaintiff to credibly
16 allege, we intend to make future products that aren't
17 covered.

18 JUSTICE SOTOMAYOR: I agree with you.

19 MS. ANDERS: So I also think that it may
20 depend -- the less far along a party's plans are to make
21 its shoes, the easier it will be for the defendant to
22 say, it is speculative that your plans will actually
23 mature into something that doesn't --

24 JUSTICE KAGAN: Well, Ms. Anders, take this
25 case, where Already says -- you know, we're not really

1 going to say anything particular. We're just going to
2 say that we're in the business of making shoes, and we
3 might make a shoe. Would that -- would that -- that
4 would not be enough under your standard; is that
5 correct?

6 MS. ANDERS: I think that's right. I think
7 if the parties went back on remand in this case -- and
8 we do think there should be a remand here -- but if the
9 parties went back and we had the exact same facts, and
10 Nike said that anything that was a colorable imitation
11 of Already's shoes was covered by the covenant, and
12 Already came back and said, just generally, we're making
13 new shoes, I think, in that situation, it would be
14 relatively easy for Nike to show that the possibility
15 that Already would be impacted by the covenant -- or
16 impacted by the trademark, I'm sorry -- would be
17 speculative.

18 So that --

19 JUSTICE KAGAN: Given what Already has said
20 in this case, why is it that you think that we should
21 remand? I mean, it sounds as though we're remanding for
22 no purpose, given what Already has said throughout the
23 course of the litigation and, indeed, in this Court
24 today.

25 MS. ANDERS: I think there are two reasons.

1 The first is that, when this Court establishes a new
2 standard, it often -- it traditionally will remand to
3 allow the courts -- the lower courts to apply that
4 standard in the first instance.

5 And the second is that there was some
6 uncertainty about what the covenant meant below. So
7 Nike represented that the covenant covered the existing
8 shoes, and Already said, in its motion to dismiss
9 briefing, that it thought that the covenant did not --

10 JUSTICE KENNEDY: But its future -- its
11 future shoes are clearly -- and I thought the counsel
12 for the Petitioner might have -- might have added this
13 in his answer to Justice Sotomayor, that its future
14 shoes are not covered by this. And the -- if -- if Nike
15 has the heavy burden of proof, can it have discovery and
16 take depositions on what their plans are, what their
17 marketing plans are, what designs they're thinking
18 about?

19 MS. ANDERS: I think that would be one way
20 for Nike to try to establish that -- that the dispute is
21 not reasonably likely to recur. It could get discovery
22 into --

23 JUSTICE KENNEDY: So then -- so then the
24 covenant not to sue gives Nike an advantage that no
25 other manufacturer has.

1 MS. ANDERS: I don't think it does give
2 the --

3 JUSTICE KENNEDY: Do you mean any
4 manufacturer without -- without any litigation can ask
5 Already, well, tell us your plans, what shoes are you
6 thinking about?

7 MS. ANDERS: Well, once Already produces --
8 once Already identifies what its future activities may
9 be -- and, again --

10 JUSTICE KENNEDY: But why should Already
11 have to do that to anybody?

12 MS. ANDERS: Well, we think it makes sense
13 for Already to have to -- have to at least identify here
14 what activities it thinks may not be outside the
15 covenant. And I don't think that hurts Already, and the
16 reason is that if -- if Already's evidence convinces the
17 court that the case isn't moot, then Already gets its
18 adjudication on the related --

19 JUSTICE KENNEDY: So Nike has an advantage
20 over Already that no other manufacturers had. It can
21 demand what its future plans are.

22 MS. ANDERS: Well, it will get -- the
23 trademark will be -- will be adjudicated if -- if
24 Already convinces the Court the action isn't --

25 JUSTICE KENNEDY: Let me just ask one

1 question on that, and it's a little bit off of what
2 we've been talking about. You say, in your brief, well,
3 now, don't worry, what you can do is you can go to the
4 trademark -- the PTO board, and they'll -- they'll
5 adjudicate this mark. And so -- you know, you can
6 really go out of the courts and go to the
7 administrators.

8 Suppose Already goes to the administrative
9 agency and loses. Can it have judicial review? And is
10 there -- is standing easier to show, once there has been
11 an adverse action in the administrative office? Or are
12 we right back where we started? So once you go to the
13 agency and you try to appeal, the Court says, well, this
14 is an Article III court, we need a case of controversy,
15 and you're right back where we are now?

16 MS. ANDERS: Well, a couple of points on
17 that. The first is that we are not proposing that the
18 Court should dismiss discretionarily every action just
19 because the TTAB exists and can adjudicate --

20 JUSTICE KENNEDY: That was a big part of
21 your argument. You were telling us, oh, don't worry,
22 you can always go to the patent level.

23 MS. ANDERS: What we're proposing here is
24 that, as a function of the Court's broader discretion
25 under the Declaratory Judgment Act and United States v.

1 W. T. Grant, is that when the Court believes that it
2 probably does -- does have jurisdiction but it doesn't
3 think that the likelihood of a dispute is -- is really
4 that great, that in that situation, it can
5 discretionarily dismiss.

6 So that would be a situation in which there
7 is Article III --

8 JUSTICE KENNEDY: No. My -- my question is:
9 Is the Article III requirement that Already has the same
10 in this case as it would be if they sought judicial
11 review from an adverse order of the administrative
12 agency?

13 MS. ANDERS: The administrative agency's
14 standing rules are broader than Article III, so it
15 would -- it is easier to get --

16 JUSTICE KENNEDY: I'm talking about going to
17 court.

18 MS. ANDERS: And so once it goes to court,
19 there may be rare cases in which Already, as the party
20 that lost, if it isn't injured in fact by the TTAB's
21 decision itself, that it would not have the necessary
22 Article III injury to seek judicial review. That
23 hasn't -- to our knowledge, that has not occurred, but
24 it is possible that that could happen because 15 U.S.C.
25 1064 makes the TTAB standing requirements broader than

1 in Article III.

2 JUSTICE GINSBURG: Ms. Anders, you did say,
3 if I recall correctly, that Congress regarded the PTO as
4 the preferred form for cancellation proceedings. The --
5 the statute sets up the PTO proceeding, but it also
6 allows the claim to be brought in -- in court. So
7 what -- what shows that Congress meant these claims to
8 be -- to go to the agency in preference to the court?

9 MS. ANDERS: Well, I think Congress didn't
10 set it up as an exhaustion requirement, so I don't think
11 it's preferred for all of these claims to go to the TTAB.
12 But the TTAB is the expert body that -- that adjudicates
13 cancellation of validity issues all the time. So we think
14 there could be circumstances in which it would be
15 particularly appropriate for a district court to consider
16 the existence of the TTAB proceeding.

17 For instance, if there's a related
18 proceeding pending before the TTAB or there's a
19 concurrent proceeding, something like that, we think it
20 would make sense for the district court in considering
21 whether to dismiss the action to take that into account.

22 CHIEF JUSTICE ROBERTS: I thought your
23 answer to Justice Kennedy's question might be that
24 the -- an adverse decision from the agency covering you
25 is an additional injury in fact that gives you Article

1 III standing, unless the -- unless the basis for the
2 agency's decision is you don't have any injury.

3 MS. ANDERS: I think there could be some
4 circumstances in which the TTAB's decision would create
5 injury in fact if it said something about the scope of
6 the trademark, something like that. So there could be
7 situations in which 1071 would then allow the losing
8 party to get judicial review.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Mr. Goldstein.

11 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

12 ON BEHALF OF THE RESPONDENT

13 MR. GOLDSTEIN: Mr. Chief Justice, thank you
14 very much, may it please the Court:

15 You will want to have available to you the
16 cert petition and the small volume of the Joint
17 Appendix.

18 In our submission, the Court needs to adopt
19 a rule that has balance to it, and that is there -- it
20 has to be possible to resolve one of these cases through
21 a covenant not to sue of appropriate breadth, but it
22 also has to be the case that a covenant not to sue can't
23 just always eliminate the other side's injury. And so
24 it's going to depend on the covenant and it's going to
25 depend on what the other side says about its plans.

1 And our point in this case is that you
2 should adopt the following rule: And that is, if you
3 have a covenant not to sue and it covers everything that
4 the other side alleges an intent to produce, then there
5 is no more injury. If it doesn't cover that, then there
6 may well be injury.

7 And our point --

8 JUSTICE SOTOMAYOR: How do you deal with the
9 point that's been discussed with your adversary, they
10 have to show you everything they intend to produce?
11 What entitles you to that showing?

12 MR. GOLDSTEIN: Absolutely. So one thing
13 that's very important to recognize -- two things about
14 trademark practice. First is that, in all of these
15 cases -- remember, most of the time the question of
16 trademark or patent validity will just be a suit for
17 invalidity. It might be a counterclaim. This happens
18 all the time.

19 And in all of these cases, including this
20 case, there is a protective order, and there is one in
21 this case. And the protective order says that a party
22 can designate its material, so that it's lawyers' eyes
23 only, and so that no businessperson from the other side
24 is entitled to see it.

25 So that, Justice Kennedy, with respect, it's

1 actually not true that this is an unusual situation or
2 that we would get some special advantage.

3 In every single patent or trademark
4 invalidity case, after this Court's decision in
5 MedImmune, the party alleging invalidity, in order to
6 show its standing, has to say, we intend to make a
7 product that is regarded as potentially infringing.

8 JUSTICE SOTOMAYOR: What if they simply
9 said --

10 MR. GOLDSTEIN: Yes.

11 JUSTICE SOTOMAYOR: -- you have the
12 trademark, we think it's invalid, we want to copy your
13 shoe? We want to copy just the form of your shoe
14 because that's what the trademark involves.

15 MR. GOLDSTEIN: Yes.

16 JUSTICE SOTOMAYOR: And once we have the
17 invalidity, that's what we're going to do.

18 MR. GOLDSTEIN: Yes.

19 JUSTICE SOTOMAYOR: Would that be enough of
20 a showing? We don't have plans right now because your
21 trademark stopped us from having the plans, but the
22 minute your trademark is -- isn't validated, for sure,
23 we're going to do it because it's going to mean great
24 sales if we put our name on it, rather than your name.

25 MR. GOLDSTEIN: Yes. The answer to your

1 question is going to be yes, but it has two parts to it.
2 The first is -- because I really want to focus on
3 precisely what you said. You said first, what did they
4 simply say?

5 Now, if they were to simply say it, there
6 could be a factual inquiry into whether they're telling
7 the truth or not. We could debate -- we could have a
8 fight about the actual evidence. But let's assume they
9 could prove it, and that is, the district judge was told
10 by Already, or whatever other competitor, we want to
11 make a counterfeit.

12 In that case, unquestionably --
13 unquestionably -- there would be a continuing Article
14 III injury. And let's then go to your understanding of
15 what the declaration in this case actually says.

16 So, first, let me start with how the case
17 came to you, and that is the court of appeals, what it
18 understood the record -- and the district court
19 understood the record to be, and that is going to be in
20 the petition appendix at page --

21 JUSTICE GINSBURG: Mr. Goldstein, how the
22 case came to us -- how this case originated was a
23 counterclaim.

24 MR. GOLDSTEIN: Yes.

25 JUSTICE GINSBURG: And at the time the

1 counterclaim was asserted, there was certainly Article
2 III jurisdiction over the counterclaim, right?

3 MR. GOLDSTEIN: That's absolutely right.

4 And we accept, for present purposes, that there is going
5 to be a reduced requirement under the voluntary
6 cessation doctrine. We briefed why we don't think
7 that's true, but I assume, for the purposes of these
8 answers, that the Court is going to apply the heightened
9 burden on us to show that the case is over.

10 And we believe that we showed beyond
11 peradventure -- that we really resolved this case, when
12 we didn't just dismiss our claim with prejudice, but we
13 affirmatively granted them a covenant not to sue that
14 covered not only their existing products. But, Justice
15 Kennedy, their future products -- and I'm glad to take you
16 to the language of the covenant -- because they are the
17 colorable imitations of their current products.

18 JUSTICE KAGAN: Do you that this covenant
19 covers an exact copy of your shoe?

20 MR. GOLDSTEIN: It does not. And if the
21 other side had said, in the district court, we have an
22 intention -- and this is Justice Sotomayor's point -- we
23 have an intention, we have a desire to make a copy of
24 your shoe, then there would be a case or controversy.
25 And it's in --

1 JUSTICE KENNEDY: Is -- is -- is the
2 Petitioner -- do you anticipate that the Petitioner will
3 agree with you, that this covers future products?

4 MR. GOLDSTEIN: Yes, because although the
5 cert petition says that it doesn't, we have quite
6 stridently pointed out, in our briefing, that that was
7 completely inaccurate. And I'll just -- let's go to the
8 covenant. I don't think this is really that hard or
9 that controversial.

10 So if we go to the Joint Appendix, at pages
11 96 to 97, and so -- and -- and I remind you that the --
12 the question presented is -- is exactly what you're
13 saying, Justice Kennedy. I'll read it, so you don't
14 have to turn back to the cert petition.

15 And its premise was that the registrant
16 promises not to assert its mark against the party's then
17 existing commercial activities. So now, I'm in the
18 covenant itself, on page 97A, and this is what we
19 promised not to sue them about.

20 We have -- we have promised not to sue them,
21 and I'm five lines down from the top, on account of any
22 possible action based on or involving trademark
23 infringement, unfair competition or dilution, under
24 state or Federal law, based on the appearance of
25 Already's current -- okay, that's not future -- or

1 previous footwear product designs and any colorable
2 imitations. And that's what -- and that's what --

3 JUSTICE SOTOMAYOR: The colorful
4 imitations -- colorable --

5 MR. GOLDSTEIN: Colorable.

6 JUSTICE SOTOMAYOR: The colorable imitations
7 are colorable imitations of their shoe?

8 MR. GOLDSTEIN: That's exactly right.

9 JUSTICE SOTOMAYOR: You haven't promised to
10 not sue them over colorable imitations of your shoe?

11 MR. GOLDSTEIN: That are not colorable
12 imitations of --

13 JUSTICE KENNEDY: But you have two
14 categories. You have current and previous, as to which
15 the covenant runs to everything. Then you have what you
16 say is future, and that has to be a colorable imitation.

17 MR. GOLDSTEIN: That's exactly right.

18 JUSTICE KENNEDY: So it -- so it -- so it
19 does cover some future designs. And they're correct
20 about that, and you're incorrect.

21 MR. GOLDSTEIN: Justice Kennedy, I -- I may
22 have confused things. This is the situation with the
23 covenant: Our covenant not to sue covers everything
24 they have made in the past, everything they were making
25 at the time and every future product of theirs that is a

1 colorable imitation.

2 Our point is not that it covers every future
3 shoe of theirs. We're on the same page in that respect.
4 You are absolutely right, Justice Kennedy, that there
5 are shoes that they could make in the future that would
6 not be covered by the covenant. There could be an
7 injury about that.

8 And so my point about the record in the case
9 and how the case was developed and how we might have
10 modified the covenant, if they had told us anything,
11 suggesting -- suggested anything outside the covenant
12 they might want to make, is let's look at what they
13 actually told the district court and the court of
14 appeals about what their intentions were.

15 JUSTICE GINSBURG: So it's -- so it's a
16 question of -- of deficiency in their pleading. Suppose
17 they amended that counterclaim and said, as soon as we
18 are able, we want to do a counterfeit.

19 MR. GOLDSTEIN: Yes. It is not a deficiency
20 in the pleading. It's a deficiency in the proof. So my
21 point about this -- it's very important for the Court to
22 understand that this case was not dismissed just on the
23 pleadings. It wasn't just an insufficiency in their
24 allegation.

25 And they said, well, actually, we have more

1 that we want to say, because we actually can explain to
2 the courts that we want to make other shoes.

3 The case was decided on a fully developed
4 record. We moved to dismiss. They submitted five
5 declarations in response that described their intentions
6 precisely.

7 JUSTICE KAGAN: But suppose in a different
8 hypothetical case, they had said, what we want to do is
9 to copy Nike's shoe --

10 MR. GOLDSTEIN: Yes.

11 JUSTICE KAGAN: -- what then should have
12 happened then, in your view?

13 MR. GOLDSTEIN: Okay. So I do -- I would
14 love to return to what actually happened. But in that
15 hypothetical, what would happen is that our motion to
16 dismiss would be denied, unless and until we could prove
17 that what they were saying wasn't true because it is
18 absolutely the case -- and it is a strong point in our
19 favor -- that you can't evade an attempt to invalidate
20 your trademark through a covenant not to sue because you
21 can't give a covenant not to sue over a counterfeit
22 because you are in real risk of being deemed to have
23 abandoned the mark because you're just --

24 JUSTICE GINSBURG: Why? Why? I know you
25 said that in your brief, but if you give it -- yes, if

1 you -- if you say the -- the whole world can copy it,
2 but this covenant would give it to only one
3 manufacturer.

4 MR. GOLDSTEIN: That's correct.

5 JUSTICE GINSBURG: So why would you
6 abandon -- why would giving a covenant to Already amount
7 to abandonment of your mark?

8 MR. GOLDSTEIN: Okay. It is not a settled
9 question in the law. There is no case that has
10 considered this question. What a party claiming
11 abandonment would say is that we would have licensed
12 Already then to increase its production and its
13 distribution.

14 But even if one didn't agree with that,
15 Justice Ginsburg, my point would be this: And that is
16 you can't continually evade an attempt to invalidate
17 your mark because, certainly, the agree -- we would
18 agree that if you give a second one of these things out
19 or the third one, you would be abandoning the mark. I
20 have some actual facts for you about this, and that --

21 JUSTICE BREYER: What is it -- I would like
22 to know. I mean, I assume you ask them, do you have any
23 current or future plan to produce a shoe that would
24 violate our mark --

25 MR. GOLDSTEIN: Yes.

1 JUSTICE BREYER: -- or that might -- which
2 does not look at all like the present -- your present
3 shoe, and isn't even colorably like your present shoe,
4 do you have a plan to do such a thing, are you in the
5 process, is it likely?

6 And they say, no, it's not likely. That's
7 the end of it. They're just as if they manufactured
8 cell phones.

9 MR. GOLDSTEIN: Yes.

10 JUSTICE BREYER: But if they were to say --
11 you know, we make new shoes all the time.

12 MR. GOLDSTEIN: Yes.

13 JUSTICE BREYER: And this is some kind of
14 thing we might well consider, and we have people working
15 on it; and they are considering whether to do it or not,
16 it's well in the works -- they win. Okay?

17 What did they say?

18 MR. GOLDSTEIN: Page 173 of the Joint
19 Appendix. They had every opportunity to describe
20 exactly what you wanted to know about, Justice Breyer.
21 We moved to dismiss the case --

22 JUSTICE SOTOMAYOR: I'm making this as
23 simple as I can.

24 MR. GOLDSTEIN: Okay.

25 JUSTICE SOTOMAYOR: I'm a shoe manufacturer.

1 I want to make new designs, and I want to be free to
2 make the designs that I want.

3 MR. GOLDSTEIN: Yes.

4 JUSTICE SOTOMAYOR: If this mark isn't
5 validated --

6 MR. GOLDSTEIN: Yes.

7 JUSTICE SOTOMAYOR: -- I intend to copy as
8 much of it as I can.

9 MR. GOLDSTEIN: Sure.

10 JUSTICE SOTOMAYOR: I don't have any records
11 of doing the planning because the trademark was there.

12 MR. GOLDSTEIN: Sure.

13 JUSTICE SOTOMAYOR: But, for sure, given my
14 current shoe --

15 MR. GOLDSTEIN: Yes.

16 JUSTICE SOTOMAYOR: -- and the fact that
17 they thought I imitated them --

18 MR. GOLDSTEIN: Yes.

19 JUSTICE SOTOMAYOR: -- meaning, you --

20 MR. GOLDSTEIN: Yes.

21 JUSTICE SOTOMAYOR: -- you invalidate the
22 mark, I'm going to copy as much of it as I can.

23 MR. GOLDSTEIN: Yes.

24 JUSTICE SOTOMAYOR: Would that be enough?

25 MR. GOLDSTEIN: Yes.

1 JUSTICE SOTOMAYOR: In your mind, you're
2 saying --

3 MR. GOLDSTEIN: Yes, that would be fine.

4 JUSTICE SOTOMAYOR: You could do discovery
5 then?

6 MR. GOLDSTEIN: Yes. And, Justice
7 Sotomayor --

8 JUSTICE SOTOMAYOR: And the discovery is
9 going to show what?

10 MR. GOLDSTEIN: Well --

11 JUSTICE SOTOMAYOR: The president comes in
12 and says exactly what I said. There are no plans --

13 MR. GOLDSTEIN: They're going to win.
14 They're going to win, Justice Sotomayor. And so for
15 your vote, I am resting my entire case on the fact that
16 you're understanding that this is what their affidavit
17 suggests that's just not right.

18 CHIEF JUSTICE ROBERTS: Counsel, could you
19 go back to Justice Breyer's question and answer that?

20 MR. GOLDSTEIN: Yes. Yes. So page 173 --
21 because there is a record here. You -- you don't have
22 to hypothesize. This was all on the table in the
23 district court. We said, they have no intention, no
24 desire, no nothing, to make something that is not
25 unambiguously covered by the covenant.

1 And Justice Ginsburg did point out, in
2 passing, that if they said something to the contrary, we
3 would have modified the covenant. So here's what they
4 said -- and I -- it would take a lot of your time for me
5 to read all seven paragraphs on page 173, but they
6 don't --

7 JUSTICE SOTOMAYOR: Yes. You don't have to
8 read to us.

9 MR. GOLDSTEIN: Okay. So these paragraphs
10 do not say -- they do not suggest, they do not imply --
11 even between the lines -- an intention to make something
12 that is outside the covenant. They just don't. And
13 that's --

14 JUSTICE BREYER: What they say is that they
15 changed this at the rate of a mile a minute -- you know,
16 they have -- they have stuff they put out, and we have
17 the YUMS and the Sweet -- whatever it is and the Jelly
18 Bean and so forth, and we keep changing it.

19 And so I don't know. I mean, it doesn't
20 seem clear, one way or the other. If it is -- if I come
21 to that conclusion, is it the case -- I thought perhaps,
22 in looking at this, that the line I quoted -- remember,
23 which puts a lot of burden on you, from Friends of the
24 Earth -- is not quoted in the district court, not quoted
25 in the Court of Appeals, so perhaps the thing -- I think

1 the SG wants something like it.

2 MR. GOLDSTEIN: Yes.

3 JUSTICE BREYER: So you say, okay, this is
4 the standard; it's tough for Nike to show this. You
5 seem to have conducted this case without that standard
6 quite in mind. It's tough for Nike, but they can do
7 it -- you know, depending on the facts, and you have
8 these protective orders, da, da, da, so send it back,
9 use the right standard, and give Nike a chance and give
10 them a chance, and that way, we --

11 JUSTICE SOTOMAYOR: I thought what they were
12 arguing --

13 JUSTICE BREYER: What about that? I would
14 like to know what the answer to that question is here.

15 MR. GOLDSTEIN: Okay. Do you want --

16 CHIEF JUSTICE ROBERTS: Answer
17 Justice Breyer's question.

18 JUSTICE BREYER: Excellent.

19 MR. GOLDSTEIN: All right. Justice Breyer,
20 so you've got a choice. You could let us win now, or
21 you could say, well, maybe you will win on remand.

22 JUSTICE BREYER: Well, that's your opinion,
23 that you will win on remand. Okay.

24 MR. GOLDSTEIN: Okay. Right.

25 (Laughter.)

1 MR. GOLDSTEIN: Right. And, Justice Breyer,
2 I have two answers for you. Number one is going -- the
3 first one is going to be about the facts of the case,
4 and the second is just going to be jurisprudential. The
5 first one is what more could one imagine in such an
6 opinion that you would ask Nike to do on a remand?

7 JUSTICE BREYER: I would ask Nike, I
8 suppose, Nike could say -- you know, I read the page 73
9 and you changed things at the rate of mile a minute, and
10 we looked at YUMS and Jelly Bean, and they're sort of
11 like our shoe, but we didn't think enough, but you did
12 think enough, and are some of these changes that could
13 happen at a mile a minute -- is there any reason to
14 think -- you know, that they won't look really colorably
15 even like what you just did, but nonetheless, is a
16 pretty good point that they might infringe our -- our
17 present trademark.

18 MR. GOLDSTEIN: Justice Breyer --

19 JUSTICE BREYER: That's a long question, I
20 don't know if I'll get a good answer.

21 MR. GOLDSTEIN: Well, I hope you'll get a
22 good answer. The -- my point is this, Justice Breyer:
23 what you've just said on remand, what we would do is ask
24 a question. We wouldn't try to prove anything. My
25 point is this: Already has told the district court, the

1 court of appeals, and this Court everything that it
2 wants to say about its intentions.

3 It has had every opportunity in every court
4 to have its lawyers simply say, Justice Sotomayor, this
5 is not an accident. The reason they are not saying that
6 they want to make a covenant of the -- a copy of the Air
7 Force 1 is that they don't want to make a copy of the
8 Air Force 1. There is no reason in the world to send
9 this back to give -- ask Already, again, the question
10 that has been asked in three separate courts.

11 I said I had a jurisprudential --
12 jurisprudential answer to you as well, and that is the
13 case was presented to you as presenting a question of
14 law, and that is, can you have a covenant not to sue
15 that will end a case like this?

16 And if you tell the lower courts, we don't
17 know, you are doing, I think, not as much of a service
18 to the development of the law as you could. It is a
19 much more sound approach, we think, to say Already had
20 the chance to build its record --

21 JUSTICE GINSBURG: Mr. Goldstein, can you
22 inform us of when this practice of the unilateral
23 covenant in order to moot a -- a cancellation claim,
24 when -- how long has it been around?

25 MR. GOLDSTEIN: It is still -- it has been

1 around for at least 20 years. It is still not very
2 common for the very important reason that trademark
3 owners know that, if they hand these things out, they
4 are at risk of having their mark invalidated; and
5 second, they know that it doesn't avoid a -- a
6 determination of the validity of the mark because a
7 party like Already can always go to the Federal agency,
8 the TTAB.

9 So I said I have some actual facts. And the
10 facts are these: Although Nike has a broad trademark
11 portfolio, it has only, once in its history, issued a
12 covenant not to sue. It is in this case.

13 JUSTICE KENNEDY: That's because it usually
14 sues. Page -- page 114 of the Joint Appendix says,
15 "Your Honor, over the past eight months, Nike has
16 cleared out the worst offending infringers. Now,
17 Already remains as one of the last few companies that
18 was identified on that top ten list of infringers."

19 I mean, that -- that's your company's
20 policy. That's your attorney, I take it.

21 MR. GOLDSTEIN: We -- Justice Kennedy, we do
22 enforce our trademarks. You say we usually sue. I will
23 tell you that we have filed six trade dress actions in
24 the company's history.

25 Now, you had said, because I think it's the

1 other side's -- the impression the other side has given,
2 that we are getting a special advantage over them. I
3 think it's really important to recognize, for purposes
4 of standing doctrine and mootness doctrine, that of all
5 the shoe manufacturers in the country, the one that is
6 least likely to be injured by this trademark -- there is
7 only one.

8 And it is Already because they are the only
9 company in the entire world that has a promise that's
10 substantial not to be sued under this trademark. We are
11 the one -- they are the ones that are least likely to
12 come into conflict with Nike. Now, they --

13 JUSTICE KENNEDY: Well, but that's because
14 you gave them the covenant after you sued them.

15 MR. GOLDSTEIN: Yes. Yes, that's right, but
16 we did give them the covenant. That's my point. After
17 the covenant -- we didn't merely withdraw the case. I
18 have one other piece of fact.

19 JUSTICE SCALIA: What -- what -- what's the
20 consideration -- I used to teach contract law. This
21 is -- you know, you can just give a covenant like that?

22 MR. GOLDSTEIN: Yes, we're judicially
23 estopped. It's not a contract. We are estopped, and
24 they have -- the district court acted in reliance on it,
25 construed it, and so we are bound by it. It's not a

1 contract.

2 I did have one other fact for you, because
3 the other side has given you this impression that, once
4 bitten, twice shy; that if you are sued once for a
5 trademark -- they have a special fear that they're in
6 the cross-hairs, that we're watching everything that
7 they do. So when they made this argument --

8 JUSTICE KENNEDY: They are on the top ten
9 list of infringers.

10 (Laughter.)

11 MR. GOLDSTEIN: Yes. They are on the top
12 ten list of infringers. But after that -- after that
13 they, and they alone, got a covenant not to be sued,
14 under the -- they are the -- they are in the specially
15 protected position, not a specially disadvantaged
16 position.

17 I did, however -- when they made this
18 argument in the reply brief -- tried to figure out if
19 that is true. Is it actually the case that a person who
20 is sued once has a legitimate worry that they will
21 actually be sued again?

22 So you should lower the -- the mootness or
23 standing bar still further. So we looked at every
24 single trademark action between 2000 -- January 1, 2000,
25 and December 31, 2004, all of them. There were 593.

1 And over the next eight years, we tried to figure out
2 how many times did the plaintiff sue the defendant
3 again. It happened six times, so --

4 JUSTICE BREYER: I see that. But I thought
5 your response to Justice Kennedy was a different one. I
6 liked it because it was that -- the concern that Nike
7 can go and find out the competitor's plans is true, but
8 it exists whenever a -- a -- a manufacturer brings a
9 trademark infringement case because that manufacturer
10 has to show he is now making the product; or, if not, he
11 intends to. And if it's a question of intends to, then
12 the defendant can go and look and see if that's true.

13 MR. GOLDSTEIN: Yes.

14 JUSTICE BREYER: And your response, I took
15 it, to that was there are procedures that deal with
16 that. They're called protective orders and so forth.
17 Is that -- have I got that right with your argument?

18 MR. GOLDSTEIN: You could not -- you could
19 not be more right.

20 JUSTICE BREYER: That's what your argument
21 is, yes.

22 MR. GOLDSTEIN: It's also the truth that --
23 that it is what happens in every single patent and
24 trademark invalidity case. If you believe that gives rise
25 to Article III injury, then every party has standing to

1 challenge every competitor.

2 JUSTICE GINSBURG: Mr. Goldstein, what about
3 Federal Rule 41(a)(2)? It says, if the defendant has
4 pleaded a counterclaim -- and you have recognized that
5 there was Article III jurisdiction over that
6 counterclaim -- the case may be dismissed on the
7 plaintiff's request over the defendant's objection, only
8 if the counterclaim can remain pending for independent
9 adjudication.

10 MR. GOLDSTEIN: Yes.

11 JUSTICE GINSBURG: So on the face of it, it
12 seems that this -- that that rule fits this case to a T;
13 that is, the -- plaintiff wants the case withdrawn,
14 defendant objects, and the question is can the
15 counterclaim remain pending for independent
16 adjudication.

17 MR. GOLDSTEIN: Yes. I think the reason
18 they did not pursue the Rule 41 argument in this Court
19 and abandoned it is that it's completely understood
20 that, if the party that's instituting the claim says I'm
21 not going to pursue my case at all, there simply is no
22 Article III jurisdiction. And so even without a Rule 41
23 dismissal, there is no case or controversy remaining in
24 the case.

25 The district court -- the court of appeals

1 might also have said, when it's dealt with this issue on
2 8(a) and 9(a) of the petition appendix, that they
3 actually acceded to the dismissal of our claims.
4 They're happy to have our claims gone. And you can't
5 say, we'll take the dismissal of the -- sorry -- the
6 plaintiff's claim, but want to have the counterclaim
7 remaining.

8 JUSTICE KENNEDY: You -- you referred, just
9 in a fleeting way, to the fact that they can go to the
10 PTO and to the board?

11 MR. GOLDSTEIN: Yes.

12 JUSTICE KENNEDY: What about my question,
13 and I wasn't -- it was probably my fault --

14 MR. GOLDSTEIN: No, I understand --

15 JUSTICE KENNEDY: -- I didn't quite
16 understand the government's petition. Is the standing
17 burden any less after there is a -- an administrative
18 adjudication and you go to court for judicial review?

19 MR. GOLDSTEIN: The Chief Justice suggested
20 an argument that could be made. It is an argument that
21 we disagree with. We've looked at the cases. We think
22 that it's a point in their favor, Justice Kennedy, that,
23 while you can go to the TTAB, they wouldn't be able to
24 appeal to an Article III court. I think that's a point
25 in their favor.

1 A point in our favor, however, is this
2 notion of scarecrow trademarks hanging out there on the
3 fields is inaccurate because of the ability to go to the
4 TTAB in the first instance; they're experts. And
5 second, remember what I said to Justice Sotomayor,
6 anybody in this market can say we want to counterfeit
7 the Air Force 1 -- we just want to make a copy of it,
8 it's not complicated -- and they will have the right to
9 bring a claim to invalidate the mark. So we can't leave
10 the trademark hanging out there.

11 I have kept trying to come back -- and if I
12 could, in my remaining time, to the understanding of the
13 lower courts about the record because I said, Justice
14 Breyer, I think it would be much better for you to
15 resolve the case because they had the opportunity to
16 build a record, the case came to you on two courts'
17 understanding of the record, and so if I could take you
18 back to 14(a) and 15(a) of the petition appendix?

19 JUSTICE GINSBURG: May I interject just one
20 thing that I would like you to clarify? Justice Breyer
21 started out by saying the standard comes from Friends of
22 the Earth. Do you agree? Because, as I recall, your
23 brief doesn't -- doesn't even cite Friends of the Earth.

24 MR. GOLDSTEIN: That's not correct, Justice
25 Ginsburg. So on -- we do disagree because of the

1 Court's decision in Deakins, that this a voluntary
2 cessation case, but we accept for present purposes, so
3 you don't think I'm fighting the hypothetical.

4 Assuming that voluntary cessation principles
5 apply, here's how they apply: When you not just dismiss
6 the case, but you grant the covenant not to sue, and the
7 covenant not to sue says, I won't sue you over what
8 you're doing now or anything that I can imagine you
9 doing in the future because you haven't told me anything
10 else, then you have ensured that the controversy can't
11 arise again, and you've met the Voluntary Cessation
12 Doctrine.

13 If, on the other hand, the other side comes
14 forward with a declaration from an officer or some other
15 form of proof that says, no, I'm worried I might do
16 something outside the covenant, I would definitely want
17 to make a counterfeit, then the case is going to go on.

18 But this case is not that hypothetical case.
19 On 14(a), the first full paragraph, seven lines from the
20 bottom, "Given the similarity of YUMS' designs to the
21 '905 mark and the breadth of the covenant, it is hard to
22 imagine a scenario that would potentially infringe the
23 '905 mark and yet not fall under the covenant. YUMS has
24 not asserted any intention to market any such shoe."

25 And then in footnote 5, on 15(a), "Given the

1 absence of record evidence that YUMS intends to make any
2 arguably infringing shoe that is not unambiguously
3 covered by the covenant, this hypothetical possibility
4 does not create a definite and concrete dispute."

5 That's how the case should be resolved. You
6 should say, yes, there can be other cases where the
7 covenant is too narrow; yes, there can be other cases
8 where someone does allege a desire to make a
9 counterfeit. Those are different cases. But do not, I
10 suggest to you, remand when the facts have already been
11 developed in this case.

12 If we lose on this record, we lose on this
13 record. But if we win on this record, we win on it
14 because the record has been built in this case and it is
15 settled.

16 JUSTICE SOTOMAYOR: You are saying that
17 you've met -- if we decide you bear the burden of proof,
18 you're saying, you -- you could live with that.

19 MR. GOLDSTEIN: Yes.

20 JUSTICE SOTOMAYOR: And your burden was met
21 by their submissions?

22 MR. GOLDSTEIN: Our burden was met by our
23 submission of the covenant, which dealt with every
24 product they're making and every colorable imitation in
25 the future of it. And when they didn't then come back

1 and say, actually, we want to make something that might
2 be outside the covenant, then it was -- that's -- that's
3 when we won the case.

4 Thank you very much.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Dabney, you have four minutes remaining.

7 REBUTTAL ARGUMENT OF JAMES W. DABNEY

8 ON BEHALF OF THE PETITIONER

9 MR. DABNEY: Your Honor, the covenant --
10 the -- the affidavits in this case were prepared about
11 five weeks after this completely unexpected development
12 in the middle of a hard-pressed litigation was made.

13 And the position that the Petitioner made to
14 the district court was there is obviously subject matter
15 jurisdiction here, not just because of the Rule 41
16 point, but that you can't say, well, we have a case that
17 raises these three issues. You could, say, enter a
18 single judgment right now, the plaintiff's claims are
19 waived because they've waived them, the trademark is
20 invalid, and the registration was unlawfully issued and
21 should be granted.

22 Courts issue judgments on the basis of
23 alternative holdings all the time. And the only reason
24 why we're even talking about this is that Judge Sullivan
25 bifurcated the proceedings so that we dealt with this

1 one issue in isolation, and then the other thing came up
2 separately. So we said, we think there's a case right
3 now, but if you doubt it, we request leave to amend our
4 counterclaim to assert claims for invalid procurement of
5 registration and other things that could have been
6 asserted.

7 So the -- the state of the record reflects
8 the -- the suddenness with which the -- the plaintiff
9 most unexpectedly did what it now says, in public, it's
10 never done before and dropped its claim so unexpectedly
11 in the case.

12 So there's no question, but that if -- if it
13 turns out that it's not enough to say that we're
14 actively engaged, and we want to do all of the things
15 any person in a normal position would want to do, and we
16 have a concrete interest, the -- the defendant can
17 certainly allege more than what it has been alleged.
18 The -- the --

19 JUSTICE SOTOMAYOR: His challenge, you said
20 you had the chance in three different courts to say
21 directly and unequivocally, if the mark is invalid,
22 we're going to imitate, and you haven't been willing to
23 do that. You --

24 MR. DABNEY: Your Honor, the Petitioner has
25 been trying now for two and a half years to establish

1 its right to do that. It was not our understanding
2 that, under the law, as it stood, that the -- in
3 addition to staying we have an enormous commercial
4 interest in doing this, and we are seeking the right to
5 do this since --

6 JUSTICE SOTOMAYOR: What's your commercial
7 interest?

8 MR. DABNEY: The commercial interest is to
9 partake of this very large and lucrative business that
10 the Respondent's evidence shows in this case.

11 JUSTICE SOTOMAYOR: So are you willing to
12 make the statement he's asked you for? You keep
13 equivocating on the answer.

14 I -- you know, it's like I don't want to say
15 it, is what you're telling us.

16 MR. DABNEY: I -- I think it is -- first of
17 all, the -- the Petitioner, up until now, has said what
18 he said. I could stand here and say I believe that, if
19 the registration were cancelled, it is highly likely
20 that the Petitioner would bring out a YUMS shoe.

21 JUSTICE BREYER: Okay. So, look, how are
22 you hurt then? Because suppose he wins here. Now, you,
23 if you have the president of the company say, hey, I'm
24 going to do an exact copy, go bring a -- go bring a
25 cancellation action.

1 If you can't quite say that -- you know, you
2 can start one -- you can't quite say that, but he says
3 something sort of vague about it that's close, go to the
4 PTO. And if he can't say anything like that at all,
5 well, then, maybe you should lose. I mean, that's --
6 that's -- what's the practical problem with that?

7 MR. DABNEY: The practical problem here is
8 that, in the procedural posture of this case, which is
9 analogous to a summary judgment situation, all
10 inferences, all reasonable inferences need to be drawn
11 in favor of the nonmoving party. The suggestion that we
12 had the opportunity to develop the record is completely
13 incorrect.

14 There wasn't even oral argument on this
15 motion. The district court never gave us any
16 opportunity to put in evidence, other than to come in
17 and say, we have what we believe is a basis for
18 jurisdiction now, Rule 41(a)(2) precludes you from
19 dismissing our counterclaim, but if you think what we've
20 alleged now is not enough, we request leave to amend our
21 pleading.

22 So to force us to start all over again in a
23 new suit is -- would be fundamentally unfair to the
24 Petitioner. And what we're seeking here is simply
25 judicial review.

1 We're seeking the -- the ability to obtain
2 extinguishment, not just of the particular claims that
3 this Plaintiff saw fit to waive, but the much broader
4 government-registered claim of right to exclude
5 competition in the sale of shoes, and the fact that --

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 The case is submitted.

8 MR. DABNEY: Thank you.

9 (Whereupon, at 11:04 a.m., the case in the
10 above-entitled matter was submitted.)

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