

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 STAR ATHLETICA, L.L.C., :

4 Petitioner : No. 15-866

5 v. :

6 VARSITY BRANDS, INC., ET AL., :

7 Respondents. :

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9 Washington, D.C.

10 Monday, October 31, 2016

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:07 a.m.

15 APPEARANCES:

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17 Petitioner.

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23 Respondents.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	JOHN J. BURSCH, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	WILLIAM M. JAY, ESQ.	
7	On behalf of the Respondents	26
8	ORAL ARGUMENT OF	
9	ERIC J. FEIGIN, ESQ.	
10	For United States, as amicus curiae,	
11	supporting the Respondents	45
12	REBUTTAL ARGUMENT OF	
13	JOHN J. BURSCH, ESQ.	
14	On behalf of the Petitioner	55
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 15-866, Star Athletica v. Varsity Brands.

5 Mr. Bursch.

6 ORAL ARGUMENT OF JOHN J. BURSCH

7 ON BEHALF OF THE PETITIONER

8 MR. BURSCH: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 Congress did not intend to grant a
11 century-long copyright monopoly in cheerleader uniform
12 design. And there are three points that support that
13 conclusion.

14 First, by subjecting two-dimensional
15 pictures and graphics as well as sculptures to Section
16 101 separability test, Congress made clear that
17 two-dimensional and three-dimensional designs must be
18 analyzed for separability.

19 Second, under Section 101's text, the
20 dispositive questions are twofold: Whether the design
21 features can be identified separately from the useful
22 article's utilitarian aspects; and second, whether they
23 can exist independently, that is, the design features do
24 not add to or change the useful article's utilitarian --

25 JUSTICE GINSBURG: Why, in this case, would

1 we even need to get to any question of separability?
2 What was submitted was a two-dimensional artwork. It
3 may not be like Mondrian, but it is chevrons and other
4 things.

5 They are not submitting the cheerleader's
6 uniform itself. They are not saying anything about the
7 shape of the uniform, the cut of the uniform. They are
8 just saying these zigzag designs -- and you can choose
9 from five different ones that are interchangeable, the
10 design.

11 So why isn't this a -- a case of not -- not
12 part -- the pictorial graphic element is not part of the
13 design of the cheerleader's uniform; it's superimposed
14 on it. It's reproduced on it. It's applied to it.

15 MR. BURSCH: There two reasons, Justice
16 Ginsburg. First, consider the example where you have a
17 designer who designs a military uniform. And on that
18 military uniform, they design the best desert camouflage
19 that's been ever designed in the history of the world.
20 And they submit it to the copyright office, and they
21 don't claim the design in the uniform, they only claim
22 copyright in the design on the uniform.

23 There is no question they would have the
24 copyright in the design, but the courts would still look
25 to see whether that adds to the utilitarian aspects of

1 that uniform such that that design copyright holder
2 could not prevent the military from producing a military
3 uniform that uses that design.

4 That's why it's so important to understand
5 that in Section 101, not only two-dimensional -- or
6 three-dimensional, but also two-dimensional designs are
7 subject to separability.

8 And there's a second reason, Justice
9 Ginsburg. What you're referring to, generally, is kind
10 of the area of fabric design. And a good example of
11 fabric design is the -- the flowers on the fabric in the
12 Folio Impressions case that we reprint on page 7 of our
13 reply brief.

14 And those flowers, you could expand the
15 design, you could contract the design, you can make any
16 article of clothing out of it whatsoever, you could
17 rotate it 45 degrees, and it always works functionally
18 the same.

19 Here, when you're talking about these
20 cheerleader uniform designs, the arrangement of the
21 color blocks and the chevrons and the stripes, if you
22 made it smaller and put it in the center of a uniform,
23 it would no longer have the slimming effects. It
24 wouldn't make the wearer look taller. I mean, if you
25 put it on a hat or a lunch box, it wouldn't have those

1 functions.

2 JUSTICE SOTOMAYOR: But they have put it on
3 those other items. That's their whole point, that
4 they've taken the pictorial design and applied it not
5 just to a -- by the way, this is not conceding, I think,
6 by them. They'll talk on their own and tell me -- that
7 this isn't obvious and -- and some of your amici brief
8 seemed to take that position, that if all we're looking
9 at is a picture of this color blocks and stripes, that
10 it may be too obvious to qualify for copyright
11 protection, or not original enough, whatever.

12 But my point is that they already have done
13 that. They've taken the designs and not put it on a
14 cheerleading uniform. They've put it on sweats.
15 They've put it on both tops and bottoms.

16 So what does that do for you?

17 MR. BURSCH: Let me respond to both of those
18 points, that the obvious in the second; first, the other
19 garments.

20 To the extent they're putting it on other
21 garments, if you look closely at those pictures, the
22 design changes. It's not the same design anymore. And
23 to the extent that it remains similar, it's because, for
24 example, the warmup jackets are putting those lines in
25 the same place.

1 So the great example of this is on page 21
2 of the Fromer and Buccafusco brief, where it is the
3 Stella McCartney dresses on Kate Winslet. And she's got
4 those slimming, dark lines along the sides that change
5 how she is perceived. It makes her shape look different
6 to someone who is looking at her, and the lines on these
7 uniforms do the exact same thing.

8 Similarly, you've got in -- in these
9 uniforms you've got the waist-narrowing Vs on the sides.
10 It creates the optical illusion that the wearer is
11 thinner than they actually are, slimmer. You've got the
12 Müller-Lyer lines --

13 JUSTICE SOTOMAYOR: How could you copyright
14 anything under your use of "utility," under your
15 definition of "utility"?

16 MR. BURSCH: Because my definition --

17 JUSTICE SOTOMAYOR: Every form -- I suspect
18 in most cases, every form gives something else, an
19 attractiveness, to the purchaser. That's why you have
20 designs of anything, even pictorial designs.

21 MR. BURSCH: We completely agree. And
22 that's why it's so important that you focus on the
23 statutory text, because under the exists-independently
24 requirement that we cite -- this is right from Section
25 101 -- the feature cannot add to or change the

1 "utilitarian aspects" of the "useful article."

2 So let's say that I've got a T-shirt with a
3 happy face on it, and maybe that makes me look better
4 because I appear happier. Well, that design has the
5 same effect whether I'm wearing it on my shirt, my
6 pants, my hat, or carrying it on my notebook.

7 But here, these designs only work when
8 they're on the article for which they are designed in
9 the exact place where they were designed.

10 JUSTICE KENNEDY: Suppose you have a Picasso
11 painting or Mondrian or Klee, and suppose they're alive
12 and they licensed the use of their picture on a garment
13 and it does just what you say: This Picasso painting or
14 Mondrian just completely captures the shape of the
15 article you want. The fact that it completely captures
16 it means that it can be copied?

17 MR. BURSCH: No, it does not, because the
18 Picasso --

19 JUSTICE KENNEDY: What's the difference
20 between Mondrian or Picasso and these -- and these
21 lines?

22 MR. BURSCH: Because I could take the
23 Picasso and I could just have it in a frame on the
24 chest, or I could expand it to the entire breadth of the
25 uniform.

1 With these designs, it has -- the side lines
2 have to be right here. The Vs have to be right here.
3 The Müller-Lyer line has to be right here. And if you
4 would move it, say rotate that 45 degrees, you can do
5 that with the Picasso and it would still look like a
6 Picasso. If you turned one of these designs 45 degrees,
7 it would no longer make the cheerleader look taller and
8 thinner.

9 JUSTICE KAGAN: How is your argument
10 different from this tuxedo shirt that the government
11 talks about -- it's on page 10 of the government's
12 brief --

13 MR. BURSCH: Yes.

14 JUSTICE KAGAN: -- where the lines really do
15 have to be just in a particular place on the piece of
16 apparel in order for it to make any sense at all and, in
17 there, that was found to be copyrightable?

18 Is that -- is there -- there any difference
19 between the tuxedo shirt and this?

20 MR. BURSCH: Well, there are differences,
21 and I think even the government would tell you, if you
22 asked them that question, that that design wouldn't
23 prevent you from making the tuxedo. And what we're
24 talking about here is making the cheerleader uniform,
25 the actual three-dimensional cheerleader uniform that

1 you wear, and that's the lesson of one Section -- or
2 Section 113.

3 JUSTICE KAGAN: No. But it prevents you --
4 it prevents you from making this T-shirt with these
5 lines on it in the same way that you're saying nobody
6 should be able to make a short dress --

7 MR. BURSCH: Right. And the point --

8 JUSTICE KAGAN: -- with those particular
9 lines in that particular place.

10 MR. BURSCH: The point is you can have a
11 copyright in that design. We don't contest that Varsity
12 has a copyright in the design. We wouldn't contest in
13 the hypothetical I used with Justice Ginsburg you could
14 have a copyright in the camouflage design. But that
15 copyright doesn't extend to prevent you from making the
16 useful article depicted. That's where the line stops.

17 CHIEF JUSTICE ROBERTS: So I guess I'm not
18 sure about your -- does that mean if you can have a
19 copyright in the tuxedo shirt design that somebody
20 couldn't draw a tuxedo shirt because that's copyrighted
21 two-dimensional?

22 MR. BURSCH: Correct, right. You could not
23 replicate the design, but you could make the tuxedo.
24 That's the lesson of Jack Adelman in Section 1.

25 JUSTICE KAGAN: But you're saying you

1 couldn't make the tuxedo shirt -- is that correct? -- or
2 you could?

3 MR. BURSCH: You could not. Let's take it
4 back to the cheerleader uniform, and then bring it back
5 to the text of the statute.

6 We don't contest that Varsity could take
7 these designs and put it on a notebook, put it on a
8 lunchbox, put it on a hat, and no one could copy that.
9 That's clearly within the subject matter of their
10 copyright.

11 What they can't do is prevent someone from
12 making the entire uniform. And the reason the statute
13 requires that is because you have this
14 identified-separately requirement.

15 JUSTICE SOTOMAYOR: So are you suing them
16 just for the pictures that are in their catalogue? Is
17 that what you're suing them for?

18 MR. BURSCH: We're not suing them; they're
19 suing us.

20 JUSTICE SOTOMAYOR: I'm sorry. You're
21 right. I apologize.

22 So can you get -- you could stop them from
23 using their pictures of their uniforms in their
24 catalogue --

25 MR. BURSCH: No.

1 JUSTICE SOTOMAYOR: -- but you can't stop
2 them from selling their --

3 MR. BURSCH: We can't stop them from using
4 their copyright to do anything on a printed page, or
5 even to take these designs and, like I said, put it on a
6 lunchbox or a notebook. But their copyright does not --

7 JUSTICE SOTOMAYOR: I transposed the two of
8 you. I apologize.

9 MR. BURSCH: No problem, Justice Sotomayor.

10 JUSTICE SOTOMAYOR: Can -- are they stopping
11 you from -- you think you can sell your uniforms
12 anywhere.

13 MR. BURSCH: Correct.

14 JUSTICE SOTOMAYOR: So what can't you do?
15 If we don't agree with you, if we agree with them that
16 this is a -- eligible for copyright absent some other
17 disqualification, like obviousness or lack of creativity
18 or whatever else, okay, assume we agree with them; what
19 can they stop you from doing?

20 MR. BURSCH: Well, actually, if you agree
21 with them that they have a copyright, then you're
22 agreeing with us, too, because we all agree they have a
23 copyright in the sketch.

24 JUSTICE SOTOMAYOR: Okay.

25 MR. BURSCH: They have a copyright in the

1 image. Our position is that they cannot then take that
2 image and prohibit us from making the actual
3 three-dimensional uniform. And the reason for that
4 under Section 101 is because the design neither can be
5 identified separately, nor can exist independently,
6 which are the statutory requirements of the "utilitarian
7 aspects" of the cheerleader uniform.

8 JUSTICE KAGAN: So but if I could just go
9 back and make sure I understand my question about the
10 tuxedo shirt.

11 MR. BURSCH: Yes.

12 JUSTICE KAGAN: If I have a copyright in the
13 design of the tuxedo shirt, not in a tuxedo --

14 MR. BURSCH: Correct.

15 JUSTICE KAGAN: -- I have a copyright in the
16 design of a tuxedo shirt, can I prevent other people
17 from manufacturing tuxedo shirts?

18 MR. BURSCH: Yes.

19 JUSTICE KAGAN: So why isn't that exactly
20 the same?

21 MR. BURSCH: Because --

22 JUSTICE KAGAN: Because here, I have a
23 design in a copyright dress, and now I'm trying to
24 prevent other people from manufacturing that cheerleader
25 dress with that design.

1 MR. BURSCH: Because then that's like
2 manufacturing the tuxedo. And what Section 113(b) says
3 is that all of the copyright law with respect to this
4 kind of issue, that was --

5 JUSTICE KAGAN: I don't understand why it's
6 like manufacturing a tuxedo. It seems as though it's
7 like manufacturing the thing that I have the design in.
8 I have design in the -- I have a design of a tuxedo
9 shirt, so you can't make a tuxedo shirt. I have a
10 design in a cheerleader dress, so you can't make the
11 cheerleader dress.

12 MR. BURSCH: It has to do with the very
13 careful statutory requirement that they exist
14 independently. What that means is the feature can't add
15 to or change the "utilitarian aspects" of the article.

16 When you're talking about the tuxedo design,
17 it's not adding anything functional to the T-shirt.
18 It's simply putting a design on it. When you're talking
19 about these designs on a cheerleader uniform, it
20 advances a number of utilitarian designs, and let me
21 just tick those off quickly.

22 First, it changes how the wearer is
23 perceived through optical illusion. And that's some of
24 the things that I've been referring to: the slimming
25 lines on the side, the waist-narrowing Vs, the

1 Müller-Lyer lines --

2 JUSTICE GINSBURG: Is that the same for all
3 five of the --

4 MR. BURSCH: All five. And I'll tick
5 through this list, and then let's look at the uniforms
6 and I can show you how they do that.

7 The second, like all uniforms, Justice
8 Kagan, it actually identifies the cheerleader as a
9 cheerleader, which was Judge McKeague's point, Judge
10 Cleland's point below. Because if these cheerleaders
11 were wearing wrestling singlets, no one would identify
12 them as cheerleaders.

13 And uniforms have a special identification
14 function. You think about military people who are in a
15 scene mixed up with civilians, and it's the military
16 uniforms that identify them as members of the military
17 that tells you whether the rules of war apply to them or
18 not.

19 JUSTICE GINSBURG: I thought conveying
20 information doesn't make an article useful.

21 MR. BURSCH: I don't think that optical
22 illusions are conveying information. I don't think that
23 identification is conveying optical illusion.

24 JUSTICE GINSBURG: Well, you said -- you
25 said a function of the cheerleader -- cheerleader's

1 dress is to identify the person as a cheerleader.

2 MR. BURSCH: Yes. That's a second function.
3 So let me first make clear, the optical illusions isn't
4 conveying information; it's actually causing you to see
5 the person differently than they actually are. So at a
6 minimum, that doesn't fall within this.

7 I think with the identification, that allows
8 you to sort people. That's different than conveying
9 information like facts and figures.

10 In addition, Your Honor, the conveyance of
11 information is actually something that has to be
12 considered as part of the exists-independently prong.
13 And you can see this on page 2 of the blue brief where
14 we have Section 101, both the "pictorial graphic" and
15 "sculptural works" definition and the "useful article"
16 definition.

17 And if you start with the "useful article"
18 definition, to determine whether something is a useful
19 article in the first instance, you ask whether it has an
20 intrinsic utilitarian function that is not merely to
21 portray the appearance of the article or to convey
22 information.

23 So portraying the appearance and conveying
24 information are utilitarian functions, but if that's the
25 only thing that they do, then it's not a useful article.

1 But once you've decided that a garment like a
2 cheerleader uniform is a useful article, now you turn to
3 the separability test. So now we look at the PGS
4 definition right above the "useful article" definition,
5 and there you are measuring the features against the
6 utilitarian aspects of the article.

7 It doesn't say only the intrinsic
8 utilitarian functions; it's any "utilitarian aspect."

9 So having made the first decision, yes, this
10 garment is a useful article, the statute requires us to
11 consider all the "utilitarian aspects" of the article.
12 And -- and that has to be the case or otherwise, again,
13 military uniforms, their identifying functions, you
14 could have lay people making military uniform designs
15 and barring the government from ever being able to
16 manufacture those uniforms themselves, even if everyone
17 agrees that that is a useful thing.

18 Two other quick things on functionality.
19 These designs also define the uniform's style line and
20 their actual three-dimensional shape.

21 So, Justice Kagan, the -- the zigzag that
22 they have on the bottom of 299A and 299B on page 4 of
23 our -- our blue brief, it's actually defining the shape,
24 and everyone agrees that the shape of a uniform can
25 never be copyrighted. There is no dispute about that.

1 The last thing --

2 JUSTICE GINSBURG: I thought that the -- the
3 shape was the same on all of these. We have different
4 designs, five different designs, same shape.

5 MR. BURSCH: No. The -- maybe this would be
6 a good time to turn to the pictures on pages 4 to 5 of
7 the blue brief, because these are the actual copyright
8 deposits involved. And what you can see -- I'll give
9 you a moment to pull up pages 4 and 5 of the blue brief.

10 On page 4, you have two of the deposits.
11 This is 299A on the bottom, 299B on the top, and that
12 zigzag actually defines the shape. And it also has the
13 functional utility of covering up the seams and making
14 that waistband stronger, not allowing it to stretch when
15 the cheerleader puts it on and off.

16 The stripes at the top that define the shape
17 of the collar, again, that's not copyrightable, also
18 cover up seams.

19 That stripe that goes across diagonally
20 right there that separates the white color block from
21 the red color block, those two color blocks have to be
22 stitched together, and what they do is they put those
23 stitches on the outside so that it'll be smooth on the
24 inside where the cheerleader is, and they have to cover
25 up those seams with a stripe. So all these things

1 are -- are functional.

2 So now let's look --

3 CHIEF JUSTICE ROBERTS: So do you get a
4 different -- a different result if, instead of stitched,
5 the design is applied?

6 MR. BURSCH: If it's -- it's subliminated,
7 which is something that they -- they've talked about.
8 It's no different with respect to the optical illusion
9 or the identifying function, because if you print the
10 same design in a cheerleader uniform, you'd have to
11 print it exactly the same way they stitch it.

12 Let's focus now on page 5. The bottom
13 drawing there is number 815. This is the red one with
14 the blue stripes that go down the side. It's those blue
15 stripes on the side, just like the Stella McCartney
16 dress, that cause the cheerleader to be perceived as
17 slimmer and more curvy than they actually are.

18 JUSTICE SOTOMAYOR: Mr. Bursch, I go back to
19 this point, because I'm a little confused. You started
20 by saying to me you don't want to be stopped from
21 manufacturing this particular uniform.

22 MR. BURSCH: Correct.

23 JUSTICE SOTOMAYOR: What do they -- what do
24 you think they have a copyright in?

25 MR. BURSCH: They have a copyright --

1 JUSTICE SOTOMAYOR: Or the -- what do you
2 think is eligible for copyright in this picture?

3 MR. BURSCH: I think the copyright
4 eligibility in this picture is the design, so long as
5 it's not being used to prevent the manufacturer of the
6 useful article that it was intended to be -- to appear
7 on.

8 Like I said, they --

9 JUSTICE SOTOMAYOR: Isn't that the
10 government's position too?

11 MR. BURSCH: Well, I -- I think they agree
12 with us on that point. If you look at --

13 JUSTICE SOTOMAYOR: On that point.

14 MR. BURSCH: Yeah. If you look at page 22
15 and 23 of their brief, they have our little black dress,
16 and then they have this very design here, number 815,
17 and they explain that if we are right that this design
18 has functionality --

19 JUSTICE SOTOMAYOR: So what can't you do,
20 assuming that you accept what they have a copyright in,
21 sort of the -- this thing, but not in stopping the
22 manufacture of the uniform --

23 MR. BURSCH: Yes.

24 JUSTICE SOTOMAYOR: -- what do you think
25 their copyright stops you from doing?

1 MR. BURSCH: Everything else. We could not
2 print this on a notebook cover. We couldn't put it on a
3 lunch pail. We couldn't put it on a hat. The -- the
4 only thing it allows us to do is to actually produce the
5 useful article itself.

6 And I -- I'm -- I'm talking so much about
7 cheerleader uniforms. I want to focus back on the text
8 just for a moment because the purpose of having a
9 separability test under Section 101 is to make sure that
10 anything that enhances in any way the functionality of a
11 useful article is not within the subject matter of
12 copyright.

13 JUSTICE KAGAN: Well, I guess that's the
14 question, is it really in any way, because the opposite
15 way of reading this statute is that the "utilitarian
16 aspects" of the article that you're talking about in
17 terms of the separability test?

18 MR. BURSCH: Yes.

19 JUSTICE KAGAN: That -- that those
20 "utilitarian aspects" should be understood to encompass
21 only the utilitarian functions that make something a
22 useful article in the first place, which means that they
23 should be held to exclude things that relate to the --
24 portraying the appearance of the article or things that
25 relates to conveying information, and that seems to me a

1 pretty good -- I mean, it's a confusing statute, but it
2 seems to me a pretty good holistic understanding of this
3 statute.

4 But that is what this statute is trying to
5 do, is to say there are certain kinds of things that
6 might in a broad sense be considered utilitarian, which
7 has to do with portraying appearance or conveying
8 information, that, for this inquiry, we want you to
9 exclude, that the separability test does not relate to
10 those kinds of things.

11 MR. BURSCH: And, Justice Kagan, that would
12 be a possible policy that Congress could have adopted,
13 but that's not what the statute says.

14 When you're applying the separability test,
15 you're comparing the features to the "utilitarian
16 aspects" of the article, not the intrinsic utilitarian
17 function. Not the ones that made it a useful article,
18 but all "utilitarian aspects" of the article. And --
19 and if you excluded things like uniform's identifying
20 functions, then someone would be able to prevent the
21 military from producing camouflage uniforms if they got
22 to that design first, and that's exactly the opposite of
23 what Congress intended.

24 You know, in fact, there has been a hundred
25 years of proposed legislation where people have tried --

1 JUSTICE KAGAN: But the reason why
2 camouflage is such a good example for your side is that
3 camouflage actually -- we can understand it as having a
4 utilitarian function that is different from simply
5 conveying information and it is different from simply
6 making something appear a certain way.

7 MR. BURSCH: Yeah.

8 JUSTICE KAGAN: In other words, the
9 utilitarian function that camouflage has is to hide you
10 in the woods.

11 MR. BURSCH: Yes.

12 JUSTICE KAGAN: And so -- so that function
13 would not be excluded by these things.

14 MR. BURSCH: Right, but the utilitarian
15 function of the fabric only works -- of the design only
16 works in conjunction with the useful article, and the
17 same is true here. When you talk about camouflage, it's
18 creating an optical illusion, right? We've got that
19 picture on page 1 of our reply brief, and when you first
20 look at that, you don't immediately see that there is a
21 person standing in that tree because they are
22 camouflaged.

23 Well, in the same way with these
24 cheerleader-uniform designs, it creates the optical
25 illusion that they are taller, that they're slimmer,

1 that they're -- they're curvier. You know, all these
2 functions work exactly the same way as camouflage.

3 JUSTICE BREYER: Forget the special things.
4 I have a picture of a dress now. The dress is in my
5 mind. I have abstracted it. When I look at those forms
6 in space, it looks like a dress.

7 MR. BURSCH: Yes.

8 JUSTICE BREYER: All right. Now, you'd say,
9 I take it, that when I've tried to identify the design
10 separately, I've ended up with something that is not
11 capable of existing independently of the -- of the
12 "utilitarian aspects" of the dress, because it looks
13 like a dress. So when Marcel Duchamp has a shovel on
14 the wall and says it's a work of art, he can have a
15 copyright as long as he doesn't try to sue people who
16 make shovels.

17 MR. BURSCH: Exactly.

18 JUSTICE BREYER: That's it.

19 MR. BURSCH: That is the "identified
20 separately" portion of our argument.

21 JUSTICE BREYER: That's your point. That's
22 your point.

23 MR. BURSCH: That's one of two points.

24 JUSTICE BREYER: And then if you fail on
25 that, you have all the specialized arguments about

1 special purposes of cheerleader costumes.

2 MR. BURSCH: Right. Now, part --

3 JUSTICE BREYER: But the basic argument is
4 what I said; is that right?

5 MR. BURSCH: Well, the part of your --

6 JUSTICE BREYER: Is that right?

7 MR. BURSCH: Yes, but the -- the part of
8 your description that makes me nervous is when you talk
9 about, I'm just imagining something, because that's the
10 "side-by-side" test that Varsity advances. That you
11 have to just imagine and visualize whether two things
12 can be conceived of --

13 JUSTICE BREYER: Well, why not? It says,
14 separable from, so we look to see if it's separable
15 from.

16 MR. BURSCH: Right, but what they ignore --

17 JUSTICE BREYER: What else do we have --

18 MR. BURSCH: But what they ignore --

19 JUSTICE BREYER: -- but our imagination?

20 MR. BURSCH: But what they ignore is that it
21 has to be independent. That means completely separate
22 on both sides --

23 JUSTICE BREYER: All right. And this --

24 MR. BURSCH: -- of the "utilitarian
25 aspects."

1 And so -- so then you lose the utility. You
2 know, they would say under their test that -- that here,
3 because I can conceptualize this uniform separate from
4 the fabric, that that's enough. But -- but it's not,
5 because if that design is doing work on the fabric in
6 the place where it was designed to be, then utilitarian
7 function is lost when you remove it. And that's exactly
8 what Section 101 requires, right?

9 JUSTICE BREYER: True, true.

10 MR. BURSCH: So you have to look not only at
11 the design; you have to look at the article as well.
12 And if the article does less work when that thing is
13 gone, it's not separable. It's protectable.

14 If there are no further questions, I'll
15 reserve the balance of my time.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Mr. Jay.

18 ORAL ARGUMENT OF WILLIAM M. JAY

19 ON BEHALF OF THE RESPONDENTS

20 MR. JAY: Mr. Chief Justice, and may it
21 please the Court:

22 Congress directed the copyright office and
23 the courts to protect applied art as well as fine art.
24 Applied art is art applied to a useful article. And
25 where that directive comes into the statute is in

1 Section 101 and in the -- in its definition of pictorial
2 graphic and sculptural works, and in the substantive
3 provisions that implement that.

4 Now, there are two key directives there,
5 which the Copyright Office has faithfully implemented
6 over many years in thousands upon thousands of
7 registration decisions for applied art, and two key
8 principles which the Petitioner rejects.

9 Number one is that this is a hypothetical
10 inquiry capable of existing independently of, can be
11 identified.

12 And the second is that courts and the
13 Copyright Office are not required to get into the
14 question of how effective the visual or artistic
15 expression of the copyrighted work is.

16 CHIEF JUSTICE ROBERTS: What do you do about
17 the camouflage case?

18 MR. JAY: We think that camouflage -- the
19 idea of camouflage certainly can't be copyrighted
20 under --

21 CHIEF JUSTICE ROBERTS: No, no, no. This is
22 a special design that things are curved one way or
23 another that nobody else had thought of.

24 MR. JAY: If it's a brand-new, original
25 camouflage pattern --

1 CHIEF JUSTICE ROBERTS: Right.

2 MR. JAY: -- we think -- although, I don't
3 think you need to agree with me about this in order to
4 agree with Varsity in this case. I do think that an
5 original camouflage pattern could be copyrighted and
6 then reproduced on backpacks, iPhone covers, you know,
7 other --

8 CHIEF JUSTICE ROBERTS: Well, can it be --
9 can it be reproduced on a military uniform?

10 MR. JAY: -- or -- a hunter's garment. I
11 think -- I think it could -- that copyright could extend
12 to that. If -- if that case -- if the camouflage is not
13 copyrightable in that extent, that that's for reasons
14 that, I think exactly as Justice Kagan said to my
15 friend, for reasons having to do with the utility of the
16 camouflage design itself. None of the useful article on
17 which it appears. And in this case, our position is
18 that the graphic designs, the striped chevrons and color
19 blocks, they are separable from the useful article on
20 which they appear because they have --

21 CHIEF JUSTICE ROBERTS: Well, if you take
22 them off the useful article, you have whatever color the
23 fabric is, a white dress. If you look at somebody in
24 the white dress, you don't say, oh, that's a
25 cheerleader.

1 MR. JAY: Well, respectfully, Mr. Chief
2 Justice, you can -- you can have a white cheerleading
3 uniform worn by a cheerleader with the team name and
4 team logo on it. And -- and I think that we've given
5 examples of why that is, in fact --

6 CHIEF JUSTICE ROBERTS: From the 1950s.

7 MR. JAY: Well, you could -- you could have
8 -- you could have -- if you look at page 34 of the Joint
9 Appendix, you'll see in Star's own catalogue examples of
10 uniforms that have neither stripes nor chevrons nor
11 color blocks. Those simply aren't essential to
12 identifying a cheerleader as a cheerleader, even if
13 identifying were a function that's cognizable under the
14 statute, which it is not; ultimately, the design can be
15 taken and put on other articles. It could be, you know,
16 as I said before, an iPhone cover or on the warm-up
17 jackets, warm-ups and jackets that are in -- reproduced
18 in a joint --

19 CHIEF JUSTICE ROBERTS: Your friend on the
20 other side concedes that those could be copyrighted. If
21 you take the design of a particular cheerleading uniform
22 and put it on the lunchbox or the computer cover, yes,
23 those can be copyrighted. But because it is the design
24 that makes the dress a cheerleading uniform, you can't
25 separate -- you can't copyright the design applied to

1 that functional article.

2 MR. JAY: Well, let me resist the premise,
3 of course, then, that this -- this particular design or
4 these five particular designs and striped chevrons and
5 color blocks are what make a cheerleading uniform a
6 cheerleading uniform. But even -- even setting that
7 aside, if you look at Section 113A, which sets out what
8 rights the owner of a copyright in a pictorial or
9 graphic sculptural work has, those rights include the
10 right to make copies of it to embody the design in or on
11 any kind of article, including a useful article. And
12 you know, now, it would be convenient for Star to have a
13 right that just doesn't extend to the product that they
14 want to make. That is not the statute that Congress
15 enacted. You have the owner of a copyright in a visual
16 work, pictorial graphic or sculptural work, has the
17 right to embody it on use --

18 CHIEF JUSTICE ROBERTS: I think you're
19 avoiding the question. Yes, you can have a copyright in
20 the pattern; and, yes, you can attach it to a useful
21 article like a lunchbox that's going to have a design.
22 But the question is when the design is what makes that
23 useful article what it is -- the design on a lunchbox
24 doesn't make the lunchbox a lunchbox. It's still a
25 lunchbox. But the design on a cheerleading uniform is

1 what makes it a cheerleading uniform, as opposed to a
2 plain dress.

3 MR. JAY: Well, I guess I just have to
4 resist the premise that these particular designs are
5 what make a cheerleading uniform a cheerleading uniform.

6 CHIEF JUSTICE ROBERTS: But if you -- I
7 understand you are resisting the premise as applied to
8 your case. But is that right as a general test, that if
9 it is the design that makes the article what it is in
10 its utilitarian aspect, that that cannot be copyrighted?

11 MR. JAY: I think that's exactly the kind of
12 utility that Congress did not write into the statute.
13 That -- that is not the kind of utilitarian function
14 that Congress contemplated. And I think that the best
15 evidence of that is both in the legislative history,
16 meaning the House report, and also in the register's
17 testimony about what the Copyright Office had been doing
18 for decades explaining to Congress in the course of
19 adopting doing the '76 Act, both the register and the
20 House reports say that virtually all two-dimensional
21 designs applied to useful articles are going to remain
22 copyrightable.

23 CHIEF JUSTICE ROBERTS: Well, the House
24 report is not the law, right?

25 MR. JAY: To be sure -- we are not -- we are

1 not saying that it is, but we are saying that if you
 2 look, it's perfectly consistent with our view of what a
 3 utilitarian aspect of a useful article is. And we also
 4 think that, you know, again you -- even if the House
 5 report had not said we are intending to codify this
 6 Court's decision in Mazer and the Copyright Office
 7 practice, this Court, I think, would have presumed that
 8 Congress was doing so. Here, I think that presumption
 9 is amply justified.

10 CHIEF JUSTICE ROBERTS: So you're saying
 11 that the cheerleading uniforms do not serve a
 12 utilitarian purpose?

13 MR. JAY: We are saying that they don't
 14 serve the utilitarian purpose -- that the purposes my
 15 friends attributes to them are not utilitarian aspects
 16 of the article under the statute. They are certainly
 17 utilitarian. They cover the body. They have a --
 18 provide mobility.

19 JUSTICE SOTOMAYOR: Does the university that
 20 contracts with you know that they have to buy their
 21 uniform for you -- from you for 99 years plus whatever?
 22 Every university that you sell these cheerleading
 23 uniforms to, do they know that under your copyright,
 24 they are stuck with you forever?

25 MR. JAY: No Justice Sotomayor, that's --

1 that's not the case.

2 JUSTICE SOTOMAYOR: Why not? If you have a
3 copyright on this design, and they have adopted their
4 school colors, orange and black, and I presume some of
5 these are cheerleading uniforms belonging to certain
6 teams, they buy them and they put their names on them,
7 correct?

8 MR. JAY: Sure. Schools certainly put their
9 names on cheerleading uniforms.

10 JUSTICE SOTOMAYOR: So why aren't they stuck
11 with you being their only supplier of their school
12 colors for the rest of their existence?

13 MR. JAY: There are many, many, many
14 variants available, both copyrighted and uncopyrighted,
15 you know, variants, of cheerleading uniforms, that, you
16 know, Varsity and its competitors can sell. Again,
17 there are examples in the Joint Appendix, you know, of
18 the pages I referred to.

19 JUSTICE SOTOMAYOR: So I'm right, once a
20 school -- you design a uniform for a school, that's it,
21 forever?

22 MR. JAY: Well, respectfully, Justice
23 Sotomayor -- Justice Sotomayor, if we -- if we design
24 this particular combination of elements and we do own
25 the -- we do own a copyright in that combination, but we

1 don't own the idea of an orange and black cheerleader
2 uniform or a black and yellow cheerleader uniform.

3 JUSTICE BREYER: But the point, the question
4 is, I think, if I -- because I have exactly the same
5 question. And it starts with the premise that
6 everything has a design. Some -- really, a lot of that
7 set can be copyrighted. All women's clothes have
8 design. All men's clothes have design. For a hundred
9 and more-than-that years, the fashion industry has not
10 enjoyed copyright protection. It is an industry on the
11 women's side, I believe, that 225 billion dollars, at
12 least, worth of clothes are sold every year. If
13 suddenly in this case we say that dresses are
14 copyrightable, and they are because every one of them
15 has some design, perhaps we'll double the price of
16 women's clothes. Now if that's -- that's, I think, the
17 thrust of the question, and that is a practical
18 question.

19 I also have a conceptual question which I'd
20 like to ask, but why don't you disabuse me of my notion
21 that we are into monopoly big-time?

22 MR. JAY: Absolutely, Justice Breyer,
23 because, you know, Justice Sotomayor's question was
24 about the particular patterns.

25 JUSTICE BREYER: And mine is about all

1 dresses, all clothes, that's all suits.

2 JUSTICE SOTOMAYOR: You're killing -- you're
3 killing knock-offs with -- with copyright. You haven't
4 been able to do it with trademark law. You haven't been
5 able to do it with patent designs. We are now going to
6 use copyright law to kill the -- the knockoff industry.
7 I don't know that that's bad. I'm just saying.

8 MR. JAY: So let me clarify at the -- at the
9 outset, we are not claiming the shape, the cut, or
10 anything like that about -- about these garments. Look
11 at page 60 of our brief, and you will see catalogued all
12 the places where we set out what our registration is in.
13 It's in the two-dimensional art work that appears on the
14 surface.

15 JUSTICE BREYER: Well, I see it here, and as
16 I look at it and cut away the wings, I have left -- this
17 is page 22 of the ASG's brief -- what I have left is, I
18 have left the design you're after. It is a
19 two-dimensional design that looks to me very much like a
20 dress. It looks very much like a two-dimensional
21 picture of a dress that covers a woman's body. Now, did
22 you -- that's what you want to copyright, that thing --

23 MR. JAY: Absolutely not, Justice Breyer.

24 JUSTICE BREYER: It's not. So you have a
25 different design. So we are not talking about -- about

1 figure eight. We are not talking about figure eight.

2 MR. JAY: Our design in figure eight, if you
3 look at the registration that corresponds to that
4 figure, which you will find in the Joint Appendix at G
5 46, you will see that the registration is for
6 two-dimensional art work.

7 JUSTICE BREYER: Of course. It's a two- --
8 look, I can do a two-dimensional art work that looks
9 like a Rubik's cube. I mean, a two-dimensional can look
10 like a three-dimensional thing.

11 MR. JAY: No, but it's the two-dimensional
12 artwork that appears on this surface. It's not -- it's
13 not that we did a two-dimensional picture of a dress and
14 said now we own the dress.

15 JUSTICE BREYER: You didn't say you own the
16 dress.

17 MR. JAY: Correct.

18 JUSTICE BREYER: What you said is you own
19 the design of the dress.

20 MR. JAY: No.

21 JUSTICE BREYER: I -- now isn't -- you
22 don't?

23 MR. JAY: No. We say -- we say that we own
24 the design that -- that appears on -- in that case on
25 the dress, but that can -- that can also appear on the

1 warmups. It can also appear on the jacket.

2 JUSTICE KAGAN: Mr. Jay, see --

3 JUSTICE BREYER: Now, wait. I have a
4 conceptual question. I'm not yet satisfied with your
5 answer to the practical question because I fear that any
6 good designer or lawyer could go and take any dress or
7 suit, just about, and produce a picture that looks very
8 much like that and then sue the companies that use the
9 same dress or style. That's my practical, but this is
10 the conceptual.

11 Since we can take -- since we can take
12 anything -- anything -- to a two-dimensional picture and
13 put it on the wall like Marcel Duchamp, if I decide in
14 your favor, am I not allowing copyright for virtually,
15 assuming other things satisfied, every design of a
16 useful article, the very thing that Congress said they
17 did not want?

18 MR. JAY: No, absolutely not, because the
19 ability to take the shovel and hang it on the wall does
20 not make the shovel a sculpture because the things that
21 make the "utilitarian aspect" --

22 JUSTICE BREYER: I'm not talking about the
23 shovel at the moment. I am talking about an artist's
24 ability to take a piece of clothing, which is a
25 utilitarian object, and do a two-dimensional picture of

1 the piece of clothing, which it has some things on it,
2 some chevrons, or nothing. It just looks like a dress.
3 Now on your theory, does that not become copyrightable?

4 MR. JAY: Only in the surface design, not
5 the folds, not the pleats, not the shape, not the cut.
6 And my friend agreed with me --

7 JUSTICE KAGAN: Mr. Jay, can I --

8 JUSTICE ALITO: As to the -- as to the
9 surface design, I have a similar question. But suppose
10 I go to a Museum of Modern Art and I look at a great
11 many famous abstract paintings. I assume that you would
12 say that all of those could be copyrighted, could they
13 not?

14 MR. JAY: You know, if they are original and
15 meet the other requisites, one assumes so, yes.

16 JUSTICE ALITO: And so the design on any
17 fabric, potentially, could be copyrighted, could it not?

18 MR. JAY: The surface --

19 JUSTICE ALITO: If it began as a painting?

20 MR. JAY: The owner of the copyright in that
21 painting has the right to reproduce it on fabric, on
22 other textiles, you know, or you know, on a -- on a
23 tapestry, on a rug or on wallpaper. Absolutely.

24 JUSTICE KAGAN: And isn't it -- just
25 starting from the premise that Justice Alito suggested,

1 the -- fabric designs are copyrightable; is that
2 correct?

3 MR. JAY: That's what -- that's what I was
4 trying to say to Justice Breyer --

5 JUSTICE KAGAN: Everybody agrees with that.

6 MR. JAY: My friend agreed that the fabric
7 design is copyrightable.

8 JUSTICE KAGAN: So it seems to me that the
9 question, right, in this case, is are you going to treat
10 this kind of design just as you would a fabric design?

11 MR. JAY: That's right.

12 JUSTICE KAGAN: And as I understand
13 Mr. Bursch's point, what Mr. Bursch is saying is, no,
14 you shouldn't, because this kind of design has -- it --
15 it follows the figure of a human body, essentially. And
16 that's the difference between just a design of like
17 stripes and zigzags and chevrons sort of abstractly, and
18 then one that's put on something that looks like a
19 particular piece of apparel that's meant to fit onto a
20 human body in a particular way.

21 And that seems to me to be the -- the
22 distinction he's making, and I want you to tell me why
23 that distinction, in your view, doesn't make a
24 difference.

25 MR. JAY: It doesn't make a difference

1 because what he -- he has identified a number of
2 different supposed "utilitarian aspects," and some of
3 which, I think, actually go to the fabric of the dress
4 and were not -- or the uniform. We're not laying claim
5 to that.

6 What he's talking about are the -- are the
7 visual ones, the ones that make the cheerleader look a
8 particular way. And he's saying that you can't
9 copyright those as it applies to a cheerleader uniform
10 because they're especially useful there. Like, you
11 know, that's where they are most effective in conveying
12 this image.

13 We -- that is not what the definition of
14 utilitarian -- the meaning of "utilitarian aspects"
15 encompasses because any work of visual art conveys a --
16 you know, a visual message or an aesthetic impact. And
17 to have the ones that are most effective be least
18 copyrightable we think doesn't work.

19 And I think that --

20 JUSTICE ALITO: What is the difference
21 between that utilitarian argument and the utilitarian
22 argument as applied to camouflage?

23 MR. JAY: The utilitarian argument as
24 applied to camouflage is that it's -- I mean, as I said
25 to the Chief Justice, we do think that if you see

1 camouflage as portraying the appearance of a -- you
2 know, of a particular thing, you know, or -- or sending
3 a message that you belong in -- in a particular group,
4 that would not be copyright-eligible -- sorry -- that --
5 that would not be a "utilitarian aspect."

6 If camouflage is not copyright-eligible,
7 it's because it performs something that's different from
8 making you look good in a -- in an anesthetic way. It's
9 because it conceals. You know, ultimately, we think the
10 best answer is that --

11 JUSTICE KENNEDY: But why -- why should that
12 make a difference?

13 MR. JAY: I mean, the word "utilitarian" is
14 the key word in the definition. And I -- I think maybe
15 using one of the fine arts examples, you know, might
16 help to illustrate this point.

17 If you look in the amicus brief of
18 Professors Buccafusco and Fromer, they have in their
19 illustration number one is the fresco painted on the
20 dome of a church. And they say that's not
21 copyright-eligible because it uses techniques to make
22 the dome look bigger.

23 And now you certainly can't get a copyright
24 in the idea of Trompe-l'oeil art, but you certainly get
25 a copyright in a work of fine art that decorates a room

1 or a rug or a useful -- you know, a useful article, and
 2 that makes the room look better or makes the person who
 3 wears it look better. And the fact that it's effective,
 4 that it makes -- you know, it serves to make that
 5 particular church look bigger, that is not a reason to
 6 withhold a copyright protection.

7 CHIEF JUSTICE ROBERTS: Your -- the argument
 8 is not that it makes the room or whatever look better.
 9 The argument here is the design makes this look like a
 10 cheerleader uniform, which is different and distinctive
 11 function in -- than a normal dress.

12 MR. JAY: Well --

13 CHIEF JUSTICE ROBERTS: It's not simply to
 14 cover the body. It's to convey a particular message.
 15 It shows that you're a member of the cheerleading squad
 16 and --

17 MR. JAY: Well -- well, if that were true,
 18 Mr. Chief Justice, they'd have a decent argument under
 19 the merger doctrine if there were -- if there were only
 20 a few ways of expressing that you are a cheerleader and
 21 that you are wearing a cheerleader uniform. You can't
 22 get a copyright in an idea. That's 102(b).

23 The merger doctrine, not this utilitarian
 24 separability analysis that we've been talking about, the
 25 merger doctrine is the primary way in which courts and

1 the Copyright Office can, you know, prevent the owner of
2 a copyright from locking up the ways of expressing a
3 particular idea. So that if, on the facts, there were
4 only a couple ways of looking like a cheerleader, that
5 would be the way to -- to get at that.

6 JUSTICE KENNEDY: Under your -- under your
7 argument, and as you best understand your colleagues'
8 argument, to what extent are there findings of fact
9 involved here? I mean, are we the ones that decide
10 this?

11 You wanted to introduce expert testimony.
12 What was the expert testimony you wanted to introduce?

13 MR. JAY: The other side wanted to introduce
14 expert testimony, Your Honor. Petitioner told this
15 Court under page 40 of the petition for cert that this
16 is a pure legal question.

17 We agree that, under the correct analysis,
18 it is a pure legal question. We think that's a real
19 vice of the other side's view, that they are asserting,
20 you know, essentially, as a matter of law that certain
21 things are necessary to be a cheerleader; that certain
22 things are -- influenced by function or form.

23 CHIEF JUSTICE ROBERTS: Well, you just said
24 that. You said there are a lot of other ways to show
25 that somebody's a cheerleader. And, you know, maybe I

1 started to try to think of them. And, you know, it's
2 not just that they all look alike, it's -- so maybe
3 that's one area which you have testimony, that 95
4 percent of the cheerleading squads look like this. So
5 maybe there aren't other ways.

6 MR. JAY: Well, ultimately, the question is
7 -- the question is the hypothetical question whether
8 this design can -- can be identified separately from the
9 articles on which it appears and whether it has -- it
10 has an existence separate from those articles.

11 And I think --

12 JUSTICE KAGAN: And when you say "this
13 design" -- I'm sorry, Mr. Jay.

14 MR. JAY: No, Your Honor --

15 JUSTICE KAGAN: When you say "this design,"
16 just to make sure I understand what you're claiming
17 copyright in, so if I'm looking at page 4 and there's
18 this design with a blue stripe and a white stripe and a
19 red stripe and a white stripe and a blue stripe, could
20 somebody else come along and just add another red stripe
21 to that? And would that -- would you then say you
22 violated our copyright?

23 MR. JAY: Our copyright is in the
24 arrangement of the design elements.

25 JUSTICE KAGAN: The particular arrangement.

1 So if somebody just added a different, another stripe.

2 MR. JAY: Well, adding another stripe is --

3 I -- I hesitate to agree with because usually

4 reproducing a copyrighted work and then adding some

5 other stuff around it is not enough to avoid

6 infringement. But if they changed the colors and -- and

7 reordered the elements, I think they'd have a good

8 argument that it's not infringing.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 MR. JAY: Thank you, Mr. Chief Justice.

11 CHIEF JUSTICE ROBERTS: Mr. Feigin.

12 ORAL ARGUMENT OF ERIC J. FEIGIN

13 FOR UNITED STATES, AS AMICUS CURIAE,

14 SUPPORTING THE RESPONDENTS

15 MR. FEIGIN: Thank you, Mr. Chief Justice,

16 and may it please the Court:

17 This case is about the reproduction of

18 two-dimensional artwork on a useful article. The

19 question here is fundamentally indistinguishable from

20 the tuxedo shirt that my friend conceded would retain

21 copyright protection, or putting a sports team logo on a

22 T-Shirt that identifies somebody as a team member or a

23 fan.

24 CHIEF JUSTICE ROBERTS: Or putting

25 camouflage on a military uniform?

1 MR. FEIGIN: So, Your Honor, camouflage has
2 been protected by copyright for decades. The Copyright
3 Office's practices on that reflect the view that
4 camouflage is generally eligible, at least for a very
5 thin copyright, in the creative elements of a particular
6 camouflage pattern that aren't dictated by the
7 underlying ideas and scientific principles that make it
8 work.

9 CHIEF JUSTICE ROBERTS: As applied to a
10 military uniform.

11 MR. FEIGIN: So as applied to a military
12 uniform, if someone were asserting a copyright in
13 camouflage in such a manner as to prevent the
14 manufacturer of a uniform from actually manufacturing a
15 uniform that would perform a concealment function, and
16 if concealment were, as Justice Kagan was positing,
17 considered to be separate from the sorts of expressive
18 functions that are traditionally protective by
19 copyright --

20 CHIEF JUSTICE ROBERTS: All of which --

21 MR. FEIGIN: -- then there might
22 infringement --

23 CHIEF JUSTICE ROBERTS: -- suggest the
24 answer was yes; right?

25 MR. FEIGIN: Then there might be some

1 infringement defenses that would apply in that context.
2 But what I think the dispute in this case is really
3 boiling down to is a question of what the utilitarian
4 aspects of the "useful article" are. And I think there
5 are two the Petitioner's identifying: One is conveying
6 the information that someone is a cheerleader,
7 identifying someone as a cheerleader; and the other is
8 affecting the viewer's perception of the wearer's
9 appearance. And I'd like to just explain overall --

10 JUSTICE BREYER: What about the woman or the
11 man who wishes -- and, indeed, this is a normal reason
12 for wearing clothes -- they are making a statement about
13 themselves? They're saying who they are? The clothes
14 on the hanger do nothing; the clothes on the woman do
15 everything. And that is, I think, what fashion is
16 about.

17 JUSTICE KAGAN: That's so romantic.

18 JUSTICE BREYER: It always has been in
19 history. Now, isn't that a -- what?

20 MR. FEIGIN: Well, Your Honor, it is --

21 JUSTICE BREYER: Why do we wear robes?

22 MR. FEIGIN: Your Honor, it is clear and it
23 is common ground among the parties and with the
24 Copyright Office that the actual cut and shape of a
25 garment isn't copyrightable.

1 JUSTICE BREYER: What about Lemley's --

2 MR. FEIGIN: What we're here about --

3 JUSTICE BREYER: What about Lemley's test on
4 page 17 of his brief? As I -- as I read it, as I read
5 it and I thought -- and I'm sure you've read it -- and
6 it seemed to me that it does say that a two-dimensional
7 picture of a three-dimensional piece of clothing is not
8 entitled to copyright because it is not a design of
9 anything but a utilitarian object, the clothes, whether
10 they are beautiful clothes, ugly clothes, cheerleader,
11 or anything else.

12 MR. FEIGIN: Well, Your Honor, I think I --
13 we disagree that you can't take the aesthetic aspects of
14 the cheerleading uniform and put them in a different
15 medium.

16 JUSTICE BREYER: But do you agree with
17 Lemley's statement, which, I mean, it's such an -- all
18 the professors are there --

19 MR. FEIGIN: No. Your Honor --

20 JUSTICE BREYER: -- and that's why I thought
21 probably you've read it. And it's from all over the
22 country, and I wanted to get your opinion of it.

23 MR. FEIGIN: Your Honor, as you've
24 characterized the statement, we don't agree with it. We
25 do think that the two-dimensional artwork here is

1 separable from the garment, the cut and shape of which
2 is not copyrightable. Let me just make a couple of
3 points.

4 One is about the act and what it's doing
5 overall. The act overall is drawing a distinction
6 between the kinds of aesthetic communicative expressive
7 functions that are traditionally protected by copyright
8 and the kinds of mechanical, pragmatic, utilitarian
9 functions that are exclusively the domain of a "useful
10 article." And the kinds of functions that Mr. Bursch is
11 talking about here are fundamentally expressive
12 functions.

13 First of all, conveying the information that
14 someone is a cheerleader. When someone is wearing a
15 particular piece of clothing intended to convey that
16 they're a member of a particular group or that they hold
17 a particular belief, that is the kind of expressive
18 function that copyright traditionally protects.

19 And, indeed, there is an express exception
20 in the definition of a "useful article" for conveying
21 information. And I think this is indistinguishable from
22 putting a sports team logo on a T-shirt to identify
23 someone as a Washington Capitals fan, for instance.

24 JUSTICE KAGAN: Well, what do you do in
25 Mr. Bursch's examples of military uniforms or police

1 officer uniforms, something like that?

2 MR. FEIGIN: So, Your Honor, those also are
3 conveying information. Now, if someone were trying to
4 assert a copyright in the design of a policeman uniform
5 in such a way that it turned out there were, say, only a
6 limited number of ways to identify someone as a
7 policeman and a copyright were being asserted to prevent
8 identification of someone as a policeman, then the
9 defenses that we discuss at pages 39 to 40 of our brief,
10 the "merger" doctrine, the "scènes à faire" doctrine,
11 would apply to prevent what would effectively be
12 monopolization of that idea.

13 So if that were really happening in this
14 case -- and there are some reasons to think that's not
15 actually happening in the cheerleading realm, and we
16 discuss those in our brief -- if that were happening,
17 those defenses would apply.

18 JUSTICE GINSBURG: What about the Galiano
19 case? That was the casino uniform. Why is that
20 different from the cheerleader uniform?

21 MR. FEIGIN: Well, Your Honor, we -- we
22 don't agree with the result in the Galiano case. To the
23 extent there was some sort of unique, two-dimensional
24 elements that some casino wanted to put on its uniforms
25 to identify its employees, that artwork would be

1 copyrightable and -- just like the cheerleading uniforms
2 in this case.

3 I also want to address the argument --

4 JUSTICE BREYER: Well, before you get away
5 from that, one thing very quick, because maybe I really
6 agree with you.

7 MR. FEIGIN: I hope so.

8 JUSTICE BREYER: I had looked at page 22 of
9 your brief at figure 8. And what I had seen there when
10 I took the arms away was a picture of a thing that was a
11 picture of the cut and style and not just a picture of
12 chevrons. And so -- but if that's what it is, then you
13 would agree and I would agree that it's not -- everybody
14 would agree, I guess, it's not copyrightable.

15 MR. FEIGIN: The point of figure 7 and 8 in
16 our brief, Your Honor, is that everything you see in
17 figure 7 that's also in figure 8 is not copyrightable.
18 That's the cut and shape of the dress. It's the stripes
19 and the coloration, the lines and the design in this
20 particular arrangement.

21 JUSTICE BREYER: So what happens if when you
22 look at the picture that they submit to the Copyright
23 Office and try to figure out if it's separable what you
24 see is a picture of a dress that goes around a woman
25 which does look like, you know, shape and cut and so

1 forth?

2 MR. FEIGIN: So they have generally checked
3 a box, as they did here, that says two-dimensional
4 artwork, and the Copyright Office understands all
5 they're trying to protect is the surface imagery of the
6 garment, and that, they'll register.

7 I do want to address this idea that making
8 the viewer look different is somehow the kind of
9 non-expressive function that is associated with the
10 "useful article" -- with a "useful article." And I
11 think that approach would be contrary to congressional
12 intent and completely inadministrable.

13 If you look at page 55 of the House report,
14 you'll see that Congress believed that two-dimensional
15 designs on fabric or on wallpaper would be separable and
16 thus copyrightable. But that wouldn't be true under the
17 approach petitioner is urging.

18 Under that approach, you'd have to look at a
19 particular two-dimensional design on wallpaper and try
20 to assess whether and to what degree it might make the
21 room look bigger or brighter or smaller or darker. I'm
22 not aware of any scientific reliable or consistent way
23 --

24 JUSTICE KAGAN: Well, that seems a problem.
25 But on the other hand, it seems a little bit strange

1 that, you know, take a garment designer who wants to do
2 a design that is slimming. And if -- there are all
3 kinds of structural things you can do that are slimming,
4 and those would not be copyrightable.

5 MR. FEIGIN: Correct.

6 JUSTICE KAGAN: Then you're saying that
7 the -- that the placement of stripes or color, that is
8 copyrightable, even though the garment designer is
9 really trying to do the same thing through color and
10 through graphic design as he was doing through the shape
11 of the article.

12 MR. FEIGIN: So, Your Honor, I definitely
13 think there is a spectrum here, but let me try to
14 explain why I think this is on the expressive side of
15 the line, not the non-expressive side of the line.

16 If I were to wear a shirt that said "Please
17 focus on my very nicely toned arms. I've worked very
18 hard on them," I think we'd all understand the message
19 conveyed by that shirt to be expressive and separable
20 from the non-expressive functions that the shirt
21 performs covering my body.

22 Now, what -- the kinds of things that we're
23 talking about here are essentially sending that same
24 message, albeit in a nonverbal, more subconscious way,
25 but they're still fundamentally expressive because

1 they're about how the wearer is trying to portray
2 themselves and their appearance to the world, and that's
3 all that's being copyrighted. That's traditionally
4 within the domain of copyright. It is not copyrighting
5 a particular functionality.

6 JUSTICE KENNEDY: Is the domain of copyright
7 to copyright the way people present themselves to the
8 world?

9 MR. FEIGIN: The way that someone
10 expresses -- the way that someone expresses an idea to
11 the world -- in this case, the idea would be how they
12 look -- is something that is very akin to traditional
13 expression that's protected by copyright.

14 Again, here we're just talking about
15 two-dimensional artwork. If we were -- if we adopted
16 petitioner's view, the Copyright Office, when it looks
17 at a particular two-dimensional design, would have to
18 figure out what effect it would have in all sorts of
19 contexts on various "useful articles," which would
20 really --

21 CHIEF JUSTICE ROBERTS: The whole point of
22 the case is we're not just talking about two-dimensional
23 artwork. We're talking about two-dimensional artwork
24 applied to a -- the fabric in a way that conveys a
25 utilitarian function. It's not just -- your friend

1 concedes that if you want to put a picture of this on a
2 lunchbox or whatever that you have a copyright in that.
3 It's only when you apply it to a garment -- because it
4 is what makes that garment a cheerleading outfit as
5 opposed to somebody else; it serves that utilitarian
6 function -- that you don't have a copyright.

7 MR. FEIGIN: Your Honor, I think our
8 fundamental disagreement is whether this is actually
9 performing utilitarian functions. If I could just --

10 CHIEF JUSTICE ROBERTS: Sure.

11 MR. FEIGIN: -- finish my response.

12 And I think one -- I think one problem with
13 the approach you've just articulated is it really
14 divorces Section 101 and 113(a) because you could get a
15 copyright in the illustration, and then he would say
16 it's not copyrightable in certain applications, and that
17 doesn't make much sense.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. Bursch, six minutes.

21 REBUTTAL ARGUMENT OF JOHN J. BURSCH

22 ON BEHALF OF THE PETITIONER

23 MR. BURSCH: Thank you, Mr. Chief Justice.

24 I want to start with that final point that
25 the government makes, that if you had a statement that

1 says look at my arms on your shirt that somehow that
2 would be conveying the same message. That -- that's not
3 what this is doing. No one is saying, look at my arms.
4 Like with camouflage, you're not saying, look, you can't
5 see me.

6 The camouflage is actually doing work when
7 it's put in connection with the garment that it was
8 designed for. That's the point.

9 And on that point, Justice Kagan, I just
10 want to make clear about the functionality that we are
11 claiming here with respect to these designs. It's not
12 just that the lines follow the figure of the human body.
13 It's that they actually make the human body appear to
14 look different than it would if they were not wearing
15 those designs. It's just like camouflage.

16 JUSTICE SOTOMAYOR: But the colors do. I
17 mean, the colors are just colors. You can -- what he is
18 saying is you can achieve the same thing with probably
19 most colors and stripes and whatever else is in these
20 designs.

21 MR. BURSCH: Well, they are not claiming
22 copyright in the colors. They -- they can't --

23 JUSTICE SOTOMAYOR: No, they are not.

24 MR. BURSCH: -- the arrangement.

25 And I would say even as to color, this Court

1 in the Qualitex case, that was a trademark case, you
2 said that black, the color black has the ability to make
3 a motor look smaller than it actually is. It has a
4 function that makes it ineligible for trademark
5 protection, and, really, that's the same thing that we
6 are talking about here. That you can use graphic design
7 like camouflage --

8 JUSTICE SOTOMAYOR: Before we are going much
9 further, you're now saying that any -- you're saying
10 there is no copyright on those things.

11 MR. BURSCH: Oh, no. We are saying --

12 JUSTICE SOTOMAYOR: On those pictorial
13 representations --

14 MR. BURSCH: Yes.

15 JUSTICE SOTOMAYOR: -- because they can
16 always be applied in a way that has a function.

17 MR. BURSCH: That -- that's not correct,
18 because if you took the sports logo that the government
19 mentioned, that's a perfect example of something that
20 doesn't require the garment for its functionality,
21 because, just like we were discussing earlier, you could
22 take the logo, and you could put it on your hat or your
23 socks or your lunch pail or on your -- your mitten that
24 you hold up when the folks hit the home run, right,
25 because it doesn't rely at all for the article on which

1 it's appeared for its functionality.

2 But here, these designs rely entirely --

3 JUSTICE SOTOMAYOR: Certain kinds make you
4 look fatter --

5 MR. BURSCH: Right. Exactly.

6 JUSTICE SOTOMAYOR: You believe that --

7 MR. BURSCH: And if --

8 JUSTICE SOTOMAYOR: So you're saying none --
9 even if you find a color rainbow of some weird elk that
10 could never be copyrighted, because --

11 MR. BURSCH: They -- they could have the
12 copyright in the two-dimensional design, but if there
13 was an application where it would create functionality
14 when paired with a garment, then, yes, their copyright
15 would not extend to prevent --

16 JUSTICE SOTOMAYOR: How about the gorilla, a
17 gorilla's hand around your -- one of the pictures in --

18 MR. BURSCH: Right. That -- that's a much
19 closer case than this one.

20 For starters, if we're walking through the
21 analysis, first you look at the identified separately,
22 and, here, when you look at the arrangements of the
23 stripes and the color blocks and the chevrons, you --
24 you see the cheerleader uniforms.

25 And this is Justice Breyer's point about

1 page 17 of the Lemley brief, right, that the aesthetic
2 elements exist only as part of a cheerleader uniform.
3 There's nothing to extract. That's why this case is
4 different than the gorilla case.

5 So then what you have to ask is if the --
6 the -- the T-shirt in that case was less functional
7 without the design, and I think that's a -- a close
8 call.

9 But -- but this case is like the camouflage
10 because it's -- it's doing the work of changing the way
11 the body is perceived just the way camouflage changes
12 the way the body is perceived, and just like military
13 uniforms, having an identifying function which is
14 extremely important.

15 So I -- I bring this all back to what the
16 Chief Justice said, isn't it the test, if it's the
17 design that makes the article what it is, then you can't
18 copyright it. And I would say that that's almost
19 exactly right.

20 They can copyright the design and prevent
21 reproduction of the two-dimensional design on the
22 notebook or the lunchbox, but if it's the design that
23 makes the article what it is, you can't manufacture --

24 JUSTICE GINSBURG: How do we decide that
25 it's -- how do we decide that it's the design that makes

1 it what it is, as opposed to the cut of the garment, the
2 shape, the pleats or whatever, the tightness of the top?
3 What -- why should we say that -- that this
4 two-dimensional design, which could be put on many
5 things, is what makes this article utilitarian?

6 But what do you do about the shape?

7 MR. BURSCH: Well, here it's more than just
8 the shape. If we go back and look at page --

9 JUSTICE GINSBURG: But we -- everybody
10 agrees that the shape, the cut of the dress, that the
11 garment itself is not copyrightable, right?

12 MR. BURSCH: Correct. Everyone agrees.

13 JUSTICE GINSBURG: So we are talking about
14 the -- the design.

15 MR. BURSCH: Yes.

16 JUSTICE GINSBURG: So why -- why is this
17 close to a fabric design?

18 MR. BURSCH: Because, again, the fabric
19 designs work anywhere, anyplace, no matter how you move
20 them. If we are looking at page 5 and you've got the
21 waist narrowing Vs, which are not the shape of the dress
22 but they -- they make the illusion that the shape of the
23 dress is cutting in to make you slimmer, those only work
24 in that particular place on this article.

25 If you put those on the lunchbox, they don't

1 make the person look narrower. They don't even make the
2 lunchbox look narrower.

3 The designs, the shape of the designs work
4 just like the shape of the garment itself, and -- and
5 that's why this is different than that flowered print
6 that we were talking about in the -- the Folio case.

7 You know, in -- in conclusion, I want to go
8 back to what Justice Breyer and what Justice Sotomayor
9 said: That if you recognize their -- their
10 two-dimensional copyright extends to prohibit the
11 manufacture of actual three-dimensional cheerleader
12 uniforms, then -- then you're giving them 100-year of
13 copyright monopoly, and that school can't go anywhere
14 else. And that's really ironic because you have to keep
15 in mind that --

16 JUSTICE KAGAN: Well, can't the school just
17 go to somebody who puts the zigzag where the chevron
18 was, or the chevron where the zigzag was, or makes it a
19 couple of different colors or adds another stripe?

20 I mean, there's this -- my clerk found --
21 I'm sorry. Just add that --

22 CHIEF JUSTICE ROBERTS: No, you can --

23 JUSTICE KAGAN: I'm done with my question.

24 MR. BURSCH: Yeah, as my -- as my friend on
25 the other side said, it -- it would still be a copyright

1 problem because they would claim that it was too close
2 to the original.

3 And you can see from the last two pictures
4 that we have in our reply brief, that there are only
5 certain places that these stripes and chevrons and color
6 blocks can go, otherwise it doesn't look like a
7 cheerleader uniform anymore. It doesn't identify the
8 person. Certainly doesn't have the slimming effect, the
9 making taller effect, and all the other things that
10 camouflage do.

11 So we respectfully request that you not
12 grant a 100-year copyright monopoly in design.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 The case is submitted.

15 (Whereupon, at 12:09 p.m., the case in the
16 above-entitled matter was submitted.)

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A	51:6,13,13,14	Appendix 29:9	17:10,11 20:6	Assistant 1:20
à 50:10	agreed 38:6 39:6	33:17 36:4	21:5,11,16,22	associated 52:9
a.m 1:14 3:2	agreeing 12:22	application	21:24 22:16,17	assume 12:18
ability 37:19,24	agrees 17:17,24	58:13	22:18 23:16	38:11
57:2	39:5 60:10,12	applications	26:11,12,24	assumes 38:15
able 10:6 17:15	akin 54:12	55:16	28:16,19,22	assuming 20:20
22:20 35:4,5	AL 1:6	applied 4:14 6:4	30:1,11,11,21	37:15
above-entitled	albeit 53:24	19:5 26:23,24	30:23 31:9	Athletica 1:3 3:4
1:12 62:16	alike 44:2	26:24 27:7	32:3,16 37:16	attach 30:20
absent 12:16	Alito 38:8,16,19	29:25 31:7,21	42:1 45:18	attractiveness
absolutely 34:22	38:25 40:20	40:22,24 46:9	47:4 49:10,20	7:19
35:23 37:18	alive 8:11	46:11 54:24	52:10,10 53:11	attributes 32:15
38:23	allowing 18:14	57:16	57:25 59:17,23	available 33:14
abstract 38:11	37:14	applies 40:9	60:5,24	avoid 45:5
abstracted 24:5	allows 16:7 21:4	apply 15:17 47:1	article's 3:22,24	avoiding 30:19
abstractly 39:17	amici 6:7	50:11,17 55:3	articles 29:15	aware 52:22
accept 20:20	amicus 1:22	applying 22:14	31:21 44:9,10	
achieve 56:18	2:10 41:17	approach 52:11	54:19	B
act 31:19 49:4,5	45:13	52:17,18 55:13	articulated	back 11:4,4 13:9
actual 9:25 13:2	amply 32:9	area 5:10 44:3	55:13	19:18 21:7
17:20 18:7	analysis 42:24	argument 1:13	artist's 37:23	59:15 60:8
47:24 61:11	43:17 58:21	2:2,5,8,12 3:3	artistic 27:14	61:8
add 3:24 7:25	analyzed 3:18	3:6 9:9 24:20	arts 41:15	backpacks 28:6
14:14 44:20	anesthetic 41:8	25:3 26:18	artwork 4:2	bad 35:7
61:21	answer 37:5	40:21,22,23	36:12 45:18	balance 26:15
added 45:1	41:10 46:24	42:7,9,18 43:7	48:25 50:25	barring 17:15
adding 14:17	anymore 6:22	43:8 45:8,12	52:4 54:15,23	basic 25:3
45:2,4	62:7	51:3 55:21	54:23	beautiful 48:10
addition 16:10	anyplace 60:19	arguments	ASG's 35:17	began 38:19
address 51:3	apologize 11:21	24:25	aside 30:7	behalf 1:16,18
52:7	12:8	arms 51:10	asked 9:22	2:4,7,14 3:7
adds 4:25 61:19	apparel 9:16	53:17 56:1,3	aspect 17:8	26:19 55:22
Adelman 10:24	39:19	arrangement	31:10 32:3	belief 49:17
adopted 22:12	appear 8:4 20:6	5:20 44:24,25	37:21 41:5	believe 34:11
33:3 54:15	23:6 28:20	51:20 56:24	aspects 3:22	58:6
adopting 31:19	36:25 37:1	arrangements	4:25 8:1 13:7	believed 52:14
advances 14:20	56:13	58:22	14:15 17:6,11	belong 41:3
25:10	appearance	art 24:14 26:23	21:16,20 22:16	belonging 33:5
aesthetic 40:16	16:21,23 21:24	26:23,24,24	22:18 24:12	best 4:18 31:14
48:13 49:6	22:7 41:1 47:9	27:7 35:13	25:25 32:15	41:10 43:7
59:1	54:2	36:6,8 38:10	40:2,14 47:4	better 8:3 42:2,3
agree 7:21 12:15	APPEARAN...	40:15 41:24,25	48:13	42:8
12:15,18,20,22	1:15	article 5:16 8:1	assert 50:4	big-time 34:21
20:11 28:3,4	appeared 58:1	8:8,15 10:16	asserted 50:7	bigger 41:22
43:17 45:3	appears 28:17	14:15 15:20	asserting 43:19	42:5 52:21
48:16,24 50:22	35:13 36:12,24	16:15,17,19,21	46:12	billion 34:11
	44:9	16:25 17:2,4,6	assess 52:20	bit 52:25

black 20:15 33:4 34:1,2 57:2,2	Buccafusco 7:2 41:18	camouflaged 23:22	checked 52:2	29:19 30:18
block 18:20,21	Bursch 1:16 2:3	capable 24:11	cheerleader	31:6,23 32:10
blocks 5:21 6:9	2:13 3:5,6,8	27:10	3:11 5:20 9:7	40:25 42:7,13
18:21 28:19	4:15 6:17 7:16	Capitals 49:23	9:24,25 11:4	42:18 43:23
29:11 30:5	7:21 8:17,22	captures 8:14,15	13:7,24 14:10	45:9,10,11,15
58:23 62:6	9:13,20 10:7	careful 14:13	14:11,19 15:8	45:24 46:9,20
blue 16:13 17:23	10:10,22 11:3	carrying 8:6	15:9,25 16:1	46:23 54:21
18:7,9 19:14	11:18,25 12:3	case 3:4,25 4:11	17:2 18:15,24	55:10,19,23
19:14 44:18,19	12:9,13,20,25	5:12 17:12	19:10,16 21:7	59:16 61:22
body 32:17	13:11,14,18,21	27:17 28:4,12	25:1 28:25	62:13
35:21 39:15,20	14:1,12 15:4	28:17 31:8	29:3,12,12	choose 4:8
42:14 53:21	15:21 16:2	33:1 34:13	34:1,2 40:7,9	church 41:20
56:12,13 59:11	18:5 19:6,18	36:24 39:9	42:10,20,21	42:5
59:12	19:22,25 20:3	45:17 47:2	43:4,21,25	cite 7:24
boiling 47:3	20:11,14,23	50:14,19,22	47:6,7 48:10	civilians 15:15
bottom 17:22	21:1,18 22:11	51:2 54:11,22	49:14 50:20	claim 4:21,21
18:11 19:12	23:7,11,14	57:1,1 58:19	58:24 59:2	40:4 62:1
bottoms 6:15	24:7,17,19,23	59:3,4,6,9 61:6	61:11 62:7	claiming 35:9
box 5:25 52:3	25:2,5,7,16,18	62:14,15	cheerleader's	44:16 56:11,21
brand-new	25:20,24 26:10	cases 7:18	4:5,13 15:25	clarify 35:8
27:24	39:13 49:10	casino 50:19,24	cheerleader-u...	clear 3:16 16:3
Brands 1:6 3:4	55:20,21,23	catalogue 11:16	23:24	47:22 56:10
breadth 8:24	56:21,24 57:11	11:24 29:9	cheerleaders	clearly 11:9
Breyer 24:3,8,18	57:14,17 58:5	catalogued	15:10,12	Cleland's 15:10
24:21,24 25:3	58:7,11,18	35:11	cheerleading	clerk 61:20
25:6,13,17,19	60:7,12,15,18	cause 19:16	6:14 29:2,21	close 59:7 60:17
25:23 26:9	61:24	causing 16:4	29:24 30:5,6	62:1
34:3,22,25	Bursch's 39:13	center 5:22	30:25 31:1,5,5	closely 6:21
35:15,23,24	49:25	century-long	32:11,22 33:5	closer 58:19
36:7,15,18,21	buy 32:20 33:6	3:11	33:9,15 42:15	clothes 34:7,8,12
37:3,22 39:4		cert 43:15	44:4 48:14	34:16 35:1
47:10,18,21		certain 22:5	50:15 51:1	47:12,13,14
48:1,3,16,20		23:6 33:5	55:4	48:9,10,10
51:4,8,21 61:8		43:20,21 55:16	chest 8:24	clothing 5:16
Breyer's 58:25		58:3 62:5	chevron 61:17	37:24 38:1
brief 5:13 6:7		certainly 27:19	61:18	48:7 49:15
7:2 9:12 16:13		32:16 33:8	chevrons 4:3	codify 32:5
17:23 18:7,9		41:23,24 62:8	5:21 28:18	cognizable
20:15 23:19		change 3:24 7:4	29:10 30:4	29:13
35:11,17 41:17		7:25 14:15	38:2 39:17	collar 18:17
48:4 50:9,16		changed 45:6	51:12 58:23	colleagues' 43:7
51:9,16 59:1		changes 6:22	62:5	color 5:21 6:9
62:4		14:22 59:11	Chief 3:3,8	18:20,21,21
brighter 52:21		changing 59:10	10:17 19:3	28:18,22 29:11
bring 11:4 59:15		characterized	26:16,20 27:16	30:5 53:7,9
broad 22:6		48:24	27:21 28:1,8	56:25 57:2
			28:21 29:1,6	58:9,23 62:5

coloration 51:19	connection 56:7	26:22 27:5,13	corresponds	dark 7:4
colors 33:4,12	consider 4:16	28:11 29:25	36:3	darker 52:21
45:6 56:16,17	17:11	30:8,15,19	costumes 25:1	decades 31:18
56:17,19,22	considered	31:17 32:6,23	counsel 26:16	46:2
61:19	16:12 22:6	33:3,25 34:10	45:9 55:19	decent 42:18
combination	46:17	35:3,6,22	62:13	decide 37:13
33:24,25	consistent 32:2	37:14 38:20	country 48:22	43:9 59:24,25
come 44:20	52:22	40:9 41:23,25	couple 43:4 49:2	decided 17:1
comes 26:25	contemplated	42:6,22 43:1,2	61:19	decision 17:9
common 47:23	31:14	44:17,22,23	course 30:3	32:6
communicative	contest 10:11,12	45:21 46:2,2,5	31:18 36:7	decisions 27:7
49:6	11:6	46:12,19 47:24	Court 1:1,13 3:9	decorates 41:25
companies 37:8	context 47:1	48:8 49:7,18	26:21 32:7	defenses 47:1
comparing	contexts 54:19	50:4,7 51:22	43:15 45:16	50:9,17
22:15	contract 5:15	52:4 54:4,6,7	56:25	define 17:19
competitors	contracts 32:20	54:13,16 55:2	Court's 32:6	18:16
33:16	contrary 52:11	55:6,15 56:22	courts 4:24	defines 18:12
completely 7:21	convenient	57:10 58:12,14	26:23 27:12	defining 17:23
8:14,15 25:21	30:12	59:18,20 61:10	42:25	definitely 53:12
52:12	convey 16:21	61:13,25 62:12	cover 18:18,24	definition 7:15
computer 29:22	42:14 49:15	copyright-elig...	21:2 29:16,22	7:16 16:15,16
concealment	conveyance	41:4,6,21	32:17 42:14	16:18 17:4,4
46:15,16	16:10	copyrightable	covering 18:13	27:1 40:13
conceals 41:9	conveyed 53:19	9:17 18:17	53:21	41:14 49:20
conceded 45:20	conveying 15:19	28:13 31:22	covers 28:6	degree 52:20
concedes 29:20	15:22,23 16:4	34:14 38:3	35:21	degrees 5:17 9:4
55:1	16:8,23 21:25	39:1,7 40:18	create 58:13	9:6
conceding 6:5	22:7 23:5	47:25 49:2	creates 7:10	deign 3:20
conceived 25:12	40:11 47:5	51:1,14,17	23:24	Department
conceptual	49:13,20 50:3	52:16 53:4,8	creating 23:18	1:21
34:19 37:4,10	56:2	55:16 60:11	creative 46:5	depicted 10:16
conceptualize	conveys 40:15	copyrighted	creativity 12:17	deposits 18:8,10
26:3	54:24	10:20 17:25	cube 36:9	description 25:8
conclusion 3:13	copied 8:16	27:15,19 28:5	curiae 1:22 2:10	desert 4:18
61:7	copies 30:10	29:20,23 31:10	45:13	design 3:12,23
confused 19:19	copy 11:8	33:14 34:7	curved 27:22	4:10,13,18,21
confusing 22:1	copyright 3:11	38:12,17 45:4	curvier 24:1	4:22,24 5:1,3
Congress 3:10	4:20,22,24 5:1	54:3 58:10	curvy 19:17	5:10,11,15,15
3:16 22:12,23	6:10 7:13	copyrighting	cut 4:7 35:9,16	6:4,22,22 8:4
26:22 30:14	10:11,12,14,15	54:4	38:5 47:24	9:22 10:11,12
31:12,14,18	10:19 11:10	correct 10:22	49:1 51:11,18	10:14,19,23
32:8 37:16	12:4,6,16,21	11:1 12:13	51:25 60:1,10	13:4,13,16,23
52:14	12:23,25 13:12	13:14 19:22	cutting 60:23	13:25 14:7,8,8
congressional	13:15,23 14:3	33:7 36:17		14:10,16,18
52:11	18:7 19:24,25	39:2 43:17	D	19:5,10 20:4
conjunction	20:2,3,20,25	53:5 57:17	D 3:1	20:16,17 22:22
23:16	21:12 24:15	60:12	D.C 1:9,18,21	23:15 24:9

26:5,11 27:22 28:16 29:14,21 29:23,25 30:3 30:10,21,22,23 30:25 31:9 33:3,20,23 34:6,8,8,15 35:18,19,25 36:2,19,24 37:15 38:4,9 38:16 39:7,10 39:10,14,16 42:9 44:8,13 44:15,18,24 48:8 50:4 51:19 52:19 53:2,10 54:17 57:6 58:12 59:7,17,20,21 59:22,25 60:4 60:14,17 62:12 designed 4:19 8:8,9 26:6 56:8 designer 4:17 37:6 53:1,8 designs 3:17 4:8 4:17 5:6,20 6:13 7:20,20 8:7 9:1,6 11:7 12:5 14:19,20 17:14,19 18:4 18:4 23:24 28:18 30:4 31:4,21 35:5 39:1 52:15 56:11,15,20 58:2 60:19 61:3,3 determine 16:18 diagonally 18:19 dictated 46:6 difference 8:19 9:18 39:16,24 39:25 40:20 41:12 differences 9:20	different 4:9 7:5 9:10 16:8 18:3 18:4 19:4,4,8 23:4,5 35:25 40:2 41:7 42:10 45:1 48:14 50:20 52:8 56:14 59:4 61:5,19 differently 16:5 directed 26:22 directive 26:25 directives 27:4 disabuse 34:20 disagree 48:13 disagreement 55:8 discuss 50:9,16 discussing 57:21 dispositive 3:20 dispute 17:25 47:2 disqualification 12:17 distinction 39:22,23 49:5 distinctive 42:10 divorces 55:14 doctrine 42:19 42:23,25 50:10 50:10 doing 12:19 20:25 26:5 31:17,19 32:8 49:4 53:10 56:3,6 59:10 dollars 34:11 domain 49:9 54:4,6 dome 41:20,22 double 34:15 draw 10:20 drawing 19:13 49:5 dress 10:6 13:23 13:25 14:10,11 16:1 19:16	20:15 24:4,4,6 24:12,13 28:23 28:24 29:24 31:2 35:20,21 36:13,14,16,19 36:25 37:6,9 38:2 40:3 42:11 51:18,24 60:10,21,23 dresses 7:3 34:13 35:1 Duchamp 24:13 37:13 <hr/> E <hr/> E 2:1 3:1,1 earlier 57:21 effect 8:5 54:18 62:8,9 effective 27:14 40:11,17 42:3 effectively 50:11 effects 5:23 eight 36:1,1,2 element 4:12 elements 33:24 44:24 45:7 46:5 50:24 59:2 eligibility 20:4 eligible 12:16 20:2 46:4 elk 58:9 embody 30:10 30:17 employees 50:25 enacted 30:15 encompass 21:20 encompasses 40:15 ended 24:10 enhances 21:10 enjoyed 34:10 entire 8:24 11:12 entirely 58:2	entitled 48:8 ERIC 1:20 2:9 45:12 especially 40:10 ESQ 1:16,18,20 2:3,6,9,13 essential 29:11 essentially 39:15 43:20 53:23 ET 1:6 everybody 39:5 51:13 60:9 evidence 31:15 exact 7:7 8:9 exactly 13:19 19:11 22:22 24:2,17 26:7 28:14 31:11 34:4 58:5 59:19 example 4:16 5:10 6:24 7:1 23:2 57:19 examples 29:5,9 33:17 41:15 49:25 exception 49:19 exclude 21:23 22:9 excluded 22:19 23:13 exclusively 49:9 exist 3:23 13:5 14:13 59:2 existence 33:12 44:10 existing 24:11 27:10 exists-indepen... 7:23 16:12 expand 5:14 8:24 expert 43:11,12 43:14 explain 20:17 47:9 53:14 explaining	31:18 express 49:19 expresses 54:10 54:10 expressing 42:20 43:2 expression 27:15 54:13 expressive 46:17 49:6,11,17 53:14,19,25 extend 10:15 28:11 30:13 58:15 extends 61:10 extent 6:20,23 28:13 43:8 50:23 extract 59:3 extremely 59:14 <hr/> F <hr/> fabric 5:10,11 5:11 23:15 26:4,5 28:23 38:17,21 39:1 39:6,10 40:3 52:15 54:24 60:17,18 face 8:3 fact 8:15 22:24 29:5 42:3 43:8 facts 16:9 43:3 fail 24:24 faire 50:10 faithfully 27:5 fall 16:6 famous 38:11 fan 45:23 49:23 fashion 34:9 47:15 fatter 58:4 favor 37:14 fear 37:5 feature 7:25 14:14 features 3:21,23
---	--	--	---	---

17:5 22:15 Feigin 1:20 2:9 45:11,12,15 46:1,11,21,25 47:20,22 48:2 48:12,19,23 50:2,21 51:7 51:15 52:2 53:5,12 54:9 55:7,11 figure 36:1,1,2,4 39:15 51:9,15 51:17,17,23 54:18 56:12 figures 16:9 final 55:24 find 36:4 58:9 findings 43:8 fine 26:23 41:15 41:25 finish 55:11 first 3:14 4:16 6:18 14:22 16:3,19 17:9 21:22 22:22 23:19 49:13 58:21 fit 39:19 five 4:9 15:3,4 18:4 30:4 flowered 61:5 flowers 5:11,14 focus 7:22 19:12 21:7 53:17 folds 38:5 Folio 5:12 61:6 folks 57:24 follow 56:12 follows 39:15 forever 32:24 33:21 Forget 24:3 form 7:17,18 43:22 forms 24:5 forth 52:1 found 9:17	61:20 frame 8:23 fresco 41:19 friend 28:15 29:19 38:6 39:6 45:20 54:25 61:24 friends 32:15 Fromer 7:2 41:18 function 15:14 15:25 16:2,20 19:9 22:17 23:4,9,12,15 26:7 29:13 31:13 42:11 43:22 46:15 49:18 52:9 54:25 55:6 57:4,16 59:13 functional 14:17 18:13 19:1 30:1 59:6 functionality 17:18 20:18 21:10 54:5 56:10 57:20 58:1,13 functionally 5:17 functions 6:1 16:24 17:8,13 21:21 22:20 24:2 46:18 49:7,9,10,12 53:20 55:9 fundamental 55:8 fundamentally 45:19 49:11 53:25 further 26:14 57:9 <hr/> G <hr/> G 3:1 36:4 Galiano 50:18	50:22 garment 8:12 17:1,10 28:10 47:25 49:1 52:6 53:1,8 55:3,4 56:7 57:20 58:14 60:1,11 61:4 garments 6:19 6:21 35:10 general 1:21 31:8 generally 5:9 46:4 52:2 Ginsburg 3:25 4:16 5:9 10:13 15:2,19,24 18:2 50:18 59:24 60:9,13 60:16 give 18:8 given 29:4 gives 7:18 giving 61:12 go 13:8 19:14,18 37:6 38:10 40:3 60:8 61:7 61:13,17 62:6 goes 18:19 51:24 going 30:21 31:21 35:5 39:9 57:8 good 5:10 18:6 22:1,2 23:2 37:6 41:8 45:7 gorilla 58:16 59:4 gorilla's 58:17 government 9:10,21 17:15 55:25 57:18 government's 9:11 20:10 grant 3:10 62:12 graphic 4:12 16:14 27:2 28:18 30:9,16	53:10 57:6 graphics 3:15 great 7:1 38:10 ground 47:23 group 41:3 49:16 guess 10:17 21:13 31:3 51:14 <hr/> H <hr/> hand 52:25 58:17 hang 37:19 hanger 47:14 happening 50:13,15,16 happens 51:21 happier 8:4 happy 8:3 hard 53:18 hat 5:25 8:6 11:8 21:3 57:22 hear 3:3 held 21:23 help 41:16 hesitate 45:3 hide 23:9 history 4:19 31:15 47:19 hit 57:24 hold 49:16 57:24 holder 5:1 holistic 22:2 home 57:24 Honor 16:10 43:14 44:14 46:1 47:20,22 48:12,19,23 50:2,21 51:16 53:12 55:7 hope 51:7 House 31:16,20 31:23 32:4 52:13 human 39:15,20 56:12,13	hundred 22:24 34:8 hunter's 28:10 hypothetical 10:13 27:9 44:7 <hr/> I <hr/> idea 27:19 34:1 41:24 42:22 43:3 50:12 52:7 54:10,11 ideas 46:7 identification 15:13,23 16:7 50:8 identified 3:21 13:5 24:19 27:11 40:1 44:8 58:21 identified-sep... 11:14 identifies 15:8 45:22 identify 15:11 15:16 16:1 24:9 49:22 50:6,25 62:7 identifying 17:13 19:9 22:19 29:12,13 47:5,7 59:13 ignore 25:16,18 25:20 illusion 7:10 14:23 15:23 19:8 23:18,25 60:22 illusions 15:22 16:3 illustrate 41:16 illustration 41:19 55:15 image 13:1,2 40:12 imagery 52:5 imagination
--	--	--	--	---

25:19 imagine 25:11 imagining 25:9 immediately 23:20 impact 40:16 implement 27:3 implemented 27:5 important 5:4 7:22 59:14 Impressions 5:12 inadmissible 52:12 include 30:9 including 30:11 independent 25:21 independently 3:23 13:5 14:14 24:11 27:10 indistinguishable 45:19 49:21 industry 34:9,10 35:6 ineligible 57:4 influenced 43:22 information 15:20,22 16:4 16:9,11,22,24 21:25 22:8 23:5 47:6 49:13,21 50:3 infringement 45:6 46:22 47:1 infringing 45:8 inquiry 22:8 27:10 inside 18:24 instance 16:19 49:23 intend 3:10 intended 20:6	22:23 49:15 intending 32:5 intent 52:12 interchangeable 4:9 intrinsic 16:20 17:7 22:16 introduce 43:11 43:12,13 involved 18:8 43:9 iPhone 28:6 29:16 ironic 61:14 issue 14:4 it'll 18:23 items 6:3 <hr/> J J 1:16,20 2:3,9 2:13 3:6 45:12 55:21 Jack 10:24 jacket 37:1 jackets 6:24 29:17,17 Jay 1:18 2:6 26:17,18,20 27:18,24 28:2 28:10 29:1,7 30:2 31:3,11 31:25 32:13,25 33:8,13,22 34:22 35:8,23 36:2,11,17,20 36:23 37:2,18 38:4,7,14,18 38:20 39:3,6 39:11,25 40:23 41:13 42:12,17 43:13 44:6,13 44:14,23 45:2 45:10 JOHN 1:16 2:3 2:13 3:6 55:21 joint 29:8,18 33:17 36:4	Judge 15:9,9 Justice 1:21 3:3 3:8,25 4:15 5:8 6:2 7:13,17 8:10,19 9:9,14 10:3,8,13,17 10:25 11:15,20 12:1,7,9,10,14 12:24 13:8,12 13:15,19,22 14:5 15:2,7,19 15:24 17:21 18:2 19:3,18 19:23 20:1,9 20:13,19,24 21:13,19 22:11 23:1,8,12 24:3 24:8,18,21,24 25:3,6,13,17 25:19,23 26:9 26:16,20 27:16 27:21 28:1,8 28:14,21 29:2 29:6,19 30:18 31:6,23 32:10 32:19,25 33:2 33:10,19,22,23 34:3,22,23,25 35:2,15,23,24 36:7,15,18,21 37:2,3,22 38:7 38:8,16,19,24 38:25 39:4,5,8 39:12 40:20,25 41:11 42:7,13 42:18 43:6,23 44:12,15,25 45:9,10,11,15 45:24 46:9,16 46:20,23 47:10 47:17,18,21 48:1,3,16,20 49:24 50:18 51:4,8,21 52:24 53:6 54:6,21 55:10 55:19,23 56:9	56:16,23 57:8 57:12,15 58:3 58:6,8,16,25 59:16,24 60:9 60:13,16 61:8 61:8,16,22,23 62:13 justified 32:9 <hr/> K Kagan 9:9,14 10:3,8,25 13:8 13:12,15,19,22 14:5 15:8 17:21 21:13,19 22:11 23:1,8 23:12 28:14 37:2 38:7,24 39:5,8,12 44:12,15,25 46:16 47:17 49:24 52:24 53:6 56:9 61:16,23 Kate 7:3 keep 61:14 KENNEDY 8:10,19 41:11 43:6 54:6 key 27:4,7 41:14 kill 35:6 killing 35:2,3 kind 5:9 14:4 30:11 31:11,13 39:10,14 49:17 52:8 kinds 22:5,10 49:6,8,10 53:3 53:22 58:3 Klee 8:11 knock-offs 35:3 knockoff 35:6 know 22:24 24:1 26:2 28:6 29:15 30:12 32:4,20,23 33:15,16,17	34:23 35:7 38:14,22,22 40:11,16 41:2 41:2,9,15 42:1 42:4 43:1,20 43:25 44:1 51:25 53:1 61:7 <hr/> L L.L.C 1:3 lack 12:17 law 14:3 31:24 35:4,6 43:20 lawyer 37:6 lay 17:14 laying 40:4 left 35:16,17,18 legal 43:16,18 legislation 22:25 legislative 31:15 Lemley 59:1 Lemley's 48:1,3 48:17 lesson 10:1,24 let's 8:2 11:3 15:5 19:2,12 licensed 8:12 limited 50:6 line 9:3 10:16 17:19 53:15,15 lines 6:24 7:4,6 7:12 8:21 9:1 9:14 10:5,9 14:25 15:1 51:19 56:12 list 15:5 little 19:19 20:15 52:25 locking 43:2 logo 29:4 45:21 49:22 57:18,22 long 20:4 24:15 longer 5:23 9:7 look 4:24 5:24 6:21 7:5 8:3 9:5,7 15:5 17:3
--	---	--	--	--

19:2 20:12,14 23:20 24:5 25:14 26:10,11 28:23 29:8 30:7 32:2 35:10,16 36:3 36:8,9 38:10 40:7 41:8,17 41:22 42:2,3,5 42:8,9 44:2,4 51:22,25 52:8 52:13,18,21 54:12 56:1,3,4 56:14 57:3 58:4,21,22 60:8 61:1,2 62:6 looked 51:8 looking 6:8 7:6 43:4 44:17 60:20 looks 24:6,12 35:19,20 36:8 37:7 38:2 39:18 54:16 lose 26:1 lost 26:7 lot 34:6 43:24 lunch 5:25 21:3 57:23 lunchbox 11:8 12:6 29:22 30:21,23,24,24 30:25 55:2 59:22 60:25 61:2	man 47:11 manner 46:13 manufacture 17:16 20:22 59:23 61:11 manufacturer 20:5 46:14 manufacturing 13:17,24 14:2 14:6,7 19:21 46:14 Marcel 24:13 37:13 matter 1:12 11:9 21:11 43:20 60:19 62:16 Mazer 32:6 McCartney 7:3 19:15 McKeague's 15:9 mean 5:24 10:18 22:1 36:9 40:24 41:13 43:9 48:17 56:17 61:20 meaning 31:16 40:14 means 8:16 14:14 21:22 25:21 meant 39:19 measuring 17:5 mechanical 49:8 medium 48:15 meet 38:15 member 42:15 45:22 49:16 members 15:16 men's 34:8 mentioned 57:19 merely 16:20 merger 42:19,23 42:25 50:10 message 40:16 41:3 42:14	53:18,24 56:2 Mich 1:16 military 4:17,18 5:2,2 15:14,15 15:16 17:13,14 22:21 28:9 45:25 46:10,11 49:25 59:12 mind 24:5 61:15 mine 34:25 minimum 16:6 minutes 55:20 mitten 57:23 mixed 15:15 mobility 32:18 Modern 38:10 moment 18:9 21:8 37:23 Monday 1:10 Mondrian 4:3 8:11,14,20 monopolization 50:12 monopoly 3:11 34:21 61:13 62:12 more-than-that 34:9 motor 57:3 move 9:4 60:19 Müller-Lyer 7:12 9:3 15:1 Museum 38:10	58:10 nicely 53:17 non-expressive 52:9 53:15,20 nonverbal 53:24 normal 42:11 47:11 notebook 8:6 11:7 12:6 21:2 59:22 notion 34:20 number 14:20 19:13 20:16 27:9 40:1 41:19 50:6	3:6 26:18 45:12 orange 33:4 34:1 order 9:16 28:3 original 6:11 27:24 28:5 38:14 62:2 outfit 55:4 outset 35:9 outside 18:23 overall 47:9 49:5,5 owner 30:8,15 38:20 43:1
			O	P
			O 2:1 3:1 object 37:25 48:9 obvious 6:7,10 6:18 obviousness 12:17 October 1:10 office 4:20 26:22 27:5,13 31:17 32:6 43:1 47:24 51:23 52:4 54:16 Office's 46:3 officer 50:1 oh 28:24 57:11 okay 12:18,24 once 17:1 33:19 ones 4:9 22:17 40:7,7,17 43:9 opinion 48:22 opposed 31:1 55:5 60:1 opposite 21:14 22:22 optical 7:10 14:23 15:21,23 16:3 19:8 23:18,24 oral 1:12 2:2,5,8	P 3:1 p.m 62:15 page 2:2 5:12 7:1 9:11 12:4 16:13 17:22 18:10 19:12 20:14 23:19 29:8 35:11,17 43:15 44:17 48:4 51:8 52:13 59:1 60:8,20 pages 18:6,9 33:18 50:9 pail 21:3 57:23 painted 41:19 painting 8:11,13 38:19,21 paintings 38:11 paired 58:14 pants 8:6 part 4:12,12 16:12 25:2,5,7 59:2 particular 9:15 10:8,9 19:21 29:21 30:3,4 31:4 33:24 34:24 39:19,20 40:8 41:2,3
M		N		
M 1:18 2:6 26:18 making 9:23,24 10:4,15 11:12 13:2 17:14 18:13 23:6 39:22 41:8 47:12 52:7 62:9		N 2:1,1 3:1 name 29:3 names 33:6,9 narrower 61:1,2 narrowing 60:21 necessary 43:21 need 4:1 28:3 neither 13:4 29:10 nervous 25:8 never 17:25		

42:5,14 43:3 44:25 46:5 49:15,16,17 51:20 52:19 54:5,17 60:24 parties 47:23 patent 35:5 pattern 27:25 28:5 30:20 46:6 patterns 34:24 people 13:16,24 15:14 16:8 17:14 22:25 24:15 54:7 perceived 7:5 14:23 19:16 59:11,12 percent 44:4 perception 47:8 perfect 57:19 perfectly 32:2 perform 46:15 performing 55:9 performs 41:7 53:21 person 16:1,5 23:21 42:2 61:1 62:8 petition 43:15 petitioner 1:4,17 2:4,14 3:7 27:8 43:14 52:17 55:22 petitioner's 47:5 54:16 PGS 17:3 Picasso 8:10,13 8:18,20,23 9:5 9:6 pictorial 4:12 6:4 7:20 16:14 27:1 30:8,16 57:12 picture 6:9 8:12 20:2,4 23:19 24:4 35:21	36:13 37:7,12 37:25 48:7 51:10,11,11,22 51:24 55:1 pictures 3:15 6:21 11:16,23 18:6 58:17 62:3 piece 9:15 37:24 38:1 39:19 48:7 49:15 place 6:25 8:9 9:15 10:9 21:22 26:6 60:24 placement 53:7 places 35:12 62:5 plain 31:2 please 3:9 26:21 45:16 53:16 pleats 38:5 60:2 plus 32:21 point 6:3,12 10:7,10 15:9 15:10 19:19 20:12,13 24:21 24:22 34:3 39:13 41:16 51:15 54:21 55:24 56:8,9 58:25 points 3:12 6:18 24:23 49:3 police 49:25 policeman 50:4 50:7,8 policy 22:12 portion 24:20 portray 16:21 54:1 portraying 16:23 21:24 22:7 41:1 positing 46:16 position 6:8 13:1 20:10 28:17	possible 22:12 potentially 38:17 practical 34:17 37:5,9 practice 32:7 practices 46:3 pragmatic 49:8 premise 30:2 31:4,7 34:5 38:25 present 54:7 presume 33:4 presumed 32:7 presumption 32:8 pretty 22:1,2 prevent 5:2 9:23 10:15 11:11 13:16,24 20:5 22:20 43:1 46:13 50:7,11 58:15 59:20 prevents 10:3,4 price 34:15 primary 42:25 principles 27:8 46:7 print 19:9,11 21:2 61:5 printed 12:4 probably 48:21 56:18 problem 12:9 52:24 55:12 62:1 produce 21:4 37:7 producing 5:2 22:21 product 30:13 professors 41:18 48:18 prohibit 13:2 61:10 prong 16:12 proposed 22:25	protect 26:23 52:5 protectable 26:13 protected 46:2 49:7 54:13 protection 6:11 34:10 42:6 45:21 57:5 protective 46:18 protects 49:18 provide 32:18 provisions 27:3 pull 18:9 purchaser 7:19 pure 43:16,18 purpose 21:8 32:12,14 purposes 25:1 32:14 put 5:22,25 6:2 6:13,14,15 11:7,7,8 12:5 18:22 21:2,3 29:15,22 33:6 33:8 37:13 39:18 48:14 50:24 55:1 56:7 57:22 60:4,25 puts 18:15 61:17 putting 6:20,24 14:18 45:21,24 49:22	47:3 61:23 questions 3:20 26:14 quick 17:18 51:5 quickly 14:21 <hr/> R <hr/> R 3:1 rainbow 58:9 read 48:4,4,5,21 reading 21:15 real 43:18 really 9:14 21:14 34:6 47:2 50:13 51:5 53:9 54:20 55:13 57:5 61:14 realm 50:15 reason 5:8 11:12 13:3 23:1 42:5 47:11 reasons 4:15 28:13,15 50:14 REBUTTAL 2:12 55:21 recognize 61:9 red 18:21 19:13 44:19,20 referred 33:18 referring 5:9 14:24 reflect 46:3 register 31:19 52:6 register's 31:16 registration 27:7 35:12 36:3,5 rejects 27:8 relate 21:23 22:9 relates 21:25 reliable 52:22 rely 57:25 58:2 remain 31:21 remains 6:23
--	---	--	---	---

remove 26:7	9:3 10:7,22	52:3 56:1	53:19	simply 14:18
reordered 45:7	11:21 17:4	scene 15:15	separate 25:21	23:4,5 29:11
replicate 10:23	18:20 20:17	scènes 50:10	26:3 29:25	42:13
reply 5:13 23:19	23:14,18 24:8	school 33:4,11	44:10 46:17	singlets 15:11
62:4	25:2,4,6,16,23	33:20,20 61:13	separately 3:21	six 55:20
report 31:16,24	26:8 28:1	61:16	13:5 24:10,20	sketch 12:23
32:5 52:13	30:10,13,17	Schools 33:8	44:8 58:21	slimmer 7:11
reports 31:20	31:8,24 33:19	scientific 46:7	separates 18:20	19:17 23:25
representations	38:21 39:9,11	52:22	serve 32:11,14	60:23
57:13	46:24 57:24	sculptural 16:15	serves 42:4 55:5	slimming 5:23
reprint 5:12	58:5,18 59:1	27:2 30:9,16	set 34:7 35:12	7:4 14:24 53:2
reproduce 38:21	59:19 60:11	sculpture 37:20	sets 30:7	53:3 62:8
reproduced 4:14	rights 30:8,9	sculptures 3:15	setting 30:6	smaller 5:22
28:6,9 29:17	ROBERTS 3:3	seams 18:13,18	shape 4:7 7:5	52:21 57:3
reproducing	10:17 19:3	second 3:19,22	8:14 17:20,23	smooth 18:23
45:4	26:16 27:16,21	5:8 6:18 15:7	17:24 18:3,4	socks 57:23
reproduction	28:1,8,21 29:6	16:2 27:12	18:12,16 35:9	sold 34:12
45:17 59:21	29:19 30:18	Section 3:15,19	38:5 47:24	Solicitor 1:20
request 62:11	31:6,23 32:10	5:5 7:24 10:1,2	49:1 51:18,25	somebody 10:19
require 57:20	42:7,13 43:23	10:24 13:4	53:10 60:2,6,8	28:23 44:20
required 27:13	45:9,11,24	14:2 16:14	60:10,21,22	45:1,22 55:5
requirement	46:9,20,23	21:9 26:8 27:1	61:3,4	61:17
7:24 11:14	54:21 55:10,19	30:7 55:14	shirt 8:5 9:10,19	somebody's
14:13	61:22 62:13	see 4:25 16:4,13	10:19,20 11:1	43:25
requirements	robes 47:21	18:8 23:20	13:10,13,16	sorry 11:20 41:4
13:6	romantic 47:17	25:14 29:9	14:9,9 45:20	44:13 61:21
requires 11:13	room 41:25 42:2	35:11,15 36:5	53:16,19,20	sort 16:8 20:21
17:10 26:8	42:8 52:21	37:2 40:25	56:1	39:17 50:23
requisites 38:15	rotate 5:17 9:4	51:16,24 52:14	shirts 13:17	sorts 46:17
reserve 26:15	Rubik's 36:9	56:5 58:24	short 10:6	54:18
resist 30:2 31:4	rug 38:23 42:1	62:3	shovel 24:13	Sotomayor 6:2
resisting 31:7	rules 15:17	seen 51:9	37:19,20,23	7:13,17 11:15
respect 14:3	run 57:24	sell 12:11 32:22	shovels 24:16	11:20 12:1,7,9
19:8 56:11		33:16	show 15:6 43:24	12:10,14,24
respectfully	S	selling 12:2	shows 42:15	19:18,23 20:1
29:1 33:22	S 2:1 3:1	sending 41:2	side 9:1 14:25	20:9,13,19,24
62:11	sales 18:25	53:23	19:14,15 23:2	32:19,25 33:2
respond 6:17	satisfied 37:4,15	sense 9:16 22:6	29:20 34:11	33:10,19,23,23
Respondents 1:7	saying 4:6,8	55:17	43:13 53:14,15	35:2 56:16,23
1:19,23 2:7,11	10:5,25 19:20	separability	61:25	57:8,12,15
26:19 45:14	32:1,1,10,13	3:16,18 4:1 5:7	side's 43:19	58:3,6,8,16
response 55:11	35:7 39:13	17:3 21:9,17	side-by-side	61:8
rest 33:12	40:8 47:13	22:9,14 42:24	25:10	Sotomayor's
result 19:4	53:6 56:3,4,18	separable 25:14	sides 7:4,9 25:22	34:23
50:22	57:9,9,11 58:8	25:14 26:13	similar 6:23	space 24:6
retain 45:20	says 14:2 22:13	28:19 49:1	38:9	special 15:13
right 7:24 9:2,2	24:14 25:13	51:23 52:15	Similarly 7:8	24:3 25:1

27:22 specialized 24:25 spectrum 53:13 sports 45:21 49:22 57:18 squad 42:15 squads 44:4 standing 23:21 Star 1:3 3:4 30:12 Star's 29:9 start 16:17 55:24 started 19:19 44:1 starters 58:20 starting 38:25 starts 34:5 statement 47:12 48:17,24 55:25 States 1:1,13,22 2:10 45:13 statute 11:5,12 17:10 21:15 22:1,3,4,13 26:25 29:14 30:14 31:12 32:16 statutory 7:23 13:6 14:13 Stella 7:3 19:15 stitch 19:11 stitched 18:22 19:4 stitches 18:23 stop 11:22 12:1 12:3,19 stopped 19:20 stopping 12:10 20:21 stops 10:16 20:25 strange 52:25 stretch 18:14 stripe 18:19,25 44:18,18,19,19	44:19,20 45:1 45:2 61:19 striped 28:18 30:4 stripes 5:21 6:9 18:16 19:14,15 29:10 39:17 51:18 53:7 56:19 58:23 62:5 stronger 18:14 structural 53:3 stuck 32:24 33:10 stuff 45:5 style 17:19 37:9 51:11 subconscious 53:24 subject 5:7 11:9 21:11 subjecting 3:14 subliminated 19:6 submit 4:20 51:22 submitted 4:2 62:14,16 submitting 4:5 substantive 27:2 suddenly 34:13 sue 24:15 37:8 suggest 46:23 suggested 38:25 suing 11:15,17 11:18,19 suit 37:7 suits 35:1 superimposed 4:13 supplier 33:11 support 3:12 supporting 1:22 2:11 45:14 suppose 8:10,11 38:9 supposed 40:2	Supreme 1:1,13 sure 10:18 13:9 21:9 31:25 33:8 44:16 48:5 55:10 surface 35:14 36:12 38:4,9 38:18 52:5 suspect 7:17 sweats 6:14 T T 2:1,1 T-shirt 8:2 10:4 14:17 45:22 49:22 59:6 take 6:8 8:22 11:3,6 12:5 13:1 24:9 28:21 29:21 37:6,11,11,19 37:24 48:13 53:1 57:22 taken 6:4,13 29:15 talk 6:6 23:17 25:8 talked 19:7 talking 5:19 9:24 14:16,18 21:6,16 35:25 36:1 37:22,23 40:6 42:24 49:11 53:23 54:14,22,23 57:6 60:13 61:6 talks 9:11 taller 5:24 9:7 23:25 62:9 tapestry 38:23 team 29:3,4 45:21,22 49:22 teams 33:6 techniques 41:21 tell 6:6 9:21	39:22 tells 15:17 terms 21:17 test 3:16 17:3 21:9,17 22:9 22:14 25:10 26:2 31:8 48:3 59:16 testimony 31:17 43:11,12,14 44:3 text 3:19 7:23 11:5 21:7 textiles 38:22 Thank 3:8 26:16 45:9,10,15 55:18,19,23 62:13 theory 38:3 they'd 42:18 45:7 thin 46:5 thing 7:7 14:7 16:25 17:17 18:1 20:21 21:4 26:12 35:22 36:10 37:16 41:2 51:5,10 53:9 56:18 57:5 things 4:4 14:24 17:18 18:25 21:23,24 22:5 22:10,19 23:13 24:3 25:11 27:22 37:15,20 38:1 43:21,22 53:3,22 57:10 60:5 62:9 think 6:5 9:21 12:11 15:14,21 15:22 16:7 19:24 20:2,3 20:11,24 27:18 28:2,3,4,11,11 28:14 29:4 30:18 31:11,14	32:4,7,8 34:4 34:16 40:3,18 40:19,25 41:9 41:14 43:18 44:1,11 45:7 47:2,4,15 48:12,25 49:21 50:14 52:11 53:13,14,18 55:7,12,12 59:7 thinner 7:11 9:8 thought 15:19 18:2 27:23 48:5,20 thousands 27:6 27:6 three 3:12 three-dimensi... 3:17 5:6 9:25 13:3 17:20 36:10 48:7 61:11 thrust 34:17 tick 14:21 15:4 tightness 60:2 time 18:6 26:15 told 43:14 toned 53:17 top 18:11,16 60:2 tops 6:15 trademark 35:4 57:1,4 traditional 54:12 traditionally 46:18 49:7,18 54:3 transposed 12:7 treat 39:9 tree 23:21 tried 22:25 24:9 Trompe-l'oeil 41:24 true 23:17 26:9 26:9 42:17
--	--	---	---	---

Alderson Reporting Company

woods 23:10	62:12	5 18:6,9 19:12		
word 41:13,14	101 3:16 5:5	60:20		
words 23:8	7:25 13:4	55 2:14 52:13		
work 8:7 24:2	16:14 21:9	<hr/>		
24:14 26:5,12	26:8 27:1	6		
27:15 30:9,16	55:14	<hr/>		
30:16 35:13	101's 3:19	60 35:11		
36:6,8 40:15	102(b) 42:22	<hr/>		
40:18 41:25	11:07 1:14 3:2	7		
45:4 46:8 56:6	113 10:2	7 5:12 51:15,17		
59:10 60:19,23	113(a) 55:14	76 31:19		
61:3	113(b) 14:2	<hr/>		
worked 53:17	113A 30:7	8		
works 5:17	12:09 62:15	8 51:9,15,17		
16:15 23:15,16	15-866 1:4 3:4	815 19:13 20:16		
27:2	17 48:4 59:1	<hr/>		
world 4:19 54:2	1950s 29:6	9		
54:8,11	<hr/>	95 44:3		
worn 29:3	2	99 32:21		
worth 34:12	2 16:13			
wouldn't 5:24	2016 1:10			
5:25 9:22	21 7:1			
10:12 52:16	22 20:14 35:17			
wrestling 15:11	51:8			
write 31:12	225 34:11			
<hr/>	23 20:15			
X	26 2:7			
<hr/>	299A 17:22			
x 1:2,8	18:11			
<hr/>	299B 17:22			
Y	18:11			
Yeah 20:14 23:7	<hr/>			
61:24	3			
year 34:12	3 2:4			
years 22:25 27:6	31 1:10			
32:21 34:9	34 29:8			
yellow 34:2	39 50:9			
<hr/>	<hr/>			
Z	4			
zigzag 4:8 17:21	4 17:22 18:6,9			
18:12 61:17,18	18:10 44:17			
zigzags 39:17	40 43:15 50:9			
<hr/>	45 2:11 5:17 9:4			
0	9:6			
<hr/>	46 36:5			
1	<hr/>			
1 10:24 23:19	5			
10 9:11	<hr/>			
100-year 61:12				