

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The
United States Court of Appeals
For The District of Columbia Circuit

VALANCOURT BOOKS, LLC,
Plaintiff - Appellant,

v.

MERRICK B. GARLAND, Attorney General;
SHIRA PERLMUTTER, in her official capacity as the
Register of Copyrights of the U.S. Copyright Office,
Defendants - Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BRIEF OF APPELLANT

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**CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES**

A. Parties and Amici

The Plaintiff-Appellant is Valancourt Books, LLC, a limited liability company incorporated in Virginia. Defendants-Appellants are Merrick B. Garland, in his official capacity as the Attorney General of the United States, and Shira Perlmutter, in her official capacity as the Register of Copyrights of the U.S. Copyright Office. Zvi S. Rosen and Brian L. Frye have filed a Notice of Intent to File an Amicus Curiae Brief in this matter. No other parties or amici have yet appeared.

B. Rulings Under Review

This appeal seeks review of the order and opinion entered by the district court (Hon. Amy Berman Jackson), granting summary judgment to the defendants below. The order and opinion are reproduced at pages 174 and 175–200 of the Joint Appendix, respectively. The opinion below has also been published at 2021 U.S.P.Q.2D (BNA) 791.

C. Related Cases.

Appellant is unaware of any related cases.

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Valancourt Books, LLC, a limited liability corporation incorporated under the laws of Virginia, hereby states that it has no parent companies or subsidiaries and that no publicly held company has any ownership interest in it.

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331, 1343, and 2201. On July 23, 2021, the district court entered final judgment in favor of the defendants. JA 174. Plaintiff Valancourt Books timely filed its notice of appeal on September 17, 2021. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The U.S. Copyright Office threatened Valancourt Books with tens of thousands of dollars in fines for publishing books containing “copyrightable” material in the United States without providing free copies of those books to the United States for its own use. The issue on appeal is whether a demand like this violates either the Takings Clause or the First Amendment.

STATUTES AND REGULATIONS

The statutes primarily discussed below, 17 U.S.C. §§ 407 and 408, are reproduced in the Addendum.

STATEMENT OF THE CASE

Plaintiff-Appellant Valancourt Books is a two-person publishing firm located in Richmond, Virginia. JA 109 ¶ 4; JA 112 ¶ 23. Since

2005, founder James Jenkins and his husband have pursued a simple mission through Valancourt: finding and bringing forgotten, unloved, and underappreciated books to a broader audience. JA 148 ¶ 2–3. They find and republish long-forgotten Gothic novels, works of early LGBT authors, and other books they believe deserve a wider audience. *Id.* ¶ 3. The name itself reflects this mission—“Valancourt Books” is a reference to both the dashing hero of Ann Radcliffe’s 1794 novel *The Mysteries of Udolpho* and to an essay in which W.M. Thackeray laments that young readers were unfamiliar with Radcliffe’s works, which had fallen out of print. JA 110 ¶ 11.

Perhaps understandably, Valancourt’s is not a high-volume business. Valancourt’s books have received scholarly attention and praise from the popular press, but it is not unusual for a new Valancourt book to sell a few hundred copies at most. JA 111 ¶¶ 18–19. Valancourt survives only because it uses a print-on-demand model; rather than producing a run of thousands of books and storing inventory against future orders, Valancourt’s books are printed one at a time by a digital printing vendor. JA 111 ¶ 20; JA 148–49 ¶ 4. This allows Valancourt to avoid the costs of stockpiling physical copies of its

books. JA 148–49 ¶ 4. Indeed, when Jenkins himself needs a copy of a Valancourt book, he orders it through the third-party vendor’s website. JA 111 ¶ 21.

While most of Valancourt’s books are old (and many of the original texts thus long out of copyright), nearly all of them contain at least some new material, whether in the form of scholarly introductions or footnotes meant to clue a reader in on what a reference would have meant to a contemporary audience. JA 149 ¶ 5. As far as Jenkins understood, every book contained at least some material that was copyrighted as a matter of law in the U.S. or the U.K. (the two jurisdictions where most of Valancourt’s books were sold), even if only the book’s layout.¹ JA 149 ¶¶ 5–6. And so most if not all Valancourt books contained a notice that the contents were copyrighted. *Id.* Valancourt did not include these notices because it intended to enforce

¹ Jenkins’s understanding that layouts and design choices can be protected by copyright is generally correct as a matter of U.K. law and less clear under U.S. law. *Compare* U.K. Copyright Service, *U.K. Copyright Law Fact Sheet P-01*, available at https://copyrightservice.co.uk/copyright/p01_uk_copyright_law, with *Logical Operations, Inc. v. 30 Bird Media, LLC*, 354 F. Supp. 3d, 286, 297–98 (W.D.N.Y. 2018) (explaining complex status of layout decisions under U.S. copyright law).

its copyrights—indeed, Jenkins testified that it would be “unthinkable” for a firm Valancourt’s size to file a copyright lawsuit—but instead for the more prosaic reason that “they [were] true.” JA 149 ¶ 6.

As to the new material in Valancourt’s books, Valancourt mostly did not own the copyright. Instead, Valancourt had licensing agreements (sometimes written, sometimes not) with friendly scholars or writers who contributed introductions, footnotes, and the like, and allowed Valancourt to publish them. JA 150 ¶ 7.

Over the years Valancourt’s model proved enough of a success that it could serve as Jenkins’s full-time occupation (though not enough of a success for its staff to expand beyond Jenkins and his husband). JA 110 ¶ 15; JA 112 ¶ 23. Beyond its modest financial success, though, Valancourt has succeeded in its mission, with a catalog of over 400 books, some so rare that (before their republication by Valancourt) they had survived in only a single known copy. JA 111 ¶¶ 16–17.

That success was threatened on June 11, 2018, when Jenkins received via email a letter from Michael Lind, an employee of the Copyright Office. JA 130. The letter notified Jenkins that Valancourt had failed to comply with the mandatory-deposit requirements of

17 U.S.C. § 407 and ordered him to immediately provide copies of some 341 Valancourt books on pain of fines. JA 122–23; JA 127–32. Despite his years in publishing, this was the first Jenkins had heard of the mandatory-deposit requirement. JA 123 ¶ 74.

Jenkins was dismayed by this email. JA 146–47 ¶ 7. The fines were daunting, reaching at least into the six figures, and complying with the request would impose a significant burden in time and money. *Id.* He knew through firsthand experience that supplying the Library of Congress with copies of Valancourt’s books could be expensive and burdensome: Early in Valancourt’s history, Jenkins had voluntarily participated in a Library program called the “Cataloging in Publication Program,” in which publishers exchange free copies of their books for catalog control numbers from the Library. JA 120 ¶ 62, JA 151 ¶ 10. Jenkins had at first believed that the program would help Valancourt sell its books to public libraries, but he ultimately concluded that supplying the books was an unjustifiable expense. *Id.*

Moreover, Jenkins had kept copies of virtually none of the demanded books; providing copies of them to the federal government would require him to order copies through his third-party printing

vendor. JA 123 ¶¶ 75–76. Complying with this demand—ordering, repackaging, and shipping over 300 books—would cost him thousands of dollars and many hours of time. JA 151 ¶ 10.

With that in mind, Jenkins promptly responded to the demand letter. He explained that (a) Valancourt was a small, print-on-demand publisher that would find compliance extremely burdensome, (b) most of Valancourt’s books were in fact reprints of older books that would already be in the Library’s collection in earlier editions, and (c) many of the books requested had already been deposited with the Library pursuant to Valancourt’s previous participation in the Cataloging in Publication Program. JA 134–35.

Two months later, the Copyright Office responded, rejecting Jenkins’s arguments. JA 137. To the extent Valancourt’s books contained any new “copyrightable” material at all, Valancourt was required to deposit them regardless of any earlier editions the Library might have. *Id.* And to the extent Valancourt had deposited books voluntarily as part of the Cataloging in Publication Program, those books did not count: They had been deposited in exchange for a control

number, and the mandatory-deposit law required Valancourt to deposit books free of charge. *Id.*

The Copyright Office did, however, reduce the total number of books demanded from 341 to 240. The record is unclear as to exactly why or how the Copyright Office culled its demand down to 240 books. The Copyright Office claims it tried to remove books that did not contain “newly added material,” though Jenkins testified that the removed books seemed to have just as much copyrightable material as the remaining 240. *Compare* JA 123 ¶ 77, *with* JA 150–51 ¶ 9.

The mystery of the reduced demand aside, however, the Copyright Office’s position was based on a correct understanding of the statute. Federal law, as embodied in 17 U.S.C. § 407, required Valancourt to deposit with the government copies of any work that contained any “copyrightable” material. JA 115–16 ¶ 43. If Valancourt failed to do so in response to the government’s demand, it could face fines of up to \$250 per book, plus the book’s retail price, plus a separate fine of \$2,500 per book if its refusal to comply was “willful[].” 17 U.S.C. § 407(d).

Federal law did not always require this. Under federal copyright law as adopted after the Founding, only an author or publisher seeking

copyright protection was required to deposit copies of the work to be protected with the federal government. Copyright Act of May 31, 1790, ch. 15, § 3, 1 Stat. 124, 125; *see also Wheaton v. Peters*, 33 U.S. 591, 592 (1834). As originally conceived, mandatory deposit was an exchange. Those seeking copyright were required to surrender some of their property for it; those who chose not to surrender any property did not receive copyright protection.

No longer. As a result of the United States' entry into the Berne Convention, copyright is no longer conditioned on registration (or anything else). Instead, copyright attaches to a new work the moment the work is created. *See generally* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853. Despite this change, the mandatory-deposit requirement persists, but it is no longer an exchange. Instead, it operates as a requirement imposed on any publication that contains anything “copyrightable”—which is to say any publication containing any new material at all. JA 115–16 ¶ 43.

These mandatory-deposit requirements are not, of course, the only way the Library of Congress obtains works from publishers. As noted above, some books are deposited through the Cataloging in Publication

Program in exchange for catalog numbers. Still others are deposited in exchange for copyright registration: Under 17 U.S.C. § 408, a publisher that wishes to register its copyright (a necessary step to enforcing that right in court) is still required to deposit copies of the registered work in exchange for registration. But if a publisher opts not to register its copyright, the mandatory-deposit requirement demands that it send in copies of its books anyway—in exchange for nothing at all. JA 116 ¶ 45; JA 120 ¶ 63.

Most publishers that comply with the mandatory-deposit requirement make the deposits on their own without any request from the government. More than 35,000 books were deposited pursuant to the mandatory-deposit requirement in fiscal 2017 alone. JA 118 ¶ 57; JA 120 ¶ 66. But if a publisher fails to deposit copies of its books, the Copyright Office may do what it did to Valancourt and demand copies of the books on pain of fines. JA 117 ¶¶ 50–51. It does this comparatively infrequently. As compared to the more than 35,000 books deposited without any request in 2017, the Copyright Office sent out demands for only about 4,500 titles per year over a six-year period. JA 117 ¶ 51.

Of this smaller number of demands, the majority originate from within the Copyright Office itself. That office employs about a dozen people organized into “acquisitions teams” that are tasked with finding publishers who have not complied with the mandatory-deposit requirement, determining whether those publishers’ books fit the Library of Congress’s formal criteria for acquisition, and (if so) sending out threat letters to induce compliance. JA 117 ¶¶ 48–49, JA 118 ¶¶ 53–54. The “acquisitions teams” divide up the publishing world alphabetically, rather than by subject matter, and mostly do their jobs by searching the internet for noncompliant publishers. JA 118 ¶ 56. About 80 percent of the demands for deposit sent out by the Copyright Office result from this sort of self-directed internet research. JA 118 ¶ 57. More rarely, about 20 percent of the time, a demand comes from staff within the Library identifying a book the Library itself wants and asking the Copyright Office to obtain a copy. *Id.*

For all the books that come in via mandatory deposit, far more are deposited in exchange for copyright registration. In fiscal 2017, for example, the Copyright Office received 137,223 books via copyright registration and only 35,554 through mandatory deposit. JA 120 ¶ 66.

Based on the patterns recounted above, fewer than 5,000 of those 35,000 were likely the result of the sort of demand issued to Valancourt, and fewer than 1,000 of those likely came from an actual request by Library of Congress staff. In Valancourt’s particular case, the threat letter was issued based on internet research by an “acquisitions team,” not by a determination by Library of Congress staff that they needed any of Valancourt’s books. JA 122 ¶ 70.

All told, the Copyright Office receives a huge influx of books each year that it then transfers to the Library of Congress. But the Library, unsurprisingly, does not want all these books. Some of them are not the sort of books the Library wants to collect; others are only discarded due to the limited size of the Library’s own physical space. JA 120 ¶ 67. The Library must dispose of all of these unwanted books somehow—and so it trades them, gives them away, or just destroys them. JA 121–22 ¶ 68. In 2018 alone, the Library traded or gave away more than 80,000 books. *Id.* If unwanted books cannot be easily traded or given away, they are simply destroyed—and the Library makes no effort to track how many books it destroys. *Id.* Neither does the Library track where the unwanted books came from: Many of the tens of thousands of books

given away or destroyed by the Library in 2018 would have been deposited pursuant to the mandatory-deposit requirement, but the Library makes no effort to track how many or what happened to them. JA 121–22 ¶¶ 68–69. In sum, as one might expect, thousands upon thousands of books come in; as many as half (or even more) of them are given away or destroyed; and the government cannot provide even the beginnings of an accounting of what it did with a huge proportion of them.

This system, then, generated the threat letter to Valancourt Books and James Jenkins. Unwilling to spend hours of time and thousands of dollars providing the government with books that (in many cases) it already had, Valancourt sued. JA 6–32. The parties promptly agreed to toll the imposition of any fines pending the outcome of this litigation rather than litigate a preliminary-injunction motion. JA 124 ¶ 81. That tolling agreement is still in place, which means Valancourt still has not complied with the demands and the government has not (yet) initiated action to enforce its threatened fines. *Id.*

While the lawsuit was pending, the government made a settlement offer. Under the terms of the offer, Valancourt would be

allowed to deposit electronic copies of the demanded works instead of physical copies. JA 173. Valancourt rejected the offer, in part because it seemed a ploy to give Valancourt special treatment while leaving the abusive policies in place, but in part because Valancourt did not even have all the requisite electronic copies. JA 167–70. James Jenkins testified that it would take him an enormous amount of time even to comb through Valancourt’s electronic records, which had been stored on various personal laptops over the course of the company’s 15-year history. What’s more, he was quite sure that, having completed this time-consuming search, he would come up at least partly empty: Due to a home burglary several years ago where some of those personal laptops were stolen, he was certain that Valancourt no longer retained copies of at least some of the demanded books. JA 168–70 ¶¶ 6–9. In short, the government’s offer would require Valancourt to undertake a huge amount of time and effort—and, then, at the end of all that time and effort, turn over a number of physical books anyway. *Id.*

At cross-motions for summary judgment, Valancourt objected to the consideration of this settlement offer under Federal Rule of Evidence 408. *See, e.g.*, Pl.’s Mem. in Supp. of Mot. Summ. J. (ECF 17-1

below) at 7 n.3. But the government countered that the settlement offer was no longer a settlement offer; it was instead “a statement of Defendants’ present intent.” JA 165 (quoting Defendants’ brief). Crediting this assertion from the government’s brief, the district court entered an order directing the parties to file supplemental briefs addressing whether the government’s newly asserted position mooted the case. JA 164–66.

After receiving that briefing, the district court eventually entered a decision granting the government’s motion for summary judgment. JA 175–200. The court held that (1) it retained subject matter jurisdiction but that the new settlement position announced in the government’s brief had partially mooted Valancourt’s claims; (2) the mandatory-deposit requirement did not effect a taking because it was a voluntary condition of the receipt of copyright protection; and (3) the burdens imposed on speakers by the mandatory-deposit requirement did not violate the First Amendment. This appeal timely followed.

SUMMARY OF ARGUMENT

Valancourt Books wants to publish books that contain at least some new material. The government’s position is that Valancourt is not free to do this—that publishing a book that contains any “copyrightable” material requires Valancourt to either provide the government with free copies of that book or pay money in lieu of surrendering its property. Valancourt sued because this is unconstitutional. The Takings Clause prevents the government from demanding private property as a condition of simply publishing a book. And the First Amendment prevents the government from punishing Valancourt (or anybody else) simply because it published a book.

The district court’s ruling to the contrary was error.

First, the district court failed to address the actual dispute between the parties. Instead, it held that Valancourt’s original constitutional challenge to the government’s demand for 240 physical books was moot because of the government’s offer to accept electronic copies of books instead. But the government’s unilateral change in position—conveyed exclusively in the form of an assertion in the government’s summary-judgment brief—cannot moot this case in whole

or in part. Because there has been no intervening change in law or policy or even an on-the-record explanation for why Valancourt has suddenly become eligible for special treatment, Valancourt's original constitutional challenge remains live.

And that constitutional challenge is meritorious under both the Fifth and First Amendments. Under the Fifth, the mandatory-deposit requirement violates the Takings Clause. It is a classic taking in which the government is demanding private property be turned over for its own use. This triggers a categorical duty to pay just compensation.

The district court rejected this argument by holding that the mandatory-deposit requirement is not a taking but is instead a valid condition of copyright. This was incorrect. The statutory text explicitly says that mandatory deposit is not a condition of copyright. Under modern law, copyright protection automatically attaches to a creative work at the moment of creation; it is neither conditional nor offered in exchange for anything. The mandatory-deposit requirement is thus not triggered by a publisher's request for copyright protection but by the mere act of publishing a book that contains "copyrightable" material. Under binding Supreme Court precedent, the government may not

condition the right to do something as anodyne as publishing a book on a publisher's willingness to surrender its property rights.

Separately, the mandatory-deposit requirement violates the First Amendment for two reasons. First, the requirement is content-based in both its justification and its enforcement. In practice, the government uses the mandatory-deposit requirement as a way to obtain particular books—books whose content makes them suitable for inclusion in the Library of Congress's catalog. In *Valancourt's* case, it is undisputed that the company was threatened with fines solely because a government employee found its website on the internet, reviewed the content of its publications, and decided to subject it to punishment based solely on that content. That is a content-based burden on speech. True, *Valancourt* is not being punished because the government is hostile to its speech—perversely, it is being punished because the government approves of its speech and wants to benefit from it. But content-based laws are subject to strict scrutiny regardless of their motivation.

But even if one ignores the government's content-based enforcement of the law, what is left is a law that is absurdly overbroad. The mandatory-deposit requirement, as written, requires everyone who

publishes a book with any “copyrightable” material in the United States to provide the government with a copy of the book for the use of the Library of Congress—even if the Library already has a copy and even if the Library doesn’t want the book at all. The Library, of course, does not want every “copyrightable” book published in the United States; it couldn’t possibly store them all. It only wants good books that it thinks are worthwhile. And so it trades, gives away, or destroys many or even most of the books it receives from publishers that comply with the law’s plain command. This is wildly overbroad, imposing real burdens on every speaker nationwide just to allow the government to obtain a small subset of those books for free instead of purchasing them at retail. In sum, whether viewed through the lens of the law’s enforcement mechanisms (which are employed solely on the basis of content) or the law’s plain text (which burdens all publishers in an effort to obtain a select few books), the mandatory-deposit requirement fails First Amendment scrutiny.

For all these reasons, the ruling below should be reversed, and this case should be remanded with instructions to grant summary judgment in favor of Valancourt.

STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed de novo. *Farrell v. Blinken*, 4 F.4th 124, 135 (D.C. Cir. 2021).

ARGUMENT

Part I explains that the district court erred in holding that part of Valancourt's claims had been mooted by the government's announcement in its summary judgment brief that it had converted its settlement offer into a "statement of present intent." Part II explains that requiring publishers to surrender property (or pay money in lieu of surrendering property) simply because they publish copyrightable material violates the Takings Clause. Part III explains that the burdens the mandatory-deposit requirement imposes on speakers violate the First Amendment.

I. THE DISTRICT COURT ERRED BY TREATING VALANCOURT'S ORIGINAL CLAIMS AS MOOT IN LIGHT OF THE GOVERNMENT'S SETTLEMENT OFFER.

This case was filed because the government had threatened Valancourt with tens of thousands in dollars in fines if it failed to turn over its personal property in the form of hundreds of copies of books it

had published. The dispute between the parties was whether that threat violated the Constitution.

The district court never resolved that dispute. Instead, it held that the dispute between the parties had been “narrowed” by the government’s offer to settle the case by accepting only electronic copies of the books in question. JA 182. In other words, it found that “one aspect” of Valancourt’s claims (its objections to the government’s initial demands) was moot but that there was still a live controversy over the constitutionality of the government’s new demand for electronic copies. JA 184 (quotation marks omitted).

This was error. No aspect of Valancourt’s original constitutional claims is moot, and the district court should therefore have addressed those claims. The government’s unilateral decision to grant Valancourt special treatment, at most, amounts to voluntary cessation. But “[m]ere voluntary cessation of allegedly illegal conduct does not moot a case” because if it did a defendant would be “free to return to [its] old ways.” *United States v. Concentrated Phosphate Exp. Ass’n*, 393 U.S. 199, 203 (1968) (quotation marks omitted). For this reason, a defendant seeking to moot a claim through voluntary cessation must show both that (1) it

is “‘absolutely clear’ that it could not revert to” the challenged policy, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017), **and** (2) “interim relief or events have completely or irrevocably eradicated the effects of the alleged violation.” *Zukerman v. U.S. Postal Serv.*, 961 F.3d 431, 442 (D.C. Cir. 2020) (quotation marks omitted). There is nothing in the record to make either showing.

For one thing, the “‘heavy burden of persuad[ing]’ the court [that a claim is moot] lies with the party asserting mootness.” *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *Concentrated Phosphate*, 393 U.S. at 203). And at no point has the government introduced anything to carry that burden. The entirety of the record on this point is that (1) the government offered to settle this case by accepting electronic copies of the demanded books (JA 173) and (2) the government announced for the first time in its summary-judgment briefing that this offer of special treatment was now open to Valancourt whether it settled the case or not (JA 165). That is not the stuff of which mootness is made.

Even if the record contained more, though, this Court has repeatedly held that mootness by voluntary cessation requires, at a

bare minimum, that the government have changed or rescinded the policies being challenged. *Zukerman*, 961 F.3d at 446 (case could not be moot where “the challenged [r]ule remain[ed] in effect”); *see also Glob. Tel*Link v. FCC*, 866 F.3d 397, 407 (D.C. Cir. 2017) (finding “absolutely no basis” for mootness so long as a challenged order was “still in force”). There has been no change in statute, rule, or regulation here. Indeed, the government has not even formally withdrawn its threat letters to Valancourt, conveying its new position solely in the form of an assertion in its brief. *Cf. Conservation Force v. Salazar*, 715 F. Supp. 2d 99, 106 n.9 (D.D.C. 2010) (noting that the “mere arguments of counsel . . . are not evidence” (quotation marks omitted)).

Similarly, nothing in the record makes “‘absolutely clear’ that [the government] could not revert to its policy” of demanding physical books from Valancourt. *Trinity Lutheran*, 137 S. Ct. at 2019 n.1; *cf. K.P. v. LeBlanc*, 729 F.3d 427, 438–39 (5th Cir. 2013) (holding case not moot even where defendants had met plaintiff’s demands because nothing required defendants to do so again in the future). As far as the record reveals, the government’s new stance toward Valancourt is simply an

act of executive grace, conveyed in the government's boundless discretion and revocable in the same way.

After all, nothing changed about either the law or Valancourt in the year between the filing of this lawsuit and the government's announcement of its new position. The government did not change its position because of any intervening regulatory change. *Cf. Nat'l Mining Ass'n v. Dep't of Interior*, 251 F.3d 1007, 1011 (D.C. Cir. 2001) (finding case moot due to "substantial changes" in governing regulations such that "[a]ny opinion regarding the former rules would be merely advisory"). There has been no underlying regulatory change—substantial or otherwise.

Neither did the government change its position because it realized it was treating Valancourt unlawfully. *See Gordon v. Lynch*, 817 F.3d 804, 806–07 (D.C. Cir. 2016) (finding case moot where government explicitly recognized constitutional barriers to enforcement). To the contrary, it "vigorously defends the constitutionality of its [] program, and nowhere suggests that if this litigation is resolved in its favor it will not" carry on demanding physical books from anyone it chooses.

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 719 (2007).

And neither did the government change its position because it learned new facts about Valancourt—again, James Jenkins’s pre-litigation plea for mercy laid out all the salient facts about the company but fell on deaf ears. *See* JA 134–35. Simply put, nothing in the record explains why Valancourt suddenly qualified for special treatment when it previously had not. Nothing in the record explains what might cause Valancourt to lose its newfound special status in the future. And so nothing in the record even approaches the “heavy burden” the government must shoulder to prove mootness here. *Friends of the Earth*, 528 U.S. at 189.

Even if the government’s unilateral change in attitude toward Valancourt were the sort of policy change that could raise mootness concerns, Valancourt’s claims would still not be moot because the government’s new position did not “irrevocably eradicate[]” its injuries. *Zukerman*, 961 F.3d at 442. Indeed, it did not eradicate them, revocably or otherwise. As the record reflects, one reason Valancourt rejected the government’s settlement offer was because it could not comply.

Valancourt almost certainly does not have electronic copies of some of the books demanded by the government, which means (as to those books) the government's demand for physical copies stands. JA 167–70. In other words, even by the terms of the government's new position, Valancourt still faces the same injury: a choice between surrendering its physical property and paying substantial fines. That is a “tangible, concrete effect, traceable to the injury and curable by the relief demanded” that defeats mootness. *Zukerman*, 961 F.3d at 444 (quotation marks omitted).

In short, when this case began, the government asserted the power to fine Valancourt for publishing books that contained “copyrightable” material without surrendering physical copies of those books to the government. It still does. And Valancourt contended that the government's asserted power violated both the Fifth and First Amendments. It still does. This Court should therefore resolve this live controversy between the parties.

II. THE MANDATORY-DEPOSIT REQUIREMENT VIOLATES THE FIFTH AMENDMENT.

The mandatory-deposit requirement violates the Takings Clause because it requires private parties like Valancourt to turn over private property to the government without just compensation. As discussed in Part A below, the district court erred by holding that this requirement is a mere “voluntary exchange” of private property for copyright protection. As explained in Part B, it also erred by following the Ninth Circuit’s decision in *Ladd v. Law & Technology Press*, 762 F.2d 809 (9th Cir. 1985), a decision that was wrong when it was decided and that has been further undermined by changes to the mandatory-deposit statute.

A. The Mandatory-Deposit Requirement Is Not An Exchange.

The mandatory-deposit requirement is a “classic taking . . . in which government directly appropriates private property for its own use.” *Horne v. Dep’t of Agric.*, 576 U.S. 350, 357–58 (2015). Ordinarily, this kind of direct appropriation triggers a “categorical duty to pay just compensation.” *Id.* at 358. The district court, though, found there was no taking here at all because the mandatory-deposit requirement

is a “voluntary exchange in return for federal copyright protection.”

JA 184. It is not. Below, Valancourt explains first that the district court’s ruling rests on a misunderstanding of both Supreme Court precedent and the plain text of § 407. It then explains that the district court was further mistaken in suggesting that Valancourt’s own actions or omissions somehow cure the Takings Clause problem in this case.

1. *The ruling below misunderstands Supreme Court precedent and the statutory text.*

The district court’s primary support for its holding was *Ruckelshaus v. Monsanto Company*, 467 U.S. 986 (1984), which (on the district court’s reading) holds that “a statute that confers a ‘benefit’ on a citizen may condition the receipt of that benefit on the submission of private property in exchange without running afoul of the Takings Clause.” JA 185. This was error for two independent reasons.

First, the mandatory-deposit requirement does not “condition the receipt” of any benefit at all. Quite the contrary: The statutory text makes clear that “the deposit requirements” of § 407 are not “conditions of copyright.” 17 U.S.C. § 407(a). That, on its own, should stop the analysis. Congress has said that the mandatory-deposit requirement is

not a condition of the receipt of copyright, and it was therefore error for the district court to hold otherwise.

In its original form, of course, the Copyright Act's deposit provision was an exchange. Under the original system, an author or publisher who sought copyright protection was required to deposit copies of the work to be protected with the federal government as a condition of registering that copyright. Copyright Act of May 31, 1790, ch. 15, § 3, 1 Stat. 124, 125; *see also Wheaton v. Peters*, 33 U.S. 591, 592 (1834); *accord Golan v. Holder*, 565 U.S. 302, 314 n.11 (2012) ("From the first Copyright Act until late in the 20th century, Congress conditioned copyright protection on compliance with certain statutory formalities").

But those conditions are no more. As a result of the United States' entry into the Berne Convention, copyright no longer hinges on registration: Instead, copyright attaches to a new work the moment the work is created. *See generally* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853. The Berne Convention, among other things, was meant to eliminate the formalities attendant on copyright protection among signatory nations. *See* Berne Convention

for the Protection of Literary and Artistic Works, art. 5(2), *adopted* Sept. 9, 1886, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3 (“The enjoyment and the exercise of these rights shall not be subject to any formality”). Despite this change, the mandatory-deposit requirement persists—but now, instead of a requirement imposed on a publisher who wants to *obtain* copyright, it is imposed on anyone who publishes a work that is “copyrightable.” JA 115–16 ¶ 43.

In short, Valancourt’s argument is that when Congress changed the law, the law changed. If copyright is no longer conditioned on mandatory deposit (and Congress says it is not), then mandatory deposit is no longer an exchange of property for copyright. It is simply a demand for property—and that triggers the Takings Clause.

Second, the district court’s broad reading of *Monsanto* cannot be squared with the Supreme Court’s decision in *Horne*. In *Horne*, the plaintiffs were raisin growers who challenged the requirement that they set aside a certain percentage of their raisin crop for the government, free of charge. 576 U.S. at 354. The penalty for noncompliance was the same as the penalty Valancourt faces: the fair market value of the private property the government had demanded, plus a fine. *Id.* at 356.

The Court held that this was a taking and that the proper remedy was for the growers to be “relieved of the obligation to pay the fine and associated civil penalty” for having refused to turn over the raisins in the first place. *Id.* at 370.

In dissent, Justice Sotomayor invoked *Monsanto*, raising arguments that largely mirror those adopted by the district court below. The Hornes, like the companies in *Monsanto*, had gained advantages from the overall regulatory scheme, including “the advantage of living and doing business in a civilized community.” *Id.* at 383 (Sotomayor, J., dissenting) (quotation marks omitted). Indeed, the dissent emphasized, the Hornes were not selling into an unregulated market: Any raisins they sold would sell at a price supported by the very regulatory program they challenged. *Id.* at 384 (Sotomayor, J., dissenting). And so, reasoned the dissent, the Hornes’ claims must fail because “the Government may impose a price on the privilege of engaging in a particular business without effecting a taking.” *Id.* at 385 (Sotomayor, J., dissenting).

Not so, said the majority. Instead, the Supreme Court clarified that *Monsanto* was far more limited than the dissent suggested, emphasizing that the Takings Clause was not implicated in that case

only because the companies were (1) taking part in a “voluntary exchange” in which they received (2) “a license to sell dangerous chemicals” that would otherwise be illegal. 576 U.S. at 366. Neither of these criteria is present here.

There is no “exchange” here, voluntary or otherwise, because the mandatory-deposit requirement is simply not a condition of copyright protection. Copyright is not created as a result of compliance with some condition precedent; instead, “U.S. copyright subsists in unpublished works . . . *from the moment of creation*[.]” Thomas F. Cotter, *Toward a Functional Definition of Publication in Copyright Law*, 92 Minn. L. Rev. 1724, 1743 (2008) (emphasis added) (citing 17 U.S.C. § 104(a)). This is why the government consistently demands deposit of books containing “copyrightable” material. JA 14 ¶ 41; JA 17 ¶ 55. Any material that is *copyrightable* is automatically *copyrighted* as a matter of law, with nothing given or demanded in exchange. The moment Valancourt publishes a book, it is subject to the mandatory-deposit requirement—just as the Hornes were subject to the requirements of the Raisin Marketing Order as soon as they sold their first raisin.

Similarly, nothing *Valancourt* does is remotely analogous to “a license to sell dangerous chemicals.” *Horne*, 576 U.S. at 366. In *Horne*, the Court was clear that the *Monsanto* principle at most extends to activities that the government could prohibit, like selling dangerous chemicals or fishing oysters that belonged to the State. *Id.* at 366–67. The principle cannot be extended to what the Court called “basic and familiar uses of property” like building on one’s own property or selling raisins in interstate commerce. *Id.* at 366. But *Valancourt* just wants to publish books—a use of property as old as Gutenberg and at least as familiar as selling raisins. Under § 407, the mere act of publishing those books requires *Valancourt* to surrender its property or pay fines. Congress is free to grant or withhold copyright protection in the “copyrightable” material in those books as it sees fit, but it may not treat the right to publish a book as a right it “may hold hostage, to be ransomed by waiver of constitutional protection.” *Id.*

To be sure, *Horne* does not overrule *Monsanto*. As the Supreme Court reaffirmed last Term, *Monsanto* continues to stand for the proposition that the government may make a “grant of a benefit such as a permit, license, or registration” conditional on the surrender of

property rights. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021); *see also* JA 189 (quoting this language). But *Cedar Point Nursery*'s chosen examples prove the point: Copyright, in itself, is neither a permit nor a license nor a registration.

Indeed, the difference between copyright *registration* and copyright *protection* provides a useful counterexample. Under 17 U.S.C. § 408, a creator who wants to obtain copyright registration is required to pay a fee and surrender a copy of the work to the government *in exchange for* copyright registration. 17 U.S.C. § 408(a).² Copyright registration is thus conditional: People who are unwilling to surrender their property are unable to enforce their copyrights in court. By contrast, people who are unwilling to surrender their property under the mandatory-deposit provisions of § 407 still have exactly the same (limited) rights as anyone else who holds an unregistered copyright. They are just fined for failure to turn over their property. *Cedar Point Nursery*'s use of "registration" as an example of a permissible demand for property therefore makes perfect sense. But it in no way stands for the proposition, as the district court held, that the government can make demands for property on

² This, too, "is not a condition of copyright protection." *Id.*

anyone who has received any “benefit” from a statutory scheme, no matter how tenuous or unenforceable that benefit might be. The district court’s holding to the contrary was therefore error.

2. *None of Valancourt’s actions or omissions justify the seizure of its property.*

In the alternative, the district court suggested that Valancourt has brought the mandatory-deposit requirement on itself through its own acts or omissions. On this view, Valancourt can be subjected to the mandatory-deposit requirement either because it has included a notice of copyright in its books (JA 187) or because it has failed to “disavow[]” its copyright protection. JA 193. Neither argument withstands scrutiny.

First, Valancourt’s mandatory-deposit obligations cannot vary based on whether its books contain a copyright notice. James Jenkins testified that Valancourt’s books contained copyright notices for a single reason: because “they are true.” JA 149 ¶ 6. The record is clear that Valancourt was ordered to turn over its books because they contained “copyrightable” material, not because they contained notices of copyright. JA 137. As a simple matter of law, the notices of copyright did not trigger Valancourt’s statutory obligations under § 407, nor could Valancourt have avoided those obligations by omitting these notices.

Moreover, placing any weight on Valancourt's truthful statements about copyright law would create a perverse statutory scheme.

Copyright law would automatically protect any "copyrightable" material in any books that are published. But as soon as publishers *told* anyone about that copyright protection, the mandatory-deposit provisions would kick in and subject them to fines. But Congress has not adopted such a scheme, and this Court should not graft one onto the statute.

The mandatory-deposit requirement effects a taking, or it does not.

Either way, the Takings Clause analysis cannot vary based on whether a publisher publicly acknowledges the reality of modern copyright law.

Cf. Bartnicki v. Vopper, 532 U.S. 514, 527 (2001) ("As a general matter, state action to punish the publication of truthful information seldom can satisfy constitutional standards." (quotation marks omitted)).

Second, the district court similarly erred by crediting the government's argument that Valancourt could escape the mandatory-deposit requirement by "disavow[ing]" its copyright protection. JA 193.

To start, it is unclear that it is even possible for Valancourt to meaningfully disavow its copyright. There is no statutory provision for abandoning automatic copyright protections; rather, "abandonment" is

a judicially created affirmative defense in a copyright-infringement action. *See generally Nat'l Comics Publ'ns, Inc. v. Fawcett Publ'ns, Inc.*, 191 F.2d 594, 598 (2d Cir. 1951). The Copyright Office allows copyright holders to file statements purporting to abandon their copyright, but the Copyright Office itself does not assert that these notices have any legal effect. U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 2311 (3d ed. 2021) (noting that the Copyright Office will accept such statements but that it will not “offer[] any opinion as to the legal effect of the document”).

Indeed, the difficulty of abandoning copyright underlies the creation of legal devices like the Creative Commons, a nonprofit that designs special licenses allowing copyright holders to permit broader public use of their works. Creative Commons itself says that its licenses were created because “[d]edicating works to the public domain is difficult if not impossible for those wanting to contribute their works for public use before applicable copyright or database protection terms expire. Few if any jurisdictions have a process for doing so easily and reliably.” Creative Commons, *CC0: “No Rights Reserved”*, <https://creativecommons.org/share-your-work/public-domain/cc0>.

Even if “abandoning” its copyright with the Copyright Office had some legal effect, though, that would not cure the Takings Clause problem because abandonment is neither easy nor free. It is not easy because “abandoning” copyright would entail immense administrative burdens for Valancourt, which does not own the copyright in much of what it publishes but only licenses it (formally or informally). JA 150 ¶¶ 7–8. And it is not free because even filing a notice of abandonment comes with a filing fee of \$125. *See* Copyright Office Fees, 85 Fed. Reg. 9374 (Feb. 19, 2020) (promulgating rule increasing filing fees); *accord* U.S. Copyright Office, *Fees*, <https://www.copyright.gov/about/fees.html>.

In other words, even accepting the district court’s view of the legal effect of abandoning copyright at face value, it leaves Valancourt with a choice of (1) surrendering its property every time it publishes a book, (2) paying a fine of \$250 per book, or (3) paying a fee of \$125 per book to “abandon” its automatic copyright. Significantly, it does not leave Valancourt with the option of just publishing a book without surrendering its money or other property to the government. But Valancourt (like anyone else) has a right to do exactly that—a right that the government “may [not] hold hostage” until Valancourt pays a

ransom in one form or another. *Horne*, 576 U.S. at 366. Because Valancourt has a right to publish books without paying the government for the privilege, the ruling below should be reversed.

B. The District Court Erred By Relying On The Ninth Circuit's Decision In *Ladd v. Law & Technology Press*.

The district court also sought to ground its ruling in the Ninth Circuit's decision in *Ladd v. Law & Technology Press*, 762 F.2d 809 (9th Cir. 1985), which upheld an earlier version of the mandatory-deposit requirement. This, too, was error. *Ladd* was wrong when it was decided and should be rejected by this Court. Even if it had been right, though, the mandatory-deposit requirement has since been amended in ways that dictate a different outcome today.

1. *Ladd was wrongly decided.*

In *Ladd*, the Ninth Circuit rejected a challenge to the mandatory-deposit requirement (as it then existed), on the grounds that in 1985 the obligation to deposit attached only if a work was published with an affirmative notice of copyright. 762 F.2d at 810 n.1; *id.* at 814; *see also* 17 U.S.C. § 407 (1982). As the *Ladd* court saw it, this was still an exchange: Under the original system of copyright (in which mandatory

deposit was made in a quid pro quo exchange for copyright), a publisher was faced with a choice of either depositing the books or forfeiting the copyright. *Ladd*, 762 F.2d at 814. As amended, copyright law in 1985 had “taken away that choice about deposit.” *Id.* Instead, “[o]nce publication with copyright notice has occurred, the owner *must* deposit.” *Id.* That was enough for the *Ladd* court: Once a publisher “voluntarily sought” the benefit of copyright protection, the government was allowed to impose mandatory deposit as a condition of that benefit. *Id.* at 810.

This was wrong.³ As discussed above, *Horne* makes clear that the government’s “categorical duty to pay just compensation” does not hinge merely on a party’s voluntary acceptance of a generally available government benefit. *Horne*, 576 U.S. at 358. After all, the Hornes voluntarily availed themselves of the right to sell raisins in interstate commerce (and, as noted by Justice Sotomayor, to do so at a government-supported price), but they nonetheless made a successful

³ The district court appears to have misapprehended Valancourt’s arguments on this point below. *Compare* JA 191 (“Plaintiff does not contend that the Ninth Circuit’s decision [in *Ladd*] was erroneous at the time.”), *with* Mem. of Points and Authorities in Supp. of Pl.’s Cross-Motion for Summary Judgment (ECF 18-1 below) at 14 (“*Ladd* was wrongly decided.”).

Takings Clause objection to the government's demand that they turn over some raisins in exchange. *Id.* at 365–67. And it would be odd if the law were otherwise: Every day, Americans voluntarily avail themselves of generally available government benefits. Their cars are more valuable because the government provides roads on which they can be driven. Their homes are more valuable because government-funded fire departments protect them from being burned down. Their wallets are more valuable because government-funded police help prevent them from being stolen. But it does not follow—it cannot follow—that the government could therefore order citizens to turn over their cars, homes, or wallets as the price of their having accepted these benefits.

This is why *Horne* holds that the Takings Clause applies unless property is demanded (1) *in exchange for* (2) a special right to do something that would otherwise be unlawful. *Supra* 29–31. Because there was no such exchange in *Ladd*, that case was wrongly decided even under the statute as it stood at the time.

2. *Ladd has been vitiated by later statutory changes.*

Even if it had not been wrong then, though, *Ladd* is wrong now. That is because *Ladd* expressly rested its conclusion on the fact that

mandatory deposit was triggered only after a publisher took voluntary steps to acquire copyright protection. 762 F.2d at 810. That is no longer the case. The mandatory-deposit provision is not triggered by any deliberate choice to acquire copyright protection; instead, since 1988, it applies to any “copyrightable” work published in the United States. JA 115–16 ¶ 43.

The district court held that this statutory change did not matter because *Ladd*'s reasoning did not hinge on whether the acceptance of copyright was voluntary; instead, the district court said, the Ninth Circuit's holding was simply that the government could impose the condition “in return for the *receipt* of the public benefit.” JA 192. Even if this is a correct reading of *Ladd*, though, it only underscores that *Ladd* was wrongly decided because that is exactly the rule rejected in *Horne*. In *Horne*, the Ninth Circuit (like the panel in *Ladd* or the district court here) had held that the government could validly demand property by claiming its demand was a “condition” of a benefit and that those who wanted to avoid the condition could take steps to avoid the benefit (by, in that case, growing different crops). *Horne*, 576 U.S. at 356. That was held to be wrong in *Horne*, and it is wrong here.

The district court also placed significant weight on the legislative history of the post-*Ladd* amendments to § 407, in which Congress asserted that “[t]he elimination of copyright notice as a factor in subjecting works to mandatory deposit does not have constitutional significance” because “only those works published in the United States in which copyright is claimed are subject to mandatory deposit.” JA 192. But courts “do not resort to legislative history to cloud a statutory text that is clear.” *Am. Fuel & Petrochem. Mfrs. v. EPA*, 3 F.4th 373, 383 (D.C. Cir. 2021) (quotation marks omitted). Nothing in the text of § 407 rests the mandatory-deposit requirement on any claim of copyright ownership. And the government’s practice of demanding deposit of anything containing “copyrightable” material matches the statutory text. JA 115–16 ¶ 43. The district court erred by privileging legislative history over both statutory text and the government’s own practice.

* * *

Congress has chosen to grant copyright protection to all new written works created in the United States. This grant is unconditional. The government’s position is that this unconditional grant nonetheless imposes obligations on publishers like Valancourt, who must surrender

their private property or spend money paying fines or divesting themselves of the unconditional right Congress gave them. This is wrong. Congress is free to grant or withhold copyright. It is even free to impose conditions on those who seek copyright. It has elected not to do so. And demanding private property without compensation simply because someone has enjoyed (to any degree) a public benefit is a violation of the Takings Clause. The district court's contrary ruling should therefore be reversed.

III. THE MANDATORY-DEPOSIT REQUIREMENT VIOLATES THE FIRST AMENDMENT.

The mandatory-deposit requirement also violates the First Amendment for two reasons. First, as discussed in Part A below, the law is unconstitutional because (as enforced in the real world) it is entirely content-based. The fines authorized by § 407 are threatened exclusively on the basis of government officials' analysis of a publisher's speech. But second, as discussed in Part B below, if one sets aside the government's content-based enforcement practices, what is left is a law that is almost comically overbroad. Every creator of any copyrightable written work (which is *any* written work) is saddled with an affirmative obligation to send copies of that work to the government or else

somehow figure out how to abandon its copyright. And these sweeping burdens are imposed only so that the government can get copies of the comparatively small subset of books it wants to keep in the Library of Congress without buying them at retail. Under either view, the law's burdens on creators violate the First Amendment.

A. Mandatory Deposit Is Subject To Strict Scrutiny.

The stated purpose of the mandatory-deposit requirement is to acquire books for the collections of the Library of Congress. JA 86; JA 114 ¶ 35. And the district court credited this purpose, finding that under the mandatory-deposit requirement “every published work will become part of the Library’s collection.” JA 195.

The trouble is that this is not true. Every published work will not become part of the Library’s collection, and the government does not *want* every book published in the United States to become part of the Library’s collection. Quite the contrary. Indeed, every year the Library gives away or even destroys an untold number of books—so many it does not bother to count—that it simply does not want. JA 121–22 ¶¶ 68–69.

Instead, the government wants only *good* books. It wants books that meet its highly detailed Collections Policy Statements, and when publishers deposit books that fall outside those guidelines, those books are discarded. JA 118 ¶ 54; JA 120–21 ¶¶ 67–68. And if a publisher fails to comply with the mandatory-deposit requirement, the government frequently ignores the omission—*unless* it determines that the content of the book falls within the scope of a Collections Policy Statement, in which case the publisher is threatened with fines to force it to deposit the books. JA 118 ¶ 55.⁴

The upshot is that the mandatory-deposit requirements of § 407 look on their face to be content-neutral in that they apply to every work published in the United States, but they are content-based both in their

⁴ Valancourt, of course, was threatened with fines because Copyright Office staffers found its website while doing internet research rather than because anyone in the Library of Congress decided its books needed to be included in the Library's collections. JA 118 ¶ 53–56; JA 122 ¶ 70. But the staffers in the Copyright Office are still charged with evaluating the content of a publisher's books before sending out any threat letters. JA 113 ¶ 53. Ultimately, whether the content-based determination is made by Library staff deciding they need a certain book or by Copyright Office staffers trawling the internet makes no difference: The determination of whom to threaten with fines is still based entirely on content.

justifications and in their enforcement. Each flaw independently triggers strict scrutiny under the First Amendment.

As to the law's justification, the Supreme Court has repeatedly held that even a facially neutral law will be treated as content-based if the law "cannot be justified without reference to the content of the regulated speech." *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (cleaned up). In other words, if the government cannot describe the law's purpose without discussing the content of the regulated speech, the law is content-based. That is the case here. By the government's own admission, the purpose of mandatory deposit is not to ensure universal acquisitions but to acquire certain desirable books, with certain content, as described in the Collections Policy Statements.

The district court failed to recognize the content-based nature of mandatory deposit because it disregarded the parties' stipulations. The court rejected the idea that the law's purpose was content-based by pointing to the fact that "every published work will become part of the Library's collection." JA 195. But this, again, was false: The purpose of mandatory deposit is not to ensure that every published work becomes

a part of the Library's collection. It is to build the Library's collection by adding books *with particular content*. The district court did not address this argument or point to a different content-neutral justification for the mandatory-deposit requirement.

Neither did the district court grapple with the constitutional problems raised by the government's admitted enforcement practices. According to the district court, "the mere assertion that the [Copyright] Office pursues some cases and not others does not rise to the level of a showing that those decisions were based on content." JA 196.⁵ True enough. But Valancourt's argument is not premised on the mere assertion that the government pursues some cases and not others. It is premised on the parties' stipulation that the government decides whether to threaten a publisher with fines based *solely* on the content of that publisher's speech. JA 117–18 ¶¶ 52–57.

⁵ The district court also attempted to distinguish between "the Copyright Office's discretionary enforcement of the deposit requirement" and "the deposit requirement itself." JA 196. But the threat letter that was the genesis of this lawsuit was, of course, the product of both the deposit requirement and the Copyright Office's discretionary decision to enforce it against Valancourt, and both things are at issue in this case.

For instance, to decide whether to enforce the mandatory-deposit requirement, government agents must assess whether a work of American fiction has “literary merit” or “represent[s] current trends in writing.” They must assess whether books belong in “research level” or “instructional support level” collections.⁶ These are, needless to say, assessments of the content of the books themselves. In other words, Valancourt is subject to fines because a government official reviewed the content of its speech and determined that it fell into one category rather than another. *See* JA 122 ¶ 70 (stipulating that Valancourt was threatened with fines “due in part to [its books’] historical significance”). That triggers strict scrutiny. *See, e.g., Mahoney v. Babbitt*, 105 F.3d 1452, 1456 (D.C. Cir. 1997) (content-based enforcement subject to strict scrutiny); *Hoye v. City of Oakland*, 653 F.3d 835, 852 (9th Cir. 2011) (same).

The district court’s failure to recognize the content-based nature of the government’s enforcement practices seems to stem, in part, from a misunderstanding about what it means for a law to be content-based. In

⁶ These quotations are drawn from the Library of Congress’s Collections Policy Statements, true and correct copies of which the parties stipulated are available at <https://www.loc.gov/acq/devpol/cpsstate.html>.

rejecting Valancourt's claim, the court concluded that "there is nothing in the record that would begin to suggest that the Copyright Office has any problem with the republication of classic works of literature in particular." JA 196. The court also suggested that mandatory deposit is constitutional because it "is part of a federal copyright scheme that encourages and protects expression, rather than restricting or chilling the right to speak." JA 198. But, of course, content-based laws trigger strict scrutiny regardless of whether they are motivated by hostility towards the regulated speech. *See Reed*, 576 U.S. at 169 ("[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter."). By suggesting that Valancourt needed to show some level of hostility to its viewpoint, the district court "conflate[d] two distinct but related limitations that the First Amendment places on government regulation of speech." *Id.* at 168.

Indeed, the district court is right that there is no evidence in the record to suggest that the government singled Valancourt out because it disapproved of its speech. Quite the opposite. Valancourt was threatened with fines because the government *likes* its books. The

record is clear that if government officials had deemed Valancourt's books to be low-quality, pornographic, or otherwise undesirable they would have left the company alone. But federal courts do not distinguish between *beneficent* content-based distinctions and *malicious* ones. They instead apply strict scrutiny to content-based distinctions, full stop. As the *Reed* Court explained, "[t]he vice of content-based legislation is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Id.* at 167 (cleaned up). A law that punishes speech for being good is not constitutionally distinct from a law that punishes speech for being bad. *Id.* at 171 ("[A] clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem 'entirely reasonable' will sometimes be 'struck down because of their content-based nature.'") (citation omitted); *cf. United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 812 (2000) ("The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans."). The ruling below should therefore be reversed.

B. Mandatory Deposit Is Overbroad And Cannot Survive Either Strict Or Intermediate Scrutiny.

Even if the mandatory-deposit requirement is viewed as content-neutral—that is, as a burden imposed on everyone who publishes any new material in the United States, regardless of its content—it is wildly overbroad and overly burdensome relative to the government’s narrow asserted interests. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (“A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests”).⁷

Here, the government has articulated only one interest supporting the mandatory deposit rule: maintaining the collections of the Library of Congress as a public repository. JA 197. With regard to this objective, there are at least three ways that mandatory deposit is overbroad: (1) It

⁷ The district court also said that the First Amendment question was controlled by its holdings that the mandatory-deposit requirement is a condition placed on copyright protection and that the only live controversy between the parties was the constitutionality of the government’s settlement offer to accept digital copies (the burden of which the court asserted would be minimal). JA 197, 199. For the reasons already explained above, those holdings were error.

applies to all copyrightable books, regardless of whether the Library actually wants them; (2) inasmuch as the government has an easy means of acquiring the books it wants—including, but not limited to, buying them—the law’s burdens are totally unnecessary; and (3) it applies even to speech that is intended to remain anonymous or to be narrowly disseminated.

First, mandatory deposit is overbroad (and hence, not tailored) because it applies to a huge number of books that the government admits it does not want. *See Time Warner Ent. Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001) (holding FCC regulation unconstitutional, under intermediate scrutiny, where FCC failed to prove that it burdened no more speech than necessary). The mandatory-deposit requirement of § 407 applies to every book published in the United States containing any “copyrightable” material at all. JA 115–16 ¶ 43. It applies to books the Library has already acquired through other means. JA 120 ¶ 63. And it applies to books the Library does not want. JA 120–21 ¶ 67. And the result is an enormous amount of waste. In 2018 alone the Library gave away 76,129 books, traded 9,752 books to foreign libraries in exchange for other books, and destroyed an unknown

number of other “surplus books.” Joint Stipulations ¶ 68. To underscore: The mandatory-deposit requirement results in the federal government destroying so many books that it cannot even be bothered to count. Every book given away (or worse yet, destroyed) represents a burden imposed on protected speech that resulted in no public benefit at all. To be sure, the mandatory-deposit requirement was responsible for a small but significant percentage of the books the Copyright Office received in fiscal 2017: some 35,554 came in through mandatory deposit (as compared to 137,223 in exchange for copyright registration). JA 120 ¶ 66. But the government is unable to say (because it does not know) how many of those 35,554 books it kept, how many it gave away, and how many it outright destroyed.

This is, at a minimum, proof of an enormous and unnecessary burden on protected speech. The government’s failure to track how many books it destroys, of course, makes it impossible to determine precisely how often the mandatory-deposit requirement yields an addition to the Library’s collection instead of sheer waste. But the record is clear that tens of thousands of books come in, and (at least) tens of thousands of books are summarily disposed of, and the

government cannot be bothered to keep track of what it does with any given deposit. But the First Amendment does not allow the government to be so cavalier when it burdens protected speech. Overbreadth like this is fatal, under either strict or intermediate scrutiny. *See McCullen v. Coakley*, 573 U.S. 464, 490 (2014).

Second, the mandatory deposit requirement is also overbroad because it is completely unnecessary to achieve the governmental objective of maintaining the Library's collections. There is no question that the Library has the right to purchase all the books that it wants for its collection, just as every other library in the country does. And it is similarly undisputed that the Library can obtain books through other means as well, as when it receives books in exchange for copyright registration or in exchange for a catalog number as part of its Cataloging in Publication program. The government's interest, then, is not in maintaining the Library's collections. The government's interest is in obtaining books *without providing anything in exchange*. The only justification for imposing the burden of mandatory deposit on publishers is that it allows the government to save money.

The problem is that the government is saving money by imposing its own costs on third parties. This is the kind of legislative contrivance that courts view with extreme skepticism because “[a] governmental entity can always find a use for extra money, especially when taxes do not have to be raised.” *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 26 (1977). “The Constitution, however, is concerned with means as well as ends.” *Horne*, 576 U.S. at 362. When the government acquires property for its own use, it is supposed to pay for it with revenue raised through general taxation. This principle explains why some taxes that incidentally burden speech are subject only to a deferential standard of review. *See, e.g., Leathers v. Medlock*, 499 U.S. 439, 451 (1991) (noting the “strong presumption in favor of duly enacted taxation schemes”).

When the legislature uses means other than taxation to advance its financial interests, courts are appropriately skeptical. *E.g., U.S. Tr. Co of N.Y.*, 431 U.S. at 26 (“If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.”); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (“The Fifth Amendment’s guarantee that private property shall not be

taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”).⁸

Finally, mandatory deposit is also substantially overbroad because it reaches speakers who may wish to publish anonymously or to a narrow audience. Such anonymous speech is legitimate and “is an aspect of the freedom of speech protected by the First Amendment.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995). As the Supreme Court has explained:

Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to

⁸ Further, it is not clear from the record whether the program even succeeds in saving the government money. The parties have stipulated that the Copyright Office employs roughly a dozen people to conduct “acquisitions,” which includes sending demand letters. JA 117 ¶ 48. It is unclear whether it would cost the government more money to replace the labor-intensive process of demanding free books with the less labor-intensive process of buying those books through an online retailer.

which government had to go to find out who was responsible for books that were obnoxious to the rulers. . . . Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

Talley v. California, 362 U.S. 60, 64–65 (1960).⁹ The value of anonymous speech is also not limited to situations in which people may fear political persecution. Individuals may also fear “economic . . . retaliation,” “social ostracism,” or loss of privacy, *McIntyre*, 514 U.S. at 341–42, and the Court recognizes these as legitimate reasons to speak anonymously. Indeed, Valancourt publishes many works that were first published anonymously, including classic Gothic fiction and early LGBT fiction. Mandatory deposit, by forcing copyright holders to identify

⁹ This also underscores the district court’s error in viewing the modern mandatory-deposit requirement as a “decision Congress made more than two hundred years ago.” JA 199. The Founding generation did not adopt—and would not have countenanced—a statute that outlawed publishing an anonymous pamphlet without notifying the federal government. And yet the modern form of § 407 does exactly that.

themselves to the government and provide the government with a copy of their speech, burdens those who wish to be anonymous.

In sum, the mandatory deposit requirement accomplishes three things: (1) It requires the deposit of huge numbers of books that the Library does not want and actually destroys; (2) it allows the government to obtain copies of books that are freely available for sale without paying the market price; and (3) it coerces anonymous speakers who do not want to sell their books to a wide audience into revealing themselves to the government. These wide-ranging burdens on speech cannot be justified by the government's naked desire to avoid paying for the books that it wants.

The district court did not address any of these arguments. It simply concluded, without citation to the record, that “the [mandatory deposit] requirement is well-tailored to further the public interest in promoting the arts and sciences with a public repository, and it imposes an obligation that is no greater than necessary to achieve that important public goal.” JA 197. This will not do. Even under intermediate scrutiny, even if the government's objectives are noble, and even if the law at issue advances a legitimate interest, the

government must still prove that it is not burdening more speech than necessary to achieve its goal. *See Time Warner Ent. Co.*, 240 F.3d at 1137. The government did not do that here. The district court's ruling should therefore be reversed.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and this case should be remanded with instructions to enter judgment in favor of Valancourt.

Dated: February 11, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,817 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: February 11, 2022.

/s/ Robert McNamara
Robert J. McNamara

CERTIFICATE OF SERVICE

I certify that on February 11, 2022, I filed the foregoing Brief of Appellant and the Joint Appendix with the Clerk of the United States Court of Appeals for the D.C. Circuit via the CM/ECF system, which will notify all participants in the case who are registered CM/ECF users.

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ADDENDUM

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17 U.S.C.A. § 407

§ 407. Deposit of copies or phonorecords for Library of Congress

Effective: November 13, 1997

(a) Except as provided by subsection (c), and subject to the provisions of subsection (e), the owner of copyright or of the exclusive right of publication in a work published in the United States shall deposit, within three months after the date of such publication--

(1) two complete copies of the best edition; or

(2) if the work is a sound recording, two complete phonorecords of the best edition, together with any printed or other visually perceptible material published with such phonorecords.

Neither the deposit requirements of this subsection nor the acquisition provisions of subsection (e) are conditions of copyright protection.

(b) The required copies or phonorecords shall be deposited in the Copyright Office for the use or disposition of the Library of Congress. The Register of Copyrights shall, when requested by the depositor and upon payment of the fee prescribed by section 708, issue a receipt for the deposit.

(c) The Register of Copyrights may by regulation exempt any categories of material from the deposit requirements of this section, or require deposit of only one copy or phonorecord with respect to any categories. Such regulations shall provide either for complete exemption from the deposit requirements of this section, or for alternative forms of deposit aimed at providing a satisfactory archival record of a work without imposing practical or financial hardships on the depositor, where the individual author is the owner of copyright in a pictorial, graphic, or sculptural work and (i) less than five copies of the work have been published, or (ii) the work has been published in a limited edition consisting of numbered copies, the monetary value of which

would make the mandatory deposit of two copies of the best edition of the work burdensome, unfair, or unreasonable.

(d) At any time after publication of a work as provided by subsection (a), the Register of Copyrights may make written demand for the required deposit on any of the persons obligated to make the deposit under subsection (a). Unless deposit is made within three months after the demand is received, the person or persons on whom the demand was made are liable--

(1) to a fine of not more than \$250 for each work; and

(2) to pay into a specially designated fund in the Library of Congress the total retail price of the copies or phonorecords demanded, or, if no retail price has been fixed, the reasonable cost to the Library of Congress of acquiring them; and

(3) to pay a fine of \$2,500, in addition to any fine or liability imposed under clauses (1) and (2), if such person willfully or repeatedly fails or refuses to comply with such a demand.

(e) With respect to transmission programs that have been fixed and transmitted to the public in the United States but have not been published, the Register of Copyrights shall, after consulting with the Librarian of Congress and other interested organizations and officials, establish regulations governing the acquisition, through deposit or otherwise, of copies or phonorecords of such programs for the collections of the Library of Congress.

(1) The Librarian of Congress shall be permitted, under the standards and conditions set forth in such regulations, to make a fixation of a transmission program directly from a transmission to the public, and to reproduce one copy or phonorecord from such fixation for archival purposes.

(2) Such regulations shall also provide standards and procedures by which the Register of Copyrights may make written demand, upon the owner of the

right of transmission in the United States, for the deposit of a copy or phonorecord of a specific transmission program. Such deposit may, at the option of the owner of the right of transmission in the United States, be accomplished by gift, by loan for purposes of reproduction, or by sale at a price not to exceed the cost of reproducing and supplying the copy or phonorecord. The regulations established under this clause shall provide reasonable periods of not less than three months for compliance with a demand, and shall allow for extensions of such periods and adjustments in the scope of the demand or the methods for fulfilling it, as reasonably warranted by the circumstances. Willful failure or refusal to comply with the conditions prescribed by such regulations shall subject the owner of the right of transmission in the United States to liability for an amount, not to exceed the cost of reproducing and supplying the copy or phonorecord in question, to be paid into a specially designated fund in the Library of Congress.

(3) Nothing in this subsection shall be construed to require the making or retention, for purposes of deposit, of any copy or phonorecord of an unpublished transmission program, the transmission of which occurs before the receipt of a specific written demand as provided by clause (2).

(4) No activity undertaken in compliance with regulations prescribed under clauses (1) or (2) of this subsection shall result in liability if intended solely to assist in the acquisition of copies or phonorecords under this subsection.

17 U.S.C.A. § 408

§ 408. Copyright registration in general

Effective: April 27, 2005

(a) Registration Permissive.--At any time during the subsistence of the first term of copyright in any published or unpublished work in which the copyright was secured before January 1, 1978, and during the subsistence of any copyright secured on or after that date, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Such registration is not a condition of copyright protection.

(b) Deposit for Copyright Registration.--Except as provided by subsection (c), the material deposited for registration shall include--

- (1)** in the case of an unpublished work, one complete copy or phonorecord;
- (2)** in the case of a published work, two complete copies or phonorecords of the best edition;
- (3)** in the case of a work first published outside the United States, one complete copy or phonorecord as so published;
- (4)** in the case of a contribution to a collective work, one complete copy or phonorecord of the best edition of the collective work.

Copies or phonorecords deposited for the Library of Congress under section 407 may be used to satisfy the deposit provisions of this section, if they are accompanied by the prescribed application and fee, and by any additional identifying material that the Register may, by regulation, require. The Register shall also prescribe regulations establishing requirements under which copies or phonorecords acquired for the Library of Congress under

subsection (e) of section 407, otherwise than by deposit, may be used to satisfy the deposit provisions of this section.

(c) Administrative Classification and Optional Deposit.--

(1) The Register of Copyrights is authorized to specify by regulation the administrative classes into which works are to be placed for purposes of deposit and registration, and the nature of the copies or phonorecords to be deposited in the various classes specified. The regulations may require or permit, for particular classes, the deposit of identifying material instead of copies or phonorecords, the deposit of only one copy or phonorecord where two would normally be required, or a single registration for a group of related works. This administrative classification of works has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title.

(2) Without prejudice to the general authority provided under clause (1), the Register of Copyrights shall establish regulations specifically permitting a single registration for a group of works by the same individual author, all first published as contributions to periodicals, including newspapers, within a twelve-month period, on the basis of a single deposit, application, and registration fee, under the following conditions:

(A) if the deposit consists of one copy of the entire issue of the periodical, or of the entire section in the case of a newspaper, in which each contribution was first published; and

(B) if the application identifies each work separately, including the periodical containing it and its date of first publication.

(3) As an alternative to separate renewal registrations under subsection (a) of section 304, a single renewal registration may be made for a group of works by the same individual author, all first published as contributions to

periodicals, including newspapers, upon the filing of a single application and fee, under all of the following conditions:

(A) the renewal claimant or claimants, and the basis of claim or claims under section 304(a), is the same for each of the works; and

(B) the works were all copyrighted upon their first publication, either through separate copyright notice and registration or by virtue of a general copyright notice in the periodical issue as a whole; and

(C) the renewal application and fee are received not more than twenty-eight or less than twenty-seven years after the thirty-first day of December of the calendar year in which all of the works were first published; and

(D) the renewal application identifies each work separately, including the periodical containing it and its date of first publication.

(d) Corrections and Amplifications.--The Register may also establish, by regulation, formal procedures for the filing of an application for supplementary registration, to correct an error in a copyright registration or to amplify the information given in a registration. Such application shall be accompanied by the fee provided by section 708, and shall clearly identify the registration to be corrected or amplified. The information contained in a supplementary registration augments but does not supersede that contained in the earlier registration.

(e) Published Edition of Previously Registered Work.--Registration for the first published edition of a work previously registered in unpublished form may be made even though the work as published is substantially the same as the unpublished version.

(f) Preregistration of works being prepared for commercial distribution.--

(1) Rulemaking.--Not later than 180 days after the date of enactment of this subsection, the Register of Copyrights shall issue regulations to establish procedures for preregistration of a work that is being prepared for commercial distribution and has not been published.

(2) Class of works.--The regulations established under paragraph (1) shall permit preregistration for any work that is in a class of works that the Register determines has had a history of infringement prior to authorized commercial distribution.

(3) Application for registration.--Not later than 3 months after the first publication of a work preregistered under this subsection, the applicant shall submit to the Copyright Office--

(A) an application for registration of the work;

(B) a deposit; and

(C) the applicable fee.

(4) Effect of untimely application.--An action under this chapter for infringement of a work preregistered under this subsection, in a case in which the infringement commenced no later than 2 months after the first publication of the work, shall be dismissed if the items described in paragraph (3) are not submitted to the Copyright Office in proper form within the earlier of--

(A) 3 months after the first publication of the work; or

(B) 1 month after the copyright owner has learned of the infringement.