

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**

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**REPLY BRIEF OF APPELLANT**

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## SUMMARY OF ARGUMENT

The federal government has threatened to fine Appellant Valancourt Books tens of thousands of dollars for refusing to turn over its private property without compensation. Rather than pay the fines, Valancourt initiated this declaratory-judgment action, contending that the government's threatened fines violate the First and Fifth Amendments. As explained in its opening brief, Valancourt's argument is simple: It is generally true that the government can lawfully demand that private parties surrender their property in exchange for a discretionary government benefit.<sup>1</sup> But the government may not demand the surrender of private property simply because someone has received (and failed to divest himself of) a generally available legal right, such as the automatic copyright that exists in any new work published in the United States. *See* Appellant's Opening Br. 15–18.

The government's opposition brief fails to overcome the straightforward logic of this position. Valancourt's argument in reply proceeds in three parts. ***First***, it establishes that the relevant question

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<sup>1</sup> Indeed, the government in fact does this through a range of federal laws, including the requirements that anyone *registering* a copyright must turn over free copies of the registered work. 17 U.S.C. § 408.

is the constitutionality of the government's pre-litigation threats to fine Valancourt for refusing to turn over its property—not the government's (still unexplained) mid-litigation offer of special treatment. **Second**, it explains that the government's arguments fail under the Supreme Court's well-established Takings Clause jurisprudence because its demand for Valancourt's property was not a condition on any specially granted right akin to the right to sell dangerous chemicals. Instead, anyone who publishes any book containing new, copyrightable material in the United States is subject to fines if they refuse to surrender their private property without compensation. **Third**, Valancourt shows that the government has failed utterly to justify a system that imposes substantial burdens on anyone who publishes copyrightable material in the United States in the name of allowing the government to avoid paying for some of the things it wants. For all of these reasons, the ruling below should be reversed and this case remanded with instructions to grant summary judgment to Valancourt.



## ARGUMENT

### **I. Valancourt’s Original Declaratory Judgment Action Remains A Live Controversy.**

Valancourt initiated this case because government officials demanded it turn over some 341 copies of books it had published, on pain of tens of thousands of dollars in fines. Appellant’s Br. 4–6. The district court determined that it did not need to resolve the constitutionality of this demand because, while the litigation was pending, the government had offered to let Valancourt substitute electronic copies for some (but not all) of the books it had initially demanded. (JA 182–84.) As explained in Valancourt’s opening brief, this was error because under this Court’s precedents the government’s sudden, unexplained, and wholly revocable change of heart cannot moot the original controversy between the parties. Appellant’s Br. 19–25.

In response, the government makes no effort to justify the district court’s ruling as a matter of this Court’s mootness jurisprudence. *See* Appellees’ Br. 56–58. Instead, it claims that this Court need not decide the claims Valancourt actually brought because it can instead evaluate the constitutionality of the government’s new position, which (it asserts) is to exercise its discretion to offer Valancourt “special relief” from its

statutory obligations. *Id.* But this is a mootness argument: The government says that Valancourt’s original injury is off the table because the government claims it no longer wants to inflict exactly that injury. And, as detailed in Valancourt’s opening brief, Appellant’s Br. 19–25, the government must carry a “heavy burden of persuad[ing]” this Court that the controversy over the government’s initial threats to Valancourt is now moot. *See also West Virginia v. EPA*, No. 20-1530, \_\_\_ S. Ct. \_\_\_, slip op. at 15–16 (June 30, 2022) (describing government’s heavy burden to show mootness, particularly if it continues to defend the legality of its allegedly wrongful conduct).

The government does not bother with this burden, apparently expecting this Court (and Valancourt) to treat its offer of mercy as a binding change in the law. But this is error. It is true, of course, that the government has discretion to offer “special relief” from the mandatory-deposit requirements as it sees fit—but it is also undisputed that Valancourt did not qualify for “special relief” before it sued. Indeed, James Jenkins responded to the government’s initial threat letter by explaining that complying with its demands would impose crushing financial burdens on Valancourt. (JA 134–35.) His plea fell on deaf ears:

Instead of responding by offering special relief, the government sent a renewed demand for books. (JA 137.)<sup>2</sup> What changed between the government's final demand letter and the government's decision that Valancourt qualified for "special relief"? The government declines to say. What might change in the future to subject Valancourt to renewed demands? The government declines to say.

The government does not answer these questions because nothing in the record provides any basis for its new position. Indeed, the only piece of record evidence about the government's decision to offer "special relief" is an email from the government's counsel, sent seven months into litigation and expressly marked "CONFIDENTIAL SETTLEMENT COMMUNICATION[.]" (JA 173.) But nothing in this Court's mootness precedents suggests that the government can moot a constitutional injury through a "confidential settlement communication[.]" and so this

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<sup>2</sup> The government's brief asserts without citation that Valancourt "filed this suit rather than requesting special relief," Appellee's Br. 57, but it never explains what about Jenkins' letter was insufficient to qualify as a "request[ for] special relief." (JA 137.) Indeed, while the government's brief makes much of the high rate at which it grants "requests for special relief," Jenkins' experience suggests that it achieves this rate at least in part by refusing to consider letters like Jenkins' as "requests for special relief."

Court should adjudicate the constitutionality of the government's threatened fines rather than the constitutionality of its settlement offers.

## **II. The Mandatory-Deposit Requirement Is A Taking.**

The mandatory-deposit requirements of § 407 violate the Takings Clause because they are not a condition of receiving copyright. Faced with this reality, the government expends much of its brief arguing that Valancourt should be subject to fines under § 407 even if other publishers might not be, but its alternative arguments are unavailing.

### **A. Mandatory deposit is not a condition of copyright.**

The basic law governing Valancourt's Takings claim is undisputed. If the government demands private property be turned over for government use, it effects a taking unless the demand is made "as a condition of receiving certain benefits . . . ." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021); compare Appellant's Br. 32 with Appellees' Br. 42. And the statutory text is perfectly clear that the mandatory-deposit requirements of § 407 are not "conditions of copyright." 17 U.S.C. § 407(a). That should end the matter.

But the government urges this Court to look beyond the statutory text. The government's position, in essence, is that while Congress *said* that mandatory deposit was not a condition of copyright, this Court should hold that Congress did not mean it. Instead, says the government, the Court should find that Congress (though it changed the relevant statutory language) intended to maintain essentially the same system of deposit-in-exchange-for-copyright that has existed “[s]ince the dawn of the Republic[.]” Appellees’ Br. 26. The Court should divine this atextual congressional intent from legislative history, Appellees’ Br. 33, or perhaps from the government’s repeated assertion that the unconditional grant of copyright is a “bargain.” *E.g.*, Appellees’ Br. 32–33. But the statutory text is clear—mandatory deposit is not a condition of automatic copyright—and this Court does not resort to legislative history in order to muddy Congress’s plain language. *E.g.* *Goldring v. Dist. of Columbia*, 416 F.3d 70, 74–75 (D.C. Cir. 2005) (collecting cases).

And the Court should be particularly wary of the government’s invocations of legislative history here because Congress knows full well how to offer a “bargain” in exchange for property. Indeed, it has done so

in the very next section of the U.S. Code, which makes copyright *registration* conditional on surrender of copies of the registered works. 17 U.S.C. § 408. Congress could do the same here, but it has chosen not to.

It has chosen not to, perhaps, because doing so would be contrary to the nation's obligations under the Berne Convention. *See* Appellant's Br. 8; Amicus Curiae Br. of Zvi Rosen & Brian Frye 11. Where Congress has declined to expressly abrogate the nation's treaty obligations, this Court should hesitate to do so on its behalf. *Cf. Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 880 (D.C. Cir. 2006) (noting that it is primarily the executive and legislative branches' role to determine how to incorporate treaty obligations into domestic law). Congress *can* make legal rights conditional, and it *can*—if it chooses—abandon the Berne Convention. But it has not done so.

Instead, Congress has chosen to make copyright a generally available, automatic right that “subsists” as soon as any new idea is “fixed in any tangible medium of expression . . . .” 17 U.S.C. § 102(a). And the automatic nature of this right is why the government has consistently interpreted § 407 as requiring the mandatory deposit of

any work containing “copyrightable” material—because *copyrightable* material is instantly *copyrighted* as a matter of law. The government originally threatened to fine Valancourt because it asserted the company’s books contained “copyrightable” material. (JA 137.) And the government stipulated that it interpreted § 407 as requiring the deposit of “two copies of the best edition of every copyrightable work published in the United States[.]” (JA 115–16 ¶ 43.) In its appellate briefing, the government seems to have quietly abandoned this longstanding interpretation of the statute.

The problem with the government’s attempt to abandon its prior stance is that the prior stance is perfectly in line with the statutory text, which says both that (1) any copyrightable work is instantly copyrighted and (2) any copyrighted work is subject to the deposit requirement. And that statutory text works a taking. It establishes a uniform, automatically vesting right available to all, and then it demands that those receiving that legal right surrender their private property. Appellant’s Br. 29–30.

Simply put, automatic copyright cannot justify the government’s mandatory-deposit demands because automatic copyright is simply a

general rule of law, no different from any other general regulatory activity that bestows rights on the population in gross. And the Supreme Court has expressly rejected the “notion that general regulatory activity . . . can constitute just compensation for a specific physical taking.” *Horne v. Dep’t of Agric.*, 576 U.S. 350, 368 (2015).

Instead, the relevant question is whether the government’s demand for property is made in exchange for “a ‘Government benefit’ on the same order as a permit to sell hazardous chemicals.” *Id.* at 366.

To ask that question here is to answer it. Publishing books is not selling dangerous chemicals. The dichotomy in the Supreme Court’s caselaw is clear: In *Horne*, the right to sell raisins was generally available to anyone, but the government asserted that everyone who availed themselves of that right had to surrender part of their property. *Id.* That was a taking. *Id.* By contrast, in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), it was generally illegal to sell pesticides in the United States, and the government demanded property in exchange for the special EPA registration that would allow someone to legally sell them. *Id.* at 991–92, 1007. That was not a taking. *Id.* at 1007.



The same principles apply in this case. For example, it is generally impossible to enforce an unregistered copyright. 17 U.S.C. § 411(a). This means the government does not effect a taking when it demands property in exchange for the special registration that renders a copyright enforceable. *See* 17 U.S.C. § 408. By contrast, it is generally legal to publish books in the United States, and copyright is fixed automatically in any new material those books contain. 17 U.S.C. § 102(a). This means that the government does effect a taking when it demands property from anyone who avails themselves of that general right to publish a book containing new material. 17 U.S.C. § 407; *Horne*, 576 U.S. at 366. The ruling below should therefore be reversed.

**B. Valancourt has done nothing for which it can constitutionally be punished.**

The government spends relatively little time on the statutory text, perhaps sensing that the law Congress actually adopted (and that the government has vigorously enforced) is difficult to justify. Instead, it spends much of its response arguing that, even if § 407 may be unconstitutional as applied to others, there is no obstacle to fining Valancourt itself for refusing to turn over copies of its books. Perhaps, offers the government, Valancourt can be fined because it has not

undertaken sufficient efforts to divest itself of the copyright automatically attached to the new material in its books. Or perhaps it can be fined because its books contain true statements about copyright law. Or, instead, perhaps Valancourt is subject to fines because of the way it obtains the right to publish the new material in its books. These arguments are incorrect.

1. *Valancourt cannot be fined for having exerted insufficient effort to divest itself of copyright protection.*

In its opening brief, Valancourt explained that the district court erred in holding that § 407 was saved from unconstitutionality because Valancourt could have avoided fines by paying to file notices with the Copyright Office abandoning its copyrights. Appellant's Br. 35–38. In its response brief, the government does not defend the district court's holding on this point, instead insisting that Valancourt could have escaped § 407 by at any point taking “any overt act” to announce that it was relinquishing copyright. Appellees' Br. 39–40. This is wrong.

To begin, the government waived this novel interpretation of the law by failing to raise it in the district court. *Cf. Sorrell v. IMS Health Inc.*, 564 U.S. 552, 562–63 (2011) (rejecting new characterization of challenged law because “the State's newfound interpretation comes too

late in the day”). The government’s argument below was that Valancourt could escape mandatory deposit only by recording a document with the Copyright Office formally abandoning its copyright. JA 193.

Indeed, the citations in the government’s appellate brief illustrate this. The only evidence it cites in support of its assertion that Valancourt “has been offered, on several occasions, the opportunity to forswear copyright protection and thus escape the deposit requirement,” is page 161 of the Joint Appendix. Appellees’ Br. 38. But the only relevant material on that page consists of citations to the government’s brief below asserting that Valancourt could abandon copyright by “filing” or “record[ing]” a document with the Copyright Office (and, by implication, paying the attendant fees). (JA 161.) The government’s own citations do not support its position, and they provide no explanation for why this new interpretation arises for the first time now or why the Court should credit it despite the government’s failure to think of it below.

And it is no surprise that the government failed to invoke this argument below because it misstates the law. Contrary to the

government's view, there is no clear legal path to abandoning copyright. *See, e.g.,* Dave Fagundes & Aaron Perzanowski, *Abandoning Copyright*, 62 Wm. & Mary L. Rev. 487, 536 (noting “confusion, uncertainty, and inconsistency” in the cases addressing abandonment). Abandonment of copyright appears nowhere in the Copyright Act. It is a judicially created defense to a copyright lawsuit; it is not a straightforward process for rightsholders who want to disclaim their rights. *Id.* at 491–92; *see also* Appellant's Br. 35–36.

Whether waived or not, though, the government's new argument is contrary to the statutory text. For one thing, requiring a publisher like Valancourt either to comply with mandatory deposit or take some affirmative step to disclaim its copyright would transform mandatory deposit into a “condition” of copyright—exactly the thing the statutory text insists it is not. 17 U.S.C. § 407(a). In the government's view, copyright is conditioned on complying with mandatory deposit or paying fines; anyone who wants to avoid those consequences must find a way to divest themselves of copyright. But the law says mandatory deposit is not a condition of copyright *at all*—and Congress, not the government's attorneys, has the final say.

But even setting aside the statutory command that mandatory deposit is not a condition of copyright, the government's abandonment argument is a red herring. Valancourt's obligations under § 407 attached at the moment of publication. Nothing in the statute suggests that it can retroactively eliminate those obligations by abandoning its copyrights today. And the government points to nothing in the statute supporting its interpretation; instead, it simply asks the Court to adopt this novel interpretation of the law "as a matter of constitutional avoidance." Appellees' Br. 41. But, like legislative history, the "constitutional-doubt canon" comes into play only where the statute at issue is ambiguous. *M.M.V. v. Garland*, 1 F.4th 1100, 1107 (D.C. Cir. 2021). Here, both the statute and the government's demands to Valancourt say what they say—and neither provides even a hint of support for the government's newfound position. However easy or hard abandonment may be in practice, it provides no answer to the question before the Court.

2. *Valancourt cannot be fined for stating true facts about copyright law.*

The government's brief makes much of the fact that Valancourt has published books that include an assertion of copyright. *E.g.*,

Appellees' Br. 21, 36, 46. But Valancourt is not being fined because it *asserted* copyright. Under the plain language of § 407, Valancourt is subject to fines whether its books include notices of copyright or not. The statute does not authorize fines because of Valancourt's statements about copyright law. The government did not threaten fines because of Valancourt's statements about copyright law. This case would not change one jot had Valancourt said different things about copyright law or remained silent.

In any event, the government provides no authority for the proposition that Valancourt can be fined because it has said true things about copyright law. The government's brief acknowledges, as it must, that Valancourt's notices of copyright do not create any legal rights. Appellees' Br. 37. Neither copyright protection nor Valancourt's legal obligations under § 407 vary up or down depending on whether the books include a copyright notice, and the government does not contend otherwise. But it protests that these legally meaningless notices nonetheless resolve the constitutional questions before the Court because through them Valancourt "avails itself of significant benefits of copyright[.]" Appellees' Br. 36.

But these copyright notices do not bear the constitutional weight the government tries to place upon them. Valancourt's true statements that its books are copyrighted under U.S. and U.K. law are simply that: truisms. They have no legal effect and create no enforceable rights: The only way for Valancourt to have any enforceable legal copyright is if it chooses to register its copyrights and provide deposit copies to the government in exchange for registration.<sup>3</sup>

Moreover, the government's position would create a striking and untenable rule of law. Under its theory, the Takings Clause would prevent the government from demanding private property from individuals simply because it had made available a general benefit. *But* the protections of the Takings Clause would evaporate the minute that individual *truthfully told others* about that benefit. The government cites no case supporting the notion that the government may punish

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<sup>3</sup> The government cites *Gaiman v. McFarlane*, 360 F.3d 644, 653 (7th Cir. 2004) for the proposition that “the ‘function of copyright notice is to warn off copiers[.]’” Appellees’ Br. 37. But *Gaiman* does not hold (because it is not the law) that copyright notices have any legal effect; indeed, everything *Gaiman* cites for that proposition is an explanation of the role the notice plays in *litigation* over registered copyrights.

this sort of truthful speech because no such case exists. *Fla. Star v. B.J.F.*, 491 U.S. 524, 533–34 (1989). The government cannot bootstrap the requirements of § 407 into a legal requirement that copyright holders *keep their rights secret* on pain of punishing fines.

3. *Nothing about Valancourt’s business model allows the government to fine it under § 407.*

Separately, the government contends that Valancourt can be fined because it “takes advantage of the benefits of copyright” by telling people that their copyrights exist or generally being better off because of the copyright system. Appellees’ Br. 46.

But Valancourt cannot be fined simply because it enjoys the same benefits made freely available to all, any more than the Hornes could be fined because they enjoyed the benefit of selling their raisins in a regulated market. *See Horne*, 576 U.S. at 366. This, again, would present an untenable rule of law. On the government’s view, if Valancourt *profits* by the general availability of automatic copyright, it can be fined, but that analysis would come out differently if a court found that Valancourt on net lost money because of automatic



copyright. Surely not. Nothing in § 407 turns on whether Valancourt benefits from copyright, and nothing in the Takings Clause jurisprudence does either.

But, more broadly, the government's brief misunderstands Valancourt's relationship to automatic copyright. Automatic copyright is not a *benefit* to a publisher like Valancourt. It is simply the water in which the company swims. To be sure, Valancourt exerts efforts to secure licenses to publish copyrighted material—because it *must* do this in a world where all new material is automatically copyrighted. When James Jenkins writes new footnotes for a Valancourt book, copyright attaches the moment he lays out the new material. (*See* JA 112–13 ¶¶ 24–28.) When the company recruits someone else to write materials for a Valancourt book, it must secure a license—which it sometimes does formally, sometimes informally. (JA 145–46 ¶ 5.) And when Valancourt wants to republish a book that is still protected by automatic copyright, it has to expend considerable effort to find the current rightsholder and license the work. (JA 112 ¶ 25.) Some of these

things may be benefits of the current legal regime; others are obviously costs.<sup>4</sup>

Valancourt does these things because it *has to*—because, in a system of automatic copyright for any new work, it is impossible to publish books without acquiring the right to do so. And this illustrates the fundamentally unworkable nature of the government’s suggestions for what Valancourt ought to have done to avoid fines under § 407. The government’s brief suggests, for example, that Valancourt could have avoided all this trouble had it simply negotiated *nonexclusive* licenses to publish the material contributed by outside scholars. Appellees’ Br. 34–36. Perhaps the government is right that this would have relieved Valancourt of its obligations under § 407—but if so, it would only

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<sup>4</sup> Indeed, the government’s efforts to find some legal benefit tied to Valancourt’s automatic copyright verges on the absurd. It suggests, for instance, that Valancourt’s automatic copyright allows it to file a takedown notice under the Digital Millennium Copyright Act. Appellees’ Br. 47 n.5. But these takedown notices are effective only for those copyright holders who can litigate about their rights—that is, those who voluntarily exchange their property for copyright registration under § 408. After all, “[i]f the owner files a takedown notice and receives a counter-notification from the allegedly infringing party, the holder must file suit within 10–14 days to prevent the ISP from replacing the material—even though the lawsuit will be subject to dismissal under § 411(a) because the copyright is not registered . . . .” *Schenck v. Orosz*, 109 U.S.P.Q.2d (BNA) 1099, 1108 (M.D. Tenn. 2013).

transfer those obligations to the authors themselves. 17 U.S.C. § 407 (imposing mandatory-deposit obligation on either “the owner of copyright or of the exclusive right of publication in” a work). The government’s theory of the case means that the kind of informal arrangements Valancourt has with outside scholars who contribute introductions or footnotes to its books (JA 150 ¶ 7) are unlawful—or, at least, come with additional legal obligations. Someone (either Valancourt or the scholar) must deposit the new work, pay fines for failing to do so, or else find a way to divest themselves of automatic copyright.

Ultimately, this Court need not consider whether Valancourt should (or even could) have persuaded these outside scholars to shoulder the burdens of mandatory deposit themselves. Perhaps Valancourt ultimately benefited from the automatic copyright that attached to the footnotes written by outside scholars (or by James Jenkins himself). Perhaps it was harmed by automatic copyright when those rights interfered with its ability to republish an out-of-print, forgotten work. The Takings Clause does not require this sort of totting up of generalized benefits against generalized costs to determine

whether a taking has occurred. Neither does it ask whether a party whose property is being taken was insufficiently diligent in avoiding the government's benefits—the Hornes, after all, could certainly have sold grape juice instead of selling raisins in interstate commerce. *Horne*, 576 U.S. at 366. The Supreme Court's Takings Clause cases ask only whether property is being demanded *as a condition of* an otherwise unavailable special right or whether the only justification for the demand is a background legal right available to all. Here, it is the second. *See supra* part II.A. The ruling below should therefore be reversed.

### **III. The Mandatory-Deposit Requirement Violates The First Amendment.**

The government does not even attempt to argue that the First Amendment would tolerate a mandatory-deposit requirement that is triggered by the mere publication of a book. As with its Fifth Amendment argument, the government's First Amendment theory hinges on the idea that mandatory deposit functions as a voluntary exchange instead of an obligation imposed on every “copyrightable work published in the United States.” (*See* JA 115–16 ¶ 43 (stipulating that mandatory deposit is the second of these).) As explained above, the

government's theory misdescribes both the statute and the government's historical enforcement of it. *Supra* part II.A. If this Court agrees that mandatory deposit is not an exchange, that should be the end of the matter: By failing to defend the statute that Congress enacted, rather than the one the government invented on appeal, the government implicitly concedes that mandatory deposit cannot survive First Amendment scrutiny.

But the government's First Amendment argument also fails on its own terms. First, the government substantially understates the burdens the mandatory-deposit requirement imposes on publishers like Valancourt. And second, the government's arguments for why it may constitutionally impose these burdens run afoul of longstanding First Amendment doctrine.

**A. The mandatory-deposit requirement imposes real burdens on creators.**

Valancourt's basic legal theory is that the First Amendment protects the right to publish books. The government apparently disagrees. In the government's view, publishing a book that contains any new material at all is attended by significant legal obligations. If Valancourt founder James Jenkins writes a single new footnote for a

Valancourt book, then Valancourt must either comply with § 407 or find a way to eliminate the copyright that attached to that footnote at the moment of creation.

Either way, those are real, nontrivial costs. Complying with § 407 is difficult. It would cost Valancourt thousands of dollars and days of labor to comply with the government's demands here, necessarily diverting resources from Valancourt's real purpose: publishing books. (JA 25, 151.) This is in the record, and it is undisputed, (JA 160–61), which makes the government's bald assertion that there is “no evidence that Section 407 even indirectly burdens speech” baffling. Appellees' Br. 49.

Perhaps the best illustration of the real costs of mandatory deposit are its results, which include the destruction of untold thousands of books. Appellant's Br. 52–53. The government does not dispute, nor could it, that the mandatory-deposit requirement leads it to destroy so many mandatorily deposited books that it cannot bother to keep track. Undeniably, it cost publishers time and money to deposit these books. And those publishers, presumably, did not elect to spend that time and money complying with a mandatory-deposit requirement that could be

*costlessly avoided*. Each destroyed book is a vivid illustration of the fact that the mandatory-deposit requirement imposes real (and often senseless) costs. The government does not bother to address, let alone justify, that reality.

Simply put, if copyright attaches the moment new copyrightable material is written down (and it does) and if the requirements of § 407 attach the moment copyrighted material is published (and they do), those requirements impose real costs on speakers. Those costs may come in the form of complying with the mandatory-deposit requirement, or they may take the form of some clever scheme (like the government's newly articulated theory of copyright abandonment) to avoid them. But those costs are real, and, under the First Amendment, they must be justified. As demonstrated below, they cannot be.

**B. These burdens on speakers fail First Amendment scrutiny.**

Whether the burdens of the mandatory-deposit requirement are large or small, though, the government's attempts to justify them fail. First, the government fails to grapple with the Supreme Court's longstanding test for determining when burdens on speech are content-based. Second, the government fails to defend what it has stipulated is

its purely content-based enforcement policy for the mandatory-deposit requirement. And finally, the government fails to even try to justify imposing these burdens in light of the much simpler way of obtaining the books it wants: buying them.

1. *The government asks this Court to disregard the test for content-based speech burdens.*

In its opening brief, Valancourt explained that mandatory deposit is subject to strict scrutiny because it “cannot be justified without reference to the content of the regulated speech.” Appellant’s Br. 46 (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015)). As the government has stipulated, the entire point of mandatory deposit is to obtain particular books, with particular content, as described by the Library’s Acquisitions Policy Statements. (JA 117–18 ¶¶ 52–57.) That is a purely content-based justification, which triggers strict scrutiny.

The government’s brief simply ignores *Reed* and decades of precedent, inventing a new test for when a law is content-based: when it seeks “to suppress a disfavored message.” Appellees’ Br. 50. But the Supreme Court has “consistently held that ‘illicit legislative intent is not the *sine qua non* of a violation of the First Amendment,’” and plaintiffs “need adduce ‘no evidence of an improper censorial motive.’”



*Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 502 U.S. 105, 117 (1991); accord *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987).

Under the *Reed* standard, the government cannot claim that mandatory deposit has a content-neutral justification. Accordingly, it is subject to strict scrutiny, which it cannot survive.

2. *Content-based enforcement is also subject to strict scrutiny under the First Amendment.*

The government has stipulated that its enforcement of mandatory deposit is entirely content-based. (JA 117–18 ¶¶ 52–57.) **Every decision** about whether to threaten a publisher with fines turns on a government official's assessment of whether a particular book is covered by the Library's content-based Acquisitions Policy Statements. (*Id.*) Nevertheless, the government argues that content-based enforcement must be viewed through the lens of equal protection rather than the First Amendment. Appellees' Br. 51–52. The government is wrong, but in this case, the distinction between these claims is immaterial.

*First*, the fact that the enforcement of a statute is carried out in a wholly content-based manner suffices to prove that the purpose of the

statute is content-based, which subjects it to strict scrutiny under *Reed*, 576 U.S. at 169, and distinguishes this case from cases in which statutes whose text and purpose are neutral were nevertheless abused in their enforcement.

*Second*, this Court has squarely held that content-based enforcement of facially neutral laws is subject to strict scrutiny. *See Mahoney v. Babbitt*, 105 F.3d 1452, 1455 (D.C. Cir. 1997); *accord Hoyer v. City of Oakland*, 653 F.3d 835, 855 (9th Cir. 2011) (same); *cf. Brown v. City of Pittsburgh*, 586 F.3d 263, 294 (3d Cir. 2009) (recognizing First Amendment selective enforcement claim). Indeed, statutes have been held to violate the First Amendment merely because they *allow* for “unbridled discretion” in their application, on the theory that this discretion might allow officials to smuggle in content discrimination. *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 757 (1988). The statute here not only allows for unbridled discretion, but the Copyright Office has used that discretion to *formally announce that it will engage in content discrimination*.

*Third*, although courts sometimes conclude that particular selective enforcement claims are “better considered” through the lens of

equal protection, *Frederick Douglass Found., Inc. v. D.C.*, 2021 WL 3912119, at \*4 (D.D.C. Sept. 1, 2021), they do not decline to consider the claims because they disagree with a plaintiff's label. The distinction between the claims is "semantic rather than substantive." *Hoye v. City of Oakland*, 653 F.3d 835, 855 (9th Cir. 2011).

It is no answer to say, as the government does, that libraries have "broad discretion to make content-based judgments in deciding what private speech to make available to the public." Appellees' Br. at 53 (citing *United States v. American Library Ass'n*, 539 U.S. 194, 204 (2003)). Of course they do. But the fact that government libraries have broad discretion when deciding whether to purchase books does not imply that these libraries (alone among government agencies) may also levy fines based solely on the content of private citizens' speech.

The only other authority the government musters in support of its contrary argument is a footnote from *Sanjour v. EPA*, 56 F.3d 85, 92 n.9 (D.C. Cir. 1995) (en banc). Appellant's Br. 52. But *Sanjour* simply described the doctrine of selective enforcement as an aside in the course of holding that the regulations challenged in that case violated the First Amendment. *See* 56 F.3d at 99. Nothing in that footnote rejects any of

the cases cited above, much less requires this Court to sign off on a system in which the government openly concedes that its employees threaten to fine publishers based on the employee's evaluation of the quality of that publisher's speech.

In short, the government has stipulated that its enforcement of the mandatory-deposit requirement is exclusively content-based, and that it threatens to fine publishers (and in fact threatened to fine Valancourt) only because of the content of their speech. This system of content-based enforcement is unconstitutional, and the proper remedy is to enjoin that enforcement—including the enforcement against Valancourt itself. The judgment below should therefore be reversed.

3. *The government cannot justify burdening speakers simply so it can obtain books without paying for them.*

As explained in the opening brief, under any level of First Amendment scrutiny, the government cannot justify its threatening publishers into providing books for free when the government could simply buy them at retail. Appellant's Br. 54. The government's brief does not respond to this argument at all, which is perhaps unsurprising. What is there to say? The only conceivable reason the government does

not want to purchase readily available books at retail is that it would rather save money by shifting the costs onto writers and publishers.

The government's *amici* are more candid, arguing that the problem with asking the government to purchase the books it wants is that it “would cost the Library approximately \$34 million per year.” Am. Libr. Ass’n Amicus Br. at 23. Perhaps. But saying the requirement saves the government \$34 million a year is the same as saying the requirement *costs* private individuals at least \$34 million a year.<sup>5</sup> As Justice Holmes long ago observed, “a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922); *see also U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 26 (1977) (“A governmental entity can always find a use for extra money, especially when taxes do not have to be raised.”).

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<sup>5</sup> Likely far more. Even setting aside the costs of the countless mandatory-deposit submissions the government does not want and therefore destroys—which are presumably excluded from the \$34 million figure—the cost of the deposited books alone does not account for the substantial costs a publisher like Valancourt must shoulder to comply with the requirement. (*See, e.g.*, JA 151 ¶ 10.)

And, at bottom, that is what this case is about. Not the wisdom of the First Congress, the importance of the copyright system, or the special role of the Library of Congress in our democracy. It is about whether the government can impose burdens on everyone who publishes “copyrightable” material—via a system that results in the destruction of untold thousands of books every year—in order to save \$34 million. It is, of course, true that the government can save money if it acquires the things it wants by force. But doing so is not a compelling interest. It is not even a legitimate one. The ruling below should therefore be reversed.

### **CONCLUSION**

The decision below should be reversed and this case remanded with instructions to grant summary judgment to Valancourt.

Dated: July 1, 2022

Respectfully submitted,

*/s/ Robert McNamara*

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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 6,271 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 with a 14-point Century Schoolbook font.

Dated: July 1, 2022.

*/s/ Robert McNamara*  
Robert J. McNamara



**CERTIFICATE OF SERVICE**

I certify that on July 1, 2022, I filed the foregoing **Reply Brief of Appellants** 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.

*/s/ Robert McNamara*

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