

In the Supreme Court of the United States

JACK DANIEL'S PROPERTIES, INC.,

Petitioner,

v.

VIP PRODUCTS LLC,

Respondent.

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

**MSCHF PRODUCT STUDIO, INC'S
AMICUS CURIAE BRIEF
IN SUPPORT OF RESPONDENT**

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INTEREST OF AMICUS CURIAE

“Crackpots” might be how the *Tinker* Court would describe us. *Far worse*, one of the other *amicus* called us shoe manufacturers. Meanwhile, members of the art world named us “the future.” We call ourselves MSCHF (pronounced “mischief”).¹ We are a collective who critiques and comments on American culture. The renowned Perrotin Art Gallery described our work as “elaborate interventions [that] expose and leverage the absurdity of our cultural, political, and monetary systems.” We start conversations about culture by participating in culture; so we agree with this Court that the freedom of expression is not limited to areas that a benevolent government provides as a safe haven for people like us.

Our cultural commentary varies. We brought attention to the burden of medical debt by soliciting unpaid medical bills, then painting the bills on to a

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

canvas, and selling the art to pay off the patients' medical debt.



By cutting up Hermès Birkin bags and selling them as sandals, we commented on the obsession with high fashion and how society assigns value based on a good's placement in the supply chain.

The New York Times

\$76,000 Birkinstocks Made From Actual Birkin Bags?

Warning: Neither Hermès nor Birkenstock has approved this product.

Give this article 01



The MSCHF Birkinstocks are made from deconstructed Hermès Birkin bags, with gold vermeil buckles and actual Birkenstock cork soles. MSCHF

At Art Basel this past December, we challenged society's and the art world's desire to flaunt wealth with *ATM Leaderboard*. The piece allowed participants to put their bankcard into an automatic teller machine that displayed how their account balance compared to the riches of all other participants on the “leaderboard.”



Our *Cease and Desist Grand Prix* project spotlighted how multi-national corporations abuse the Lanham Act — through cease and desist threats — to prevent speech. Likewise, *TAP3* highlighted the constraints that litigious corporate property holders

impose on creativity. We invoked the profile of a popular sneaker, wrapped it in “MSCHF” branded tape to dispel confusion and symbolically demonstrated how the likelihood of confusion test restrains expression and creativity.



The Perrotin Art Gallery hosted our debut solo art exhibition in late 2022.²



² Perrotin, *MSCHF: No More Tears, I'm Lovin' It*, WWW.PERROTIN.COM, <https://bit.ly/3Kf2Kr2> (last visited Feb. 7, 2023).

At the show, we featured a piece called *Wavy Shoes*, which responded to a preliminary injunction issued against us when we used a warped shoe as a medium for our critique of both sneaker culture and the shoe manufacturer Vans.³ While fully respecting the injunction, *Wavy Shoes* extends our critique of sneaker culture. By placing this piece at an art show, we also demonstrated how corporations use the Lanham Act to confine speech to approved spaces, such as white-walled galleries.



By drawing on existing symbols and ideas, speakers critique society and communicate their own ideas. We appreciate how the Lanham Act protects the source *identification* for goods and services, but

³ That matter is currently before the Second Circuit, and as Judge Dennis Jacobs accurately stated at oral argument, the piece critiqued “the objectification of the holy consumer product of sneakers to be a collectible, and that that is absurd and a sign of the cultural crisis.” Oral Argument at 19:51-20:07, *Vans, Inc. v. MSCHF Prod. Studio, Inc.*, No. 22-1006 (2d Cir. Sept. 28, 2022), <https://bit.ly/3EhbFV1>. Our appeal is currently held in abeyance.

iconic symbols represent cultures and are necessary short hand for commenting on society.

So let's begin.

- *MSCHF*

CALL FOR ENTRY

Show Title: *Where To Draw The Line*

Dear Chief Justice, Associate Justices, and Law Clerks of the Supreme Court of the United States:

You are invited to submit artworks to *Where To Draw The Line*, a group exhibition planned to open in Fall of 2023, curated by MSCHF.

SUBMISSION REQUIREMENTS:

The show will be composed of 45 works on paper, each taking the form of a Connect-the-Dots drawing, a classic childhood puzzle-drawing format.

Enclosed in this brief are 45 pages, each specifically addressed to one of the people reading this brief. Each page has on its front face a connect-the-dots drawing waiting for an artist's hand to make them into completed artworks. On the reverse is a pre-addressed, pre-paid mailing label allowing the completed drawing to be returned to MSCHF for exhibition at no cost to the artist.

1. Find and complete, in your own hand, the prompt addressed to you;
2. Remove the completed drawing (don't forget to sign your work!) from this brief; and

3. Fold the drawing into thirds with the mailing label facing outwards, close with a bit of tape, and send to MSCHF via USPS.

CURATORIAL STATEMENT:

These connect-the-dots works follow in an established tradition of “uncreative art” that stretches from Duchampian readymades, to Dadaist random poetry, to Warhol’s paint-by-numbers works. Such artworks historically have been deliberate reactions against or critiques of art world conventions around craft, ego, and formalism.

It is the combination of action, artist, and destination that determines exactly what these artworks are, not merely the nature of the manual execution.

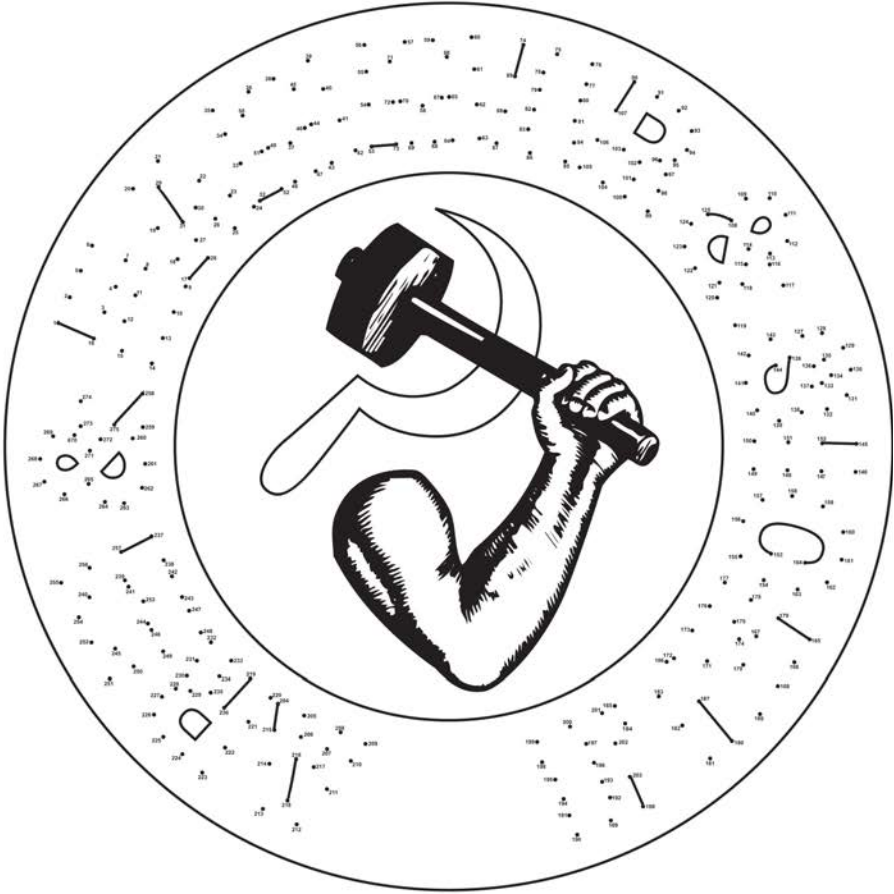
Each of you, by virtue of completing one of these drawings, is the executor of an artwork that makes use of cultural iconography.

Each of you, by virtue of your position, may decide the fate of artistic expression’s ability to freely choose its subject matter.

Each of these drawings will be displayed as part of a gallery show. Will they be rendered illegal prior to that exhibition?

TERMS:

The 45 artworks solicited by this call for entry shall be provided to MSCHF on a consignment basis. All rights and ownership are retained by the artist. The artist grants permission for the sale of artwork, at the price listed in the call. Taxes and fees are the responsibility of the purchaser. Unsold works will be returned to the artists prior to the closing of the show.



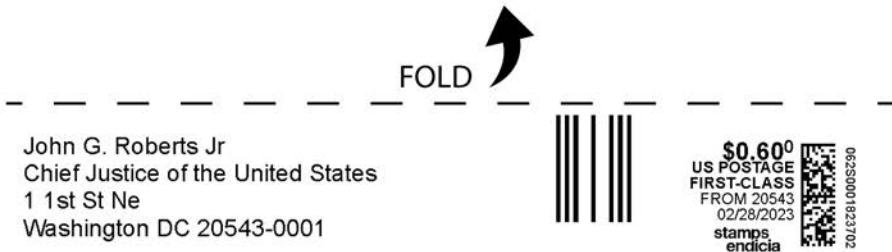
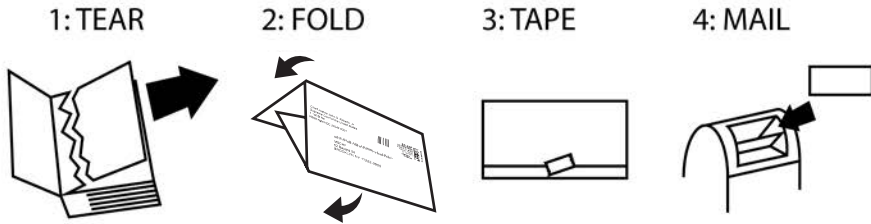
John Roberts

Arm & Hammer & Sickle, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist, Chief Justice John Roberts

Consigned for sale. Available.



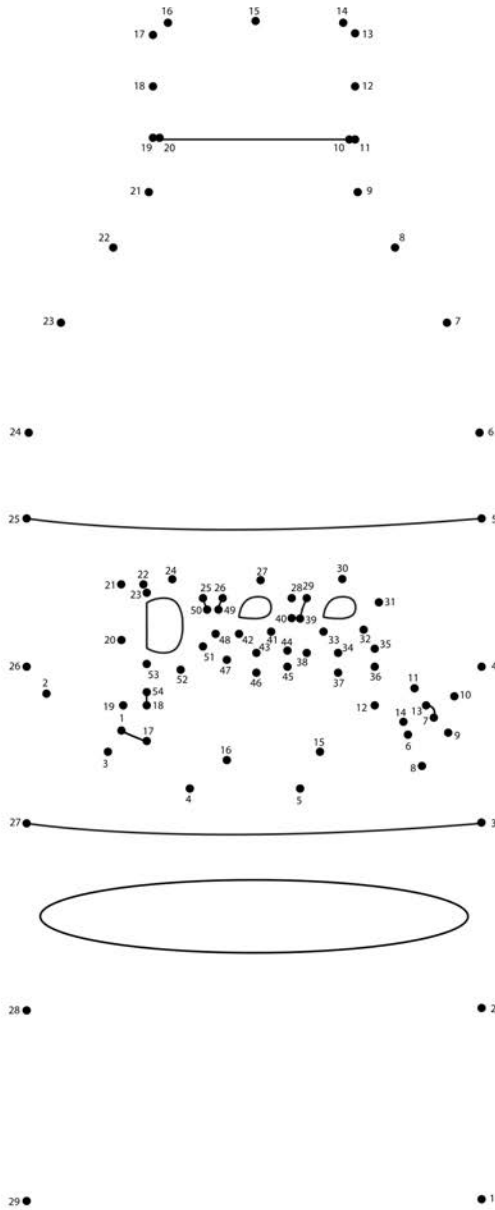
MSCHF
106b Nassau Ave # 316
BROOKLYN NY 11222-6675



FOLD THIS SIDE UNDER

CONTACT INFO: _____

PLEASE PROVIDE A CONTACT METHOD BY WHICH
THE CURATORS (MSCHF) MAY CONTACT YOU (THE ARTIST).



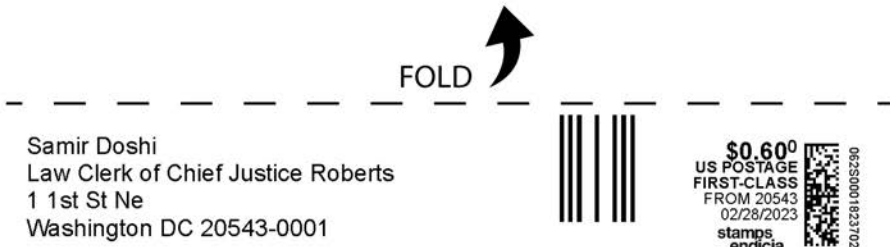
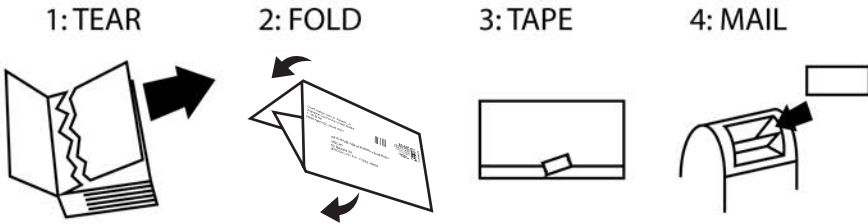
Samir Doshi

Bathroom Break, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist Samir Doshi

Consigned for sale. Available.



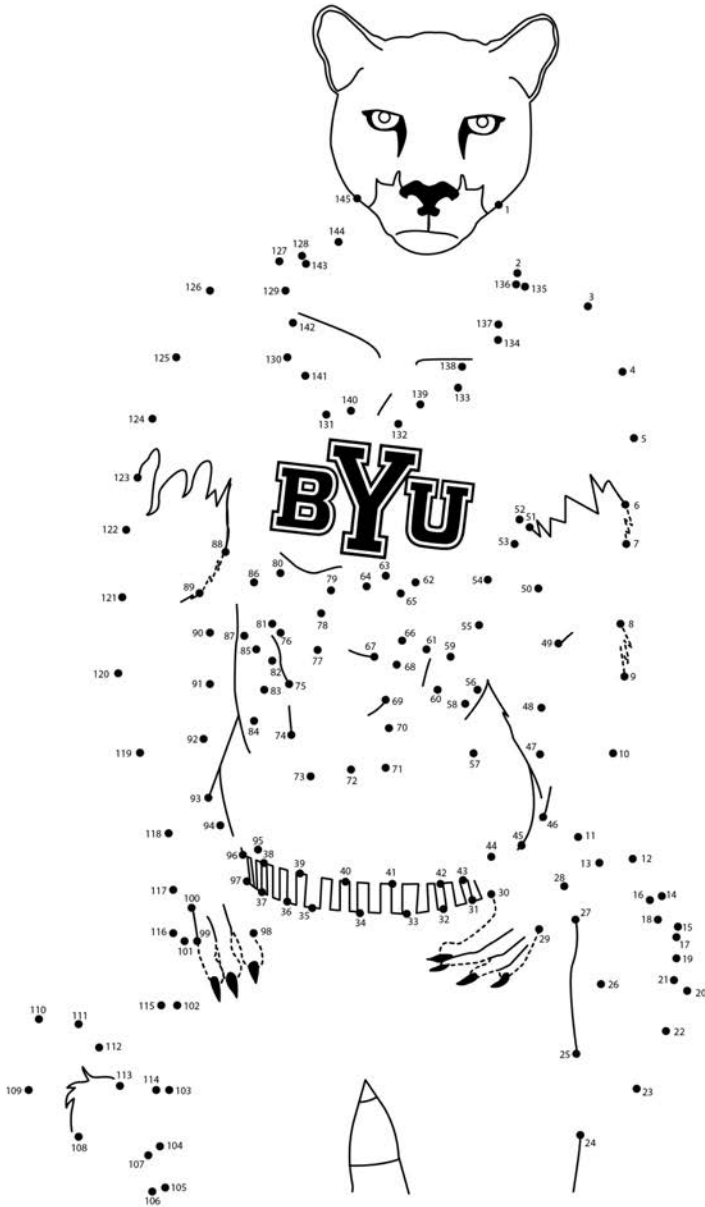
MSCHF
106b Nassau Ave # 316
BROOKLYN NY 11222-6675



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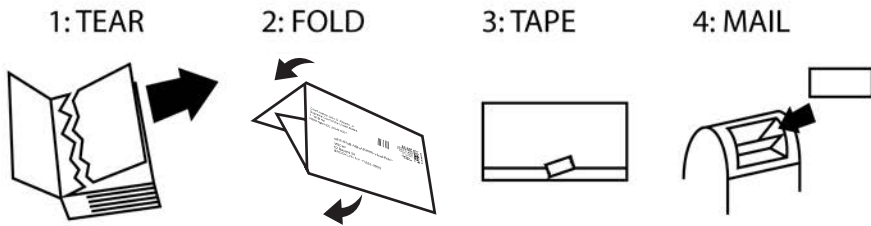
Mark Gillespie

Go Cougars!, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist Mark Gillespie

Consigned for sale. Available.



FOLD

Mark Gillespie
Law Clerk of Chief Justice Roberts
1 1st St Ne
Washington DC 20543-0001



\$0.60⁰
US POSTAGE
FIRST-CLASS
FROM 20543
02/28/2023
stamps
endicia



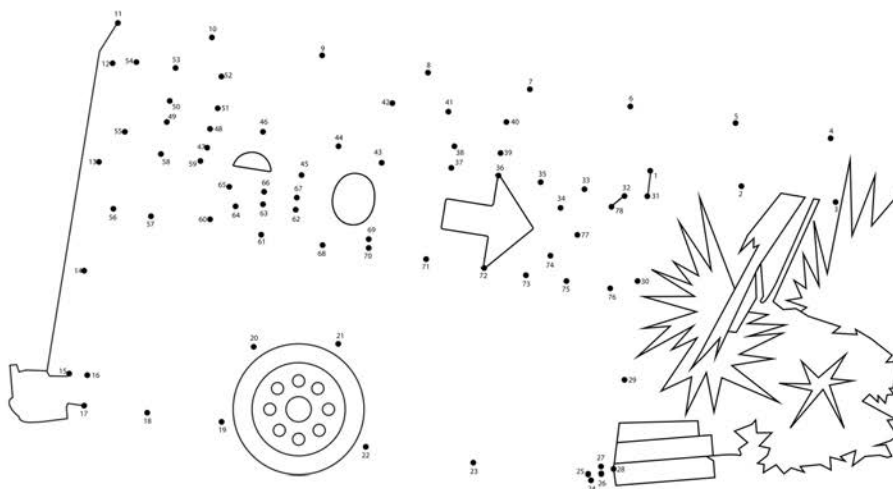
MSCHF
106b Nassau Ave # 316
BROOKLYN NY 11222-6675

FOLD

FOLD THIS SIDE UNDER

CONTACT INFO: _____

PLEASE PROVIDE A CONTACT METHOD BY WHICH
THE CURATORS (MSCHF) MAY CONTACT YOU (THE ARTIST).



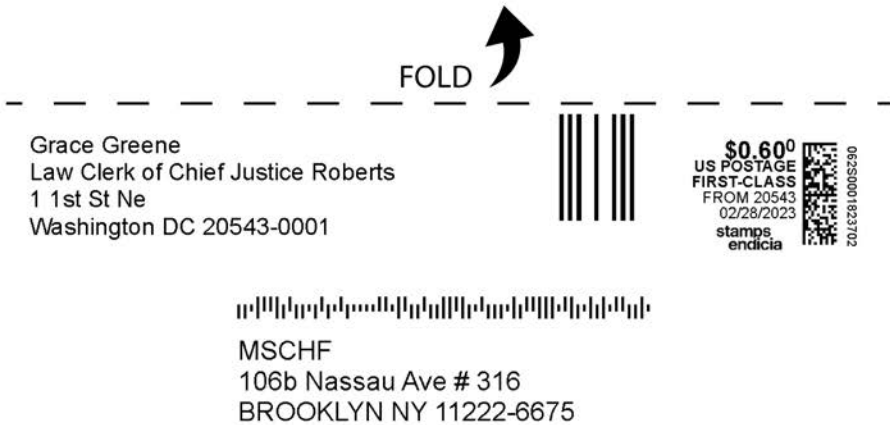
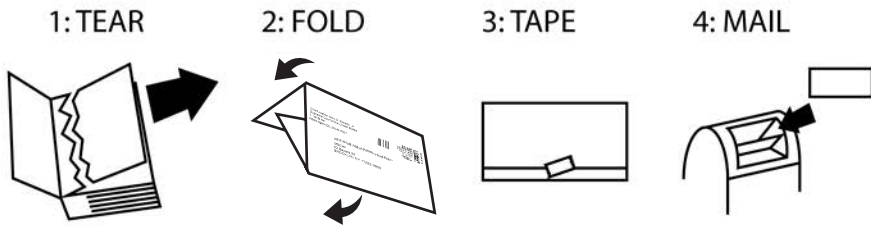
Grace Greene

Rush Delivery, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist Grace Greene

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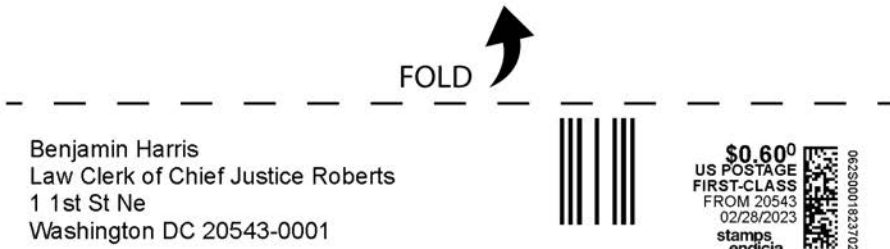
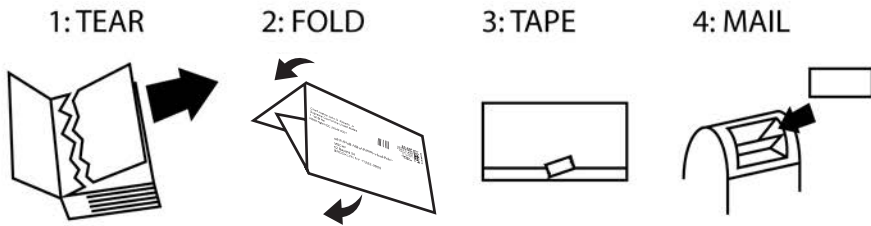


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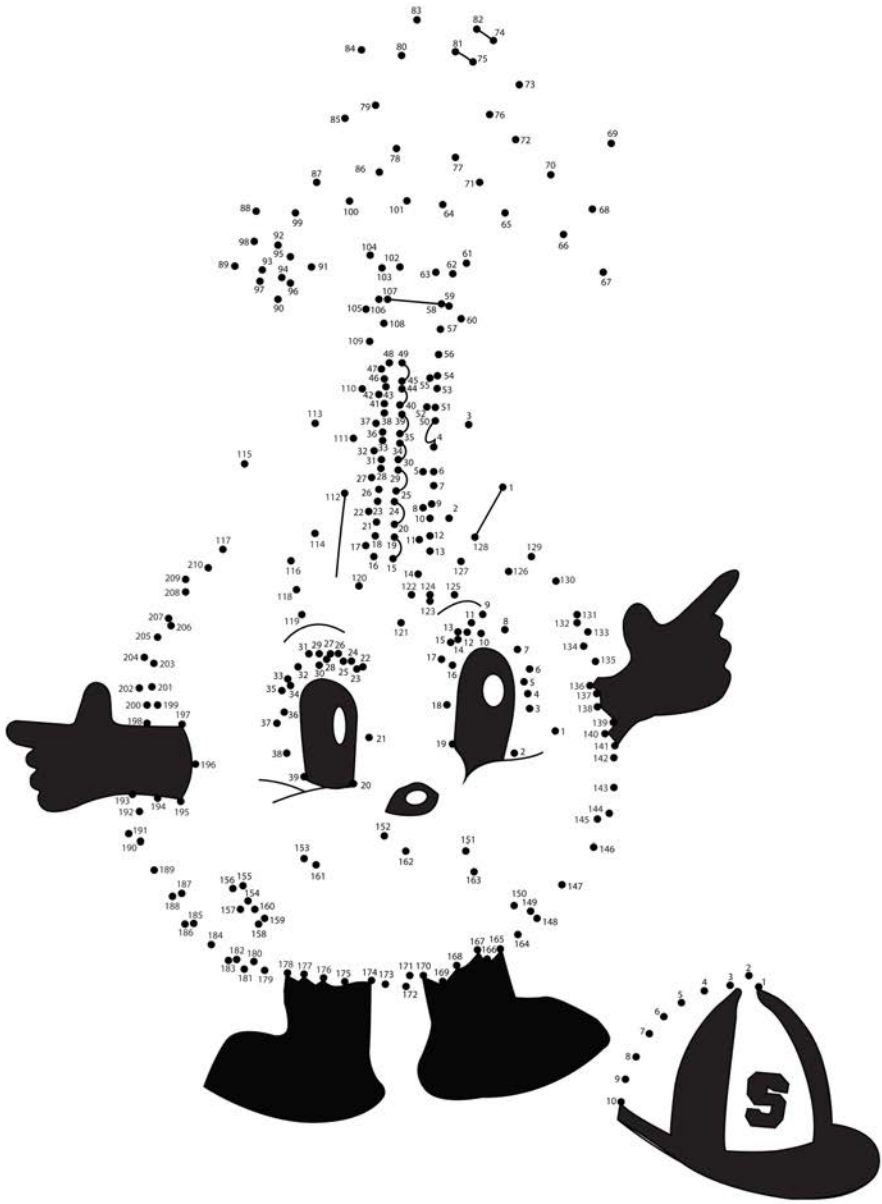
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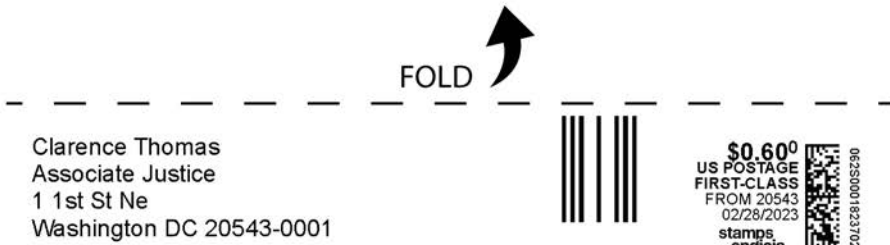
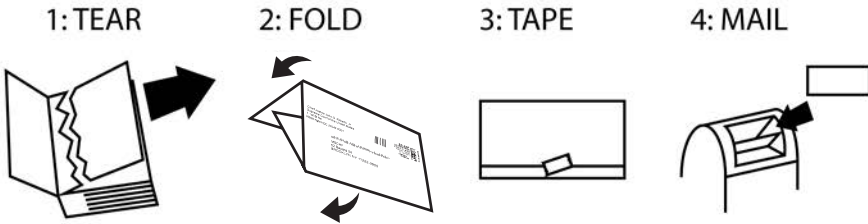
Clarence Thomas

Know Orange, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist, Associate Justice Clarence Thomas

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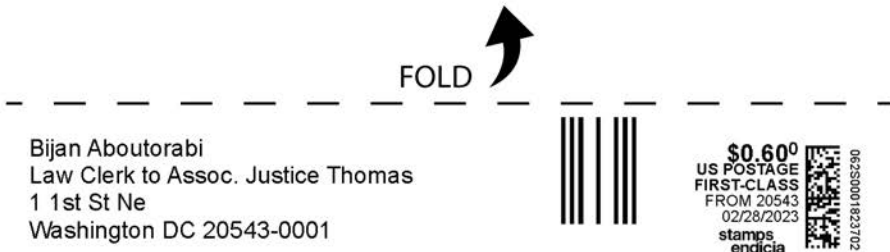
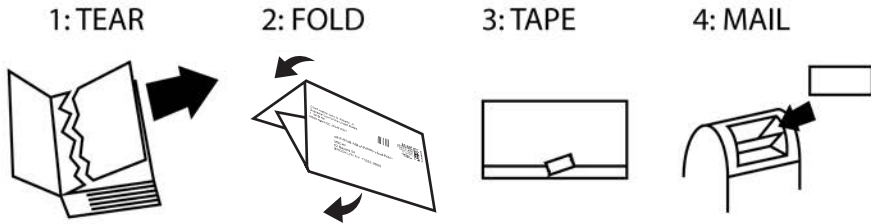
Bijan Aboutorabi

Sports Drink, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist Bijan Aboutorabi

Consigned for sale. Available.



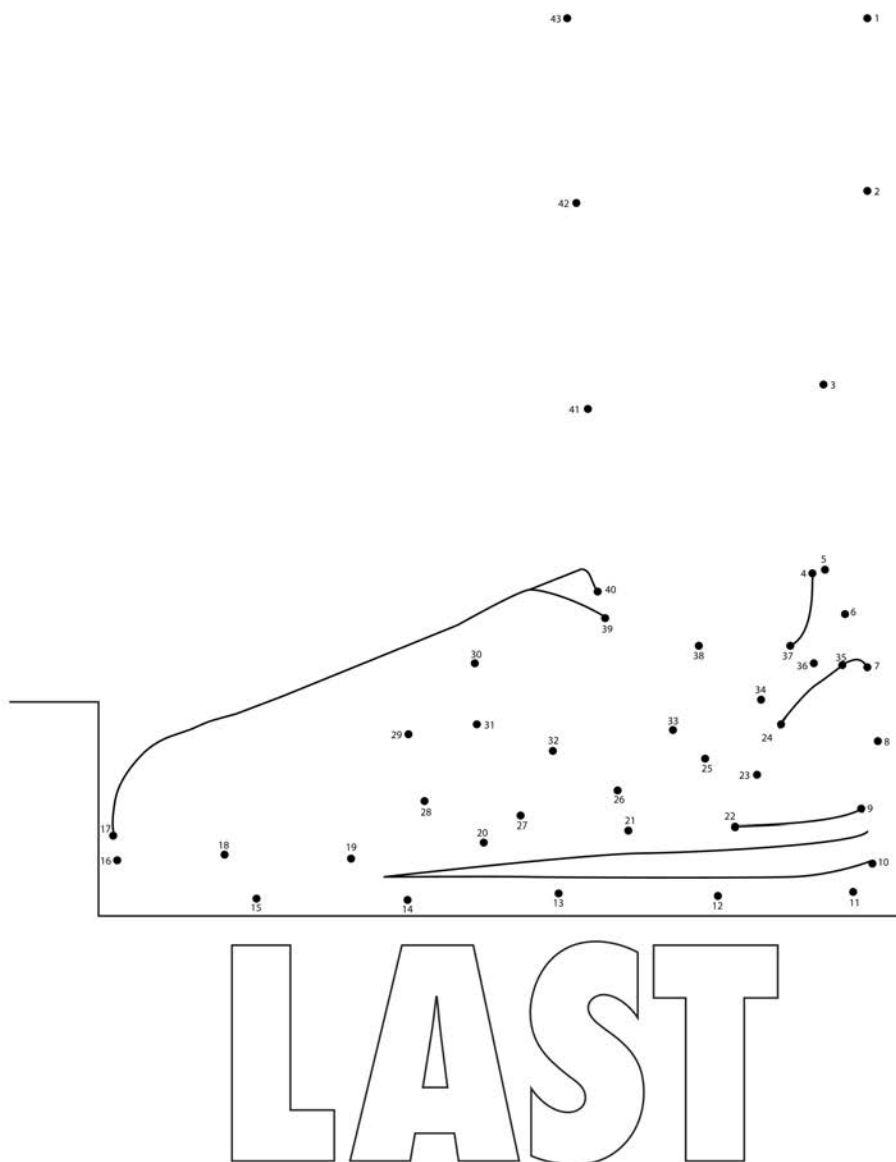
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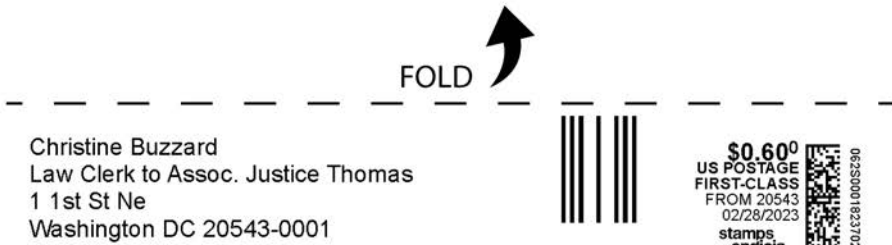
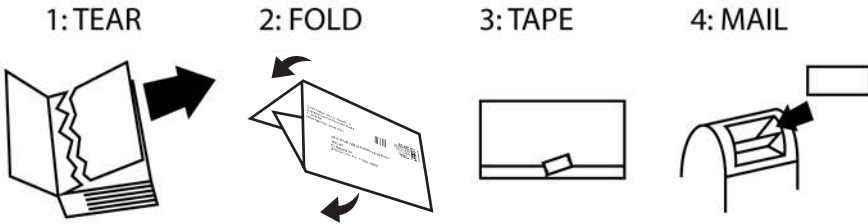
Christine Buzzard

Last Place, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist Christine Buzzard

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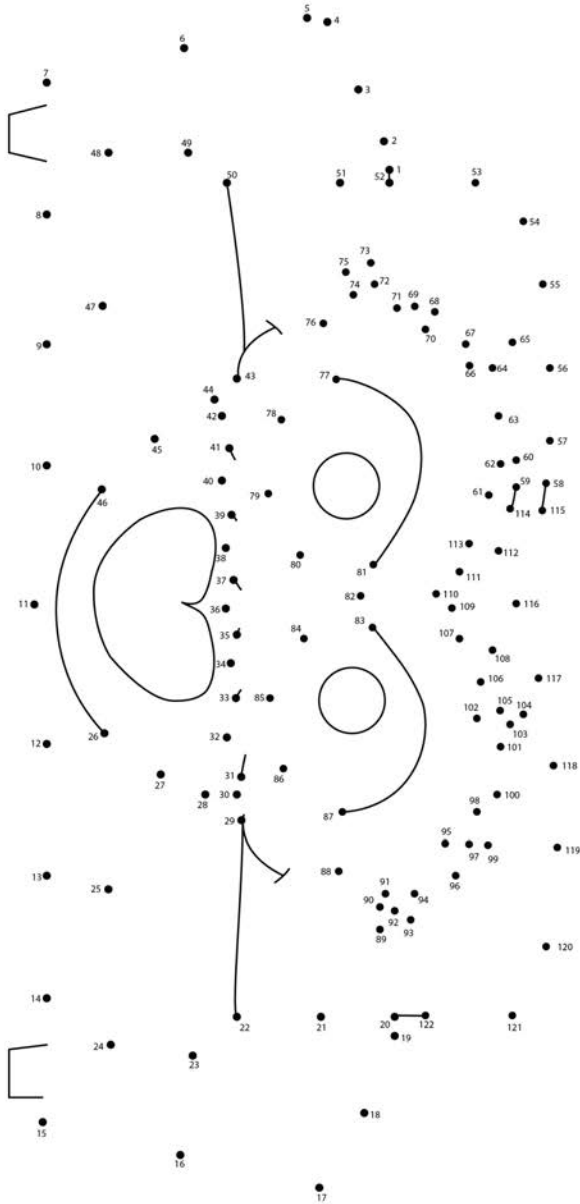
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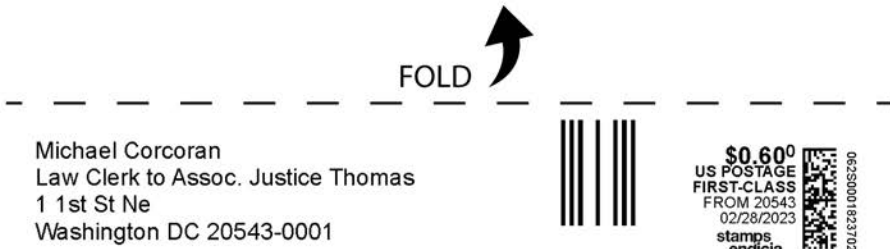
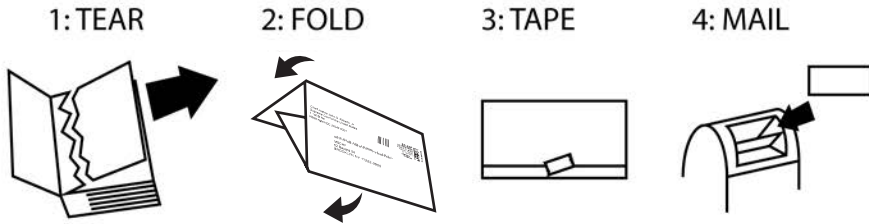
Michael Corcoran

Oscar The Couch, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist Michael Corcoran

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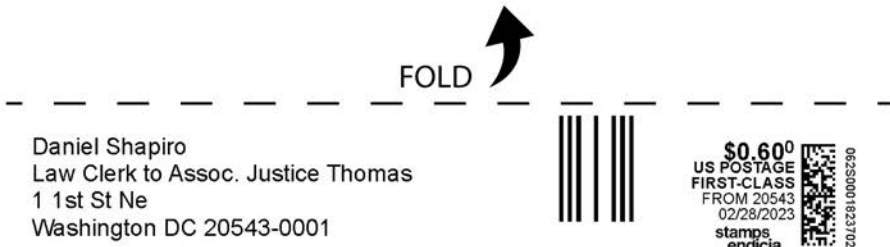
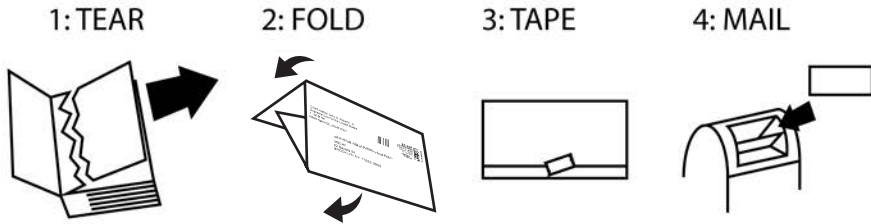
Daniel Shapiro

BDSM&M, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist Daniel Shapiro

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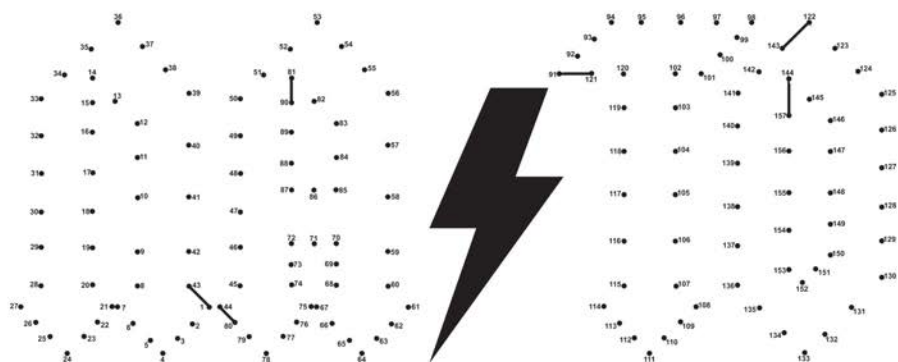
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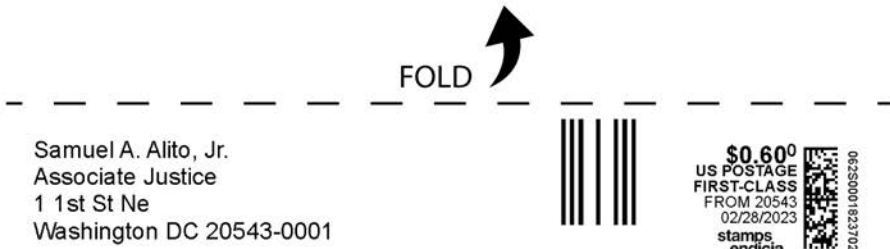
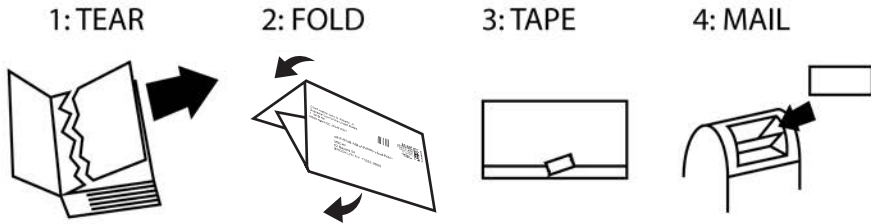
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Samuel Alito
Back In Black, 2023
Pen on paper, Connect-the-Dot

Signature of the Artist, Associate Justice Samuel Alito

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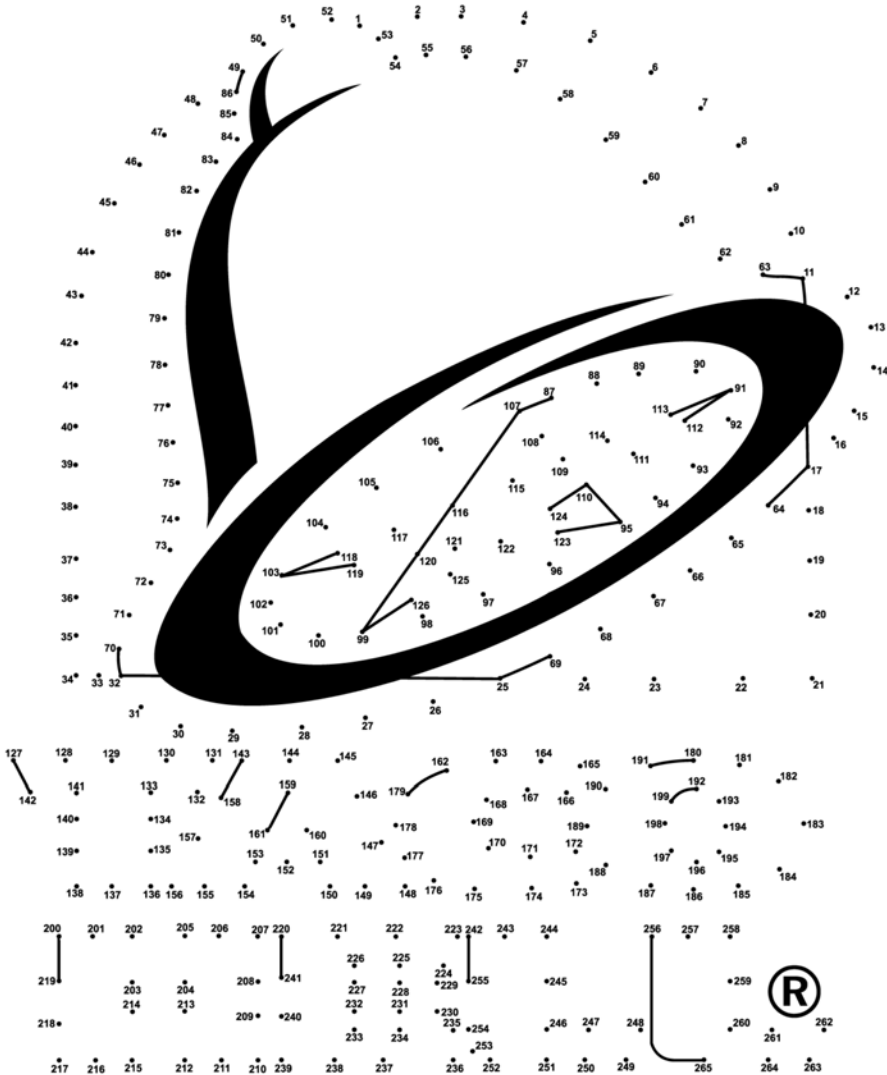
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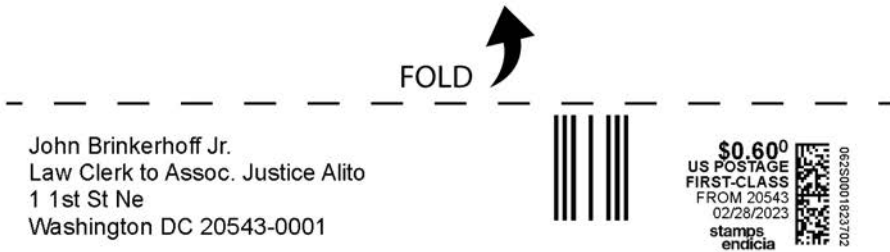
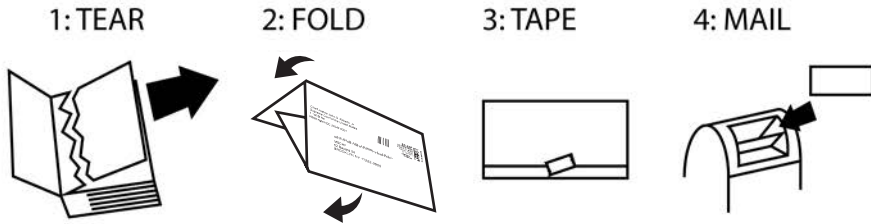
John Brinkerhoff Jr.

Taco Hell, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist John Brinkerhoff Jr.

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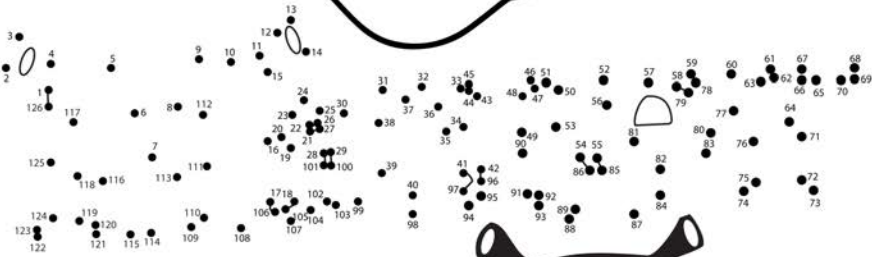
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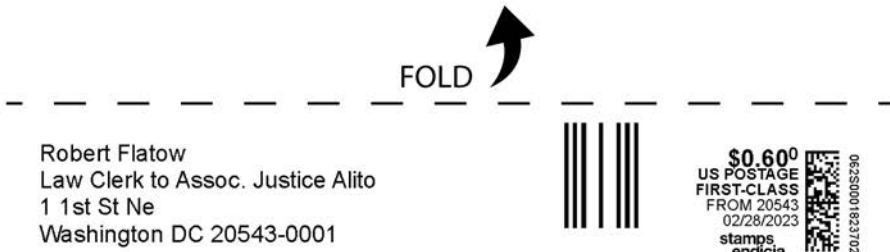
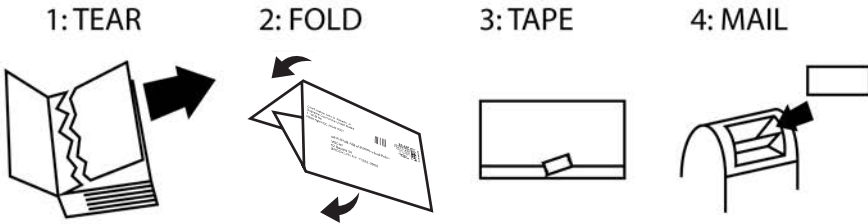
Robert Flatlow

What Are Ye Doing In My Swamp?!, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist Robert Flatlow

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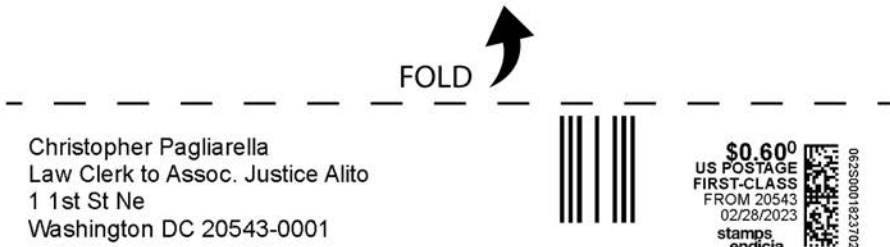
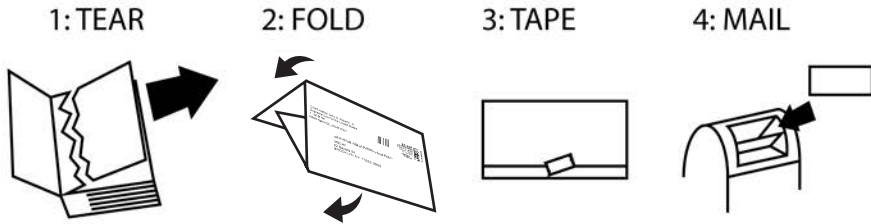
Christopher Pagliarella

Part Of An Unbalanced Breakfast, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist Christopher Pagliarella

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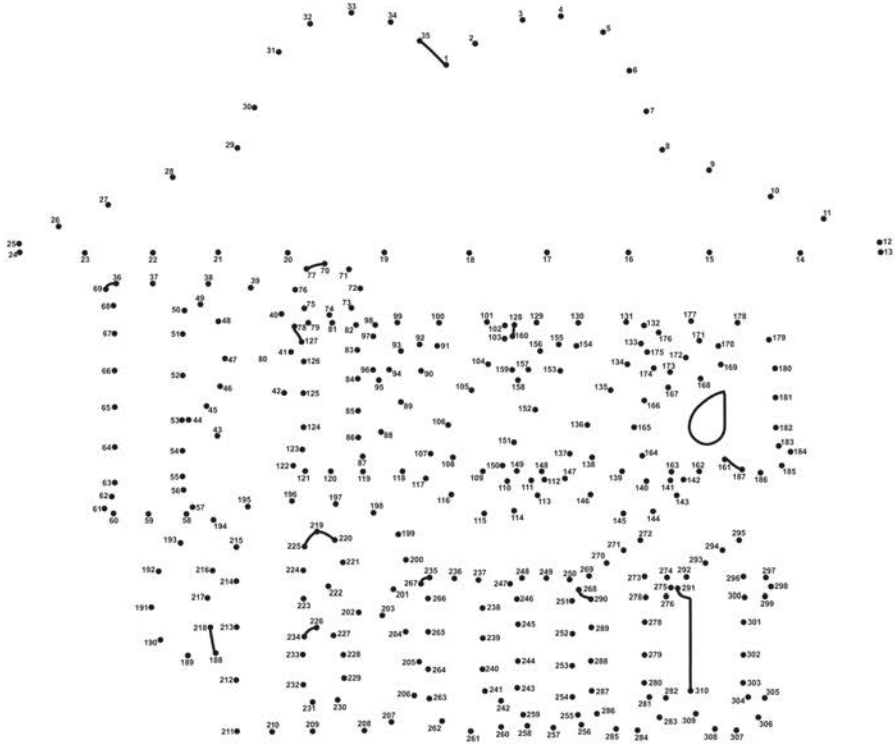
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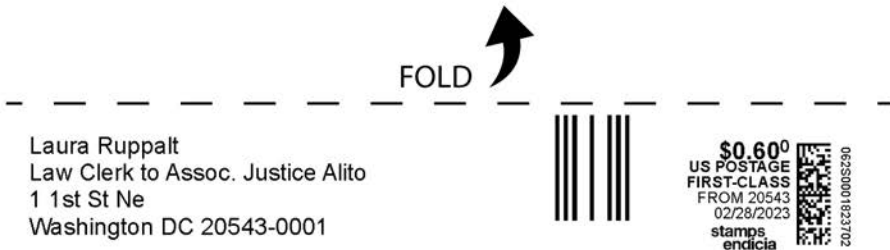
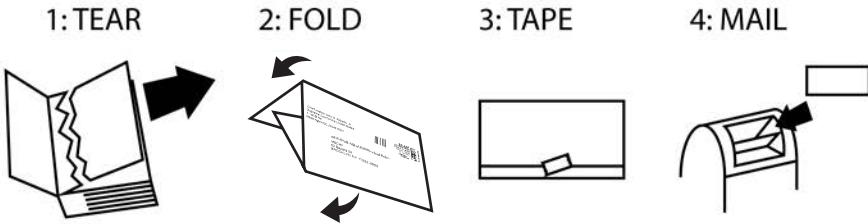
Laura Ruppault

No One Out-Pizzas The Butt, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist Laura Ruppault

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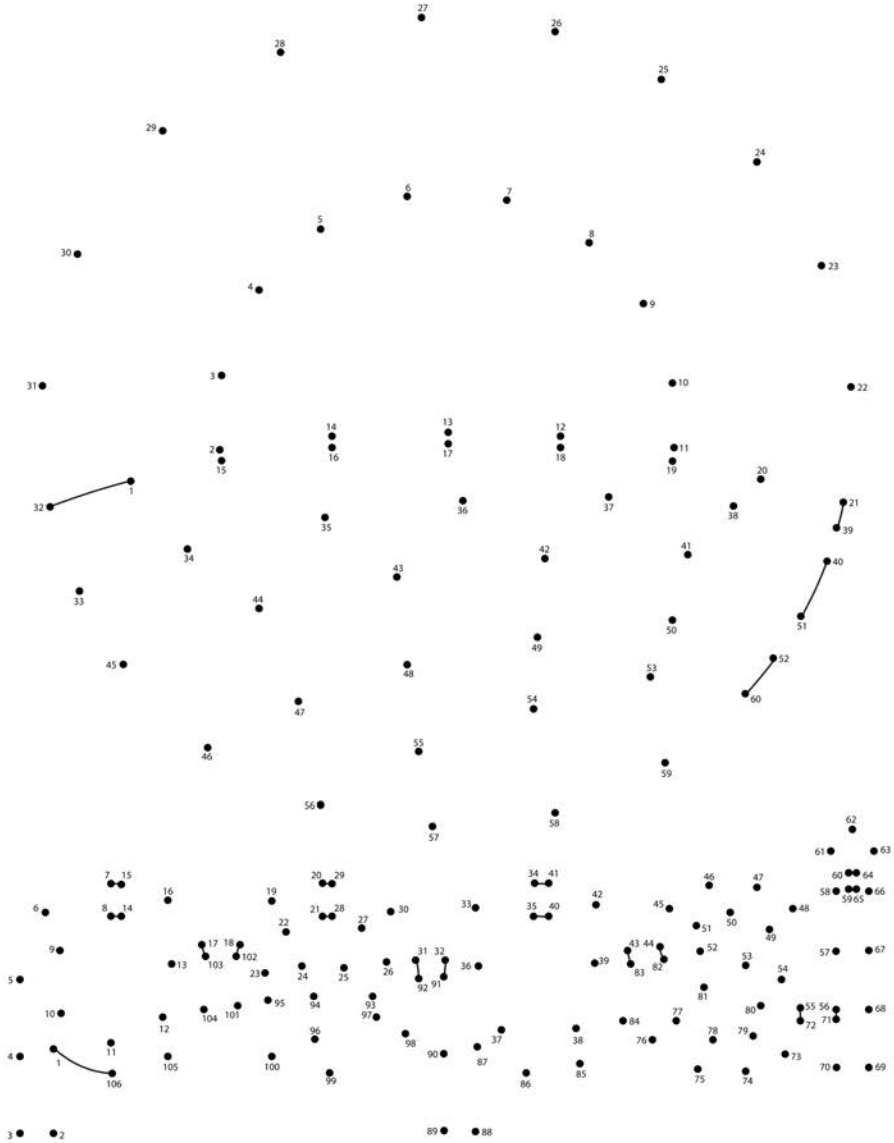
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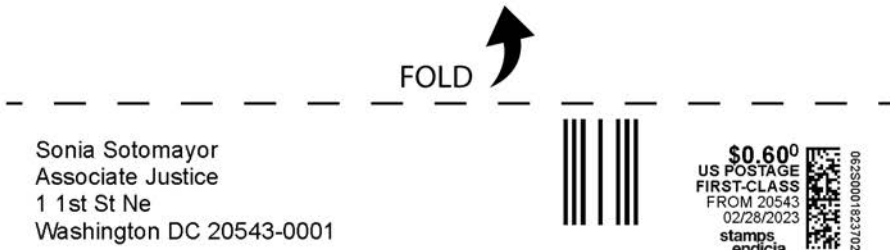
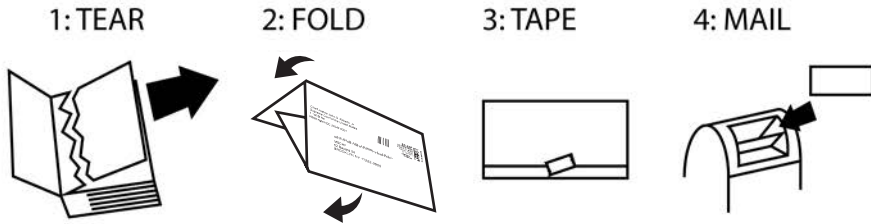
Sonia Sotomayor

Yes We Can Of Soda-mayor, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist, Associate Justice Sonia Sotomayor

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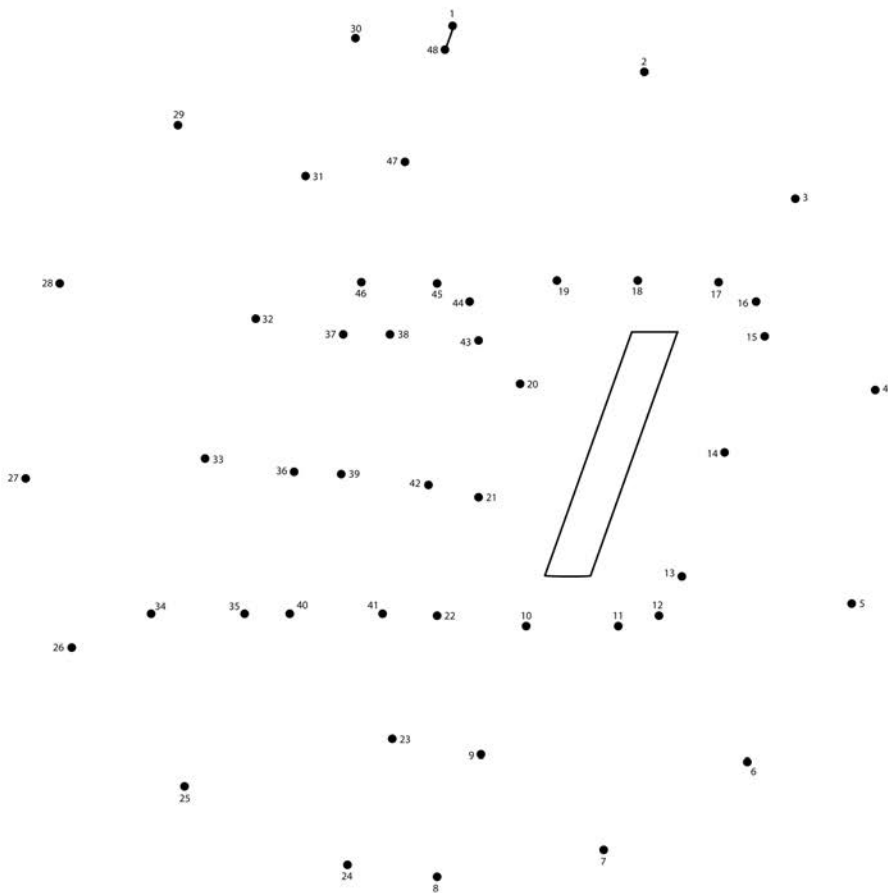
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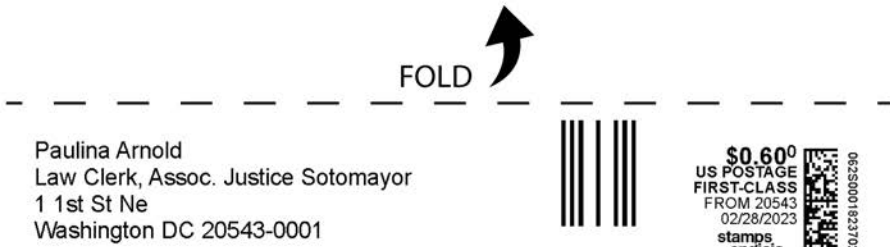
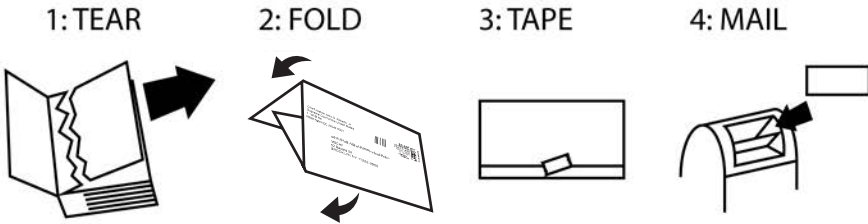
by J.K. Rowling

Paulina Arnold
*Harry Potter and the Prisoner
of Corporate America, 2023*

Pen on paper, Connect-the-Dot

Signature of the Artist Paulina Arnold

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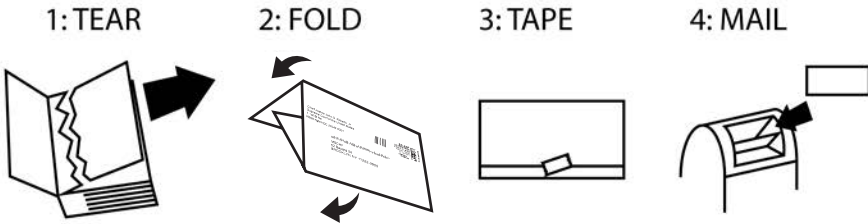
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Pen on paper, Connect-the-Dot

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Alejandra Ávila
Law Clerk, Assoc. Justice Sotomayor
1 1st St Ne
Washington DC 20543-0001



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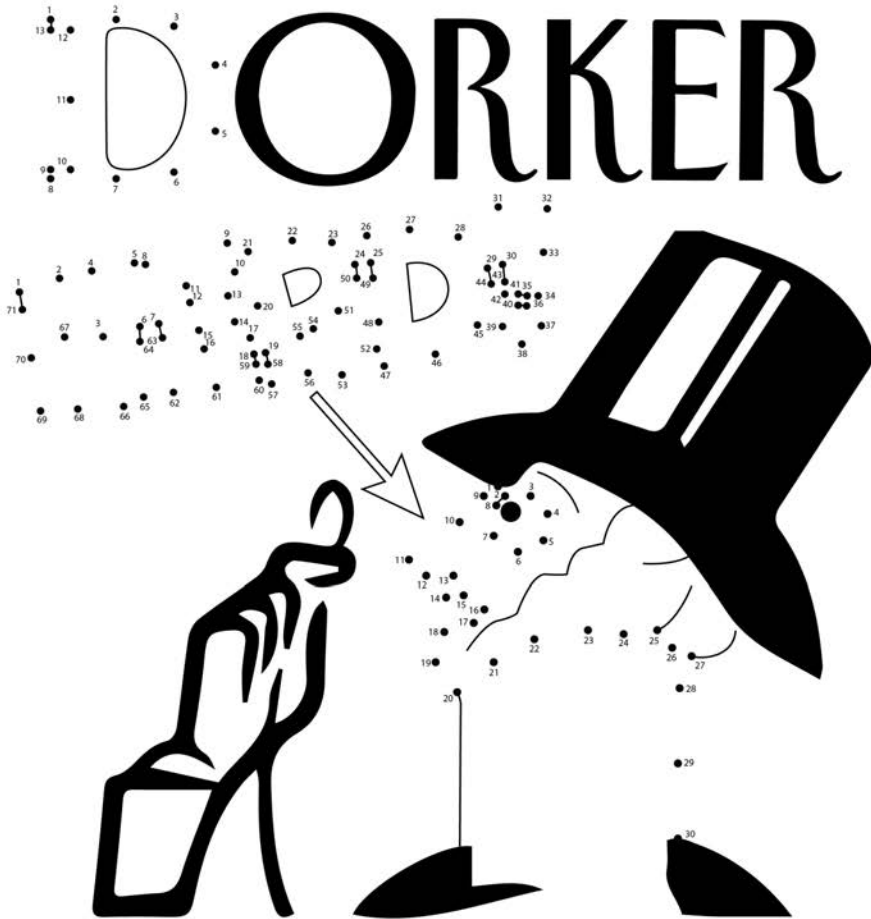
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THE NEW ORKER



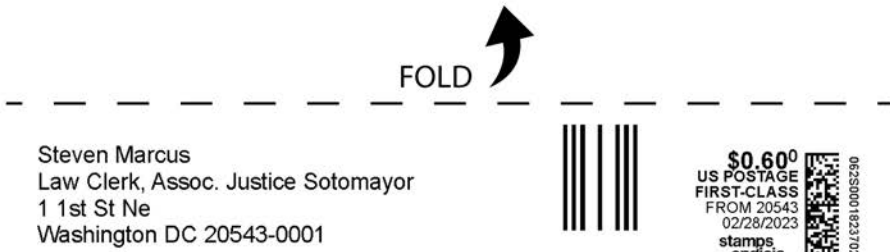
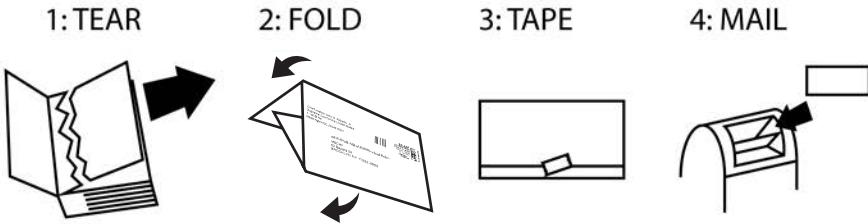
Steven Marcus

I Love New Dork, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist Steven Marcus

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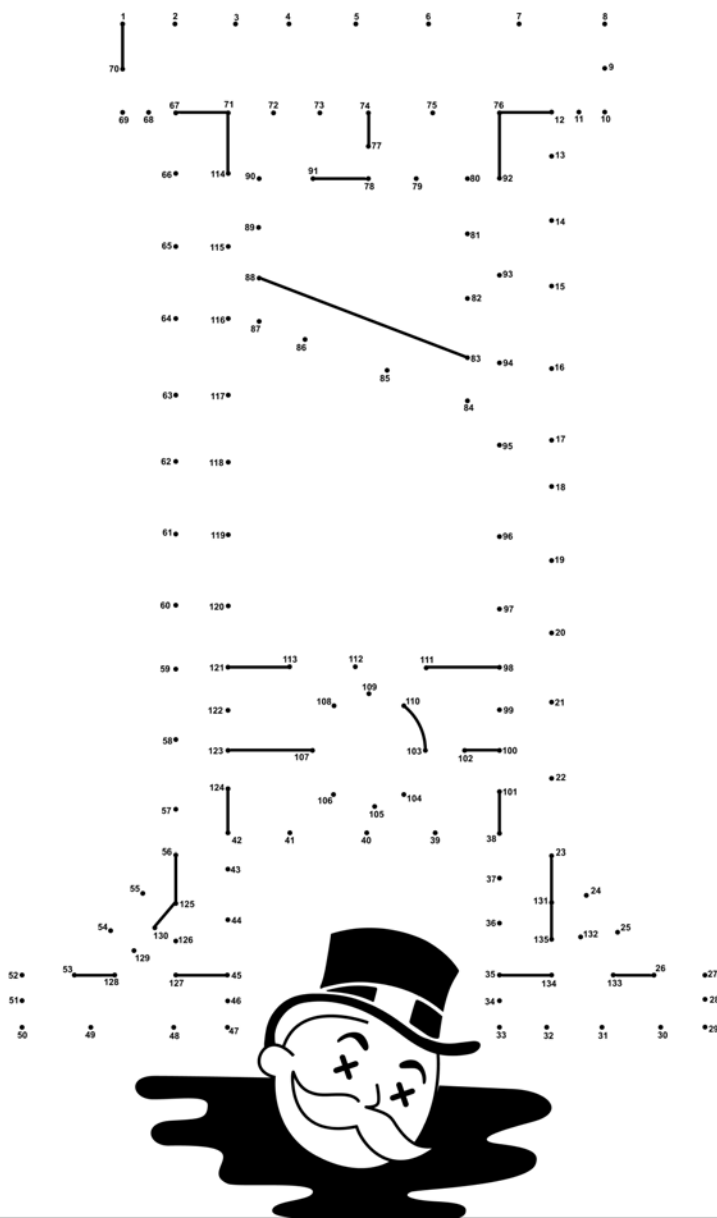
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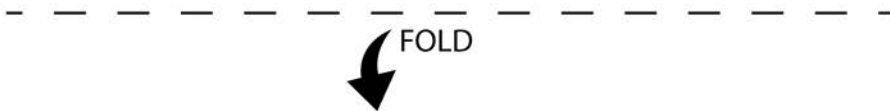
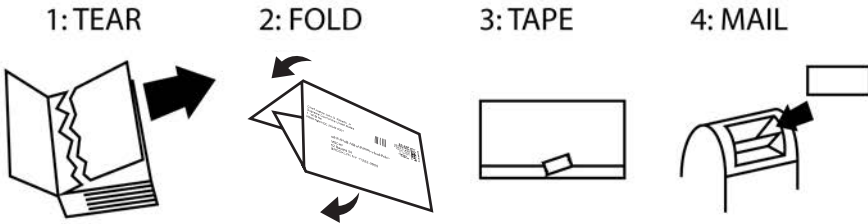
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Spencer Smith
Section 230, 2023
Pen on paper, Connect-the-Dot

Signature of the Artist Spencer Smith

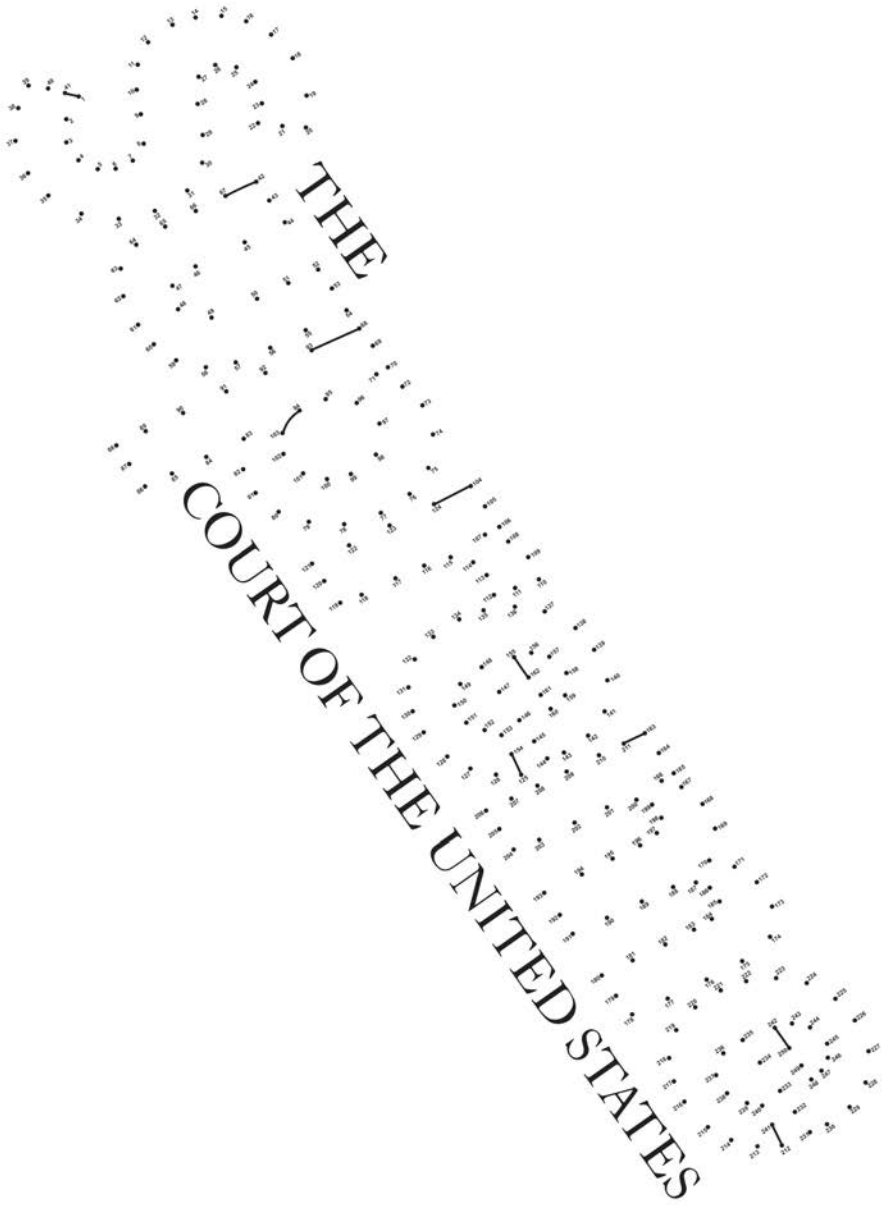
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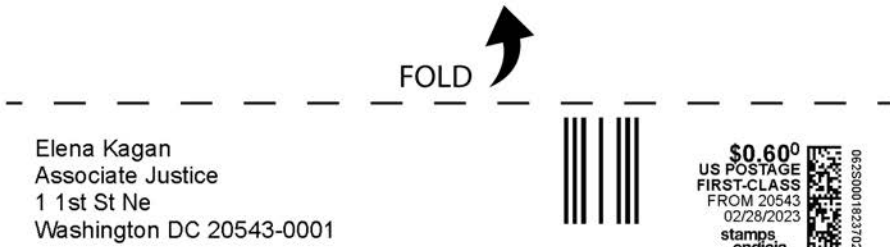
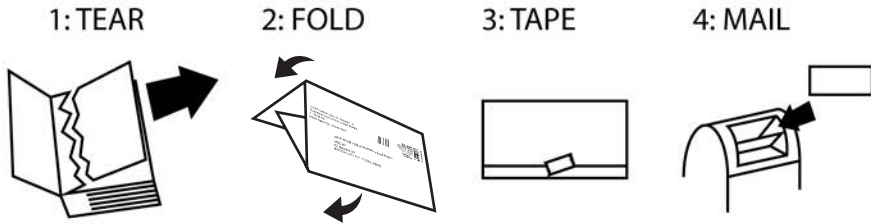
Elena Kagan

Supreme, 2023

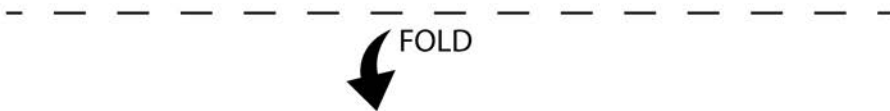
Pen on paper, Connect-the-Dot

Signature of the Artist, Associate Justice Elena Kagan

Consigned for sale. Available.



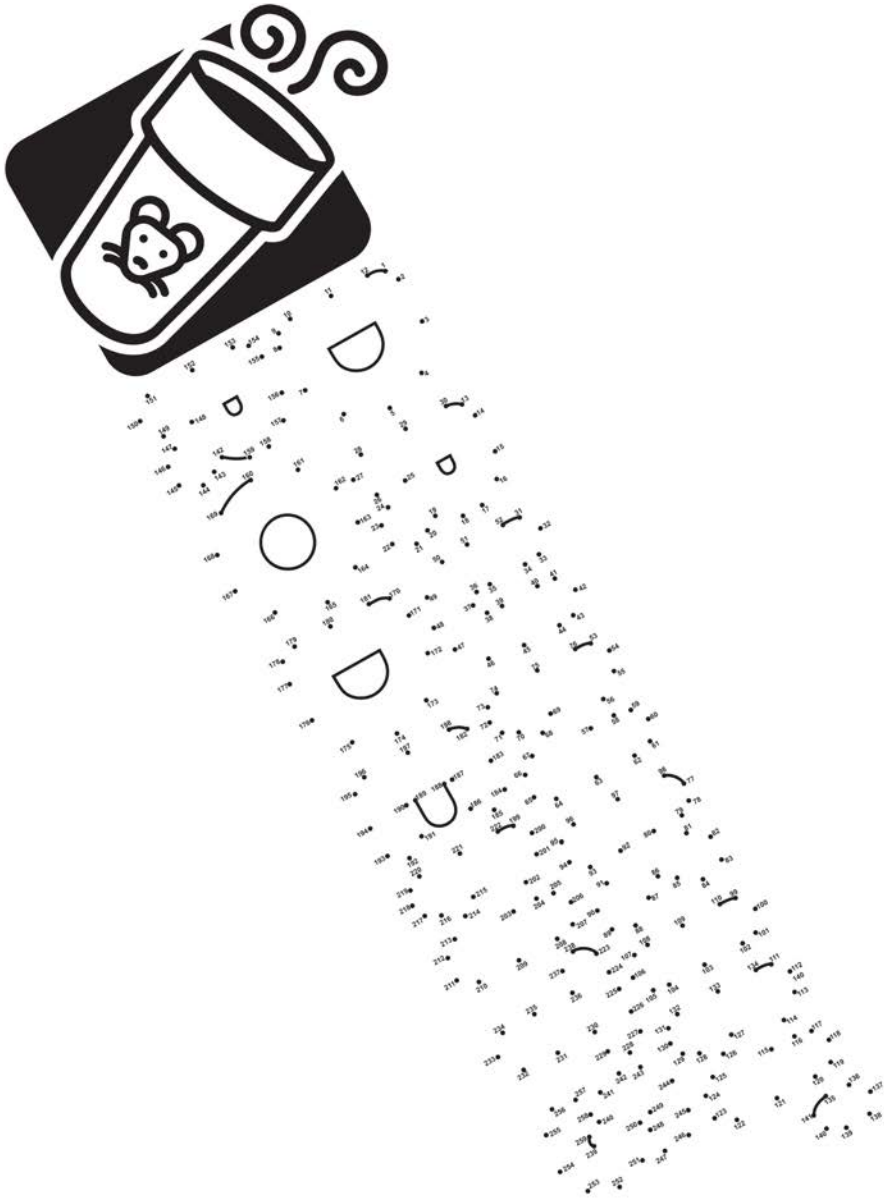
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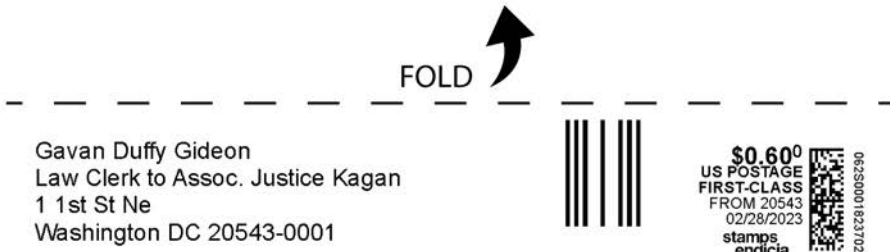
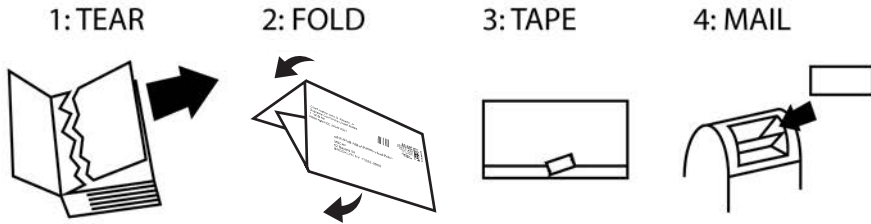
Gavan Duffy Gideon

America Runs On Drunkin, 2023

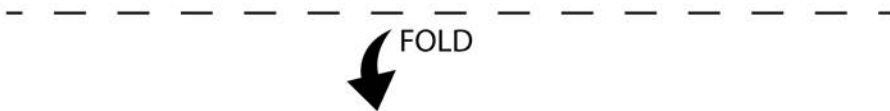
Pen on paper, Connect-the-Dot

Signature of the Artist Gavan Duffy Gideon

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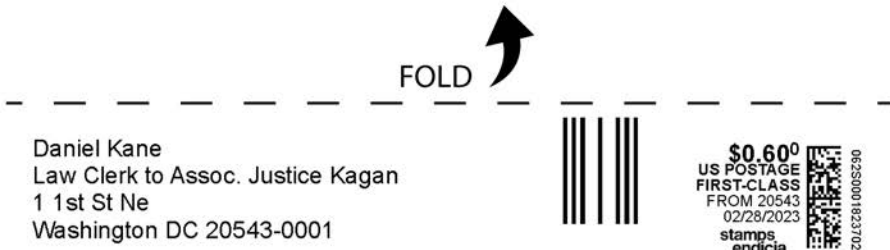
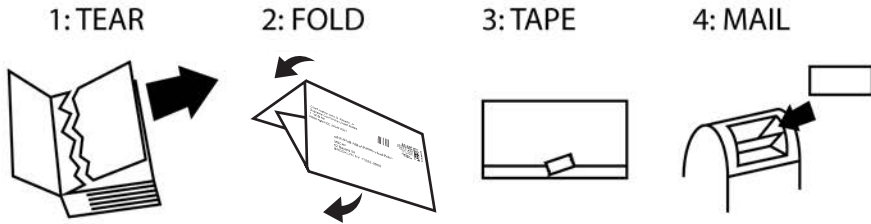
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Daniel Kane
Bad Apple, 2023
Pen on paper, Connect-the-Dot

Signature of the Artist Daniel Kane

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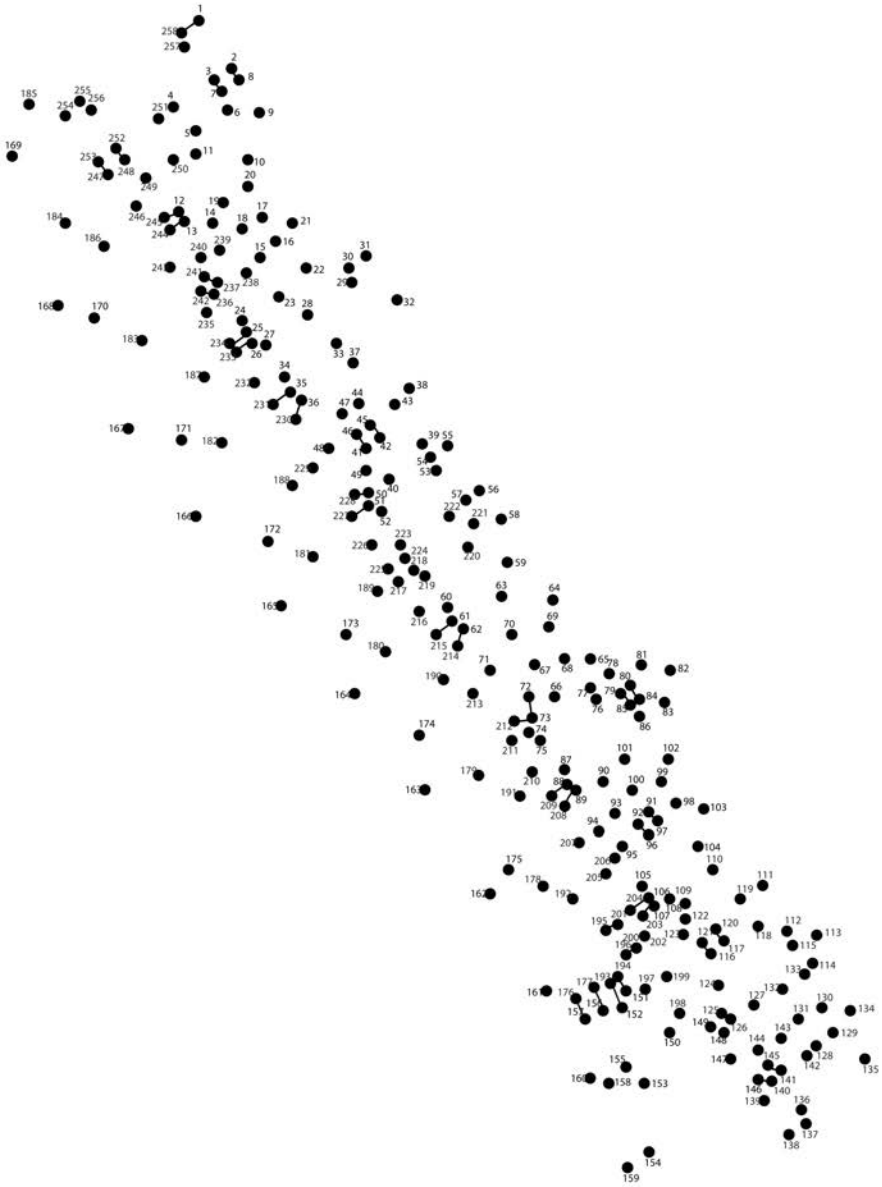
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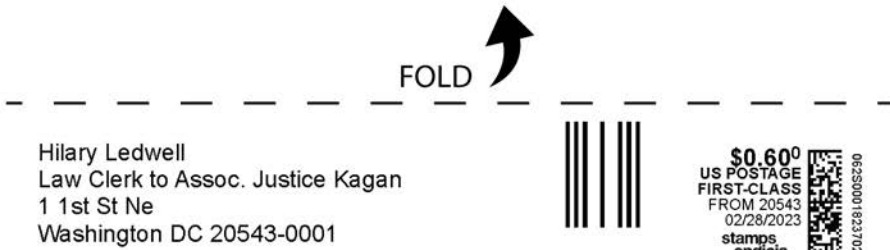
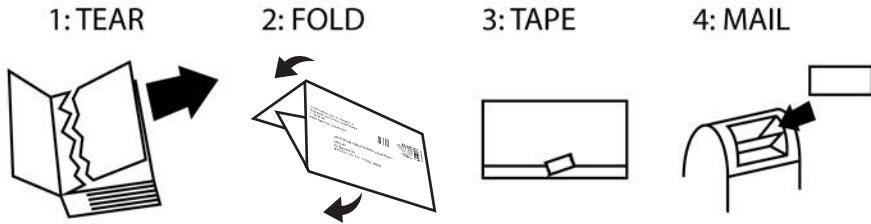
Hilary Ledwell

Stolen Valor, 2023

Pen on paper, Connect-the-Dot

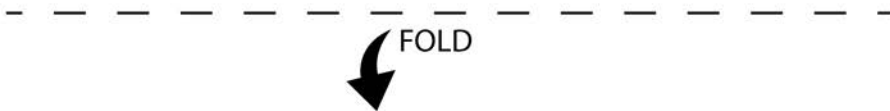
Signature of the Artist Hilary Ledwell

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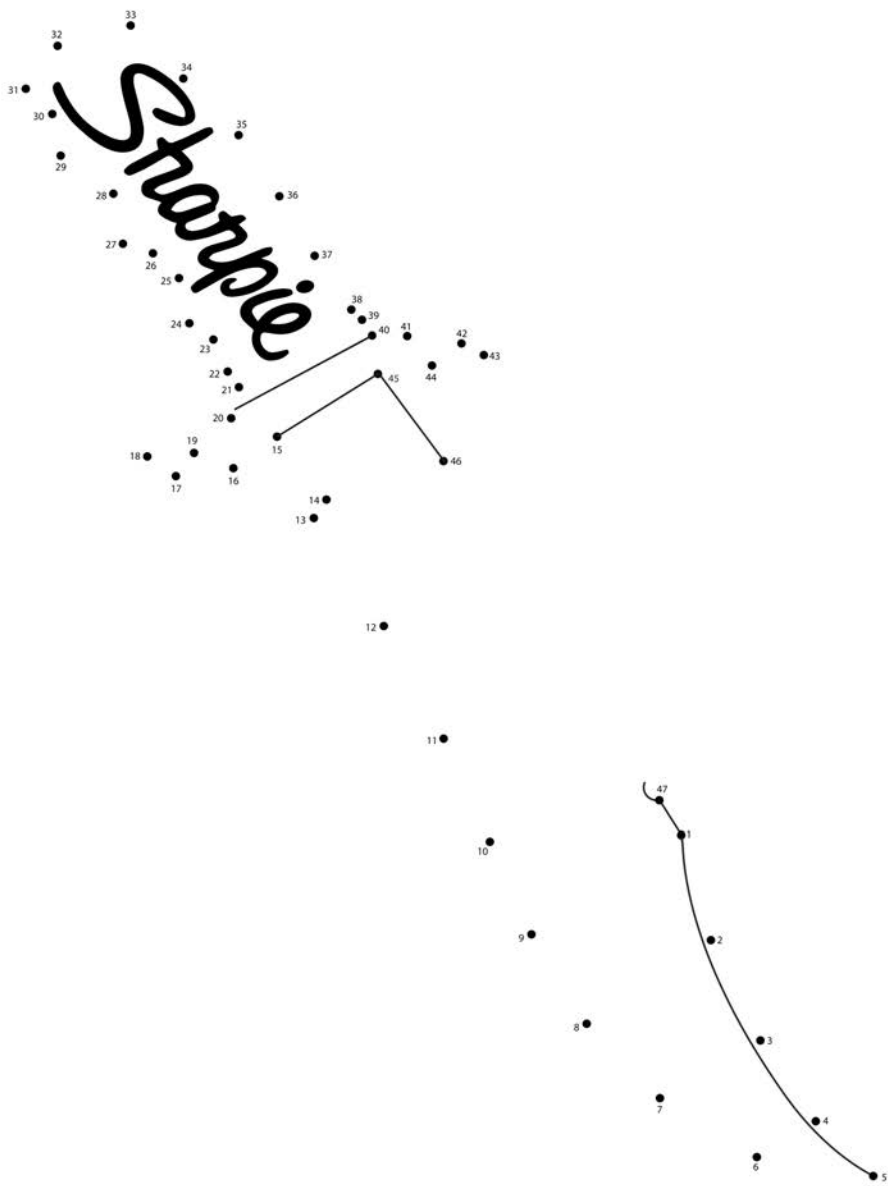
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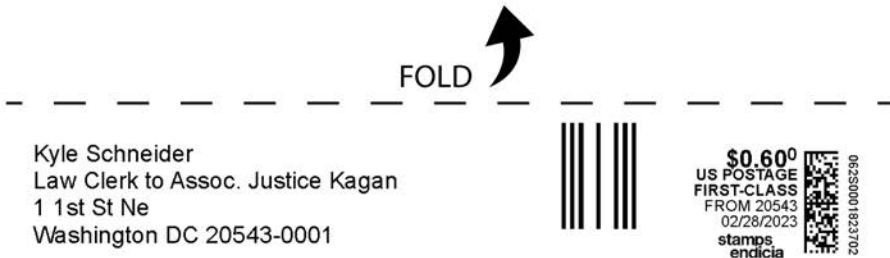
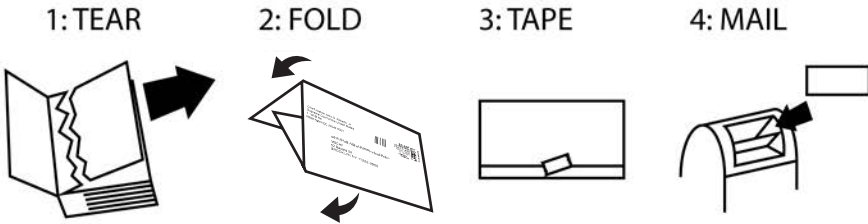
Kyle Schneider

Sharpie, 2023

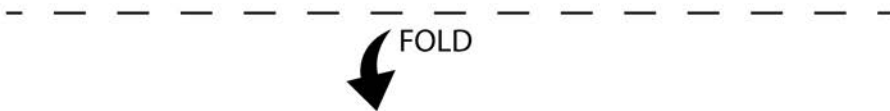
Pen on paper, Connect-the-Dot

Signature of the Artist Kyle Schneider

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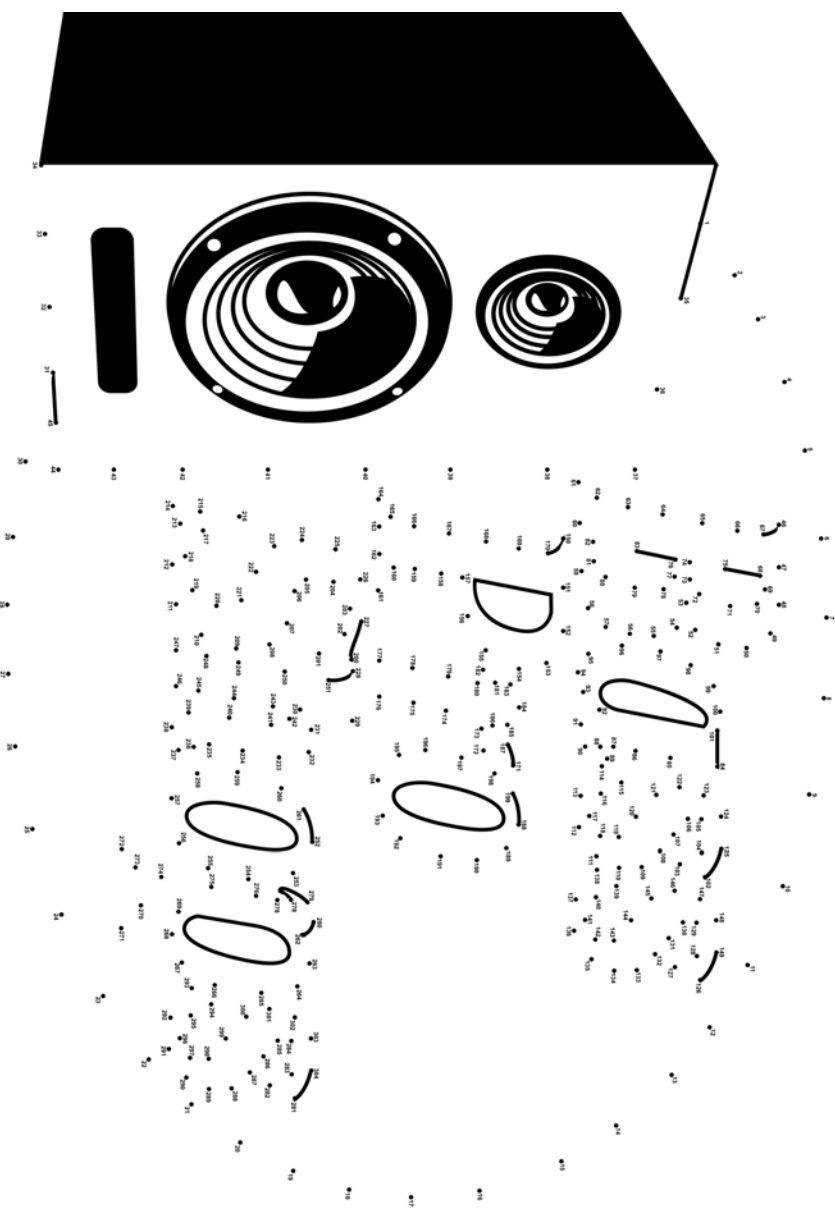
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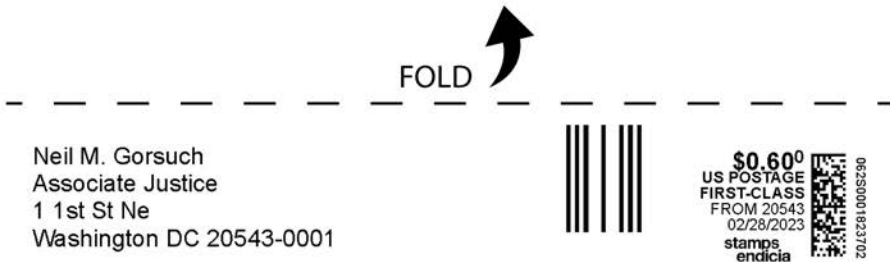
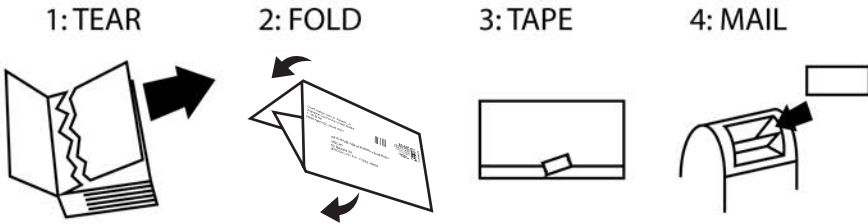
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Neil Gorsuch
Bass Pro Shops, 2023
Pen on paper, Connect-the-Dot

Signature of the Artist, Associate Justice Neil Gorsuch

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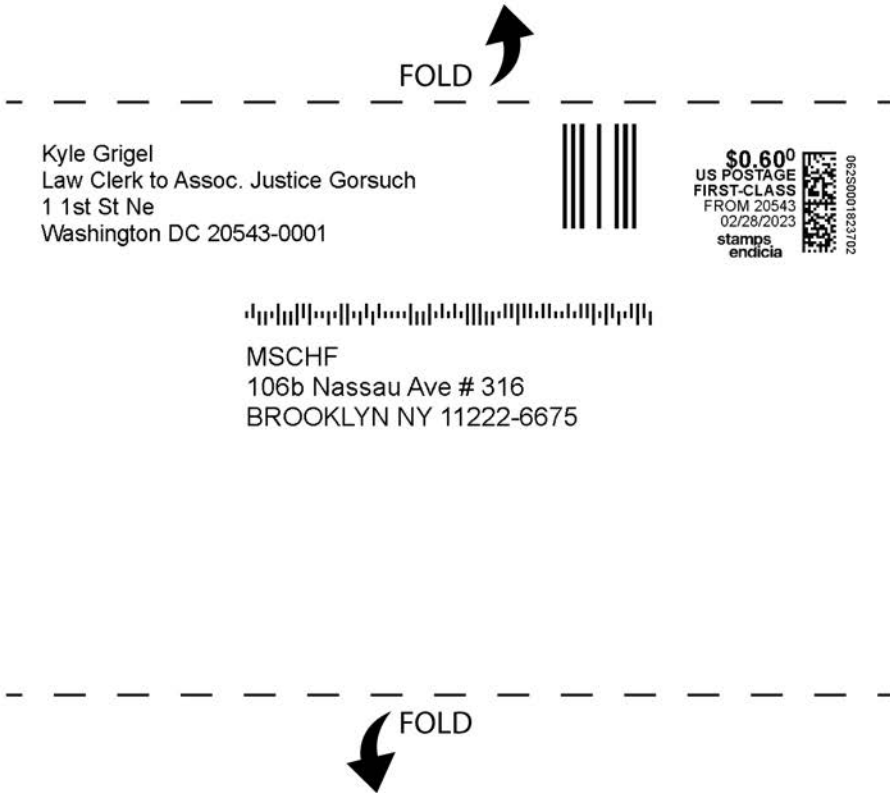
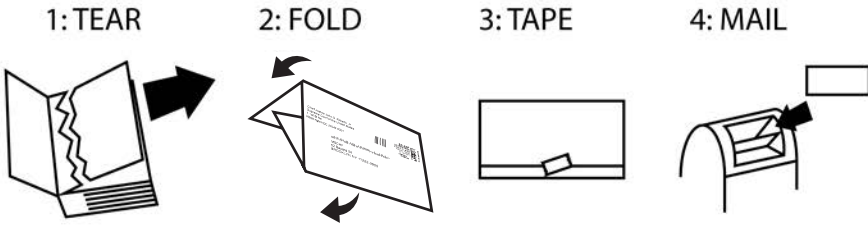
Kyle Grigel

Spearfishing, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist Kyle Grigel

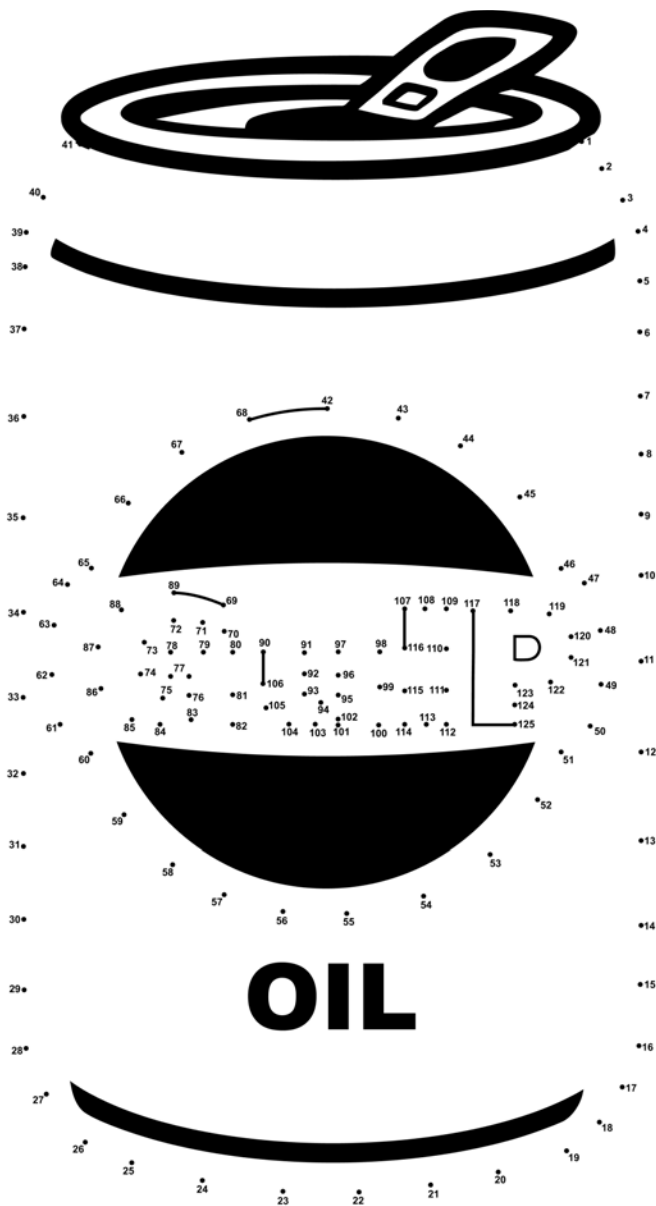
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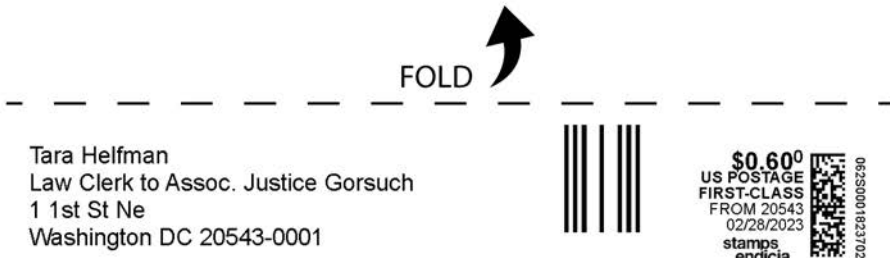
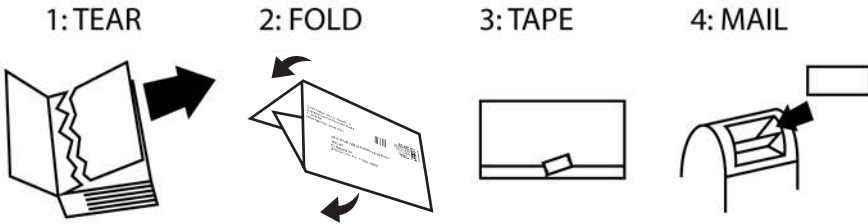
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Tara Heffman
Goes Down Smooth, 2023
Pen on paper, Connect-the-Dot

Signature of the Artist Tara Heffman

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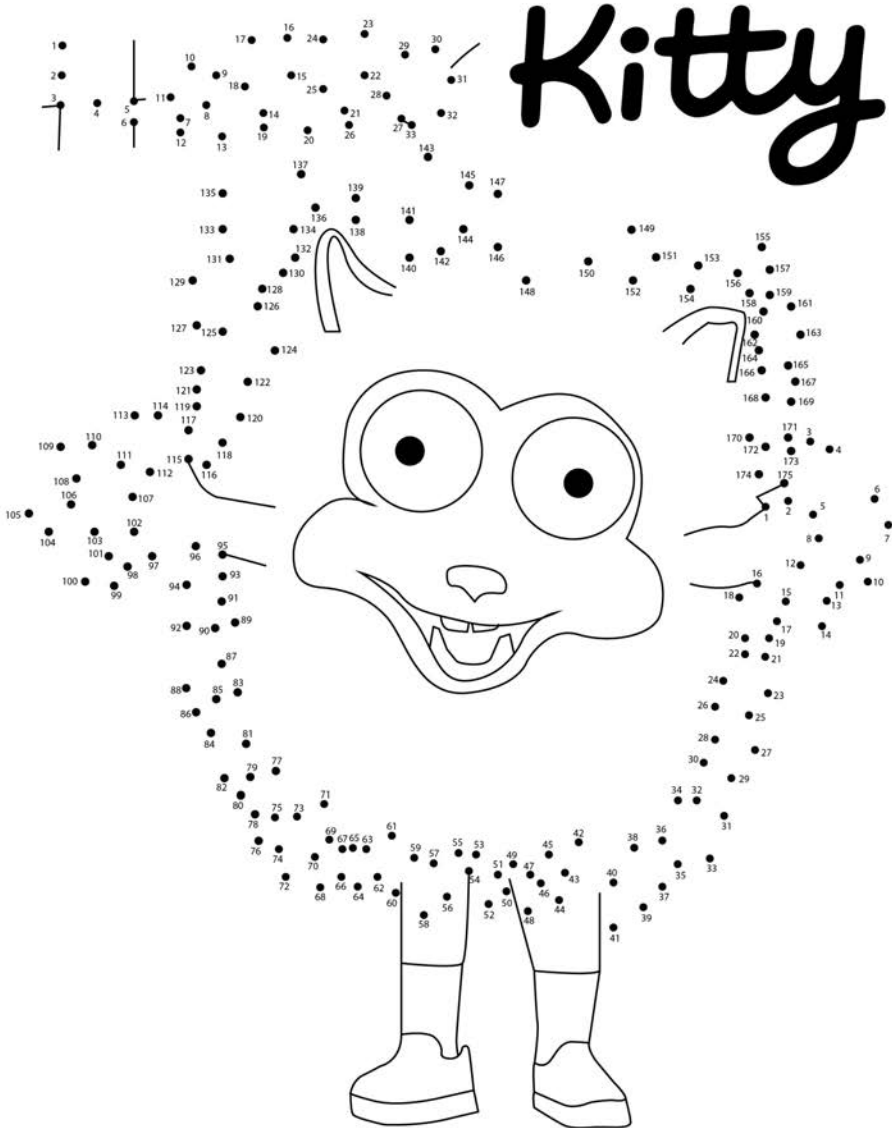
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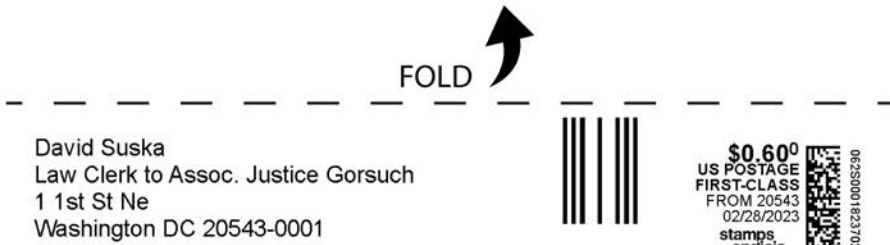
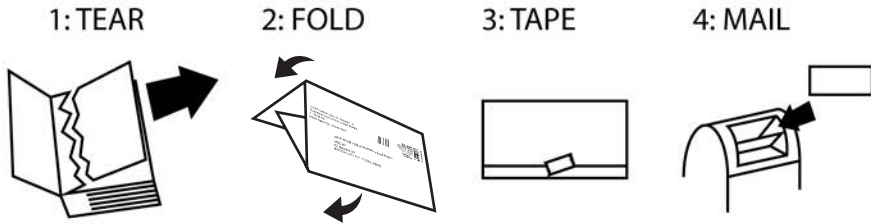
David Suska

Hello Kitty Is Not A Cat, 2023

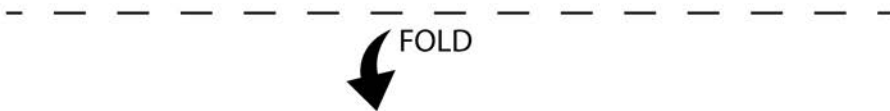
Pen on paper, Connect-the-Dot

Signature of the Artist David Suska

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Abercrombie



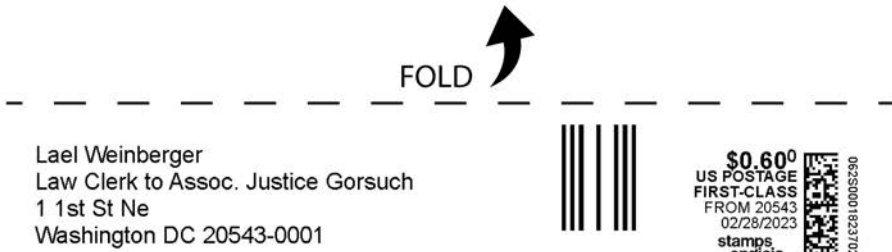
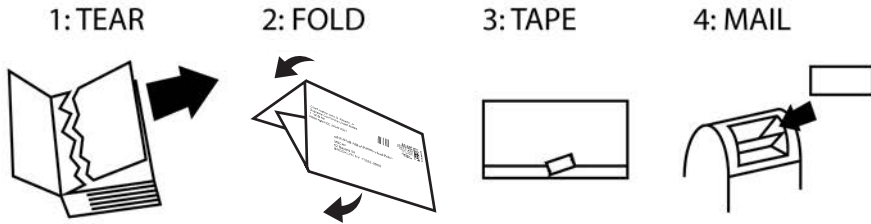
Lael Weinberger

Abercrombie & Stitch, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist Lael Weinberger

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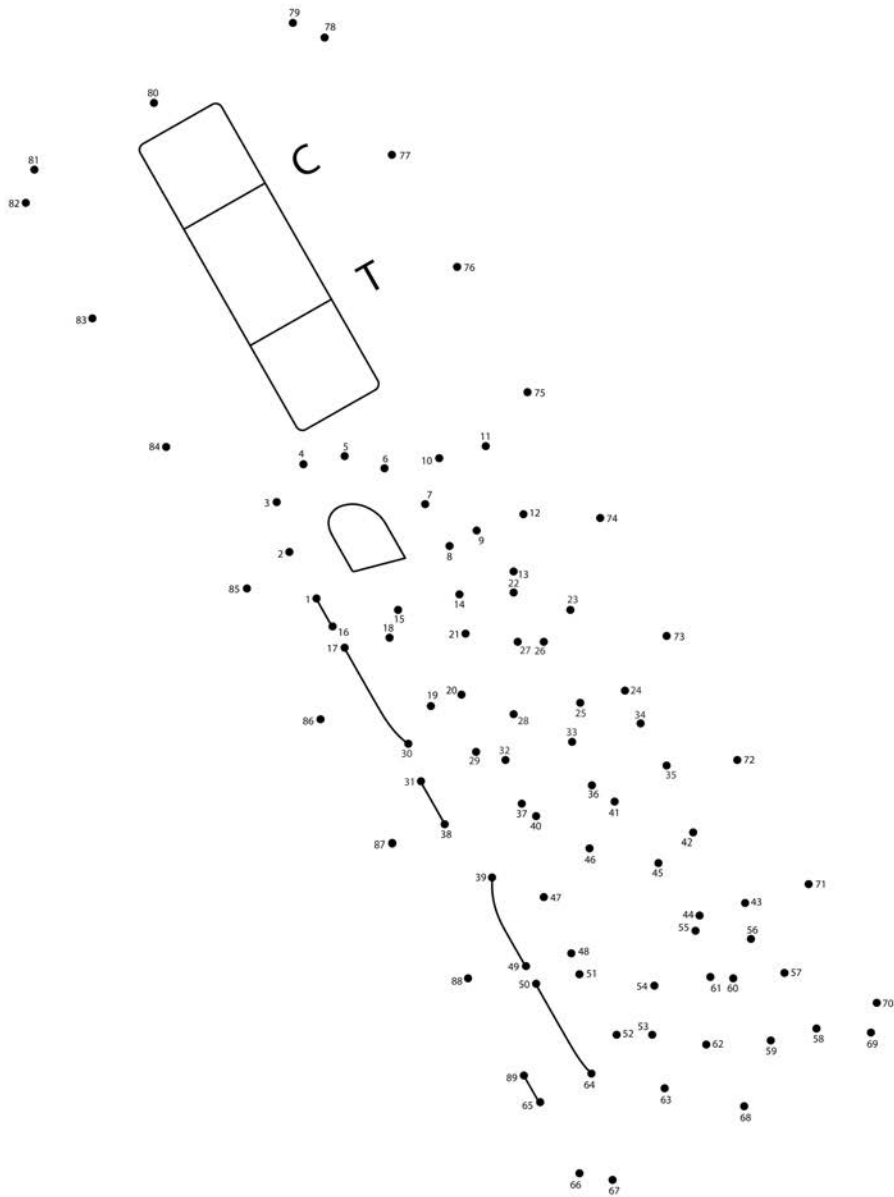
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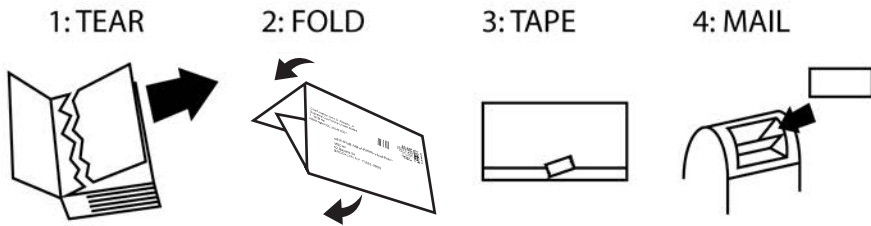
Brett Kavanaugh

I'm aSic, Mario!, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist, Associate Justice Brett Kavanaugh

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Brett M. Kavanaugh
Associate Justice
1 1st St Ne
Washington DC 20543-0001



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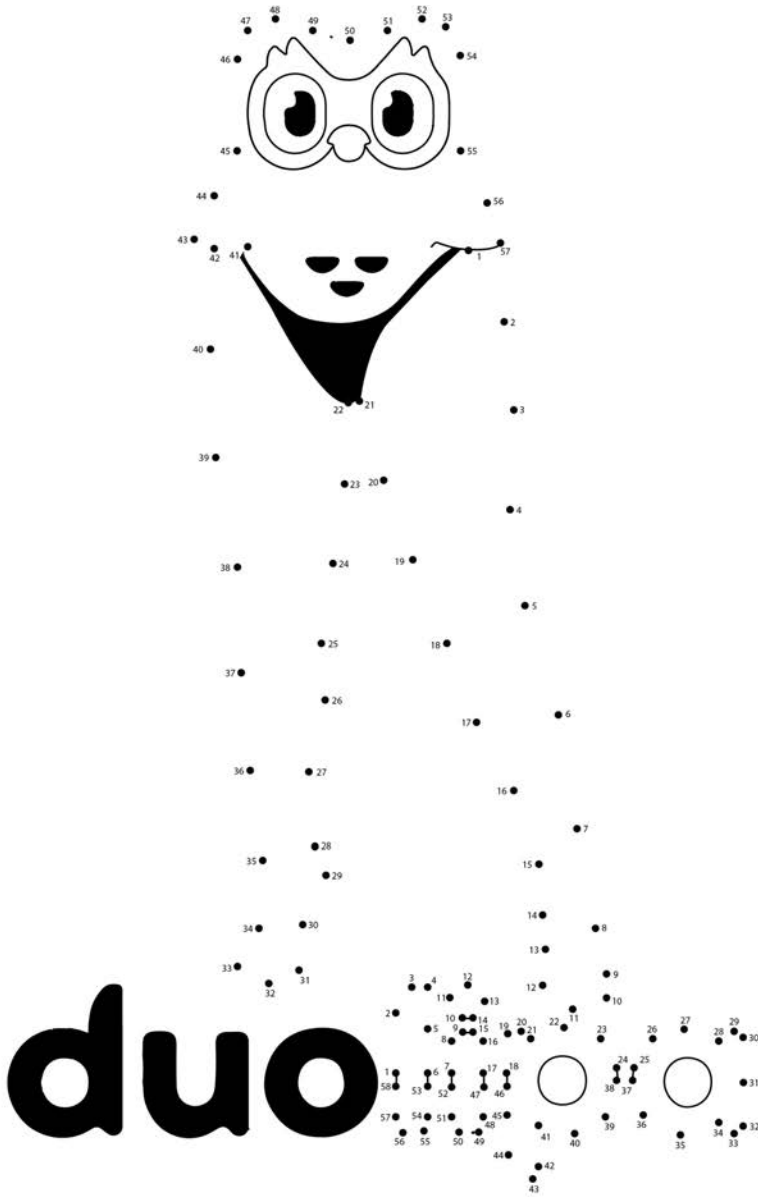
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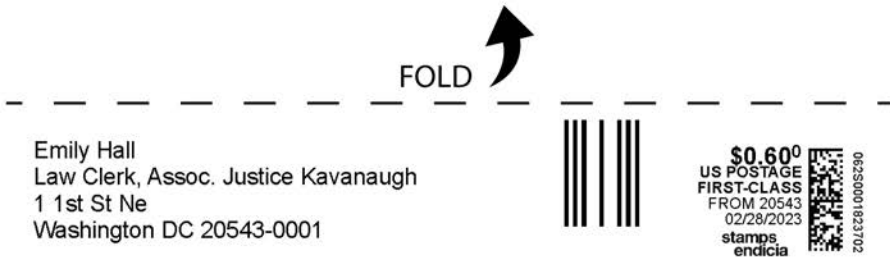
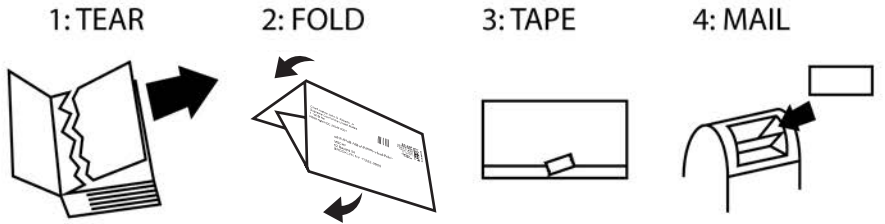
Emily Hall

Speak Pop-erly, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist Emily Hall

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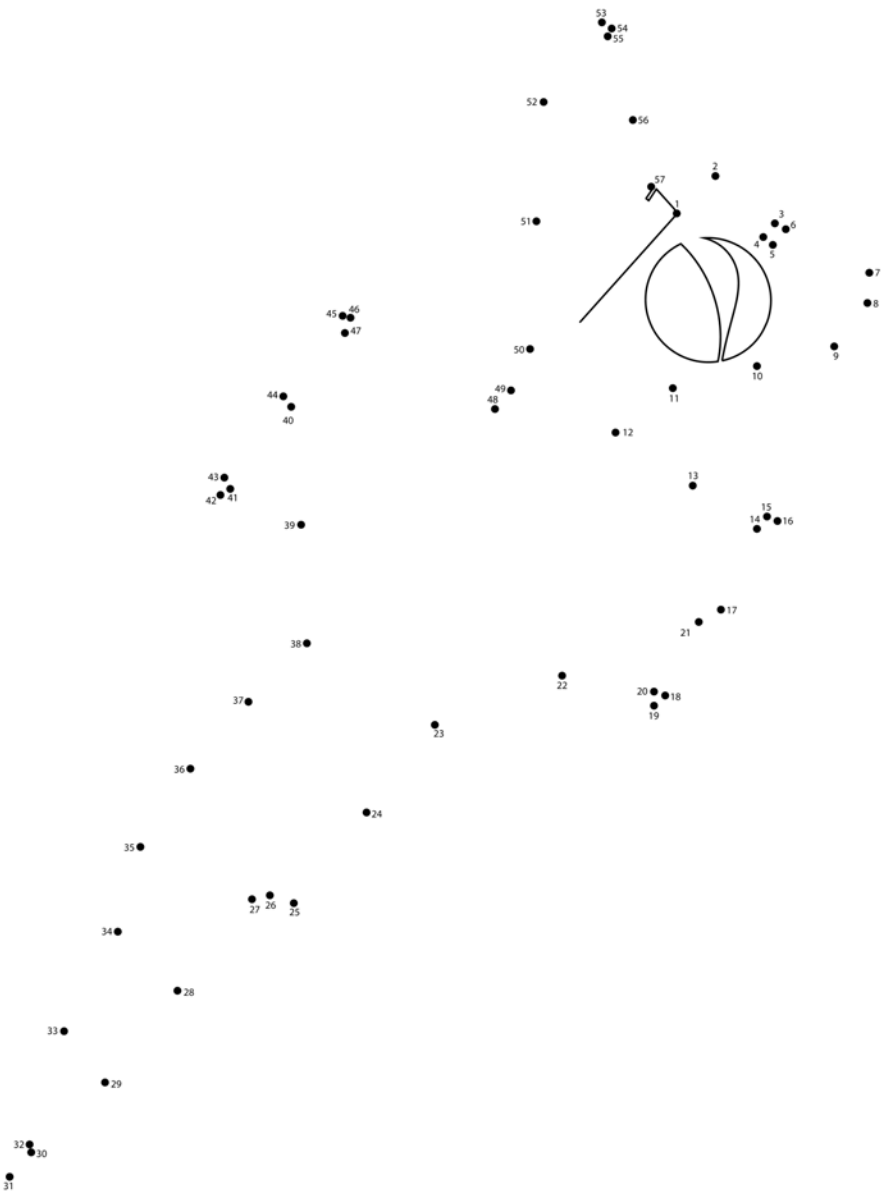
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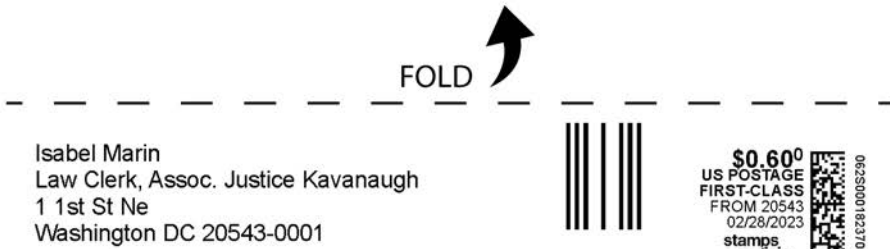
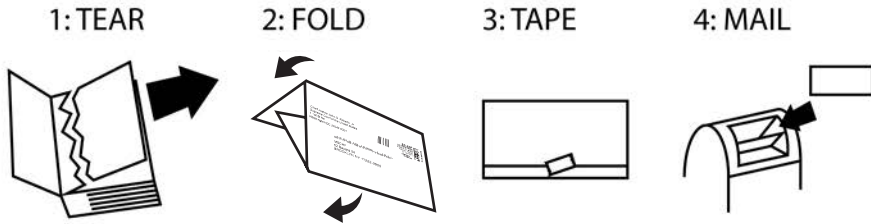
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Isabel Marin
And Now A Word From Our Sponsor, 2023
Pen on paper, Connect-the-Dot

Signature of the Artist Isabel Marin

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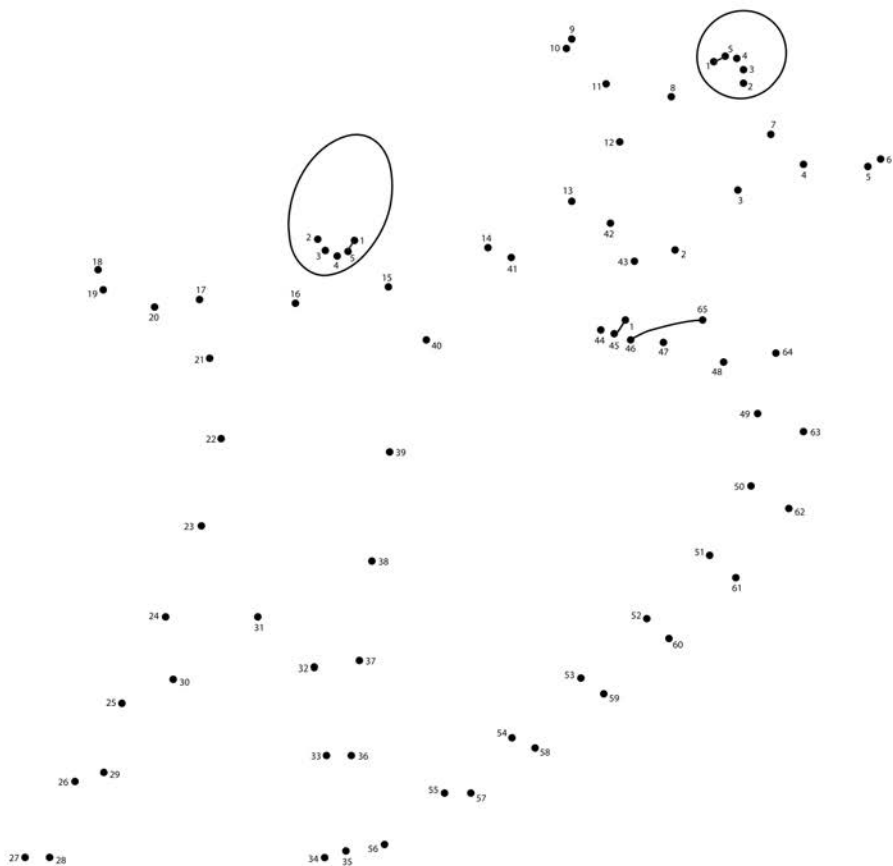
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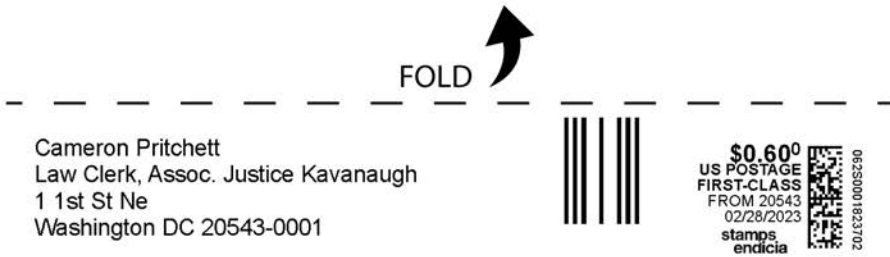
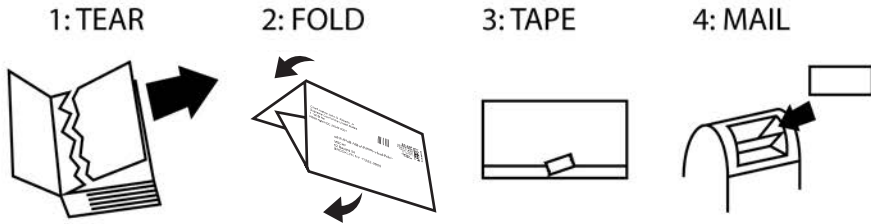
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Cameron Pritchett
How to Hold A Toddler, 2023
Pen on paper, Connect-the-Dot

Signature of the Artist Cameron Pritchett

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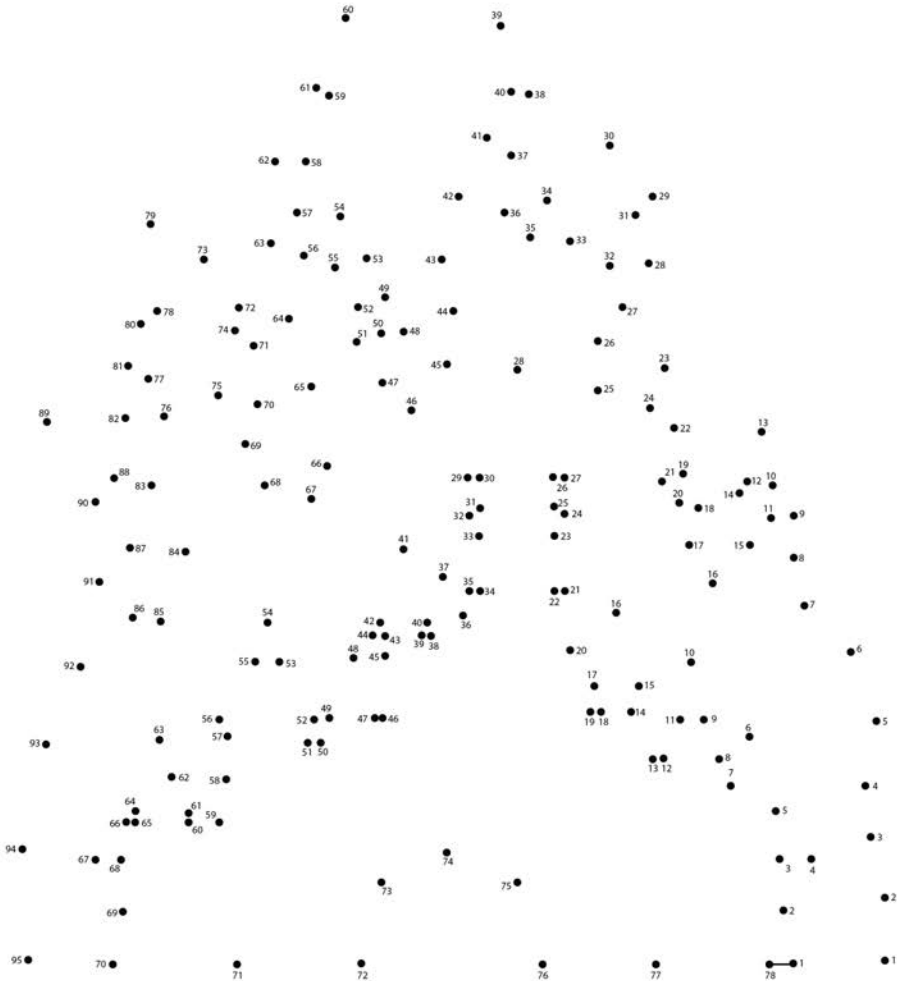
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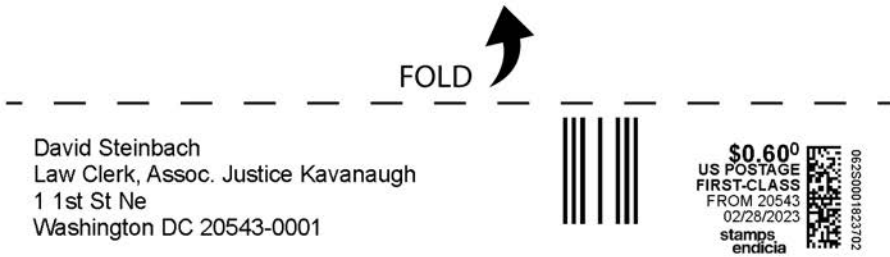
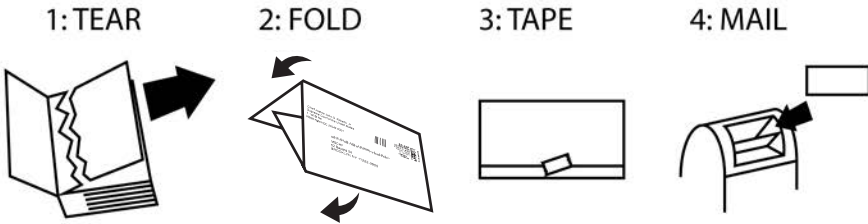
David Steinbach

Disney Needs Ice, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist David Steinbach

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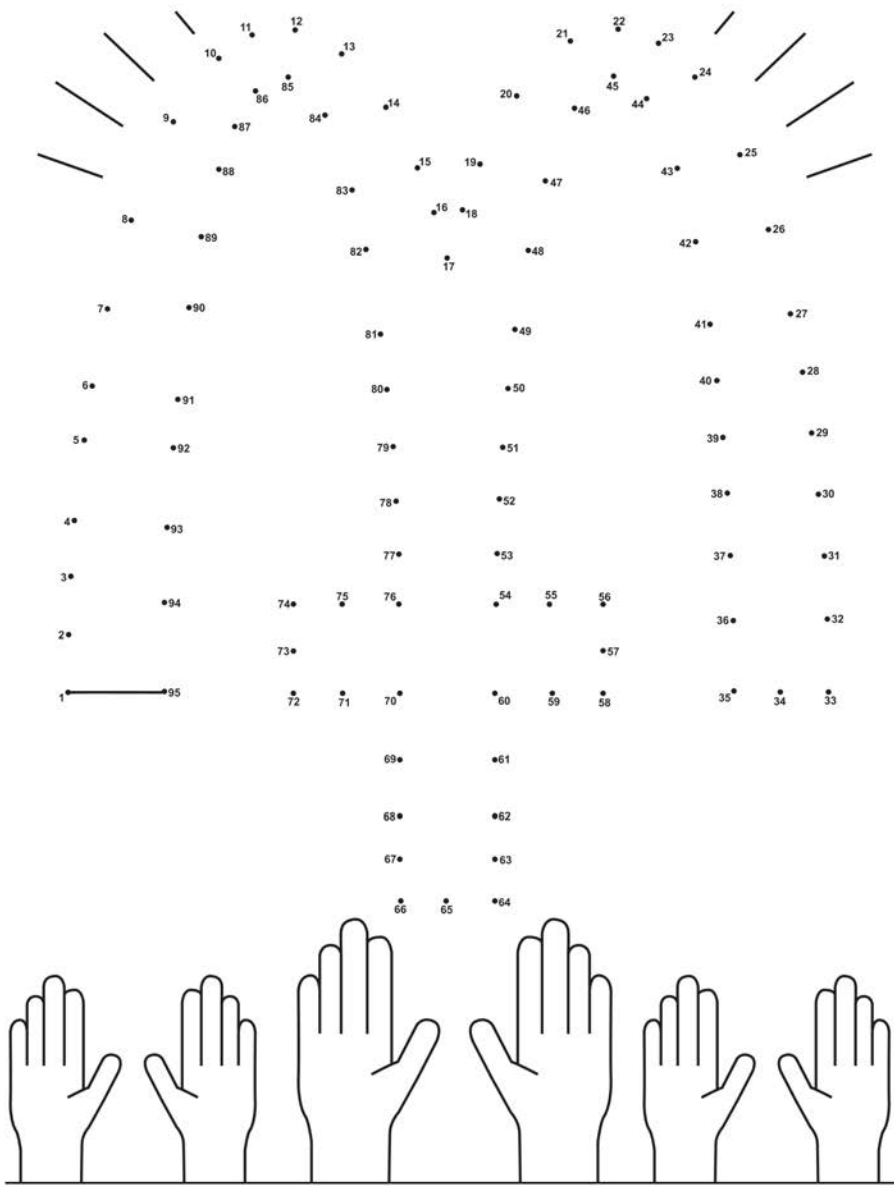
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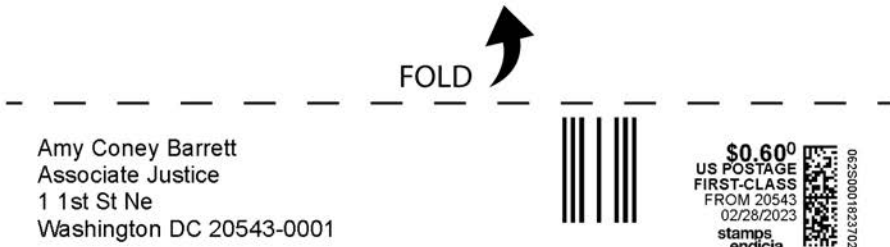
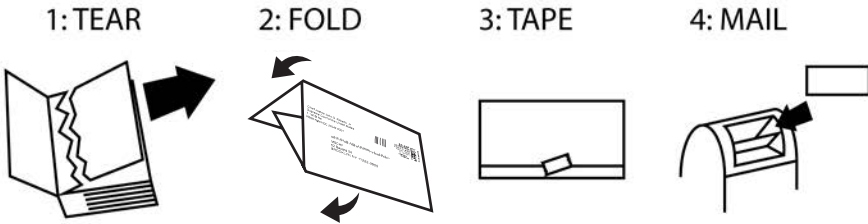
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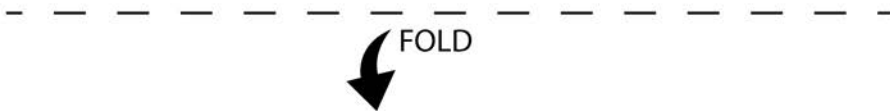
Amy Coney Barrett
McMass, 2023
Pen on paper, Connect-the-Dot

Signature of the Artist, Associate Justice Amy Coney Barrett

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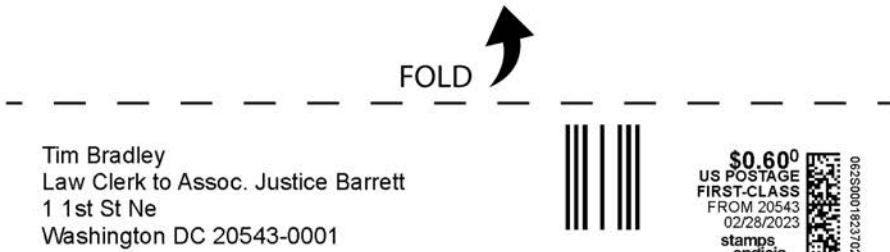
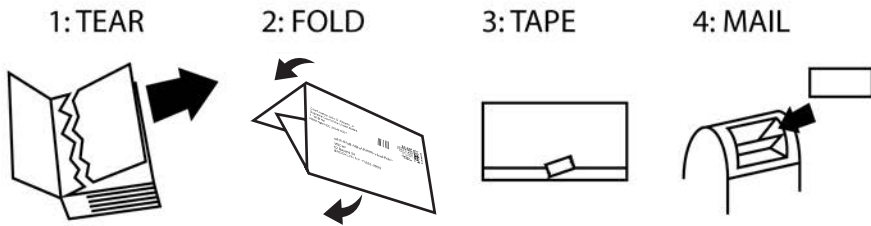
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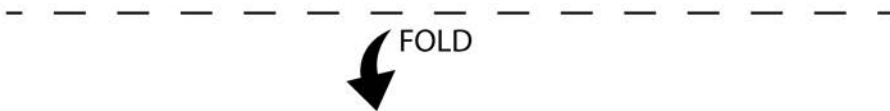
Tim Bradley
OHHH NOOOO!, 2023
 Pen on paper, Connect-the-Dot

Signature of the Artist Tim Bradley

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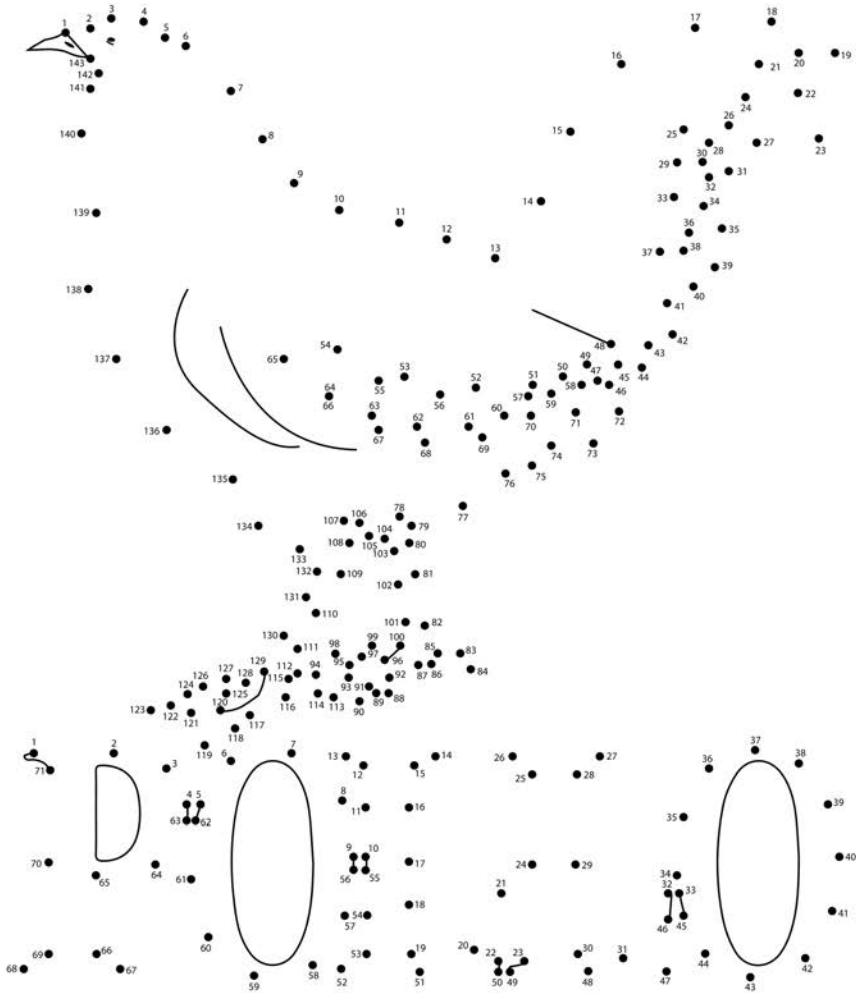
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RALPH LAUREN

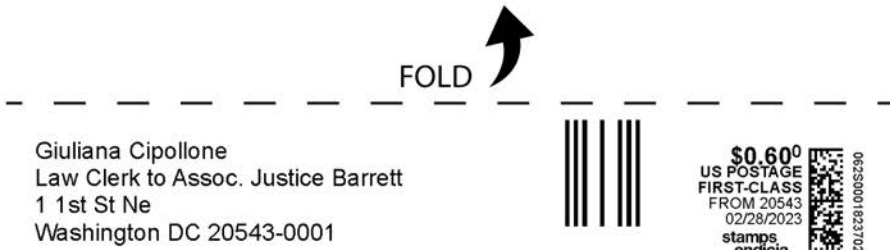
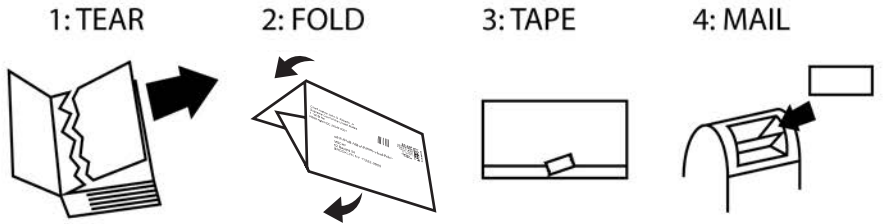
Giuliana Carozza Cipollone

Winner Winner Chicken Dinner, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist Giuliana Carozza Cipollone

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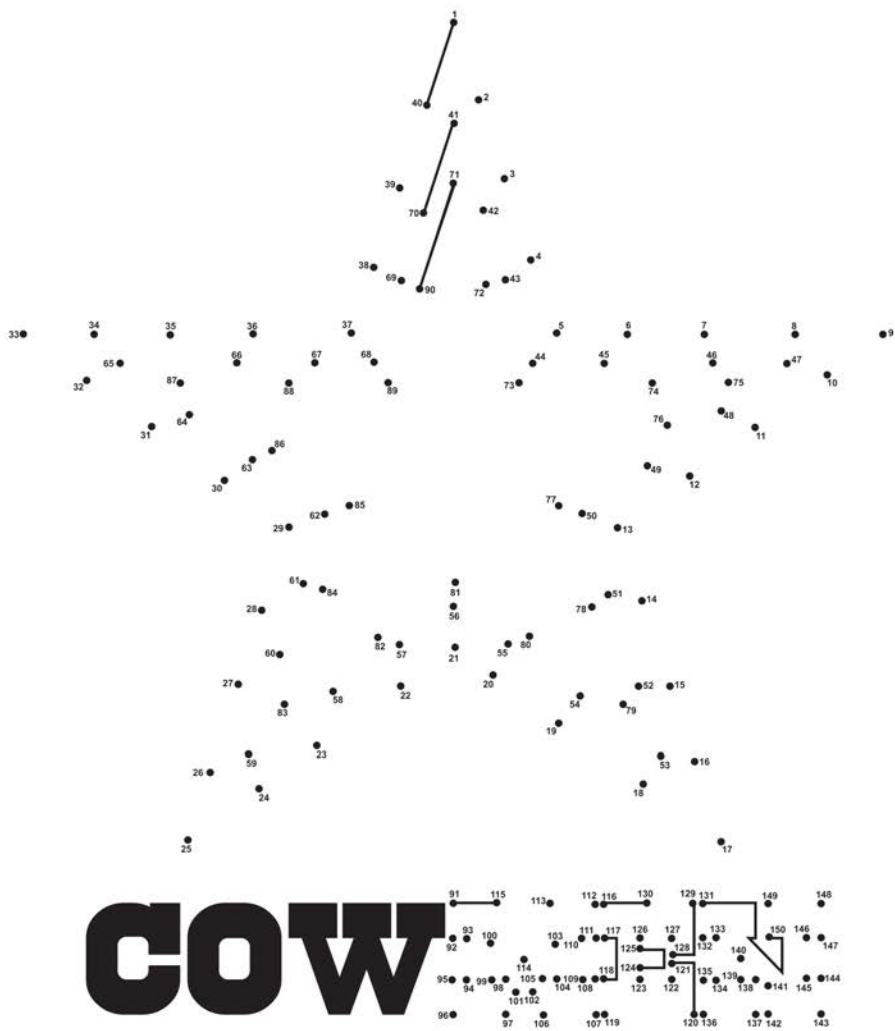
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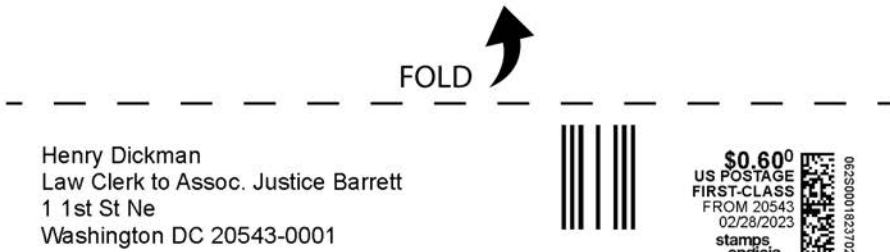
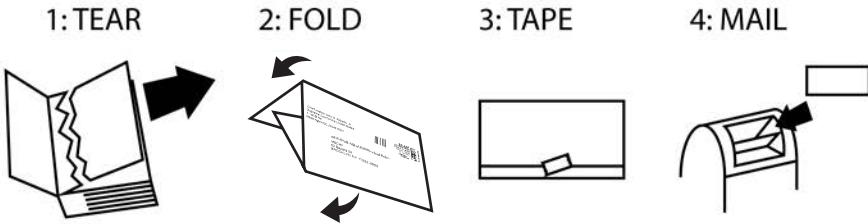
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Henry Dickman
Cow Men, 2023
Pen on paper, Connect-the-Dot

Signature of the Artist Henry Dickman

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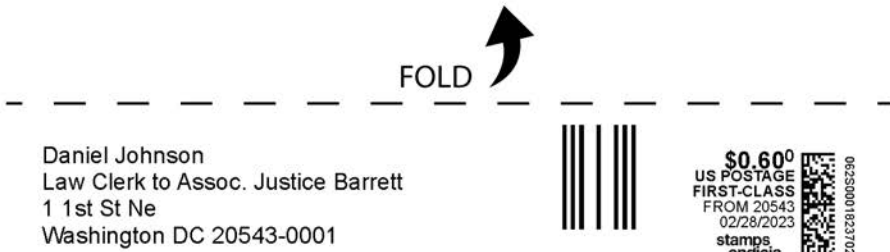
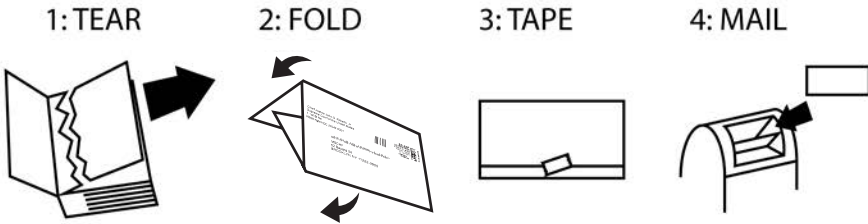
Daniel Johnson

Dumb Express, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist Daniel Johnson

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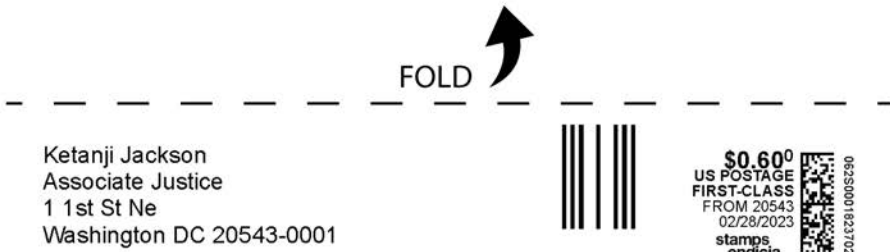
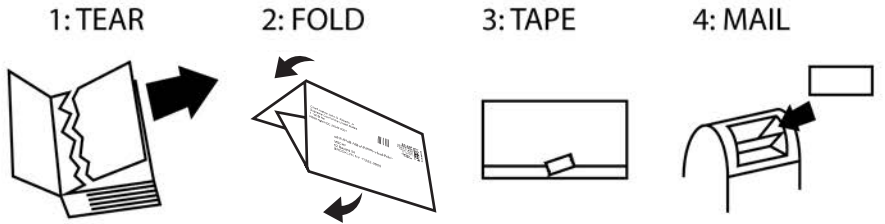
Katanji Brown Jackson

Whiskey The Pooh, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist, Associate Justice Katanji Brown Jackson

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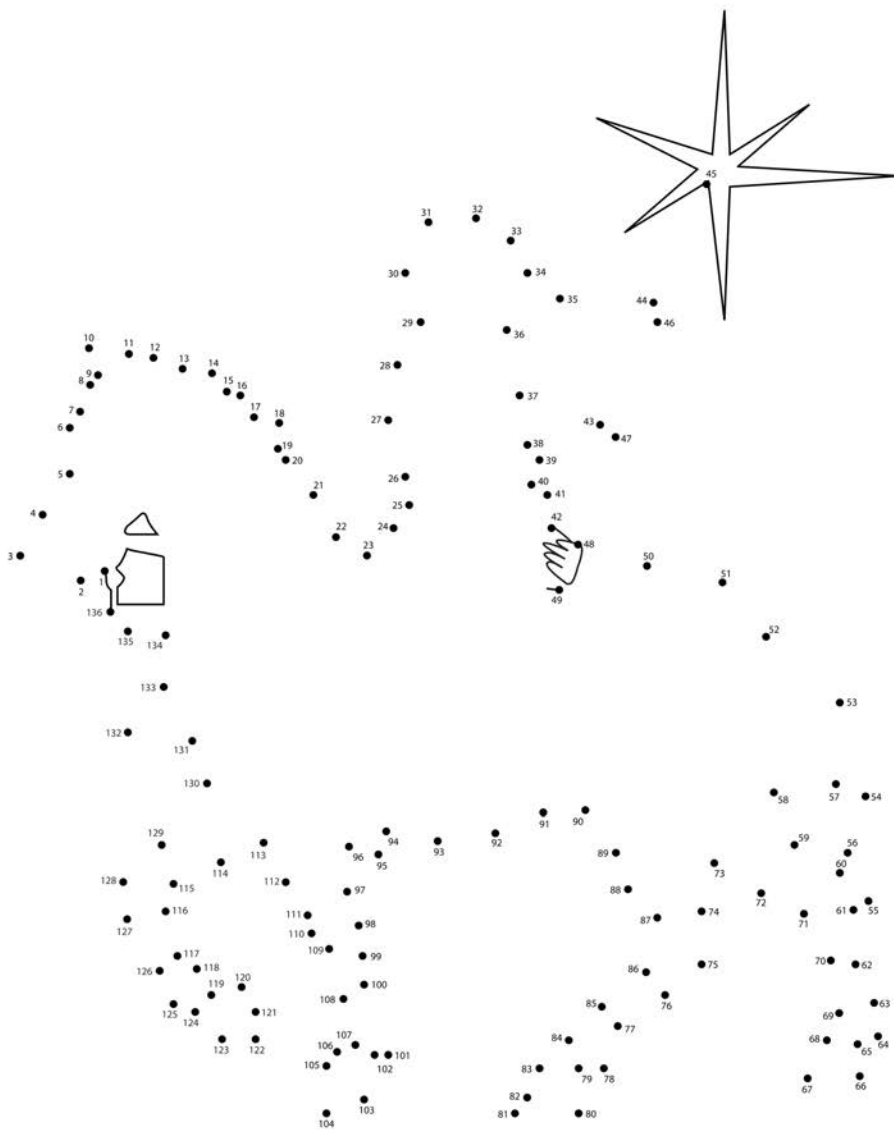
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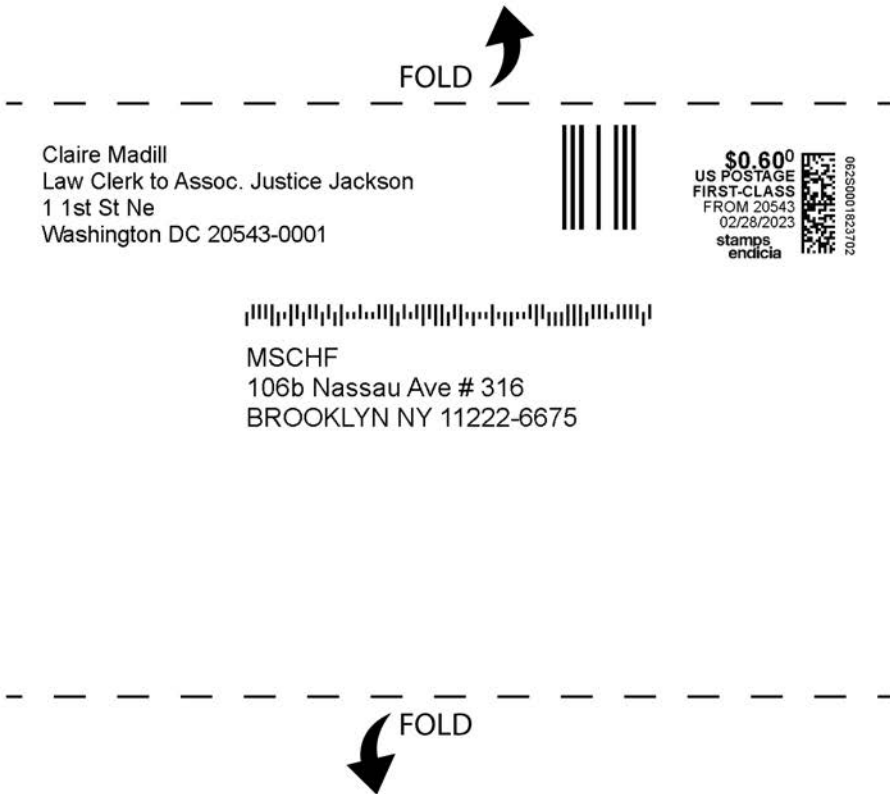
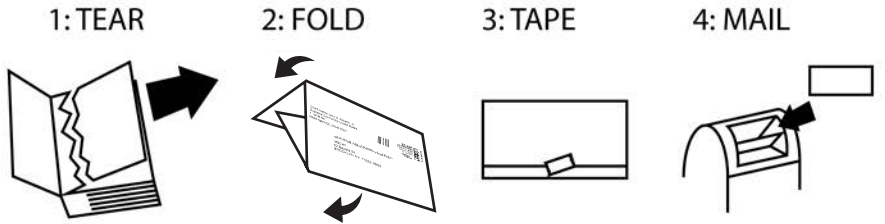
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Claire Madill
2023, DC Public Defender's Office
Pen on paper, Connect-the-Dot

Signature of the Artist Claire Madill

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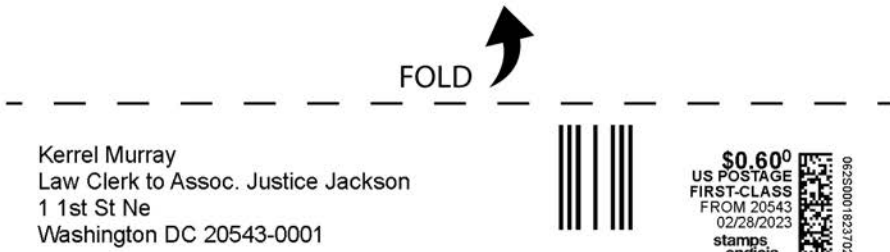
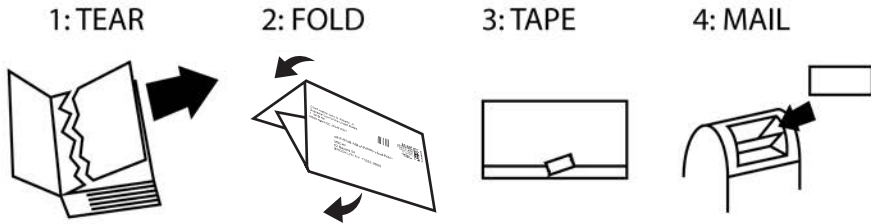
Kerrel Murray

Return to Tradition, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist Kerrel Murray

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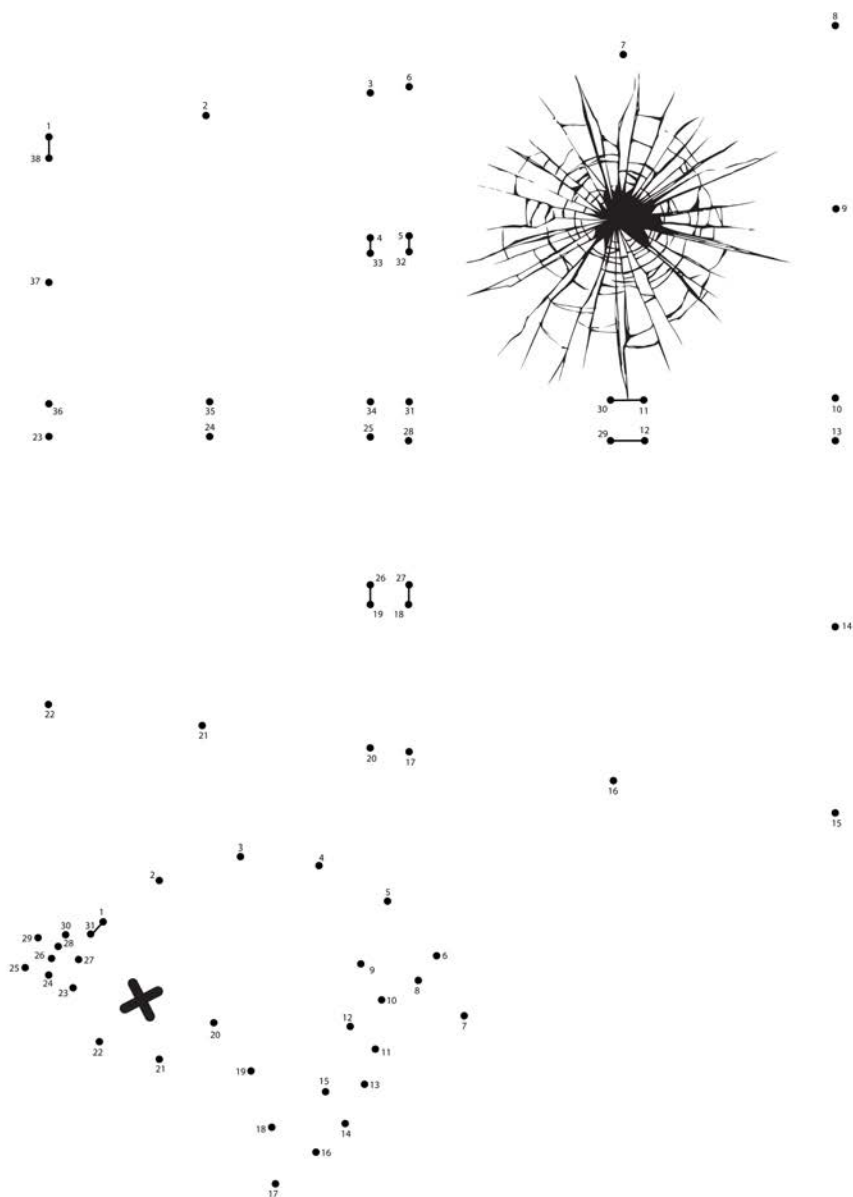
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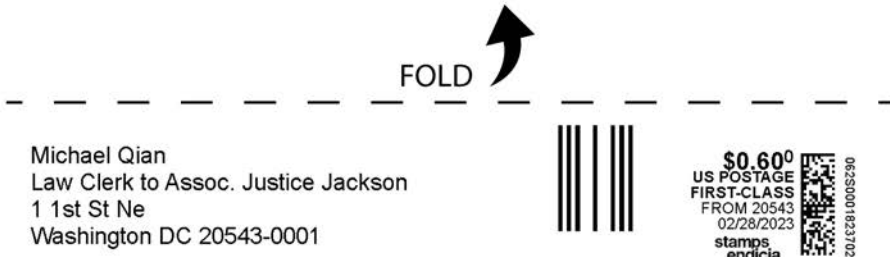
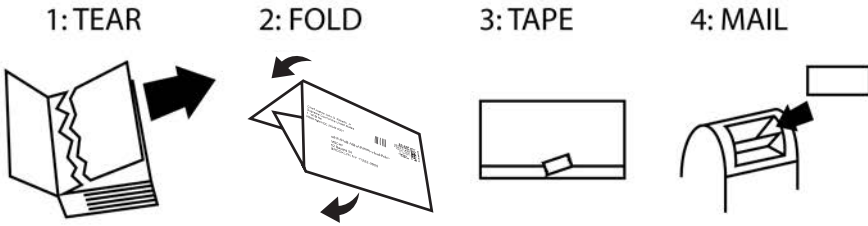
Michael Qian

Dead Bird, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist Michael Qian

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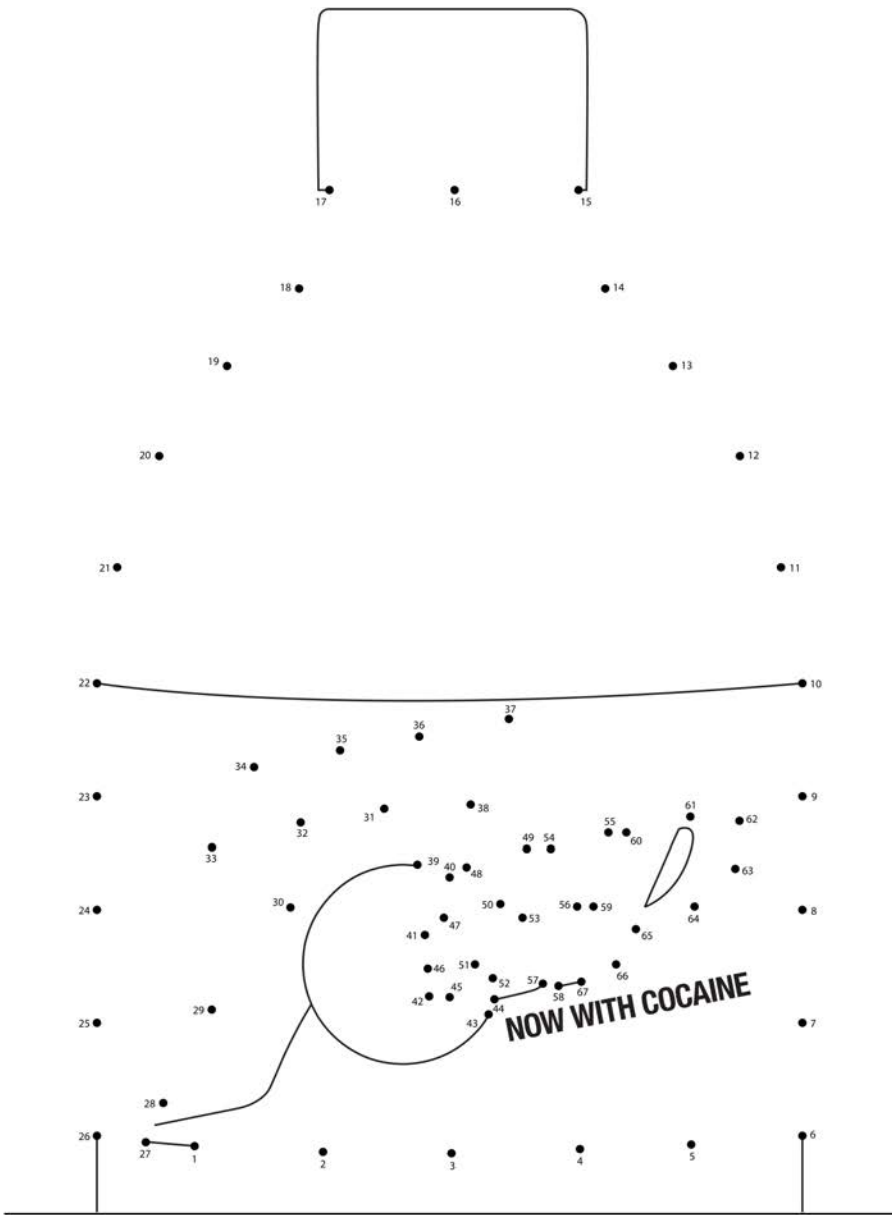
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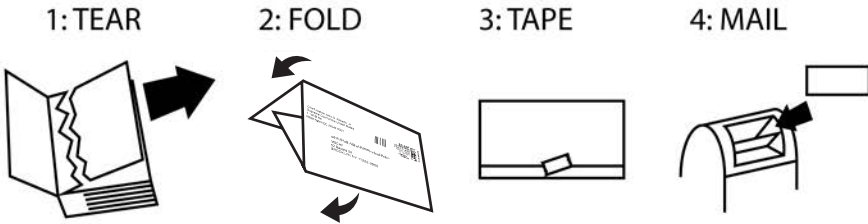
Natalie Salmanowitz

Heads Up, 2023

Pen on paper, Connect-the-Dot

Signature of the Artist Natalie Salmanowitz

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Natalie Salmanowitz
Law Clerk to Assoc. Justice Jackson
1 1st St Ne
Washington DC 20543-0001



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SUMMARY OF ARGUMENT

Freedom of expression does not exist if it “could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. . . . [W]e do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet.”

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

We communicate using symbols found around us. By taking what you found and adding your own expression, you just participated in one of our most cherished traditions: Freedom of Speech. This is a tradition of evaluating what came before and interjecting your own thoughts into the conversation. By its nature, “[f]reedom of speech is appropriative because it draws on existing cultural resources In a democratic culture people are free to appropriate elements of culture that lay to hand, criticize them, build upon them, and create something new.” Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 4-5 (2004).

Under long-standing First Amendment precedent, you also control how you share your expression. You could now sell your expression on

tote bags at the Supreme Court gift shop, you could assemble the twelve best pieces and sell them as a calendar, or you could take all forty-five artworks, add a few more, and sell them on playing cards. Of course, you may also offer your work at the Perrotin Gallery. The choice is yours.

This exchange of expression is a two-way street. Trademark holders routinely take from art and culture and add their message to imbue their marks with meaning. Meanwhile artistic and political speech use the cultural resonance of trademarks for their own expression.

Jack Daniel's and its *amici* seek to suppress this free flow of ideas. Their proposal suggests speech should be limited to clear speech or the safe haven of pre-approved mediums enforced through content-based regulations. This Court should reject their effort.

Instead of contradicting centuries of precedent, we ask this Court to honor established First Amendment principles. The appropriate test is to ask: What is sold? If it is speech, then the use of a trademark is noncommercial and permissible. Here, VIP sells a joke. The parody comments on how dog owners like to humanize their animals, and the role of alcohol branding in society. Like your own artwork, this expression is classically protected speech under the First Amendment.

ARGUMENT

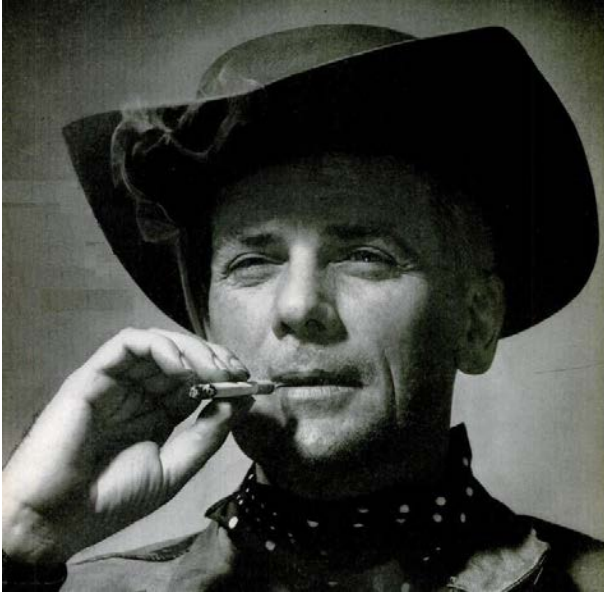
I. The Free *Exchange* of Expression is Essential to a Free Society.

Advertisements appropriate art. By using meaningful iconography, companies imbue meaning into their logos. Once companies add meaning to their logos, the logos become useful tools for commentary and critique of the trademark owner and the values the logos represent. The First Amendment protects this exchange.

A. Successful Trademarks Appropriate Cultural Iconography.

The two cowboys on the page look similar for good reason.

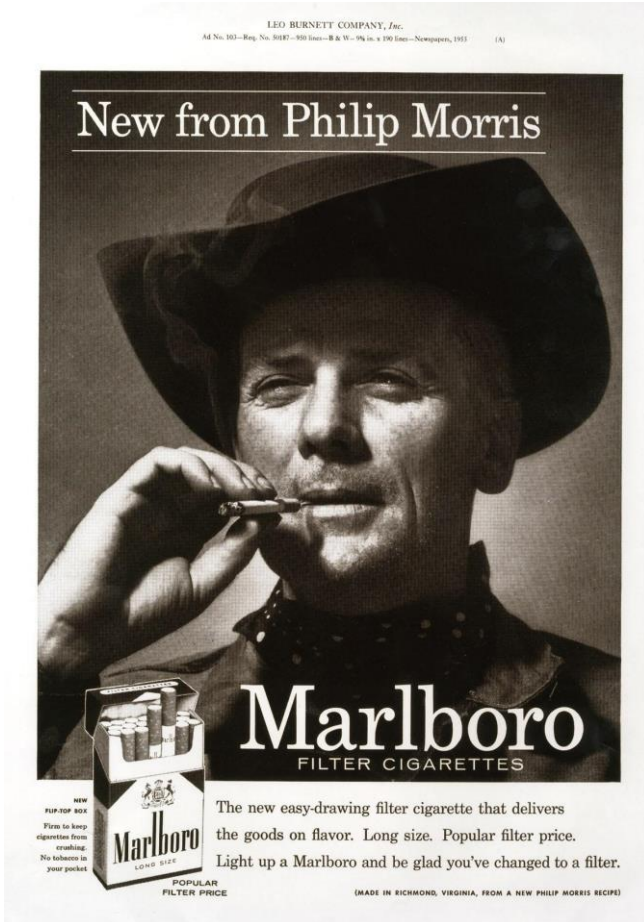




Both cowboys project individualism and a brand of confident masculinity. They differ, however, in an important way. The first cowboy is actor Montgomery Clift in the 1948 film *Red River*, selling an artistic vision of the old West. The second cowboy is one of the original Marlboro Men, featured in a 1955 Marlboro advertisement. He sells cigarettes.

Companies create iconic trademarks by borrowing from culture and adding their sales pitch. For several decades, Marlboro cigarettes sold poorly because men were not attracted to the product due to its packaging and “feminine aura,” and relatively few women smoked. John G. Blair, *Cowboys, Europe and Smoke: Marlboro in the Saddle*, 24/25 REVUE FRANÇAISE D’ÉTUDES AMÉRICAINES 195, 196 (May 1985). Then in 1954, the advertising agency Leo Burnett introduced Marlboro Man. Leo Burnett

wanted to communicate “masculine confidence,” and its research demonstrated that the American cowboy was the most effective messenger. *Id.* at 196-97.



4

By the mid-twentieth century, the American cowboy symbolized rugged individualism and

⁴ Collection: *Marlboro Men*, STANFORD.EDU, <http://bit.ly/3Z1rR4C> (last visited Feb. 8, 2023).

manliness, but the image of a “stock cowboy is as much a fiction in America as . . . Uncle Sam.”

Marshall W. Fishwick, *The Cowboy: America’s Contribution to the World’s Mythology*, 11 W.

FOLKLORE 77, 84 (1952). In their heyday, the reputation of cowboys was mixed at best.

Contemporaries described cowboys as people living “remote[ly] from the restraints of a moral life” and who “loiter sometimes for months, and share the boughten dalliances of fallen women!” *Id.* at 82.

American art so effectively transformed the image of the American Cowboy that the Marlboro Man advertising campaign worked for Marlboro everywhere — except Argentina. Blair, *supra*, at 198. In Argentina, American art never transformed the *gaucho* into a mythical icon. Instead, the *gaucho* continued to embody “poor, dirty, statusless drifters at the bottom of the work ladder.” *Id.* at 199.

Without art providing a readymade symbol for Marlboro to appropriate, none of Marlboro’s massive marketing budget and goodwill could spur sales. *Id.* at 198-99.

Borrowing from art to develop trademarks is common because advertisement must leverage meaningful symbols and icons to acquire value. *See* Sonia K. Katyal, *Semiotic Disobedience*, 84:3 WASH. U. L. REV. 489, 522 (2006). Take Barbara Kruger’s 1987 masterpiece *Untitled (I shop therefore I am)*, which uses a red box with white text in Futura Bold Oblique font to express her criticism of consumer culture.



In 1994, Supreme's CEO wanted a symbol for his fast-fashion store, so he gave their designer a book of Kruger's work to develop a logo. Nick Matthies, *The Supreme Logo and Barbara Kruger: A History*, STOCKX THE MAGAZINE (Jan. 25, 2019), <http://bit.ly/3lKIOlK>. The result inverts the artist's message while borrowing her aesthetic to lend an air of pop art to Supreme's fashion offerings and suggest it is a rebellious brand "outside fashion." *Whose Claim Reigns Supreme?* 4 MSCHF MAG, 2021 at 21-27. The appropriation worked, and now Supreme is a worldwide clothing and skateboarding company.



The plight of pop art or cowboys is not unique. Starbucks borrowed its name from First Mate Mister Starbuck in the novel *Moby Dick*, and the mermaid on the coffee cup is Melusine, a mythical siren of medieval Europe. See Ronald Holden, *Mermaid, Siren, Princess: How the Starbucks Logo Evolved*, FORBES (Mar. 4, 2017, 08:58 PM), <http://bit.ly/3I2n108>; Angelica Calabrese, *The Siren on Your Starbucks Cup Was Born in 7th-Century Italy*, ATLAS OBSCURA (Nov. 10, 2015), <http://bit.ly/3xwGxNO>.

As Starbucks admits on its website, its use of this medieval symbol evokes “the seafaring tradition of the early coffee traders.” *Our Company*, STARBUCKS.COM, <http://bit.ly/3XGnX0j> (last visited Feb. 7, 2023). With its iconic status, the logo carries considerable expressive value. For instance, it can be used to critique Starbucks’ own labor practices:



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⁵ *Starbucks workers labor union strong power fist Coffee Mug*, REDBUBBLE.COM, <http://bit.ly/3k1TaNJ> (last visited Feb. 7, 2023).

Cultural symbols and iconography also bestow meaning and expression on trademarks, and companies appropriate these symbols in the name of developing goodwill. For example, Quaker Oats adopted a man in traditional 17th-century “Quaker garb” because the association with Quakers symbolizes “good quality and honest value.” *Our Oat Origins*, QUAKEROATS.COM, <https://bit.ly/3EgLXjG> (last visited Feb. 7, 2023).



Coca-Cola’s advertising appropriates Santa Claus and claims they established the modern version of the jolly elf.⁶ *Did Coca-Cola Invent Santa Claus?*, COCA-COLACOMPANY.COM, <http://bit.ly/3YX37L8> (last visited Feb. 7, 2023).

⁶ They did not. David Mikkelsen, *Did Coca-Cola Invent the Modern Image of Santa?* SNOPES.COM (Dec. 18, 2008), <http://bit.ly/3YVQDmS>.



Anheuser-Busch borrows the American flag and other patriotic iconography to suggest that your Fourth of July picnic is incomplete without a Budweiser beer.



Similarly, Nabisco appropriates patriotic iconography to suggest eating Oreo cookies supports your country and Team USA at the Olympics.

⁷ Joe Millitzer, *Budweiser's 2022 patriotic 'Freedom' cans in stores now*, Fox2Now (May 16, 2022, 2:13 PM), <http://bit.ly/3lM3uJT>.



We recently experienced this phenomenon ourselves. As a fun comment on cartoons and our increasingly abstract world, we released *Big Red Boots*. See Jacob Gallagher, *MSCHF Big Red Boots Offer Cartoonish Commentary on Fashion Footwear*, WALL ST. J. (Feb. 13, 2023, 9:20 AM), <http://bit.ly/3IwZ5U8>.



⁸ Erica Chayes Wida, *Oreo launches new 'Team US' cookie to cheer on US athletes at the 2020 Olympics*, TODAY.COM (Jan. 29, 2020, 12:26 PM), <http://bit.ly/3k4Dfhp>.

Corporations jumped at the opportunity to use our art to suggest they and their products are similarly fun.





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Even THE®¹⁰ most notorious trademark registrant of 2022 joined in THE® fun.

⁹ Babybel (@Babybel), TWITTER (Feb. 16, 2023, 10:00 AM), <http://bitly.ws/AtyW>; Slim Jim (@SlimJim), TWITTER (Feb. 9, 2023, 2:31 PM), <http://bitly.ws/Awe2>; Pepsi (@Pepsi), TWITTER (Feb. 17, 2023, 10:00 AM), <http://bitly.ws/Atzf>; AXE (@AXE), TWITTER (Feb. 9, 2023, 2:41 PM), <http://bitly.ws/Aweu>; Hanes (@Hanes), TWITTER (Feb. 9, 2023, 1:30 PM), <http://bitly.ws/Atz9>; KFC (@KFC_ES), TWITTER (Feb. 9, 2023, 4:28 AM), <http://bitly.ws/Atzn>.

¹⁰ The Ohio State University obtained a trademark for use of the word "THE" on June 21, 2022. *See* THE, Registration No. 6,763,118.



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All advertising leverages iconic imagery and symbols to send a message to potential consumers. The setting, the music, the clothing, and the people in the advertisement all borrow from our cultural archetypes to express something about the company or product. That expression becomes part of the meaning of the trademark, and that meaning is valuable for expression unrelated to the sale of goods and services.

¹¹ Ohio State Football (@ohiostatefb), INSTAGRAM (Feb. 10 2023), <http://bitly.ws/Atzz>.

B. Both Political and Artistic Speech Appropriate Trademarks.

NASCAR's rise correlated with the growth of incomes for working-class, white men in the Southeast, and NASCAR adopted symbols of southern culture into their car-race names and customs to cement the relationship with that demographic. Ben Shackelford, *NASCAR Stock Car Racing: Establishment and Southern Retrenchment*, 28:2 INT'L J. HIST. SPORT 300, 313-14 (2011). Over time, the relationship became so strong that political analysts began using the term "NASCAR Dads" to describe this voting bloc. Mary Douglas Vavrus, *The Politics of NASCAR Dads: Branded Media Paternity*, 24:3 CRITICAL STUD. MEDIA COMMUN, 245, 245-46 (2007). Recently, a crowd at a NASCAR event chanted their discontent with President Biden. Instead of repeating what they were clearly stating, one commentator said the crowd was chanting "Let's Go Brandon!" in honor of Brandon Brown, the winner of the NASCAR race that day. Colleen Long, *How 'Let's Go Brandon' Became Code for Insulting Joe Biden*, ASSOCIATED PRESS (Oct. 30, 2021), <http://bit.ly/3YD2bLX>.

The phrase, "Let's Go Brandon!" quickly became a euphemism for expressing dissatisfaction with President Biden. To express this sentiment and underscore their own connection to "NASCAR Dads," the Republican Party sells speech in the form of a portion of the NASCAR logo with the phrase "Let's Go Brandon!" See *Shop Collections: Let's Go*

Brandon, OFFICIAL GOP STORE, <http://bit.ly/3I3U0kS> (last visited Feb. 17, 2023).



Id.

Public health departments have also used corporate trademarks, such as Marlboro Man, and then added their own commentary about health and safety.



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Political campaigns incorporate corporate trade dress too. On January 1, 2000, a forgettable insurance company named American Family Life

¹² *I miss my lung, Bob*, NAT'L LIBR. OF MED., <http://bit.ly/3xush7U> (last visited Feb. 7, 2023).

Assurance Company ran a commercial with a duck. The Aflac Duck taught millions of Americans about insurance and Aflac's sales doubled. Daniel P. Amos, *How I Did It: Aflac's CEO Explains How He Fell for the Duck*, HARV. BUS. REV. (Jan.-Feb. 2010), <https://bit.ly/3Z0KtBQ>. Sixteen years later, a young politician in Hamilton County, Ohio named Aftab Pureval also needed to overcome a difficult name. He appropriated the Aflac duck and placed a modified version of the duck in his commercials to help voters remember him. Jason Williams, *Watch: 'Aftab!' duck to quack on local TV*, THE ENQUIRER (Oct. 11, 2016), <http://bit.ly/3Egi9U8>. Mr. Pureval is now Mayor of Cincinnati.



Id.

Like NASCAR, Marlboro Man, and the Aflac duck, Jack Daniel's sparks discussion. Jack Daniel's sometimes embraces its role as inspiration for expression, even titling a whole podcast episode

about itself, “Country Music’s Greatest Muse.” Around the Barrel with Jack Daniel’s, *Country Music’s Greatest Muse*, (Aug. 31, 2020), <http://bit.ly/3IxbWWs>. But these songs are not all complimentary. James Payne uses Jack Daniel’s to symbolize sin in “The Night Jack Daniel’s Met John 3:16.” Chase Rice associates Jack Daniel’s with the devil in “Jack Daniel’s and Jesus”. When Ke\$ha sings in her song “Tik Tok” that she “brush[ed] [her] teeth with a bottle of Jack,” we know her night will not involve drinking responsibly.

Songs that associate Jack Daniel’s with sin, the devil or irresponsible drinking diverge from Jack Daniel’s corporate messaging. The solution to this divergence is not censorship through litigation. The solution is more speech.

C. The Proper Response to Critical Speech is More Speech.

Trademark holders possess the right to respond to criticism and commentary. After all, a free flow of ideas forms the “heart of the First Amendment.” *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50 (1988). For example, in contrast to the unflattering critique of musicians, Jack Daniel’s promotes itself as a drink crafted by wholesome, authentic people. While discussing his legendary “Postcards from Lynchburg” campaign, ad man Ted Simmons explained, “Jack Daniel’s country is... a magical, mythical place that beckons American men.” Around the Barrel with Jack Daniel’s, *The Art of Storytelling in Advertising*, at 16:53 (June 4,

2018), <http://bit.ly/3IlylY6>. To burnish the image of the distiller Jack Daniel, a copywriter was told to imagine, “an old Southern Lawyer, like Atticus Finch in *To Kill a Mockingbird*,” while Lynchburg, Tennessee should have a “*Wizard of Oz*, Emerald City” quality. Oscar Rickett, *The True Story Behind Those Jack Daniel's Tube Adverts*, VICE (June 21, 2018 4:07am), <http://bit.ly/3k73mEx>. Jack Daniel’s appropriation of art and cultural symbols rebuts the negative associations created by other speakers.

Jack Daniel’s is not alone in appropriating art to shape conversation around consumer products. The French artist Christophe Guinet recycles old Nike shoes by modifying the shoes with natural materials. As Guinet explained, “I like to play with the opposition and use symbols giving them a natural and ethical twist, as if to say that nature will always triumph over man and his consumption patterns.” Mark Wilson, *This Artist Turns Old Nikes into Sculptural Marvels Made of Moss, Bark and Rock*, FAST CO. (Oct. 22, 2021), <https://bit.ly/3k8yinK>.



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The next year, Nike took the artist's symbolic concept and released "Overgrown," a Nike shoe "centered around an overgrown plant theme". Nicolaus Li, *The Cactus Plant Flea Market x Nike CPFM Flea 1 "Overgrown" Receives an Official Release Date*, HYPEBEAST (Nov. 25. 2022), <http://bit.ly/3YU0Xvu>. Using the same symbols, Nike's shoe counters Guinet, suggesting that Nike is environmentally friendly. Both the artist and Nike appropriated the symbolism of natural materials and the Nike Swoosh to create opposing messages about consumerism.

¹³ Monsieur Plant, *Snoop* | *Los Angeles*, MR. PLANT, <https://bit.ly/3S6D3uA> (last visited Feb. 17, 2023).



Id.

Far from needing a monopoly on trademark infused expression, the world's largest companies have ample opportunity to draw on cultural iconography and participate in the marketplace of ideas. There is no reason to limit the free exchange of expression to protect those who already wield the largest megaphones.

II. The Sale of Expression Enjoys Full First Amendment Protection.

The difference between a cowboy selling a mythic version of the West and a cowboy selling cigarettes is the difference between noncommercial speech and commercial speech. Trademarks, like the American cowboy, can embody both noncommercial and commercial speech. *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017). We distinguish between these two embodiments of the cowboy by how the embodiment is used. After all, “the context in which a symbol is used for purposes of expression is important.” *Spence v. Washington*, 418 U.S. 405, 410 (1974). If a symbol

is used to sell goods or services, then it is commercial speech and falls within the Lanham Act. 15 U.S.C. § 1127 (limiting scope to goods and services). Speech, however, does not lose its First Amendment protections when the speech itself is sold. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952). When a trademark intertwines with the speech that is being sold, the speech does not lose its noncommercial status. *Id.*; *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

The Lanham Act does not concern noncommercial speech. Infringement under the Lanham Act only concerns the sale of goods and services, not speech. 15 U.S.C. § 1115(b)(4). Therefore, when the speech itself is the thing being sold, the Lanham Act is inapplicable.

A. The Test for Noncommercial Speech: What is Being Sold?

Dog collars and ice cream scoops are quintessential “utilitarian” goods. If, however, a political party puts their own expression on these objects, the objects are noncommercial speech subject to the full protection of the First Amendment. *Riley*, 487 U.S. at 796 (protected speech intertwined with a commercial good is noncommercial speech).



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This principle – that there is a difference between selling speech and selling goods and services – matches this Court’s guidance in *Fox* that whether or not the speech at issue does more than propose a commercial transaction is “the test identifying commercial speech.” *Bd. of Trs. of State*

¹⁴ *USA Dog Collar*, OFFICIAL GOP STORE, <http://bit.ly/3Km2SVX> (last visited Feb. 7, 2023); *Ice Cream Scoop*, STORE.DEMOCRATS.ORG, <http://bit.ly/3lDqydP> (last visited Feb. 7, 2023).

Univ. of N.Y. v. Fox, 492 U.S. 469, 473-74 (1989) (quoting *Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). This test allows a court to adjudicate the defense of noncommercial expression at the early stages of litigation by quickly determining if the use of a symbol even concerns the sale of goods and services.

This Court demonstrated this principled difference between selling speech and selling goods and services in *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*. 483 U.S. 522 (1987). San Francisco Arts & Athletics (SFAA) sought to promote an event called the “Gay Olympic Games.” *Id.* at 525. A congressional statute, however, prohibited the use of the word “Olympic” to induce the sale of goods or services, or to promote the sale of tickets to an athletic or theatrical event. *Id.* at 539-40. As this Court recognized, there was no added expression. Instead, “the image the SFAA sought to invoke was exactly the image carefully cultivated by the USOC.” *Id.* at 540-41. Therefore, despite the SFAA’s claim, the SFAA used their “expression” to sell tickets and promote a sporting event, not in the sale of noncommercial speech. *Id.* at 541.

Lower courts are adept at distinguishing between the sale of speech and the sale of goods and services. The Second Circuit refused to apply the First Amendment to a humorous use of the Harley-Davidson trademark to sell motorcycle repair services. *Harley-Davidson, Inc. v. Grottanelli*, 164 F.3d 806, 812-13 (2d Cir. 1999). But the Second

Circuit properly applied heightened First Amendment protections when a parodist emulated Cliffs Notes' trademarks to sell its own jokes. *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp.*, 886 F.2d 490, 493 (2d Cir.1989).

Protecting the sale of speech, even when attached to goods, complies with First Amendment precedent that protected speech inextricably intertwined with a commercial good is noncommercial speech. *See Riley*, 487 U.S. at 796. Indeed, placing expression on a utilitarian good may heighten the expression, such as with this fly swatter sold by the Democratic Party referencing an incident at a political debate:



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By adopting the distinction between commercial and noncommercial uses of trademarks,

¹⁵ *Truth Over Flies Swatter*, STORE.DEMOCRATS.ORG, <http://bit.ly/3Ed5Ms0> (last visited Feb. 7, 2023).

this Court also respects the distinction between parody and noncommercial speech. Parody does not always sell speech; often it sells other goods and services. For example, Just Candy LLC uses parody to sell candy cigarettes. Because the expression serves as an advertisement to sell candy, this is commercial speech, though Just Candy may leverage other fair use defenses, such as parody.



B. Message Trumps Medium.

For First Amendment purposes, the difference between a movie and a commercial is not the medium; the difference is the message. Similarly, the difference between noncommercial speech and commercial speech is the message, not the medium. Jack Daniel's and their *amici*'s suggestion otherwise contradicts both this Court's precedent and how Americans express themselves.

i. Jack Daniel’s Proposes an Unconstitutional Content-Based Regulation.

Jack Daniel’s and its *amici* propose that freedom of speech should be curtailed when placed on “commercial” or “utilitarian” products. The proposed rule suppresses protected speech like the Republican Party’s expressive beverage coolers:



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Jack Daniel’s suggested rule is a textbook example of an impermissible content-based regulation. As this Court explained in *Reed v. Town of Gilbert*, “a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation.” 576 U.S. 155, 169 (2015). Here, Jack Daniel’s and its *amici* propose banning the use of commercial or utilitarian goods for expression they do not approve, and only for expression they do not approve. Resp. Br. at 22-23 (citing Dkt. 234 at 139). The First Amendment,

¹⁶ *Shop Collections: Let’s Go Brandon, supra.*

however, does not permit regulation that privileges certain categories of expression, on specified mediums, over other categories of expression. *Reed*, 576 U.S. at 169. As this Court explained in *Reed*, the suggestion otherwise creates a “paradigmatic example of content-based discrimination.” *Id.* at 169.

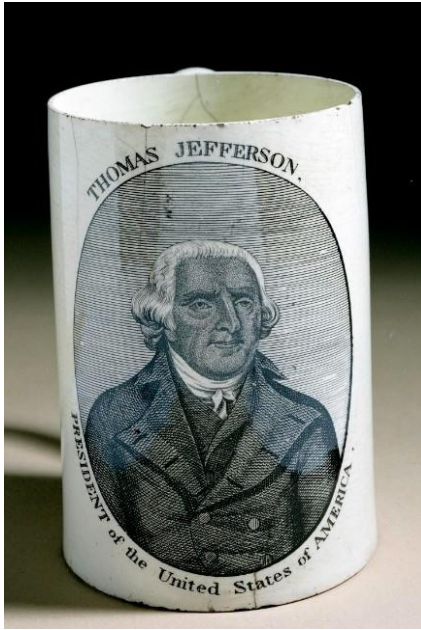
A limitation that only permits licensed commentary about trademark holders also violates the bedrock First Amendment principle that government may not “regulate speech in ways that favor some viewpoints or ideas at the expense of others.” *Matal*, 137 S. Ct. at 1757 (quoting *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993)). Restricting the types of speech that may appear on commercial goods favors corporate ideals over others. As this Court observed, there is “no more certain antithesis” to freedom of speech than “a proposal to limit speech in the service of orthodox expression.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 579 (1995).

That artistic expression may still appear in movies or on white-walled galleries is of no consolation, because “the distinction between laws burdening and laws banning speech is but a matter of degree.” *U.S. v. Playboy Enter. Grp. Inc.*, 529 U.S. 803, 812 (2000). Unsurprisingly, this Court routinely rejects limits to the First Amendment based on medium. See e.g., *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (clothing); *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790-98

(2011) (video games); *Cohen v. California*, 403 U.S. 15, 19 (1971) (jackets); *Tinker*, 393 U.S. at 505-06 (armbands); *Joseph Burstyn, Inc.*, 343 U.S. at 503 (movies). Confining artistic and political speech to pre-approved corporate messages or specified safe havens is an impermissible content-based restriction, and the proposal should be rejected.

ii. Political and Artistic Expression Have Always Been Everywhere.

Aside from being unconstitutional, the suggestion that commercial products are not useful for political and artistic expression is ahistorical. Shirt buttons supported George Washington's inauguration, mugs commemorated Thomas Jefferson's inauguration, and spoons supported William Henry Harrison's campaign. *Political Novelties*, SMITHSONIAN INST., <https://bit.ly/3IwTe17> (last visited Feb. 7, 2023). In early-America, political expression appeared on a variety of consumer goods as politicians sought "to instill a high level of [political] activism and engagement." *Id.*

*Id.*

This practice continues to the modern day. As shown throughout this brief, political parties sell all manner of utilitarian objects loaded with political expression.



17

Like political expression, artistic expression takes advantage of the opportunity to heighten statements by placing art in different mediums. After creating her 1987 masterpiece *Untitled (I shop therefore I am)*, Barbara Kruger placed the same expression on a shopping bag.

¹⁷ *GOP Logo Tumbler*, OFFICIAL GOP STORE, <http://bit.ly/4124yts> (last visited Feb. 7, 2023); *Hate Has No Home Here Tote Bag*, DEMOCRATS.ORG, <http://bit.ly/3KpjGLo> (last visited Feb. 17, 2023).



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Created in 1990, this particular piece is part of the Museum of Modern Art's collection in New York. If anything, placing this image on a shopping bag heightens the expression and critique of consumerism.

Similarly, the widely respected contemporary artist Tom Sachs could sell books of his art. Instead,

¹⁸ Barbara Kruger, *I shop therefore I am* (1990), MoMA, <https://bit.ly/3EjxqUq> (last visited Feb. 17, 2023).

he sells collections of his art printed on playing cards.



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¹⁹ *Nugget Playing Cards (Black Edition)*, TOMSACHS.COM, <http://bit.ly/3xwWTWI> (last visited Feb. 7, 2023).

Prohibiting all but preapproved speech that appears on playing cards, tote bags, cups, spoons, mugs, beverage coolers, fly swatters, ice cream scoops, dog collars, and Supreme Court calendars-to-be is an unconstitutional content-based restriction that contradicts traditions as old as our country. There is no need or basis for adoption of this rule.

III. The Likelihood of Confusion Test Suppresses Free Speech.

The likelihood of confusion test censors protected speech. Had courts applied the likelihood of confusion test anti-abortion ads, calendars for University of Alabama football, Aqua's song "*Barbie Girl*," Polo Magazine, and the Fellini film "*Ginger and Fred*" would all be banned. See *Radiance Found., Inc. v. NAACP*, 786 F.3d 316, 325 (4th Cir. 2015); *Univ. of Ala. Bd. of Trs. v. New Life Art, Inc.*, 683 F.3d 1266, 1278 (11th Cir. 2012); *Mattel, Inc. v. MCA Recs., Inc.*, 296 F.3d 894, 902 (9th Cir. 2002); *Westchester Media v. PRL USA Holdings, Inc.*, 214 F.3d 658, 665 (5th Cir. 2000); *Rogers v. Grimaldi*, 875 F.2d 994, 997, 1001 (2d Cir. 1989).

Our own experience demonstrates the problem. Twice courts entered a preliminary injunction finding that our artwork would likely confuse customers. Yet, of the more than 5,000 pieces of art we distributed prior to entry of those injunctions, *not a single* patron ever expressed *actual* confusion. Unsurprisingly, VIP's experience is similar. Resp. Br. at 9-10. A test that consistently

finds likely confusion when no confusion exists is overbroad.

A. The Likelihood of Confusion Test Contradicts the First Amendment.

The First Amendment does not require that speakers limit themselves to a “narrow, succinctly articulable message,” because clarity “is not a condition of constitutional protection.” *Hurley*, 515 U.S. at 569. Indeed, “First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994) (quoting *Yankee Publ’g Inc. v. News Am. Publ’g, Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992)). While the First Amendment protects confusing speech, the likelihood of confusion test prohibits it.

The purpose of protecting noncommercial speech in art and literature is to permit people to form and test expression. *See Playboy Ent. Grp.*, 529 U.S. at 818. Requiring noncommercial speech to survive scrutiny of the judicially created likelihood of confusion test deprives speakers of the ability to test and refine their expression. Thus, if applied, the likelihood of confusion test censors noncommercial speech.

B. The Likelihood of Confusion Test is Unpredictable.

The likelihood of confusion test suppresses speech by providing no predictability regarding when constitutional rights begin and end, rendering

it overbroad. For example, we conducted a survey at the art studio about Jack Daniel's whiskey.



Our colleagues who expressed an opinion that Jack Daniel's tastes like anything but the nectar of the gods are, of course, wrong, but this is America and they may express their opinion. Under the likelihood of confusion test, however, it is unclear how far they can go to share that opinion. Could they print their opinion on a pamphlet? What if the opinion is printed on clothing? Could they use Jack Daniel's filigree to surround their opinion stated on a t-shirt? What if they print that expression on a t-shirt using Jack Daniel's stylized font? Could they print the expression on a black t-shirt using Jack Daniel's stylized font and a replica of a Jack Daniel's bottle? Does it depend on where you live?

The test itself is also a mess, with different circuits weighing different factors differently and “excessive intercircuit variation in the application and outcome.” Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1582-83 (2006).

As bad as that may be, perhaps the bigger issue is that a small minority (ten to fifteen percent) of consumers dictate the limits of free speech.²⁰ Granting trademark owners the right to censor expression that one in ten Americans do not understand is problematic. First, it provides none of the “breathing space” required to protect the freedom of expression. *Hustler Mag., Inc.*, 485 U.S. at 52. Second, surveys consistently find seventeen to eighteen percent of Americans believe the sun revolves around the Earth.²¹ A minority of

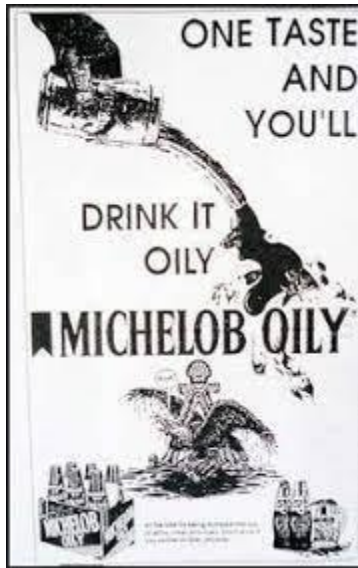
²⁰ Ten to fifteen percent is the generally accepted standard. See e.g., *RXC Media, LLC v. IP Application Dev. LLC*, 986 F.3d 361, 373 (4th Cir. 2021) (10 percent supports a finding of likelihood of confusion and 17 percent is “clear evidence”); *Mut. of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 400-01 (8th Cir. 1987) (10 percent is significant confusion); *Exxon Corp. v. Tex. Motor Exch., Inc.*, 628 F.2d 500, 507 (5th Cir. 1980) (15 percent confusion is strong evidence of likely confusion); *RJR Foods, Inc. v. White Rock Corp.*, 603 F.2d 1058, 1061 (2d Cir. 1979) (study showing 15-20 percent confusion is sufficient); *James Burrough, Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266, 279 (7th Cir. 1976) (15 percent confusion is neither small nor *de minimis*).

²¹ See Lawrence Hamilton, *Conspiracy vs. Science: A Survey of U.S. Public Beliefs*, UNIV. OF N.H. (Apr. 25, 2022), <http://bit.ly/3I6oDGt>; Steve Crabtree, *New Poll Gauges Americans' General Knowledge Levels*, GALLUP (July 6, 1999), <http://bit.ly/3KhfKwh>.

Americans – smaller than the number confused by Copernican Theory – should not determine our First Amendment freedoms.

Further undermining Jack Daniel’s proposal is that it bans speech when survey respondents fail to understand the intricacies of trademark law. This is not an area of law widely understood by the public. For example, when The Ohio State University registered a trademark for the word “The,” it prompted numerous explanatory articles clarifying that Ohio State’s trademark rights in “the” are limited. *See e.g.*, Daniel Victor, *Ohio State University Trademarks ‘The’*, N.Y. TIMES (June 23, 2022), <http://bit.ly/3IIAt1R> ; Emery Winter, *No, Ohio State Doesn’t Own ‘the’*, VERIFY (June 29, 2022), <http://bit.ly/3xtyQHY>.

Unfortunately, failure to understand the limits of trademark and licensing rights has led directly to censorship. The Eighth Circuit suppressed a comedic advertisement for Michelob Oily in a humor magazine because “over half of those surveyed thought [the artist] needed Anheuser-Busch’s approval to publish the ad.” *Anheuser-Busch, Inc. v. Balducci Publ’ns*, 28 F.3d 769, 775 (8th Cir. 1994). The belief that a license is necessary to create a parody tilted the balance. *See id.* And even though only six percent of survey respondents thought the “ad” was an actual Anheuser-Busch advertisement, it was banned. *Id.*



Similarly, Jack Daniel's survey results demonstrate confusion about licensing rules, not source of origin. J.A. 123-146. Bad Spaniels is supposed to resemble a Jack Daniel's bottle. That's the joke. So when a survey respondent answers a question with the statement that it "resembles a Jack Daniel's bottle," *see* J.A. 127, 130, 139, it means they understand the reference, not that they were confused. In fact, half of the "confused" survey respondents did not believe the Bad Spaniels dog toy originated with Jack Daniel's. J.A. 123-146. Instead, they only expressed a belief that the parody required authorization or approval. As one respondent explained when asked why they thought authorization or approval was required, "[m]y best guess is that in order to use this design you would have to have permission from the Jack Daniel's brand." J.A. 127.

Survey respondents guessing about licensing requirements and turning that into the definition of infringement creates a death spiral for freedom of expression. Once a court makes a finding of infringement, even for a temporary restraining order or preliminary injunction, news spreads that the use of the trademark is forbidden. This creates a feedback loop: upon learning about this adverse outcome for the speaker, the number of future survey respondents believing a license is always required will grow and speech will be further constrained. *See* Graeme B. Dinwoodie, *Trademark Law as a Normative Project*, 2023 SING. J. LEG. STUD. (forthcoming 2023) (manuscript at 12-14) (available in full at <https://bit.ly/3KhgwcF>).

Differences exist between trademark and copyright law, particularly with regard to derivative works. And these differences must be respected. *See Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33-34 (2003). A copyright owner has the right to prevent the copying of their work in any medium, while trademark law prevents the use of a similar mark on goods or services that would probably cause a likelihood of confusion among consumers as to the origin of the goods or services. J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, §§ 6:14, 6:6 (5th ed. 2022). Survey respondents do not appreciate this nuance,²²

²² Even judges fail to appreciate the distinction between the two. *See, e.g., Bd. of Governors of Univ. of N.C. v. Helpingstine*, 714 F. Supp. 167, 170 (M.D.N.C. 1989) (plaintiff had not

often assuming a license is required as if the trademark holder had a monopoly on derivative works. *See e.g.* J.A. 142 (when asked why approval or authorization is necessary, respondent explained “Jack Daniels (sic) IPR/copyright”).

Even if a survey respondent understands the nuance, questions about affiliation are nonsensical when applied to expressive uses of trademarks. Again, an expressive use *should* remind the viewer of the trademark holder. Therefore, when the survey asks a respondent if they believe there is an affiliation or relationship, the real question being asked is if the survey respondent believes the law requires a relationship between the trademark owner and the speaker. Under trademark law, that relationship – a license – is necessary only if the use is confusing. If properly understood by the respondent in the context of expression, the question becomes: Do you believe ten to fifteen percent of consumers would find this confusing? In other words, if ten percent of respondents believe ten percent of consumers would be confused, we lose our freedom of speech.

Accelerating this death spiral for expression, lower courts now accept random, pseudo-anonymous and unverified tweets to determine if confusion is likely. *See e.g. Instructure, Inc. v. Canvas Techs. Inc.*,

established the “requisite likelihood of confusion that is the hallmark of copyright infringement”); *Leventhal v. Ollie Morris Equip. Corp.*, 184 Cal. App. 2d 553, 556 (1960) (stating a party was granted a “copyright” on a name by the state and USPTO).

No. 2:21-CV-00454, 2022 WL 43829, at *12 (D. Utah Jan. 5, 2022) (citing tweets to show likely confusion and granting a preliminary injunction); *Museum of Mod. Art v. MOMACHA IP LLC*, 339 F. Supp. 3d 361, 370-71 (S.D.N.Y. 2018) (social media posts support finding of confusion and granting a preliminary injunction); *Inst. For Just. v. Media Grp. of Am., LLC*, No. 1:15-cv-1410, 2015 WL 7758845, at *9 (E.D. Va. Nov. 30, 2015).

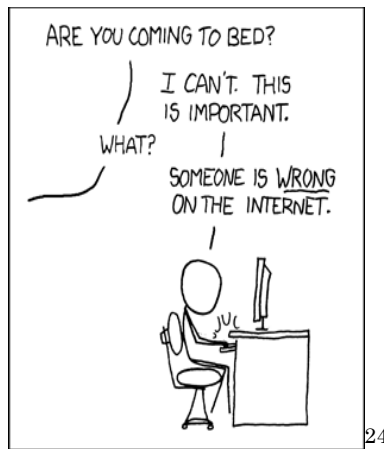
Returning to the political expression in the “Let’s Go Brandon!” slogan, we quickly found tweets believing this expression comes from NASCAR. Applying the likelihood of confusion test, a court could use these tweets to grant a preliminary injunction.





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The likelihood of confusion test burdens speakers by forcing them not only to endeavor to speak so clearly that not even one in ten consumers thinks the message is approved by someone else, but they must also make sure there is no confusion about their message *anywhere* on the internet.



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²³ Naz (@Naz_MIA771), TWITTER (Dec. 26, 2021, 11:03 AM), <https://bit.ly/3lJzKO1>; Wisconsin Hate Account (@wiyeeeee), TWITTER (Aug. 13, 2022, 1:22 PM), <https://bit.ly/3kc6PBB>; American Jungle Podcast (@Jungle American), TWITTER (Aug. 6, 2022, 6:15 AM), <https://bit.ly/3kc77Zd>.

²⁴ *Duty Calls*, XKCD, <http://bit.ly/3k5ldvs> (last visited Feb. 9, 2023).

Under Jack Daniel's proposal, a speaker must be prepared to monitor the entire internet to correct confusion, or speak so clearly that monitoring is unnecessary. Otherwise, the likelihood of confusion test will censor speech either by deterring a speaker from expressing themselves, or through enforcement by the courts.

C. The Likelihood of Confusion Test is Overbroad.

As in *Tam*, it matters little whether we apply strict scrutiny or the *Central Hudson* test. Application of the likelihood of confusion test to speech is constitutionally problematic. *See generally Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564-65 (1980). The likelihood of confusion test is not just overbroad, but applied to noncommercial expression it lacks any substantial interest. When a trademark does not function to identify the source of goods or services, there is no consumer understanding to protect. *See Graeme B. Dinwoodie, Reconceptualizing the Inherent Distinctiveness of Product Design Trade Dress*, 75 N. CAR. L. REV. 471, 483 (1997).

Although Jack Daniel's and its *amici* argue they have a substantial interest in their investment in developing their own expression in their marks, it is well-settled that trademark law was "*not* designed to protect originality or creativity." *Dastar Corp.*, 539 U.S. at 37 (emphasis in original). Further, the value of goodwill is linked to the ability to sell goods and

services, not expression (the domain of copyright law) or an ability to suppress speech.

Applied to noncommercial speech, the likelihood of confusion test is overbroad. It bans political and artistic speech, it censors speech unless ninety-one percent of the public understands the message, it suppresses speech by being unpredictable, and it conflates copyright and trademark law to censor legitimate expression. Because noncommercial expression involves the sale of speech, not the sale of goods, there are no consumer interests to protect. If the likelihood of confusion test applied here, it would cause the Lanham Act to fail the *Central Hudson* test. *See* 447 U.S. at 564-65. Unsurprisingly, lower courts do not apply the likelihood of confusion test to expression.

D. VIP Engaged in Noncommercial Speech.

Parody, satire and jokes, no matter how outrageous, are protected by the First Amendment. *Hustler Mag., Inc.*, 485 U.S. at 54-55. VIP's Silly Squeakers are a series of dog puns, each one heightened by placement on a dog toy.

The speech is the toy. Like placing the political statement "Truth over Lies" on a fly swatter, the use of the dog toy heightens the dog joke, which intertwines the expression and the good. This is noncommercial speech like the Fellini film in *Rogers* – as opposed to the title – and is fully protected by the First Amendment without need for

additional analysis. *Rogers*, 875 F.2d at 1005 (Griesa, J., concurring).²⁵

When a speaker sells speech, it does not matter if that speech uses trademarks as symbols for expression – the speech is protected. The free exchange of ideas is the crux of the First Amendment. A judge or justice may read a legal argument and adapt or modify that argument making it their own opinion. Absent a copyright, an artist can take pre-existing content, chose a medium, add their perspective, and sell their expression. If the owners of iconic trademarks do not like the message, they may participate in the marketplace of ideas, but they do not get a monopoly on expression through trademark law for trademark law does not restrict expression. *Dastar Corp.*, 539 U.S. at 34-35.

Bad Spaniels is a joke about whiskey and dog owners' humanization of their pets. As noncommercial speech, the Constitution fully protects the joke from censorship. There is no reason to change centuries of expressive tradition to protect those with the largest speakers.

²⁵ If the Court treats the joke as commercial speech, the likelihood of confusion test remains deeply problematic. As the Second Circuit noted, the likelihood of confusion test “is at best awkward in the context of parody.” *Cliffs Notes, Inc.*, 886 F.2d at 495 n.3. For speech that is expressive but made for purposes of selling goods and services, the *Rogers* test as applied by the Ninth Circuit appropriately avoids the issues with expressive uses of trademarks noted in Section III B.

CONCLUSION

For the reasons stated herein, this Court should affirm the decision of the lower courts and clarify that noncommercial uses of trademarks are fully protected by the First Amendment.

Respectfully Submitted,

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