No. 22-1078

IN THE
Supreme Court of the United States

WARNER CHAPPELL MUSIC, INC.
AND ARTIST PUBLISHING GROUP, LLC,
Petitioners,

v.

SHERMAN NEALY AND MUSIC SPECIALIST, INC.,
Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Eleventh Circuit

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of vital concern to the nation's business community.

The Chamber and its members have a strong interest in ensuring that statutes of limitations are enforced as Congress has written them and in a way that provides clarity and predictability. The Eleventh Circuit's decision allows copyright plaintiffs to seek damages for alleged violations of the Copyright Act well outside the Copyright Act's three-year statute of limitations, exposing the Chamber's members to unanticipated financial liability.

The Chamber submits this brief to urge the Court to provide much-needed guidance on the limitations period

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[1] Counsel of record for all parties was notified of *amicus*'s intent to file this brief by ten days prior to the due date for this brief. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

for copyright claims. The Court should hold that an injury rule, not a discovery rule, applies to determine when a copyright claim has accrued. Even if it does not reach the question of whether a discovery rule exists, the Court should limit the effect of the discovery rule by holding that plaintiffs cannot recover damages based on acts occurring more than three years before they file suit.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Chamber agrees with Petitioners that the Copyright Act's statute of limitations precludes a plaintiff from obtaining damages based on acts that occurred more than three years before a lawsuit, regardless of when the plaintiff discovered those acts. The Chamber urges the Court to reach that conclusion by holding that no discovery rule applies to the Copyright Act at all. As Petitioners correctly explain, "this case would allow the Court to reach [that] question if it were so inclined, and it is encompassed within the question presented." Pet. 14 n.*.

The Copyright Act imposes a three-year statute of limitations: "[n]o civil action shall be maintained under the provisions of [the Act] unless it is commenced within three years after the claim accrued." 17 U.S.C. § 507(b). "Three years" means three years, not three years plus a potentially infinite period prior to the plaintiff's discovery of the infringement.

In *Rotkiske v. Klemm*, 140 S. Ct. 355 (2019), this Court held that because the Fair Debt Collection

Practices Act's statute of limitations does not expressly recite a discovery rule, no discovery rule exists. That reasoning resolves this case. The Copyright Act does not recite a discovery rule, and courts should follow the plain text of the Copyright Act rather than rewriting it.

Numerous lower courts have held that the Copyright Act's statute of limitations includes a discovery rule, but those cases are poorly reasoned. Some rely on outmoded interpretive principles; others reflexively cite out-of-circuit authority while offering no independent analysis; still others offer no reasoning at all. No lower court has offered an intelligible account of how a discovery rule can be reconciled with the Copyright Act's text.

The policy consequences of a discovery rule do not matter. The text is clear. But if policy consequences mattered, they would weigh against a discovery rule. Statutes of limitations ensure certainty and protect against stale claims—a problem in any context and especially in the copyright context.

This Court should grant certiorari and hold that the Copyright Act does not include a discovery rule. But even if the Court declines to resolve that question, this case is still well worth deciding.

There is an indisputable and deepening circuit split on the availability of damages for acts occurring more than three years before the filing of a complaint, and the Eleventh Circuit is on the wrong side of that split. This Court's decision in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014), holds that "a successful plaintiff can gain retrospective relief only three years back from the time of suit" and that "[n]o recovery may be had for

infringement in earlier years." 572 U.S. at 677. This reasoning was central to *Petrella*'s holding that the doctrine of laches was unnecessary in the copyright context, because "the copyright statute of limitations, § 507(b), itself takes account of delay" by limiting the ability to sue over conduct outside the limitations period. *Id.* Certiorari is necessary to correct the Eleventh and Ninth Circuits' incorrect conclusion that a plaintiff may recover retrospective relief dating back more than three years before filing suit.

ARGUMENT

As Petitioners correctly explain, the Eleventh Circuit erred in holding that plaintiffs can obtain damages based on acts occurring over three years before filing suit. The Chamber agrees with Petitioners that, even assuming the Copyright Act includes a discovery rule, *Petrella* forecloses Respondents' efforts to recover *damages* for stale claims. The Chamber further agrees with Petitioners that this Court's review is warranted to review the circuit conflict on that question.

In the Chamber's view, Respondents' damages claim fails for a more fundamental reason: no discovery rule exists under the Copyright Act at all. The Court should grant certiorari and announce that holding expressly.

I. The Discovery Rule Does Not Apply To The Copyright Act's Statute Of Limitations.

The Copyright Act's limitations clock begins on the date of injury, not on the date of discovery. By its terms, the Copyright Act requires a civil action to be commenced "within three years after the claim accrued." 17 U.S.C. § 507(b). A claim accrues when the plaintiff

has a complete cause of action. That occurs on the date of injury, as "each violation" gives rise to a "new wrong" from which the statute of limitations separately runs. *Petrella*, 572 U.S. at 671. No lower court has provided a sound basis to engraft an atextual discovery rule onto the Copyright Act.

A. Statutes Of Limitations Do Not Include Discovery Rules Unless They Say So.

The Copyright Act's statute of limitations makes no reference to a discovery rule. As this Court has made clear, that means there is no discovery rule.

The Copyright Act requires a civil action to be commenced "within three years after the claim accrued." 17 U.S.C. § 507(b). This Court has recognized that "[a] claim ordinarily accrues 'when [a] plaintiff has a complete and present cause of action.'" *Petrella*, 572 U.S. at 670. Indeed, this Court has described this principle repeatedly as the "standard" or "default" rule. *Green v. Brennan*, 578 U.S. 547, 554 (2016); *Wallace v. Kato*, 549 U.S. 384, 388 (2007); *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418–19 (2005); *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 201 (1997); *see also Gabelli v. SEC*, 568 U.S. 442, 448 (2013) (recognizing that this "standard rule" has "governed since the 1830s").

A copyright plaintiff has a complete and present cause of action when the defendant violates the Copyright Act. In this case, for example, when Petitioners allegedly began infringing Respondents' copyright in 2008, Respondents had a complete and

present cause of action. Hence, by its unambiguous terms, the Copyright Act requires a claim to be brought within three years of that violation. The date the plaintiff discovers the violation is irrelevant.

The Eleventh Circuit did not doubt the seemingly obvious proposition that the limitations clock starts when the defendant infringes. But it took the counterintuitive view that the clock starts *twice*. In the Eleventh Circuit's view, there are "two recognized rules for determining" when the limitations clock begins: "the discovery rule and the injury rule." Pet. App. 7a-8a. That holding was wrong. Nothing in the Copyright Act suggests the clock might start at two different times. The clock starts at one time: the date of "accrual," which means the date of infringement.

This Court's recent decision in *Rotkiske v. Klemm*, 140 S. Ct. 355 (2019), confirms that the Copyright Act does not include a discovery rule. In *Rotkiske*, the Court held that the Fair Debt Collection Practices Act's statute of limitations does not include a discovery rule. By its terms, the statute's limitations clock starts on "the date on which the violation occurs." *See id.* at 360 (quoting 15 U.S.C. § 1692k(d)). The Court held that because this statute does not explicitly recite a discovery rule, no discovery rule exists. As the Court explained, "[i]t is a fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts.'" *Id.* at 360–61 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 94 (2012)). This is because "[t]o do so 'is not a construction of a statute, but, in effect, an enlargement of it by the court.'" *Id.* at 361

(quoting *Nichols v. United States*, 578 U.S. 104, 110 (2016)). The Court further explained that "[a]textual judicial supplementation is particularly inappropriate when … Congress has shown that it knows how to adopt the omitted language or provision." *See id.* The Court cited numerous examples of statutes of limitations expressly reciting that the clock starts on the date of discovery.[2] The Fair Debt Collection Practices Act, however, includes no such provision, and the Court held

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[2] *See Rotkiske*, 140 S. Ct. at 361 (citing 12 U.S.C. § 3416; 15 U.S.C. § 1679i; 15 U.S.C. § 77m (1976 ed.); 19 U.S.C. § 1621 (1976 ed.); 26 U.S.C. § 7217(c) (1976 ed.); and 29 U.S.C. § 1113 (1976 ed.)). There are many other examples of statutes of limitations with express discovery rules. *See, e.g.*, 12 U.S.C. § 1715z-4a(d) (tethering limitation period to "6 years after the latest date that the Secretary discovers any use of a property's assets and income in violation of the regulatory agreement"); 15 U.S.C. § 78r(c) ("one year after the discovery of facts constituting the cause of action and … three years after such cause of action accrued"); 15 U.S.C. § 78u-6(h)(1)(B)(iii)(I)(bb) ("3 years after the date when facts material to the right of action are known or reasonably should have been known"); 15 U.S.C. § 6104(a) ("3 years after discovery of the violation"); 15 U.S.C. § 1711(a)(2) ("three years after discovery of the violation or after discovery should have been made by the exercise of reasonable diligence"); 15 U.S.C. § 3006(c) ("3 years after the discovery of the alleged violation"); 18 U.S.C. § 2520(e) ("two years after the date upon which the claimant first has a reasonable opportunity to discover the violation"); 18 U.S.C. § 2710(c)(3) ("2 years from the date of the act complained of or the date of discovery"); 26 U.S.C. § 7431(d) ("2 years after the date of discovery"); 28 U.S.C. § 1658(b)(1) ("2 years after the discovery of the facts constituting the violation"); 42 U.S.C. § 9612(d)(2)(A) ("3 years after … [t]he date of the discovery of the loss and its connection with the release in question").

that it was not authorized to rewrite that statute to include one. *See id.*

Rotkiske's reasoning tracks Justice Scalia's analysis in his concurrence in the judgment in *TRW Inc. v. Andrews*, 534 U.S. 19 (2001). As Justice Scalia explained, the discovery rule is "bad wine of recent vintage." *Id.* at 37 (Scalia, J., concurring in judgment). Under the "traditional rule," "[a]bsent other indication, a statute of limitations begins to run at the time the plaintiff has the right to apply to the court for relief." *Id.* (internal quotation marks omitted). "That a person entitled to an action has no knowledge of his right to sue, or of the facts out of which his right arises, does not postpone the period of limitation." *Id.* (quotation marks omitted).

To be sure, the Supreme Court has in some cases applied an "equitable doctrine that delays the commencement of the statute of limitations in fraud actions." *Rotkiske*, 140 S. Ct. at 361. This rule recognizes that "something different [is] needed in the case of fraud, where a defendant's deceptive conduct may prevent a plaintiff from even knowing that he or she has been defrauded." *Merck & Co. v. Reynolds*, 559 U.S. 633, 644 (2010). "Otherwise, the law which was designed to prevent fraud could become the means by which it is made successful and secure." *Id.* (internal quotation marks omitted). The fraud-discovery rule is the exception that proves the rule. If a discovery rule existed in *every* case, then the special fraud-discovery rule would be irrelevant. Thus, when there is no fraud, there is no discovery rule.

Under *Rotkiske*'s analysis, this case is remarkably easy. Because the Copyright Act does not expressly recite a discovery rule, none exists. The Copyright Act is not a fraud statute, so the fraud-discovery rule does not apply. The Court's analysis should begin, and end, there.

B. Lower-Court Decisions Rewriting The Copyright Act To Include A Discovery Rule Are Unpersuasive.

Although several lower-court cases have read a discovery rule into the Copyright Act, those cases are incorrect. As a leading copyright treatise has explained, undiscovered violations of the Copyright Act "bear no resemblance" to the limited situations where this Court has recognized that a discovery rule may be appropriate. 6 William F. Patry, *Patry on Copyright* § 20:18, Westlaw (database updated Mar. 2023).

No circuit has offered a persuasive rationale for injecting the discovery rule into the Copyright Act. Some circuits have applied the discovery rule in copyright cases based on a general presumption that the discovery rule applies in federal-question cases. *See, e.g.*, *Webster v. Dean Guitars*, 955 F.3d 1270, 1276 (11th Cir. 2020); *Cooper v. NCS Pearson, Inc.*, 733 F.3d 1013, 1015–16 (10th Cir. 2013); *Comcast of Ill. X v. Multi-Vision Elecs., Inc.*, 491 F.3d 938, 944 (8th Cir. 2007); *Santa-Rosa v. Combo Recs.*, 471 F.3d 224, 227–28 (1st Cir. 2006); *Taylor v. Meirick*, 712 F.2d 1112, 1117–18 (7th

Cir. 1983).[3] As *Rotkiske* makes clear, no such presumption exists.

The Ninth Circuit has applied the discovery rule to the Copyright Act based on the *fraud* discovery rule, apparently not realizing that this is a separate doctrine that does not apply absent allegations of fraud. *Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir. 1994) (citing *Wood v. Santa Barbara Chambers of Commerce, Inc.*, 507 F. Supp. 1128, 1135 (D. Nev. 1980), which concerned fraudulent concealment). The Sixth and Fourth Circuits have followed the Ninth Circuit's errant decision with no meaningful analysis. *See Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615, 621 (6th Cir. 2004) (citing *Roley*, 19 F.3d at 481); *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 202 (4th Cir. 1997) (citing *Roley*, 19 F.3d at 481).

The Third Circuit has adopted the discovery rule based on its suggestion that the Copyright Act's criminal statute of limitations in 17 U.S.C. § 507(a) ("5 years after the cause of action arose") and its civil statute of limitations in 17 U.S.C. § 507(b) ("three years after the claim accrued") signifies congressional intent to treat the two differently. *William A. Graham Co. v. Haughey*, 568 F.3d 425, 433–37 (3d Cir. 2009). This reasoning is baffling. The fact that Section 507(a) uses different language from 507(b) does not justify adopting

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[3] The Seventh Circuit more recently signaled that *Petrella* may have abrogated its application of the discovery rule. *See Chi. Bldg. Design, P.C. v. Mongolian House, Inc.*, 770 F.3d 610, 618 (7th Cir. 2014).

a rule that appears in *neither* Section 507(a) *nor* Section 507(b). For its part, the Second Circuit gestured at other courts' analysis of "the text and structure of the Copyright Act" and "[p]olicy considerations," citing the Third Circuit's *Haughey* decision. *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124–25 (2d Cir. 2014). However, the Second Circuit did not articulate what aspects of the text or structure of the Copyright Act or what policy considerations supported its decision.

The Fifth Circuit's reasoning is weakest of all. In *Martinelli v. Hearst Newspapers, L.L.C.*, 65 F.4th 231 (5th Cir. 2023), the court deemed itself bound by circuit precedent to apply the discovery rule in a copyright case, but did not mince words on how weak that precedent was. As the Fifth Circuit recounted, its circuit precedent "did not explain why the discovery rule applied," but instead merely cited an unpublished opinion that also offered no explanation. *Id.* at 236 & n.2.

The large volume of cases adopting a discovery rule should not deter the Court from stepping in. The lower courts have gone astray, and this Court should right the ship.

C. The Discovery Rule Is Bad Policy.

The Court should not leave in place the erroneous discovery rule on the basis of already-repudiated policy justifications. As the *Rotkiske* Court explained, it is not the judiciary's "role to second-guess Congress' decision" on whether to include a discovery rule. 140 S. Ct. at 361. Observing that "[t]he length of a limitations period reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are

outweighed by the interests in prohibiting the prosecution of stale ones," the Court explained that "[i]t is Congress, not this Court, that balances those interests." *Id.* (internal quotation marks omitted). The judiciary's role is to "simply enforce the value judgments made by Congress." *Id.* Justice Scalia made a similar point in *TRW*: regardless of whether judges believe that applying a discovery rule in a particular case may be "humane," it is Congress "whose job it is to decide how 'humane' legislation should be—or (to put the point less tendentiously) to strike the balance between remediation of all injuries and a policy of repose." 534 U.S. at 38 (Scalia, J., concurring in judgment).

But if policy consequences mattered to this textual argument, the argument against the discovery rule would get even stronger.

"Statutes of limitations are not simply technicalities," but instead "have long been respected as fundamental to a well-ordered justice system." *Bd. of Regents of Univ. of N.Y. v. Tomanio*, 446 U.S. 478, 487 (1980). Limitations periods further critical interests in fairness, stability, and predictability and mitigate the burdens and arbitrariness associated with stale claims. *See Rotella v. Wood*, 528 U.S. 549, 555 (2000) ("[T]he basic policies of all limitations provisions [are] repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities."); *Tomanio*, 446 U.S. at 487 ("[T]here comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be

barred without respect to whether it is meritorious."); *United States v. Kubrick*, 444 U.S. 111, 117 (1979) ("These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."); *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348–49 (1944) ("Statutes of limitation … are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."); *Guar. Tr. Co. of N.Y. v. United States*, 304 U.S. 126, 136 (1938) ("The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time.").

In particular, this Court has been wary of doctrines that threaten to "lengthen[] the limitations period dramatically," recognizing that they "conflict[] with a basic objective—repose—that underlies limitations periods." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997); *accord Rotella*, 528 U.S. at 554–55. Indeed, in situations where Congress has expressly enacted a discovery rule in a limitations provision, it has "often couple[d] that rule with an absolute provision for repose," which allows a potential defendant to have some certainty notwithstanding the potential for claims to be

brought outside the initial limitations period. *Gabelli*, 568 U.S. at 453.

These goals are no less applicable in the copyright context. In fact, it is "peculiarly important" that copyright law's "boundaries … be demarcated as clearly as possible" because "copyright law ultimately serves the purpose of enriching the general public through access to creative works." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994). "Copyright, like real estate, lasts a long time, so stability of title has great economic importance." *Zuill v. Shanahan*, 80 F.3d 1366, 1370 (9th Cir. 1996). So, "like any property right, its boundaries should be clear" in order to "enable[ ] efficient investment." *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 730–31 (2002). Indeed, Congress's "paramount goal" in revising the Copyright Act has been to "enhanc[e] predictability and certainty of copyright ownership." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989).

Statutes of limitations serve a crucial role in ensuring predictability and certainty of copyright ownership. Under the Copyright Act as written, if a claim has not been brought within three years of the alleged violation, all stakeholders can be secure in the knowledge that it will never be brought. The need for repose is especially pressing because copyright law imposes strict liability. *See* 6 *Patry on Copyright* § 21:38. As such, if the Copyright Act is rewritten to include a discovery rule, it is entirely possible that a copyright defendant may incur liability after investing in a work that it legitimately believes it had the right to exploit. This case is illustrative: Respondents did not file their copyright

infringement suit until over a decade after Mr. Nealy's business partner held out a separate entity as authorized to license the musical rights. Pet. App. 4a.

Statutes of limitations also ensure fair trials in copyright cases. Copyright disputes frequently hinge on factual questions for which witness memories must be fresh. For example, a copyright defendant may need to present evidence that it lacked access to the plaintiff's work. *See, e.g.*, *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 51–56 (2d Cir. 2003). A defendant sued over decades-old infringements will face a formidable challenge in the courtroom.

Finally, the prospect of statutory damages for copyright infringement heightens the need for strict enforcement of statutes of limitations. *See* 17 U.S.C. § 504(c) (providing for $750 to $30,000 in statutory damages per work infringed, even where infringement was not committed willfully). In cases where plaintiffs must prove actual damages, plaintiffs often have an incentive to bring suit swiftly. A plaintiff who has suffered actual harm typically wants to remedy that harm sooner rather than later. Moreover, the passage of time makes it harder to prove actual harm with the requisite level of precision. The longer the time that has passed since the violation, the harder it is to reconstruct the position the plaintiff would have occupied if no violation had occurred.

But where plaintiffs are authorized to obtain statutory damages, the incentive to bring suit quickly weakens. The Copyright Act's statutory damages provision has "long been intended to compensate plaintiffs in situations in which it was difficult for a

copyright owner to prove what actual damages she sustained … or when it would be too expensive … to prove damages or profits in comparison with the amount that could be recovered." Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 Wm. & Mary L. Rev. 439, 499 (2009). But this also means that a plaintiff who newly discovers a claim outside the limitations period has a heightened incentive to press forward with litigation despite not having felt the impact of the infringement in an appreciable way. *See id.* at 481 ("One unfortunate practice utilized in several recent cases has been to jump straight to the statutory maximum, even when the infringement caused little or no actual harm to the plaintiff and brought the defendant little or no profit."). Moreover, the plaintiff does not have to worry about the difficulty of proving actual harm many years after the violation. Indeed, the plaintiff will benefit from delay—as years pass, the defendant may lose the evidence it needs to defend itself, but the plaintiff need not worry about losing the evidence it needs to prove its damages. The availability of statutory damages counsels for a need to curb potentially indefinite copyright liability.

II. This Court's Review Is Warranted.

The Court should grant certiorari in this case and hold that the Copyright Act lacks a discovery rule. Even if the Court declines to reach that question, it should still grant certiorari to resolve the circuit split that the Eleventh Circuit identified, and reverse the Eleventh Circuit's errant judgment.

A. This Court Should Resolve Whether The Copyright Act Includes A Discovery Rule.

As Petitioners correctly state, "this case would allow the Court to reach the [discovery rule] question if it were so inclined, and it is encompassed within the question presented." Pet. 14 n.*.

Although there is no conflict among the courts of appeals on the availability of the discovery rule, this Court's review is nonetheless warranted. The circuit precedents adopting the discovery rule are wholly unpersuasive, particularly in light of *Petrella* and *Rotkiske*. Yet, now that most courts of appeals have addressed the question, a circuit split is unlikely to emerge. Lower courts today reflexively apply the discovery as a matter of circuit precedent, even though those precedents are poorly reasoned. *See, e.g.*, Pet. App. 9a–15a; *Martinelli*, 65 F.4th at 237–39, 242–43; *Starz Ent., LLC v. MGM Domestic Television Distrib., LLC*, 39 F.4th 1236, 1241–42 (9th Cir. 2022); *Sohm v. Scholastic, Inc.*, 959 F.3d 39, 49–50 (2d Cir. 2020). As the Patry treatise has noted, lower courts will continue applying the discovery rule not for any good reason, but instead based on "sheer precedent" "until the Supreme Court holds otherwise." 6 *Patry on Copyright* § 20:18. It is time for this Court to hold otherwise. This case provides an opportunity for the Court to get the law right on a consequential issue.

Not only will granting certiorari allow the Court to correct lower courts' errors regarding the Copyright Act, it will allow the Court to resolve broader confusion regarding the discovery rule. Even after *Rotkiske*,

courts continue to apply a discovery rule uncritically in numerous contexts. *See Snyder-Hill v. Ohio State Univ.*, 48 F.4th 686, 700 (6th Cir. 2022) (collecting cases applying discovery rule following *Rotkiske*), *petition for cert. filed*, 91 U.S.L.W. 3237 (U.S. Mar. 14, 2023) (No. 22-896); *Carbone v. Brown Univ.*, 621 F. Supp. 3d 878, 891–92 (N.D. Ill. 2022) (applying discovery rule to antitrust claims and distinguishing *Gabelli* and *Rotkiske*); *Wu v. Bitfloor, Inc.*, 460 F. Supp. 3d 418, 425 (S.D.N.Y. 2020) (applying pre-*Rotkiske* decision treating discovery rule as the default when the statute is silent to apply discovery rule under Commodities Exchange Act (citing *Levy v. BASF Metals Ltd.*, 917 F.3d 106, 108 (2d Cir. 2019))). The Court should hold, once and for all, that statutes of limitations do not include the discovery rule unless they say so.

B. Regardless Of Whether The Court Resolves The Availability Of The Discovery Rule, This Court's Review Is Warranted.

Even if the Court declines to resolve whether the discovery rule is available, this case is still worthy of Supreme Court review. As Petitioners persuasively explain, there is a clean circuit split on the question presented that is emphatically worth resolving. Further, ruling in Petitioners' favor would bring the law more closely into alignment with what the Copyright Act's plain text requires.

Adopting Petitioners' position would also vindicate this Court's reasoning in *Petrella*. *Petrella* could not have been clearer: the Copyright Act's three-year limitations period "bars relief for any kind of conduct

occurring prior," a "successful plaintiff can gain retrospective relief only three years back from the time of suit," and "[n]o recovery may be had for infringement in earlier years." 572 U.S. at 667, 677. The fact that the statute of limitations "itself takes account of delay," *id.* at 677, in turn renders laches unnecessary and cushions the potential practical harms of the Copyright Act's rolling limitations period.

As the Second Circuit appropriately recognized, notwithstanding the continued validity of the discovery rule in that Circuit, "*Petrella*'s plain language explicitly dissociated the Copyright Act's statute of limitations from its time limit on damages." *Sohm*, 959 F.3d at 52. The Court should similarly apply that plain language and reverse the Eleventh Circuit.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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