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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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This case remains a clear-cut candidate for the Court's review. Respondents acknowledge that the Eleventh Circuit has held that the statute of limitations in the Copyright Act, 17 U.S.C. 507(b), allows retrospective relief for acts that occurred more than three years before the filing of a lawsuit. They further acknowledge that the circuits are divided, with the Eleventh Circuit agreeing with the Ninth Circuit and disagreeing with the Second Circuit. See *Starz Entertainment, LLC* v. *MGM Domestic Television Distribution, LLC*, 39 F.4th 1236 (9th Cir. 2022); *Sohm* v. *Scholastic, Inc.*, 959 F.3d 39 (2d Cir. 2020). And they do not dispute that national uniformity is urgently needed, as major trade associations and copyright scholars have explained in amicus briefs supporting certiorari.

Respondents' arguments against certiorari can be dealt with succinctly. Respondents contend that review is unwarranted because district courts have tended to agree with the Ninth and Eleventh Circuits. But the very fact that district courts, like the courts of appeals, are divided on the question presented merely underscores the need for further review. Respondents also suggest that, should the Court grant review, it will be foreclosed from addressing the antecedent argument that a discovery rule does not apply to the Copyright Act. But petitioners were not obligated to raise a futile challenge to the binding circuit precedent holding that the discovery rule applies, and the question presented in the petition simply affords the Court the opportunity to consider the applicability of the discovery rule at the merits stage if it so chooses.

This case presents the Court with a straight-forward opportunity to restore national uniformity on an exceedingly important question concerning the interpretation of the Copyright Act. The petition for a writ of certiorari should be granted.

A. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

Respondents correctly concede that there is a "2-1 circuit split" and that the decision below is "in conflict with a decision of the Second Circuit." Br. in Opp. 2-3. Their arguments for denying review despite the circuit conflict miss the mark.

Respondents first contend that the "vast majority of the district courts" follow the Ninth and Eleventh Circuit's interpretation of the Copyright Act. See Br. in Opp. 3-4. They rely on an opinion collecting more than a dozen decisions—including several adopting the Second Circuit's conflicting interpretation. See *AMO Development, LLC* v. *Alcon Vision, LLC*, Civ. No. 20-842, 2022 WL

17475479, at *4 n.1 (D. Del. Dec. 6, 2022). The sheer number of courts to have weighed in on the question presented in recent years—on both sides—demonstrates that the conflict among the courts of appeals is only likely to deepen, not resolve.

Respondents further suggest that the opinion below "hardly acknowledge[d] a deepened circuit split." See Br. in Opp. 16. But the Eleventh Circuit did, in fact, acknowledge that "[t]he circuits are split," and it specifically gave its reasons for rejecting the Second Circuit's reasoning in *Sohm*. Pet. App. 10a-11a. And there can be no dispute that the circuits have given conflicting answers to the question presented: namely, whether the Copyright Act permits or precludes retrospective relief for acts that occurred more than three years before the filing of a lawsuit. Compare *id.* at 17a and *Starz Entertainment*, 39 F.4th at 1245-1246, with *Sohm*, 959 F.3d at 52.

For the most part, respondents simply litigate the merits of that question. See Br. in Opp. 4, 13-17. Respondents' arguments are properly left for the merits stage. They are certainly not a reason to deny further review where the circuits are in conflict on the question presented in the wake of *Petrella* v. *Metro-Goldwyn Mayer, Inc.*, 572 U.S. 663 (2014).

B. The Question Presented Is Exceptionally Important And Warrants Review In This Case

Respondents do not dispute the importance of the question presented. They recognize that the decision below permits financial relief "go[ing] back to when the infringement started," which (as here) could be a decade or more even though the defendants obtained a license. Br. in Opp. 19. Respondents also do not question the need for uniformity on the interpretation of the Copyright Act's

limitations period. Nor could they; as amici have explained at length, the circuit conflict "has real and harmful effects in the world by yielding different outcomes based merely on a happenstance of geography." RIAA Br. 10; see Chamber Br. 11-19; Cavazos Br. 15-16. That is particularly significant because the circuits that give rise to the conflict are home to some of the Nation's most prominent artistic and commercial centers—to say nothing of the potential for forum-shopping by plaintiffs seeking to take advantage of a vastly more expansive remedial regime. See Pet. 13-14, 16.

Finally, there is no impediment in this case to addressing whether the discovery rule applies in Copyright Act cases. Respondents contend that petitioners failed to preserve that logically antecedent argument below. See, *e.g.*, Br. in Opp. 5-6, 18-19. But they do not dispute that the availability of the discovery rule is encompassed within the scope of the question presented, nor that it would have been futile for petitioners to make that argument in the lower courts in light of Eleventh Circuit precedent. See *ibid.* This Court has granted review in numerous cases where adverse circuit precedent made it futile to litigate all or some of the question presented below. See, *e.g.*, *Samia* v. *United States*, 143 S. Ct. 542 (2022); *US Airways, Inc.* v. *McCutchen*, 569 U.S. 88, 101 n.7 (2013); *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 125 (2007). The broad question presented here simply affords the Court the opportunity to consider the threshold applicability of the discovery rule if it so chooses, in addition to the core question on which the circuits are indisputably divided.

* * * * *

In short, this case presents an ideal vehicle for resolving a practically significant question of federal law that has divided the courts of appeals. The case for certiorari here is simple and overwhelming. The petition should be granted.

Respectfully submitted.

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