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 Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

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

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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 for copyright claims. The Court should hold that an

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[1] 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.

injury rule, not a discovery rule, applies to determine when a copyright claim has accrued. Alternatively, if a discovery rule does exist, it applies only in cases where the plaintiff can demonstrate fraud. Even if the Court assumes that a broader discovery rule exists, it should hold 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 hold that either no discovery rule, or a very narrow discovery rule, applies to the Copyright Act. The Court's rephrased question presented assumes the existence of a "discovery accrual rule applied by the circuit courts." However, there is no uniform "discovery accrual rule applied by the circuit courts." Although some courts of appeals have recognized some version of a discovery rule, courts differ on both the scope and the justification for the rule. Moreover, the legal analysis governing the lookback period for damages is intertwined with the legal analysis governing the scope and justification for the discovery rule. As such, the Court's decision would provide clearer guidance if it decided the discovery rule's scope rather than assuming the existence of a uniform "discovery accrual rule applied by the circuit courts."

If the Court decides the discovery rule's scope, it should hold that no discovery rule exists. 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.

To the extent a discovery rule exists, it should be limited to fraud cases. *See Rotkiske*, 140 S. Ct. at 361 (noting the "existence of decisions applying a discovery rule in 'fraud cases'"). The Court should repudiate a discovery rule that *invariably* delays accrual until discovery of the infringement.

Certain lower court decisions include loose language endorsing a broad 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 text is clear without resort to the policy consequences of a broad discovery rule. But those consequences likewise would weigh against a discovery rule—and would certainly weigh against a discovery rule that applied outside the fraud context. Statutes of limitations ensure certainty and protect against stale claims, a problem in any context and especially in the copyright context.

If the Court elects to assume the existence of a broad discovery rule, it should still reverse the Eleventh Circuit. The Court should follow the path of *Sohm v. Scholastic Inc.*, 959 F.3d 39 (2d Cir. 2020), which held that regardless of the discovery rule's scope, the lookback period for damages under the Copyright Act is three years. 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.* As the Second Circuit held in *Sohm*, *Petrella* resolves the question presented even if some version of the discovery rule still exists.

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 Court rephrased the question presented

to include a reference to the "discovery rule applied by the circuit courts." Notwithstanding the rephrased question presented, the Chamber respectfully urges the Court to decide the scope and justification for the discovery rule in this case. Specifically, the Court should hold that the discovery rule either does not exist under the Copyright Act, or is limited to cases of fraud. Such a ruling would ensure clarity for lower courts and would prevent mischief and evasion of this Court's decision.

If the Court declines to resolve that question, it should hold that even assuming the Copyright Act includes a discovery rule, *Petrella* forecloses Respondents' efforts to recover damages for stale claims.

I. The Court Should Decide the Scope and Applicability of the Discovery Rule In this Case.

The Court granted certiorari limited to the following question: "Whether, under the discovery accrual rule applied by the circuit courts and the Copyright Act's statute of limitations for civil actions, 17 U. S. C. §507(b), a copyright plaintiff can recover damages for acts that allegedly occurred more than three years before the filing of a lawsuit." As rephrased by the Court, the question presented appears to assume the existence of a uniform "discovery accrual rule applied by the circuit courts," and appears to ask whether the lookback period for copyright damages stretches back beyond three years under that assumption.

Resolving this case in that manner, however, may result in a lack of clarity for lower courts. First, the

courts of appeals differ substantially on the scope and justification for the "discovery accrual rule applied by the circuit courts." Second, the legal analysis in this case may depend on the discovery rule's scope and justification. As such, the Chamber urges the Court to decide the discovery rule's scope and justification, rather than taking the discovery rule as a given.

A. There is no uniform "discovery accrual rule applied by the circuit courts."

In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014), this Court stated: "Although we have not passed on the question, nine Courts of Appeals have adopted, as an alternative to the incident of injury rule, a 'discovery rule,' which starts the limitations period when 'the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim.'" *Id.* at 670 n.4 (quoting *William A. Graham Co. v. Haughey*, 568 F.3d 425, 433 (3d Cir. 2009)). That dictum may have been the basis for the Court's assumption in its rephrased question presented that there exists a uniform "discovery accrual rule applied by the circuit courts." But notwithstanding the dictum in *Petrella*, no such uniform rule exists. There is significant disagreement among lower courts about what the discovery rule is and where it comes from.

Begin with the lower-court decision cited in *Petrella*—the Third Circuit's *Haughey* decision. In that case, the Third Circuit did hold that "the discovery rule governs the accrual of claims under the Copyright Act." 568 F.3d at 428. The Third Circuit's reasoning, however, was baffling. The Third Circuit reasoned 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. 568 F.3d at 433-37. But the fact that Section 507(a) uses different language from 507(b) does not justify adopting a rule that appears in *neither* Section 507(a) *nor* Section 507(b).

Two years later, in a follow-up decision in the same case, the Third Circuit clarified that, regardless of its prior loose language, there is no "discovery accrual rule" in the Copyright Act. *See William A. Graham Co. v. Haughey*, 646 F.3d 138, 150 (3d Cir. 2011) (stating that "the discovery rule" should not "be read to alter the date on which a cause of action accrues"). The court reasoned: "In order to defer accrual, the discovery rule would have to add an additional component to the substantive definitions of the claims to which it applies. That simply cannot be right. Rules regarding limitations periods do not alter substantive causes of action." *Id.* Instead, the Third Circuit held that "the discovery rule must instead be one of those legal precepts that operate to toll the running of the limitations period after a cause of action has accrued." *Id.*

Other circuits have continued to characterize the discovery rule as an accrual rule, while offering varying accounts about where it comes from:

- 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).[2]

- The Ninth Circuit has applied the discovery rule to the Copyright Act based on its citation of a district court case that concerned fraudulent concealment, without any justification for a version of the discovery rule that applies in the non-fraud context. *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)). The Sixth and Fourth Circuit 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 Second Circuit has vaguely adverted to "the text and structure of the Copyright Act"

[2] 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).

and "[p]olicy considerations." *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124–25 (2d Cir. 2014).

- In *Martinelli v. Hearst Newspapers, L.L.C.*, 65 F.4th 231 (5th Cir. 2023), *petition for cert. filed*, 92 U.S.L.W. 3112 (U.S. Nov. 2, 2023) (No. 23-474), the Fifth Circuit 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.

In addition to offering varying justifications for the discovery rule, courts of appeals have differed on its scope. Of particular relevance to this case, courts have disagreed on how to apply the discovery rule in the context of ownership disputes. In the decision below, the Eleventh Circuit applied *Webster v. Dean Guitars*, 955 F.3d 1270 (11th Cir. 2020), which held that holding that "where the 'gravamen' of a copyright claim is ownership, the discovery rule dictates when a copyright plaintiff's claim accrues." Pet. App. 7a (quoting *Webster*, 955 F.3d at 1276). "Under the discovery rule, a copyright ownership claim accrues, and therefore the limitations period starts, 'when the plaintiff learns, or should as a reasonable person have learned, that the defendant was violating his ownership rights.'" *Id.* (quoting *Webster*, 955 F.3d at 1276).

But other courts of appeals do not superimpose a discovery rule onto the statute of limitations in copyright ownership disputes. *Webster* expressly recognized that it was enlarging a circuit split on this issue. As *Webster* explained, the "First, Second, Fifth, and Seventh Circuits have held that copyright ownership claims accrue 'when the plaintiff learns, or should as a reasonable person have learned, that the defendant was violating his rights.'" 955 F.3d at 1275 (citing cases). The court adopted that approach as "most consistent with our existing precedent." *Id.* at 1276. The court recognized, however, that "[t]he Sixth and Ninth Circuits have held that a copyright ownership claim accrues when 'there is a "plain and express repudiation" of ownership by one party as against the other.'" *Id.* at 1275 (citing cases). The court also pointed to Ninth Circuit case law holding that "where the gravamen of a copyright infringement suit is ownership, and a freestanding ownership claim would be time-barred, any infringement claims are also barred." *Seven Arts Filmed Ent. Ltd. v. Content Media Corp. PLC*, 733 F.3d 1251, 1255 (9th Cir. 2013). Thus, in the Sixth and Ninth Circuits, the discovery rule would likely not have applied to this case.[3]

B. Assuming the existence of a uniform discovery rule creates the risk of confusion.

In view of widespread disagreement over the discovery rule's justification and scope, the Court should

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[3] Although *Webster* did not cite it, Tenth Circuit precedent aligns with Sixth and Ninth Circuit precedent. *Stan Lee Media, Inc. v. Walt Disney Co.*, 774 F.3d 1292, 1300 n.4 (10th Cir. 2014).

not merely assume the existence of the discovery rule and decide the case under that constraint. Instead, it should examine that issue, and hold either that no discovery rule exists or that the discovery rule applies only in cases of fraud.

Of course, the Court frequently resolves cases while assuming, without deciding, that a particular legal rule exists. In this case, however, the Court should hesitate to follow that path because it may cloud the Court's analysis and yield confusion for lower courts.

The Chamber's concern is that respondents will attempt to define the discovery rule in a manner that inevitably leads to the conclusion that the lookback period for copyright damages stretches beyond the Copyright Act's three-year limitation period. Specifically, respondents may endorse a version of the discovery rule under which the limitations clock for *any* infringement occurring outside the three-year limitations period starts at the time of discovery, yet the plaintiff may recover *all* damages for that infringement. If respondents define the discovery rule in that manner, then, by definition, the plaintiff could recover damages occurring outside the three-year limitations period. That argument should lose—but explaining *why* it should lose may require explaining why respondents' understanding of the discovery rule is wrong.

As such, the Chamber urges the Court to explain that the discovery rule either does not apply at all to copyright cases or applies only in the case of fraud. *See infra* Part II. That said, even if the Court says nothing about the discovery rule, it can and should resolve this case in petitioners' favor. *See infra* Part III.

II. The Discovery Rule Either Does Not Apply, or Applies Very Narrowly, to the Copyright Act.

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. To the extent a discovery rule exists, it applies only in cases of fraud—which are not alleged here.

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 (citation omitted). 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." 140 S. Ct. 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.[4] The Fair Debt Collection Practices Act,

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[4] *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

however, includes no such provision, and the Court held 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).

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

B. If any discovery rule exists, it applies only in cases of fraud.

The Supreme Court has sometimes applied an "equitable doctrine that delays the commencement of the statute of limitations in fraud actions." *Rotkiske*, 140

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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").

S. Ct. at 361. Under that doctrine, "equity tolls the statute of limitations in cases of fraud or concealment; it does not establish a general presumption applicable across all contexts." *TRW*, 534 U.S. at 27; *see id.* at 37 (Scalia, J., concurring in judgment) (noting "historical exception for suits based on fraud").[5] 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.

In the Chamber's view, the fraud-discovery rule never applies to copyright lawsuits, because copyright infringement actions are not "fraud actions." *Rotkiske*, 140 S. Ct. at 361. Deceitful conduct is not an element of a copyright infringement action; indeed, infringement routinely occurs out in the open.

At most, the fraud-discovery rule applies in copyright cases *involving fraud*. A copyright claim might involve fraud if the plaintiff alleges the defendant

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[5] The Supreme Court has also applied the discovery rule in the context of "latent disease and medical malpractice," *TRW*, 534 U.S. at 27, but it is difficult to imagine how any copyright case would ever involve latent disease or medical malpractice.

fraudulently deprived the plaintiff of his rights under the Copyright Act; this might happen, for example, if the defendant deceived the plaintiff into giving up his ownership interest. Alternatively, a copyright claim might involve fraud if the plaintiff alleges that the defendant fraudulently concealed the cause of action. *See, e.g.*, *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 971 F.3d 1042, 1048 (9th Cir. 2020) (stating that, under fraudulent concealment doctrine, Copyright Act limitations period could be tolled if plaintiff shows "both that the defendant used fraudulent means to keep the plaintiff unaware of his cause of action, and also that the plaintiff was, in fact, ignorant of the existence of his cause of action" (quotation marks omitted)).

The Court need not decide the metes and bounds of such a doctrine (if it exists at all). In this case, the parties stipulated that respondents would not offer evidence of fraud for purposes of tolling the statute of limitations. C.A. Supp. App. 659-660, ECF No. 37. As such, the Court should hold that whatever the scope of any fraud-based discovery rule, it does not apply here.

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, Westlaw (database updated Sept. 2023). 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—liability that may be for conduct occurring many years ago. 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-5a.

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). Thus, 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. Moreover, 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."). The availability of statutory damages counsels for a need to curb potentially indefinite copyright liability.

III. Even Assuming There Exists a Discovery Rule, Petitioners Should Prevail.

If the Court elects to assume the existence of a broad discovery rule, it should still reverse the Eleventh Circuit. *Petrella* could not have been clearer: the Copyright Act's three-year limitations period "bars relief of any kind for 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. *Petrella*'s reasoning is dispositive: whether there is a discovery rule or not, the damages lookback period stretches three years and no further.

The Second Circuit's *Sohm* decision guides the path to ruling in petitioners' favor while remaining silent on the discovery rule. In *Sohm*, the Second Circuit began by holding that, under binding circuit precedent, "the discovery rule applies for statute of limitations purposes in determining when a copyright infringement claim accrues under the Copyright Act." 959 F.3d at 50. The Second Circuit did not explain or endorse this holding, but merely characterized it as circuit precedent that the court was required to follow based on *stare decisis*. *Id.*

The court then held, however, that regardless of whether some version of the discovery rule was still extant, *Petrella* required limiting damages to a three-year lookback period. As the court explained: "Despite not passing on the propriety of the discovery rule in *Petrella*, the Supreme Court explicitly delimited damages to the three years prior to the commencement of a copyright infringement action." *Id.* at 51. The Second Circuit reasoned that "*Petrella*'s plain language explicitly dissociated the Copyright Act's statute of limitations from its time limit on damages." *Id.* at 52. Rejecting the plaintiff's insistence that *Petrella*'s language was dicta, the Second Circuit explained that "[t]he *Petrella* Court partially based its determination

that laches was inapplicable to actions under the Copyright Act on the conclusion that the statute 'itself takes account of delay' by limiting damages to the three years prior to when suit is filed." *Id.* "Therefore, the three-year limitation on damages was necessary to the result in *Petrella* and thus binding precedent." *Id.* Synthesizing *Petrella* and Second Circuit precedent on the discovery rule, the court held that it "must apply the discovery rule to determine when a copyright infringement claim accrues, but a three-year lookback period from the time a suit is filed to determine the extent of the relief available." *Id.*

The Second Circuit's reasoning guides the path toward ruling in petitioners' favor, even assuming the existence of a broad discovery rule. The Court can hold that the discovery rule governs when a claim accrues, but *Petrella* governs what damages may be obtained. The practical effect of such a ruling may be that the discovery rule has limited effect—and perhaps, in a future case, the Court could decide that it does not exist at all. Nonetheless, such a ruling would allow the Court to follow the plain text of the Copyright Act in a manner that is compatible with the rephrased question presented. If the Court takes the discovery rule as a given, such a ruling would resolve this case in a manner most faithful to the statutory text.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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