No. 22-1078

In the Supreme Court of the United States

WARNER CHAPPEL 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 MCHALE & SLAVIN, P.A. AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

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.

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INTEREST OF AMICUS CURIAE

MCHALE & SLAVIN, P.A. is a Florida professional association of intellectual property attorneys that represents parties in all aspects of intellectual property protection, including both plaintiffs and defendants in copyright infringement litigation.[1] Attorneys for the firm regularly litigate intellectual property cases in trial and appellate courts, including the Eleventh Circuit, and also teach intellectual property courses. Many of the firm's cases have focused on issues related to the "discovery rule", including where acts of alleged infringement only occurred more than three years before the suit was filed, an issue more common with images posted, and archived, on the internet. Consequently, attorneys at the firm have developed particular expertise in the nuances of the issues addressed by the question upon which certiorari was granted.

One of the firm's current cases pending at the Court of Appeals for the Eleventh Circuit addresses when copyright infringement claims "accrue" under 17 U.S.C. §507(b), which is presently an open question in the circuit. *See Affordable Aerial Photography v. Property Matters USA, LLC*, Appeal No. 23-12563 (11th Cir.). The briefing in that case was completed on November 20, 2023.

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[1] No counsel for any party authored this brief, in whole or in part, and no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The rephrased question that this Court granted certiorari to resolve asks: Whether, under the discovery accrual rule applied by the circuit courts and the Copyright Act's statute of limitations for civil action, 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. But as Petitioner discusses in its brief, there are different "discovery rules" applied by different courts. *See* Pet. Br. 31-44; *see also Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019) (Thomas, J.) ("The phrase 'discovery rule,' however, has no generally accepted meaning."). And here, the "discovery accrual rule" applied by the Eleventh Circuit in the decision below did not address the accrual of the Respondent's *copyright infringement* claims, but rather whether the Respondent was separately time-barred from establishing *ownership* of the copyrighted works at issue. *Nealy v. Warner Chappel Music, Inc.*, 60 F.4th 1325, 1330 (11th Cir. 2023); *see also Webster v. Dean Guitars*, 955 F.3d 1270, 1275-77 (11th Cir. 2020).

Further, even understanding §507(b) as adopting the occurrence rule—which is the only rule consistent with this Court's precedents—there are still situations where a claim *can* be timely even if filed more than three years after the claim accrued, e.g., under an equitable tolling doctrine. *See Rotkiske*, 140 S. Ct. at 363-64 and n.* (Ginsburg, J., dissenting from the opinion in part and from the judgment) (discussing

confusion in lower courts between the fraud-based discovery rule and equitable tolling doctrines). In cases where equitable tolling principles can save an otherwise untimely copyright infringement claim, such a plaintiff would be able to recover damages for acts that allegedly occurred more than three years before the filing of the lawsuit. But that plaintiff would bear the burden of establishing entitlement to tolling.

As such, the question presented can be answered in the affirmative: Under the discovery accrual rule applied by the circuit courts and the Copyright Act's statute of limitations for civil action, 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. But that leaves lower courts to wrestle with the same question, merely shifting the focus to trying to answer *when* can that plaintiff recover damages for acts occurring more than three years before filing suit.

The better way to answer the question is: Under §507(b), a copyright plaintiff *cannot* recover damages for acts that allegedly occurred more than three years before the filing of a lawsuit *unless* that plaintiff can establish that she is entitled to equitable tolling.

Given the framing of the question presented, the correct answer must concede that there are times that a claim occurring (and accruing) more than three years before filing an action can still be timely. Answering the question by articulating the limits of

§507(b) and the availability of general principles of equitable tolling avoids creating an absolute bar that Congress did not intend when drafting §507(b) while also clarifying *when* a claim can be timely filed more than three years after it occurred, i.e., under general principles of equitable tolling rather than by an overbroad and atextual "discovery rule" applied so as to alter the plain meaning of "accrue."

The application of a broad discovery accrual rule as a principle of statutory interpretation has been identified by this Court as "bad wine of recent vintage." *Rotkiske*, 140 S. Ct. at 360 (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring in judgment)). The Court has long recognized that "Congress legislates against the 'standard rule that the limitations period commences when the plaintiff has a complete and present cause of action.'" *Ibid.* (quoting *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418-19 (2005) (Thomas, J.) (quoting *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997))). Similarly, Congress is presumed to draft limitations periods against the background principle that limtiations periods are customarily subject to equitable tolling unless it would be inconsistent with the relevant statutory text. *Young v. United States*, 535 U.S. 43, 49-50 (2002) (Scalia, J.) (referring to this background principle as "hornbook law").

Contrary to these bedrock principles, the Second

and Ninth Circuits (among others) have adopted a broad discovery rule that transforms the plain text of §507(b) to delay the accrual of a copyright infringement claim until the plaintiff knows, or should have known, of the infringement. *See, e.g., Sohm v. Scholastic*, 959 F.3d 39, 49-51 (2d Cir. 2020); *Starz Ent., LLC v. MGM Domestic TV Distrib., LLC*, 39 F.4th 1236, 1239-41 (9th Cir. 2022). The Third Circuit *initially* appeared to adopt that same "discovery rule" for copyright claim accrual, *William A. Graham Co. v. Haughey*, 568 F.3d 425, 433-37 (3d Cir. 2009), *cert. denied sub nom. USA MidAtlantic, Inc. v. William A. Graham Co.*, 588 U.S. 991 (2009) ("*Graham I*"), but then rejected it.

On further reflection, while addressing prejudgment interest after a finding of copyright infringement, the Third Circuit changed course and held that a copyright claim "accrues" the moment the infringing act occurs but that the limitations period is tolled until the plaintiff knows, or should have known, of the infringement. *William A. Graham Co. v. Haughey*, 646 F.3d 138, 151 (3d Cir. 2011), *cert. denied sub nom. USI MidAtlantic v. William A. Graham Co.*, 132 S. Ct. 456 (2011) ("*Graham II*"). The Third Circuit discussed the "discovery rule" as sometimes being "characterized as delaying the accrual of a cause of action" and other times as "tolling the running of the limitations period." *Id.* at 148. Following this Court's precedents for claim "accrual" it then held "that the 'accrual' of a cause of action occurs at the moment at which each of its

component elements has come into being as a matter of objective reality" and that "[t]he federal discovery rule then operates in applicable cases to toll the running of the limitations period." *Id.* at 146-51. It did not address what it considered "applicable cases."

The Eleventh Circuit, however, has not adopted a discovery rule for copyright infringement claims—that remains an open question in the circuit. But it has adopted a discovery rule that delays the accrual of claims where there is no statute of limitations—and therefore no statutory text to interpret. *See, e.g.*, *Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 588 (11th Cir. 1990) (applying a discovery rule to hold a §1983 claim "accrue[s] when the plaintiff knows or has reason to know of the injury which is the basis of the action"); *Webster*, 955 F.3d at 1275-77 (collecting cases of Declaratory Judgment Act claims for copyright ownership or co-ownership and adopting one of the two discovery rules discussed therein).

It applied *that* discovery rule in *Webster* where the "gravamen" of the copyright infringement claim was ownership, i.e., where the plaintiff needed to establish ownership of the work that had been licensed to the defendant by a third party, holding that a plaintiff must establish ownership of her work within three years of when she learns, or should as a reasonable person have learned, that her ownership rights were being violated. 955 F.3d at 1275-76. Applying that principle, the Eleventh Circuit held that because ownership is a necessary *element* of a copyright

infringement action, when the plaintiff is time-barred from establishing ownership of the work the infringement claim necessarily fails. *Id.* at 1276-77; *see also Feist Pub'lns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (O'Connor, J.) ("To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.").

The *Webster* discovery rule, applied below, did not address "accrual" of the copyright infringement claims. *Webster*, 955 F.3d at 1275-77; *Nealy*, 60 F.4th at 1330. The parties below stipulated "that this case presents an 'ownership dispute' within the meaning of the statute of limitations for copyright claims," i.e., that the *Webster* discovery rule applied. *Nealy*, 60 F.4th at 1329-31. Based on that stipulation, a narrow question was certified for interlocutory appeal asking: "whether damages in this copyright action are limited to a three-year lookback period as calculated from the date of the filing of the complaint." *Id.* at 1328. The even narrower holding was merely that §507(b) governs the timeliness of copyright claims and the Copyright Act "does not impose a separate bar on retrospective relief for an otherwise timely claim." *Id.* at 1334-35.

If this Court does not resolve when copyright infringement claims "accrue" under §507(b), answering the question presented results in different outcomes based on which "discovery accrual rule" is applied by a given circuit.

Applying the *Webster* discovery rule, §507(b) still prevents a copyright plaintiff from recovering damages for infringing acts that occurred more than three years before filing the action, unless that plaintiff can establish a basis for equitable tolling. *See, e.g.*, *Webster*, 955 F.3d at 1275-77 (adopting a discovery rule for claims seeking a declaration of copyright ownership or co-ownership); *Nealy*, 60 F.4th at 1329-30 (a discovery rule applies only to the type of claim that accrues once, whereas an injury rule applies to the types of claims where separate infringing acts result in separate claims accruing, i.e., copyright infringement); *Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338, 340-41 (5th Cir. 1971) (holding that copyright infringement claims are subject to tolling based on general equitable doctrines, and affirming dismissal of copyright claims as untimely based on the last *occurrence* of an infringing act where the plaintiff could not establish fraudulent concealment of the cause of action to toll the limitations period).

Applying a different discovery rule, such as the broad discovery rule that delays when copyright claims accrue, *see, e.g.*, *Sohm*, 959 F.3d at 49-51; *Starz*, 39 F.4th at 1239-41, or a discovery rule that automatically tolls the statute of limitations until "discovery," *see Graham II*, 646 F.3d at 150-51, would permit a plaintiff to recover for infringing acts that occur outside of the Copyright Act's statute of limitations. Such discovery rules are contrary to the plain text of §507(b) and contrary to this Court's precedents for statutes of

limitations; they operate to create a special, copyright-specific rule for claim accrual that this Court should not endorse.

Separate from that inquiry, however, the Ninth and Eleventh Circuits are correct that the Copyright Act does not have a time limitation on damages that is *separate from* the statute of limitations. *See Starz*, 39 F.4th at 1245-46; *see also Nealy*, 60 F.4th at 1334. The Second Circuit erred when it held otherwise. *See Sohm*, 959 F.3d at 51-52. That error, however, appears to reflect internal tension with being bound to apply a broad discovery rule after *Petrella*. *See Sohm*, 959 F.3d at 49-51.

Given the limited certified question addressed by the Eleventh Circuit below, it did pass on whether the Respondent is barred from recovering retrospective relief for infringing acts that occurred more than three years before this action was filed. It only addressed whether the Copyright Act contained a time limitation on damages that is *separate from* §507(b). *See Nealy*, 60 F.4th at 1334 ("Having established that *Petrella* itself does not impose a separate bar on retrospective relief for an otherwise timely claim, we turn to the Copyright Act's text to see if it supports such a bar. We conclude it does not."); *see also Starz*, 39 F.4th at 1245 (explaining that *Petrella* "did not create a damages bar separate from the statute of limitations").

Under the Eleventh Circuit's *Webster* discovery rule, the Respondent *is not barred* from (potentially)

establishing ownership of the copyrighted works at issue and, therefore, is able to maintain a cause of action. *See Nealy*, 60 F.4th at 1331. Under the Eleventh Circuit's *Webster* discovery rule and §507(b), however, if the Respondent is able to establish ownership of the works, he *is likely still barred* from recovering damages for infringing acts that occurred more than three years before filing suit because Respondent waived equitable tolling arguments. *See* Pet. Br. 44 n.9.

Though there is a genuine split between the Second and Ninth Circuits, that split merely highlights the need for this Court to address when copyright claims "accrue" under §507(b). Resolving only the split between *Sohm* and *Starz*—whether the Copyright Act contains a time limitation on damages separate from the statute of limitations—does not affect the outcome of this case. While those circuits have adopted an atextual "discovery rule" governing accrual of copyright infringement claims, the Eleventh Circuit has not. To resolve the present dispute, as well as provide the necessary guidance to the lower courts, this Court should clarify that copyright claims accrue under §507(b) based on the occurrence of the infringing act, but that the limitations period can be equitably tolled if a plaintiff can establish a basis for tolling.

Rather than a "discovery accrual rule" copyright claims are subject to general equitable doctrines, where "once a defendant has shown that a claim is time barred by the applicable statute of limitations, it is incumbent upon the plaintiff, if he is to avoid the

bar, to come forward and demonstrate that for some equitable reasons the statute should be tolled in his case." *Prather*, 446 F.2d at 340. This Court has similarly explained both that unless it would be inconsistent with the statutory text, Congress is presumed to draft limitations periods against the background principle of "hornbook law" that limitations periods are subject to equitable tolling, *Young*, 535 U.S. at 44, and that Congress legislates against the "standard rule" that limitations periods commence when there is a complete and present cause of action, *Rotkiske*, 140 S. Ct. at 360.

For copyright infringement claims, that means "a copyright plaintiff's claim accrues when the harm, that is, the infringement, occurs, no matter when the plaintiff learns of it." *Nealy*, 60 F.4th at 1330 (citing *Petrella v. MGM, Inc.*, 572 U.S. 663, 670 (2014)). To establish a statute of limitations defense, the defendant's burden is to show that the infringing act *occurred* more than three years before the suit was filed. *Prather*, 446 F.2d at 339-41. The burden then shifts back to the plaintiff to establish an equitable basis for tolling. *Ibid.*

This is the rule most consistent with the statutory text, the presumptions we attribute to Congress, and this Court's precedents for statutes of limitations, it also produces the fairest results. Most cases will survive a motion to dismiss unless the complaint forecloses a tolling argument. At summary judgment, the defendant will need to establish that the infringing act

occurred more than three years before the suit was filed, and then the burden would shift to the plaintiff to show that there is a triable issue with respect to tolling. At trial, if the defendant establishes that the infringing act occurred more than three years before the suit was filed, the plaintiff can only prevail if she establishes a basis for tolling.

This protects defendants from being haled into court for long-dead claims, particularly where the allegedly infringing act was public and temporary, occurring only outside of the Act's three-year limitations period.

ARGUMENT

I. Under the Eleventh Circuit's *Webster* Discovery Rule and the Copyright Act's Statute of Limitations, Respondents Should Not Be Able to Obtain Relief for Infringements That Occurred More Than Three Years Before This Suit Was Filed Because Any Equitable Tolling Argument Was Abandoned.

The Eleventh Circuit has not yet construed §507(b) and has not adopted a discovery rule for the accrual of copyright *infringement* claims. But Eleventh Circuit precedent from the Former Fifth Circuit has implicitly held—albeit with respect to the 1957 amendment to the 1909 Copyright Act, *see* 17 U.S.C. §115(b) (1958 ed.)—that a copyright infringement claim accrues based on the occurrence of an infringing act but is subject to general principles of equitable tolling. *Prather*,

443 F.2d at 339-41; *see also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) (adopting precedential decisions of the Former Fifth Circuit). Further, the decision below also indicated that copyright *infringement* claims "accrue" when the infringing act "occurs, no matter when the plaintiff learns of it." *Nealy*, 60 F.4th at 1330; *see also id.* at 1332-33 (contrasting infringement claims that apply an injury rule to ownership "claims" that apply the *Webster* discovery rule).

The Eleventh Circuit adopted the *Webster* discovery rule to address copyright claims where the "gravamen" of the infringement claim is ownership, i.e., where a third party asserted ownership of the work and licensed it to the defendant. 955 F.3d at 1275-77; *Nealy*, 60 F.4th at 1329-31. Disputes where the plaintiff seeks to establish herself as the owner or co-owner of the work have been referred to as copyright ownership "claims." *See Webster*, 955 F.3d at 1275-76 (collecting cases seeking declarations of ownership); *see also Everly v. Everly*, 958 F.3d 442, 463-68 (6th Cir. 2020) (Murphy, J., concurring) (discussing the problem of ownership "claims").

But "ownership" is not a claim under the Copyright Act; ownership is an *element* of a copyright infringement claim. *See Feist*, 499 U.S. at 361; *see also Everly*, 958 F.3d at 463-68 (Murphy, J., concurring) (discussing the problem of ownership "claims"). A claim seeking a declaration of "ownership" (or co-ownership) of a copyrighted work is a claim under the Declaratory

Judgment Act, and therefore has no statute of limitations. *See Webster*, 955 F.3d at 1275-76 (collecting cases); *see also Everly*, 958 F.3d at 463-68 (Murphy, J., concurring).

The Eleventh Circuit adopted the *Webster* discovery rule from claims seeking declarations of copyright ownership or co-ownership rights. 955 F.3d at 1275-77. It rejected the "express repudiation test" and adopted the "discovery rule" for accrual of an ownership "claim," as that rule was most consistent with its other precedents which apply a general discovery rule for claims that do not have a statute of limitations. *See, e.g.*, *Ibid.*; *Corn*, 904 F.2d at 588 (applying a general "discovery rule" to §1983 claims).

But as the decision below highlighted, these types of claims—seeking ownership rights—accrue only once. *Nealy*, 60 F.4th at 1330, 1332-33. The Eleventh Circuit reasoned that once a plaintiff is time-barred from bringing a claim to establish ownership rights in the work, then she cannot establish the necessary ownership *element* to maintain an infringement claim. *Webster*, 955 F.3d at 1277 ("when a copyright ownership claim is time-barred, 'all those claims logically following therefrom should be barred including infringement claims.'") (quoting *Calhoun v. Lillenas Publ'g*, 298 F.3d 1228, 1236 (11th Cir. 2002) (Birch, J., concurring)).

Thus, the *Webster* discovery rule is not a bar based on the Copyright Act's statute of limitations, but a

separate bar to establishing ownership of the asserted work. 955 F.3d at 1275-76. If a plaintiff is charged with knowledge that a third party was licensing the work and claiming ownership of it, but waits more than three years to bring an action for the purpose of establishing her ownership of the work, she is forever barred (in the Eleventh Circuit) from establishing ownership of that work; any infringement claim based on that work will then necessarily fail. *Id.* at 1275-77.

Below, the parties stipulated that the *Webster* discovery rule governed this case and certified a question to the Eleventh Circuit as to whether there was a time limit on damages *separate from* §507(b). *Nealy*, 60 F.4th at 1328-31. But the *Webster* discovery rule does not address accrual under §507(b), 955 F.3d at 1275-77, and as a result of the parties' stipulation, the decision below did not address accrual under §507(b), *see Nealy*, 60 F.4th at 1328.

Accrual under §507(b), and whether a discovery rule or occurrence rule applies, is technically an open question in the Eleventh Circuit.[2] The plain text of §507(b), as well as precedents of this Court and the Eleventh Circuit, indicate that the Eleventh Circuit should hold (when it finally addresses the question) that copyright infringement claims "accrue when the harm, that is, the infringement, occurs, no matter

[2] As noted *supra*, *amicus* is counsel in a pending case at the Eleventh Circuit, *Affordable Aerial Photography, Inc. v. Property Matters USA, LLC*, Appeal No. 23-12563 (11th Cir.), which seeks to resolve this open question.

when the plaintiff learns of it." *See Nealy*, 60 F.4th at 1330; *see also Prather*, 466 F.2d at 339-41; *MSPA Claims 1, LLC v. Tower Hill Prime Ins. Co.*, 43 F.4th 1259, 1265-67 (11th Cir. 2022) (applying *Rotkiske* to interpret "accrue" in 28 U.S.C. §1658(a) as adopting the occurrence rule). As Petitioner correctly asserts, §507(b) is properly interpreted as adopting the occurrence rule rather than an atextual discovery rule. *See* Pet. Br. 15-24.

This Court's precedent reflects that applying a broad, atextual discovery rule to alter the meaning of the verb "accrue"—but only for copyright cases—is error. *See, e.g.*, *Gabelli v. S.E.C.*, 568 U.S. 442, 448-49 (2013) (Roberts, C.J.); *Rotkiske*, 140 S. Ct. at 360-61; *Petrella*, 572 U.S. at 670-71 (not passing on the question but articulating these long-standing principles); *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 337-38 (2017) (Alito, J.) (explaining the interpretation of statutes of limitations generally). As Petitioner correctly addresses, under the plain text of §507(b) copyright claims "accrue" when they occur, not on the basis of a broad discovery rule. Pet. Br. 15-24; *see also Nealy*, 60 F.4th at 1330 (explaining that non-ownership copyright infringement claims would "accrue[] when the harm, that is, the infringement, occurs, no matter when the plaintiff learns of it," but are subject to the separate-accrual rule).

Under Eleventh Circuit precedent, copyright claims are subject to "general equitable doctrines,

[and] once a defendant has shown that a claim is time barred by the applicable statute of limitations, it is incumbent upon the plaintiff, if he is to avoid the bar, to come forward and demonstrate that for some equitable reasons the statute should be tolled in his case." *Prather*, 446 F.2d at 340. Similarly, this Court has explained that "[i]t is hornbook law that limitations periods are customarily subject to equitable tolling, * * * unless tolling would be inconsistent with the text of the relevant statute," and "Congress must be presumed to draft limitations periods in light of this background principle." *Young*, 535 U.S. at 49 (internal quotations and citations omitted).

For copyright infringement, that means a defendant need only establish that the alleged infringing act *occurred* outside of the limitations period, which then shifts the burden to the plaintiff to establish a basis for tolling. *Prather*, 446 F.2d at 339-41 (affirming dismissal of the plaintiff's claim based on the occurrence of the last infringing act and the finding that the plaintiff could not establish entitlement to equitable tolling for fraudulent concealment).

This is the rule most consistent with the text of the statute and this Court's precedents, and it produces the fairest results. Under this rule, most cases will survive a motion to dismiss unless tolling is foreclosed by the pleadings. At summary judgment, the defendant will need to show that the infringing act occurred more than three years before the suit was filed to shift the burden to the plaintiff to show that there is a

triable issue with respect to tolling. At trial, if the defendant has established that the infringing act occurred more than three years before the suit, the plaintiff will be required to establish a basis for tolling.

Against this backdrop, answering the question presented under the *Webster* discovery rule—as this case would—and the Copyright Act's statute of limitations, a plaintiff will *sometimes* be able to recover damages for infringing acts that occurred more than three years before the lawsuit was filed. The "sometimes," however, is not based on the *Webster* discovery rule, but rather because copyright claims are subject to general principles of equitable tolling. *See, e.g.*, *Prather*, 446 F.2d at 339-41; *Young*, 535 U.S. at 44 (Congress legislates against the background principle that limitations periods are subject to equitable tolling).

Here, Respondents conceded that equitable tolling cannot save their claims. Pet. Br. 44 n.9. Under the *Webster* discovery rule, while Respondents *may* be able to establish ownership of the asserted works, they should still be barred by the application of §507(b) from recovering damages for infringements that occurred more than three years before the suit was filed.

II. To Resolve This Case and the Confusion in the Lower Courts, the Court Should Hold That Copyright Infringement Claims "Accrue" Based on the Occurrence of the Infringing Act, But That General Equitable Tolling Principles Can Apply to Toll the Limitations Period.

Answering the question presented will resolve the split between the Second and Ninth Circuits, but without more, it is not likely to resolve this case or the confusion among the lower courts. The Second Circuit held that *Petrella* created a time limitation on damages separate from §507(b); the Ninth Circuit held the opposite. The question presented to resolve that split asks only 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 an action. But if the Court answers that a plaintiff "can" recover those damages, as it should, it will only resolve that there is no separate damages bar in the Copyright Act; it will not likely resolve *this case* or the confusion among the lower courts.

Reading a broad discovery rule into the Copyright Act's statute of limitations is atextual, conflicts with this Court's precedents, and should not be endorsed. But it is nevertheless still *possible* for a claim to be timely under §507(b) even if it occurred (and accrued) more than three years before a lawsuit was filed. *See*

Prather, 446 F.2d at 340 (general equitable tolling principles apply to copyright claims). And when equitable tolling saves a copyright infringement claim that would otherwise be untimely under §507(b), the Copyright Act does not provide a *separate* time limitation on the plaintiff's ability to recover damages for that claim. However, the Respondent here abandoned equitable tolling arguments below, so *this plaintiff* will not likely be able to recover damages. *See supra*, §I.

Though mired with confusing dicta referencing different discovery rules (and without articulating that they were different rules), the narrow decision below correctly held that neither *Petrella* nor the Copyright Act "impose[s] a separate bar on retrospective relief for an otherwise timely claim" under §507(b). *See Nealy*, 60 F.4th at 1334-35; *see also Starz*, 39 F.4th at 1245 ("The Supreme Court did not create a damages bar separate from the statute of limitations in *Petrella*."). The decision below, however, did not resolve when a claim is timely under §507(b). *Supra*, §I.

If the Court does not resolve the underlying question as to when copyright infringement claims "accrue" under §507(b), this case, and the confusion in the lower courts, will not be resolved. If the Court holds that a copyright plaintiff "can" recover damages based on an infringing act that allegedly occurred more than three years before the lawsuit was filed, that will only mean that there is no *separate* damages bar—that answer alone will not clarify whether the recovery is possible because of a broad discovery rule or because

equitable tolling "can," once established by the plaintiff, save a claim that would otherwise be untimely. And as addressed *supra*, it will still be unlikely that the Respondent will be able to recover damages for infringements that occurred more than three years before the action was filed.

This Court's precedents indicates that a copyright claim should accrue based on the occurrence of an act of infringement. *See Rotkiske*, 140 S. Ct. at 360; *see also Petrella*, 572 U.S. at 670-71; *Nealy*, 60 F.4th at 1330. The Court should not endorse the application of a "special copyright rule" interpreting "accrue" as adopting a "discovery rule" that is contrary to its plain text. *Compare Rotkiske*, 140 S. Ct. at 360 *with Starz*, 39 F.4th at 1239-41; *see also Everly*, 958 F.3d at 459-68 (Murphy, J., concurring) (discussing the errors in applying a "discovery rule" to copyright infringement claims and in considering ownership a "claim" under the Copyright Act).

In addressing the question presented, the Court should resolve the underlying confusion of the circuit courts—the atextual discovery rule that is being applied to change the meaning of "accrue" in copyright cases.

Holding that §507(b) adopted an occurrence rule that is subject to equitable tolling if established by the plaintiff, stays consistent with the plain text of §507(b), this Court's precedents, and the presumptions attributed to Congress in drafting statutes of

limtiations. *See, e.g.*, *Rotkiske*, 140 S. Ct. at 360; *Young* 535 U.S. at 44 ("It is hornbook law that limitations periods are customarily subject to equitable tolling, * * * unless tolling would be inconsistent with the text of the relevant statute," and "Congress must be presumed to draft limitations periods in light of this background principle.") (internal quotations and citations omitted); *Prather*, 446 F.2d at 339-41 (holding that general equitable principles apply to toll the limitations period of copyright claims, but that it is the plaintiff's burden to establish an equitable basis for tolling).

* * * * *

Resolving this case and the Copyright Act's statute of limitations should be straightforward, and consistent with the plain text of the Copyright Act, history, and the Congressional presumptions used for interpreting statutes of limitations. It should also reflect the purpose and policy behind statutes of limitations:

> Statutes of limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly

> destroying evidence of rights, they supply in its place a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed is a conclusive bar. The bane and antidote go together.

Wood v. Carpenter, 101 U.S. 135, 139 (1879); *see also Gabelli*, 568 U.S. at 448-49 (citing *Wood*).

If plausible based on the text, Congress is presumed to have adopted an occurrence rule when drafting a statute of limitations. *Rotkiske*, 140 S. Ct. at 360. And unless it would be inconsistent with the statutory text, Congress is also presumed to draft limitations periods in light of the basic principles that they are subject to equitable tolling. *Young*, 525 U.S. at 49-50.

As the Former Fifth Circuit understood in 1971: Copyright claims "accrue" when the infringing act occurs, but general principles of equitable tolling, e.g., for fraudulent concealment, can toll the limitations period if the plaintiff can establish a basis for tolling. *Prather*, 446 F.2d at 339-41. But following that decision, the Ninth Circuit in *Roley* started a trend of "discovery rules" that has led other courts astray from these basic principles. *See Everly*, 958 F.3d at 461-62 (Murphy, J., concurring).

Roley created its "discovery rule" out of *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 507 F. Supp. 1128, 1135 (D. Nev. 1980), which itself was applying *Prather*'s holding regarding equitable tolling

for fraudulent concealment—not a "discovery rule". *See Everly*, 958 F.3d at 461-62 (Murphy, J., concurring); *see also Wood*, 507 F. Supp. at 1135 (citing *Prather*, 446 F.2d at 340).

The consequences of that new discovery rule have filtered through most other circuits and now operate to nearly obliterate the Copyright Act's statute of limitations. Plaintiffs need only assert they did not know about an alleged infringement, and a defendant is unlikely to be able to establish otherwise—the proof of the plaintiff's knowledge would likely be solely within the plaintiff's control. That result flips the burden that would apply under general equitable tolling principles. *See Prather*, 446 F.2d at 340-41.

This Court should realign the application of copyright law in the lower courts based on the interpretation of the plain statutory text, precedent, history, and Congressional presumptions. Copyright claims should "accrue[] when the harm, that is, the infringement, occurs, no matter when the plaintiff learns of it." *Nealy*, 60 F.4th at 1330. But a plaintiff can save an otherwise untimely claim if she can establish a basis for equitable tolling. *See Prather*, 446 F.2d at 340-41; *see also Young*, 535 U.S. at 49-50.

Under this rule, a repeat "infringer," such as Petitioner—assuming the Respondent proves ownership of the works—will still be liable for infringing acts that occurred within three years of a lawsuit. But those whose infringing acts occurred—and ceased—more

than three years before the action was filed, where "evidence has been lost, memories have faded, and witnesses have disappeared," will be spared. *See Gabelli*, 568 U.S. at 448 (quoting *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)). Those "wrongdoers are entitled to assume that their sins may be forgotten." *Id.* at 449 (quoting *Wilson v. Garcia*, 471 U.S. 261, 271 (1985)).

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the Court should answer the question presented by holding that a plaintiff *cannot* obtain relief for infringing acts that occurred more than three years before filing an action *unless* she can establish a basis for equitable tolling. In so doing, the Court can resolve the confusion in the lower courts by clarifying that copyright infringement claims "accrue" under §507(b) based on the occurrence of the alleged infringing act, not based on a "discovery rule," and that it is the plaintiff's burden to establish entitlement to equitable tolling doctrines before one can be applied.

Respectfully submitted,

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