



1           IN THE SUPREME COURT OF THE UNITED STATES  
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3   WARNER CHAPPELL MUSIC, INC.,           )  
4   ET AL.,                                    )  
5                                    Petitioners,            )  
6                                    v.                                ) No. 22-1078  
7   SHERMAN NEALY, ET AL.,                )  
8                                    Respondents.            )

9   - - - - -

10                                   Washington, D.C.  
11                                   Wednesday, February 21, 2024

12  
13                   The above-entitled matter came on for  
14   oral argument before the Supreme Court of the  
15   United States at 11:41 a.m.

16  
17   APPEARANCES:  
18   KANNON K. SHANMUGAM, ESQUIRE, Washington, D.C.; on  
19        behalf of the Petitioners.  
20   JOE WESLEY EARNHARDT, ESQUIRE, New York, New York; on  
21        behalf of the Respondents.  
22   YAIRA DUBIN, Assistant to the Solicitor General,  
23        Department of Justice, Washington, D.C.; for the  
24        United States, as amicus curiae, supporting the  
25        Respondents.

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P R O C E E D I N G S

(11:41 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 22-1078, Warner Chappell Music versus Nealy.

Mr. Shanmugam.

ORAL ARGUMENT OF KANNON K. SHANMUGAM  
ON BEHALF OF THE PETITIONERS

MR. SHANMUGAM: Thank you, Mr. Chief Justice, and may it please the Court:

This case presents the question whether a copyright plaintiff can recover damages for acts that allegedly occurred more than three years before the filing of suit.

As a straightforward matter of statutory interpretation, the answer to that question here is no. Under the applicable statute of limitations, a civil action must be brought within three years after the claim accrued. A claim accrues when the plaintiff has a complete cause of action.

Accordingly, as this Court repeatedly stated in *Petrella*, a plaintiff can obtain damages for acts of infringement only within three years of filing. And under this Court's

1 understanding of the background discovery rule,  
2 a plaintiff is entitled to extend that period  
3 only in cases involving fraud.

4 Now faced with those points,  
5 Respondents seek to use the rephrased question  
6 presented to clear the board of Petitioners'  
7 strongest arguments. But that question directs  
8 the parties to address the statute, and  
9 statutory construction begins with the text.

10 Respondents eventually join issue on  
11 the text, but the inferences from the other  
12 provisions they cite cannot overcome the plain  
13 meaning of the term "accrues." And even if the  
14 statutory text were somehow off the table here,  
15 Respondents offer no valid explanation for this  
16 Court's statements in *Petrella*, and they assume  
17 the existence of a broad discovery rule, even in  
18 the face of disagreement among the lower courts  
19 about the discovery rule's scope. And  
20 Respondents do not dispute that if the discovery  
21 rule applies only in cases involving fraud, they  
22 are not entitled to invoke it.

23 There is no precedent for this Court's  
24 resolving a question of statutory interpretation  
25 by assuming away the relevant statutory text.

1 At most, the rephrased question presented  
2 assumes the existence of some version of the  
3 discovery rule. It does not take sides on the  
4 scope of that rule.

5 Nor need the Court establish the exact  
6 contours of the discovery rule here. Instead,  
7 it need only hold that Respondents in this case  
8 are not entitled to damages for acts that took  
9 place more than a decade before they filed suit.  
10 And on that basis, this Court should reverse the  
11 court of appeals' judgment.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: Did the courts, any  
14 of the courts below, rule on or pass on the  
15 discovery rule, or did it -- they just simply  
16 assume the existence of some discovery rule?

17 MR. SHANMUGAM: So I think that the  
18 court of appeals reaffirmed its prior discovery  
19 rule from the Webster decision, which applies  
20 parenthetically only in the context of ownership  
21 disputes.

22 JUSTICE THOMAS: So the argument that  
23 you're making now, was it raised below?

24 MR. SHANMUGAM: So we did not raise  
25 that argument in the Eleventh Circuit precisely

1 because we were bound by the Webster decision.  
2 But we would respectfully submit that that is  
3 not necessary, both because the Eleventh Circuit  
4 passed upon the issue and because there has  
5 never been a requirement that a party challenge  
6 binding court of appeals case law as a ticket to  
7 raise arguments before this Court.

8 JUSTICE THOMAS: What was the question  
9 that was certified to the Eleventh Circuit?

10 MR. SHANMUGAM: So the question that  
11 was certified was the question of the  
12 availability of retrospective relief for acts  
13 beyond three years from the time of the filings.

14 JUSTICE THOMAS: But didn't it assume  
15 the existence of the -- of the discovery rule?

16 MR. SHANMUGAM: Precisely because, in  
17 the Eleventh Circuit, there was binding case law  
18 on that issue. And our fundamental submission  
19 for this Court is that we are not challenging  
20 the existence of a discovery rule.

21 To be sure, the question of the scope  
22 of any discovery rule is to some extent  
23 intertwined with the substantive question that  
24 is presented here. And to quote from this  
25 Court's question presented, that question is

1 "whether a copyright plaintiff can recover  
2 damages for acts that allegedly occurred more  
3 than three years before the filing of a  
4 lawsuit."

5 JUSTICE BARRETT: Mr. Shanmugam, we  
6 took it off the table, and your cert petition  
7 did not ask us to grant cert on the merits of  
8 the discovery rule. In fact, your cert petition  
9 acknowledged that there was no split on the  
10 discovery rule and that the split was between  
11 the Second and the Ninth on this recovery of  
12 damages beyond three years' point.

13 MR. SHANMUGAM: Well, I would  
14 respectfully disagree with that, Justice  
15 Barrett, to this extent: In the star footnote  
16 in our petition, we indicated that the Court may  
17 wish --

18 JUSTICE BARRETT: But it wasn't the  
19 question on which you sought cert. And your  
20 brief pretty much says, well, this is our  
21 strongest point, so this is what we're going to  
22 focus on. The star footnote was not what you  
23 asked us to grant cert on.

24 MR. SHANMUGAM: Well, we asked this  
25 Court to grant cert on a somewhat broader

1 question presented. The formulation of our  
2 question presented, as we indicated in the star  
3 footnote, would have given the Court the  
4 opportunity to pass on the antecedent question  
5 of whether or not the Copyright Act embodies a  
6 discovery rule.

7           Once this Court rephrased the question  
8 presented, we abandoned any argument that there  
9 is no discovery rule. My point to this Court is  
10 simply that the scope of the discovery rule is  
11 relevant to this question. Why is --

12           JUSTICE JACKSON: But how so, Mr.  
13 Shanmugam? When we rephrased the question, we  
14 rephrased it. And I noted that you didn't read  
15 the part, when -- when you talked about what the  
16 question presented is, whether under the  
17 discovery rule applied by the circuit courts and  
18 the Copyright Act's statute of limitation for  
19 civil actions. We were very specific. We  
20 weren't saying, you know, please entertain some  
21 arguments about the scope of the rule. We were  
22 taking it off the table, as Justice Barrett  
23 suggests.

24           MR. SHANMUGAM: Yeah, happy to address  
25 that, and I certainly didn't mean to ignore the

1 prepositional phrase at the beginning.

2 JUSTICE JACKSON: The critical -- the  
3 critical part.

4 MR. SHANMUGAM: Well -- well, let me  
5 address that directly. So I think that what  
6 that part of the question presented did was to  
7 direct the parties to address the substantive  
8 question, the availability of retrospective  
9 relief, in light of two considerations, as you  
10 say, first, the discovery accrual rule applied  
11 by the circuit courts and, second, the statute  
12 of limitations itself.

13 Now our submission, as the Court will  
14 be aware, as to the first part of that is that  
15 there is no consensus in the courts of appeals  
16 about the scope of the discovery rule. There is  
17 consensus about the existence of a discovery  
18 rule. On that issue, all of the regional  
19 circuits have said to some extent that there is  
20 a discovery rule. We read this Court's  
21 rephrasing of the question presented to take  
22 that issue off the table precisely because there  
23 was no circuit conflict on that issue.

24 But the Court also addressed --  
25 directed us to address the statutory text. And

1 our submission, to the extent that Respondents  
2 and the government suggest that, well, you  
3 should just look at the arguments in the court  
4 of appeals' decisions addressing the circuit  
5 conflict, is that when you look at those  
6 decisions, they in turn address this Court's  
7 decision in Petrella, they cite the language on  
8 which we rely from Petrella, and our submission  
9 to this Court is that that language, in turn,  
10 relied on the statute of limitations. It relied  
11 on Section 507(b). When the Court said on  
12 multiple occasions that retrospective relief was  
13 not available for acts beyond three years, the  
14 Court was discussing Section 507(b).

15 So I think it would be quite  
16 artificial for this Court to try to --

17 JUSTICE SOTOMAYOR: Counsel, isn't it  
18 artificial for you to do what Justice Barrett  
19 said, which is to raise the most important part  
20 of your argument in a footnote to say the Court  
21 can reach it if it wants?

22 The Court chose not to. Your  
23 petition -- you point to Samia, where the Court  
24 did reach a question that wasn't argued below.  
25 It's a very good example. And that petition was

1 very honest about the fact that it was asking  
2 the Court to answer the question that it had not  
3 raised below because of binding circuit  
4 precedent.

5 You didn't do that.

6 MR. SHANMUGAM: Well --

7 JUSTICE SOTOMAYOR: You came in and  
8 said reach this other question, not the one  
9 that's most important, not the one I'm going to  
10 hinge my argument on in my brief. Don't reach  
11 that because there's no circuit split, you don't  
12 have to. We're just going to rely on the  
13 discovery rule argument.

14 MR. SHANMUGAM: So I have two points  
15 in response to that. The first is that, again,  
16 in the cert petition, I think we were quite  
17 forthright in indicating that we would raise the  
18 issue on which we were bound below, the issue of  
19 whether or not the Copyright Act embodied a  
20 discovery rule at all. When the Court --

21 JUSTICE SOTOMAYOR: No, counsel. You  
22 put that in a footnote, that there was no  
23 circuit split around it.

24 MR. SHANMUGAM: Yes, but -- but --

25 JUSTICE SOTOMAYOR: Can I move on to

1 another --

2 MR. SHANMUGAM: -- but I'm happy to --

3 JUSTICE SOTOMAYOR: -- can I move on  
4 to another issue? Show me the statutory  
5 language that you reply on.

6 The damages section speaks about  
7 damages. The statute of limitations speaks  
8 about a time period to file a complaint. You're  
9 automatically tying the two. Tell me how you're  
10 doing it.

11 MR. SHANMUGAM: Sure, I'd be glad to.  
12 And that is precisely why --

13 JUSTICE SOTOMAYOR: Statutorily how.

14 MR. SHANMUGAM: Yes. And that's  
15 precisely why in our brief we start with the  
16 statutory language. After all, this is a  
17 question of statutory interpretation.

18 We believe that the relevant language  
19 is the language in Section 507(b), as this Court  
20 directed in the rephrased question presented,  
21 and not the language in 504 or any other  
22 provision. We would freely recognize that in  
23 the remedial provision, there is no sort of  
24 limitations period built into that.

25 We believe that the language of

1 Section 507(b) and, of course, in particular,  
2 the operative term "accrues" is the relevant  
3 language.

4 Now I will say that this Court's  
5 decision in *Petrella*, which I think my friends  
6 on the other side acknowledge is well within the  
7 scope of the question presented, because, after  
8 all, that was the primary authority discussed by  
9 the Second Circuit and the Ninth Circuit and the  
10 Eleventh Circuit, when this Court said time and  
11 again that there was a limitation on  
12 retrospective relief, the Court cited the  
13 statute of limitations in Section 507(b).

14 Now, to be sure, the Court in its  
15 opinion in Footnote 4 recognized that some  
16 courts of appeals had recognized a discovery  
17 rule.

18 We think that those two things can be  
19 harmonized by concluding that when the Court  
20 referred to the discovery rule there, what it  
21 was really referring to is the more modest  
22 equity-based discovery rule that this Court has  
23 recognized, most recently in *Gabelli* and  
24 *Rotkiske*, a discovery rule -- rule that is  
25 limited to cases involving fraud and not a

1 broad-based discovery rule more generally.

2 But it is really for that reason that  
3 treatises like --

4 JUSTICE SOTOMAYOR: That -- that --  
5 that -- that's the -- the scope of when the  
6 exception can be raised is different from  
7 whether it can or not.

8 MR. SHANMUGAM: Correct.

9 JUSTICE SOTOMAYOR: If it is a statute  
10 of limitations as you claim that does not permit  
11 recovery at all if it's outside the three-year  
12 period, then there would be no fraud exception.  
13 It would be almost like a statute of repose.

14 But that's not the argument you're  
15 making. You're making a very different one that  
16 would be subject to briefing in the appropriate  
17 case of how -- why the expansive was the  
18 discovery -- was the fraud exception in the  
19 common law. But there is an exception of some  
20 sort that you're recognizing. The only question  
21 is its breadth.

22 MR. SHANMUGAM: Correct. And on that  
23 issue --

24 JUSTICE SOTOMAYOR: That wasn't what  
25 we granted cert on.

1           MR. SHANMUGAM: But, to circle back to  
2 Justice Jackson's question about the rephrased  
3 question presented, I don't think that this  
4 Court when it rephrased the question presented  
5 -- and you can certainly tell me if I'm  
6 incorrect about this -- was accepting any  
7 particular version of the discovery rule.

8           And there is disagreement about that  
9 in the courts of appeals.

10          JUSTICE SOTOMAYOR: The only  
11 disagreement is whether it applies to ownership  
12 versus infringement. There is no disagreement  
13 on the issue of whether, if it applies, how  
14 limited is it.

15          MR. SHANMUGAM: It --

16          JUSTICE BARRETT: And does that matter  
17 that you're an ownership case versus an  
18 infringement case? Does that matter to your  
19 argument here at all, that -- that disagreement  
20 about the discovery rule?

21          MR. SHANMUGAM: Well, as this case  
22 comes to the Court, the Eleventh Circuit does  
23 apply the discovery rule to ownership claims.  
24 Our point is simply that in the courts of  
25 appeals, there are a variety of views about the

1 scope of the discovery rule, not just on that  
2 axis but on other axes.

3 As we point out in the Third Circuit,  
4 the -- Third Circuit does not locate the  
5 discovery rule in any notion of accrual. It  
6 instead locates it in a notion of equitable  
7 tolling.

8 And my submission to this Court -- and  
9 this goes to one of our other arguments that,  
10 again, I think is properly before the Court --  
11 is that in rephrasing the question presented, I  
12 don't think that the Court is bound to any of  
13 the options the courts of appeals have  
14 previously accepted, particularly when those  
15 decisions are inconsistent with this Court's  
16 approach to the discovery rule more generally.

17 JUSTICE ALITO: Mr. Shanmugam --

18 MR. SHANMUGAM: I just --

19 JUSTICE ALITO: Oh, I'm sorry.

20 Finish.

21 MR. SHANMUGAM: No, go ahead.

22 JUSTICE ALITO: If -- if we were to  
23 hold that there -- there is no discovery rule  
24 with respect to the statute of limitations and  
25 the Copyright Act, this -- the question on which

1 we granted review would go away, would it not?

2 MR. SHANMUGAM: Yes. The answer to  
3 that question would be no, with a proviso that  
4 the Court could and I think should leave open  
5 the question of whether or not there is a  
6 narrower equity-based discovery rule for cases  
7 involving fraud. And the Court does not need to  
8 opine on that here for the reason that I gave in  
9 the opening, namely, that there's no claim here.

10 JUSTICE ALITO: Well, let me map out  
11 what would happen if, in the event -- and this  
12 may or may not occur -- we granted cert in the  
13 case, we were to dismiss this petition as  
14 improvidently granted. The case, I assume,  
15 would go back to the district court, and the  
16 district court would be aware that we recently  
17 -- excuse me -- granted review in a case that  
18 does present the issue of whether there is a  
19 discovery rule for the Copyright Act statute of  
20 limitations.

21 So, if I were the district court judge  
22 in those circumstances, I might choose not to  
23 plow ahead with further proceedings in this case  
24 until that issue was resolved.

25 Isn't that true?

1           MR. SHANMUGAM: Yes. Well, I think,  
2           that the court would be bound by the existing  
3           Eleventh Circuit case law. But let me just say  
4           a word about this question of whether or not to  
5           dismiss the case, because I don't think that  
6           this is a case involving, you know, unfair  
7           surprise or anything like that. We flagged this  
8           issue again in the petition.

9           It's really a dispute about what  
10          arguments are available to us and what arguments  
11          the Court should address concerning the question  
12          presented because, after all, as you pointed  
13          out, if our view of the statutory language is  
14          correct, the answer to the question presented  
15          will be no.

16          Now we have a number of arguments  
17          before this Court --

18          JUSTICE ALITO: Well, what -- what  
19          concerns me is that we're being asked to decide  
20          what -- a -- a question that may be eliminated  
21          based on a subsequent decision. I mean, we're  
22          -- there are two questions, one would think.

23          Is there a discovery rule? If there  
24          is, what is -- what are its implications for  
25          relief? The first is logically prior to the

1 second. Why does it make sense to talk about  
2 the second without resolving the first?

3 MR. SHANMUGAM: Well, it -- it  
4 doesn't, but I think what I would say is that  
5 it's really critical, as is always true in a  
6 case of statutory interpretation, to start with  
7 the relevant statutory language, and that is  
8 precisely why, when the Court rephrased the  
9 question presented, we pivoted away from any  
10 threshold argument that there's no discovery  
11 rule and we said let's start with the statutory  
12 language, as this Court directed, and figure out  
13 how it bears on this question of the  
14 availability of retrospective relief. Now --

15 JUSTICE JACKSON: So what is your  
16 argument on that, please?

17 MR. SHANMUGAM: Sure. Our argument is  
18 very simple, and I think that the issue is  
19 abundantly joined in the briefing in this case.

20 It is, what is the meaning of the term  
21 "accrues"? Our submission is simple. As this  
22 Court has said, the standard rule is that  
23 "accrues" means at the point when you have a  
24 complete and present cause of action.

25 Now that's not a hard-and-fast rule.

1 That can be rebutted by context or other cues.  
2 But, here, the statutes that Respondents and  
3 their amici cite simply don't rebut that  
4 ordinary presumption.

5 JUSTICE JACKSON: But I guess what I  
6 don't understand is why that has to do with the  
7 scope of the damages. So we have "accrues" and  
8 we have "accrues" in Section 507, which talks  
9 about when a civil action shall be maintained.

10 So fine, right? Even if I agree with  
11 you that "accrues" means what you say it means,  
12 that just -- the consequence of that, it looks  
13 like, under this statute is that the action  
14 shall be maintained within that time frame.

15 You -- you seem to be arguing that if  
16 you maintain an action within that time frame,  
17 the three-year statute of limitations that  
18 pertains to 507 is somehow transported into the  
19 consideration of how much damages you can get.  
20 And so that's the part where you've lost me.

21 MR. SHANMUGAM: Happy to address that.

22 JUSTICE JACKSON: Yes.

23 MR. SHANMUGAM: So the question  
24 presented in this case is whether a plaintiff  
25 can recover damages for acts that allegedly

1 occurred more than three years before the filing  
2 of a lawsuit.

3 And if you go back and look at this  
4 Court's decision in Petrella, I think that that  
5 was the distinction that the Court was drawing.  
6 I think the Court was saying, if the act takes  
7 place more than three years before, you cannot  
8 get retrospective relief.

9 And, as we explain in our brief,  
10 prospective relief is different for the simple  
11 reason that you don't have to have any past  
12 violation at all in order to get injunctive  
13 relief. All you have to show is a likelihood of  
14 future infringement.

15 JUSTICE JACKSON: But what do we do  
16 with 504 and the discussion of being entitled to  
17 recover the actual damages suffered by him? So,  
18 if you have an act that occurs within the time  
19 frame, but the damages extend before that, I  
20 take it your position is you can't go back any  
21 more than three years, but I don't see that in  
22 the statute.

23 MR. SHANMUGAM: Our position,  
24 consistent with Petrella and I think the Second  
25 Circuit's reasoning in Sohm, is that it's

1 actually the timing of the act. In other words,  
2 in the perhaps unlikely scenario that you had an  
3 act that took place four or five years earlier,  
4 we're not saying there's a damages cutoff at  
5 three years. And I don't think that that's what  
6 Justice Ginsburg in her opinion for the Court  
7 was saying either.

8           Now I recognize that that feels like  
9 the flip side of the broad version of the  
10 discovery rule, and I would submit to the Court  
11 that it is. That is why these issues are so  
12 hard conceptually to disentangle.

13           My point is simply that when it comes  
14 to retrospective relief, if the act took place  
15 more than three years earlier, the implication  
16 of the statutory language is you are out of  
17 luck. You cannot recover for retrospective  
18 relief. If you're bringing a claim for  
19 prospective relief, it will turn on whether  
20 there is a likelihood of future infringement.

21           Now I want to say a word about  
22 Petrella and our other arguments before this  
23 Court because, as I was saying to Justice Alito,  
24 the reason why this is not really a case  
25 involving dismissal, it's really a case

1 involving what issues the Court should address,  
2 is because we have three other arguments.

3 The first is our argument concerning  
4 Petrella, and I've already addressed that to  
5 some extent. I think the only other thing I  
6 would add is that I don't think that  
7 Respondents' or the government's  
8 characterization of Petrella is credible.

9 They say that when the Court on  
10 multiple occasions was talking about the  
11 availability of retrospective relief, the Court  
12 was really talking about Ms. Petrella's case,  
13 and because she was not relying on a discovery  
14 rule, that those statements should all be read  
15 in that context.

16 But the Court was relying on the  
17 unavailability of retrospective relief for acts  
18 more than three years earlier precisely to  
19 explain why applying the doctrine of laches was  
20 unnecessary because there was a strict statutory  
21 cutoff.

22 And that is why the leading treatises  
23 have said that the logic of Petrella supports  
24 our position here. It supports our position  
25 because that was a necessary premise of the

1 Court's decision, and, again, I would submit  
2 that when Justice Ginsburg, one of the most  
3 careful opinion writers ever to sit on this  
4 Court, made those statements, she was relying on  
5 the language in the statute of limitations, not  
6 some penumbra of Section 504 or something else.

7 Now the two other arguments that we  
8 are making to this Court are, first, the  
9 argument that under a proper understanding of  
10 the discovery rule, it should be limited to  
11 fraud.

12 When you look out over the court of  
13 appeals' opinions that have adopted the  
14 discovery rule, there is not a lot of reasoning  
15 in those opinions. They really rely on two  
16 things: first, the broad-based presumption in  
17 favor of a discovery rule that this Court cast  
18 doubt on -- on -- in TRW and then repudiated in  
19 Rotkiske and, second, the fact that the criminal  
20 statute of limitations uses "arises" rather than  
21 "accrues."

22 And as recently as yesterday, members  
23 of the Court indicated that there's no  
24 meaningful difference between those two terms.  
25 The Court itself recognized as much in Petrella

1     itself.  And the legislative history indicates  
2     that Congress intended for those two periods to  
3     be similar.

4                     And our last argument before the  
5     Court, again, an argument that is plainly within  
6     the scope of the question presented even if you  
7     take the stingiest view of it, is the argument  
8     that, at a minimum, if the Court thinks that  
9     there is a broad discovery rule, it should  
10    characterize that as an equitable rule that is  
11    subject to equitable limitations.

12                    And, at a minimum, we think that this  
13    Court's statements in *Petrella*, if the Court  
14    doesn't agree with us on the interpretation of  
15    the statute, should be applied as an equitable  
16    limitation on that equitable rule.  Indeed, in  
17    *Petrella* itself, the Court recognized that the  
18    doctrine of laches could apply where what you're  
19    dealing with is an equitable principle or a  
20    source of equitable relief.

21                    So, at bottom, what is really going on  
22    here, I would submit -- and I recognize that it  
23    is difficult to sort of parse questions  
24    presented sometimes.  We spent a lot of time  
25    trying to figure out exactly what the Court was

1 intending when it reframed the question  
2 presented in a way that directed us both to the  
3 text and to what the lower courts had done.

4 Our fundamental submission is it would  
5 -- it would be wholly artificial for the Court  
6 to try to resolve this case without starting  
7 with the relevant statutory language. It would  
8 be a straw man for the Court to say: Well,  
9 there's no limitation in Section 504 or Section  
10 502. And that is precisely because we are  
11 dealing with a three-year limitations period  
12 that is in Section 507(b).

13 JUSTICE GORSUCH: May -- may I ask a  
14 question about your last submission? It seems  
15 to me a pretty tough one. Kind of a halfway  
16 textualism, if you will, to -- to say that  
17 there's a discovery rule, put aside fraud, a  
18 real discovery rule, the real bad wine, okay,  
19 but we're only going to do three years because  
20 Petrella, which interpreted the statute, which  
21 you think doesn't have a discovery rule? I  
22 mean, that -- that's a -- that's a bit of a -- a  
23 few gymnastics required there.

24 MR. SHANMUGAM: So I -- I don't think  
25 that that's quite what we're saying, Justice

1 Gorsuch. So just to be clear about our argument  
2 concerning the text, again, our argument is a  
3 claim accrues when you have a complete and  
4 present cause of action. None of these --

5 JUSTICE GORSUCH: I totally understand  
6 that argument.

7 MR. SHANMUGAM: None of these other  
8 statutes overcomes that. So, therefore, what is  
9 the consequence?

10 JUSTICE GORSUCH: I -- I -- I got all  
11 that. I'm asking about your last argument and  
12 only your last argument.

13 MR. SHANMUGAM: Sure. So our last  
14 argument is the equitable limitation.

15 JUSTICE GORSUCH: Yes.

16 MR. SHANMUGAM: And I recognize that  
17 you only get to that as a fallback if you reject  
18 our statutory argument or if you somehow say  
19 that that is off the table. And I would submit  
20 that the Court really shouldn't --

21 JUSTICE GORSUCH: Well, no, nobody --  
22 nobody's going to say it's off the table, all  
23 right? I haven't -- you know, it may -- may not  
24 be on this table. It may be on another table.  
25 But it's on the table, okay?

1                   MR. SHANMUGAM: Well, I would say two  
2 things about that --

3                   JUSTICE GORSUCH: So --

4                   MR. SHANMUGAM: -- first, that the  
5 Court has a petition currently pending before  
6 it --

7                   JUSTICE GORSUCH: I -- I -- I'm well  
8 aware, counsel.

9                   MR. SHANMUGAM: -- in the Martinelli  
10 case that presents that issue.

11                   JUSTICE GORSUCH: And I'm just asking,  
12 assuming that we are not going to decide 507 and  
13 you've got Petrella out there, how do you -- how  
14 do you get to this, okay, there's a discovery  
15 rule, but it's only a three-year discovery rule?

16                   MR. SHANMUGAM: The best reading of  
17 Petrella is that Petrella was in turn resting on  
18 507(b).

19                   JUSTICE GORSUCH: Right.

20                   MR. SHANMUGAM: We are not arguing for  
21 a -- a three-year discovery rule. We're arguing  
22 for a three-year injury rule. We think that the  
23 trigger is the point of injury.

24                   JUSTICE GORSUCH: So it's not even a  
25 discovery rule. That's my point. It's not even

1 -- it's not even the old bad wine. It's  
2 something else. It's a new bad wine.

3 MR. SHANMUGAM: Well, I think that the  
4 discovery rule, as applied by the lower courts,  
5 allows you to go back for acts that have taken  
6 place more than three years earlier. As we  
7 point out in this case, we're talking about acts  
8 of infringement going back to 2008.

9 And -- and we would submit that a  
10 proper understanding of the discovery rule is to  
11 limit it to cases of fraud. So the way that  
12 this legal regime should work, if the Court  
13 feels unencumbered by the exact parsing of the  
14 question presented, is acts of infringement more  
15 than three years earlier, ordinarily not  
16 actionable. Under the ordinary operation of the  
17 discovery rule, they are actionable if you have  
18 fraud or concealment or one of the other  
19 traditionally recognized equity-based  
20 exceptions.

21 This is not a difficult question. The  
22 Court has before it all of the arguments to  
23 resolve the question of the correct  
24 interpretation of Section 507(b), and we would  
25 submit that the Court can proceed to do that

1 accordingly in this case.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Justice Thomas?

5 Justice Alito?

6 Justice Sotomayor?

7 Justice Kagan?

8 Justice Gorsuch, anything further?

9 No?

10 Justice Kavanaugh?

11 Justice Barrett?

12 Thank you, counsel.

13 MR. SHANMUGAM: Thank you.

14 CHIEF JUSTICE ROBERTS: Mr. Earnhardt.

15 ORAL ARGUMENT OF JOE WESLEY EARNHARDT

16 ON BEHALF OF THE RESPONDENTS

17 MR. EARNHARDT: Mr. Chief Justice, and  
18 may it please the Court:

19 The Court reformulated the question  
20 presented to set aside debates about the  
21 discovery rule. Those issues were never raised  
22 or decided below, and reaching them is not  
23 necessary to resolve the circuit split targeted  
24 by the Court's actual question presented.

25 Assuming Respondents' claims are

1 timely under the discovery rule, Respondents are  
2 entitled to seek damages as a remedy for those  
3 claims. Section 507(b) makes no distinction  
4 between claims seeking the remedy of damages and  
5 claims seeking other forms of relief. Section  
6 504 is entitled "Remedies for Infringement,  
7 Damages, and Profits," and it expressly says  
8 that a copyright owner is entitled to recover  
9 the actual damages suffered by him, any profits  
10 of the infringer, or statutory damages for all  
11 infringements involved in the action. There is  
12 no damages bar for copyright claims in Title 17.

13 Now Congress has enacted three-year  
14 lookback damages bars as narrow exceptions  
15 elsewhere in Title 17, but Congress needed to  
16 add those as narrow exceptions precisely because  
17 there is no damages bar in Title 17 as a general  
18 rule.

19 Nor would a judicially created damages  
20 bar be permissible. In *Petrella*, this Court  
21 held that if a copyright claim is timely under  
22 the statute of limitations, again, as is assumed  
23 here, courts are not at liberty to impose  
24 equitable-based time limits on the recovery of  
25 damages for those claims.

1                   Now, to be sure, in Petrella, recovery  
2                   was limited to infringements committed during  
3                   the three years before the complaint was filed.  
4                   But that was because, under a laches case like  
5                   that one and any other laches case, earlier  
6                   claims which separately accrue were and will  
7                   become time-barred under the statute of  
8                   limitations when the plaintiff doesn't sue on  
9                   them.

10                   That is how the statute of limitations  
11                   takes account of delay. It bars claims if  
12                   they're not brought within three years of when  
13                   they accrue. But, if a copyright claim is  
14                   brought within three years of when it accrues  
15                   and, thus, is timely under the statute of  
16                   limitations, damages must be available as a  
17                   remedy.

18                   I welcome the Court's questions.

19                   JUSTICE THOMAS: Petitioner seems to  
20                   argue that, well, I'm willing to assume a  
21                   discovery rule, but it's a very narrow or  
22                   cramped discovery rule.

23                   If we're going to assume the existence  
24                   of a discovery rule, how do we determine its  
25                   scope?

1                   MR. EARNHARDT: Well, I think the  
2 question presented answers that question as  
3 well. The way that I interpret the question  
4 presented -- and I don't think it's very  
5 complicated -- is that Clause 1 of the question  
6 presented defines a term nested within Clause 2.

7                   So Clause 2 refers to Section 507(b).  
8 507(b) uses the word "accrue," okay? What rule  
9 determines when a claim accrues? Well, Clause 1  
10 of the question presented tells us what the  
11 assumption is here, which is the discovery  
12 accrual rule applied by the circuit courts tells  
13 you when a claim accrues. And so the reason a  
14 fraud-based discovery rule doesn't work is  
15 that's not the discovery accrual rule applied by  
16 the circuit courts.

17                   Another piece of potential confusion  
18 that I think I should clear up is we -- we agree  
19 that what the scope of the discovery rule is is  
20 not necessary to answer the question presented.  
21 You hold that constant and say does the  
22 discovery rule apply and, if so, what are the  
23 consequences of damages. But, even if that were  
24 relevant, there is no disagreement in the lower  
25 courts about the scope of the discovery rule

1 even with respect to ownership claims.

2           So Petitioners say in their reply  
3 brief that in the -- in the Sixth, Ninth, and  
4 Tenth Circuits, the courts don't apply a  
5 discovery rule if it's a so-called ownership  
6 claim. I believe that's demonstrably false.  
7 Here is what the Abbas case from the Ninth  
8 Circuit, which they cite for that proposition,  
9 says about the discovery rule under an ownership  
10 claim: "Under these circumstances, a plaintiff  
11 must bring suit within three years of receiving  
12 notice of the repudiation of his or her  
13 ownership rights."

14           That is a discovery rule. It's a more  
15 permissive form of a discovery rule. Inquiry  
16 notice is not enough. It has to be actual  
17 notice. And it has to be a particular type of  
18 actual notice and express repudiation. All of  
19 those things can only delay the statute of  
20 limitations running, but it's a discovery rule.  
21 It turns on what the plaintiff knows, not on  
22 what the defendant did. And so, for that  
23 reason, there is no variability in the lower  
24 courts about the scope of discovery rule if that  
25 were relevant.

1 JUSTICE JACKSON: Do you have a view  
2 on Justice Alito's suggestion about dismissing  
3 the case?

4 MR. EARNHARDT: You know, I think  
5 either path is viable. I will say that, you  
6 know, being from New York, the -- the Sohm court  
7 is -- is causing some mischief there and the  
8 decision of the Second Circuit in Sohm is so  
9 facially incorrect that I believe it would be  
10 helpful to the -- to the bar to -- to clarify  
11 that it's wrong, that there is no separate  
12 damages bar, and that would resolve the circuit  
13 split that currently exists between the Second  
14 Circuit on the one hand and the Ninth and the  
15 Eleventh on the other.

16 I have to say, you know, we don't have  
17 sort of a dog in the hunt in this case about  
18 whether there is a discovery rule or not, but,  
19 for 40 years, the courts of appeals unanimously  
20 have found that there is one, and Congress  
21 during that time period has amended the  
22 Copyright Act 79 times, reasons big and small,  
23 and they've never stepped in to say that there's  
24 not one.

25 In fact, when they've wanted there to

1 be one, when Congress has expanded the  
2 traditional rights of copyright, as a  
3 counterbalance, they've instituted a discovery  
4 rule -- I mean, I'm sorry, a damages bar --

5 JUSTICE GORSUCH: Counsel, you said  
6 you don't have a dog in the hunt on whether  
7 there's a discovery rule. If not, then why are  
8 we here?

9 MR. EARNHARDT: Well, because we --  
10 that's assumed by the question presented here.  
11 I -- I believe we're here because that has been  
12 the unanimous view of the courts of appeals, and  
13 the only question is assuming that there is a  
14 discovery rule --

15 JUSTICE GORSUCH: So you have a dog in  
16 the hunt on the scope of the discovery rule --

17 MR. EARNHARDT: Well --

18 JUSTICE GORSUCH: -- but not on  
19 whether there is a discovery rule?

20 MR. EARNHARDT: Well, no, I --

21 JUSTICE GORSUCH: Is that what you're  
22 saying?

23 MR. EARNHARDT: No, I'm saying --

24 JUSTICE GORSUCH: Where is this dog?

25 (Laughter.)

1                   MR. EARNHARDT: This dog already has a  
2 bone because --

3                   JUSTICE GORSUCH: Oh, boy.

4                   MR. EARNHARDT: -- this Court assumes  
5 --

6                   JUSTICE GORSUCH: Oh, boy.

7                   MR. EARNHARDT: -- that there is a  
8 discovery rule. All -- all I mean by saying we  
9 don't have a dog in the hunt is we don't -- we  
10 don't have that issue before us.

11                   JUSTICE GORSUCH: We don't have it  
12 before us, and that is a curiosity of this case.  
13 We're being asked to decide the scope of  
14 something that may or may not exist.

15                   And I think Justice Alito was asking  
16 shouldn't we as a matter of -- you're asking  
17 what would be helpful to the bar. You mentioned  
18 that and clarity.

19                   Wouldn't it be just good governance to  
20 take up that question first?

21                   MR. EARNHARDT: I -- I don't think so,  
22 Your Honor, and the reason is we have a 40-year  
23 history in which the courts of appeals have  
24 applied the discovery rule.

25                   JUSTICE GORSUCH: All over the map.

1 All over the map. And we also have a lot of  
2 cases in this Court casting doubt on the  
3 existence of a discovery rule. We've called it  
4 -- a wine from a bad vintage or something like  
5 that, and we've done it, like, several times,  
6 including, like, two years ago.

7 So what do we do with that?

8 MR. EARNHARDT: Well, Your Honor, I  
9 think that with -- with respect to the wine of  
10 bad vintage, that's not the type of discovery  
11 rule that would exist in the Copyright Act. It  
12 -- you know, that does exist in the Copyright  
13 Act. That --

14 JUSTICE GORSUCH: Well, it may or may  
15 not. And -- and some people say that the wine  
16 is there. Other people say there's no dog and  
17 we've got bones. I don't know.

18 (Laughter.)

19 JUSTICE GORSUCH: Why wouldn't -- why  
20 wouldn't we just take up that question first,  
21 counsel?

22 MR. EARNHARDT: Well, to -- to borrow  
23 a phrase from the Court, in this case, there's a  
24 lot of "stuff" that would prevent us from doing  
25 that. It wasn't raised below. It wasn't

1 accepted by the Eleventh Circuit as part of the  
2 interlocutory question.

3 This Court rephrased the question  
4 presented to exclude it, and so neither we nor  
5 the United States briefed it. It's not  
6 necessary to decide the circuit split targeted  
7 by the actual question presented, which is, if  
8 there's a discovery rule, are damages somehow  
9 not available as a remedy? So I think this is a  
10 bad vehicle for that.

11 I also have to say on the issue of  
12 whether this is the -- the bad wine of recent  
13 vintage --

14 JUSTICE GORSUCH: If it's a bad  
15 vehicle, does that not suggest we should dismiss  
16 this as improvidently granted?

17 MR. EARNHARDT: I -- I don't think so.  
18 The reason this case is so --

19 JUSTICE GORSUCH: I mean, I've never  
20 -- well, very rarely do I hear counsel standing  
21 at the podium arguing against a result that  
22 helps their client in the particular case. I  
23 mean, a dismissal as improvidently granted would  
24 -- would go some way for you.

25 MR. EARNHARDT: And -- and that's why

1 we spent a significant amount of time in our  
2 brief saying that that's a viable option and it  
3 is. However, between the two options of  
4 dismissing it as improvidently granted compared  
5 to clarifying that the Sohm rule is incorrect,  
6 the Sohm rule being clarified as incorrect  
7 because it so clearly is --

8 JUSTICE KAGAN: So what -- what  
9 mischief is Sohm causing? You said it was  
10 causing mischief. Explain.

11 MR. EARNHARDT: Well, so in the Second  
12 Circuit, under current law, even if a claim is  
13 timely, there's a peculiar rule that you can  
14 only seek damages going back for three years for  
15 that claim.

16 And that is completely different from  
17 the rule that now exists in the Ninth Circuit  
18 under the --

19 JUSTICE KAGAN: Yeah. I'm -- I guess  
20 I'm just wondering, is that rule being applied  
21 frequently? Are there many cases that raise  
22 this issue?

23 MR. EARNHARDT: It --

24 JUSTICE KAGAN: Has the Second Circuit  
25 rearticulated it? Have there been district

1 courts that have applied it?

2 What's the status of this rule now?

3 MR. EARNHARDT: It's more an issue of  
4 forum shopping. Some folks want to be in the  
5 Second Circuit. Other folks want to be in the  
6 Ninth and Eleventh Circuits.

7 And so I think that it's an issue of  
8 -- the -- the -- the point of the Copyright Act,  
9 the reason that there was a statute of  
10 limitations enacted in the first place because  
11 there did not used to be one, you used to look  
12 at the state statute of limitations, was for  
13 there to be a uniform period during which  
14 time -- claims are timely and recovery is  
15 granted. Now there's not.

16 There's a circuit split in -- between  
17 the Second Circuit on the one hand and the Ninth  
18 and the Eleventh on the other about the  
19 availability of damages under the discovery  
20 rule. And that's a -- that's a -- an  
21 inconsistency that the Court, I think,  
22 importantly should resolve, and that's the --  
23 the circuit split directed by the question  
24 presented.

25 Now, on the issue of whether this is

1 the bad wine of recent vintage, that, as I  
2 understand the Court's critique of that, that's  
3 courts of appeals below assuming there's this  
4 background principle that there's a discovery  
5 rule when the word "accrue" is used, and that  
6 I -- I understand the Court has taken issue with  
7 in recent cases.

8           That would not be the basis for the  
9 discovery rule here. Here, the -- the --  
10 Section 507(b) uses the word "accrue" and in  
11 Crown Coats, this Court was very careful to say  
12 that you cannot apply a universal meaning to the  
13 word "accrue." You have to roll up your sleeves  
14 and look at what the Congress meant when it used  
15 that -- that word.

16           So, if there's a discovery rule here  
17 in the Copyright Act, which we -- we submit that  
18 there is and that the question presented assumes  
19 there is, it's because, in 1957, when Congress  
20 adopted that term, they intended it to include a  
21 discovery rule.

22           JUSTICE GORSUCH: Counsel --

23           JUSTICE BARRETT: Counsel, can I --

24           JUSTICE GORSUCH: I'm sorry.

25           JUSTICE BARRETT: Oh, sorry.

1 JUSTICE GORSUCH: No, go ahead.

2 JUSTICE BARRETT: Do you think that  
3 the antecedent question of whether there's a  
4 discovery rule is cert worthy? And by that, I  
5 mean, is there a split -- let's just -- let's  
6 just say that -- so we know there's a split on  
7 this other question about the scope of damages,  
8 right?

9 And the antecedent question at least  
10 at the cert stage was kind of presented as,  
11 well, all the courts of appeals are applying  
12 this, but there is this division about the other  
13 thing.

14 Do you think that if it just came to  
15 us straight up, is there a discovery rule or is  
16 this an injury accrual, that that's the kind of  
17 thing the Court should take?

18 MR. EARNHARDT: I -- I do not, Your  
19 Honor, and the reason is there is no circuit  
20 split on that issue.

21 JUSTICE BARRETT: Is there a circuit  
22 split about the scope?

23 MR. EARNHARDT: There is --

24 JUSTICE BARRETT: Mr. Shanmugam says  
25 there's a circuit split about the -- the scope

1 of the discovery rule, some saying ownership  
2 versus infringement.

3 MR. EARNHARDT: That's incorrect.  
4 That -- that is -- that is demonstrably  
5 incorrect. The -- the cases that apply  
6 the owner -- the ownership claim distinction,  
7 which, by the way, is a -- is a -- is a  
8 questionable distinction in the first place, but  
9 the courts that do apply that distinction apply  
10 a discovery rule.

11 It turns on when the plaintiff  
12 receives notice of an express repudiation.  
13 That's a more permissive form of a discovery  
14 rule. It can only delay the statute of  
15 limitations running, but it is a discovery rule.

16 So you have a situation where, for 40  
17 years, the courts of appeals have uniformly  
18 applied a rule. There's no contrary opinion in  
19 the courts of appeals that that is the rule.

20 And Congress, this is not like the  
21 Sherman Act, where they -- they pass a -- an act  
22 with a few sentences and let the courts sort of  
23 figure it out. Congress has taken an active  
24 role in managing the copyright law of this  
25 country. They've amended the Copyright Act 79

1 times since 1976. Yet --

2 JUSTICE ALITO: How can the -- how can  
3 the question about -- how can a question about  
4 the scope of the discovery rule be cert worthy  
5 and yet the existence, the question of the  
6 existence of the -- of the discovery rule, not  
7 be cert worthy?

8 MR. EARNHARDT: Well, because, Your  
9 Honor --

10 JUSTICE ALITO: I mean, you're making  
11 an argument that the -- this -- that the court  
12 of appeals decisions recognizing a discovery  
13 rule are correct. And that may well be true,  
14 and it's impressive that so many of them have  
15 reached that conclusion. But I don't understand  
16 how the second question can be cert worthy and  
17 the first is not.

18 MR. EARNHARDT: Well, it's because the  
19 Second Circuit in *Sohm* took -- took such a  
20 strange turn off of the -- off of the path.  
21 They -- they fashioned this peculiar rule that  
22 says we're going to assume that there is a  
23 discovery rule, we're going to assume that it  
24 applies to claims and that the claims are  
25 timely, but we're going to have this other rule

1 that, even if the claim is timely, you're not  
2 allowed to recover damages for that claim.

3 And that is -- created a circuit  
4 split, and so that -- that's why that issue is  
5 cert worthy and the other is not.

6 JUSTICE KAVANAUGH: If the Second  
7 Circuit had gone the other way and hadn't gone  
8 off the path, none of this would be cert worthy  
9 is your view, right?

10 MR. EARNHARDT: That's correct.  
11 That's correct.

12 JUSTICE JACKSON: And -- and we  
13 frequently assume certain aspects of cases when  
14 we're looking at a split about a -- a subsequent  
15 issue.

16 MR. EARNHARDT: Absolutely. And it's  
17 entirely appropriate to do that here, to assume  
18 that there's a discovery rule and ask what  
19 impact does that rule have on damages.

20 JUSTICE JACKSON: And is that how you  
21 read our refashioning of the question presented?

22 MR. EARNHARDT: That's exactly how I  
23 read it. As I said before, I read the question  
24 presented as the first clause defining a term  
25 nested within the second clause. The second

1 clause says 507(b). 507(b) says "accrue." What  
2 rule should we use to determine when a claim  
3 accrues under the Copyright Act? Look to Clause  
4 Number 1. You use a discovery accrual rule  
5 applied by the circuit courts.

6 So I think that's a -- that's a --  
7 that's a clear -- a clear reading of the  
8 question presented.

9 Just a -- a few -- just one comment on  
10 policy. Congress gets to decide what the best  
11 policy is here. And in the Copyright Act, it  
12 balances repose on the one hand with  
13 compensation and motivation on the other.

14 So the Copyright Act doesn't exist  
15 primarily to compensate authors whose works are  
16 being infringed. It exists primarily to  
17 motivate other folks to create works based on  
18 the profit motive that's available to them.

19 So, when Congress decides that policy,  
20 in certain circumstances, it has imposed a  
21 three-year lookback damages bar incompatible  
22 with a discovery rule for vessel hull design and  
23 other situations. It hasn't done that with  
24 general copyright claims precisely because it  
25 wants to really motivate the -- the creation of

1 future works.

2 And I respectfully submit that  
3 Congress's policy -- policy decisions on these  
4 questions should not be second-guessed.

5 JUSTICE GORSUCH: You -- you say the  
6 discovery rule allows you to look back more than  
7 three years, right?

8 MR. EARNHARDT: It doesn't allow you  
9 to look back more than three years. It allows  
10 --

11 JUSTICE GORSUCH: Recover damages for  
12 more than three years?

13 MR. EARNHARDT: If the claim is  
14 timely, yes.

15 JUSTICE GORSUCH: Okay. And that fits  
16 with Petrella because Petrella doesn't cover all  
17 cases; it covers some subset of cases. Is that  
18 the gist of it?

19 MR. EARNHARDT: No. It's -- it's  
20 because that's the -- the precise holding of  
21 Petrella. Petrella says that if a claim is  
22 timely under the statute of limitations -- in  
23 the discovery rule context, that would mean it  
24 is brought within three years of when the claim  
25 is or reasonably should have been discovered --

1 then there cannot be equity-based limits on the  
2 remedy of damages for that claim.

3 JUSTICE GORSUCH: Well, Petrella says  
4 you look back -- as I read it; maybe we're just  
5 reading it differently -- you look back three  
6 years and no more.

7 MR. EARNHARDT: No. That --

8 JUSTICE GORSUCH: You just disagree  
9 with that?

10 MR. EARNHARDT: Well, I -- I disagree  
11 --

12 JUSTICE GORSUCH: So that's a  
13 misreading of Petrella?

14 MR. EARNHARDT: It -- it is. And --  
15 and -- and the Court --

16 JUSTICE GORSUCH: Yeah. Okay.

17 MR. EARNHARDT: There are many  
18 statements where the Court says retrospective  
19 relief is limited to three years.

20 JUSTICE GORSUCH: I -- I -- that's  
21 what I had recalled.

22 MR. EARNHARDT: Yeah. The reason the  
23 Court was making those statements was to explain  
24 why it was that Ms. Petrella's laches had  
25 consequences under the statute of limitations.

1                   The -- the dissent in that case said  
2                   this isn't fair. Ms. Petrella is getting a fair  
3                   -- a free pass. She sat on her hands and didn't  
4                   sue. How can it be that she can bring claims  
5                   and recover damages? The majority responds to  
6                   that by saying no, no, no, many of  
7                   Ms. Petrella's claims based on infringements  
8                   that happened years ago accrued, the three-year  
9                   period ran, and then those claims were  
10                  time-barred, but it's the statute of limitations  
11                  and the dismissal of claims that aren't brought  
12                  within three years of when they accrue that --

13                  JUSTICE GORSUCH: So Petrella only is  
14                  with respect -- in your reading is Petrella is  
15                  only with respect to claims in three years; it  
16                  says nothing about the damages period.

17                  MR. EARNHARDT: Well, that -- that --

18                  JUSTICE GORSUCH: Extending that  
19                  broadly?

20                  MR. EARNHARDT: -- that has to be  
21                  correct because Ms. Petrella only brought claims  
22                  for the three-year period -- infringements in --  
23                  that occurred --

24                  JUSTICE GORSUCH: So the -- all the  
25                  language in Petrella about three years for

1 damages is neither here nor there?

2 MR. EARNHARDT: It -- I -- I don't  
3 read it as being three years for damages. I  
4 read it as -- as being --

5 JUSTICE GORSUCH: The claim?

6 MR. EARNHARDT: -- the -- the claim.  
7 If the claim is untimely because of the -- the  
8 -- the discovery rule, there can be no damages.

9 CHIEF JUSTICE ROBERTS: Anyone else?  
10 No?

11 Anyone else? No.

12 Thank you, counsel.

13 Ms. Dubin.

14 ORAL ARGUMENT OF YAIRA DUBIN

15 FOR THE UNITED STATES, AS AMICUS CURIAE,

16 SUPPORTING THE RESPONDENTS

17 MS. DUBIN: Mr. Chief Justice, and may  
18 it please the Court:

19 First, the only question properly  
20 before the Court today is damages. Read fairly,  
21 the reformulated question presented bakes in an  
22 assumption. It tells the parties to assume that  
23 a copyright claim can accrue upon discovery,  
24 then ask whether damages are available if a  
25 claim is timely under that rule.

1           The answer to that question is a  
2 simple yes. If a claim is timely under 507(b),  
3 nothing in the Copyright Act imposes a separate  
4 time-based limit on damages. This Court's  
5 decision in Petrella rejected the idea that  
6 courts could impose an atextual bar on recovery  
7 for timely copyright claims, so the Second  
8 Circuit erred in relying on out-of-context  
9 language from Petrella to adopt a different  
10 atextual bar.

11           Second, Petitioners don't much defend  
12 the Second Circuit -- Second Circuit's damages  
13 rule, perhaps because it lacks a textual basis.  
14 Instead, they're really asking the Court to  
15 answer a different question, whether the  
16 discovery accrual rule applies to copyright  
17 claims at all or at least to the claims here.

18           But this Court reformulated the  
19 question presented to exclude that question,  
20 setting those arguments out of bounds. If the  
21 Court reaches the merits, it should affirm the  
22 judgment below.

23           I welcome the Court's questions.

24           JUSTICE THOMAS: Does the government  
25 have a view on whether or not there is a

1 discovery rule?

2 MS. DUBIN: The government does not  
3 have a view on whether there is a discovery rule  
4 at this time. We took our cues from the  
5 question presented as reformulated by the Court,  
6 and the question on which we solicited views  
7 across the government and provided our views is  
8 on the question of damages.

9 JUSTICE THOMAS: That was just an  
10 unfair question.

11 (Laughter.)

12 JUSTICE BARRETT: Should we DIG?

13 MS. DUBIN: The United States doesn't  
14 have and hasn't expressed a view on -- between  
15 the two options of dismissing the case as  
16 improvidently granted and affirming. I think  
17 there are good reasons to affirm here on the  
18 Sohm damages rule and reverse that -- that rule.

19 The circuits are divided on that  
20 question. Eleven circuits apply a discovery  
21 rule, so the question of damages under that rule  
22 is important. This Court granted certiorari to  
23 resolve that, and that conflict stems from a  
24 misreading of this Court's decision in Petrella.  
25 So this Court is uniquely situated to resolve

1 that conflict.

2 JUSTICE BARRETT: I mean, Justice  
3 Alito pointed out that antecedent -- the  
4 antecedent question is whether there's a  
5 discovery rule at all. Do you think the effect  
6 of doing that cleanup and resolving the circuit  
7 split will solidify the discovery rule in a way  
8 that then doesn't give the Court an opportunity  
9 to address it again if we think that the  
10 acceptance of the discovery rule is wrong?

11 MS. DUBIN: To be candid, I think the  
12 discovery rule is pretty solidified as it is.  
13 Eleven courts of appeals apply that rule. So I  
14 think it's unlikely to solidify it further.

15 This Court does often grant certiorari  
16 on questions that bake in an assumption and then  
17 decide only that question, such as in the  
18 PROMESA case two years ago and U.S. Bank several  
19 years before that. There is an assumption baked  
20 into both of those cases, and the Court goes on  
21 to resolve the question on which there is a  
22 circuit conflict.

23 JUSTICE BARRETT: And we're free then  
24 to just revisit it later if we ever decide, hey,  
25 there's an error that we want to correct?

1 MS. DUBIN: Of course. Absolutely.

2 CHIEF JUSTICE ROBERTS: Well, it  
3 doesn't sound like that later day is ever going  
4 to come.

5 MS. DUBIN: This Court sometimes, when  
6 there is a -- a -- a well-solidified rule in the  
7 courts of appeals and this Court thinks it's  
8 wrong and it's important to resolve it, does  
9 sometimes grant certiorari when there is no  
10 circuit conflict. Of course, it could choose to  
11 do so in an appropriate case.

12 Here, Petitioner suggested that the  
13 Court do exactly that, and the Court said no.  
14 The Court reformulated the question presented.

15 JUSTICE KAGAN: Does the government  
16 have a view on whether we should do that next  
17 time around?

18 MS. DUBIN: We do not have a view.  
19 There is a petition pending that presents this  
20 question. We have not offered our views, nor  
21 has this Court called for our views on that  
22 question.

23 JUSTICE KAGAN: The government doesn't  
24 have many views here.

25 (Laughter.)

1 MS. DUBIN: Justice Kagan, we do have  
2 strong views on two questions. One, the damages  
3 rule applied by the Second Circuit is wrong.  
4 There's no textual basis for it. They misread  
5 this Court's decision in Petrella. This Court  
6 could clarify that and do good in -- in  
7 providing uniform administration of copyright  
8 law.

9 But the second thing that we have a  
10 strong view on is that you shouldn't do what  
11 Petitioner is asking you to do and go outside  
12 the reformulated question presented and address  
13 the question of accrual on a one-sided  
14 presentation from Petitioners' counsel.

15 As this Court heard yesterday, the  
16 question of accrual is context-specific. If you  
17 were deciding that question in the context of  
18 the Copyright Act, you would want to be deciding  
19 it with briefing from both sides on both parties  
20 as to what "accrue" means in Section 507(b).

21 JUSTICE JACKSON: Why don't you take  
22 this opportunity to just explain why the Second  
23 Circuit is wrong.

24 MS. DUBIN: Absolutely. Thank you,  
25 Justice Jackson.

1                   The Second Circuit believed that  
2     Petrella imposed a separate bar on damages,  
3     separate from the question of accrual under the  
4     Copyright Act. But that's not the right reading  
5     of Petrella.

6                   What Petrella was trying to explain  
7     was that in a case in which your claims are  
8     untimely for acts of infringement that occurred  
9     more than three years before you filed suit, you  
10    can't then use claims within the limitation  
11    period to bootstrap in those claims.

12                  That's the way in which the separate  
13    accrual protects both the interests of  
14    defendants and plaintiffs.

15                  In Petrella itself, all claims for  
16    acts that occurred more than three years before  
17    she filed suit were untimely and she didn't try  
18    to invoke the discovery rule and couldn't have  
19    invoked the discovery rule because MGM's  
20    exploitation of Raging Bull was so open and  
21    notorious.

22                  But nothing in Petrella should be read  
23    to suggest that in a case in which a plaintiff  
24    could raise a timely claim for acts that  
25    occurred more than three years before it filed

1 suit, she still can't recover damages.

2 And I wanted to respond to  
3 Petitioners', you know, suggestion that we're  
4 suggesting in some way that Petrella is  
5 careless. That is not our suggestion at all.  
6 Petrella reserved the question in Footnote 4 of  
7 the discovery accrual rule.

8 But I think Petitioners' reading of  
9 Petrella would suggest that in the same opinion  
10 in which Justice Ginsburg reserved the question  
11 of whether the discovery rule applied, she also  
12 decided to gut it by eliminating damages  
13 thereunder with no textual basis for it, and I  
14 would submit that that's a far stranger reading  
15 of Petrella.

16 CHIEF JUSTICE ROBERTS: Anything  
17 further? Anything further? No?

18 Thank you, counsel.

19 Rebuttal, Mr. Shanmugam?

20 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM  
21 ON BEHALF OF THE PETITIONERS

22 MR. SHANMUGAM: Thank you, Mr. Chief  
23 Justice.

24 Respondents and the government now  
25 seemingly ask for a narrow affirmance that

1 resolves the circuit conflict and that rejects  
2 the circuit's -- Second Circuit's reasoning in  
3 Sohm. We think that that reasoning is correct  
4 and that Sohm appropriately rested on its  
5 reading of this Court's decision in Petrella.

6           And I would note parenthetically that  
7 it's not just the majority opinion in Petrella,  
8 it's Justice Breyer's dissent and, indeed, even  
9 the government's own brief in Petrella that all  
10 seem to understand the statute of limitations  
11 the same way, namely, as a statute under which  
12 claims accrue, consistent with what the  
13 government has recently as a couple of terms ago  
14 described as the standard rule at the time of  
15 injury.

16           And I would submit that Respondents  
17 have fully joined issue on the relevant part of  
18 this, which is the question of the extent to  
19 which the statutory language bears on the  
20 availability of retrospective relief.

21           If you look at pages 32 to 40 of  
22 Respondents' brief, they make all of the  
23 arguments that are available to the best of my  
24 knowledge as to why "accrue" should not be given  
25 that standard meaning.

1           So that issue is fully teed up, and we  
2     rely on the statutory language, as this Court  
3     directed in the rephrased question presented,  
4     notwithstanding my friend, Mr. Earnhardt's  
5     careful parsing. I think that this Court  
6     directed the parties to address the statute of  
7     limitations, and we did so consistent with that,  
8     explaining how it bears on the question that  
9     this Court actually asked.

10           Now we don't think that the Court  
11    needs to resolve the validity of the discovery  
12    rule, but let me explain why the Court may want  
13    to do that. And the Court does, as Justice  
14    Gorsuch alluded to, have before it right now a  
15    petition in the Martinelli case presenting that  
16    issue. It is true that now 11 courts of appeals  
17    have accepted a broad-based discovery rule,  
18    though there are disputes -- pace, Mr. Earnhardt  
19    -- about how -- how that applies in the context  
20    of ownership claims, where it comes from and the  
21    like.

22           I would submit that if this Court  
23    doesn't intervene here, particularly given what  
24    this Court has said about the discovery rule  
25    more recently, that it will really solidify the

1 discovery rule in place.

2           And how we know that is that both in  
3 the Second Circuit in *Sohm* and in the Fifth  
4 Circuit in *Martinelli*, parties raised the  
5 question of whether this Court's more recent  
6 case law discussing the bad wine of recent  
7 vintage cast doubt on discovery rules in those  
8 circuits and yet the courts continued to apply  
9 them.

10           I take Justice Jackson's point that  
11 this Court assumes things in questions presented  
12 all the time, but I'm not aware of any precedent  
13 where the Court has assumed away the most  
14 relevant statutory language -- and we all agree  
15 that the language of 507(b) is the most relevant  
16 for purposes of resolving a question of  
17 statutory interpretation -- or a case where the  
18 Court has confined itself to the interpretations  
19 of particular courts of appeals.

20           This Court is always free to reject  
21 all of the interpretations of the courts of  
22 appeals where they are wrong, and particularly  
23 here, where those interpretations rely on an  
24 outdated presumption in favor of the discovery  
25 rule that this Court has now definitively

1 rejected, it would be artificial for the Court  
2 to do so.

3 I recognize the desire for judicial  
4 modesty and incremental decision-making, but  
5 this is a context in which, as all of the amicus  
6 briefs and all of the commentary reflects,  
7 parties and lower courts are crying out for  
8 guidance on what is at bottom a simple question  
9 of statutory interpretation.

10 So whether the Court does so in this  
11 case or whether it holds this case and then  
12 grants the Martinelli petition and resolves the  
13 broader questions here, we believe that the  
14 broader questions are important to litigants.  
15 They are really intertwined with the narrower  
16 question that Respondents and the government are  
17 asking this Court to resolve.

18 And I do submit that it would really  
19 be unfortunate if this Court, however it decides  
20 this case, left in place lower court decisions  
21 that really cannot be reconciled with this  
22 Court's own precedents.

23 The answer in this case is  
24 straightforward. All the Court need do is to  
25 apply the standard rule concerning the meaning

1 of the term "accrues" and, if it does so, the  
2 answer to the question presented of whether a  
3 copyright plaintiff can recover damages for acts  
4 that allegedly occurred more than three years  
5 before the filing of a lawsuit is no. And so we  
6 would ask that the judgment of the Eleventh  
7 Circuit be reversed.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 The case is submitted.

12 (Whereupon, at 12:35 p.m., the case  
13 was submitted.)

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## Official

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