No. 22-1078

In the Supreme Court of the United States

WARNER CHAPPELL MUSIC, INC., ET AL., PETITIONERS

v.

SHERMAN NEALY, ET AL.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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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 THE UNITED STATES

This case presents the question whether, under the discovery accrual rule applied by the courts of appeals and the limitations period set forth in the Copyright Act of 1976, see 17 U.S.C. 507(b), a plaintiff can recover damages for infringing acts that occurred more than three years before she filed suit. The United States has significant responsibilities related to, and derives important benefits from, the national copyright system. The Copyright Office is responsible for administering the registration of creative works and for advising Congress, federal agencies, the courts, and the public on copyright law and policy. See 17 U.S.C. 701. The Copyright Office also operates the Copyright Claims Board, which resolves small-claims copyright actions governed by a statute of limitations materially identical to 17 U.S.C.

507(b). See 17 U.S.C. 1504(b)(1). The United States Patent and Trademark Office, through the Secretary of Commerce, advises the President on intellectual-property matters. 35 U.S.C. 2(b)(8) and (c)(5). The question presented implicates the expertise and responsibilities of other federal agencies and components as well. The United States therefore has a substantial interest in the Court's disposition of this case.

STATUTORY PROVISION INVOLVED

Section 507(b) of Title 17 provides: "No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." 17 U.S.C. 507(b).

STATEMENT

1. The Copyright Act of 1976 (Copyright Act or Act), 17 U.S.C. 101 *et seq.*, grants copyright protection to original works of authorship fixed in a tangible medium of expression. 17 U.S.C. 102(a). A valid copyright grants the owner "exclusive rights" to, among other things, "reproduce the copyrighted work in copies," 17 U.S.C. 106(1); "prepare derivative works based upon the copyrighted work," 17 U.S.C. 106(2); and "distribute copies * * * of the copyrighted work to the public," 17 U.S.C. 106(3). "Anyone who violates any of" these "exclusive rights" is "an infringer of the copyright or right of the author." 17 U.S.C. 501(a).

The Copyright Act authorizes a variety of civil remedies for infringement. See 17 U.S.C. 502-505. A court may issue an injunction, "on such terms as it may deem reasonable," to prevent or restrain infringement of a copyright. 17 U.S.C. 502(a). "[A]n infringer of copyright" is also "liable," at the election of the copyright owner, "for either": (1) "the copyright owner's actual damages and any additional profits of the infringer" or

(2) "statutory damages." 17 U.S.C. 504(a). "Actual damages" means "the actual damages suffered by [the copyright owner] as a result of the infringement," and "profits of the infringer" include any profits "that are attributable to the infringement" and not "taken into account in computing the actual damages." 17 U.S.C. 504(b).

2. The Copyright Act's limitations provision states that "[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." 17 U.S.C. 507(b). The Act does not define the term "accrued." And this Court has never resolved when a copyright-infringement claim "accrue[s]" under that provision. Cf. *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 517 (1967) (refusing "to define for all purposes when a 'cause of action' first 'accrues'" because "[s]uch words are to be 'interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends * * * served by'" a particular limitations period).

In *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014), the Court identified two possible understandings of the term "accrued" as it appears in Section 507(b). The Court observed that a copyright claim could "arise[] or 'accrue[]' when an infringing act occurs." *Id.* at 670. The Court further explained, however, that "nine Courts of Appeals ha[d] adopted, as an alternative to the incident of injury rule, a 'discovery rule,' which starts the limitations period when 'the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim.'" *Id.* at 670 n.4 (citing 6 W. Patry, *Copyright* § 20:19, at 20-28 (2013) ("The overwhelming majority of courts use discovery

accrual in copyright cases.")). The Court noted that it had "not passed on the question" of which rule is correct. *Ibid.*

Petrella involved a copyright dispute arising from the 1980 film *Raging Bull*. 572 U.S. at 673-674. In 1981, plaintiff Paula Petrella inherited her father's copyright to a screenplay on which she alleged *Raging Bull* was based. *Id.* at 674. She renewed the copyright in 1991. *Ibid.* In 1998, Petrella's attorney informed Metro-Goldwyn-Mayer, Inc. (MGM) that its commercial exploitation of any work derived from the screenplay—including MGM's use, production, and distribution of *Raging Bull*—would infringe Petrella's copyright. *Ibid.* During the ensuing years, Petrella repeatedly threatened to take legal action, but she did not sue MGM for copyright infringement until January 6, 2009, after the film started to turn a profit. *Id.* at 674, 676, 676 n.10.

Because Section 507(b) "requires commencement of suit 'within three years after the claim accrued,' Petrella sought relief only for acts of infringement occurring on or after January 6, 2006." *Petrella*, 572 U.S. at 674-675 (quoting 17 U.S.C. 507(b)). Although Petrella's claims as to those alleged infringing acts were filed within the period prescribed by Section 507(b), MGM argued that her suit was barred by the equitable doctrine of laches—*i.e.*, "unreasonable, prejudicial delay in commencing suit"—given her "18–year delay, from the 1991 renewal of the copyright on which she relied, until 2009, when she commenced suit." *Id.* at 667, 675. This Court rejected that argument, holding that "[l]aches * * * cannot be invoked to preclude adjudication of a claim for damages brought within the three-year window" prescribed by Section 507(b). *Id.* at 667.

The *Petrella* Court had no occasion, however, to determine the appropriate approach to accrual under Section 507(b). Petrella had sued only for infringing acts alleged to have occurred during the three-year period before she filed her complaint. See 572 U.S. at 667, 674-675. And because Petrella had long known of MGM's commercial exploitation of *Raging Bull*, going back decades before she sued, *id.* at 674-675, she could not plausibly have invoked a discovery accrual rule to recover for earlier acts of infringement. The Court therefore identified the two possible understandings of Section 507(b) accrual described above, without deciding which is correct. *Id.* at 670 & n.4.

3. a. The dispute in this case involves several musical works that respondents created in the 1980s. In 1983, respondent Sherman Nealy formed respondent Music Specialist, Inc. with his then-business partner Tony Butler. Pet. App. 3a-4a. Nealy funded the company; Butler authored or co-authored the company's musical works. *Ibid.* Between 1983 and 1986, Music Specialist recorded and released the musical works at issue here. *Id.* at 4a.

Music Specialist dissolved in 1986, and it ceased to do business in 1989 when Nealy began serving a prison sentence for distributing cocaine. Pet. App. 4a. Nealy was released in 2008, but he served another prison sentence between 2012 and 2015. *Id.* at 4a-5a.

Meanwhile, Butler started a new company, 321 Music, and began to license songs from Music Specialist's catalog. Pet. App. 4a. In 2008, Butler and 321 Music granted a license to Atlantic Recording Corp. to interpolate a Music Specialist work into a hip-hop song entitled "In the Ayer" by the recording artist Flo Rida. *Ibid.* "In the Ayer" became a smash hit. *Ibid.* Later

that year, Butler and 321 Music contracted with petitioners Warner Chappell Music, Inc. and Artist Publishing Group, LLC to make petitioners the "exclusive administrators of the music publishing rights" to several works from Music Specialist's catalog. *Ibid.*

Nealy was not involved in the music industry while he was incarcerated. Pet. App. 4a. After his first stint in prison, Nealy learned that a third party, Robert Crane, was distributing works from the Music Specialist catalog. *Id.* at 4a-5a. Nealy met with Crane but took no further action. *Ibid.* Nealy maintains that he was unaware that during his second prison term, Crane, 321 Music, petitioners, and others were engaged in litigation over the right to exploit the Music Specialist works. *Id.* at 5a; see *Baker* v. *Warner/Chappell Music, Inc.*, 759 Fed. Appx. 760, 762 (11th Cir. 2018) (per curiam). Nealy contends that in January 2016, after he completed his second term of imprisonment, he learned of that litigation and of the 2008 contract that Butler and 321 Music had formed with petitioners. Pet. App. 5a.

b. In December 2018, respondents sued petitioners and Atlantic, alleging that they had infringed the copyrights to multiple musical works owned by respondents. Pet. App. 5a; C.A. App. 59-62. Respondents invoked the Eleventh Circuit's discovery rule to argue that they were entitled to damages for acts of infringement that had allegedly occurred as early as 2008—*i.e.*, infringement that had "occurred more than three years before they filed this lawsuit." Pet. App. 7a. Under Eleventh Circuit precedent, "claims about the ownership of a copyright are timely if a plaintiff files suit within three years of when the plaintiff knew or reasonably should have known that the defendant violated the plaintiff's ownership rights." *Id.* at 2a.

Petitioners did not dispute that, under the discovery rule, "a plaintiff can file suit over harm that occurred more than three years earlier." Pet. App. 2a. Petitioners argued, however, that such plaintiffs "cannot recover damages for anything that happened more than three years before they filed suit." *Ibid.* On cross-motions for summary judgment, the district court granted in part petitioners' motion, holding as relevant here that the "potential damages in this case are limited to the three-year period prior to [respondents'] filing suit." *Id.* at 26a-27a.

The district court concluded that, "[i]n *Petrella*, the Supreme Court explicitly delimited damages to the three years prior to the filing of a copyright infringement action." Pet. App. 26a (citing *Petrella*, 572 U.S. at 671-672, 677). Specifically, in rejecting the argument that laches can bar an otherwise timely copyright infringement claim, *Petrella* explained that the Copyright Act "itself takes account of delay": "[A] successful plaintiff can gain retrospective relief only three years back from the time of suit." 572 U.S. at 677. The district court noted the Second Circuit's determination that this "three-year limitation on damages was * * * an integral part of the result in *Petrella* and is binding precedent." *Ibid.* (citing *Sohm* v. *Scholastic Inc.*, 959 F.3d 39, 52 (2020)). Finding the Second Circuit's reasoning "persuasive[]," the district court held that "even where the discovery rule dictates the accrual of a copyright infringement claim, a three-year lookback period from the time a suit is filed must be used to determine the extent of the relief available." *Ibid.*

At the parties' request, the district court certified for interlocutory appeal "its summary judgment determination that, even where the discovery rule dictates the

accrual of a copyright claim, damages in this copyright action are limited to the three-year lookback period as calculated from the date of the filing of the [c]omplaint." Pet. App. 36a; see 28 U.S.C. 1292(b).

c. On interlocutory appeal, the court of appeals "assume[d] for the purposes of answering the district court's certified question" that respondents' "claims are timely under the discovery rule." Pet. App. 9a. "The question in this appeal," the court explained, was "whether the Copyright Act's statute of limitations, 17 U.S.C. § 507(b), precludes a copyright plaintiff from recovering damages for harms occurring more than three years before the plaintiff filed suit, even if the plaintiff's suit is timely under our discovery rule." *Id.* at 7a. The court answered that question in the negative, holding "that a copyright plaintiff may recover retrospective relief for infringement occurring more than three years before the lawsuit's filing so long as the plaintiff's claim is timely under the discovery rule." *Id.* at 10a, 17a; see *id.* at 3a ("We hold that, when a copyright plaintiff has a timely claim under the discovery accrual rule for infringement that occurred more than three years before the lawsuit was filed, the plaintiff may recover damages for that infringement.").

The court of appeals explained that "[t]he plain text of the Copyright Act's statute of limitations does not limit the remedies available on an otherwise timely claim." Pet. App. 15a-16a. The court explained that Section 507(b) "provides that 'no civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.'" *Id.* at 16a (quoting 17 U.S.C. 507(b)). The court further explained that a civil action is a "proceeding 'brought to enforce, redress, or protect a private [] or

civil right,'" while a remedy "is 'the means of enforcing a right or preventing or redressing a wrong.'" *Ibid.* (quoting *Black's Law Dictionary* 38, 1547 (11th ed. 2019)). The court recognized that "[a] plaintiff cannot obtain a remedy without a timely civil action." *Ibid.* It concluded, however, that "if a plaintiff succeeds at maintaining a timely civil action," Section 507(b) "has little bearing on what a plaintiff may obtain as a remedy." *Ibid.*

The court of appeals further held that the Copyright Act's damages provisions, see 17 U.S.C. 504, do not "place a three-year limitation on the recovery of damages for past infringement." Pet. App. 16a. The court explained that, "[f]or a separate damages bar to exist, these damages provisions would have to limit a plaintiff's recovery to something less than the harm caused by the infringement for which a defendant is liable." *Ibid.* The court observed that the Act's damages provisions do not impose any such limitation; instead, the Act makes a copyright infringer liable for the "'actual damages suffered by [the plaintiff] as a result of the infringement.'" *Ibid.* (quoting 17 U.S.C. 504(a)(1) and (b)) (brackets in original).

The court of appeals concluded that this Court's decision in *Petrella* did not mandate a different result. Pet. App. 11a-15a. The court of appeals explained that it did not read various "snippets from *Petrella*," on which the district court and petitioners had relied, to "cap copyright damages for claims that are timely under the discovery rule." *Id.* at 11a; see *id.* at 17a (noting that petitioners' "argument begins and ends with *Petrella*"). The court of appeals observed that *Petrella* "did not present the question whether a plaintiff could re-

cover for harm that occurred more than three years before the plaintiff filed suit if his claim was otherwise timely under the discovery rule." *Ibid.* Rather, "[t]he plaintiff in *Petrella* 'sought no relief for conduct occurring outside § 507(b)'s three-year limitations period.'" *Id.* at 12a (quoting *Petrella*, 572 U.S. at 668). The court therefore construed statements in *Petrella* explaining that a copyright plaintiff can recover damages "'running only three years back from the date the complaint was filed'" as limited to "the facts of that case and others like it." *Id.* at 11a-12a.

The court of appeals further emphasized that "the Court in *Petrella* expressly addressed the discovery rule and preserved the question whether the discovery rule governs the accrual of copyright claims." Pet. App. 14a (citing *Petrella*, 572 U.S. at 670 n.4). The court explained that "[i]t would be inconsistent with *Petrella*'s preservation of the discovery rule to read *Petrella* to bar damages for claims that are timely under the discovery rule," since "'there is no reason for a discovery rule if damages for infringing acts of which the copyright owner reasonably becomes aware years later are unavailable.'" *Ibid.* (quoting *Starz Entm't, LLC* v. *MGM Domestic Television Distrib., LLC*, 39 F.4th 1236, 1244 (9th Cir. 2022)). The court therefore declined to construe *Petrella* as "silently eliminat[ing] the discovery rule by capping damages for claims that are timely under that rule." *Ibid.*

d. Petitioners filed a petition for a writ of certiorari, seeking review of the question "[w]hether the Copyright Act's statute of limitations for civil actions, 17 U.S.C. 507(b), precludes retrospective relief for acts that occurred more than three years before the filing of a lawsuit." Pet. I. Petitioners noted that the Eleventh

Circuit's decision in this case—which reached the same conclusion the Ninth Circuit had reached the previous year, see *Starz*, *supra*—conflicted with the Second Circuit's contrary holding in *Sohm* that even if "the discovery rule tolled the accrual of the plaintiff's claims," such that "the action as a whole was timely," "'a plaintiff's recovery is limited to damages incurred during the three years prior to filing suit.'" Pet. 11-12 (quoting *Sohm*, 959 F.3d at 52); see Pet. 11-14. Petitioners explained that there was a "2-1 conflict" as to whether, "'when a copyright plaintiff has a timely claim under the discovery accrual rule for infringement that occurred more than three years before the lawsuit was filed, the plaintiff may recover damages for that infringement.'" Pet. 9, 14 (quoting Pet. App. 3a). Petitioners asserted that "[t]his case is a straightforward candidate for certiorari" because the question whether damages may be awarded in that circumstance "is the subject of an entrenched conflict among three federal courts of appeals." Pet. 10.

Petitioners also observed that *Petrella* had "left open the question whether the discovery rule applies in Copyright Act cases." Pet. 14 n.*. Petitioners acknowledged that "a conflict in the courts of appeals has not yet developed on that antecedent question"—and that they had "not challenged" the "availability of the discovery rule" in the courts below—but asserted that "this case would allow the Court to reach the question if it were so inclined" because it was "encompassed within the question presented" in the certiorari petition. *Ibid.* In their petition-stage reply brief, petitioners reiterated that "[t]he broad question presented here * * * affords the Court the opportunity to consider the threshold applicability of the discovery rule if it so chooses, in

addition to the core question on which the circuits are indisputably divided." Pet. Cert. Reply 4.

This Court granted certiorari "limited to the following question": "Whether, under the discovery accrual rule applied by the circuit courts and the Copyright Act's statute of limitations for civil actions, 17 U.S.C. § 507(b), a copyright plaintiff can recover damages for acts that allegedly occurred more than three years before the filing of a lawsuit." 2023 WL 6319656, at *1 (Sept. 29, 2023).

SUMMARY OF ARGUMENT

A. The reformulated question on which this Court granted certiorari assumes that the timeliness of copyright-infringement claims is governed by the discovery accrual rule applied by the courts of appeals. Under that rule, the Copyright Act's three-year limitations period begins to run "when the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim." *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 n.4 (2014) (citation and internal quotation marks omitted). At the petition stage of this case, petitioners suggested that the Court might also wish to review the antecedent question whether copyright-infringement claims are subject to a discovery rule at all. But the Court's reformulation of the question presented unambiguously excludes that issue.

B. Section 507(b) is the only Copyright Act provision that imposes any time-based limit on a plaintiff's entitlement to retrospective monetary relief. Under that provision, a civil copyright-infringement action is timely if, but only if, it is commenced "within three years" after the infringement claim "accrued." 17 U.S.C. 507(b). If an infringement claim is timely under Section 507(b),

the availability of various monetary remedies is governed by *other* Copyright Act provisions. The provisions that authorize recovery of damages and profits (see 17 U.S.C. 504) do not impose any further time-based limit, and any judge-made rule precluding a damages award in a timely-filed suit would flatly contradict the statute.

C. This Court's decision in *Petrella* did not endorse the (atextual) proposition that a plaintiff's failure to sue within three years after an act of infringement occurs precludes monetary relief even if the plaintiff's claim is timely under the discovery rule. The plaintiff in *Petrella* had long been aware of the defendant's alleged pattern of infringing conduct, and she sought relief only for infringing acts that had occurred during the preceding three-year period. Because the plaintiff did not invoke a discovery accrual rule, and the Court reserved the question whether any discovery rule applies in copyright suits at all, the Court had no occasion to discuss the proper computation of damages under such a rule.

Some of the *Petrella* Court's more general reasoning, however, supports respondents' position here. In rejecting MGM's proposed laches defense, the Court cautioned against the creation of additional judge-made time limits on legal relief for claims brought within the Act's statute of limitations. The Court further explained that Section 507(b) incorporates a "separate-accrual rule," *Petrella*, 572 U.S. at 671, under which the timeliness of a suit for damages is determined on a claim-by-claim basis. That rule is less favorable to defendants than a laches bar would have been, but it is more protective of defendants' interests than a "continuing violation" approach, under which a single new act of infringement can resurrect claims for prior acts as to

which suit would otherwise be time-barred. The damages limitation that petitioners advocate is precisely the sort of judge-made limit, untethered either to the Copyright Act's remedial provisions or to its statute of limitations, that the *Petrella* Court discountenanced. And by allowing a plaintiff to recover damages only for infringement claims that accrued during the three years before she filed suit, the separate-accrual rule can balance competing interests in the manner that Congress intended, regardless of what test is used to determine accrual.

D. Petitioners principally urge the Court to hold that a copyright-infringement claim "accrues" under Section 507(b) "when the plaintiff has a 'complete and present cause of action,'" regardless of when the plaintiff "discovers the violation." Pet. Br. 20 (citation omitted). That argument falls outside the question presented as reformulated by this Court, which asks the litigants to address the availability of damages "under the discovery accrual rule applied by the circuit courts." Petitioners also contend that, if the Court decides this case on the assumption that a discovery rule exists, it should treat that rule as an atextual "equitable exception" to Section 507(b)'s time limit, and "should enforce a three-year limitation on retrospective relief as an equitable exception to the equitable discovery rule." *Id.* at 41-42. Most courts of appeals, however, have adopted the discovery rule as an *interpretation* of Section 507(b). If (as the Court's reformulation of the question presented directs) that interpretation is assumed to be correct for purposes of this case, courts cannot appropriately superimpose an additional judge-made time limitation on the availability of monetary relief.

ARGUMENT

IF A COPYRIGHT-INFRINGEMENT CLAIM IS TIMELY FILED UNDER THE DISCOVERY ACCRUAL RULE APPLIED BY THE COURTS OF APPEALS, A PLAINTIFF MAY RECOVER DAMAGES EVEN IF THE RELEVANT ACT OF INFRINGEMENT OCCURRED MORE THAN THREE YEARS BEFORE SUIT WAS FILED

This Court granted certiorari limited to the question whether, under the discovery accrual rule applied by the courts of appeals and 17 U.S.C. 507(b), a plaintiff can recover damages for acts of infringement that occurred more than three years before she filed suit. The Court's reformulation of the question presented asks the parties to assume, for purposes of this case, that a claim for copyright infringement "accrue[s]" within the meaning of Section 507(b) when the plaintiff discovers or reasonably should have discovered the injury that gives rise to the claim.

On that assumption, the answer to the question presented is straightforward. If (as the court of appeals assumed) this suit was filed within three years after respondents reasonably discovered their injury and therefore was timely under Section 507(b), nothing in the Copyright Act imposes any further time-based limit on the damages that respondents may recover. The judgment of the court of appeals should be affirmed on that basis. Petitioners principally urge this Court to hold either that Section 507(b) does not incorporate a discovery rule at all, or that it incorporates a discovery rule far narrower than any court of appeals has applied. Those arguments are outside the question presented as reformulated by this Court, and the Court should not consider them.

A. This Court Granted Certiorari Limited To The Question Whether A Plaintiff Whose Claim Is Timely Under The Discovery Rule May Recover Damages For Acts That Occurred More Than Three Years Before She Filed Suit

As explained above, see pp. 10-12, *supra*, petitioners principally asked this Court to grant certiorari to answer a question that has divided the courts of appeals: whether, when a copyright-infringement claim is timely under the discovery rule, the Copyright Act bars the plaintiff from recovering damages for infringing acts that occurred more than three years before suit was filed. Petitioners also suggested, however, that the Court might wish to address the "antecedent" question whether any discovery rule applies in copyright actions at all—and petitioners emphasized that the question they had presented in the certiorari petition encompassed that issue. Pet. 14 n.*; see Pet. Cert. Reply 4.

This Court granted certiorari but reformulated the question presented in a way that unambiguously excludes the "antecedent" question identified in the certiorari petition. See 2023 WL 6319656, at *1 (granting certiorari "limited to the following question": "Whether, under the discovery accrual rule applied by the circuit courts and the Copyright Act's statute of limitations for civil actions, 17 U.S.C. § 507(b), a copyright plaintiff can recover damages for acts that allegedly occurred more than three years before the filing of a lawsuit."). By directing the parties to address the availability of damages "under the discovery rule applied by the circuit courts," the reformulated question presented assumes that an infringement claim is timely under Section 507(b) if suit is filed within three years after the plaintiff discovers or reasonably should have discovered the injury that gave rise to the claim. The reformulated

question presented (and the question that has divided the courts of appeals) is whether the Copyright Act categorically precludes any damages recovery for acts of infringement that occurred more than three years before suit was filed, even where a suit alleging such infringing acts is timely under the discovery rule.

B. When A Claim For Copyright Infringement Is Filed Within Three Years After The Claim "Accrued," And Therefore Is Timely Under 17 U.S.C. 507(b), Nothing In The Copyright Act Imposes Any Further Time-Based Limit On The Damages The Plaintiff May Recover

"In statutory construction," the Court "begin[s] 'with the language of the statute'"; if that "language is unambiguous and 'the statutory scheme is coherent and consistent,'" then "'the inquiry ceases.'" *Kingdomware Techs., Inc.* v. *United States*, 579 U.S. 162, 171 (2016) (quoting *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). That is the case here. Section 507(b) is the only Copyright Act provision that imposes any time-based limit on a plaintiff's entitlement to retrospective monetary relief. When a plaintiff's claim is timely under Section 507(b), and the plaintiff satisfies the Act's other requirements for particular monetary remedies, nothing in the Copyright Act precludes her from recovering such relief based on when the acts of infringement occurred.

Section 507(b), by its plain terms, is a "time-to-sue prescription." *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 686 (2014). Section 507(b) states that a "civil action" may be "maintained" under the Copyright Act only if it is commenced "within three years" after the claim "accrued." 17 U.S.C. 507(b). Different approaches to determining "accru[al]" exist. See pp. 3-5,

supra. But the Court's reformulated question presented directs the litigants in this case to address the availability of damages "under the discovery accrual rule applied by the circuit courts." 2023 WL 6319656, at *1. The *Petrella* Court explained that "nine Courts of Appeals" had "adopted" a "discovery rule" for copyright infringement suits that "starts the limitations period when 'the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim.'" 572 U.S. at 670 n.4 (citation omitted); see Pet. 4 (noting that eleven circuits have now adopted the discovery rule). Under that approach to claim accrual, an infringement action may be maintained so long as it is "commenced within three years" after the date of actual or constructive discovery, regardless of when the allegedly infringing acts occurred. See Patry § 20:19, at 20-28 (collecting cases applying the discovery rule).[1]

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[1] Section 507(b)'s limitations period for filing copyright-infringement suits against private defendants differs from 28 U.S.C. 1498(b), which authorizes the Court of Federal Claims to award compensatory damages for copyright infringement committed by the United States, and from the statute of limitations in the Patent Act of 1952, 35 U.S.C. 1 *et seq*. Section 1498(b) states that, subject to a limited exception, and "[e]xcept as otherwise provided by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than three years prior to the filing of the complaint or counterclaim for infringement in the action." 28 U.S.C. 1498(b). The Patent Act's limitations provision states that, "[e]xcept as otherwise provided by law, no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint." 35 U.S.C. 286. Those provisions do not refer to the date when an infringement claim "accrues," but instead specify that the relevant three- or six-year period runs from the "infringement" of a copyright or patent.

If an infringement claim is timely under the discovery rule, Section 507(b) has no bearing on the scope of relief that a successful plaintiff can obtain. In particular, Section 507(b) cannot plausibly be read to establish two distinct three-year windows—one (measured from the date of actual or constructive discovery) for filing suit and another (measured from the date of the infringing conduct) for recovering damages. Rather, the provision establishes a single three-year period that begins to run when "the claim accrue[s]," and it specifies that "[n]o civil action" commenced after that period elapses "shall be maintained." 17 U.S.C. 507(b). When a particular suit *is* "commenced within three years after the claim accrued," *ibid.*, the elements of relief available to a successful plaintiff are defined not by Section 507(b), but by *other* Copyright Act provisions.

The Copyright Act provisions that identify the remedies available in a successful infringement suit likewise do not impose the timing requirement that petitioners advocate. "For a separate damages bar to exist," the Act's remedial provisions "would have to limit a plaintiff's recovery to something less than the harm caused by the infringement for which a defendant is liable." Pet. App. 16a. But the Copyright Act provisions that authorize recovery of damages and profits, codified at 17 U.S.C. 504, do not impose any such limitation. Instead, Section 504 states without qualification that an infringer of copyright is liable, at the copyright owner's election, either for "the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement," 17 U.S.C. 504(b), or for "an award of statutory damages for all infringements involved in the action," 17 U.S.C. 504(c)(1); pp. 2-3, *supra*. A rule precluding recovery of damages

for acts of infringement as to which suit was timely filed thus would flatly contradict the statute.

C. This Court's Decision In *Petrella* Does Not Support Petitioners' Proposed Limitation On The Damages A Successful Plaintiff May Recover For An Infringement Claim That Is Timely Under The Discovery Rule

In *Sohm* v. *Scholastic Inc.*, 959 F.3d 39 (2020), the Second Circuit held that, although the plaintiff's copyright-infringement claims were timely under the discovery rule, the district court had "erred in allowing [the plaintiff] to recover damages for more than three years prior to when he filed his copyright infringement suit." *Id.* at 51; see *id.* at 49-52. The Second Circuit did not attempt to ground that holding in the text of the Copyright Act. Instead, the court believed that "*Petrella*'s plain language explicitly dissociated the Copyright Act's statute of limitations from its time limit on damages." *Id.* at 52. That reading of *Petrella* is incorrect.

1. As explained above, see pp. 4-5, *supra*, Petrella alleged that MGM had infringed her copyright by commercially exploiting the film *Raging Bull*, which had first been released in 1980. *Petrella*, 572 U.S. at 674. Petrella had long been aware of MGM's release and distribution of the film but had not filed suit until 2009. *Id.* at 674, 682-683.

Given MGM's open and notorious commercial exploitation of *Raging Bull* and Petrella's undisputed awareness of the alleged infringement over a long period of time, Petrella would have had no realistic prospect of successfully invoking the discovery rule to expand the range of infringing acts encompassed by her suit. In any event, she sought relief only for acts of infringement that had allegedly occurred during the three-year period before she filed her complaint. See *Petrella*, 572

U.S. at 674-675. MGM argued that Petrella's suit was barred by "laches"—*i.e.*, her "unreasonable, prejudicial delay in commencing suit." *Id.* at 667, 675. This Court granted review to determine whether the doctrine of laches can "bar relief on a copyright infringement claim brought within § 507(b)'s three-year limitations period." *Id.* at 667. The Court resolved that issue in Petrella's favor, holding that the "equitable defense of laches" cannot "bar a claim for damages brought within the time allowed by a federal statute of limitations." *Id.* at 676, 679.

That holding supports respondents' position here. The *Petrella* Court held that the Ninth Circuit had erred in interposing a "'judicial[ly] creat[ed]'" bar on recovery "in [the] face of a statute of limitations enacted by Congress." 572 U.S. at 676, 679 (citation omitted). The Second Circuit's rule fails for the same reason: it purports to limit a plaintiff's monetary recovery on timely filed infringement claims for reasons untethered either to Section 504's remedial provisions or to Section 507(b)'s deadline for filing suit. Indeed, the *Petrella* Court rejected a judicially created limitation on recovery even though the plaintiff had deliberately waited to sue MGM until she determined whether "litigation [wa]s worth the candle." *Id.* at 683. A judge-made limit on monetary relief is all the more inappropriate here, where respondents have asserted (and the court of appeals assumed for purposes of this interlocutory appeal) that the delay is attributable to respondents' reasonable unawareness of the infringement.

2. *Petrella*'s broader reasoning likewise supports respondents. In rejecting MGM's laches defense, the Court explained that "the copyright statute of limitations, § 507(b), itself takes account of delay," *Petrella*,

572 U.S. at 677—and does so in a way that strikes a balance between the competing interests of copyright plaintiffs and defendants. Specifically, the Court explained that Section 507(b) incorporates a "separate-accrual rule," under which "[e]ach time an infringing work is reproduced or distributed, the infringer commits a new wrong" that "gives rise to a discrete 'claim.'" *Id.* at 671. Thus, "each infringing act starts a new limitations period," and "when a defendant commits successive violations, the statute of limitations runs separately from each violation." *Ibid.*

That rule was undoubtedly less favorable to copyright defendants than the laches defense that MGM sought to invoke, under which a plaintiff who waited too long to sue after an initial act of infringement could obtain no relief for later infringing acts no matter how long the defendant's unlawful conduct continued. See *Petrella*, 572 U.S. at 677 n.13 (noting that, if "Petrella had a winning case on the merits, the Court of Appeals' ruling on laches would effectively give MGM a cost-free license to exploit *Raging Bull* throughout the long term of the copyright"). But the separate-accrual rule was *more* friendly to copyright defendants than a continuing-violation rule, under which a plaintiff could recover damages for an entire series of acts so long as one of those acts had occurred within the limitations period. The Seventh Circuit had previously endorsed that approach in interpreting Section 507(b). See *Taylor* v. *Meirick*, 712 F.2d 1112, 1118-1119 (1983) (holding that the initial act of copying, plus subsequent sales of the resulting infringing copies, constituted a "continuing wrong" such that the plaintiff could recover damages for the entire series of acts so long as the last sale occurred within the three-year limitations period); see

also 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.05[B][1][a], at 12-155 (Apr. 2020) (describing continuing-violation rule as applied in the Seventh Circuit before *Petrella*).

In *Petrella*, the Court rejected that understanding of Section 507(b), cautioning that "[s]eparately accruing harm should not be confused with harm from past violations that are continuing." 572 U.S. at 671 & n.6. Rather, because "each infringing act" is a "separate" wrong, an "infringer is insulated from liability for earlier infringements of the same work" that fall outside the limitations period. *Id.* at 671, 672 n.7. A copyright plaintiff who identifies particular infringing acts within the limitations period therefore can obtain damages for those infringing acts. Proof of recent infringing conduct, however, does not resurrect claims based on earlier infringing acts for which suit would otherwise be untimely. Instead, "[p]rofits made in those years remain the defendant's to keep." *Id.* at 677.

The rule that each act of infringement gives rise to a separate claim can balance competing interests in the manner described above, regardless of the specific test used to determine when a particular claim "accrue[s]" under Section 507(b). 17 U.S.C. 507(b). Under the discovery rule adopted by the courts of appeals, a plaintiff can sue only on those individual acts of infringement for which her claims accrued during the three-year period before suit was filed. A plaintiff's new discovery of recent infringing conduct therefore will not allow her to resurrect claims that she discovered (or should have discovered) more than three years earlier. And the discovery rule applied by the courts of appeals gives defendants additional protection against unreasonable de-

lay by providing that a claim accrues "when 'the plaintiff discovers, *or with due diligence should have discovered*, the injury that forms the basis for the claim.'" *Petrella*, 572 U.S. at 670 n.4 (emphasis added; citation omitted).

To be sure, particular infringement claims that would be time-barred under an injury accrual rule may be timely under a discovery rule. The choice between the two interpretations of the statutory term "accrued" therefore will affect the precise balance that Section 507(b) strikes between the interests of plaintiffs and defendants. But the Court's core rationale for finding laches inapplicable to Petrella's claims for monetary relief—*i.e.*, that a judge-made limit on "legal remedies" was unnecessary and inappropriate because "the copyright statute of limitations, § 507(b), itself takes account of delay," *Petrella*, 572 U.S. at 677—remains equally apt regardless of when a copyright-infringement claim "accrue[s]."

3. In describing the operation of the separate-accrual rule, the Court in *Petrella* stated that Section 507(b)'s "limitations period * * * allows plaintiffs * * * to gain retrospective relief running only three years back from the date the complaint was filed." 572 U.S. at 672. The Court also stated that "a successful plaintiff can gain retrospective relief only three years back from the time of suit," and that "[n]o recovery may be had for infringement in earlier years." *Id.* at 677. In *Sohm*, the Second Circuit concluded that, "[d]espite not passing on the propriety of the discovery rule," the *Petrella* Court had "explicitly delimited damages to the three years prior to the commencement of a copyright infringement action." 959 F.3d at 51. That reading of *Petrella* is mistaken.

As described above, the plaintiff in *Petrella* sued only for acts of infringement that had allegedly occurred during the three-year period preceding her complaint. See pp. 5, 20-21, *supra*. And given her longstanding awareness of MGM's alleged infringing conduct, Petrella could not plausibly have invoked the discovery rule to sue for earlier infringing acts. *Petrella* thus "did not present the question whether a plaintiff could recover for harm that occurred more than three years before the plaintiff filed suit if his claim was otherwise timely under the discovery rule." Pet. App. 11a. Rather, the Court's references to the limits Section 507(b) imposes on retrospective relief simply described the balance between plaintiffs and defendants that the separate-accrual rule strikes in the factual circumstances presented in *Petrella* itself.

The Court's statement that a plaintiff can "gain retrospective relief running only three years back from the date the complaint was filed," *Petrella*, 572 U.S. at 672, thus referred to the circumstances actually before the Court, in which a plaintiff with no plausible claim to belated discovery of earlier acts of infringement sued only for those infringing acts that had occurred during the previous three years. The Court explained that such a plaintiff can recover for those recent acts of infringement, but cannot use such acts "as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period." *Id.* at 672 n.7 (citation omitted); see pp. 21-24, *supra*. But the Court did not reach beyond the circumstances of *Petrella* to hold—unmoored from the statutory text—that a (hypothetical) plaintiff who validly invokes the discovery rule to sue for infringing acts that occurred more than three years earlier cannot recover damages for

those acts. Indeed, the Court declined even to decide whether the discovery accrual rule applies in copyright actions at all. *Petrella*, 572 U.S. at 670 n.4; see *SCA Hygiene Prods. Aktiebolag* v. *First Quality Baby Prods., LLC*, 580 U.S. 328, 337-338 (2017) ("[I]n *Petrella*, we specifically noted that 'we have not passed on the question' whether the Copyright Act's statute of limitations is governed by such a [discovery] rule.") (quoting *Petrella*, 572 U.S. at 670 n.4).

To adopt a discovery accrual rule in copyright-infringement suits, while imposing the limit on retrospective relief that the Second Circuit perceived in *Petrella*, would be a largely self-defeating approach. The decision whether to adopt a discovery accrual rule in copyright cases can potentially affect the timeliness of an infringement claim only when suit is filed more than three years after an alleged act of infringement occurred. Although the Second Circuit in *Sohm* adhered to its prior view that a discovery rule governs the question whether suit is timely filed under Section 507(b), see 959 F.3d at 50, its holding as to damages largely deprives the discovery rule of any meaningful practical effect. See Pet. App. 14a ("It would be inconsistent with *Petrella*'s preservation of the discovery rule to read *Petrella* to bar damages for claims that are timely under the discovery rule" because "there is no reason for a discovery rule if damages for infringing acts of which the copyright owner reasonably becomes aware years later are unavailable.").[2]

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[2] Petitioners assert that the United States "likewise argued" in *Petrella* that under Section 507(b), "'a civil suit filed within three years after an act of infringement is timely with respect to that act.'" Pet. Br. 26 (citing U.S. Amicus Br. at 13, *Petrella*, *supra* (No. 12-

Other language in *Petrella* confirms that the Court was addressing the circumstances of the case before it, not describing the computation of damages in hypothetical discovery-rule cases. For example, the Court stated that, "[u]nder the Act's three-year provision, an infringement is actionable within three years, and only three years, of its occurrence." *Petrella*, 572 U.S. at 671. But if (as the reformulated question presented in this case directs the litigants to assume) an infringement claim "accrue[s]" under Section 507(b) at the time of actual or constructive discovery, infringing conduct may be "actionable" even though suit is filed more than three years after "its occurrence." See *Sohm*, 959 F.3d at 50-51 (recognizing that the quoted statement and similar language in *Petrella* "consistent with the injury rule" were not meant to preclude the possibility that a discovery accrual rule governs suits under the Copyright Act, given "the Supreme Court's direct and repeated representations that it has not opined on the propriety of the discovery or injury rules"). Rather, the Court used such language to describe Section 507(b)'s operation in cases like the one before it, where the plaintiff had not invoked the discovery rule. The *Petrella* Court's references to the scope of permissible retrospective relief should be understood in the same manner.

1315)). Like the Court, the United States discussed Section 507(b)'s application to the circumstances presented in *Petrella*, while noting the alternative approach to accrual applied by the courts of appeals. See U.S. Amicus Br. at 12 n.1, *Petrella*, *supra* (No. 12-1315) (noting that nine courts of appeals apply a discovery rule in copyright infringement actions but that "[p]etitioner does not rely on the discovery rule in this case").

D. Petitioners' Contrary Arguments Lack Merit

Neither petitioners nor the Second Circuit has identified any textual basis to construe the Copyright Act to limit the damages a plaintiff may recover for a timely claim. And petitioners make little effort to defend the Second Circuit's reasoning in *Sohm*—the only court of appeals decision that has answered the question presented in petitioners' favor; indeed, petitioners cite *Sohm* just once. See Pet. Br. 26.

Instead, petitioners principally argue that the discovery accrual rule does not apply to Copyright Act claims at all, or at least to claims for retrospective relief. Pet. Br. 15-41. Because those arguments are outside the scope of the question on which the Court granted certiorari, the United States takes no position as to their correctness, and the Court should not consider them. Petitioners also contend that, if the Court decides this case on the assumption that the timeliness of copyright-infringement claims is governed by a discovery rule, the Court should adopt an "equitable exception" barring retrospective relief for acts of infringement committed more than three years before suit was filed. Pet. Br. 42. That argument is meritless.

1. a. Petitioners principally argue—based on the Act's text, purpose, and legislative history—that "a claim has 'accrued' for purposes of Section 507(b) when the plaintiff has a complete and present cause of action," regardless of when the plaintiff "discovers the violation." Pet. Br. 20; see *id.* at 15-31. But as explained above, see pp. 12, 16-17, *supra*, the Court directed the parties to address the proper computation of damages "*under the discovery accrual rule applied by the circuit courts*." See Pet. Br. 31 (recognizing that "[t]he question presented in this case, as rephrased by the Court,

assumes that the Copyright Act contains a 'discovery accrual rule applied by the circuit courts'") (citation omitted). Under that rule, Section 507(b)'s limitations period begins to run when "the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim." *Petrella*, 572 U.S. at 670 n.4 (citation omitted). Petitioners' advocacy of a different triggering event runs headlong into the Court's reformulation of the question presented.

The sequence of events that produced that reformulation highlights the disconnect between petitioners' principal arguments and the question on which this Court granted review. Petitioners' certiorari-stage filings emphasized that petitioners' own question presented was broad enough to encompass the "antecedent" question whether "the discovery rule applies in Copyright Act cases" at all. Pet. 14 n.*; see pp. 10-12, 16-17, *supra*. But the Court instead directed the litigants to address the availability of "damages" "under the discovery accrual rule applied by the circuit courts." That reformulation unambiguously excludes the "antecedent" question on which petitioners previously sought review; yet petitioners have made that question the focus of their merits brief.

In seeking to reconcile their current arguments with the Court's reformulated question presented, petitioners rely in part on a purported distinction between retrospective and prospective relief. Petitioners argue that "there is no valid basis to treat claims for retrospective relief as 'accruing' more than three years after the plaintiff has a complete cause of action," but that "the Court need not reject the applicability of a discovery rule to claims for prospective relief (such as an injunction)." Pet. Br. 27-28 (capitalization and emphasis

omitted). But the Court's reformulated question does not simply direct the litigants to assume the applicability of *some* discovery rule—it directs them to address the scope of permissible damages relief "under the discovery accrual rule applied by the circuit courts." Although petitioners suggest that "some courts of appeals do not apply the discovery rule consistently," *id.* at 31, they identify no court of appeals decision that has limited the Copyright Act discovery rule to claims for injunctive relief.

b. Petitioners contend that "historical practice and this Court's precedents support" the use of a "narrow discovery rule" only in "cases of fraud, latent disease, or medical malpractice." Pet. Br. 33 (capitalization and emphasis omitted). But (again) this Court directed the parties to address the availability of damages under the discovery rule applied by the courts of appeals, and petitioners do not identify a single court of appeals that applies that "narrow[er]" rule to Copyright Act claims. Petitioners also cite various decisions in which this Court has rejected a discovery accrual rule in construing limitations provisions in *other* federal statutes. Pet. Br. 17-20. Those decisions might be relevant if the Court had granted certiorari to determine the proper interpretation of the term "accrued" in Section 507(b)—but the Court did not grant review of that issue, as demonstrated by the reformulated question presented.

Petitioners also suggest (Br. 6) that this Court in *SCA Hygiene* "reaffirmed that Section 507(b) imposes a three-year limitation on retrospective relief." See Pet. Br. 26-27. But that decision reiterated that *Petrella* had not "passed on the question" whether a discovery rule applies to the Copyright Act's statute of limita-

tions. *SCA Hygiene*, 580 U.S. at 337-338 (quoting *Petrella*, 572 U.S. at 670 n.4); see p. 26, *supra*. The Court in *SCA Hygiene* also quoted *Petrella*'s description of Section 507(b) as "'a three-year look-back limitations period,'" 580 U.S. at 337 (quoting *Petrella*, 572 U.S. at 670), that "allows plaintiffs to gain retrospective relief running only three years back from the date the complaint was filed," *id.* at 336 (quoting *Petrella*, 572 U.S. at 672) (ellipsis and emphasis omitted). But as explained above, the quoted language from *Petrella* describes the operation of Section 507(b) and the separate-accrual rule on the facts as they existed in *Petrella* itself, where the discovery rule was not and could not plausibly have been invoked.

2. Petitioners contend that, if this Court "decline[s] to consider the propriety of [the discovery] rule" in copyright-infringement suits, the Court should treat the discovery rule as "a judicially created, equitable exception to a textually mandated statute of limitations," and "should enforce a three-year limitation on retrospective relief as an equitable exception to the equitable discovery rule." Pet. Br. 41-42; see *id.* at 41-44. That argument reflects a fundamental misconception of the rationale on which courts of appeals have adopted a discovery accrual rule for copyright-infringement suits. Most courts of appeals have not characterized the discovery rule as an exception to Section 507(b)'s requirement that suit must be filed within three years after an infringement claim "accrued." Rather, they have adopted the discovery rule as an *interpretation* (albeit an interpretation that may be informed by equitable

concerns) of the term "accrued" as it appears in that provision.[3]

This Court has not yet determined whether that understanding of the statutory language is correct, and the United States takes no position on that question here. But if (as the Court's reformulation of the question presented directs) that reading of Section 507(b) is assumed to be correct for purposes of this case, courts have no authority to superimpose an additional judge-made time limitation on the availability of monetary relief. Cf. *Petrella*, 572 U.S. at 679 ("adher[ing] to the position that, in face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief"); *SCA Hygiene*, 580 U.S. at 335 ("[A]pplying laches within a limitations period specified by Congress would give judges a 'legislation-overriding' role that is beyond the Judiciary's power.") (quoting *Petrella*, 572 U.S. at 680).

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[3] See, *e.g.*, *Psihoyos* v. *John Wiley & Sons, Inc.*, 748 F.3d 120, 124 (2d Cir. 2014) ("We agree with our sister Circuits that the text and structure of the Copyright Act" reflect "Congress's intent to employ the discovery rule, not the injury rule"; "copyright infringement claims do not accrue until actual or constructive discovery of the relevant infringement."); *Warren Freedenfeld Assocs., Inc.* v. *McTigue*, 531 F.3d 38, 44 (1st Cir. 2008) ("Under the aegis of [the discovery] rule, a claim accrues only when a plaintiff knows or has sufficient reason to know of the conduct upon which the claim is grounded."); *Polar Bear Prods., Inc.* v. *Timex Corp.*, 384 F.3d 700, 706 (9th Cir. 2004) (discussing with approval a prior decision that had "interpreted the term 'accrue,' as it is used in § 507(b), to be the moment when the copyright holder 'has knowledge of a violation or is chargeable with such knowledge'") (citation omitted); but see *William A. Graham Co.* v. *Haughey*, 646 F.3d 138, 150 (3d Cir.), cert. denied, 565 U.S. 963 (2011).

* * *

This Court granted certiorari to decide a question concerning the availability of Copyright Act damages "under the discovery accrual rule applied by the circuit courts." Petitioners nevertheless devote most of their merits brief to the antecedent question whether respondents' claims are governed by a discovery rule at all. The Court should not consider those arguments, which disregard the Court's decision to reformulate the question presented that was set forth in the certiorari petition. And with respect to the reformulated question presented, petitioners offer no plausible basis to conclude that damages are unavailable for a copyright-infringement claim that is filed more than three years after the relevant infringing act but that is timely under the discovery accrual rule. Unless the Court dismisses the petition for a writ of certiorari as improvidently granted (see Resp. Br. 7, 23-25), the Court should affirm the judgment of the Eleventh Circuit.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2024