No. 23-474

IN THE

Supreme Court of the United States

HEARST NEWSPAPERS L.L.C. &
HEARST MAGAZINE MEDIA, INC.,

Petitioners,

v.

ANTONIO MARTINELLI,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
A. The Court Should Hold this Petition Until It Issues a Ruling in *Warner Chappell Music*	2
B. Martinelli's Arguments Against the Discovery Rule Highlight the Need for this Court to Grant Certiorari	4

TABLE OF AUTHORITIES

CASES Page(s)

Apex Hosiery Co. v. *Leader*,
310 U.S. 469 (1940)..... 9, 10

Bonito Boats, Inc. v. *Thunder Craft Boats, Inc.*,
489 U.S. 141 (1989)..... 10

Chi. Bldg. Design, P.C. v. *Mongolian House, Inc.*,
770 F.3d 610 (7th Cir. 2014)..... 9

Conn. Nat. Bank v. *Germain*,
503 U.S. 249 (1992)..... 11

Helvering v. *Hallock*,
309 U.S. 106 (1940)..... 10

Helvering v. *Reynolds*,
313 U.S. 428 (1941)..... 10

Jones v. *Liberty Glass Co.*,
332 U.S. 524 (1947)..... 10

Marx v. *Gen. Revenue Corp.*,
568 U.S. 371 (2013)..... 11

N.Y. State Rifle & Pistol Ass'n, Inc. v. *Bruen*,
142 S. Ct. 2111 (2022)..... 7

Petrella v. *Metro-Goldwyn-Mayer, Inc.*,
572 U.S. 663 (2014)..... 7-9

Rehaif v. *United States*,
588 U.S. ----, 139 S. Ct. 2191 (2019) 7, 10

Roley v. *New World Pictures, Ltd.*,
19 F.3d 479 (9th Cir. 1994)..... 5, 10

TABLE OF AUTHORITIES—Continued

Page(s)

Rotkiske v. *Klemm*,
140 S. Ct. 355 (2019)..... 6

Schism v. *United States*,
316 F.3d 1259 (Fed. Cir. 2002)..... 10

Sebelius v. *Auburn Reg'l Med. Ctr.*,
568 U.S. 145 (2013)..... 7

Sohm v. *Scholastic Inc.*,
959 F.3d 39 (2d Cir. 2020)..... 7

Starz Ent., LLC v. *MGM Domestic Television Distrib., LLC*,
39 F.4th 1236 (9th Cir. 2022)..... 7

Taylor v. *Meirick*,
712 F.2d 1112 (7th Cir. 1983)..... 9

Toucey v. *N.Y. Life Ins. Co.*,
314 U.S. 118 (1941)..... 10

TRW Inc. v. *Andrews*,
534 U.S. 19 (2001)..... 4

Urie v. *Thompson*,
337 U.S. 163 (1949)..... 6

Warner Chappell Music, Inc. v. *Nealy*,
No. 22-1078 (certiorari granted,
Sept. 29, 2023)..... 2-4, 8

Wilkins v. *United States*,
598 U.S. 152 (2023)..... 10

William A. Graham Co. v. *Haughey*,
568 F.3d 425 (3d Cir. 2009)..... 6

TABLE OF AUTHORITIES—Continued

STATUTES Page(s)

17 U.S.C. 507(a)..... 6

17 U.S.C. 507(b)..... 2, 4, 6, 8, 10, 12

17 U.S.C. 1301-1332..... 10-12

OTHER AUTHORITIES

2 Melville Nimmer, *Nimmer on Copyright* 11

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REPLY BRIEF FOR THE PETITIONERS

The fundamental reasons for granting certiorari are not disturbed by Martinelli's Opposition.[1] Instead, Martinelli engages on the merits of the question presented. That he does so, and that his arguments have glaring flaws, only highlight the need to grant the Petition.

[1] "Opp." or "Opposition" refers to the Brief in Opposition filed by Martinelli on January 17, 2024. Unless defined herein, capitalized terms in this reply brief have the same definition as in Hearst's Petition for Writ of Certiorari (the "Petition" or "Pet.").

But first, on timing: The Court should hold the Petition until it decides *Warner Chappell Music, Inc.* v. *Nealy*, No. 22-1078 (certiorari granted, Sept. 29, 2023) ("*Warner Chappell Music*"). In light of how the arguments have been presented, it now appears a ruling in that case may dictate the outcome of this case.

A. The Court Should Hold this Petition Until It Issues a Ruling in *Warner Chappell Music*.

Warner Chappell Music is set for argument on February 21, 2024. The question presented, as rephrased by the Court, is 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." Order, *Warner Chappell Music*, No. 22-1078 (Sept. 29, 2023).

In their merits brief, the petitioners argue that the Court should not apply the "broad discovery rule" generally adopted by the circuit courts, which "postpones the running of the limitations period until a plaintiff knows of his injury, regardless of the cause of that delay." Petitioners' Br., *Warner Chappell Music*, No. 22-1078 (Nov. 27, 2023), at 3. As the petitioners argue, "[t]he only discovery rule consistent with this Court's precedents is a narrower exception for discovery delayed by fraud, latent disease, or medical malpractice." *Id.* at 4.

On the other side, the respondents criticize the petitioners for, they say, arguing outside the limited question presented. They urge this Court to either dismiss the case as improvidently granted or to rule on

the scope of available damages, leaving untouched the circuits' discovery rule. Respondents' Br., *Warner Chappell Music*, No. 22-1078 (Jan. 5, 2024), at 12-14. The Solicitor General agrees—but does not take a position on the applicability of the discovery rule. Amicus Br. for the United States, *Warner Chappell Music*, No. 22-1078 (Jan. 12, 2024), at 28.

The Court's ruling in *Warner Chappell Music* will likely be instructive here. If the Court agrees with the petitioners, that should resolve this case in favor of Hearst. The Court could grant certiorari, vacate the Fifth Circuit's ruling, and remand.

If, instead, the Court agrees with the respondents and the Solicitor General—leaving open the question of whether the discovery rule applies—then this Petition awaits. The importance and pertinence of the question presented here is shown by the amicus briefs in *Warner Chappell Music*: The majority of the amici join issue on whether the discovery rule applies at all, notwithstanding the rephrased question presented in that case.[2] And the Court's reasoning in *Warner*

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[2] Amicus Br. of the Chamber of Commerce, *Warner Chappell Music*, No. 22-1078 (Dec. 4, 2023), at 2-17 (arguing against a broad discovery rule); Amicus Br. of the Recording Indus. Ass'n of Am., *Warner Chappell Music*, No. 22-1078 (Dec. 4, 2023), at 13-16 (same); Amicus Br. of Tyler T. Ochoa, *Warner Chappell Music*, No. 22-1078 (Dec. 1, 2023), at 2-15 (arguing the discovery rule does not apply); Amicus Br. of McHale & Slavin P.A., *Warner Chappell Music*, No. 22-1078 (Dec. 4, 2023), at 2-25 (same); Amicus Br. of Sw. Law Student Krystina Cavazos, et al, *Warner Chappell Music*, No. 22-1078 (Dec. 1, 2023), at 1-22 (same); Amicus Br. of Ass'n of Am. Publisher, *Warner Chappell Music*, No. 22-1078 (Dec. 4, 2023), at 1-19 (same); Amicus Br. of Elec. Frontier Found. *et al.*, *Warner Chappell Music*, No. 22-1078 (Dec. 4, 2023), at 3-4 (arguing against the discovery rule because it encourages "copyright trolling"); Amicus Br. of Nat'l Soc'y of

Chappell Music may inform the arguments in this case, should the Court grant this Petition.

Either way, there is no prejudice in holding this Petition for a short time so the Court will have the benefit of its ruling in *Warner Chappell Music* in deciding whether to grant the Petition.

B. Martinelli's Arguments Against the Discovery Rule Highlight the Need for this Court to Grant Certiorari.

1. This Court has never applied a discovery rule to the Copyright Act. Pet. 2. It has left the question open, twice. *Ibid.* And this Court has never applied an unwritten discovery rule for statutes of limitations outside the contexts of "fraud or concealment" or "latent disease and medical malpractice, where the cry for such a rule is loudest." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 27 (2001) (citations, alteration, and quotation marks omitted); Pet. 9. Below, on a simple and clean record, Hearst argued against the discovery rule, making this case a pristine vehicle to consider the question.

Martinelli does not dispute these points. Instead, he points to the Fifth Circuit's speculation that, "in a later case, [this Court] might decide that the discovery rule does apply to § 507(b)." Opp. 4-5. This is an

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Ent. & Arts Laws., *Warner Chappell Music*, No. 22-1078 (Jan. 12, 2024), at 2-9, 14-19 (arguing in favor of the discovery rule); Amicus Br. of the Authors Guild, Inc. et al., *Warner Chappell Music*, No. 22-1078 (Jan. 12, 2024), at 3-34 (same); Amicus Br. of Ralph Oman, *Warner Chappell Music*, No. 22-1078 (Jan. 12, 2024), at 2-24 (same). The numerous amici's substantial interest in this question undermines Martinelli's argument that this case is not "of importance to the public." Opp. 14.

acknowledgement that the question presented is open and unresolved.[3]

2. The circuits' reasons for applying the discovery rule are few and flawed—and Martinelli abandons most of them.

a. Prudently, Martinelli "does not argue for a default presumption that all federal limitations periods run from the date of discovery." Opp. 5 n.2. Yet that is the basis for six circuits' application of the discovery rule, Pet. 14-15, even though this Court has rejected that presumption, Pet. 8-11. In fact, there is a presumption *against* a judge-made discovery rule. *Ibid.*

b. Nor does Martinelli defend, at least expressly, lower courts' morphing of the equitable tolling doctrine of fraudulent concealment into a generally applicable rule that a claim does not accrue until its discovery. That is what the Ninth Circuit did in one unreasoned sentence in *Roley* v. *New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir. 1994), which was then relied upon by two other circuits with no further reasoning. Pet. 15.

c. Instead, Martinelli misreads the legislative history. He argues that, when adding the statute of limitations for civil claims in 1957, Congress "recognized" that district courts "were taking equitable

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[3] It is irrelevant that the panel below did not believe this Court had "unequivocally overruled" the Fifth Circuit's prior discovery rule precedent, which it was bound to apply—an odd focus of Martinelli's Opposition. Opp. 5-9. What *is* significant is that fealty to its precedent was the *only* stated reason the panel applied the discovery rule; "[n]one" of the Fifth Circuit's prior case law "explains *why* the discovery rule applies to a copyright infringement claim." App. 5a-6a (emphasis added).

arguments into consideration." Opp. 16. But the "equitable defenses" Congress understood would be "recognize[d] . . . anyway," *ibid.* (emphasis omitted), did *not* include a generally applicable "discovery rule." That "bad wine of recent vintage" would be "read in" to the Copyright Act by circuit courts many years later. See *Rotkiske* v. *Klemm*, 140 S. Ct. 355, 360-61 (2019). Rather, the "substantial focus" of the legislative history was on the equitable defense of *fraudulent concealment*—a "superfluous" consideration for Congress if it were assuming the discovery rule would govern. Pet. 22-23.[4]

d. The only circuit's reasoning that Martinelli stands behind, though only in part,[5] is that of the Third Circuit. Opp. 17 (discussing *William A. Graham Co.* v. *Haughey*, 568 F.3d 425 (3d Cir. 2009)). Like the Third Circuit, Martinelli points to the difference between the Copyright Act's criminal statute of limitations, 17 U.S.C. 507(a) ("cause of action *arose*" (emphasis added)), and its civil statute of limitations, 17 U.S.C. 507(b) ("claim *accrued*" (emphasis added)),

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[4] Congress also sought to make the statute of limitations uniform and predictable, which the discovery rule undermines. Pet. 21-22. Demonstrating that point, Hearst showed that lower courts' application of the discovery rule leads to unpredictable results. Pet. 19-21. Hearst is not asking this Court to resolve a "split among Circuit level decisions regarding the 'reasonable diligence' standard." Opp. 15. That question is irrelevant if no discovery rule applies.

[5] Martinelli disavows the argument that the discovery rule is the "default" rule, Opp. 5 n.2, which was central to the Third Circuit's reasoning, Pet. 14-15. And he does not argue that the Copyright Act is analogous to the Federal Employers' Liability Act, which was at issue in the case relied upon by *William A. Graham*. Pet. 15-16 (describing *William A. Graham Co.*, 568 F.3d at 433-47 (citing to *Urie* v. *Thompson*, 337 U.S. 163, 170 (1949))).

and suggests this reflects Congress's intent for "accrued" to silently incorporate a discovery rule. Opp. 17.

But as noted in the Petition, Pet. 16—and ignored by Martinelli—*Petrella* says that *neither* "arose" *nor* "accrue" incorporates the discovery rule: "A copyright claim thus *arises* or '*accrue[s]*' when an infringing act *occurs*." *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014) (emphases added). That makes sense; "arose" is not the opposite of the discovery rule. The canon that different words have different meanings "is no more than a rule of thumb that can tip the scales when a statute could be read in multiple ways." *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 156 (2013). That canon is not helpful here.

3. Martinelli urges this Court to leave the discovery rule undisturbed just because no circuit has rejected it. Whether the circuits are so uniform is debatable. See *Starz Ent., LLC* v. *MGM Domestic Television Distrib., LLC*, 39 F.4th 1236, 1244 (9th Cir. 2022) (criticizing the Second Circuit for "eviscerat[ing] the discovery rule" in *Sohm* v. *Scholastic Inc.*, 959 F.3d 39, 50 (2d Cir. 2020)).

Regardless, that the lower courts are *consistently* getting it wrong is not a good reason for this Court to refrain from getting it right. This Court has granted certiorari and rejected a rule adopted by the circuits where it is inconsistent with the Court's approach. See, *e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 142 S. Ct. 2111, 2127 (2022) ("[d]espite the popularity of this two-step approach" adopted by every court of appeals to have considered the issue, see n.4 in *Bruen*, "it is one step too many"); *Rehaif* v. *United States*, 588 U.S. ----, 139 S. Ct. 2191, 2201 (2019) (Alito, J., observing in dissent: "The Court casually overturns

the long-established interpretation of an important criminal statute, . . . an interpretation that has been adopted by every single Court of Appeals to address the question."). It should do so here.

4. Martinelli's argument that the circuits are uniform is oversimplistic. There is, of course, a circuit split concerning available damages for claims that would be timely under the discovery rule. See *Warner Chappell Music*. This Court can resolve that split by holding—as Hearst argues—that an occurrence rule applies, not the discovery rule.

An occurrence rule would be in harmony with this Court's repeated recognition, in *Petrella*, that a claim "'accrues' when an infringing act *occurs*." 572 U.S. at 670 (emphasis added); see also *id.* at 671 ("[A]n infringement is actionable within three years, and only three years, of its occurrence."); *id.* at 677 ("[A] successful plaintiff can gain retrospective relief only three years back from the time of suit. No recovery may be had for infringement in earlier years."); *id.* at 682 ("[T]he statute, § 507(b), makes the starting trigger an infringing act committed three years back from the commencement of suit . . . .").

Martinelli strains to explain *Petrella*. He points to other sentences in the opinion that include qualifying language—*e.g.*, the "limitations period *generally* begins to run at the point when the plaintiff can file suit," Opp. 9—and suggests that they support the discovery rule. But he makes no effort to (i) argue *why* this qualifying language indicates a discovery rule applies, or (ii) identify, if the discovery rule does not apply "generally," *when* it applies.

This just proves the point of the Petition. If *Petrella* is unclear as to whether and when the discovery rule

applies, this Court should grant certiorari to answer that question.

5. Lastly, Martinelli scours Title 17 of the U.S. Code for clues that might support his argument, drawing unlikely conclusions from Congressional inaction and an unrelated chapter about boat designs. Opp. 14-20.

a. These *post hoc* justifications are not among the circuits' stated reasons for adopting the discovery rule. That Martinelli, to overcome clear statutory language, must mine far-flung legislative history for new arguments to bolster the circuits' position just shows that the Petition should be granted.

b. In arguing that Congress has acquiesced to the discovery rule, Martinelli misstates the longevity and stability of the circuits' rule, incorrectly suggesting it has been the law of the land for over 40 years. Opp. 19-20 (quoting *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 487-88 (1940), which concerned a 32-year-old Supreme Court case, which Congress had "passed no act purporting" to narrow or overrule despite being "often asked to" do so).

Early circuit court decisions applying the discovery rule were sparse and equivocal. In *Taylor* v. *Meirick*, the Seventh Circuit observed that the discovery rule should apply—but then, in the next paragraph, held the claim was timely due to fraudulent concealment, anyway. 712 F.2d 1112, 1118 (7th Cir. 1983).[6] The question was untouched by the Courts of Appeals for the next 11 years, until the Ninth Circuit applied the

[6] More recently, the Seventh Circuit has recognized that *Petrella* casts the discovery rule into question. See *Chi. Bldg. Design, P.C.* v. *Mongolian House, Inc.*, 770 F.3d 610, 618 (7th Cir. 2014).

discovery rule in *Roley*, 19 F.3d at 481, followed by the Fourth Circuit three years later, Pet. 15. The rest of the circuits would not adopt the discovery rule until years later, including as late as 2020.

This is not the sort of longstanding and settled judicial construction on which legislative acquiescence may be premised. See *Wilkins* v. *United States*, 598 U.S. 152, 165 (2023) (where Supreme Court had not ruled, "no definitive judicial interpretation to which Congress could acquiesce"); *Rehaif*, 139 S. Ct. at 2198-99; *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 533-34 (1947) (canon of legislative acquiescence "as best only an auxiliary tool"); *Helvering* v. *Reynolds*, 313 U.S. 428, 432 (1941).

That Congress has passed unrelated amendments to the Copyright Act, Opp. 18-19, does not suggest it silently blessed the circuits' discovery rule. Martinelli does not argue that, in connection with those amendments, Congress was made aware of the slowly developing circuit-level interpretation of Section 507(b). *Toucey* v. *N.Y. Life Ins. Co.*, 314 U.S. 118, 141 (1941); *Helvering* v. *Hallock*, 309 U.S. 106, 119-21 (1940); *cf. Apex Hosiery*, 310 U.S. at 488. He points to nothing to suggest Congress ever voted on, or even considered, a bill that would amend or clarify the meaning of "accrue" in Section 507(b). See *Schism* v. *United States*, 316 F.3d 1259, 1294-99 (Fed. Cir. 2002) (en banc).

c. Regarding the Vessel Hull Design Protection Act of 1998 (the "Vessel Hull Act"), which Martinelli calls the "Protection of Original Designs," Opp. 19: It is far afield and unrelated to Section 507(b). Passed in response to this Court's ruling in *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), the Vessel Hull Act creates a "new species of *sui generis*

protections" for the design of vessel hulls only. 2 Melville Nimmer, *Nimmer on Copyright* § 8A.01. It prohibits duplicating unpatented boat hulls using a direct molding process.

The Vessel Hull Act, codified in Chapter 13, is "best . . . conceptualize[d]" not as part of the Copyright Act, but rather a "residual area[]" that was "tacked . . . into" Title 17. 2 Nimmer, *supra* § 8A.01.[7] It is a "self-contained scheme, independent of the general norms of copyright protection." *Id.* § 8A.13. Its 32 sections cover every aspect of protection for boat hulls. See 17 U.S.C. 1301-03 (scope of protection), 17 U.S.C. 1304-05 (term of protection), 17 U.S.C. 1306-07 (notice requirements), 17 U.S.C. 1308 (exclusive rights), 17 U.S.C. 1310-14 (registration), 17 U.S.C. 1321-23 (remedies and recoveries). Not *once* do *any* of the 32 sections of the Vessel Hull Act cite to *any* section of the Copyright Act.

The Vessel Hull Act (and its statute of limitations) do not rely on or relate to the language of the Copyright Act (or its statute of limitations). The two Acts sit side-by-side. Because each concern "cases that the other section does not reach," the canon against superfluity, Opp. 19, is inapplicable. *Conn. Nat. Bank* v. *Germain*, 503 U.S. 249, 253 (1992); see also *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 385-86 (2013) (canon against surplusage "not an absolute rule"; "force of this canon" "diminished" in *Marx*, because "§ 1692k(a)(3) is not part of Rule 54(d)(1)"). There is no reason to believe Congress assumed anything about

[7] In fact, the word "copyright" does not appear in any of the Vessel Hull Act's 32 sections—except once, in Section 1331, to define the generically termed "Administrator" and "Office of the Administrator," used throughout the Vessel Hull Act, as the "Register of Copyrights" and the "Copyright Office," respectively.

the meaning of "accrued" in Section 507(b) by passing the Vessel Hull Act.

* * * *

This case remains a strong candidate for the Court's review. The Petition should be granted.

Respectfully submitted,

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