No. 21-55379

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STARZ ENTERTAINMENT, LLC,

Plaintiff-Appellee,

v.

MGM DOMESTIC TELEVISION DISTRIBUTION LLC,

Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of California, Western Division
The Honorable Dolly M. Gee | Case No. 2:20-cv-04085

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TABLE OF CONTENTS

Page

Introduction 1
Argument.....3
I. *Sohm* Correctly Applied *Petrella*'s Construction of Section 507(b). 3
A. *Petrella* Is Not Limited to Injury Rule Cases. 4
B. The Three-Year Limit on Retrospective Relief Was Central to the Outcome in *Petrella* and Is Binding on This Court. 7
C. This Court Is Bound to Follow the Supreme Court's Construction of Section 507(b). 11
II. This Court Should Reject Starz's Invitation to Create a Circuit Split. 15
III. Public Policy Considerations Cannot Justify Disregarding *Petrella*. 22
A. *Petrella*'s Construction Does Not Eviscerate the Discovery Rule...22
B. *Amici*'s Policy Arguments Are Irrelevant and Unpersuasive.....25
Conclusion 28

TABLE OF AUTHORITIES

Page(s)

CASES

Alfa Laval Inc. v. Flowtrend, Inc.,
2016 WL 2625068 (S.D. Tex. May 9, 2016).....19

Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.,
522 U.S. 192 (1997).....11

Beasley v. John Wiley & Sons, Inc.,
56 F. Supp. 3d 937 (N.D. Ill. 2014).....19

Boehm v. Svehla,
2017 WL 4326308 (W.D. Wis. Sept. 27, 2017).....19

Bose Corp. v. Silonsonnic Corp.,
413 F. Supp. 2d 339 (S.D.N.Y. 2006).....24

Cada v. Baxter Healthcare Corp.,
920 F.2d 446 (7th Cir. 1990).....5

Chicago Bldg. Design, P.C. v. Mongolian House, Inc.,
770 F.3d 610 (7th Cir. 2014).....16

D'Pergo Custom Guitars, Inc v. Sweetwater Sound, Inc.,
516 F. Supp. 3d 121 (D.N.H. Jan. 28, 2021).....18

Danjaq LLC v. Sony Corp.,
263 F.3d 942 (9th Cir. 2001).....7, 26

Design Basics LLC v. Campbellsport Bldg. Supply Inc.,
99 F. Supp. 3d 899 (E.D. Wis. 2015).....19

Design Basics LLC v. J & V Roberts Invs., Inc.,
130 F. Supp. 3d 1266 (E.D. Wis. 2015).....19

Feist Publications, Inc. v. Rural Tel. Serv. Co.,
499 U.S. 340 (1991).....12

Frerck v. Pearson Education, Inc.,
63 F. Supp. 3d 882 (N.D. Ill. 2014).....19

TABLE OF AUTHORITIES *(continued)*

Page(s)

Gabelli v. S.E.C.,
568 U.S. 442 (2013).....12

Grant Heilman Photography, Inc.,
28 F. Supp. 3d 399 (E.D. Pa. 2014).....19

Jackson v. Sturkie,
255 F. Supp. 2d 1096 (N.D. Cal. 2003).....24

Kelly v. Maricopa Cty. Sheriff's Office,
2017 WL 6054675 (D. Ariz. Dec. 7, 2017).....19

Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co.,
346 F.3d 1190 (9th Cir. 2003).....15

Kling v. Hallmark Cards Inc.,
225 F.3d 1030 (9th Cir. 2000).....6

Krasemann v. Scholastic Inc.,
2019 WL 3220535 (D. Ariz. July 17, 2019).....19

Langere v. Verizon Wireless Servs., LLC,
983 F.3d 1115 (9th Cir. 2020).....10

Lopez-Marroquin v. Garland,
9 F.4th 1067 (9th Cir. 2021).....10

Maniar v. F.D.I.C.,
979 F.2d 782 (9th Cir. 1992).....15

Mavrix Photo, Inc. v. Rant Media Network,
LLC, 2020 WL 8028098 (C.D. Cal. Nov. 2, 2020).....17

Media Rights Techs., Inc. v. Microsoft Corp.,
922 F.3d 1014 (9th Cir. 2019).....18, 19, 23

Menzel v. Scholastic, Inc.,
2019 WL 6896145 (N.D. Cal. Dec. 18, 2019).....16

Miller v. Gammie,
335 F.3d 889 (9th Cir. 2003).....10

TABLE OF AUTHORITIES *(continued)*

Page(s)

N. Am. Karaoke-Works Trade Ass'n, Inc. v. Entral Grp. Int'l, LLC,
2010 WL 2158294 (S.D.N.Y. May 27, 2010) 24

Navarro v. Procter & Gamble Co.,
515 F. Supp. 3d 718 (S.D. Ohio 2021) 17, 23

Nealy v. Atl. Recording Corp.,
2021 WL 2280025 (S.D. Fla. June 4, 2021) 17

Petrella v. Metro-Goldwyn-Mayer, Inc.,
572 U.S. 663 (2014)..... 1, 2, 5, 6, 8, 9, 11, 12, 13, 14, 15, 19, 23, 24, 25, 26

Petrella v. Metro-Goldwyn-Mayer, Inc.,
695 F.3d 946 (9th Cir. 2012) 4, 5, 6, 7, 25

Phoenix Techs. Ltd. v. VMware, Inc.,
2017 WL 1289863 (N.D. Cal. Jan. 6, 2017).....19

Polar Bear Productions, Inc. v. Timex Corporation,
384 F.3d 700 (9th Cir. 2004) 10

Raucci v. Candy & Toy Factory,
145 F. Supp. 3d 440 (E.D. Pa. 2015).....19

RBH Energy, LLC v. Brown,
2016 WL 8465805 (N.D. Tex. Dec. 16, 2016).....5

Richardson v. Kharbouch,
2020 WL 1445629 (N.D. Ill. Mar. 25, 2020) 19

Roley v. New World Pictures, Ltd.,
19 F.3d 479 (9th Cir. 1994) 4

Rotkiske v. Klemm,
140 S. Ct. 355 (2019).....12, 13, 22

SCA Hygiene Prod. Aktiebolag v. First Quality Baby Prod., LLC,
137 S. Ct. 954 (2017).....11, 13, 22, 27

Seminole Tribe of Fla. v. Fla.,
517 U.S. 44 (1996).....3

TABLE OF AUTHORITIES *(continued)*

Page(s)

Seven Arts Filmed Ent. Ltd. v. Content Media Corp. PLC,
733 F.3d 1251 (9th Cir. 2013) 15, 19, 21, 22

Shepard v. Wo Hop City, Inc.,
2021 WL 4267527 (S.D.N.Y. Sept. 20, 2021) 17

Silvers v. Sony Pictures Entm't, Inc.,
402 F.3d 881 (9th Cir. 2005) 15, 16

Sohm v. Scholastic Inc.,
959 F.3d 39 (2d Cir. 2020) 1, 3, 7, 10, 14, 16, 23

Stross v. Hearst Commc'ns, Inc.,
2020 WL 5250579 (W.D. Tex. Sept. 3, 2020) 18

Syntek Semiconductor Co. v. Microchip Tech. Inc.,
307 F.3d 775 (9th Cir. 2002) 15

Syntel Sterling Best Shores Mauritius Ltd. v. TriZetto Grp., Inc.,
2020 WL 8083583 (S.D.N.Y. Sept. 30, 2020) 17

Topline Sols., Inc. v. Sandler Sys., Inc.,
2017 WL 1862445 (D. Md. May 8, 2017).....19

UMG Recordings, Inc. v. Global Eagle Entm't, Inc.,
2015 WL 12752881 (C.D. Cal. Aug. 27, 2015) 19

VMG Salsoul, LLC v. Ciccone,
824 F.3d 871 (9th Cir. 2016) 21

Werner v. BN Media, LLC,
477 F. Supp. 3d 452 (E.D. Va. 2020) 17, 23

William A. Graham Co. v. Haughey,
646 F.3d 138 (3d Cir. 2011) 13

Wolf v. Travolta,
167 F. Supp. 3d 1077 (C.D. Cal. 2016) 24

TABLE OF AUTHORITIES *(continued)*

Page(s)

STATUTES

17 U.S.C.A. § 1501 *et. seq.* 27

17 U.S.C. § 302 25

17 U.S.C. § 501 12

17 U.S.C. § 502 24

17 U.S.C. § 503 24

17 U.S.C. § 505 27

17 U.S.C. § 507(b) 11

OTHER AUTHORITIES

The Authors Guild, *Presentation on U.S. Published Book Author Income Survey* 26

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Ballentine's Law Dictionary 14 (3d ed. 1969) 12

Black's Law Dictionary 37 (4th ed. 1951) 12

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6 William F. Patry, *Patry on Copyright* (2021) 20, 21, 28

INTRODUCTION

Congress enacted Section 507(b) of the Copyright Act "to render uniform and certain the time within which copyright claims could be pursued" and "to prevent the forum shopping invited by disparate state limitations periods." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014). The Supreme Court clearly construed Section 507(b) to mean that "a successful plaintiff can gain retrospective relief *only three years back from the time of suit*." *Id.* at 677 (emphasis added). The Second Circuit held that this pronouncement must be followed even in cases where the discovery rule applies. *Sohm v. Scholastic Inc.*, 959 F.3d 39, 52 (2d Cir. 2020). Starz asks this Court to disregard these authorities and hold instead that the discovery rule overrides the Supreme Court's construction of the Copyright Act. That invitation should be rejected.

The Second Circuit correctly applied *Petrella*'s clear construction of Section 507(b). The plain language of the statute does not provide for any expansion of the period of recovery beyond three years from the time the complaint is filed on account of the discovery rule. Although Starz argues that the Supreme Court did not really intend to limit damages to three years from time of suit, the *Petrella* Court repeatedly emphasized the three-year lookback period as the reason why laches is unnecessary in copyright cases. Starz's arguments ultimately boil down to the contention that the

Supreme Court misinterpreted Section 507(b), and its construction is better; but this Court is bound by the Supreme Court's interpretation of the statute, not Starz's.

This Court should align itself with the Second Circuit and reverse the district court's ruling. No court of appeals has accepted Starz's proposed departure from *Petrella*, whereas numerous district courts and the leading treatises agree with the Second Circuit's analysis in *Sohm*. This Court has long recognized that circuit splits on the applicability of the Copyright Act should be avoided because copyright law is best applied uniformly. If this Court were to affirm the district court's acceptance of the contrary construction urged by Starz, it would "tug against the uniformity Congress sought to achieve when it enacted § 507(b)" and invite rampant forum shopping. *Petrella*, 572 U.S. at 681.

None of Starz's or its *amici*'s policy arguments can overcome the statutory construction supplied by *Petrella*. As *Sohm* recognizes, the lookback period may cabin the effect of the discovery rule on claims for retrospective damages in particular circumstances, including those here, but (contrary to Starz's hyperbole) it does not eviscerate the rule. The discovery rule does not exist in isolation, but rather must be applied in the context of the statute at issue. Starz's proposed rule would undermine Congress's legislative judgment that some stale copyright claims will not receive a remedy.

ARGUMENT

I. *Sohm* Correctly Applied *Petrella*'s Construction of Section 507(b).

In *Sohm*, the Second Circuit determined that the discovery rule applied to the plaintiff's claims, but nevertheless held that no damages may be recovered beyond the three-year lookback period prior to when the suit was filed. 959 F.3d at 50, 52. The Second Circuit reached its conclusion through a straightforward application of *Petrella.*

As the Second Circuit observed, although the Supreme Court in *Petrella* did not pass on the propriety of applying the discovery rule in copyright cases, it "explicitly asserted that 'a successful plaintiff can gain retrospective relief only three years back from the time of suit.'" *Sohm*, 959 F.3d at 52 (quoting *Petrella*, 572 U.S. at 677). Further, "the *Petrella* Court partially based its determination that laches was inapplicable to actions under the Copyright Act on the conclusion that the statute 'itself takes account of delay' by limiting damages to the three years prior to when suit is filed." *Id*. (quoting *Petrella*, 572 U.S. at 677). Because lower courts "are bound 'not only [by] the result [of a Supreme Court opinion,] but also those portions of the opinion necessary to that result," the Second Circuit held that "a plaintiff's recovery is limited to damages incurred during the three years prior to filing suit." *Id.* (quoting *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 67 (1996)) (alterations in the original).

None of Starz's arguments refute the Second Circuit's holding that *Petrella* must be followed regardless of whether the discovery rule applies.

A. *Petrella* Is Not Limited to Injury Rule Cases.

Starz argues that *Petrella* is inapplicable in discovery rule cases because (1) *Petrella* was an injury rule case and (2) laches and the discovery rule are mutually exclusive. Appellee's Br. at 32–33, 42. Starz is wrong on both counts.

Petrella was not an injury rule case. It arose in this Circuit, which has applied the discovery rule since *Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir. 1994). Nothing in *Petrella* or its procedural history suggests that this Court or the district court below selectively applied the injury rule to Ms. Petrella's copyright claims notwithstanding this Circuit's adoption of the discovery rule. Indeed, in determining whether her claims were presumptively barred by laches, this Court assessed when the statute of limitations began to run with reference to when she became *aware* of her claims, not when the infringements *occurred*. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 695 F.3d 946, 951–52 (9th Cir. 2012). That analysis indicates application of the discovery rule, not the injury rule.

Starz nevertheless insists that *Petrella* was an injury rule case because "[t]here was no gap between infringement and discovery." Appellee's Br. at 32. But nothing about the discovery rule requires a gap. All that the discovery rule says is that the limitation period commences on the date "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.3 (quotations omitted). That date is "often the same, but sometimes later" than "the date on which the wrong that injures the plaintiff occurs." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990). Accordingly, even in cases applying the discovery rule, there may be no gap between the infringement and the discovery. *See*, *e.g.*, *RBH Energy, LLC v. Brown*, 2016 WL 8465805, at *2 (N.D. Tex. Dec. 16, 2016).

Starz's assertion that Ms. Petrella instantaneously discovered the alleged infringements is wholly unsupported. Starz relies on the Supreme Court's observation that Ms. Petrella was aware of her potential claims before commencing suit, but that says nothing about when the infringements occurred versus when she discovered them. *Petrella*, 572 U.S. at 676. Ms. Petrella may have known that the *rights* to a screenplay that she alleged *Raging Bull* was based upon had reverted to her in 1991. *Id.* at 673–74. But it does not follow that Ms. Petrella became aware of subsequent *infringements* as they occurred each time MGM reproduced or distributed the film *Raging Bull* in new formats or special editions, rather than discovering them at some later point after seeing them in stores or in promotional material. *Petrella*, 695 F.3d at 954.

In any event, this supposed distinction played no role in the Supreme Court's holding in *Petrella*. The Supreme Court did not hold, for instance, that laches was

unavailable as a defense because there was no gap between the infringements and their discovery by the plaintiff in that case. Nor did the Supreme Court hold that laches was unavailable only where the injury rule applies. Instead, the Supreme Court effectuated a sweeping change that precluded application of the laches doctrine in all cases under the Copyright Act, without exception, because Section 507(b) limits retrospective relief to only three years back from the time of suit. *Petrella*, 572 U.S. at 676–77.

Starz also argues that *Petrella*'s holding does not extend to discovery rule cases because laches could never be invoked where the discovery rule applies. Appellee's Br. at 42. Starz is wrong. Before *Petrella*, this Court allowed laches to bar claims that were timely under the discovery rule. Under the then-existing rule, "the starting point for laches" was not necessarily the "same as the starting point for the statute of limitations for copyright infringement." *Kling v. Hallmark Cards Inc.*, 225 F.3d 1030, 1038 (9th Cir. 2000). While the statute of limitations could be triggered only after the plaintiff knew or had reasons to know that an actual infringement occurred, "a copyright holder would be vulnerable to the laches defense if he had knowledge of a *planned* infringement more than three years prior to filing his action." *Id.* at 1039 (emphasis added); *see also Petrella*, 695 F.3d at 959 ("In our circuit, laches in copyright cases does not require actual knowledge by the copyright owner of the defendant's infringement.") (Fletcher, J., concurring).

The district court in *Kling* denied summary judgment on statute of limitations grounds because the plaintiff's claim was timely under the discovery rule, but it granted summary judgment on laches. 225 F.3d at 1036. This Court reversed the grant of summary judgment because material issues of facts remained, but remanded the case to determine whether sufficient evidence supported laches. *Id.* at 1039–41. In subsequent cases, this Court reaffirmed that laches barred claims that were brought within three years of plaintiffs' discovery of them. *See Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 954 (9th Cir. 2001); *Petrella*, 695 F.3d at 952. Starz is thus wrong that laches could never apply to claims that are timely under the discovery rule.

At bottom, there is no basis to limit *Petrella* to "injury rule" cases. Instead, the Second Circuit correctly held that *Petrella*'s three-year limit on retrospective relief applies even where the discovery rule applies, as it does in the Second Circuit. *Sohm*, 959 F.3d at 52.

B. The Three-Year Limit on Retrospective Relief Was Central to the Outcome in *Petrella* and Is Binding on This Court.

The Second Circuit correctly held that *Petrella*'s conclusion that Section 507(b) limits damages to the three years prior to suit was necessary to its holding that laches does not apply in copyright cases. *Sohm*, 959 F.3d at 52. Starz insists that this damages bar played no role in Supreme Court's holding (Appellee's Br. at 39, 41), but *Petrella*'s plain language negates that argument:

> The Ninth Circuit erred, we hold, *in failing to recognize that the copyright statute of limitations, § 507(b), itself takes account of delay*. *As earlier observed*, see *supra*, at 1969–1970, *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. Profits made in those years remain the defendant's to keep*. Brought to bear here, *§ 507(b) directs that MGM's returns on its investment in Raging Bull in years outside the three-year window (years before 2006) cannot be reached by Petrella*. Only by disregarding *that feature of the statute*, and the separate-accrual rule attending § 507(b), see *supra*, at 1968–1970, could the Court of Appeals presume that infringing acts occurring before January 6, 2006 bar all relief, monetary and injunctive, for infringement occurring on and after that date.

Petrella, 572 U.S. at 677 (emphasis added).

Starz largely ignores this critical passage and argues that "the Supreme Court held that it was the separate accrual rule—not any alleged damages bar—that was the aspect of the statute that accounts for delay and renders laches unnecessary." Appellee's Br. at 41. Starz simply misreads the Supreme Court's opinion.

After noting that the Ninth Circuit "fail[ed] to recognize that the copyright statute of limitations, § 507(b), itself takes account of delay," the Court immediately followed with the explanation that "a successful plaintiff can gain retrospective relief only three years back from the time of suit." *Petrella*, 572 U.S. at 677. Later in the same paragraph, the Court reiterated that this Court's error stemmed in part from disregarding "that feature of the statute" that accounts for delay, which could not have referred to the separate accrual rule. Otherwise, the phrase "and the separate accrual rule" that followed "that feature of the statute" would be superfluous. *See*

id. *Petrella* cannot plausibly be read to identify the separate accrual rule as the feature of the statute that accounts for delay, rather than the damages bar.

The separate accrual rule does not *deter* delay; it does the opposite. The rule allows "a copyright owner *to defer suit* until she can estimate whether litigation is worth the candle." *Petrella*, 572 U.S. at 683 (emphasis added). That is because under the separate accrual rule, "each infringing act starts a new limitations period" such that earlier infringements that were not sued upon do not bar relief for later infringements of the same work. *Id.* at 671.

Prior to *Petrella*, this unlimited regeneration of the limitations period was tempered by laches, which allowed earlier infringements to bar relief for subsequent infringements where the defendants faced unfair prejudice resulting from unreasonable delay. By removing laches as an available defense, *Petrella* relieved copyright owners from having to police every infringement lest they eventually grow in magnitude. *Id.* at 682–83.

The express reason the Supreme Court gave in invalidating the equitable defense of laches was that the Court's construction of Section 507(b) already accounted for delay by ensuring that the plaintiff "will miss out on damages for periods prior to the three-year look-back." *Id.* at 683. This strict and definite limit on damages made laches unnecessary because it "will put at risk only a fraction of the income [the defendant] has earned." *Id*. at 687. The Second Circuit correctly

concluded that the three-year limit on damages was necessary to the result reached in *Petrella* and thus binding on all lower courts. *Sohm*, 959 F.3d at 52.

The holding in *Polar Bear Productions, Inc. v. Timex Corporation*, 384 F.3d 700, 706 (9th Cir. 2004), that "§ 507(b) permits damages occurring outside of the three-year window" cannot survive *Petrella.* As this Court has long recognized, when a prior case of this Court is "clearly irreconcilable" with the reasoning of a subsequent Supreme Court decision, this Court must reject it as "effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc); *accord Langere v. Verizon Wireless Servs., LLC,* 983 F.3d 1115, 1121 (9th Cir. 2020). Contrary to Starz's assertion, *Petrella* need not expressly refer to *Polar Bear* to overrule it. *See Miller*, 335 F.3d at 893 .

Petrella is clearly irreconcilable with *Polar Bear* "both in its logic and its result." *Lopez-Marroquin v. Garland*, 9 F.4th 1067, 1074 (9th Cir. 2021). As a leading copyright treatise explains, "[t]here is no way to reconcile" a rule that allows a plaintiff to recover damages beyond three years from the time of suit with *Petrella*'s express pronouncement that Section 507(b) allows plaintiffs to gain retrospective relief running only three years back from the date the complaint was filed. 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12.05[B][2][c] (2021). The Second Circuit correctly held that the Supreme Court's

limitations on damages must be followed, notwithstanding any circuit precedent to the contrary.

C. This Court Is Bound to Follow the Supreme Court's Construction of Section 507(b).

The Supreme Court unequivocally and unambiguously construed Section 507(b) to mean that "a successful plaintiff can gain retrospective relief only three years back from the time of suit." *Petrella*, 572 U.S. at 677; *see also id.* at 672 (§ 507(b) "allows plaintiffs . . . to gain retrospective relief running only three years back from the date the complaint was filed"), 683 (§ 507(b) means that a plaintiff "will miss out on damages for periods prior to the three-year look-back"). Starz asks this Court to override the Supreme Court's interpretation and adopt its construction instead. Appellee's Br. at 18–27. This Court should decline to do so, as the Supreme Court's construction is binding on this Court and amply supported by the text of Section 507(b).

Section 507(b) provides that an action for copyright infringement must be "commenced within three years after the claim accrued." 17 U.S.C. § 507(b). As the Supreme Court explained, a claim "accrues when a plaintiff has a complete and present cause of action," which is the point when the plaintiff's right to "file suit and obtain relief" comes into existence. *Petrella*, 572 U.S. at 670 (cleaned up) (quoting *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.,* 522 U.S. 192, 201 (1997)); *accord SCA Hygiene Prod. Aktiebolag v. First Quality*

Baby Prod., LLC, 137 S. Ct. 954, 962 (2017); *Gabelli v. S.E.C.*, 568 U.S. 442, 448 (2013). Under the Copyright Act, two elements are required for a plaintiff to institute an action and obtain relief: (1) ownership of a valid copyright and (2) a violation of any of the exclusive rights granted to the copyright owner. 17 U.S.C. § 501; *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). "A copyright claim thus arises or 'accrue[s]' when an infringing act occurs." *Petrella*, 572 U.S. at 670.

This comports with the meaning of the term "accrue" that was well-established in 1957 when Congress passed Section 507(b). *See* Ballentine's Law Dictionary 14 (3d ed. 1969) (defining "accrue" as the moment "a cause of action becomes complete so that the aggrieved party can begin and maintain his cause of action"); Black's Law Dictionary 37 (4th ed. 1951) (same). As the Supreme Court recently reaffirmed, absent express language stating otherwise, statutes of limitations start running when a claim accrues—which is "'when the plaintiff has a complete and present cause of action.'" *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019) (quoting *Gabelli*, 568 U.S. at 448–49).

The *Petrella* Court noted in a footnote that, as an alternative to commencing the limitations period when a claim accrues, "nine Courts of Appeals have adopted 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." 572 U.S. at 670 n.4 (cleaned up). The discovery rule is an "[a]textual judicial supplementation" that starts the clock when the plaintiff discovers his claims, rather than when the claim accrues. *Rotkiske*, 140 S. Ct. at 361; *accord SCA Hygiene*, 137 S. Ct. at 962 (contrasting the discovery rule with statutes of limitations that begin "when the cause of action accrues"). But "a running clock is not the sine qua non of accrual." *William A. Graham Co. v. Haughey*, 646 F.3d 138, 149 (3d Cir. 2011). The discovery rule thus does not change the textual definition of the word accrue, which is invariably "the point when 'the plaintiff can file suit and obtain relief.'" *Petrella*, 572 U.S. at 670 (citation omitted); *Haughey*, 646 F.3d at 149 ("[A]ccrual is defined in terms of the objective existence of a viable cause of action, not in terms of whether the limitations clock has started.").[1]

The plain text of Section 507(b) thus limits the extent of relief available under Section 504 to "only three years back from the time of suit." *Petrella*, 572 U.S. at 677. Throughout its brief, Starz accuses MGM of contradicting the text of the

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[1] Starz claims that "MGM agrees that a claim does not 'accrue' within the meaning of Section 507(b) until the copyright holder actually or constructively discovers the act of infringement giving rise to that particular claim." Appellee's Br. at 22 (emphasis omitted). That is wrong. MGM does not here challenge the application of the discovery rule in copyright cases, because (as *Sohm* recognized) damages must be limited to three years from the time of suit regardless of whether the rule applies. Appellant's Br. at 3, 25. But MGM submits that the term "accrue" in Section 507(b) means the point at which a plaintiff has a complete and present cause of action, as a long line of Supreme Court authority holds.

Copyright Act, but it is the discovery rule, not *Petrella*'s three-year limit on damages, that has no basis in the text of the statute. The Supreme Court noted in a footnote that it was not passing on the validity of the discovery rule, but it held in no uncertain terms that the extent of relief available cannot be extended beyond three years from suit. *Petrella*, 572 U.S. at 677; *Sohm*, 959 F.3d at 52; *Nimmer* § 12.05[B][2][c]. This deliberate formulation was not, as Starz suggests, the result of judicial sloppiness. Appellee's Br. at 32. Rather, the Supreme Court's careful construction ensures that the three-year limit on damages is uniform and certain, not subject to expansion depending on whether the injury rule or the discovery rule applies.

Starz's expansive reinterpretation of a footnote in *Petrella* does not allow this Court to disregard the Supreme Court's explicit construction of Section 507(b) in the body of the *Petrella* opinion—in reasoning that was necessary to its holding. To the extent any aspect of the discovery rule cannot be squared with the damages bar, the discovery rule must give way, not the text of the statute and binding Supreme Court precedent. The Second Circuit's approach correctly reconciled the two by looking to the discovery rule to determine when the limitation period starts, but to the damages bar to determine the extent of retrospective relief available. *Sohm*, 959 F.3d at 52.

II. This Court Should Reject Starz's Invitation to Create a Circuit Split.

This Court should reverse the district court and harmonize its approach to copyright limitations with *Petrella* as the Second Circuit has done. Not only is that the right result, but it also furthers Congress's purpose in enacting Section 507(b) to have a uniform statute of limitations period and prevent forum shopping. *Petrella*, 572 U.S. at 670.

As a general rule, this Court "decline[s] to create a circuit split unless there is a compelling reason to do so." *Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co*., 346 F.3d 1190, 1192 (9th Cir. 2003). This is especially true in cases involving laws that "are best applied uniformly." *Id.*; *accord Maniar v. F.D.I.C*., 979 F.2d 782, 785 (9th Cir. 1992). "Congressional intent to have national uniformity in copyright laws is clear." *Syntek Semiconductor Co. v. Microchip Tech. Inc.,* 307 F.3d 775, 781 (9th Cir. 2002). This Court has thus admonished that "the creation of a circuit split would be particularly troublesome in the realm of copyright" because "inconsistent rules among the circuits would lead to different levels of protection in different areas of the country, even if the same alleged infringement is occurring nationwide." *Silvers v. Sony Pictures Entm't, Inc*., 402 F.3d 881, 890 (9th Cir. 2005) (en banc); *accord Seven Arts Filmed Ent. Ltd. v. Content Media Corp. PLC*, 733 F.3d 1251, 1256 (9th Cir. 2013).

Starz has not presented any compelling reason to generate a circuit split. In *Sohm*, the Second Circuit expressly rejected the approach the district court applied in this case and no court of appeals has come out the other way. And the Seventh Circuit, which has not decided the issue, has observed that "in light of *Petrella*, we now know that the right question to ask in copyright cases is whether the complaint contains allegations of infringing acts that occurred within the three-year look-back period from the date on which the suit was filed." *Chicago Bldg. Design, P.C. v. Mongolian House, Inc.*, 770 F.3d 610, 616 (7th Cir. 2014).

If this Court were to affirm the district court's ruling, it would lead to troubling inconsistencies in copyright law that this Court admonished against. *Silvers*, 402 F.3d at 890. This is no theoretical concern. The defendant in *Sohm*, Scholastic, was also sued in California for virtually the same conduct, *viz.*, exceeding the scope of licenses granted by the plaintiffs for the use of certain photographs. *Compare Sohm*, 959 F.3d at 42–43, *with Menzel v. Scholastic, Inc.*, 2019 WL 6896145, at *2–4 (N.D. Cal. Dec. 18, 2019). The Second Circuit barred plaintiff from recovering damages outside of the three-year window. *Sohm*, 959 F.3d at 52. The district court in *Menzel*, however, permitted the plaintiff to recover damages without any limit (*Menzel*, 2019 WL 6896145, at *7), leading to "different levels of protection in different areas of the country," even though the "same alleged infringement is occurring nationwide." *Silvers*, 402 F.3d at 890.

Such inconsistency in turn invites forum-shopping. A circuit-level discordance between the Second Circuit and this Court is particularly concerning given that most copyright cases are filed in these two circuits. If this Court disagrees with the Second Circuit and becomes the only court of appeals to adopt Starz's rule, this Circuit will be inundated with copyright infringement cases. Starz does not even pretend that *Sohm* is distinguishable. *See* Appellee's Br. 17 (arguing that *Sohm* "was wrongly decided"). Thus, the only options available to this Court are to agree with the Second Circuit or create a circuit conflict.

Since *Sohm* was decided, district courts in the Second, Fourth, Sixth, and the Eleventh Circuits have faithfully followed *Petrella* and limited damages to three years from the time of suit. *See*, *e.g.*, *Nealy v. Atl. Recording Corp*., 2021 WL 2280025, at *4 (S.D. Fla. June 4, 2021); *Navarro v. Procter & Gamble Co.,* 515 F. Supp. 3d 718, 762 (S.D. Ohio 2021); *Werner v. BN Media, LLC*, 477 F. Supp. 3d 452, 456 (E.D. Va. 2020); *Syntel Sterling Best Shores Mauritius Ltd. v. TriZetto Grp., Inc*., 2020 WL 8083583, at *1 (S.D.N.Y. Sept. 30, 2020); *Shepard v. Wo Hop City, Inc*., 2021 WL 4267527, at *5 (S.D.N.Y. Sept. 20, 2021).

Despite this growing consensus that *Sohm* correctly applied *Petrella,* Starz wrongly insists that "*Sohm* is an outlier" that "has been widely criticized." Appellee's Br. at 8. Other than Judge Gee (in this case and in *Mavrix Photo, Inc. v. Rant Media Network,* LLC, 2020 WL 8028098 (C.D. Cal. Nov. 2, 2020)), only one

other district court has disagreed with *Sohm*, based largely on a misreading of *Petrella* as an "injury rule" case—which is incorrect as discussed above. *See D'Pergo Custom Guitars, Inc v. Sweetwater Sound, Inc*., 516 F. Supp. 3d 121, 135–36 (D.N.H. Jan. 28, 2021). Starz wrongly claims that *Stross v. Hearst Commc'ns, Inc*., 2020 WL 5250579 (W.D. Tex. Sept. 3, 2020), also rejected *Sohm*'s interpretation of *Petrella* (Appellee's Br. at 45), but that case does not discuss *Sohm* or the three-year limit on damages at all. Instead, *Stross* merely concluded—just like *Sohm* did—that the discovery rule continues to apply post-*Petrella*. *Stross*, 2020 WL 5250579 at *8.

Starz similarly mischaracterizes pre-*Sohm* authority. For instance, it cites *Media Rights Techs., Inc. v. Microsoft Corp*., 922 F.3d 1014 (9th Cir. 2019), as declining "to interpret *Petrella* as imposing an absolute bar on damages for infringements preceding the three-year limitations period." Appellee's Br. at 46. But this Court did no such thing. Instead, in determining whether certain claims were subject to claim preclusion, *Media Rights* noted that under the discovery rule, the statute of limitations begins to run "when a party discovers, or reasonably should have discovered, the alleged infringement" and that under the separate accrual rule, "[e]ach wrong gives rise to a discrete 'claim' that 'accrue[s]' at the time the wrong occurs." *Media Rights*, 922 F.3d at 1022–23. The extent of retrospective relief

available was not at issue in *Media Rights* at all. The same is true for most of the pre-*Sohm* cases that Starz cites.[2]

The principal copyright treatises are also in accord with *Sohm*'s analysis. For instance, Nimmer—"the leading copyright treatise" (*Seven Arts*, 733 F.3d at 1255)—observes that the three-year limit on damages set forth in *Petrella* cannot be extended by the discovery rule. *Nimmer* § 12.05[B][2][c]. As Nimmer explains, while *Petrella* "holds open the question of whether the discovery or injury rule is to be preferred," the Supreme Court showed "no similar reticence" in barring recovery of damages outside the three-year window. *Id*. "If any ambiguity remained, the succeeding observation would seem to have dispelled it: '§ 507(b)'s limitations period … allows plaintiffs … to gain retrospective relief running only three years

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[2] *See*, *e.g.*, *Krasemann v. Scholastic Inc*., 2019 WL 3220535, at *7 (D. Ariz. July 17, 2019); *Kelly v. Maricopa Cty. Sheriff's Office*, 2017 WL 6054675, at *2 (D. Ariz. Dec. 7, 2017); *Phoenix Techs. Ltd. v. VMware, Inc.*, 2017 WL 1289863, at *7 (N.D. Cal. Jan. 6, 2017); *UMG Recordings, Inc. v. Global Eagle Entm't, Inc*., 2015 WL 12752881, at *8 (C.D. Cal. Aug. 27, 2015); *Richardson v. Kharbouch*, 2020 WL 1445629, at *6–7 (N.D. Ill. Mar. 25, 2020); *Boehm v. Svehla*, 2017 WL 4326308, at *8–9 (W.D. Wis. Sept. 27, 2017); *Topline Sols., Inc. v. Sandler Sys., Inc*., 2017 WL 1862445, at *21 (D. Md. May 8, 2017); *Raucci v. Candy & Toy Factory*, 145 F. Supp. 3d 440, 448 (E.D. Pa. 2015); *Design Basics LLC v. J & V Roberts Invs., Inc*., 130 F. Supp. 3d 1266, 1281–82 (E.D. Wis. 2015); *Design Basics LLC v. Campbellsport Bldg. Supply Inc*., 99 F. Supp. 3d 899, 919 (E.D. Wis. 2015); *Grant Heilman Photography, Inc*., 28 F. Supp. 3d 399, 410–11 (E.D. Pa. 2014); *Frerck v. Pearson Education, Inc*., 63 F. Supp. 3d 882, 887 n.3 (N.D. Ill. 2014); *Beasley v. John Wiley & Sons, Inc*., 56 F. Supp. 3d 937, 945 n.5 (N.D. Ill. 2014); *Alfa Laval Inc. v. Flowtrend, Inc*., 2016 WL 2625068, at *5–6 (S.D. Tex. May 9, 2016).

back *from the date the complaint was filed*.'" *Id.* (quoting *Petrella*, 572 U.S. at 672) (emphasis in the original). Nimmer thus concludes that the Supreme Court's pronouncements leave no room to allow a plaintiff to recover damages outside the three-year lookback period on account of the discovery rule. *Id.* Although Nimmer goes a step further than *Sohm* and advocates for the adoption of the injury rule to best effectuate Congressional intent underlying Section 507(b), its analysis of *Petrella* is on all fours with that of the Second Circuit. *Id.*

Patry, another preeminent copyright treatise that the Supreme Court cited in *Petrella*, also agrees with *Sohm*. As Patry notes, "*[e]ven if a court uses the discovery approach to the statute of limitations*, and holds that for limitations purposes an infringement that began in 2000 did not start the limitations clock until 2003 when the plaintiff became reasonably aware of it, *a plaintiff who brings suit in 2006 can still only recover damages going back to 2003*." 6 William F. Patry, *Patry on Copyright* § 20:23 (2021) (emphasis added) (citing *Sohm*).

To be sure, Patry acknowledges that the court below thoroughly "reviewed *Petrella* and subsequent case law on the relationship between when the limitations period begins and when the cut-off for damages is." *Patry* § 20:18. As the district court observed, many courts have adopted the "'rolling' approach," which measures the extent of relief available back from the date the complaint is filed "such that the passage of each additional day forecloses one more day of past damages." 1-ER-6–

7 (quoting Nimmer § 12.05[B][2][c]); *see also* 1-ER-8 (noting that since *Petrella*, *Sohm* and the district courts in the Second Circuit have adopted this rolling approach even where the discovery rule applies). Patry agreed with district court's analysis *on this score*—that courts have generally adopted the rolling approach of "*cutting off* damages three years beyond" the filing of suit. *Patry* § 20:18 (emphasis added). But Patry in no way endorsed the district court's expansion of the rolling approach by allowing damages beyond the three-year window when the discovery rule applies; Patry unequivocally reaches the contrary conclusion. *Patry* § 20:23.

For its part, Starz identifies no scholarly work that supports its position that damages outside the three-year lookback is recoverable notwithstanding *Petrella.* Instead, it cites only Nimmer's disagreement with *Sohm* for not dispensing with the discovery rule altogether—a position that is even more at odds with Starz's arguments. Appellee's Br. at 52. And Starz's academic *amicus* cites only his own disagreement with *Sohm*. Ochoa Br. at 15 ("Within three months of the decision, I published a blog post criticizing the decision"). The weight of authority is clearly with *Sohm*.

Creation of a circuit split is unwarranted where, as here, the only appellate decision addressing *Petrella*'s construction of Section 507(b) has been supported by district courts in various circuits and leading treatises alike. *See Seven Arts*, 733 F.3d at 1255–56; *cf. VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886 (9th Cir.

2016) (taking the "unusual step" of creating a circuit split where leading treatises and every court not bound by a Sixth Circuit opinion disagreed with the ruling). This Court should instead harmonize its law with the Second Circuit. *Seven Arts*, 733 F.3d at 1256.

III. Public Policy Considerations Cannot Justify Disregarding *Petrella*.

"The length of a limitations period reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Rotkiske*, 140 S. Ct. at 361 (internal quotations omitted). *Petrella* effectuated Congress's intent to balance those interests by invalidating laches, but strictly construing Section 507(b) to limit damages to three years from the time of suit. Allowing plaintiffs to reach back further on account of "public policy considerations" (Appellee's Br. at 52) upsets this balance and undermines Section 507(b)'s purpose of safeguarding defendants from excessive relief. The Court should reject Starz's and its *amici*'s requests to engage in such policymaking. *SCA Hygiene*, 137 S. Ct. at 967.

A. *Petrella*'s Construction Does Not Eviscerate the Discovery Rule.

The Supreme Court has never approved the use of the discovery rule in copyright cases and has increasingly disfavored it as a "bad wine of recent vintage." *Rotkiske*, 140 S. Ct. at 360; *see also SCA Hygiene*, 137 S. Ct. at 962 (reiterating that the Supreme Court has not decided whether copyright claims are subject to a

discovery rule). This appeal does not present the question whether the discovery rule is available in cases arising under the Copyright Act. Contrary to Starz's mischaracterization (Appellee's Br. at 18, 22), MGM did not concede that the discovery rule applies to copyright claims; rather, MGM is not challenging that rule here because, as *Sohm* illustrates (959 F.3d at 52), the *Petrella* construction applies regardless. Appellant's Br. at 3, 25; *see also* note 1, *supra*. Whether or not the Court retains or discards the discovery rule in some other case, there is no basis for disregarding the clear direction in *Petrella* on the scope of the Copyright Act's limitations period based on an atextual, judicially created doctrine that is contrary to recent Supreme Court precedent.

In any case, *Petrella* does not eviscerate the discovery rule—in the very footnote on which Starz relies, the Supreme Court noted that circuit courts have adopted the rule without passing on its correctness. *Petrella*, 572 U.S. at 670 n.4. This Court has since applied the discovery rule to determine when the statute of limitations starts to run. *Media Rights*, 922 F.3d at 1022. Courts and commentators have harmonized the discovery rule with *Petrella* in various ways. *See*, *e.g.*, *Sohm*, 959 F.3d at 52; *Werner*, 477 F. Supp. 3d at 456; *Navarro,* 515 F. Supp. 3d at 760–62; Nimmer § 12.05[B][2][c]–[d]. With the benefit of the discovery rule, a plaintiff may obtain significant relief that would be otherwise unavailable under the injury rule.

As the Supreme Court explained, a plaintiff who does not promptly initiate suit "will miss out on damages for periods prior to the three-year look-back, but her right to prospective injunctive relief should, in most cases, remain unaltered." *Petrella*, 572 U.S. at 683. Among other things, "a plaintiff who proves infringement will likely gain forward-looking injunctive relief stopping the defendant's repetition of infringing acts." *Id.* at 683 n.19; *see also* 17 USC §§ 502, 503.

Starz contends that following the Supreme Court's directive would render the discovery rule meaningless because a plaintiff who has established past infringement "would not be able to seek prospective relief for that claim at all" and "a plaintiff capable of showing that the defendant is continuing to infringe . . . could rely (and would have to rely) on those separate infringements (which give rise to separate claims) to obtain prospective relief." Appellee's Br. at 51 (emphasis omitted).

But an ongoing infringement is not always necessary to obtain an injunction. Courts may issue an injunction upon a showing of past infringement and a threat of future harm. *See Jackson v. Sturkie,* 255 F. Supp. 2d 1096, 1103 (N.D. Cal. 2003) (granting injunction where the defendant "amply possesses the means for future infringement, either during a live concert or through the production of infringing video cassettes"); *N. Am. Karaoke-Works Trade Ass'n, Inc. v. Entral Grp. Int'l, LLC,* 2010 WL 2158294, at *3 (S.D.N.Y. May 27, 2010) (issuing injunction even though the infringement had ceased); *Bose Corp. v. Silonsonnic Corp.*, 413 F. Supp. 2d 339,

346 (S.D.N.Y. 2006) (same). Hence, while a plaintiff ordinarily could not seek any relief based on infringements that occurred outside of the limitations period (*see Wolf v. Travolta*, 167 F. Supp. 3d 1077, 1099 n.13 (C.D. Cal. 2016)), with the benefit of the discovery rule, he may be awarded "injunctive relief (given the danger of further recurrence of infringement), even though the time for recovering damages had passed." Nimmer § 12.05[B][2][d].

Starz, however, is a licensee whose rights in the titles that MGM moved to dismiss expired more than three years before this suit was filed. *See* Appellant's Br. at 38–40. Starz thus has no future interests that warrant protection. *Id.* Starz's claims must be dismissed because it has no remedy that the court may grant, not because the damages bar eviscerates the discovery rule. *Id.*

B. *Amici*'s Policy Arguments Are Irrelevant and Unpersuasive

Starz and its *amici* raise a host of policy arguments that do not warrant departing from the Supreme Court's binding ruling in *Petrella*, and in any case they are unpersuasive.

Copyright holders enjoy significant protection under the extraordinarily long copyright term provided by the Copyright Act. *Petrella*, 572 U.S. at 672; 17 U.S.C. § 302. By dismantling laches, *Petrella* significantly enlarged protection for copyright holders who can now "stand inactive while the proposed infringer spends large sums of money in its exploitation, and [] intervene only when his speculation

has proved a success." *Danjaq*, 263 F.3d at 951.[3] And because the limitations period restarts with each infringement, a plaintiff can sue at any time, no matter how long the infringements have been ongoing. A plaintiff who prevails may obtain damages within the three-year lookback period, as well as prospective injunctive relief. *Petrella*, 572 U.S. at 683.

Despite the significant protection that copyright owners already have, *amicus* Authors Guild contends that more is needed because artists' pay is rapidly decreasing and the quantity of new works produced may decline as a result. Authors Guild Br. at 6–9, 26. But the Authors Guild's own surveys show that the decline in artists' pay was primarily driven by "more people [] writing and publishing books than ever before" and Amazon controlling "so much of the retail market." The Authors Guild, *Six Takeaways from the Authors Guild 2018 Author Income Survey*. The "flood of authors" and "glut of books" has led to "more books than readers," giving retailers superior negotiating power to devaluate each work. The Authors Guild, *Presentation on U.S. Published Book Author Income Survey*. These factors have nothing to do with Section 507(b) and, at any rate, are issues that Congress ought to address, not this Court.

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[3] Indeed, the plaintiff in *Petrella* sought to maximize her potential recovery by initiating suit when MGM's investments in *Raging Bull* became profitable. *Petrella,* 695 F.3d at 953.

The Authors Guild also argues that damages should not be limited because "only thirty-two percent of the lawyers surveyed indicated that they would be willing to accept a case with less than $30,000 at stake." Authors Guild Br. at 18. But a plaintiff may be awarded attorney's fees and costs, which would compensate the plaintiff's counsel at the fair market rate. 17 U.S.C. § 505. Indeed, copyright cases have increased drastically in the last decade, with record number of filings in 2018. Judiciary Data and Analysis Office of the Administrative Office of the U.S. Courts, *Just the Facts: Intellectual Property Cases—Patent, Copyright, and Trademark*, *available at* https://tinyurl.com/3umtr9hr. And artists who still cannot find representation can avail themselves of the small claims process, which does not require a lawyer's involvement at all. 17 U.S.C.A. § 1501 *et. seq.*

"The enactment of a statute of limitations necessarily reflects a congressional decision that the timeliness of covered claims is better judged on the basis of a generally hard and fast rule" rather than any sort of "case-specific judicial determination." *SCA Hygiene*, 137 S. Ct. at 960. As Starz admits, allowing additional years of damages based on account of the discovery rule tasks courts with doing just that. Appellee's Br. at 53. *Petrella* best effectuated the legislative judgment encompassed in Section 507(b) by disallowing laches, but limiting retrospective relief to only three years from the time of suit. Although this means

that plaintiffs may lose out on some damages, the "passage of time must leave some wrongs without a remedy." Patry § 20:2 (citations omitted).

CONCLUSION

The Supreme Court construed Section 507(b) to preclude recovery of damages outside the three-year window before suit. This Court should follow the Second Circuit and harmonize its jurisprudence with *Petrella.* Doing so requires reversal of the order under review.

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I hereby certify that this Petition complies with the type-volume limitation of Ninth Circuit Rule 32-1 because it contains 6,895 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(f).

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