No. 16-217

IN THE

Supreme Court of the United States

STEPHANIE LENZ,

Petitioner,

v.

UNIVERSAL MUSIC CORP.,
UNIVERSAL MUSIC PUBLISHING, INC.,
AND UNIVERSAL MUSIC PUBLISHING GROUP,

Respondents.

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

BRIEF OF AMICI CURIAE YES MEN, REBECCA PRINCE, AND MAY FIRST IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici Yes Men, Rebecca Prince, and May First are online speakers and content creators—political activists, critics, citizen journalists and artists—as well as technologists that provide the network services those speakers utilize to share their messages with the world.[1]

Igor Vamos (a.k.a. Mike Bonanno) and Jacques Servin (a.k.a. Andy Bichlbaum) are the long-time activists and artists more commonly known as the "Yes Men." For many years, the Yes Men have regularly engaged in "identity correction," posing as business and government representatives and making statements on their behalf to raise popular awareness of the real effects of those entities' activities. For example, in 1999, the Yes Men created a website parodying the political campaign of George W. Bush, then governor of Texas. Terry M. Neal, *Satirical Website Poses Political Test*, Wash. Post (Nov. 29, 1999), http://www.washingtonpost.com/wp-srv/WPcap/1999-11/29/002r-112999-idx.html.

Yes Men campaigns have addressed issues ranging from the failure to adequately compensate

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[1] Pursuant to Rule 37.2(a), counsel for both parties received notice of intent to file this brief at least 10 days before its due date. The parties have consented to the filing of this brief; their written consents are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than the amici or their counsel made a monetary contribution to the preparation or submission of this brief.

victims of the Bhopal disaster to the destruction of public housing units in New Orleans, and criticized political forces as disparate as BP and the New York Times. *See, e.g.*, Yes Lab, *Projects*, http://yeslab.org/projects (last visited September 14, 2016); Wikipedia, *Yes Men: Projects,* https://en.wikipedia.org/wiki/The_Yes_Men#Projects (last visited Sept. 14, 2016). Yes Men actions generally result in widespread media coverage, often calling attention to issues that were not receiving significant public attention. Many that were the subjects of a Yes Men parody would have preferred to remain under the radar: in the course of their activism, the Yes Men have received DMCA takedown notices by parties seeking to reduce this coverage, and have defended at least one lawsuit regarding one of their campaigns.

Rebecca Prince, known online as "Becky Boop," is a YouTube creator, commentator and online journalist. Ms. Prince creates videos about news and current events and controversies involving YouTube, gaming, and the internet on her popular YouTube channels. One channel is aimed at reporting on and educating YouTube viewers and creators about copyright, fair use and similar issues; it combines reporting with analysis and commentary. Rebecca Prince, *Becky Boop YouTube Channel*, http://youtube.com/beckyboop. She also operates a separate YouTube channel in which she discusses and analyzes topics of interest to the online gaming community. Rebecca Prince, *Instagamrr YouTube Channel*, http://youtube.com/instagamrr.

Ms. Prince has both personal experience with wrongful DMCA takedown of her content and reporting experience with wrongful takedowns on

YouTube more generally. She recently presented testimony before the U.S. Copyright Office in one of its Roundtable Sessions in its § 512 study. United States Copyright Office, *Section 512 Study Roundtable Transcript* (May 2, 2016), http://www.copyright.gov/policy/section512/public-roundtable/transcript_05-02-2016.pdf. In addition to her YouTube activities, she is currently a graduate student at Harvard University; she began her career as a systems analyst and ultimately worked in business development for Apple.

May First/People Link ("May First") is a nonprofit Internet Service Provider with a mission to build movements by advancing the strategic use and collective control of technology for local struggles, global transformation, and emancipation without borders. *See* May First, *Official Documents*, https://mayfirst.org/en/official-documents/. May First offers internet services to individuals and organizations engaged in activism, and has repeatedly encountered the use of questionable DMCA takedowns and other improper assertions of intellectual property meant to suppress free speech and criticism—including several Yes Men projects. *See* May First, *Legal Threats to May First/People Link*, https://support.mayfirst.org/wiki/legal (last visited Sept. 14, 2016) [hereinafter *May First Legal Threats*].

Together, amici have direct experience and unique perspectives to bring to the Court's attention regarding the harm that wrongful takedowns cause to online speech and the ways in which these takedowns are used to censor criticism, political commentary, and other core First Amendment activity.

SUMMARY OF THE ARGUMENT

The Petition presents an issue of immediate national importance. Millions of users now rely on the internet as a critical platform to engage in and consume political commentary, activism, and advocacy; parody; criticism; news reporting; artistic expression; and other vital speech that is strongly in the public interest. Such speech is at the core of expression protected by the First Amendment. This Court's precedents forbid prior restraints of such speech in all but the most exceptional of cases.

Yet wrongful DMCA § 512 takedown notices are now frequently used to censor speech and immediately remove it from the internet without any consideration or determination of whether it in fact infringes copyright. Without a sufficient mechanism for deterring or remedying notices that objectively lack good faith, takedown notices have become a tool for political opponents, subjects of criticism and reporting, commercial rivals, and others to silence public speakers for a period of weeks and, often, forever—even in the absence of a valid copyright claim. The direct experiences of amici and many thousands of other content creators, activists, and critics reveals the vast degree to which censorship through wrongful takedowns is occurring.

Section 512(g) provides a mechanism for a speaker to attempt to restore or "put back" speech that has been removed from the internet via a DMCA notice. Even in cases where this mechanism operates as designed, however, lawful speech is still censored and unavailable for a significant time, often two weeks or longer. As this court has recognized, even temporary restraints on lawful speech can constitute

the irreparable loss of First Amendment freedoms. This is especially true where the speech relates to political commentary, activism, advocacy, reporting, or commentary on fast-moving events, etc., especially in the online world.

Certiorari is necessary to ensure that the mechanism that Congress crafted into the DMCA in 512(f) to guard against abuse of the takedown process—a cause of action for misrepresenting that content is not authorized by law—be construed to provide real and meaningful deterrence of and remedies for wrongful takedowns. Otherwise, people seeking to silence critics, shut down political debate, harm competitors, etc., will continue to largely achieve their ends by sending takedown notice without fear of legal consequences. Their censorship will succeed even if a counter notice eventually results in the material being replaced; it will simply be too late to matter.

Unfortunately, the subjective good faith standard for 512(f) adopted by the court below fails to provide needed deterrence and remedy against erroneous takedowns. In most cases it will be difficult or impossible for the target of a wrongful takedown to demonstrate that the sender of the notice lacked the subjective belief that the content in question was infringing (no matter how objectively unreasonable that belief is). The Ninth Circuit's misguided rule will make § 512(f) effectively toothless, eliminating any legal pressure not to send erroneous takedowns.

The determination of the proper standard for assessing the good faith under § 512(f) is a question of considerable significance to millions of online creators, critics, activists, journalists, and users who

seek to contribute to public debate or generate revenue from online content, as well as to the public interest in robust, lawful speech. Because of the impact of wrongful takedowns on a wide variety of lawful speech, this case raises an important national question. The Court should grant certiorari to resolve it.

ARGUMENT

I. The DMCA Provides a Powerful Tool That Is Often Misused to Suppress Lawful Speech, Particularly Important Political Commentary, Activism, Criticism, Reporting, and Art

Section § 512 of the DMCA, 17 U.S.C. 512, is intended to provide an efficient means for rightsholders to secure the removal of user-uploaded infringing material from online sites and services. In practice, however, all too often the notice and takedown provisions of 512(c) are misused by people and entities seeking to remove from the internet lawful speech that they likely could not suppress using other means. As explained by the Center for Democracy and Technology ("CDT"), "what motivates these takedowns is often not copyright, but issues not within the DMCA's purview, such as concerns over reputation. . . ." CDT, *CDT Releases Report on Meritless DMCA Takedowns of Political Ads* (Oct. 12, 2010), https://cdt.org/insight/cdt-releases-report-on-meritless-dmca-takedowns-of-political-ads/ [hereinafter *CDT Report Summary*]. *See also* CDT, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (September 2010), https://www.cdt.org/files/pdfs/copyright_takedowns.pdf [hereinafter *CDT Report*].

Without adequate mechanisms to deter and police the sending of wrongful takedown requests targeted at content that is in fact legal, § 512 is becoming an effective and low-cost way to censor content that the notice sender dislikes, disagrees with, wants to hide from public view or seeks to suppress for competitive advantage.

As the general counsel of Automatic, the provider of the WordPress blogging platform and software, recently testified, the

> DMCA's takedown process provides what can be *an easy avenue for censorship*: simply send in a DMCA notice claiming copyrights in a piece of content that you don't agree with. Regardless of whether you own the copyright, the service provider that hosts the content must take it down or risk being out of compliance with the DMCA.

Testimony of Paul Sieminski, *Section 512 of Title 17: Hearing Before the House Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet*, 113th Cong. 86 (Mar. 13, 2014), https://judiciary.house.gov/wp-content/uploads/2016/02/031314-Testimony-Sieminski.pdf (emphasis added).

II. Misuse of the DMCA to Silence Lawful Speech for Even a Limited Time Exacts a High Toll on the Public Interest and Internet Users and Providers Like Amici

DMCA takedown notices almost always result in immediate removal of the content at issue without

advance notice to the person who posted the content and without any adjudication of whether the speech is authorized by law or otherwise non-infringing. Even where the speaker utilizes the counter-notice and "put-back" provisions of § 512(g), his or her speech will have been removed from the internet for what is often "an eternity" in internet time. Such suppression, while limited, can nevertheless cause great harm where the immediacy of the speech is important as it so often is in the fast-moving context of online political activism and advocacy, parody, criticism and commentary.

A. DMCA takedown notices, including wrongful ones, will almost always cause lawful speech to be censored for a significant period of time.

When a service provider receives a takedown notice, it must "expeditiously" remove, or disable access to, the allegedly infringing content in order to retain the safe harbor protection. 17 U.S.C. § 512(c)(1)(C). Not surprisingly, most service providers respond to most or all notices they receive by quickly removing the complained-of content. *See* Jennifer M. Urban, Joe Karaganis, and Brianna L. Schofield, *Notice and Takedown in Everyday Practice* 44 (Mar. 29, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628. The provider is protected from liability to the user whose content is removed so long as the provider takes reasonable steps to promptly notify the user of the takedown. 17 U.S.C. § 512(g)(2)(A). This notification may take several days or more.

If the user then chooses to submit a counter-notice, a highly unusual occurrence[2] that takes additional time, the provider must notify the sender of the takedown notice and wait between ten and 14 business days before it can safely "put back" the censored content (assuming the sender has not filed a copyright lawsuit in the interim). 17 U.S.C. §§ 512(g)(2)(B) and (C). Even if the process moves as quickly as possible, the content remains censored for close to two weeks. It often takes significantly longer when delays in any of the steps occur. *See* Urban et al., *supra*, at 44. Whether the takedown notice was wrongful or legitimate, the speech at issue is suppressed and remains unavailable for close to two weeks or longer, usually forever.

B. Censoring lawful speech for even a limited time causes serious harm

As this Court has recognized, censorship of speech before a proper determination that it is unlawful causes significant harm. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976) ("A prior restraint . . . has an immediate and irreversible sanction. . . . The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events."). This is true even if the speech is suppressed only for a limited time:

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[2] User submissions of counter notices apparently are "extremely rare"—many service providers and content owners say they receive either none or only a handful per year. *See* Urban et al., *supra*, at 44.

> Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss—a loss in the immediacy, the impact, of speech. . . . Indeed, it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech.

Id. at 609 (Brennan, J., concurring) (quoting Alexander Bickel, *The Morality of Consent* 61 (1975)). *See also Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")

Harm from the loss of immediacy and impact of even temporarily suppressed speech is profoundly greater for some of the content on the internet than it was previously. The speech in which amici and many others engage—online political activism and advocacy, commentary and parody, reporting on breaking news stories—is often highly time sensitive and has a very limited lifespan. In political advocacy campaigns such as those the Yes Men conduct, for example, often the first week or even few days are essential for gaining the desired attention and delivering a powerful message.

Similarly, reporting or commenting on particular events, controversies or new developments now evolves and ages extremely rapidly online. The unavailability of topical coverage or commentary for even a few days often makes the speaker's voice and message irrelevant. *See* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in*

Intellectual Property Cases, 48 Duke L.J. 147, 199-200 (1998) ("the temporary delay created by preliminary injunctions is still a significant speech restriction . . . . When the work is tied to a particular current event, such as an election campaign, trial, scandal, or policy debate, this cost is dramatic—by the time the injunction is lifted, the work might have become largely pointless.").

Censorship for even limited times also harms small businesses and users who are trying to generate revenue from their content. On platforms like YouTube, posting material quickly about time-sensitive topics is important to gain optimal placement in search rankings and to gain a substantial audience.

It also is important to the large numbers of creators who monetize their content through advertising programs such as Google's adwords. For example, amicus Rebecca Prince generates "AdSense" revenue through views of the video content she posts to her YouTube channels. In her own experience and her observations of other creators, most of the revenue is gained within the first few days of publishing new content when it is still fresh and timely. *Section 512 Study Roundtable Transcript* 152 (May 2, 2016), http://www.copyright.gov/policy/section512/public-roundtable/transcript_05-02-2016.pdf. If lawful content is removed for even a limited time by a takedown notice, the revenue it is likely to generate decreases dramatically.

Moreover, maintaining a loyal audience of viewers depends on a steady stream of fresh content; if new material is suppressed through takedown notices, even temporarily, the audience may be likely

to swiftly drift away. For many young commentators and creators on YouTube and similar platforms, wrongful takedowns that censor their speech for even two weeks can undermine their ability to gain and maintain an audience.

Given the harm from even the shortest period of censorship that can easily be achieved through a wrongful takedown notice, such notices present a quick and easy way for rivals to eliminate competing speakers and content and deprive those speakers of deserved revenue. Worse, YouTube and many other sites frequently terminate entirely the account and remove all the content of users who receive multiple takedown notices within a set time period. By issuing multiple wrongful takedowns, rivals, as well as political opponents, targets of criticism and others often can silence their targets entirely on a particular platform rather than merely eliminating certain content. *Id.*

In short, "ten to fourteen days represents 'an eternity on the Internet' for small businesses, for community sites where content has a short lifespan, or for political speech (as the McCain presidential campaign learned when a number of its commercials were pulled from YouTube in October 2008)." Urban et al., *supra*, at 44.

III. Amici Are Among Many Thousands of Internet Speakers Whose Political Speech, Activism, Criticism, News Reporting, and Commercial Content Have Been Censored by Wrongful DMCA Takedowns

While the majority of takedown notices are properly directed at infringing content, many others

are used to censor speech that is in fact lawful and non-infringing.

A. Online Political Activists and Critics Like the Yes Men Often Face Censorship in the Guise of DMCA Takedowns

As performer-activists and "culture jammers," the Yes Men, along with a network of supporters, seek to raise awareness of political and social issues through a practice they call "identity correction," in which the Yes Men create spoof web sites or engage in satirical public relations campaigns on behalf of political figures or powerful corporate interests to draw attention to the real issues raised by their behavior.

And while these actions often generate significant public attention on critical social and political issues, they often (unsurprisingly) generate displeasure from those who have been criticized. In some cases, those criticized use the law—often via DMCA notices—to turn questionable legal assertions into effective suppression of critical speech.

While the list of Yes Men campaigns, along with the reactions of their subjects, is long, the examples below illustrate the types of satire the Yes Men produce and the effectiveness of these campaigns in drawing attention to important issues. They also show common legal tactics used by the targets of the Yes Men's political activism, and how a low standard for § 512(f) permits legally untenable DMCA takedowns to be used to successfully shut down critical, political speech, with substantial collateral damage and no legal consequences.

i. Chamber of Commerce v. Servin

In October 2009, the Yes Men held a hoax press conference pretending to be the U.S. Chamber of Commerce ("USCOC"), and announce the USCOC was dropping its opposition to climate-change legislation then pending on Congress. David A. Fahrenthold, *Pranksters Stage Chamber of Commerce Climate Change Event,* Wash. Post (Oct. 19, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/10/19/AR2009101901651.html. Before the event was even complete, representatives of the real USCOC entered and revealed the trickery. *Id.* The event received significant press coverage and succeeded in drawing public attention to the USCOC's positions on climate change. *See, e.g.*, *id.*; Suzanne Goldenberg, *US Chamber of Commerce Falls Victim to 'Fraud' Over Climate Hoax*, The Guardian (Oct. 19, 2009), https://www.theguardian.com/environment/blog/2009/oct/19/chamber-commerce-climate-hoax ("a number of reporters . . . pressed [Chamber of Commerce Spokesman] Wohlschlegel for signs of a shift in the Chamber's position").

In addition to the press conference, the Yes Men put up a spoof USCOC website making similar claims. Two days after the press conference, the USCOC sent a DMCA takedown notice to Hurricane Electric, the "upstream ISP"—the ISP providing network access for the May First servers hosting the parodic USCOC site. *See* EFF, *Chamber of Commerce Takes Aim at Yes Men* (Oct. 22, 2009), https://www.eff.org/press/archives/2009/10/22. Hurricane Electric, having no direct relationship to the Yes Men and fearing liability, then pulled the

plug on May First's servers, removing not just the parody site, but *approximately 400 unrelated organizations*, from the internet. Kate Sheppard, *Chamber Unleashes Lawyers on Yes Men,* Mother Jones (Oct. 23, 2009), http://www.motherjones.com/mojo/2009/10/site-sore-eyes-chamber-targets-yes-men-parody-website.

Unlike most victims of unlawful takedown notices, who lack the funds or legal support to combat unfounded takedowns, the Yes Men were able to respond to the letter with the pro bono legal aid of the Electronic Frontier Foundation ("EFF"). Four days later, however, the USCOC filed a similarly unsupported trademark lawsuit in attempt to permanently quiet the Yes Men's ongoing criticism. Kate Sheppard, *Chamber Sues the Yes Men*, Mother Jones (Oct. 27, 2009), http://www.motherjones.com/mojo/2009/10/chamber-take-yes-men-court. With pro bono legal representation, the Yes Men were able to fight that suit. After 3 ½ years of litigation—and presumably after any political pressure generated by the Yes Men campaign had passed—the Chamber of Commerce quietly dropped its suit. Tim Cushing, *Chamber Of Commerce Drops Lawsuit Against Parodists The Yes Men, Who Ask The Chamber To Reconsider*, Techdirt (June 20, 2013), https://www.techdirt.com/articles/20130616/18233023499/chamber-commerce-drops-trademark-infringement-suit-against-activistparodist-group-yes-men-group-asks-chamber-to-reconsider.shtml. The Chamber suffered no legal consequences for its wrongful letter, its lawsuit, or the damage done to the 400 completely innocent organizations it caused to be removed from the internet.

ii. NRA

This summer, the Yes Men held a parodic press conference announcing that the NRA was launching a new initiative called "Share the Safety." Yes Lab, *NRA Shares the Safety* (June 23, 2016), http://yeslab.org/NRA. For every gun sold through the online portal at www.sharethesafety.org, the NRA and Smith & Wesson would supposedly donate a gun to someone who could not afford one. *Id.*

While the NRA, like the U.S. Chamber of Commerce, quickly and publicly identified the campaign as political criticism rather than an actual NRA program, the press conference and accompanying press release generated significant press coverage and attention for an undeniably important political issue. *See, e.g.*, Denis Slattery, Hoaxsters Launch NRA Spoof Website, *'Share the Safety,' Promoting Gun Giveaways to 'Under-Armed Americans,'* N.Y. Daily News (June 22, 2016), http://www.nydailynews.com/news/politics/hoaxsters-launch-nra-spoof-website-share-safety-article-1.2684280.

Not satisfied with publicly denouncing the "hoax," the NRA reportedly sent a letter requesting takedown and containing legal threats to CloudFlare, which runs a Content Distribution Network used by numerous web sites. Mike Masnick, *NRA Trademark Complaint Over Yes Men Parody Takes Down 38,000 Websites*, Techdirt (June 30, 2016), https://www.techdirt.com/articles/20160629/23462634866/nra-trademark-complaint-over-yes-men-parody-takes-down-38000-websites.shtml; Sarah Jeong, *NRA Complaint Takes Down 38,000 Websites*, Motherboard (June 29, 2016), http://

motherboard.vice.com/read/nra-complaint-takes-down-38000-websites. This letter was then passed to Digital Ocean, the upstream network provider for the site, which requested that Surge, the hosting platform used by the site, provide "counterclaim documents." Jeong, *supra*. Almost immediately after making this request, Digital Ocean unilaterally took down all of Surge, resulting in *38,000 websites being removed from the internet*, based on only a threatening letter and with no warning or recourse for the victims. Masnick*, supra*.

Although most of the web sites were reinstated, the Yes Men's parody site was successfully suppressed and was not restored until they were able to find a new host willing to endure the unfounded legal threats. The NRA and the various network providers involved suffered no legal consequences.

B. Individual Speakers Like Rebecca Prince Have Little Recourse Against DMCA Takedown-Based Censorship

Amicus Rebecca Prince was the target of a false, unfounded takedown notice for one of her YouTube videos during the controversy known as "Gamergate" in October 2014.[3] As a female gamer and a visible woman posting gaming-related videos during Gamergate, she (and numerous others) were targeted

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[3] For a brief overview of the Gamergate controversy, *see, e.g.*, Caitlin Dewey, *The Only Guide to Gamergate You Will Ever Need to Read*, Wash. Post (Oct. 14, 2014), https://www.washingtonpost.com/news/the-intersect/wp/2014/10/14/the-only-guide-to-gamergate-you-will-ever-need-to-read/.

for harassment and intimidation. One person attacked her by submitting a false DMCA takedown that resulted in her gaming video being removed from the internet.[4]

Ms. Prince had no ability to prevent the initial removal and censorship of her speech, even though it was caused by a bogus notice issued solely for the purpose of harassment rather than of addressing legitimate infringement. The best she could do was to submit a 512(g) counter notification, but doing so would not immediately cure the censorship. Rather, her video remained censored from YouTube for 16 days while the put-back process played out.

Further, submitting a counter-notice meant she was required to provide personal identifying information, including her address, to her harasser. She feared that gaining her sensitive information was in fact what this person wanted so he or she could use it to "dox" her—that is, to release her identifying information online to further harass and intimidate her—which in fact happened.

Internet personalities like "Becky Boop" are the new generation of celebrity. Their personal privacy is often extremely important to them, but unlike traditional celebrities they typically don't have the resources to protect themselves if people find out

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[4] Ms. Prince was immediately aware of the bogus nature of the takedown because it included an email address ("uncleruslan@gmail.com") and a fake user name ("Ruslan Tsarni") that she understood to reference the Boston Marathon bombing and she also understood to be a message to her that the sender knew that she was living in Boston at the time.

where they live. This risk of disclosure and potential targeting creates powerful disincentives for many creators, commentators and reporters to avail themselves of the "put-back" mechanisms of § 512(g). *See, e.g.*, *Comments of the Organization for Transformative Works* 18 (Mar. 31, 2016), Section 512 Study, Copyright Office Docket No. 2015-07, https://www.regulations.gov/document?D=COLC-2015-0013-86027 ("[W]e have found that individuals (particularly young women) are generally intimidated by the prospect of counternotifying even when they believe, correctly, that their use is fair.").

C. Internet Service Providers Like May First Are Rarely Able to Fight Wrongful Takedowns

May First, unlike most ISPs and hosts, is a membership organization whose users are members rather than arms-length customers drawn from the general public. It has a mission, and therefore is more willing than most hosts to fight for the free speech rights of its users. As described above, parties wishing to suppress lawful speech by misusing copyright claims often bypass the host and send notices to upstream network providers, particularly where the host has a publicly stated dedication to protecting political activists and critics.

Nonetheless, May First regularly faces legal threats, including DMCA takedowns, targeted at suppressing the critical, political, and other lawful speech of its member users. May First provides a list of over a dozen examples of occasions on which it has been impacted by the DMCA and other legal threats. *See May First Legal Threats*, *supra*. At least two of

these examples are emblematic of the risk of speech suppression created by § 512 and the absence of a meaningful mechanism to deter or remedy wrongful takedowns.

i. Even Legitimate Journalistic Organizations Abuse the DMCA to Suppress Criticism

In October 2008, "a celebration/collaboration with Steve Lambert, Andy Bichlbaum of The Yes Men, along with 30 writers, 50 advisors, around 1000 volunteer distributors, CODEPINK, May First/People Link, Evil Twin, Improv Everywhere and Not An Alternative" launched a New York Times parody site, simultaneously releasing 80,000 free paper copies of the parodic paper across several cities. *See* Steve Lambert, *The New York Times Special Edition* (November 2008), http://visitsteve.com/made/the-ny-times-special-edition/. Dated eight months *after* the day it launched, the parodic paper contained spoof advertisements as well as "best case scenario" news describing the world as it could be eight months in the future. *Id.*

Shortly thereafter, May First's upstream provider received a DMCA takedown notice from the New York Times; it passed this notice on to May First. The project participants responsible for the web site received a similar letter. May First, however, did something unusual: With the assistance of EFF, May First responded to the New York Times letter, and refused to take down the lawful content. In doing so, it put its DMCA safe harbor eligibility at risk, and potentially put itself on the hook if a court later determined that there was an infringement.

This example has a happy ending—political speech was not suppressed or significantly delayed. But this is the exception rather than the rule. Most upstream ISP would simply have blocked the site before consulting with the host. Most hosts would simply have taken down the site; even if the site's creators had issued a counter-notice, the host and/or ISP would be under no obligation to replace the site; and even if they did so the content would have remained censored for two weeks or more. Because the New York Times faced no meaningful legal risk, regardless of the objective lack of merit to the takedown notice, there was little reason for it *not* to attempt to silence the parody. The DMCA was not intended as a tool of repression, but the lack of legal consequences for sending objectively unreasonable takedown requests greatly increases the chances that it will be used as one.

ii. Even When the Host is Willing to Defend Speech, It Can Be Suppressed

In November 2010, the Yes Men posted an Apple parody site, hosted by May First, that advertised a new model of iPhone that was developed without "ravaging Democratic Republic of the Congo" by utilizing "conflict minerals."[5] *May First Legal*

[5] Sourcing of "conflict minerals" from Democratic Republic of the Congo for use in consumer electronics has caused considerable, longstanding criticism of and public debate over companies using those minerals. *See, e.g.*, Jeffrey Gettleman, *The Price of Precious*, National Geographic (October 2013), http://ngm.nationalgeographic.com/2013/10/conflict-minerals/gettleman-text.

Threats, *supra*. Apple sent a DMCA take down notice to Hurricane Electric, May First's upstream provider. Apple succeeded; the Yes Men ultimately decided to voluntarily take the site down rather than put itself and May First at risk, even for clearly lawful political speech.[6]

iii. Even When the Speaker Has the Resources to Fight for Free Speech, Those Criticized Can Use the DMCA to Strong-Arm Their Critics

In May 2009, Oil Change International began a campaign against the New Orleans Jazz Fest since their primary sponsor is Shell Oil, and Oil Change International believed that Shell was responsible for causing environmental and political destruction in Nigeria. The web site offered "[T]he dirty truth about Shell, chief sponsor of Jazz Fest." *See Shell Guilty Website* (Archived Apr. 28, 2009), https://web.archive.org/web/20090428153345/http://www.shelljazzfest.com/. Attorneys for Jazz Fest sent a DMCA takedown notice to Oil Change International's ISP, DreamHost, who removed the site, abruptly halting the campaign.

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[6] Notably, this March—5 ½ years after Apple censored a parodic announcement that they had stopped using conflict minerals—the real Apple, Inc. has announced that it has finally eliminated conflict minerals from its supply chain. Emily Chasan, *Apple Says Supply Chain Now 100% Audited for Conflict Minerals*, Bloomberg Technology (Mar. 30, 2016), http://www.bloomberg.com/news/articles/2016-03-30/apple-says-supply-chain-now-100-audited-for-conflict-minerals.

The campaign organizers immediately joined May First, moving their site to May First's servers, after which May First received a similar takedown notice. The organizers also contacted EFF, which wrote a letter explaining the lack of legal support for the takedown notice. *See Jazz Fest Takedown Response Letter* (Apr. 30, 2009), https://support.mayfirst.org/attachment/wiki/legal/eff-shelljazzfest-response.pdf. After May First explained to Jazz Fest that it would not remove the site and would continue to fight for Oil Change International's right to engage in criticsm, Jazz Fest's attorneys threatened legal action against BandCon, May First's upstream provider.

Finally, in order to avoid a protracted legal battle or risk the upstream provider taking them offline, requiring them to move the server, the campaign organizers made changes to their site to satisfy Jazz Fest—the very group they were criticizing. By DMCA standards, however, this should be considered a victory: because of the combined willingness of the activists, the service provider, and pro bono legal help to fight, a *modified* version of political criticism was permitted to remain.

D. Countless Other Creators and Speakers Are Regularly Subject to Wrongful Takedown Notices

Amici are not rare or isolated victims of speech suppression via wrongful DMCA takedowns—they are examples of a massive problem affecting many thousands of creators and speakers on a continual basis. The number of DMCA takedown notices submitted to service providers daily is staggering. A

recent study of takedown and counternotice processes examined a sample of 108 million requests submitted to an archive over a six-month period.[7] Urban et al., *supra*, at 11. Approximately one-third of the requests were either fundamentally flawed or had characteristics that raised questions about their validity, including 7.3% that raised questions about fair use.

Similar problems plague takedowns in cases of political speech. According to a 2010 report by the Center for Democracy and Technology on meritless DMCA takedowns of political advertisements, in the context of political campaigns, "the DMCA's notice-and-takedown process against political speech is not a problem isolated to a few examples, but one that recurs with considerable frequency." *CDT Report Summary*, *supra*. Indeed, the problem "is well known to campaign professionals from across the political spectrum" and the takedowns "come from a wide variety of news organizations. . . ." *CDT Report*, *supra* at 2. It also concluded that "[i]nappropriate takedown notices can chill campaign speech in ways that go beyond the removal of a particular video." *CDT Report Summary*, *supra*.

If the DMCA's safeguards against abusive takedowns are ineffective at protecting political campaigns—one of the most strongly protected forms of speech in our legal system—there is little to

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[7] This number includes only the notices voluntarily submitted by recipients; the total number is estimated at about 17 million notices per week in 2015, with a projection of approximately 1 *billion* notices this year. *Id.* at 70.

suggest that they will be effective in protecting other types of lawful speech such as political criticism or social commentary.

IV. Certiorari is Necessary to Ensure That § 512(f) Works as Congress Intended to Deter and Remedy Censorship of Lawful Speech Through Wrongful Takedowns

The good faith standard adopted by the court below does virtually nothing to deter or remedy abuse of the DMCA and the resulting harm to lawful speech interests. A subjective good faith, actual knowledge standard reads § 512(f) out of the DMCA in all but the most extreme cases. It eliminates the deterrent effect Congress intended 512(f) to have on the sending of improper takedown notices. Even where a good faith belief that the speech in question is not lawful would be wholly unreasonable, it will be difficult or impossible for the target to prove that the sender did not subjectively believe otherwise. The Ninth Circuit's rule thus will thwart relief in the vast majority of cases of misrepresentation under 512(f) and disrupt Congress's balance between remedying copyright infringement and protecting fair use and other core First Amendment interests.

Even in cases where the speaker might ultimately be able to prove a lack of subjective good faith, they likely will be able to do so only after engaging in lengthy and expense discovery and litigation to develop sufficient proof that good faith was lacking. This expense and commitment of time serves to further reduce any ex ante deterrent effect of 512(f).

V. The Petition Presents an Issue of National Importance That Implicates Broad Interests Beyond the Facts of This Case

What constitutes good faith under § 512(f) and whether the statute should be read to deter and remedy wrongful takedowns is of broad importance well beyond this case. Indeed, millions of online creators, critics, activists, journalists and users, and a great deal of online economic activity, are at risk of unavoidable censorship of their lawful speech through misuse of the DMCA. Even if they succeed in having their content "put back" online, for many of them it will be too late and the damage will have been done. The protection of their and the public's speech interests depends on the proper resolution of the § 512(f) good faith question. This case presents precisely that important national question and the court should grant the Petition to resolve it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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