

No. 16-771

IN THE
Supreme Court of the United States

CAPITOL RECORDS, LLC, ET AL.,
Petitioners,
v.

VIMEO, LLC, ET AL.,
Respondents.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

MICHAEL A. CHEAH
VIMEO, INC.
555 West 18th St.
New York, NY 10011
(212) 314-7400

KATHLEEN M. SULLIVAN
Counsel of Record
ROBERT L. RASKOPF
TODD ANTEN
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Ave., 22nd Fl.
New York, NY 10010
(212) 849-7000
kathleensullivan@
quinnemanuel.com

Counsel for Respondents

February 16, 2017

QUESTION PRESENTED

Whether the safe harbor provided by the Digital Millennium Copyright Act, 17 U.S.C. § 512(c), which limits online service providers' liability for *any* "infringement of copyright," applies to infringement claims brought under state law as well as federal law, and thus extends to claims concerning sound recordings fixed before February 15, 1972, which are protected only by state law.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent Vimeo, Inc. ("Vimeo") is owned by IAC/InterActiveCorp ("IAC"), and no publicly held company other than IAC owns 10% or more of Vimeo's stock. Vimeo, LLC, the entity originally named in the suit below, subsequently converted into Vimeo, Inc. See Supplemental Corporate Disclosure Statement, *Capitol Records, LLC v. Vimeo, LLC*, No. 14-1048 (2d Cir.), ECF No. 265 (May 13, 2016).

Respondent Connected Ventures, LLC ("Connected Ventures") is owned by IAC, and no publicly held company other than IAC owns 10% or more of Connected Ventures' stock. Connected Ventures was formerly, but is no longer, affiliated with Vimeo. See Pet. App. 2a n.1.

No publicly held company owns 10% or more of IAC's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
CORPORATE DISCLOSURE STATEMENT.....	ii
INTRODUCTION.....	1
COUNTERSTATEMENT.....	3
REASONS FOR DENYING THE WRIT	9
I. THE PETITION DOES NOT WARRANT REVIEW.....	9
A. There Is No Conflict Warranting Review.....	9
B. The Petition Presents No Issue Of National Importance Warranting Review.....	10
II. THE DECISION BELOW IS CORRECT...	13
A. The Text And Structure Of The Statute Support The Court Of Appeals' Interpretation.....	13
B. The Purpose Of The Statute Supports The Court Of Appeals' Interpretation...	21
C. Section 301(c) Does Not Override Section 512(c).....	22
III. THIS CASE PRESENTS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED.....	27
CONCLUSION	29

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Abbott v. Veasey</i> , No. 16-393, 580 U.S. ___ (2017).....	27
<i>In re Aimster Copyright Litig.</i> , 334 F.3d 643 (7th Cir. 2003).....	11
<i>Almeida v. Amazon.com, Inc.</i> , 456 F.3d 1316 (11th Cir. 2006).....	28
<i>Barnett Bank of Marion Cnty.</i> , <i>N.A. v. Nelson</i> , 517 U.S. 25 (1996).....	24
<i>Burgess v. United States</i> , 553 U.S. 124 (2008).....	16
<i>Chickasaw Nation v. United States</i> , 534 U.S. 84 (2001).....	24
<i>Circuit City Stores, Inc. v. Adams</i> , 532 U.S. 105 (2001).....	24
<i>Cnty. for Creative Non-Violence v. Reid</i> , 490 U.S. 730 (1989).....	14
<i>Columbia Pictures Indus., Inc. v. Fung</i> , 710 F.3d 1020 (9th Cir. 2013).....	11
<i>Commissioner v. Clark</i> , 489 U.S. 726 (1989).....	27
<i>Dep't of Homeland Sec. v. MacLean</i> , 135 S. Ct. 913 (2015).....	18
<i>Dorsey v. United States</i> , 132 S. Ct. 2321 (2012).....	23
<i>EMI Christian Music Grp., Inc.</i> <i>v. MP3Tunes, LLC</i> , 844 F.3d 79 (2d Cir. 2016).....	11

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Feltner v. Columbia Pictures Television, Inc.</i> , 523 U.S. 340 (1998).....	14
<i>Firth v. New York</i> , 775 N.E.2d 463 (N.Y. 2002).....	12
<i>Flanagan v. Prudential-Bache Secs., Inc.</i> , 495 N.E.2d 345 (N.Y. 1986).....	10
<i>Flo & Eddie, Inc. v. Sirius XM Radio, Inc.</i> , ___ N.E.3d ___, 2016 N.Y. Slip Op. 08480 (N.Y. Dec. 20, 2016)	12, 29
<i>Fortnightly Corp. v. United Artists Television, Inc.</i> , 392 U.S. 390 (1968).....	15
<i>J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.</i> , 534 U.S. 124 (2001).....	26
<i>King v. Burwell</i> , 135 S. Ct. 2480 (2015).....	21
<i>Kirtsaeng v. John Wiley & Sons, Inc.</i> , 133 S. Ct. 1351 (2013).....	14, 19
<i>La. Pub. Serv. Comm’n v. FCC</i> , 476 U.S. 355 (1986).....	25
<i>Lockhart v. United States</i> , 546 U.S. 142 (2005).....	24
<i>Lunney v. Prodigy Servs. Co.</i> , 723 N.E.2d 539 (N.Y. 1999).....	13
<i>Microsoft Corp v. AT&T Corp.</i> , 550 U.S. 437 (2007).....	22

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974).....	26
<i>Mountain View Coach Lines, Inc. v. Storms</i> , 476 N.Y.S.2d 918 (App. Div. 2d Dep’t 1984).....	10
<i>Office of Senator Mark Dayton v. Hanson</i> , 550 U.S. 511 (2007).....	27
<i>Patterson v. Shumate</i> , 504 U.S. 753 (1992).....	14, 17, 20, 21
<i>Perfect 10, Inc. v. CCBill LLC</i> , 488 F.3d 1102 (9th Cir. 2007).....	28
<i>TVA v. Hill</i> , 437 U.S. 153 (1978).....	23
<i>Tasini v. New York Times Co.</i> , 206 F.3d 161 (2d Cir. 2000), <i>aff’d</i> , 533 U.S. 483 (2001).....	27
<i>Teleprompter Corp. v. Columbia Broad. Sys., Inc.</i> , 415 U.S. 394 (1974).....	9, 15
<i>UMG Recordings, Inc. v. Escape Media Grp., Inc.</i> , 964 N.Y.S.2d 106 (App. Div. 1st Dep’t 2013).....	10
<i>United States v. Fausto</i> , 484 U.S. 439 (1988).....	25
<i>United States v. Winstar Corp.</i> , 518 U.S. 839 (1996).....	23

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>United States Dep't of Treasury v. Fabe</i> , 508 U.S. 491 (1993).....	24
<i>Va. Military Inst. v. United States</i> , 113 S. Ct. 2431 (1993).....	27
STATUTES	
15 U.S.C. § 1012(b).....	24
17 U.S.C. § 101	7, 14, 16, 17
17 U.S.C. § 102(a).....	17
17 U.S.C. § 104(a).....	17
17 U.S.C. § 104(b).....	17
17 U.S.C. § 104(c)	18
17 U.S.C. § 105	17
17 U.S.C. § 106	9, 16, 17, 18
17 U.S.C. § 109	14, 19
17 U.S.C. § 113	18
17 U.S.C. § 201(a).....	18
17 U.S.C. § 201(d)(2)	18
17 U.S.C. § 203(b).....	18
17 U.S.C. § 203(b)(5).....	18
17 U.S.C. § 301(c) ...1, 5, 8, 21, 22, 23, 24, 25, 26, 27	
17 U.S.C. § 302(e).....	18
17 U.S.C. § 304(c)(6).....	18
17 U.S.C. § 405(c)	18

TABLE OF AUTHORITIES—Continued

	Page(s)
17 U.S.C. § 412	18
17 U.S.C. § 501(a).....	7, 15, 16
17 U.S.C. § 512	3, 6, 13, 19, 21, 22
17 U.S.C. § 512(c)	<i>passim</i>
17 U.S.C. § 512(c)(1).....	4
17 U.S.C. § 512(c)(1)(A)(i)-(iii).....	4
17 U.S.C. § 512(c)(1)(C).....	4
17 U.S.C. § 512(c)(3).....	4
17 U.S.C. § 512(h).....	19
17 U.S.C. § 512(i)(1)(A)	4
17 U.S.C. § 512(l).....	19
17 U.S.C. § 512(m).....	26
17 U.S.C. § 512(m)(1)	4, 26
17 U.S.C. § 602(a)(1).....	18
17 U.S.C. § 602(a)(2).....	18
17 U.S.C. § 701	18
17 U.S.C. § 1001(7)(A).....	18
17 U.S.C. § 1006(a)(1)(A).....	18
17 U.S.C. § 1008	18
17 U.S.C. § 1101(d).....	21
17 U.S.C. § 1201	19, 22
17 U.S.C. § 1201(a)(1)(A).....	19
17 U.S.C. § 1309	16

TABLE OF AUTHORITIES—Continued

	Page(s)
28 U.S.C. § 1292(b).....	27
47 U.S.C. § 230	28
47 U.S.C. § 230(c)(1).....	28
47 U.S.C. § 230(e)(2).....	28
47 U.S.C. § 230(e)(3).....	28
Act of October 15, 1971, Pub. L. No. 92- 140, 85 Stat. 391	5
Act of October 19, 1976, Pub. L. No. 94- 553, 90 Stat. 2541	5
Act of October 27, 1988, Pub. L. No. 105- 298, 112 Stat. 2827	5

OTHER AUTHORITIES

<i>DMCA (Copyright) Complaint to Google, LUMEN</i> , http://lumendatabase.org/notices/1358677#	11
H.R. Rep. No. 94-1476 (Sept. 3, 1976)	5, 25
S. Rep. 105-190 (May 11, 1998)	3, 4, 21, 22
Sup. Ct. R. 10(a)	9
U.S. Copyright Office, <i>Federal Copyright Protection for Pre-1972 Sound Recordings</i> (Dec. 2011).....	5, 6, 13, 23, 25, 27

INTRODUCTION

The Court should deny review of the decision by the court of appeals holding that the “safe harbor” provided by the Digital Millennium Copyright Act (“DMCA”) under 17 U.S.C. § 512(c) (1998) applies to copyright infringement claims based on sound recordings fixed before February 15, 1972. While such recordings are protected only under state law and not by the Copyright Act, see 17 U.S.C. § 301(c), a unanimous panel of the Court of Appeals for the Second Circuit (Leval, J., joined by Hall and Lynch, JJ.) correctly determined that the DMCA’s safe-harbor limitations on liability for “infringement of copyright” extend to state-law as well as federal copyright claims. That decision does not conflict with any decision of this Court, any other circuit, or any highest state court. Nor will it have any of the overblown practical consequences petitioners assert.

The plain language and structure of the DMCA safe-harbor provisions amply support the court of appeals’ conclusion. Congress expressly applied the DMCA to all actions for “infringement of copyright,” a phrase that is naturally read to include actions under both federal and state law, including actions based upon pre-1972 recordings protected only by state law. Contrary to petitioners’ arguments, the Copyright Act nowhere defines the term “infringement of copyright” as “infringement of *federal* copyright.” Congress notably did not limit “infringement” in the safe-harbor provisions to infringement claims “under this title,” as it did elsewhere in the DMCA and Title 17. And 17 U.S.C. § 512(c) does not conflict with a previously enacted provision exempting pre-1972 recordings from federal preemption, 17 U.S.C. § 301(c); if it does, the later provision expressly effects a partial repeal. The

report of the U.S. Copyright Office suggesting the contrary is entitled to no special deference in this straightforward matter of statutory construction.

Were there any doubt about the correct construction of 17 U.S.C. § 512(c) based on textual language and structure, it is readily resolved by the DMCA's purpose. Congress enacted the DMCA to protect copyright holders from online piracy while encouraging the robust expansion of online services. The safe-harbor provisions serve the latter goal by relieving service providers of the crippling liability that would attach if they were strictly liable for every act of copyright infringement by their users. As the court of appeals correctly reasoned, it would make no sense for Congress to relieve service providers of the affirmative duty to monitor user uploads for songs by U2, Elvis Costello, Radiohead, Coldplay, Adele, Beyoncé and Norah Jones only to impose that same onerous burden *sub silentio* as to songs by "The Beatles, The Supremes, Elvis Presley, Aretha Franklin, Barbra Streisand, and Marvin Gaye." Pet. App. 20a-21a.

While petitioners paint a dire picture of rampant online copyright abuse if the decision below remains in place, they disregard the DMCA's notice-and-takedown framework, which provides them an easy, effective and well-established way to remove infringing content. Under the stringent provisions of 17 U.S.C. § 512(c), service providers are subject to copyright infringement liability if they fail to act "expeditiously to remove" infringing material posted on their websites of which they receive notice or otherwise have actual or "red flag" knowledge. Petitioners offer no persuasive reason why that well-settled statutory regime does not work equally well for both pre- and post-1972 recordings. In fact, it is petitioners' and not respondents' approach

that would unsettle existing expectations. In reliance on the general applicability of the DMCA, many companies have made enormous investments in expanding broadband Internet access, developing Internet search engines and providing new Internet content delivery services. Petitioners' proposed new exception to the DMCA safe harbors for the vast category of pre-1972 recordings would impose potentially massive risk and cost that would jeopardize that investment.

In any event, the decision below provides a poor vehicle to review the question presented. It was rendered on interlocutory appeal and does not address alternative state-law and federal grounds that could dispose of petitioners' claims on remand. Moreover, a recent decision of the New York Court of Appeals casts doubt on petitioners' claims even apart from the DMCA safe harbor.

For all these reasons, the petition should be denied.

COUNTERSTATEMENT

1. The Digital Millennium Copyright Act is an omnibus law spanning five titles that made various changes to the copyright laws. S. Rep. 105-190 at 8-9 (May 11, 1998). Title II, the Online Copyright Infringement Liability Limitation Act, establishes the online safe harbors at issue here, 17 U.S.C. § 512. See S. Rep. 105-190 at 19-21.

Congress enacted the DMCA safe harbors to encourage the growth of websites and other online services by providing "greater certainty" concerning "their legal exposure for infringements that may occur" in the course of "common activities," such as hosting content uploaded by others that may contain infringing material of which the service providers are unaware. *Id.* at 19-20. Congress recognized that, without such certainty,

service providers would hesitate to invest in and develop new and valuable Internet services. *Id.* at 8.

The DMCA safe-harbor provisions prescribe in detail what service providers must do to avoid copyright liability for hosting third-party content. Central to this regime is a notice-and-takedown framework that enables copyright holders to obtain what is effectively an extrajudicial injunction against infringement. As relevant here, the safe harbor set forth in 17 U.S.C. § 512(c) provides that “[a] service provider shall not be liable . . . for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.” *Id.* § 512(c)(1). Upon receipt of a notice of alleged infringement of copyright, a service provider must “expeditiously” remove the allegedly infringing materials. *Id.* §§ 512(c)(1)(C), 512(c)(3). It must also expeditiously remove content if it has actual knowledge of infringement or becomes “aware of facts or circumstances from which infringing activity is apparent.” *Id.* §§ 512(c)(1)(A)(i)-(iii).¹

Although in certain circumstances a service provider may need to remove content without first receiving a notice, the DMCA expressly relieves it from the burden of affirmatively “monitoring its service or affirmatively seeking facts indicating infringing activity.” *Id.* § 512(m)(1).

2. The dispute in this case stems from Congress’s amendments to the Copyright Act to cover sound recordings. In 1971, Congress added federal copyright

¹ In addition, a service provider must meet certain threshold criteria, for example by showing that it has adopted a policy to terminate the accounts of “repeat infringers.” 17 U.S.C. § 512(i)(1)(A).

protection for “sound recordings fixed, published, and copyrighted” on or after February 15, 1972. Act of October 15, 1971, Pub. L. No. 92-140, 85 Stat. 391, 392. In 1976, Congress amended the Copyright Act to expressly preempt state-law rights in works protected by federal copyright law. Act of October 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541. Concerned that such preemption might “be read as abrogating the anti-piracy laws now existing in 29 states,” Congress added a savings clause to “exclude sound recordings fixed prior to February 15, 1972 from the effect of the preemption” for 75 years. H.R. Rep. No. 94-1476 at 133 (Sept. 3, 1976). Congress later extended this period by 20 years to mirror a term extension for federally protected works. Act of October 27, 1988, Pub. L. No. 105-298, § 102(a), 112 Stat. 2827. The resulting provision thus reads: “With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067.” 17 U.S.C. § 301(c).

3. In 2011, the U.S. Copyright Office issued a report titled *Federal Copyright Protection for Pre-1972 Sound Recordings* (“Copyright Office Rep.”). The Office reviewed the state-law protections afforded these works—which range from criminal sanctions to common-law rights—and described them as “inconsistent and sometimes vague and difficult to discern,” “amorphous,” and lacking in “clearly delineated exceptions.” *Id.* at 48. The Office noted that these deficiencies “mak[e] it hard for users to predict with assurance the range of activities that are permissible and those that are likely to result in liability” and thus “difficult to undertake multistate or nationwide activities” with respect to these older recordings. *Id.* at 48-49.

In light of these practical problems, the Copyright Office recommended that Congress “federalize” pre-1972 recordings. Although the Office took the view that the DMCA did not presently cover these works, it saw “no reason—and none has been offered—why the section 512 ‘safe harbor’ . . . should not apply to the use of pre-1972 sound recordings.” *Id.* at 130.

4. Founded in 2004, Vimeo operates the *Vimeo*® online video-sharing service available through the website <https://vimeo.com>. Vimeo allows its users to upload and share original, creative videos that others can stream over the Internet, subject to Vimeo’s Terms of Service. Pet. App. 8a-9a, 75a-76a. As of 2012, Vimeo hosted more than 31 million videos and had 12.3 million registered users in 49 countries, who collectively uploaded approximately 43,000 new videos per day. Pet. App. 8a-9a. With only a small group of employees dedicated to “community” support issues (16 employees as of 2012), Vimeo does not, and cannot, review each and every video that is uploaded per day. Pet. App. 9a, 48a.

5. In 2009, in two complaints, petitioners sued Vimeo for infringement of their music copyrights based upon 199 videos uploaded by Vimeo users. Only the Universal Music Group-affiliated record companies (Capitol Records, *et al.*, see Pet. iii) claim infringement of sound recordings. The Sony Music-controlled music publishers (EMI Blackwood, *et al.*, see Pet. iii), whose separate lawsuit involves musical compositions and not sound recordings, lack standing to pursue the question presented in this petition.

Vimeo sought summary judgment that safe harbor precluded petitioners’ claims, including their claims of state-law copyright infringement with respect to pre-1972 recordings. The district court, relying largely on

the Copyright Office Report, ruled that the DMCA safe harbors do not extend to pre-1972 recordings. Pet. App. 141a-142a. The court, however, granted Vimeo’s petition for interlocutory review of its ruling, finding that there existed substantial ground for difference of opinion on the issue. Pet. App. 63a-65a. The court of appeals accepted this certified question among several others.

6. In a unanimous decision, the court of appeals vacated the district court’s grant of summary judgment to petitioners denying safe harbor to pre-1972 recordings. Pet. App. 14a-27a. The court concluded that “the safe harbor established by § 512(c) protects a qualifying service provider from liability for infringement of copyright under state law.” Pet. App. 27a. The court acknowledged the Copyright Office’s general expertise on the Copyright Act but rejected its statutory interpretation as a “misreading” that was owed no special deference. Pet. App. 18a; see Pet. App. 26a-27a.

Instead, in a detailed analysis, the court of appeals held that “[a] literal and natural reading of the text of § 512(c) leads to the conclusion that its use of the phrase ‘infringement of copyright’ *does* include infringement of state laws of copyright.” Pet. App. 19a. Noting (Pet. App. 18a-19a) that section 101 of the Copyright Act does not define “infringement of copyright,” the court rejected the argument that 17 U.S.C. § 501(a), which provides that “[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 . . . is an infringer of the copyright,” limits “infringement of copyright” only to federal copyrights. Pet. App. 19a (“To state that conduct *x* violates a law is not the same thing as saying that conduct *x* is the *only conduct* that

violates the law.”). Moreover, the court observed that Congress had omitted to qualify the phrase “infringement of copyright” in section 512(c) with the phrase “under this title” as it had in other provisions across the Copyright Act, and thus had not limited the safe harbor’s scope to federal claims. Pet. App. 19a.

The court of appeals found its reading of the plain text of the statute confirmed by the statutory purpose. Noting that Congress had intended both to protect copyright owners from online infringement and to make Internet services “economically feasible,” the court concluded that “[t]o construe § 512(c) as leaving service providers subject to liability under state copyright laws for postings by users of infringements of which the service providers were unaware would defeat the very purpose Congress sought to achieve in passing the statute.” Pet. App. 20a. Such a reading would either impose on service providers the “heavy costs of monitoring every posting” or create “crushing liabilities under state copyright laws.” Pet. App. 20a; see Pet. App. 26a (similar).

The court of appeals likewise rejected any argument that its reading of section 512(c) would effect an impermissible implied repeal of section 301(c), holding that any “partial repeal of § 301(c)” was “not by implication but by specific statement”—namely, “by the explicit statement in § 512(c) that ‘[a] service provider shall not be liable . . . for infringement of copyright.’” Pet. App. 25a.

Petitioners filed a petition for *en banc* review, which was denied without dissent. Pet. App. 145a-147a.

REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT WARRANT REVIEW

The decision below does not warrant this Court's grant of certiorari. It does not conflict with any decision of this Court, any other federal court of appeals, or any state's court of last resort. And it does not involve any important question of federal law warranting the Court's immediate intervention.

A. There Is No Conflict Warranting Review

Petitioners do not assert that the court of appeals' decision conflicts with that of any other federal court of appeals. Nor could they, as no other court of appeals has decided the issue.

The court of appeals' decision also presents no conflict with a relevant decision of this Court, which has not previously addressed the DMCA's safe harbors, much less the question presented. Petitioners' attempt (Pet. 5, 28) to fashion a conflict based on a footnote in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, 398 n.2 (1974), is unavailing. *Teleprompter* had no occasion to consider whether "infringement of copyright" *excluded* state-law copyright. Rather, the footnote in question merely confirmed that violation of rights specifically conferred by section 1 of the Copyright Act of 1909 (analogous to section 106 of the current statute) "constitutes copyright infringement under federal law." *Id.*

Finally, the court of appeals' decision does not "conflict[] with a decision by a state court of *last resort*," Sup. Ct. R. 10(a) (emphasis added), as no such court has addressed the question presented. Without

once mentioning this standard, petitioners represent the existence of a conflict between the court of appeals and “the New York *courts*,” Pet. 5 (emphasis added), by which petitioners mean a single, contrary decision of an *intermediate* appellate court. See *UMG Recordings, Inc. v. Escape Media Grp., Inc.*, 964 N.Y.S.2d 106 (App. Div. 1st Dep’t 2013). The New York Court of Appeals—New York’s court of last resort—has not yet addressed the issue and remains capable of correcting its lower court’s error in a future case.²

B. The Petition Presents No Issue Of National Importance Warranting Review

Petitioners greatly exaggerate (Pet. 20-23) the supposed harms the decision below will visit upon the music industry, as do their *amici* (RIAA Br. 13-19; ABKCO Br. 11-12). For nearly two decades, the DMCA’s notice-and-takedown provisions have afforded copyright holders an efficient, extrajudicial means of removing unauthorized copies online. Each year, right-holders send hundreds of thousands of takedown notices to service providers, resulting in the removal of millions of works without any court intervention.

² Indeed, the Second Circuit’s decision is binding upon all New York courts, including those in the First Department, as the New York Court of Appeals has held that state courts are “bound to apply [a federal] statute as interpreted by Supreme Court decision or, absent such, in accordance with the rule established by lower Federal courts if they are in agreement.” *Flanagan v. Prudential-Bache Secs., Inc.*, 495 N.E.2d 345, 348 (N.Y. 1986). Because no federal court is in disagreement with the court of appeals’ decision, New York courts must apply it. And even if *UMG Recordings* binds the courts in the First Department, it does not bind that appellate court’s three sister departments, which remain “free to reach a contrary result.” *Mountain View Coach Lines, Inc. v. Storms*, 476 N.Y.S.2d 918, 920 (App. Div. 2d Dep’t 1984) (disagreeing with Third Department).

Indeed, petitioners themselves have, directly and through industry associations like *amicus* Recording Industry Association of America, used the DMCA’s notice-and-takedown procedures to remove *pre-1972 recordings*.³ Given this usage, it is difficult to credit any assertion (*e.g.*, RIAA Br. 13-19) that the court of appeals’ decision “upends” copyright law.

Accordingly, the DMCA is not the “one-sided” bargain (ABKCO Br. 14) that petitioners and their *amici* depict. Moreover, under the DMCA’s exacting compliance requirements, safe harbor is unavailable to any providers (like peer-to-peer file-sharing services) whose very purpose is to facilitate online infringement.⁴

Petitioners further err in contending (Pet. 21) that the decision below limits or annuls any substantive right held by holders of copyright in pre-1972 recordings. Whatever state-law rights and remedies they had for such recordings before the DMCA was

³ See, *e.g.*, *DMCA (Copyright) Complaint to Google*, LUMEN, <http://lumendatabase.org/notices/1358677#> (RIAA claim nos. 229-364 for 1960s Beach Boys recordings).

⁴ See, *e.g.*, *EMI Christian Music Grp., Inc. v. MP3Tunes, LLC*, 844 F.3d 79, 90 (2d Cir. 2016) (no safe harbor where defendant “did not even try to connect known infringing activity of which it became aware through takedown notices” and “executives were encouraged to and did personally [copy] songs from blatantly infringing websites”); *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1043 (9th Cir. 2013) (no safe harbor where defendant “actively encourag[ed] infringement[] by urging his users to both upload and download particular copyrighted works” and did so himself); *In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003) (no safe harbor where, “[f]ar from doing anything to discourage repeat infringers of the plaintiffs’ copyrights, Aimster invited them to do so [and] showed them how they could do so with ease using its [encryption] system”).

enacted, they continue to have post-enactment. Indeed, the DMCA *expands* the benefits available to holders of copyright in pre-1972 recordings by giving them the ability to obtain an extrajudicial remedy merely by submitting a DMCA notice to a service provider, who must comply in order to retain safe harbor.

At most, the decision precludes a state-law damages action against a DMCA-compliant service provider that unknowingly hosts user-generated materials containing pre-1972 recordings. But petitioners presuppose without establishing that any such strict-liability cause of action actually exists under state law. The New York Court of Appeals has never endorsed a common-law claim for contributory copyright infringement. And contrary to petitioners' suggestion (Pet 22-23), pre-1972 recordings have not gained expansive protection in state courts. In *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, ___ N.E.3d ___, 2016 N.Y. Slip Op. 08480, available at 2016 WL 7349183 (N.Y. Dec. 20, 2016), for example, the New York Court of Appeals declined to recognize a right to public performance in pre-1972 recordings in light of the "far-reaching" consequences of doing so and the "competing interests at stake." *Id.* at *13. That court also observed that expanded protection for pre-1972 recording owners is not needed to encourage the creation of music, "as it would apply only to recordings that were already created more than 40 years ago." *Id.*⁵

⁵ The New York Court of Appeals has cautioned against the expansion of service-provider liability, expressing concern about stifling online speech and innovation. See, e.g., *Firth v. New York*, 775 N.E.2d 463, 466 (N.Y. 2002) (rejecting multiple-publication rule in context of online defamation because it would cause "a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet");

While petitioners fail to show that the decision below would upend copyright law, a contrary decision would upend the DMCA. As the court of appeals rightly noted, excluding pre-1972 recordings from DMCA safe harbor would put a service provider to a Hobson’s choice between “incur[ring] heavy costs of monitoring every posting to be sure it did not contain infringing pre-1972 recordings, or incurring potentially crushing liabilities under state copyright laws.” Pet. App. 20a. This is especially so as pre- and post-1972 recordings are not easily distinguishable. Either choice would diminish service providers’ incentives to invest in new online services and would limit the utility and variety of the services they could offer to the public. See Pet. App. 26a. Thwarting the DMCA’s goals in this manner would achieve no countervailing public benefit. As the Copyright Office opined, there is “no [policy] reason—and none has been offered—why the section 512 ‘safe harbor’ . . . should not apply to the use of pre-1972 sound recordings.” Pet. App. 17a (quoting Copyright Office Rep. 130).

II. THE DECISION BELOW IS CORRECT

The petition should be denied for the further reason that the court of appeals’ decision is correct.

A. The Text And Structure Of The Statute Support The Court Of Appeals’ Interpretation

The phrase “infringement of copyright” in section 512(c) is unqualified, and is not defined elsewhere in

Lunney v. Prodigy Servs. Co., 723 N.E.2d 539, 542 (N.Y. 1999) (“The public would not be well served by compelling an ISP to examine and screen millions of e-mail communications, on pain of liability for defamation.”).

the DMCA or Title 17. As the court of appeals therefore correctly concluded, the phrase is subject to the “literal and natural reading” that it extends to “all copyrights established under the laws of the United States, regardless whether established by federal law or by local law under the sufferance of Congress, and not merely from liability under the federal statute.” Pet. App. 19a, 21a.

1. Because copyright laws predate the formation of the United States, see *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 349-50 (1998), the term “infringement of copyright” has a common-law meaning that is not restricted to either federal or state copyright—namely, the unauthorized use of an exclusive right of an author.⁶ As a matter of plain English and common sense, “common law copyright infringement” is a species of the genus of “infringement of copyright.” Cf. *Patterson v. Shumate*, 504 U.S. 753, 758 (1992) (“applicable nonbankruptcy law” includes federal and state law where “the text contains no limitation . . . relating to the source of the law”). Thus, “[o]ne who has been found liable for infringement of copyright under state laws has indisputably been found liable for infringement of copyright.” Pet. App. 19a.

Petitioners insist that “infringement of copyright” in section 512(c) must really mean “infringement of *federal* copyright,” but the plain text of the statute

⁶ Undefined terms in the Copyright Act are given their common-law meanings. See *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1358 (2013) (applying common-law meaning in interpreting first-sale doctrine under section 109); *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740-41 (1989) (applying common-law definitions of “employee” and “scope of employment” in section 101).

cannot support such a construction. Contrary to petitioners' argument (Pet. 5, 28), this Court's decision in *Teleprompter* does *not* hold that "infringement" means only "*federal* infringement." That case did not concern state-law rights at all, but only whether certain cable transmissions triggered the federal right of public performance. 415 U.S. at 396-98. In a footnote, the Court observed that, although the Copyright Act of 1909 did not define "infringement," "it is settled that unauthorized use of copyrighted material inconsistent with the 'exclusive rights' enumerated in [the statute] constitutes copyright infringement under federal law." *Id.* at 398 n.2. But nothing in that footnote suggests that "infringement" means *only* those unauthorized uses of copyrighted material that conflict with federal exclusive rights.⁷ See also *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 395 n.10 (1968) (similarly concerning only federal rights and not addressing state-law rights).

Petitioners likewise err in arguing (Pet. 21) that section 501(a) of the Copyright Act defines "infringement" as limited to infringement of *federal* rights. To the contrary, section 501(a) merely states that "[a]nyone who violates any of the exclusive rights of

⁷ To be sure, the sentence immediately following states: "Use of copyrighted material not in conflict with a right secured by § 1, however, no matter how widespread, is not copyright infringement." *Teleprompter*, 415 U.S. at 398 n.2. But as the previous sentence indicates by specifically limiting the scope of the discussion to infringement "under federal law," *Teleprompter* did not have occasion to consider state-law copyright claims, and accordingly the subsequent sentence likewise must be limited to a use that "is not copyright infringement" under federal law. *Id.* Put another way, the Court in *Teleprompter* surely was not suggesting that there is no copyright infringement but federal copyright infringement.

the copyright owner as provided by sections 106 through 122 . . . *is an infringer* of the copyright.” 17 U.S.C. § 501(a) (emphasis added). That provision does not purport to define or otherwise circumscribe the universe of potential infringement. Had Congress wished to limit infringement exclusively to such violations, it would have used words like “infringement means” See, *e.g.*, *Burgess v. United States*, 553 U.S. 124, 130 (2008) (statutes use word “means” to exclude meanings not otherwise stated). As the court of appeals rightly noted, “To state that conduct *x* violates a law is not the same thing as saying that conduct *x* is the *only conduct* that violates the law.” Pet. App. 19a. Moreover, Title 17 contains provisions *not* found in sections 106 through 122 that nonetheless can make one liable as an “infringer.” Pet. App. 19a; see, *e.g.*, 17 U.S.C. § 1309 (infringement of vessel hull designs). Section 501(a) thus does not define an exclusive category of acts constituting “infringement of copyright.”

For similar reasons, petitioners are wrong in suggesting (Pet. 21) that the “copyright owner” referenced in section 501 (and the DMCA) excludes owners of state-law or common-law rights. Section 101 does *not*, as petitioners misrepresent, define “copyright owner” as the holder of an “exclusive *federal* right” (Pet. 10-11 n.1) or the “owner of a *federally protected* right” (Pet. 21); rather, it defines “copyright owner” as the owner of “any one of the exclusive rights comprised in a copyright.” 17 U.S.C. § 101. State-law and common-law rights in a copyright are indisputably exemplars of “exclusive rights comprised in a copyright.” *Id.*

Petitioners have no basis to insert the words “federal” or “federally protected” into the definition.⁸

2. The DMCA’s broader structure confirms that “infringement of copyright” must include state-law infringement. An unqualified term of sufficient scope to encompass multiple sources of legal liability cannot be limited to *either* state or federal law where “Congress, when it desired to do so, knew how to restrict the scope of applicable law to ‘state [or federal] law’ and did so with some frequency.” *Patterson*, 504 U.S. at 758; see *id.* at 766 (Scalia, J. concurring) (finding “mystifying” the arguments that “applicable nonbankruptcy law” refers only to “state law”).

As the court of appeals noted (Pet. App. 19a), “Congress did not qualify the phrase ‘infringement of copyright’ by adding, as it did in other circumstances, the words, ‘under this title,’” a qualifier that Congress was well aware of, given its repeated use across the DMCA and other sections of Title 17.⁹ Congress’s

⁸ In a similar vein, petitioners assert (Pet. 29-30) that the “exclusive” rights referenced in section 101 are “those enumerated in section 106.” That cannot be correct. Section 106 limits its scope to “owner[s] of copyright under this title.” If the scope of “exclusive” rights defined in section 101 were limited to federal copyrights, there would be no reason for section 106 to include “under this title” to restrict its scope to federal copyright-holders. Thus, rights-holders protected by section 106 must by definition be a subclass of the broader category of “copyright owners.”

⁹ See, *e.g.*, 17 U.S.C. §§ 101 (defining “work of visual art” as not including “any work not subject to copyright protection under this title”); 102(a) (defining subject matter of copyright protection “in accordance with this title”); 104(a) (unpublished works “subject to protection under this title”); 104(b) (published works “subject to protection under this title”); 105 (copyright protection “under this title” not available for U.S. Government works); 106 (defining exclusive rights for “owner of copyright under this title,” which

omission of those words in section 512(c) must be given effect because “Congress acts intentionally when it omits language included elsewhere.” *Dep’t of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) (Congress intended “law” to have different meaning from “law, rule, or regulation” when both terms were used in close proximity).

are “[s]ubject to sections 107 through 122”); 201(a) (defining ownership of a “[c]opyright in a work protected under this title”); 201(d)(2) (owner of copyright by transfer entitled to “protection and remedies accorded to the copyright owner by this title”); 203(b) (termination of a transfer or license applies to “all rights under this title”); 302(e) (addressing presumption of author’s death as a defense to action for infringement “under this title”); 304(c)(6) (termination of a transfer or license reverts “all rights under this title”); 405(c) (unauthorized removal of copyright notice does not affect “[p]rotection under this title”); 412 (registration a prerequisite to seeking certain remedies in “any action under this title”); 602(a)(1) (addressing importation “without the authority of the owner of copyright under this title”); 602(a)(2) (similar); 701 (addressing Copyright Office’s functions and duties “under this title”); 1001(7)(A) (defining “interested copyright party” to include the owner of an “exclusive right under section 106(1) of this title” to reproduce recordings made “under this title”); 1006(a)(1)(A) (addressing royalty payments for recordings made “under this title”); 1008 (addressing actions that may not be brought “under this title alleging infringement”). Congress often juxtaposes “under this title” with other sources of law, such as “other Federal or State statutes, or the common law.” *Id.* § 104(c); see *id.* §§ 113 (“under the law, whether title 17 or the common law or statutes of a State”); 203(b)(5) (similar). The examples cited by petitioners and their *amici* of statutes not including “under this title” are largely cabined by the term by cross-reference to other statutes. See, e.g., Pet. 30 n.7 (listing statutes applicable only to owners of copyright “under this title” through reference to section 106); RIAA Br. 17-18 (similar); ABKCO Br. 17 (similar).

Section 512 itself, for example, uses the qualifier “under this title” twice: once in the subpoena provision (section 512(h)) and once in section 512(l), which states: “The failure of a service provider’s conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider’s conduct is not infringing *under this title* or any other defense.” 17 U.S.C. § 512(l) (emphasis added). This provision underscores the reach of section 512(c) to both state and federal claims. It contemplates that a service provider may have a *defense* that certain “conduct is not infringing” under either Title 17 or other sources of law (or both). This makes sense only if the safe harbors apply to *claims* of copyright infringement arising outside of Title 17—*i.e.*, state-law copyright infringement—in the first place.

Petitioners mistakenly invoke (Pet. 21) the anti-circumvention provisions of 17 U.S.C. §§ 1201, *et seq.*—enacted in Title I, not Title II—as indicating that the “DMCA” reaches only federal rights. But section 1201 proves Vimeo’s point—it pertains only to “a technological measure that effectively controls access to a work protected *under this title.*” 17 U.S.C. § 1201(a)(1)(A) (emphasis added). The absence of that qualifier to limit the section 512(c) safe harbor confirms that the latter is not so limited.

Petitioners’ reading of the statute relegates the limitation “under this title” in sections 512 and 1201 and the remainder of Title 17 to inconsequential boilerplate. But as this Court noted in *Kirtsaeng* in the context of the first-sale doctrine, 17 U.S.C. § 109, “the . . . three words, ‘under this title,’ set forth the standard of ‘lawfulness.’” 133 S. Ct. at 1358. Because these words here too supply an important limitation,

their absence from section 512(c) must have consequences. See *Patterson*, 504 U.S. at 758-59.

3. Unable to ground their preferred interpretation in the words Congress used, petitioners ask the Court (Pet. 24-27) to rely on the *absence* of explicit reference to pre-1972 recordings in section 512(c). Petitioners have it backwards: Had Congress wished to confine the safe harbors to claims of infringement of *federal* copyright under Title 17, it would have done so by simply adding the words “under this title” after “infringement of copyright” in section 512(c), as it has often done elsewhere in the Copyright Act. See *supra* pp. 17-19 & n.9. Given the clarity of the statutory text, “there is every reason to believe that Congress meant exactly what it said,” Pet. App. 20a, and petitioners bear an “exceptionally heavy burden” of showing that the words have a different and more limited meaning, *Patterson*, 504 U.S. at 760 (internal quotation marks omitted). Petitioners cannot meet that burden.

Petitioners mistakenly rely (Pet. 30-31) on various provisions in Title 17 in which Congress expressly exempted state laws from otherwise applicable federal preemption. Petitioners again have it backwards. These examples show only that, when Congress wishes to *save* some state-law rights from federal preemption, it does so expressly. It does not follow that Congress must be equally specific in preempting state-law rights; if it did, then such explicit savings provisions would be unnecessary.

A 1994 amendment illustrates the point. The Uruguay Round Agreements Act, passed by Congress four years *before* the DMCA, prohibits the unauthorized fixation of and trafficking in sound recordings and audiovisual materials based upon live musical performances. To preserve state-law rights in applicable

sound recordings, the Act contains an analogue to section 301(c): “Nothing in this section may be construed to annul or limit any rights or remedies under the common law or statutes of any State.” 17 U.S.C. § 1101(d). The absence of an equivalent clause in the 1998 DMCA, which Congress enacted just one day after it extended section 301(c) by 20 years, indicates that section 512(c) *does* apply to pre-1972 recordings; Congress was well aware how to preserve state-law rights in sound recordings when it so intended in the text of the relevant statute.

B. The Purpose Of The Statute Supports The Court Of Appeals’ Interpretation

As the court of appeals correctly held (Pet. App. 4a-5a) and the legislative history confirms, section 512 aimed to provide “greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.” S. Rep. No. 105-190 at 20. The decision below recognizes this purpose in reading section 512(c) so as to ensure that service providers’ copyright liability is “not left to the vagaries of state . . . law.” *Patterson*, 504 U.S. at 765.

Moreover, as the court of appeals correctly concluded, Congress aimed to encourage the growth of Internet services by enabling copyright holders to protect their content without imposing prohibitive costs of monitoring or liability on service providers. Pet. App. 20a, 26a. “To construe § 512(c) as leaving service providers subject to liability under state copyright laws for postings by users of infringements of which the service providers were unaware would defeat the very purpose Congress sought to achieve in passing the statute.” Pet. App. 20a; *cf. King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) (“Congress

passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter.”). Further, petitioners’ position would require the remarkable conclusion that rights-holders in pre-1972 recordings have no right to avail themselves of the notice-and-takedown procedure at all, which not only would disserve copyright owners’ ability to reduce infringement, but also would contradict industry practices and expectations. See *supra* pp. 10-13 & n.3.

Finally, contrary to petitioners’ argument (Pet. 4, 10-11, 31)¹⁰ that the purpose of the “DMCA” was “principal[ly]” to address digital piracy, the purpose of the DMCA was at least equally “to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age,” with the express purpose of section 512 being to “provide certainty for copyright owners and Internet service providers with respect to copyright infringement liability online.” S. Rep. 105-190 at 1-2 (“Purpose”). Application of section 512(c) to pre-1972 recordings is the only interpretation of the statute that is consistent with facilitating these purposes.

C. Section 301(c) Does Not Override Section 512(c)

Petitioners incorrectly argue (Pet. 24-27) that section 301(c) is the final word on the subject of federal

¹⁰ In citing *Microsoft Corp v. AT&T Corp.*, 550 U.S. 437 (2007) (Pet. 4, 10), petitioners mistakenly rely on the purpose underlying Title I of the DMCA, 17 U.S.C. §§ 1201, *et seq.*, which does not address infringement, but rather digital anti-circumvention measures.

regulation of pre-1972 recordings absent a “clear statement” otherwise. Petitioners miss the mark for three separate reasons. *First*, as the court of appeals correctly held (Pet. App. 25a), section 512(c) *is* that “clear statement.” *Second*, Congress did not intend that section 301(c) preclude all future regulation of pre-1972 recordings, and thus section 301(c) is compatible with, and may be harmonized with, section 512(c). *Third*, to the extent the statutes are not harmonized, they are irreconcilable and thus support an inference of repeal by implication.

1. Contrary to petitioners’ argument (Pet. 24-27), section 301(c)’s anti-preemption language does not create an insurmountable barrier against any regulation by Congress of pre-1972 recordings until 2067. To the contrary, “[s]tatutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified.” Pet. App. 17a n.7 (quoting *Dorsey v. United States*, 132 S. Ct. 2321, 2331 (2012)); see *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (“one legislature may not bind the legislative authority of its successors”) (citation omitted).

Here, the court of appeals correctly held that, “to the extent that Congress can be said to have repealed by § 512(c) an aspect of the rule it had previously enacted in § 301(c), it was not by implication but by *specific statement*.” Pet. App. 25a (emphasis added); see Pet. App. 25a (“the partial repeal of § 301(c) was by . . . explicit statement”).¹¹ Petitioners and their *amici*

¹¹ On this basis, the court of appeals correctly found that *TVA v. Hill*, 437 U.S. 153 (1978), relied upon by petitioners (Pet. 26) and the Copyright Office (Rep. 132), has “no application to this

thus err in suggesting that the DMCA safe-harbor provisions, if extended to state-law claims, would violate the canon against implied repeals by “silently” (Pet. 24) or “*sub silentio*” (RIAA Br. 4, 14) repealing section 301(c). As described above, see *supra* Part II.A, the phrase “infringement of copyright” on its face includes all rights in copyright and is not limited to federal copyrights. See Pet. App. 25a (describing that language as an “explicit statement”). No more is required to modify the prior statute. See, e.g., *Lockhart v. United States*, 546 U.S. 142, 144-47 (2005) (so-called “express reference” requirement in prior statute did not actually require an express reference to the specific statutory section in a later act).¹²

2. Even if section 512(c) had not effected such a partial express repeal of section 301(c), the two

issue,” as its relevance is limited to repeals “by implication.” Pet. App. 25a. Likewise, petitioners’ reliance (Pet. 2, 24-25) on *U.S. Dep’t of Treasury v. Fabe*, 508 U.S. 491 (1993), is misplaced, as that case concerned interpretation of an Act that included in its text a particular rule of statutory construction for how to identify federal statutes that displaced state insurance laws. See 15 U.S.C. § 1012(b). Section 301(c) contains no such particularized restriction. And in any event, this Court later clarified that *Fabe* did not “impose[] any such requirement,” advocated by petitioners here, that a federal statute “use the words ‘state law is pre-empted,’ or the like.” *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 43 (1996).

¹² Because section 512(c) is thus explicit, Vimeo need not rebut each of petitioners’ flawed arguments about canons of interpretation, which the court of appeals addressed in detail. See Pet. App. 21a-25a & n.8. Moreover, “canons are not mandatory rules,” but serve as mere “guides that ‘need not be conclusive’” since “[s]pecific canons ‘are often countered . . . by some maxim pointing in a different direction.’” *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)).

statutes are not in conflict and may peacefully coexist when properly interpreted in light of their purposes. See, e.g., *United States v. Fausto*, 484 U.S. 439, 453 (1988) (“Th[e] classic judicial task of reconciling many laws enacted over time, and getting them to ‘make sense’ in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.”).

There is no indication that Congress intended section 301(c) to bar any and all forms of future legislation that may have any effect whatever on pre-1972 recordings. To the contrary, section 301(c) aimed specifically at preserving from preemption state anti-piracy laws applicable to pre-1972 recordings. H.R. Rep. No. 94-1476 at 133; Copyright Office Rep. 15. But section 512(c) does not seek to abrogate state anti-piracy laws; it enhances anti-piracy protection by granting copyright holders a new extrajudicial tool for combatting *any* form of online copyright infringement while granting service providers a qualified defense to liability that is equally broad. See Pet. App. 5a (section 512(c) “establish[ed] a compromise”). Far from limiting or annulling state-law rights, section 512(c) “*augments* the rights of copyright owners,” including owners of state-law copyrights, “by establishing a notice-and-takedown regime” that would otherwise be unavailable. Pet. App. 5a (emphasis added).

The only way to harmonize the two provisions without doing violence to either thus is to hold that section 512(c) protects a qualifying service provider from liability for any infringement of copyright, including infringement under state law. Because these two statutes and their goals thus can be readily harmonized, they are not in conflict. See *La. Pub. Serv.*

Comm'n v. FCC, 476 U.S. 355, 370 (1986) (applying “the familiar rule of construction that, where possible, provisions of a statute should be read so as not to create a conflict”).

3. If the two statutes are not so harmonized, then they are “irreconcilable” and justify an inference of “repeal by implication.” *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141-42 (2001) (quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974)). Reading section 301(c) as limiting the DMCA safe harbors to federal copyright claims would effectively nullify section 512(c) and 512(m) by imposing upon service providers a duty to monitor all their users’ uploaded content for possible infringing materials. Service providers have no meaningful way of determining what is or is not a pre-1972 recording.¹³ Thus, to avoid massive strict copyright liability under state law, a service provider would have to implement monitoring mechanisms for *all* sound recordings posted online by their users. Such monitoring would defeat Congress’s decision to relieve service providers of any such affirmative duty. See 17 U.S.C. § 512(m)(1). The only alternative would be to simply prohibit *all* use of music from their platforms, defeating the entire purpose of safe harbor.

¹³ For example, how can service providers be expected to know that most of the tracks on the Rolling Stones’ *Exile on Main St.* album were recorded between June 1969 and February 1972, even though the album itself was not released until May 1972? That Richard Harris’s version of “MacArthur Park” was recorded before 1972, while Donna Summer’s version was recorded after 1972? That Natalie Cole’s 1991 *Unforgettable...With Love* album incorporated vocals recorded by her father Nat King Cole before 1972?

Further, as the court of appeals properly recognized, the argument offered by petitioners (Pet. 14, 24-26) and the Copyright Office (Rep. 132) that all exceptions to a statute must be construed narrowly and against exemption “is arbitrary and without logical foundation.” Pet. App. 22a. While such a principle might have value when an exception would nullify a general rule, it has “no application to the relationship between the general rule of § 301(c) and the exception provided by § 512(c)” because section 512(c) merely “establishes a tiny exception to the general principle of § 301(c) . . . [and] does not come close to nullifying the general rule.” Pet. App. 24a (distinguishing *Tasini v. New York Times Co.*, 206 F.3d 161 (2d Cir. 2000), *aff’d*, 533 U.S. 483 (2001), and *Commissioner v. Clark*, 489 U.S. 726 (1989)).

III. THIS CASE PRESENTS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED

Even if the question presented warranted review (it does not), this case presents a poor vehicle for resolving it.

To begin with, the decision below was rendered on an interlocutory appeal certified under 28 U.S.C. § 1292(b), and the case remains pending on remand to the district court for further proceedings. Pet. App. 40a. This Court typically requires “special circumstances [to] justify the exercise of [its] discretionary certiorari jurisdiction to review [an] interlocutory order.” *Office of Senator Mark Dayton v. Hanson*, 550 U.S. 511, 515 (2007); see *Abbott v. Veasey*, No. 16-393, 580 U.S. ____ (2017) (statement of Roberts, C.J., respecting denial of certiorari) (issues “better suited for certiorari review” after entry of final judgment); *Va. Military Inst. v. United States*, 113 S. Ct. 2431,

2432 (1993) (opinion of Scalia, J., respecting denial of certiorari) (“We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.”). No such circumstances exist here.

Moreover, the question presented here may well be mooted by application of the immunities afforded to service providers under section 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230 (“CDA”), which remains open to Vimeo on remand. That statute provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,” and expressly preempts any state laws to the contrary. 47 U.S.C. §§ 230(c)(1), (e)(3). “The majority of federal circuits have interpreted the CDA to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.” *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) (internal quotation marks omitted).

While, the CDA excludes from its grant of immunity claims pertaining to “intellectual property,” 47 U.S.C. § 230(e)(2), there remains an open question whether that exclusion is limited to federal intellectual property claims. In *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007), the Ninth Circuit interpreted that exclusion as so limited, concluding that a contrary outcome would permit states to define intellectual property claims in a manner that could defeat “Congress’s expressed goal of insulating the development of the Internet from the various state-law regimes.” *Id.* at 1119.

The Second Circuit has not yet addressed the issue of CDA immunity, as the district court decisions below

were limited to the DMCA safe-harbor issue. But if the Ninth Circuit's approach were adopted on remand, application of CDA immunity against state-law copyright claims would moot the need for the district court to reach the DMCA safe-harbor limitations.

Finally, the undeveloped condition of relevant New York law counsels against review at this time. As discussed above, see *supra* p. 12, it is doubtful whether the New York Court of Appeals, in light of its recent decision in *Flo & Eddie*, would recognize strict liability against DMCA-compliant service providers for infringing user postings of which they had no knowledge. Given that state law on pre-1972 recordings might not recognize petitioners' claims at all, the Court should allow relevant state-law jurisprudence to develop further, at minimum by a court of last resort, before accepting review of the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL A. CHEAH
VIMEO, INC.
555 West 18th St.
New York, NY 10011
(212) 314-7400
michael@vimeo.com

KATHLEEN M. SULLIVAN
Counsel of Record
ROBERT L. RASKOPF
TODD ANTEN
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Ave., 22nd Fl.
New York, NY 10010
(212) 849-7000
kathleensullivan@
quinnemanuel.com

Counsel for Respondents

February 16, 2017