

No. 16-217

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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 IN OPPOSITION**

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September 26, 2016

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## **RULE 29.6 STATEMENT**

Universal Music Corp. and Universal Music Publishing, Inc. are directly or indirectly owned by Vivendi S.A., which is publicly traded on NYSE Euronext. Universal Music Publishing Group is the colloquial name used to refer to the music publishing operations of the Universal Music Group of companies, all of which are directly or indirectly owned by Vivendi S.A.

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## INTRODUCTION

Lenz's petition asks this Court to hold that the phrase "good faith belief" in section 512(c) of the Digital Millennium Copyright Act ("DMCA") imposes a standard of objectively reasonable conduct. In her view, whether a copyright owner violates section 512(c) in sending a takedown notice depends not on whether the owner subjectively formed a good faith belief that the material infringes the owner's copyright, but on whether that belief was objectively reasonable. In holding that the phrase "good faith belief" establishes a subjective standard, the Ninth Circuit followed its prior decision in *Rossi v. Motion Picture Association of America, Inc.*, 391 F.3d 1000 (9th Cir. 2004). The Court denied the petition for certiorari in *Rossi* that raised this same question, see 544 U.S. 1018 (2005) (denying certiorari), and should deny this petition as well.

The petition does not allege a conflict in the lower courts on the question presented. The lack of any split is unsurprising because Lenz's proposed construction of the phrase "good faith belief" conflicts with the statute's plain meaning. The terms "good faith" and "belief" each refer to a state of mind. Seven years before Congress passed the DMCA, this Court held, in the context of a prosecution for willful failure to pay income taxes, that a person's alleged "good-faith belief" that he owed no such taxes should be evaluated by a subjective standard, and not by whether the belief was objectively reasonable. *Cheek v. United States*, 498 U.S. 192, 198, 203 (1991). *Cheek* alone illustrates that the Ninth Circuit reasonably construed the term "good faith belief" to impose a subjective standard.



Although the petition contends that the question presented is important, it does not support that contention. Lenz conspicuously overlooks the put-back process, which Congress designed to assist internet users in restoring challenged material to the internet. In nearly every instance of alleged abuse the petition cites, for example, the users successfully restored their content to the internet within a matter of days. Lenz's more general assertions that a subjective standard of liability impairs free speech rights and hinders judicial review are equally unsupported and conjectural. Lenz herself did not suffer retaliation for political speech or whistleblowing. Indeed, she did not incur any concrete injury whatsoever. Her petition thus is not a proper vehicle for addressing the question she raises.

## **REASONS FOR DENYING THE PETITION**

### **I. THE PETITION DOES NOT PRESENT AN IMPORTANT ISSUE.**

Lenz effectively asks this Court to rewrite the DMCA because, in petitioner's view, requiring copyright owners to act merely in subjective good faith in sending takedown notices is insufficient to prevent abuses. This Court denied a petition for certiorari raising this same question a decade ago,<sup>1</sup> and this petition identifies no changes that warrant a different disposition now.

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<sup>1</sup> The petition for certiorari in *Rossi* presented this question: "Whether the Ninth Circuit Court of Appeals is correct in ruling that the 'good faith belief' provision in the Digital Millennium Copyright Act ('DMCA'), 17 U.S.C. § 512(c)(3)(A)(v), encompasses a subjective rather than an objective standard of review prior to infringing First Amendment rights." Pet. for Cert. at i, *Rossi v. Motion Picture Ass'n of Am., Inc.*, No. 04-1166 (U.S. Feb. 28, 2005), available at 2005 WL 510720.

### A. The Plain Language Of The DMCA Imposes A Subjective Standard.

Section 512(c) requires a copyright holder to assert a “good faith belief” that an internet posting is not authorized before sending a takedown notice. 17 U.S.C. § 512(c)(3)(A)(v). Lenz asks this Court to hold that a copyright holder cannot form a “good faith belief” unless that belief is objectively reasonable. Pet. 23. The statute’s text does not support Lenz’s construction.

Lenz’s proposed reading conflicts with the plain meaning of the constituent terms “good faith” and “belief,” which each refer to state of mind. Lay and legal dictionaries alike equate *good faith* not with objective reasonableness, but with “sincerity” and “honesty.” *E.g.*, *Oxford English Dictionary* (3d ed. 2010), [www.oed.com/view/Entry/363783](http://www.oed.com/view/Entry/363783) (“[f]aithfulness, loyalty, truthfulness; *esp.* honesty or sincerity of intention” or “undertaken in the belief that what one is doing is right or correct”); *Black’s Law Dictionary* 808 (10th ed. 2014) (“Good faith” is a “state of mind consisting [of] honesty in belief or purpose”). The term “belief,” in turn, expresses subjective “[m]ental conviction,” *Oxford English Dictionary*, *supra*, [www.oed.com/view/Entry/17368](http://www.oed.com/view/Entry/17368), or “state of mind . . . regard[ing] the existence or truth of something as likely or relatively certain,” *Black’s Law Dictionary*, *supra*, at 184. A good faith belief thus equates to a sincerely held mental conviction.

Combining two terms with subjective connotations—“good faith” and “belief”—does not result in an objective standard. See Pet. 23. As shown above, the words “good faith” and “belief” are not redundant, and in combination they reinforce the subjective nature of the standard. And even if the words were to some extent redundant, that would not

convert this phrase to the opposite of its natural meaning. Congress often includes “technically unnecessary” words “out of an abundance of caution,” *Fort Stewart Schs. v. FLRA*, 495 U.S. 641, 646 (1990), or to “remove . . . doubt” about meaning, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226 (2008). “The canon against surplusage is not an absolute rule,” *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013), and thus does not require imposing an implausible construction upon terms whose meaning is otherwise plain. Here, it is implausible to conclude that Congress established an objective standard of liability by conjoining two subjective terms. See *Torres v. Lynch*, 136 S. Ct. 1619, 1633 (2016) (“Rather than expecting (let alone demanding) perfection in drafting, we have routinely construed statutes to have a particular meaning even as we acknowledged that Congress could have expressed itself more clearly.”); *Tapia v. United States*, 564 U.S. 319, 328 (2011) (“[W]hen we interpret a statute, we cannot allow the perfect to be the enemy of the merely excellent.”).

This Court confirmed that courts should assess a “good faith belief” subjectively rather than objectively in *Cheek v. United States*, 498 U.S. 192 (1991). A lower court had upheld Cheek’s conviction for willful tax evasion despite his “good-faith belief” that his wages were not income, because that court (like Lenz) thought a “good-faith belief” exists “only if the defendant’s beliefs are objectively reasonable.” *Id.* at 198. This Court reversed. It rejected the “requirement that a claimed good-faith belief must be objectively reasonable if it is to be considered as possibly negating . . . evidence purporting to show a defendant’s awareness of the legal duty at issue.” *Id.* at 203. The Court reasoned that an objective

standard made little sense for a concept like “belief,” as “[k]nowledge and belief are characteristically questions for the factfinder,” and “[c]haracterizing a particular belief as not objectively reasonable [would impermissibly] transform[] the inquiry into a legal one and would prevent the jury from considering it.” *Id.*

In so holding, the Court considered and rejected the very policy argument that Lenz and her *amici* assert here, that a subjective standard permits defendants to escape liability “no matter how unreasonable [their beliefs might] be.” Pet. 2; see Br. of Organization for Transformative Works and Public Knowledge at 10-11 (“[N]early every specious belief can clear that hurdle.”). The Court explained that “the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties.” *Cheek*, 488 U.S. at 203-04.

There is a “presumption that Congress is aware of settled judicial and administrative interpretation[s] of terms when it enacts a statute.” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 993 (2005) (alteration in original); see also *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992). Because *Cheek* was handed down some seven years prior to the DMCA, this Court should presume that Congress was aware of *Cheek*’s interpretation of “good faith belief” and imposed a comparable requirement here.

Lenz argues that the decision below is inconsistent with another decision from the Ninth Circuit, *Zaldivar v. City of L.A.*, 780 F.2d 823 (9th Cir. 1986), *abrogated by Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990). Conflicts within a circuit would not warrant plenary review in this Court, but here there is no inconsistency. In *Zaldivar*, the Ninth Circuit

found, in the context of an amendment to Rule 11, that a “good faith belief in the merit of a legal argument is an objective condition.” Pet. 23 (quoting *Zaldivar*, 780 F.2d at 830-31). But *Zaldivar* reached that conclusion only because Congress amended Rule 11 to require an “inquiry reasonable under the circumstances,” Fed. R. Civ. P. 11(b), and thus expressly incorporated “a ‘reasonableness’ standard” that “is more stringent than the original good-faith formula,” 780 F.2d at 829; see *id.* (observing that “[p]rior to the 1983 amendments, Rule 11 was interpreted to require subjective bad faith” and Congress then “intentional[ly] abandon[ed] . . . the subjective focus of the Rule in favor of an objective one”). *Zaldivar* illustrates that, when Congress wants to create an objective standard, it knows how to do so. It did not do so here.

By advancing an interpretation that the plain language of the DMCA forecloses, Lenz asks the Court in effect to amend rather than to apply the statute. Where the statute’s plain language is constitutionally sound, courts may not “alter the text in order to satisfy the policy preferences of” litigants. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002); see *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270 (2009) (“[I]t is not for [courts] to substitute [their] view of . . . policy for the legislation which has been passed by Congress.” (omission in original)).

**B. The Petition Does Not Show That The Subjective Standard Of Liability Has Prevented The DMCA From Achieving Congress’s Goals.**

The petition does not support its assertion that the question presented is important. Lenz asserts that the “DMCA safe harbors unleashed the modern Internet—precisely as Congress intended.” Pet. 12.

She nonetheless contends that requiring takedown notices to be objectively reasonable would meet Congress's objectives more fully. See *id.* In the normal course, this Court would leave such recalibrating of a statute to Congress; the petition provides no compelling reason to do otherwise here.

1. To illustrate the need for an objective standard of liability for improper takedown notices, Lenz first offers a dozen vignettes of takedowns. Pet. 13-19. These examples paint an incomplete picture, however, because Lenz omits how the users “relatively speed[il]y” restored their content online, including through the counter-notification and put-back process. *Id.* at 21; see 17 U.S.C. § 512(g).

A user who receives what he or she believes to be an improper takedown notice may serve a counter notification on the service provider, identifying the removed material and attesting to that user's *own* “good faith belief that the material was removed or disabled as a result of mistake or misidentification.” 17 U.S.C. § 512(g)(3)(C). Upon receiving the counter notification, the service provider gives the copyright holder a copy of the counter notification and “informs that person that it will replace the removed material or cease disabling access to it in 10 business days” unless the copyright holder first “file[s] an action seeking a court order to restrain the subscriber” from infringing. *Id.* § 512(g)(2)(B) & (C). A service provider that restores targeted content after receiving a counter notification has a safe harbor from monetary relief so long as it follows the procedures outlined in the statute. *Id.* Importantly, the same subjective “good faith belief” standard that applies to the copyright owner who sends a takedown notice also applies to the user in the event he or she is sued under section 512(f).

The counter-notification process allowed nearly every one of the aggrieved users in the very examples petitioner cited to restore their content to the web within a matter of days, where it remains today.

In Lenz’s first example, “AIDS denialists” attempted to silence a scientist’s debunking of their claims by sending unreasonable takedown notices. See Pet. 14. Lenz ends her account by stating that “the videos were taken offline,” *id.*, but fails to mention that the online service provider restored the videos mere days after the targeted scientist submitted a counter notification.<sup>2</sup> She also fails to mention that this scientist then posted another video publicly praising the ease of using the put-back procedure, and thanking the Electronic Frontier Foundation for educating him about it.<sup>3</sup>

Lenz states that it took the author of *Buffy vs. Edward: Twilight Remixed* “three months of intense legal wrangling before” a film company “relinquished its claim” of copyright over his remix video. Pet. 16-17. This account also is incomplete. The author spent those three months navigating YouTube’s own internal dispute process; what finally triggered the restoration of his video—within 48 hours—was his formal service of a counter notification.<sup>4</sup> The petition similarly overlooks that Mitt Romney’s political ad

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<sup>2</sup> See Myles Power, *Update and Yet More DMCA’s*, Myles Power – Fun With SCIENCE! (Mar. 4, 2014), <https://mylespower.co.uk/2014/03/04/update-and-yet-more-dmcas-2/>.

<sup>3</sup> See *id.* at 3:50.

<sup>4</sup> See Jonathan McIntosh, *Buffy vs. Edward Remix Unfairly Removed by Lionsgate*, Pop Culture Detective Agency (Jan. 9, 2013; updated Jan. 10, 2013), <http://popculturedetective.agency/2013/buffy-vs-edward-remix-unfairly-removed-by-lionsgate>.

featuring a snippet of an Al Green song was restored within two days of issuing the counter notification.<sup>5</sup> See Pet. 17.

In other instances that Lenz cites, the copyright holders themselves withdrew their takedown requests, and the underlying content was restored, mere days after the content was removed, and without the need for a counter notification. Lenz's story of a newspaper publisher removing a video of an uncomfortable interview with a politician, see Pet. 16, fails to disclose that the newspaper retracted its takedown notice and that the video in question was restored three days after it was removed.<sup>6</sup> The petition also omits that a video concerning protests in Tibet that the International Olympic Committee took down was promptly restored at the behest of petitioner's counsel here. Pet. 15.<sup>7</sup> And the petition overlooks that the satirical video that the Alberta tourism bureau took down, along with the video montage of Rush Limbaugh's statements, see Pet. 18,

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<sup>5</sup> See Jon Healey, *Mitt Romney Wins a Battle for Free (Political) Speech*, L.A. Times (July 19, 2012), <http://articles.latimes.com/2012/jul/19/news/la-ol-mitt-romney-barack-obama-sings-al-green-resinstated-20120719>

<sup>6</sup> The retraction appears in bold at the top of the article Lenz cites, and the article was written by one of Lenz's counsel. See Corynne McSherry, *For Shame: Gannett Abuses DMCA to Take Down Political Speech*, EFF DeepLinks Blog (Oct. 10, 2014; updated Oct. 13, 2014), <https://www.eff.org/deeplinks/2014/10/shame-gannett-abuses-dmca-take-down-political-speech>.

<sup>7</sup> See Stephanie Condon, *Olympic Committee Rethinks Copyright Infringement Claim on YouTube*, CNET (Aug. 15, 2008), <http://www.cnet.com/news/olympic-committee-rethinks-copyright-infringement-claim-on-youtube/>.



were each reposted to other video hosting sites, where they remain to this day.<sup>8</sup>

Petitioner's examples of abuse of the takedown process fail to make a compelling case for any rewriting of the DMCA, let alone a rewriting by this. Lenz's examples instead confirm that the put-back process functions as Congress intended.

2. Lenz and her *amici* also speculate, more generally, that a subjective standard may shield unreasonable copyright owners from accountability for improper takedowns. See Pet 24-26 (“[T]he decision below . . . quietly eviscerate[d] the fair use doctrine for online speech.”); *id.* at 27 (“[T]he *Rossi* rule . . . renders Section 512(f) effectively unavailable to the public.”); Br. of Automattic et al. at 14 (“[T]he more misinformed or unreasonable the copyright owner, the broader the immunity he would have from liability under Section 512(f).”). But Lenz and her *amici* do not explain how their examples of improper takedowns would evade liability under a subjective standard, and many of them, on their face, appear to have been sent in bad faith. See Br. of Automattic et al. at 7, 9; Br. of Yes Men et al. at 17-18. A foreign despot bent on silencing online criticism by demanding the takedown of material on the ground that it uses his image, see Pet. 16, for example, could be found liable for materially misrepresenting that he owns a copyright in his image (which he does not).

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<sup>8</sup> See *YouTube Pulls Anti-Oilsands Video After Alberta Tourism Complaint*, Huffington Post (Aug. 27, 2013), [http://www.huffingtonpost.ca/2013/08/27/oilsands-video-youtube-alberta\\_n\\_3823356.html](http://www.huffingtonpost.ca/2013/08/27/oilsands-video-youtube-alberta_n_3823356.html); Markos Moulitsas, *Rush Limbaugh Demands YouTube Remove Daily Kos Video . . . Watch It Here*, Daily Kos (Apr. 23, 2012), <http://www.dailykos.com/story/2012/4/23/1085791/-Rush-Limbaugh-demands-YouTube-remove-Daily-Kos-video-watch-it-here>.

Section 512(f) has a proper role, and there is no basis for *amici*'s hyperbole that the statute is a dead letter absent a “smoking gun” email demonstrating subjective knowledge.” Br. of Automattic et al. at 13.

Liability and monetary recoveries for violations of section 512(f) also are not as difficult to obtain as Lenz suggests them to be. See Pet. 25 (“[C]ommenters . . . have noted the lack of judgments against copyright owners . . . and the paucity even of monetary settlements . . . .”). The petition’s example of the takedown notice directed to Professor Lawrence Lessig for his use of the popular song “Lisztomania” in a lecture video, *id.* at 17, is a case in point. Professor Lessig not only had his video restored to the web via the counter-notification procedure,<sup>9</sup> but, after the copyright owner objected to his counter notification, successfully sued the owner and obtained a settlement requiring the owner “to pay Lessig for the harm it caused.”<sup>10</sup>

3. Lenz and her *amici* also fail to support the suggestion that a subjective standard threatens First Amendment rights. A foundational flaw in Lenz’s argument is that no one involved in the notice-and-takedown process—not the service provider, not the copyright owner, and not the user—is a state actor to whom the First Amendment applies. See *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972)

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<sup>9</sup> See Michael B. Farrell, *Online Lecture Prompts Legal Fight on Copyright*, Boston Globe (Aug. 27, 2013), <https://www.boston.com/business/2013/08/26/harvard-law-professor-sues-record-company-over-phoenix-lisztomania/jqYkgFaXSgGpd2hL2zsXsK/story.html>

<sup>10</sup> See Press Release, EFF, Lawrence Lessig Settles Fair Use Lawsuit Over Phoenix Music Snippets (Feb. 27, 2014), <https://www.eff.org/press/releases/lawrence-lessig-settles-fair-use-lawsuit-over-phoenix-music-snippets>.

(“The First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes.”). Lenz conceded that point in her briefing below. See Lenz’s Second Br. on Cross-Appeal at 61, Nos. 13-16106, 13-16107 (“Ms. Lenz is not arguing that Universal ‘violated’ the First Amendment, because the First Amendment by its terms applies only to state action.”).

The takedown and put-back process also looks nothing like the “prior restraint[s]” on speech that this Court has held unconstitutional. See *Br. of Yes Men et al.* at 9-10. Lenz overlooks that the DMCA does not compel anyone involved in that process to stifle any speech, but merely offers a safe harbor from monetary relief for service providers who comply with requests to remove and to restore content. Thus, although the concepts of copyright and fair use may well reflect certain First Amendment principles, *e.g.*, *Golan v. Holder*, 132 S. Ct. 873, 890 (2012), no part of the takedown and put-back process involves state-sponsored stifling of free speech by a private actor, *cf.* *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544 (1987) (holding that even though “enforceable rights in trademarks are created by some governmental act, . . . [t]he actions of the trademark owners nevertheless remain private”). To the contrary, the very decision that Lenz cites in support of her First Amendment argument, *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), see Pet. 20, praises the DMCA’s “specific notice, take-down, and put-back procedures” as a paradigmatic example of how Congress succeeded in “balanc[ing] the First Amendment rights of users with the rights of a potentially injured copyright holder,” 333 F.3d at 1031 n.19 (emphasis added) (contrasting the DMCA

with Section 230(c) of the Communications Decency Act of 1996, 47 U.S.C. § 230(c), which lacks such protections).

4. Finally, Lenz states that section 512 leaves internet users “uniquely vulnerable to extra-judicial censorship.” Pet. 1. Similarly, Lenz worries that those who engage in “anonymous speech,” “political speech[,] or whistleblowing” will be unable to vindicate their rights because the targets of their criticism will escape “without consequence” under the subjective standard. *Id.* at 2, 21. But Lenz fails to connect these concerns to the plain language or legislative history of section 512.

Congress was well aware that, prior to the enactment of the DMCA, copyright holders had asked internet service providers to take down infringing material, and that copyright holders would do so more frequently with the growth of the internet and the incentives section 512 created. Congress intended section 512’s takedown provisions not to discourage takedowns, but to “preserve[] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.” S. Rep. No. 105-190, at 20 (1998); see *id.* at 45 (“Th[e] ‘notice and takedown’ procedure is a formalization and refinement of a cooperative process that has been employed to deal efficiently with network-based copyright infringement.”).<sup>11</sup> And Congress created the

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<sup>11</sup> The staggering amount of potentially copyrighted content that users post on the internet, which prompts more than a hundred thousand notices of music infringement each day, underscores how important it is for copyright holders to be able to “deal efficiently” with infringement. See Joint Comments of American Association of Independent Music et al. at 4, *Section 512 Study*, Docket No. USCO-2015-7 (U.S. Copyright Office,

put-back procedure to “balance the need for rapid response to potential infringement with the end-users['] legitimate interests in not having material removed without recourse.” *Id.* at 20-21, 49.<sup>12</sup>

It was perfectly reasonable for Congress to believe that the “good faith belief” standard would not inexorably lead to knowing defiance of section 512(c)’s requirements. For example, intentionally targeting an election opponent’s political speech for reasons having nothing to do with copyright infringement, see Pet. 2, 10, would fail a “good faith belief” test under a subjective standard, as would many of the examples of abuses *amici* cite, e.g., Br. of Automattic et al. at 6-10; Br. of Organization for Transformative Works and Public Knowledge at 18-22; Br. of Yes Men et al. at 13-19. Similarly, in the nearly 25 years since *Cheek* was decided, it does not appear that the subjective standard for ignorance of one’s tax liability has led to rampant refusals to pay income taxes, let alone rendered laws against tax evasion “all but meaningless.” Pet. 2; see also Br. of Automattic et al.

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2016) (“Music Community Filing”), <http://www.riaa.com/wp-content/uploads/2016/03/Music-Community-Submission-in-re-DMCA-512-FINAL-7559445.pdf>.

<sup>12</sup>On this point, Lenz’s presentation of the Senate Report is inaccurate. Congress did not “craft[] Section 512(f)” to hold “copyright owners accountable if they send a takedown notice without properly considering” fair use, Pet. 22, but instead to “deter knowingly false allegations,” S. Rep. No. 105-190, at 49. Lenz’s inaccurate interpretation of the Senate Report is clear when her quotation is read in context, which shows that Congress was explaining why public entities could comply with the notice-and-takedown process without implicating due process concerns because “the provisions for the replacement of removed or disabled materials in subsection 512(f) [later codified as subsection 512(g)] provide all the process that is due.” *Id.* at 20-21.

at 13-14 (arguing that a subjective standard “would effectively encourage copyright owners to remain ignorant about the limitations on their exclusive rights under the Copyright Act”).

Lenz and her *amici*’s other complaints, and their citations to recent testimony at congressional hearings, see Br. of Yes Men et al. at 7; Br. of Organization for Transformative Works and Public Knowledge at 21-22 & nn.19, 21, simply underscore that their concerns are better directed to Congress than to this Court. Many of their objections lie not with the mens rea standard but with the takedown process itself. They claim that DMCA’s put-back procedures are insufficient because they take too long—“a minimum of ten business days,” Pet. 21—are subject to abuse, and are unsuitable for whistleblowers or others who desire anonymity. See *id.*; Br. of Automattic et al. at 11-12 (arguing that “the DMCA’s counter-notice-and-put-back procedures, while important and valuable, have not been enough to remedy the harms to users”); Br. of Yes Men et al. at 8 (characterizing section 512(g)’s ten-business-day period as “an eternity’ in internet time”); Br. of Organization for Transformative Works and Public Knowledge at 9 n.5 (arguing that the put-back remedy “provides very little recourse” and “forc[es] anonymous speakers to . . . unmask[] themselves”). But those are the time frames and consequences that Congress considered and imposed through the statute; they are not unintended results triggered by the particular mens rea that courts attach to a takedown notice. To the contrary, a judicially imposed, objective standard would not address such problems, because litigating under an “objective” standard of liability also would be time-consuming, also would defeat anonymity, and also would be

subject to abuse. In any event, a ten-business-day period of removal is nothing compared to the lengthier silencing and more-arduous process that users endured in litigating preliminary injunctions in the pre-DMCA era. See, *e.g.*, *Br. of Yes Men et al.* at 10-11 (falsely equating the takedown process with preliminary injunctions against speech).

The petition thus fails to make a case that the DMCA, with its requirement that copyright owners act subjectively upon a good faith belief that a takedown notice is appropriate, functions other than “precisely as Congress intended.” *Pet.* 12. Lenz even acknowledges that “[m]ost of these [takedown] notices are legitimate.” *Id.* at 13 & n.6 (conceding that between 70 to 90 percent of takedown notices are valid); *Br. of Automattic et al.* at 4 (“[M]ost DMCA notices are valid, well-founded, and sent in good faith.”). And Lenz overlooks that, when a notice is improper, the put-back process typically provides an effective remedy. The question Lenz presents thus does not warrant this Court’s review.

## **II. LENZ’S PETITION IS A POOR VEHICLE FOR ADDRESSING WHETHER SECTION 512(f) IMPOSES A SUBJECTIVE OR OBJECTIVE STANDARD.**

Finally, Lenz’s case would be a poor vehicle for addressing her policy concerns. She lacks standing to raise her claim, and the question she seeks to present depends on the resolution of another separate question of statutory interpretation, as well as on further factual development.

1. As Universal’s pending petition for certiorari (No. 16-218) explains, the Court initially would have to decide if Lenz has standing to sue under section 512(f) before it could decide the question Lenz

presents. Prior to filing this lawsuit, Lenz successfully used the counter-notification procedure to restore her video to YouTube, where it remains and can be watched today. See Pet. 5-6. Lenz's own petition confirms that Lenz is fighting only for a general cause, and not seeking a remedy for any injury that, for her, is particular and concrete.

When a litigant seeks review of important legal issues, a court must be "especially rigorous" in evaluating standing before "reaching the merits of the dispute." *Raines v. Byrd*, 521 U.S. 811, 819 (1997). Here, it is apparent that Lenz suffered none of the harms her petition and *amici* address. Universal did not stifle her political speech, expose her as a whistleblower, or deprive her of "AdSense' revenue." Br. of Yes Men et al. at 11. Lenz freely and successfully used the put-back procedure prior to filing suit, and her video remains online. Even if the statutory put-back procedure might be an ineffective remedy for some political parodists, internet celebrities, or whistleblowers, it *was* fully effective for Lenz. For her, the put-back procedure worked precisely as Congress intended. She therefore did not suffer a concrete injury that a court can redress. *E.g.*, *Spokeo v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("[A]lleg[ing] a bare procedural violation, divorced from any concrete harm [will not] satisfy the injury-in-fact requirement . . ."); *Hewitt v. Helms*, 482 U.S. 755, 761 (1987).

2. This Court also could not reach Lenz's question presented unless it first concluded that the DMCA requires a copyright owner, before sending a takedown notice, to consider fair use at all. The DMCA does not expressly require such consideration, and the Court should not read such a requirement into the statute.



The Ninth Circuit is the only circuit to have yet addressed this question, and its determination that the DMCA *does* require copyright owners to consider fair use (whether under a subjective or objective standard) does not withstand scrutiny. Nothing in the text, structure, or legislative history underlying section 512 supports the proposition that an *ex ante* failure to consider fair use is equivalent to a knowing material misrepresentation that the use of a work is infringing. The statute nowhere states expressly that a copyright owner must consider fair use before sending a takedown notice. Nor can it be said that a copyright owner who has failed to consider fair use knows that it is materially misrepresenting that a work is infringing. To the contrary, fair use has always been an affirmative defense that the infringing party must establish. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) (Congress “structured [Section 107] as an affirmative defense”); see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (same).

What is more, *ex ante* consideration of the possible application of the fair use doctrine is particularly ill-suited to the notice-and-takedown system that Congress envisioned in section 512. Congress’s goal was to enable a “rapid response” to “potential infringement” on the Internet. S. Rep. No. 105-190, at 21. But evaluating fair use is not always rapid, simple, or expeditious. Instead, whether a use does or does not amount to a fair use involves equitable balancing of multiple factors that do not lend themselves to “bright-line rules.” *Campbell*, 510 U.S. at 577. “Since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.” *Harper & Row*, 471 U.S. at 560 (alteration

omitted); see also 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 12B.08, at 12B-147 n.16 (rev. ed. 2016) (“Usually, fair use determinations are so clouded that one has no sure idea how they will fare until the matter is litigated.”).<sup>13</sup> Because the question of whether the DMCA requires *any* assessment of fair use is a threshold question, this Court could not decide the question Lenz presents without first reaching and resolving that issue.

3. Finally, Lenz’s case proceeded to the Ninth Circuit on interlocutory appeal. The question that Lenz’s petition presents would be appropriate for this Court’s review, if ever, only after development of the factual record on this issue. Such factual development would be helpful, for example, because Lenz’s assertions that Universal did not consider fair use before requesting that her posting be taken down, see Pet. 5, are materially misleading.<sup>14</sup>

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<sup>13</sup> In some cases, facts relevant to the fair use assessment may be known only to the alleged infringer. See *Harper & Row*, 471 U.S. at 562-63 (considering facts regarding the “propriety of the defendant’s conduct” including the defendant’s “good faith”).

<sup>14</sup> Lenz states that Universal’s internal guidelines for evaluating content do “not mention the doctrine of fair use,” Pet. 5, and that the employee who recommended removing Lenz’s video “made no mention of fair use during his testimony.” *Id.* While the precise phrase “fair use” does not appear in the guidelines or testimony, the use of the phrase “fair use” cannot be material: The phrase “fair use” is also absent entirely from section 512. See 17 U.S.C. § 512. In practice, Universal’s guidelines did instruct employees to consider—and Johnson himself considered—a number of fair use factors. See Pet. App. 44a; Def.’s Opp’n to Pl.’s Renewed Mot. for Summ. J., at 8-15, No. 5:07-cv-03783 (Dkt. 413).

**CONCLUSION**

For the foregoing reasons, the Court should deny the petition for certiorari.

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September 26, 2016

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