No. 16-218

IN THE

Supreme Court of the United States

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

Petitioners,

v.

STEPHANIE LENZ,

Respondent.

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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QUESTION PRESENTED

Does a plaintiff have standing under Article III to seek a remedy that includes but is not limited to nominal damages where material on the internet that she created and posted was disabled for over six weeks because of the defendants' conduct, and where Congress created an express cause of action for such wrongful conduct?

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BRIEF IN OPPOSITION

Universal's Petition presents the wrong question in the wrong case. The question framed by Universal's petition for a writ of certiorari is based on two predicates: a lack of concrete and particularized injury, and a remedy of only nominal damages. Both predicates are absent in this case, because Stephanie Lenz was injured—her particular video was actually disabled for over six weeks—and she seeks more than nominal damages. Universal's petition presents a question that has no basis in the record in this case and should therefore be denied.

Injury in fact: Ms. Lenz's video of her children was censored for over six weeks. Conflating "particularized and concrete" with "economic," Universal nonetheless insists that she was not injured because she suffered no lost revenues or other pecuniary loss. But the Court has long recognized that non-pecuniary injury can support standing. In any event, Ms. Lenz did suffer calculable economic harm. In addition to losing the ability to share her video on YouTube for over six weeks, she was forced to retain *pro bono* counsel to help ensure that access to her video was restored. Universal's false takedown notice created the need for that investment of time, and it would have been necessary even if she had not sued.

Redressability: Ms. Lenz's remedy is not limited to nominal damages. The Digital Millennium Copyright Act ("DMCA") renders Universal liable for "any damages" for its misdeeds—broad language that encompasses, at a minimum, compensation for the time spent by her *pro bono* counsel. 17 U.S.C. § 512(f). If that includes the time spent on the litigation of this case, Ms. Lenz's damages

are in the hundreds of thousands of dollars. If it is limited to work done to restore her video before litigation ensued, it is $1275. Either way, Ms. Lenz is entitled to, and seeks, more than nominal damages. The existence of a remedy—even nominal damages—assures that Ms. Lenz's injury can be redressed by a favorable judgment.

Because Ms. Lenz suffered a concrete and particularized injury, and because her remedy is not limited to nominal damages, this case does not raise *any* aspect of Universal's question presented. Universal's petition should therefore be denied.

STATEMENT OF THE CASE

In 2007, Ms. Lenz posted a 29-second home video of her two young children dancing in her kitchen to the Prince song *Let's Go Crazy*. App. 3a. Universal, acting on Prince's behalf, sent YouTube a notice claiming that hundreds of videos posted on YouTube, including the video posted by Ms. Lenz, infringed copyrights in Prince's musical compositions. App. 4a–5a. In that notice, Universal stated that it had a good faith belief that the videos were not authorized by Prince, his agent, or the law. App. 5a.

Universal included these videos in its notice based on its general guidelines: "[W]hen a writer is upset or requests that particular videos be removed from YouTube" Universal would "review the video to ensure that the composition was the focus of the video and if it was we then notify YouTube that the video should be removed." App. 69a. Those guidelines did not mention the doctrine of fair use. 17 U.S.C. § 107; App. 69a.

Consistent with those guidelines, Sean Johnson, the Universal employee tasked with reviewing the videos, "put a video on the list [of videos that Universal would demand that YouTube remove] that embodied a Prince composition in some way if the—there was a significant use of it, of the composition, specifically if the song was recognizable, was in a significant portion of the video or was the focus of the video." App. 68a–69a. Mr. Johnson would not include a video on the takedown list if it had only "a second or less of a Prince song, literally a one line, half line of a Prince song," or if it was shot in a noisy environment like a bar where the song was playing "deep in the background." App. 69a. He made no mention of fair use during his testimony and Universal admitted that it did not instruct Mr. Johnson to consider fair use. *Id.*

In response, YouTube took down the video, thus bringing itself within the safe harbor for internet hosts in the DMCA, 17 U.S.C. § 512(c), and rendering it immune from suit for any copyright infringement claims based on any of the hundreds of videos in Universal's notice. App. 5a; *cf. Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 27 (2d Cir. 2012). Six weeks later, YouTube, following the procedures set forth in the DMCA, restored Ms. Lenz's video after she, represented by *pro bono* counsel, submitted a counter-notice. App. 5a; 17 U.S.C. § 512(g).

REASONS FOR DENYING THE PETITION

I. Ms. Lenz suffered actual injury specific to her, rendering this case a poor vehicle for addressing whether a plaintiff with "no concrete or particularized injury" has standing under Article III.

Universal frames the question presented as asking whether a plaintiff who alleges "no concrete or particularized injury" has standing under Article III to seek nominal damages. Pet. i. An injury in fact is "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent" rather than "conjectural or hypothetical." *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560 (1992) (quotation marks and citations omitted). Ms. Lenz *has* suffered concrete and particularized injury in fact, and thus Universal's petition poses a question that is divorced from the record in this case.

A "concrete" injury is one that actually exists. *Spokeo v. Robins,* 136 S. Ct. 1540, 1548 (2016). There is no dispute that Ms. Lenz's video was taken down from YouTube for six weeks. 1SER 100 ¶ 8.[1] That censorship is an actual, not conjectural or hypothetical, injury.

A "particularized" injury is one that has a personal and individualized effect on the plaintiff. *Spokeo,* 136 S. Ct. at 1548. Ms. Lenz complains about the takedown of

1. Citations to "ER" and "SER" are respectively to the Excerpts of Record and the Supplemental Excerpts of Record in the proceedings before the circuit court.

her video of *her* children, 1SER 100 ¶¶ 3–4. Ms. Lenz's injury is therefore both concrete and particularized, and is neither conjectural nor hypothetical.

Universal nonetheless insists that Ms. Lenz has no standing because she suffered no "economic loss." Pet. 19–20. But financial harm is not a prerequisite for standing—on the contrary, the Court has held that any "individual subjected to an adverse effect has injury enough to open the courthouse door." *Doe v. Chao,* 540 U.S. 614, 624–25 (2004). "[I]ntangible injuries can nevertheless be concrete," *Spokeo,* 136 S. Ct. at 1549, and thus Article III does not close the federal courthouse doors to Ms. Lenz even if, as Universal mistakenly claims, she did not prove a quantifiable pecuniary loss.

Indeed, such a rule would sharply limit Congress's ability to regulate in a host of domains—such as environmental protection, civil rights, and freedom of speech—where the harms suffered by ordinary people might not always be calculable in precise dollar amounts. That is why the Court has long recognized injury to a wide range of non-pecuniary interests as sufficient to support Article III standing, including denial of a statutory right to access information, *Public Citizen v. U.S. Department of Justice,* 491 U.S. 440, 449 (1989), interference with an interest in living in a racially integrated community, *Trafficante v. Metropolitan Life Insurance Co.,* 409 U.S. 205, 208–12 (1972), and restrictions on free speech, *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984). Circuit courts have likewise recognized that infringement of non-pecuniary interests can support standing, such as architectural barriers confronted by a person with a disability, *Doran v.*

7-Eleven, Inc., 524 F.3d 1034, 1042–44 (9th Cir. 2008), and interference with playing the music of a nightclub owner's choice, *RK Ventures, Inc. v. City of Seattle,* 307 F.3d 1045, 1055 (9th Cir. 2002). Even the petitioner in *Spokeo* conceded that injury in fact "can take the form of pecuniary loss *or* nonpecuniary injuries that are concrete, such as loss of enjoyment of public resources and discriminatory treatment." Reply Brief for Petitioner at 4, *Spokeo, Inc. v. Robins,* No. 13-1339 (S. Ct. Sep. 30, 2015) (emphasis in original).

Moreover, "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important." *Spokeo,* 136 S. Ct. at 1549. Ms. Lenz's claim is based on injury to a statutory right expressly created by Congress. 17 U.S.C. § 512(f). Section 512(f) grants standing to any person "who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation *in removing or disabling access* to the material or activity claimed to be infringing." *Id.* (emphasis added). Ms. Lenz thus suffered precisely the type of injury that Congress, exercising its "well positioned" judgment, concluded should give rise to a cause of action under 17 U.S.C. § 512(f). *See Spokeo,* 136 S. Ct. at 1549.

While the Court last term did hold that statutory rights are still subject to the constitutional requirement of a concrete injury, that only means that Ms. Lenz could not rest on a "bare procedural violation" of 17 U.S.C. § 512(f) that was unaccompanied by concrete harm. *See id.* But Ms. Lenz's claim is not based on a bare violation of a statute; she has offered proof of a violation that led to her video

(which she filmed, to which she holds copyright, and which featured her children) being actually (not hypothetically or potentially) disabled for weeks. She had to expend personal effort and ultimately retain counsel to have the video restored. 1SER 94–97, 100 ¶¶ 6–7.

What is more, Universal misrepresents the record. Based on her own efforts and her retention of counsel to assist her, Ms. Lenz *has* suffered economic harms. *Id.; see also* Appellee and Cross-Appellant's Answering and Opening Br. on Cross-Appeal 63–65 (9th Cir. Dec. 6, 2013). That her counsel represented and represents her *pro bono* changes nothing—a person can "incur" legal fees if they have "a contingent obligation to repay the fees in the event of their eventual recovery." *Morrison v. Comm'r of Internal Revenue*, 565 F.3d 658, 662 (9th Cir. 2009); *see also* 8ER 1439–40 (retainer agreement).

By any measure, Ms. Lenz has suffered a concrete and particularized injury. This case therefore is a poor vehicle for addressing a question that assumes the *lack* of such injury.[2]

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2. In an *amicus* brief, the Recording Industry Association of America argues that the Court should grant Universal's petition on standing so that it can vacate the Ninth Circuit's ruling that the DMCA requires senders of takedown notices to consider fair use. *See* RIAA Br. 4–5, 20–25. This argument should be rejected for two reasons. *First*, it ignores the fact that Lenz did suffer a particularized injury and that this case therefore does not raise Universal's proposed question. *Second*, it ignores clear statutory text providing that a fair use is a use that is authorized by the law. *See* 17 U.S.C. § 107 ("the fair use of a copyrighted work . . . is not an infringement of copyright"). This means that to form "a good faith belief that use of the material . . . is not authorized by . . . the

II. Ms. Lenz seeks damages for attorneys' fees for work done before and during this lawsuit, and thus this case is a poor vehicle for addressing when nominal damages are a sufficient remedy to support standing under Article III.

The other issue framed by Universal in its petition is whether a plaintiff who has suffered no actual injury has standing under Article III to seek "nominal damages." Pet. i. This case is a poor vehicle for answering that question as well, because Ms. Lenz seeks more than nominal damages.

First, Ms. Lenz seeks damages for *pro bono* attorneys' fees for pre-litigation legal work in response to Universal's DMCA takedown notice. App. 78a. Section 512(f) provides that one who knowingly materially misrepresents under the DMCA that material is infringing "shall be liable for *any damages,* including *costs and attorneys' fees,* incurred by the alleged infringer . . . ." 17 U.S.C. § 512(f) (emphases added). Ms. Lenz seeks $1275 for work done by *pro bono* counsel prior to the lawsuit. App. 78a. The district court held that "[i]t may be that Lenz may recover the *pro bono* fees as an element of damages if she prevails on her DMCA claim." App. 78a–79a. Although the circuit court held that nominal damages would suffice to support standing, it did not reject the district court's holding, instead concluding only that it need not decide the issue yet. App. 21a.

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law," under § 512(c)(3)(A)(v), a party must consider the doctrine of fair use. The majority and the dissent at the Ninth Circuit, as well as the district court, correctly reached this conclusion. *See* App. 12a–13a, 23a, 72a.

Second, Ms. Lenz also seeks damages for *pro bono* counsel's fees for work in this lawsuit, consistent with Section 512(f)'s statement that damages include "costs and attorneys' fees." 17 U.S.C. § 512(f). Again, the circuit court deferred decision of whether such fees are recoverable as damages, holding that it need not yet "decide the scope of recoverable damages, i.e., whether she may recover expenses following the initiation of her § 512(f) suit or pro bono costs and attorneys' fees, both of which arose as a result of the injury incurred." App. 21a.

Because the courts below have not held that Ms. Lenz is only entitled to nominal damages, this case is a poor vehicle for deciding when nominal damages are a sufficient remedy to support Article III standing. For this reason as well, Universal's petition should be denied.

III. *Spokeo* implicitly overruled any authority holding that a constitutional violation is necessary before nominal damages are available to vindicate statutory rights, and thus there is no need to grant *certiorari* to address a circuit split.

Even if Ms. Lenz were relying solely on nominal damages, there is yet another reason to deny this Petition: contrary to Universal's contention, there is no circuit split. Pet. 15–17. Any pre-*Spokeo* authority arguably holding that constitutional harm is required in order for nominal damages to justify standing is no longer good law. In *Spokeo,* the Court confirmed that the common law "has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure," and held that violation of a procedural right granted by statute can likewise constitute injury in fact. 136 S.

Ct. at 1549. Article III nothwithstanding, "a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified." *Id.* (emphasis in original). The Court made no mention of a requirement of constitutional harm, and indeed cited two of its prior decisions finding standing without any consideration of whether there was a constitutional violation. *Id.* at 1549–50 (citing *Federal Election Comm'n v. Akins,* 524 U.S. 11, 20–25 (1998) (challenge to interpretation of the Federal Election Campaign Act of 1971), and *Pub. Citizen v. U.S. Dep't of Justice,* 491 U.S. 440, 449 (1989) (challenge to interpretation of the Federal Advisory Committee Act)).

Spokeo itself involved a federal statutory right, without any claimed constitutional violation. The Court noted that where a claim is based on a procedural violation, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." 136 S. Ct. at 1549. The Court further noted that Congress's decision to create a cause of action is "also instructive and important." *Id.* The Court confirmed its statement in *Lujan* that Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Id.* (quoting 504 U.S. at 578).

A constitutional harm would not have been "previously inadequate," and thus the Court's citation in *Spokeo* to *Lujan* must be understood as referring to a non-constitutional injury. Thus the Court's reaffirmation that Congress, through legislation, can make a "previously inadequate" injury one that passes muster under Article III compels the conclusion that, even in the absence of

a constitutional violation, nominal damages can support standing for statutory violations. Any arguably contrary pre-*Spokeo* circuit authority, *see* Pet. 16–17, is no longer good law. The circuit split Universal attempts to identify in its petition is therefore illusory, and not a basis for granting *certiorari.*

IV. The circuit court's opinion is fully consistent with *Spokeo,* and thus the Court should not grant, vacate and remand for further consideration in light of that decision.

The facts in this case are wholly unlike those that were before the Court in *Spokeo.* The question presented in *Spokeo* was "[w]hether Congress may confer Article III standing upon a plaintiff who suffers *no concrete harm*" based on a "*bare violation* of a federal statute." Petition for a Writ of Certiorari at i, *Spokeo, Inc. v. Robins*, No. 13-1339 (S. Ct. May 1, 2014) (emphases added). As discussed above, Ms. Lenz has suffered a concrete harm particular to herself, and thus is proceeding based on more than a bare violation of a statute.

The record in *Spokeo* was very different. Thomas Robins claimed that Spokeo had published inaccurate information about him in violation of the Fair Credit Reporting Act. 136 S. Ct. at 1546. He alleged no injury beyond this statutory violation; he did not allege that anyone acted in reliance on this false information. *See* Transcript of Oral Argument at 36:26–37:21, *Spokeo, Inc. v. Robins*, No. 13-1339 (S. Ct. Nov. 2, 2015). If Universal had sent a false takedown notice to YouTube but nothing more had happened, this case might be analogous to *Spokeo.* On those facts Ms. Lenz's suit would be based on

a bare misrepresentation without further effect. But those are not the facts. Instead, Universal's misrepresentation led YouTube to disable access to *her* video, and her video remained disabled for over six weeks.

Moreover, Universal erroneously argues that the Court held that for a violation of a statutory right to constitute injury in fact, "the violation itself" must be one that "imposes a concrete harm, such as a denial of access to information, for which the law can provide a remedy." Pet. 24 (citing *Spokeo,* 136 S. Ct. at 1549–50). First, Ms. Lenz's case does not present that issue, because she *did* suffer a concrete harm when her video was disabled for over six weeks. Second, the Court held that where "harms may be difficult to prove or measure," the plaintiff "need not allege any *additional* harm beyond the one Congress has identified" in order to have standing under Article III. *Spokeo,* 136 S. Ct. at 1549. Here, the circuit court expressly recognized that Ms. Lenz suffered at least "an unquantifiable harm" due to Universal's actions. App. 19a. Under the Court's holding in *Spokeo,* Article III does not require Ms. Lenz to show any further harm than the wrongful censoring of her video.

Neither is there is any purpose in remanding so that the circuit court can consider whether an analogy to common law supports standing here. *See* Pet. 24. The circuit court *already* analogized Section 512(f) to common law actions in which nominal damages are available. App. 20a.

Nor did the circuit court miss Universal's argument that common law misrepresentation claims require monetary loss. *See* Pet. 25. First, Section 512(f) expressly

includes attorneys' fees in its definition of damages, and Ms. Lenz seeks fees as part of her remedy. Second, the circuit court held that Congress's decision to allow for "any" damages, rather than limiting Section 512(f) to monetary losses, overrode any common law limitation on damages. App. 19a. Congress was free to "elevat[e] to the status of legally cognizable injuries" concrete but non-monetary harm that might have been "inadequate in law" under the common law. *Spokeo,* 136 S. Ct. at 1549 (quoting *Lujan,* 504 U.S. at 578).

The circuit court's rejection of Universal's argument that Ms. Lenz lacks standing is entirely consistent with the Court's decision in *Spokeo.* Granting the petition, vacating and remanding for further consideration thus would serve no purpose.

CONCLUSION

Universal's question presented is based on two predicate assumptions—a lack of concrete and particularized injury, and a remedy limited to nominal damages. The first predicate is absent in this case. The second predicate ignores Ms. Lenz's damages both for efforts necessary to restore her video, and for the prosecution of this lawsuit—claims that have not yet been fully adjudicated by the courts below. This case therefore is the wrong choice to address the question presented. Universal's petition should be denied.

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