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

REPLY BRIEF FOR THE PETITIONERS

KELLY M. KLAUS
MELINDA LEMOINE
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100

MARK E. HADDAD*
PETER I. OSTROFF
ROLLIN A. RANSOM
MICHELLE B. GOODMAN
COLLIN P. WEDEL
AMANDA R. FARFEL
SIDLEY AUSTIN LLP
555 W Fifth Street
Los Angeles, CA 90013
(213) 896-6000
mhaddad@sidley.com

Counsel for Petitioners

* Counsel of Record

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INTRODUCTION

In its petition, Universal identified two circuits that hold, contrary to the Ninth Circuit's decision below, that an uninjured litigant may not challenge a purely statutory violation by seeking nominal damages. Universal also explained that this case is an appropriate vehicle to resolve that conflict. The panel's decision imposes a new duty upon copyright owners to evaluate fair use before sending takedown notices, which is a change in public law that an uninjured party otherwise could obtain only from Congress. This case thus aptly illustrates why Article III's case or controversy requirement is fundamental to the balance of judicial, congressional, and executive power.

In opposing the petition, Lenz does not dispute either the circuit conflict or the breadth of the decision below. Lenz argues instead that she did suffer particular and concrete harm because her video was censored and her pro bono lawyers incurred fees and costs. The Ninth Circuit did not credit these theories, however, and this Court's precedents foreclose them. A private party's decision not to host another party's speech is not censorship, and claims for attorneys' fees do not support standing.

Lenz contends that *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540 (2016), resolved *sub silentio* the circuit split on nominal damages. *Spokeo* involved statutory damages, however, which may permit an inference that Congress intended to elevate an injury previously inadequate under Article III to the status of a legally cognizable injury; that inference does not arise when Congress chooses not to provide statutory damages and a litigant seeks only nominal damages.

The question whether, in the absence of actual injury, a claim for nominal damages for a statutory violation suffices for standing is thus squarely presented here. At the very least, the Court should vacate and remand for further consideration in light of *Spokeo*, both because *Spokeo* states that a procedural violation of a federal statute is insufficient to establish standing, and because the Court's analysis in *Spokeo*, if applied here, would require reversal.

ARGUMENT

Lenz does not dispute that, in the Fifth Circuit or Eleventh Circuit, a plaintiff's claim for nominal damages to enforce a statutory right would have been dismissed for lack of standing. Although she baldly asserts that she did, in fact, suffer an actual injury that would support more than an award of nominal damages, Lenz fails to identify a single concrete harm to her that a court could redress. Far from supporting the decision below, *Spokeo* confirms the need for plenary review or, at a minimum, a remand.

1. Lenz identifies no intangible harm that satisfies Article III's requirements of an injury-in-fact and that a federal court could redress. Lenz argues that, by having had her video removed from YouTube for six weeks due to a claimed misrepresentation about fair use, she "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)." Opp. 6.

Lenz admits, however, that her video was re-posted on YouTube before she brought suit. See Opp. 2-3. Nowhere in her brief does she identify any relief that a court could order to redress the alleged intangible harm to her of having not been able, temporarily, to access her video on YouTube. Whether a federal court

has jurisdiction to hear a nominal damages claim when it cannot fashion any relief to address the alleged intangible harm is an important question recognized as warranting this Court's review. See Pet. 18-19. This Court should hold that where an intangible harm is neither constitutionally protected nor elevated to Article III status by, at a minimum, Congress's decision to allow awards of statutory damages, an inability to remedy the intangible harm independently defeats standing. *Id.* at 21.

The plain language of section 512(f) also requires more than a statutory violation to establish standing. Section 512(f) requires *an injury resulting from* a statutory violation. By its terms, section 512(f) provides a cause of action only to those who can show that they are "injured by" a misrepresentation in connection with a takedown or put-back; those so injured may sue for damages they "incur[] . . . as a result of" the takedown or put-back. 17 U.S.C. § 512(f). Congress could have chosen to provide a cause of action to every person whose online posting is taken down in violation of the statute. In section 512(f), Congress plainly chose not to do so.

Lenz cites *Doe* v. *Chao*, 540 U.S. 614, 624-25 (2004), for the proposition that an "individual subjected to an adverse effect has injury enough to open the courthouse door," Opp. 5. She argues that the temporary disabling of her video on YouTube was an "adverse effect" sufficient to establish standing. *Id.* This argument misreads both *Chao* and the DMCA.

The "adverse effect" in *Chao* referred not to any unsatisfactory event, but to a statutory term of art in the Privacy Act, 5 U.S.C. § 552a(g)(4), that this Court equated to Article III injury. Lenz thus gets the holding of *Chao* backwards. Rather than concluding that anyone who suffers an "adverse effect" has

standing, this Court held that Congress's "reference in § 552a(g)(1)(D) to 'adverse effect' acts as a term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing, and who may consequently bring a civil action without suffering dismissal for want of standing to sue." *Chao*, 540 U.S. at 624. Thus, under the Privacy Act, only those who satisfy the constitutional minimum of an injury-in-fact suffer an "adverse effect." *Id.* Lenz's claim that a subjectively perceived adverse effect is sufficient to create standing was thus found to be meritless in the very case Lenz cites.

In the DMCA, Congress reinforced the requirement of actual injury. By restricting private actions under section 512(f) only to those "injured by" a misrepresentation, Congress clearly invoked the requisites of Article III as a predicate to a lawsuit. Under Lenz's view, by contrast, the injury requirement is superfluous because, in her view, everyone who has had a video taken down under the DMCA—which amounts to millions of postings per month, see Br. of RIAA at 15—has suffered an Article III injury. If a temporary takedown or the costs to send a put-back request were sufficient to constitute injury, then there never would be a need to show "injury as a result" of the misrepresentation, because every statutory violation automatically would inflict an injury.

The "adverse effect" that Lenz claims as injury is, in reality, a critical component of the cooperative scheme that Congress purposefully designed. That scheme limits the monetary liability of otherwise qualifying service providers who take down noticed content for a period that presumptively lasts at least 10 business days. 17 U.S.C. § 512(g)(2)(C). Nothing in

the DMCA's language or history even hints that Congress, by creating this procedure, intended thereby to cause Article III injury.

Lenz's reliance on other decisions is equally misplaced. In each case she cites, the plaintiff sought concrete relief that a court had the power to award. See Opp. 5-6; see also *Public Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 449-51 (1989) (where plaintiffs "sought and were denied specific agency records" and continued to seek disclosure of those records, they had standing because they "might gain significant relief if they prevail in their suit"); *Sec'y of State of Md.* v. *Joseph H. Munson Co.*, 467 U.S. 947, 956-58 (1984) (where plaintiffs established that they had lost a contract as a result of the challenged statutory provision and were subject to its ongoing enforcement, they established harm that could be redressed through injunctive and declaratory relief); *Trafficante* v. *Metro. Life Ins. Co.*, 409 U.S. 205, 211-12 (1972) (where plaintiffs challenged specific acts of discrimination occurring in their apartment complex, and showed that, as residents, they would benefit from enforcement of the Civil Rights Act), *not followed on other grounds*, *Thompson* v. *N. Am. Stainless, LP*, 562 U.S. 170 (2011).

Lenz, by contrast, has no claim for injunctive relief. Pet. 9-10, 21 & n.8. As the petition explains, "[r]edress is sought *through* the court, but *from* the defendant." *Id.* at 21 (quoting *Hewitt* v. *Helms*, 482 U.S. 755, 761 (1987)). Nowhere does Lenz point to relief a court could order from Universal that would redress her non-existent injury.

Finally, Lenz characterizes the takedown of her video from YouTube as "censorship." Opp. 4, 12. This characterization is unavailing because, in the absence of state action, a takedown does not implicate her

First Amendment rights. See *United Bhd. of Carpenters & Joiners of Am., Local 610* v. *Scott*, 463 U.S. 825, 831-32 (1983) ("[A] conspiracy to violate First Amendment rights is not made out without proof of state involvement."); Pet. App. 19a n.5. Congress did not expect the takedown and counter-notification process to implicate a user's constitutional rights but only the user's contractual rights, if any, with an online service provider.[1] Lenz's contract with YouTube, in turn, established YouTube's right to remove and/or terminate content "at any time, without prior notice and at its sole discretion." Pet. App. 120a. An online service provider's decision to avail itself of a safe harbor from a private party's claim for infringement damages by temporarily disabling access to a video on the service provider's own site is not censorship and does not create standing in federal court.

Universal does not contend that a subscriber could never suffer a concrete and particular intangible injury incurred as a result of a misrepresentation leading to a takedown. But Article III and section 512(f) require a litigant to establish such an injury. Lenz has not done so.

2. Lenz alternatively asserts that she suffered pecuniary harm. But she identifies no such economic harm that she herself suffered. Rather, she "seeks damages for *pro bono* attorneys' fees for pre-litigation legal work" and "for work in this lawsuit." Opp. 8, 9.

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[1] The Senate Report accompanying the DMCA stated that "the service provider contract, rather than any common law property interest, would appear to be the yardstick of the Internet user's property interest in continued access [and] [t]he contract for Internet service, therefore, can limit any property interest that would form the basis of a procedural due process claim." S. Rep. No. 105-109, at 21 (1998).

As the fee agreement she cites makes clear, her pro bono counsel will not recover their fees or costs unless Lenz recovers them in a lawsuit; Lenz herself has no obligation to pay those fees or costs. See *id.* at 7 (citing fee agreement); 8 ER 1439-42. That Lenz's counsel chose to invest resources in this case is thus a *benefit* to Lenz, not a particular and concrete injury to her.

Even if Lenz had paid for counsel out of her own pocket, that still would be insufficient to confer standing. See Pet. 19-20; see also *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit."); *Chao*, 540 U.S. at 625 n.9 (rejecting "analysis [that] would treat costs and fees as the recovery entitling a plaintiff to minimum damages" because "it would get the cart before the horse"). This Court's precedents foreclose Lenz's claim of pecuniary injury based on her counsel's expenses.

Lenz cites no contrary lower court authority. The Ninth Circuit did not credit Lenz's arguments about pecuniary harm,[2] holding instead (and consistent with *Chao*) that attorneys' fees issues arise after a plaintiff secures a judgment. Pet. App. 21a. The Eleventh Circuit and Fifth Circuit expressly hold that a prospect of attorneys' fees does not establish standing to bring a nominal damages claim. See *La. ACORN Fair Hous.* v. *LeBlanc*, 211 F.3d 298, 304-06 (5th Cir. 2000); *Walker* v. *Anderson Elec. Connectors*, 944 F.2d 841, 846-47 (11th Cir. 1991). Even the Ninth

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[2] *See* Appellee and Cross-Appellant's Answering and Opening Br. on Cross-Appeal at 57-65, No. 13-16106 (9th Cir. Dec. 6, 2013) (Dkt. No. 40) (arguing that attorneys' fees constitute pecuniary injury).

Circuit decision on which Lenz relies, *Morrison* v. *Comm'r*, 565 F.3d 658 (9th Cir. 2009), which discusses only the availability of fees to a "prevailing party" after "a judgment or a settlement," *id.* at 660, expresses caution about awarding fees incurred by a third party. *Morrison* acknowledges that recovery of fees would be inappropriate where there is "a concern that awarding fees to a petitioner whose fees have been paid by a third party will encourage 'straw-man' litigation, in which a third party that does not qualify for an award will go in search of a plaintiff who does and bring suit in that person's name." *Id.* at 665. That concern is apposite here.

3. Finally, Lenz argues that *Spokeo* implicitly resolves the circuit conflict over whether an uninjured plaintiff may vindicate a statutory violation by seeking nominal damages. Opp. 9-10. *Spokeo* could not have implicitly resolved this issue in Lenz's favor, because *Spokeo* did not address nominal damages. In the statute at issue in *Spokeo*, Congress provided for an award of statutory damages as an alternative to proof of actual damages. Such a remedy provides a reasonable basis for inferring that, at least in Congress's view, a statutory violation may cause an actual injury that merits compensation even if the plaintiff cannot quantify the injury. See Pet. 26-27 & n.11. The Court never had occasion in *Spokeo* to consider whether a comparable inference about Congress's view may be drawn for a statute like the DMCA, where Congress has declined to provide a remedy of statutory damages.[3]

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[3] *See* Pet. 26 (explaining that Congress did not adopt an earlier version of the DMCA that would have awarded statutory damages under a draft provision that later became section 512(f)); S. 1146, 105th Cong., sec. 102(a), § 512(b)(4) (1997).

Lenz also argues that the Ninth Circuit's opinion is "fully consistent" with *Spokeo*. Opp. 11. But this argument largely depends on Lenz's claim of having suffered an injury. Lenz offers no response to the plain statement in *Spokeo* that "a bare procedural violation, divorced from any concrete harm," will not "satisfy the injury-in-fact requirement." *Spokeo*, 136 S. Ct. at 1549. Lenz asserts that a remand is unnecessary because the Ninth Circuit already considered "whether an analogy to common law supports standing here." Opp. 12. But the Ninth Circuit did not consider the implications of the common law requirement that a cause of action for misrepresentation be supported by proof of actual loss, and had it done so, it would have concluded that Lenz suffered no actual loss. See Pet. 24-25. And the Ninth Circuit certainly did not analyze the language of the DMCA in light of the considerations that *Spokeo* identifies as critical. See *id.* at 26-28. Had the Ninth Circuit conducted the careful analysis that *Spokeo* requires, Lenz's suit would have been dismissed for lack of standing.

CONCLUSION

For the foregoing reasons and those stated in the petition, Universal's petition for a writ of certiorari should be granted.

Respectfully submitted,

KELLY M. KLAUS
MELINDA LEMOINE
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100

MARK E. HADDAD*
PETER I. OSTROFF
ROLLIN A. RANSOM
MICHELLE A. GOODMAN
COLLIN P. WEDEL
AMANDA R. FARFEL
SIDLEY AUSTIN LLP
555 W Fifth Street
Los Angeles, CA 90013
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mhaddad@sidley.com

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