

No. 16-

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IN THE  
**Supreme Court of the United States**

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

v.

STEPHANIE LENZ,  
*Respondent,*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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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*

August 12, 2016

\* Counsel of Record

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## **QUESTION PRESENTED**

Whether a plaintiff who alleges a statutory violation but no concrete or particularized injury has standing under Article III to seek a remedy of nominal damages?

## **PARTIES TO THE PROCEEDINGS**

All parties to the proceeding below are listed in the caption.

### **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.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
PARTIES TO THE PROCEEDINGS .....	ii
RULE 29.6 STATEMENT .....	ii
TABLE OF AUTHORITIES .....	v
OPINIONS BELOW .....	1
JURISDICTION .....	1
STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	2
I. STATUTORY BACKGROUND.....	3
II. FACTUAL AND PROCEDURAL HIS- TORY .....	5
A. Factual Background And District Court Proceedings .....	5
B. Appeal To The Ninth Circuit.....	9
REASONS FOR GRANTING THE PETITION...	11
CONCLUSION .....	28
APPENDICES	
APPENDIX A: <i>Lenz v. Univ. Music Corp.</i> , 815 F.3d 1145 (9th Cir. 2016) .....	1a
APPENDIX B: <i>Lenz v. Univ. Music Corp.</i> , 801 F.3d 1126 (9th Cir. 2015) .....	29a
APPENDIX C: <i>Lenz v. Univ. Music Corp.</i> , No. 5:07-cv-03783 (N.D. Cal. Jan. 24, 2013) (order denying summary judgment) .....	59a
APPENDIX D: <i>Lenz v. Univ. Music Corp.</i> , 572 F. Supp. 2d 1150 (N.D. Cal. 2008) .....	80a

TABLE OF CONTENTS—continued

	Page
APPENDIX E: Second Amended Complaint, <i>Lenz v. Univ. Music Corp.</i> , No. C 07-cv-03783 (N.D. Cal. Apr. 18, 2008) .....	93a
APPENDIX F: <i>Lenz v. Univ. Music Corp.</i> , No. C 07-cv-03783 (N.D. Cal. Apr. 8, 2008) (order granting motion to dismiss) .....	145a
APPENDIX G: Federal Statute.....	157a

## TABLE OF AUTHORITIES

CASES	Page
<i>Alexander v. Riga</i> , 208 F.3d 419 (3d Cir. 2000) .....	15
<i>Azimi v. Jordan’s Meats, Inc.</i> , 456 F.3d 228 (1st Cir. 2006).....	15, 16
<i>Barker v. Niles Bolton Assocs.</i> , 316 F. App’x 933 (11th Cir. 2009) .....	17
<i>Bernhardt v. Cty. of L.A.</i> , 279 F.3d 862 (9th Cir. 2002) .....	15
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994) .....	22
<i>Carey v. Phipus</i> , 435 U.S. 247 (1978) .....	<i>passim</i>
<i>Clapper v. Amnesty Int’l USA</i> , 133 S. Ct. 1138 (2013) .....	20
<i>Diamond v. Charles</i> , 476 U.S. 54 (1986) .....	21
<i>Douglas v. Cunningham</i> , 294 U.S. 207 (1935) .....	27
<i>Draper v. Coombs</i> , 792 F.2d 915 (9th Cir. 1986) .....	15
<i>Dura Pharm., Inc. v. Broudo</i> , 544 U.S. 336 (2005) .....	13, 25
<i>F.W. Woolworth Co. v. Contemporary Arts, Inc.</i> , 344 U.S. 228 (1952) .....	27
<i>Farrar v. Hobby</i> , 506 U.S. 103 (1992) .....	20
<i>Frothingham v. Mellon</i> , 262 U.S. 447 (1923) .....	25
<i>Gladstone, Realtors v. Vill. of Bellwood</i> , 441 U.S. 91 (1979) .....	25
<i>Hamad v. Woodcrest Condo. Ass’n</i> , 328 F.3d 224 (6th Cir. 2003) .....	16
<i>Henry v. City of Rock Hill</i> , 376 U.S. 776 (1964) .....	23
<i>Hewitt v. Helms</i> , 482 U.S. 755 (1987) .....	21
<i>Keene Corp. v. United States</i> , 508 U.S. 200 (1993) .....	27

## TABLE OF AUTHORITIES—continued

	Page
<i>Laird v. Tatum</i> , 408 U.S. 1 (1972).....	20
<i>Lewin v. Cooke</i> , 28 F. App'x 186 (4th Cir. 2002).....	16
<i>La. ACORN Fair Hous. v. LeBlanc</i> , 211 F.3d 298 (5th Cir. 2000).....	16, 17
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	19
<i>MedImmune, Inc. v. Genentech, Inc.</i> , 549 U.S. 118 (2007).....	19
<i>Memphis Cmty. Sch. Dist. v. Stachura</i> , 477 U.S. 299 (1986).....	10, 11, 14, 15
<i>O'Connor v. Washburn Univ.</i> , 416 F.3d 1216 (10th Cir. 2005).....	18
<i>Praise Christian Ctr. v. City of Huntington Beach</i> , 352 F. App'x 196 (9th Cir. 2009)....	15
<i>Schlesinger v. Reservists Comm. to Stop the War</i> , 418 U.S. 208 (1974).....	3, 28
<i>Sierra Club v. Morton</i> , 405 U.S. 727 (1972).....	21
<i>Spokeo, Inc. v. Robins</i> , 136 S. Ct. 1540 (2016).....	<i>passim</i>
<i>Steel Co. v. Citizens for a Better Env't</i> , 523 U.S. 83 (1998).....	20
<i>Texas v. Lesage</i> , 528 U.S. 18 (1999).....	15
<i>Thomas v. Am. Home Prods., Inc.</i> , 519 U.S. 913 (1996).....	23
<i>Tyler v. Cain</i> , 533 U.S. 656 (2001).....	23
<i>Utah Animal Rights Coal. v. Salt Lake City Corp.</i> , 371 F.3d 1248 (10th Cir. 2004).....	18
<i>Viacom Int'l, Inc. v. YouTube, Inc.</i> , 676 F.3d 19 (2d Cir. 2012).....	23
<i>Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens</i> , 529 U.S. 765 (2000).....	20
<i>Walker v. Anderson Elec. Connectors</i> , 944 F.2d 841 (11th Cir. 1991).....	16, 17

## TABLE OF AUTHORITIES—continued

STATUTES	Page
Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075...	27
Online Copyright Infringement Liability Limitation Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).....	2, 26
17 U.S.C. § 504(c).....	27
§ 507(b).....	21
§ 512.....	<i>passim</i>
§ 1203(c)(1)(A).....	10
42 U.S.C. § 3601 <i>et seq.</i> .....	17
LEGISLATIVE HISTORY	
S. 1146, 105th Cong. (1997).....	26
<i>WIPO Copyright Treaties Implementation Act; And Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary, 105th Cong. (1997).....</i>	5
S. Rep. No. 105-190 (1998).....	<i>passim</i>
H.R. Rep. No. 105-551, pt. 2 (1998).....	3, 4
SCHOLARLY AUTHORITIES	
John G. Roberts, Jr., <i>Article III Limits on Statutory Standing</i> , 42 Duke L.J. 1219 (1993).....	12
Antonin Scalia, <i>The Doctrine of Standing as an Essential Element of the Separation of Powers</i> , 17 Suffolk U. L. Rev. 881 (1983).....	22
OTHER AUTHORITIES	
Restatement (Second) of Torts (1979).....	25

TABLE OF AUTHORITIES—continued

	Page
David Price, NetNames, <i>Sizing the Piracy Universe</i> (2013), <a href="http://www.netnames.com/Sizing_the_piracy_universe/download-the-report">http://www.netnames.com/Sizing_the_piracy_universe/download-the-report</a> .....	23

## **PETITION FOR A WRIT OF CERTIORARI**

Petitioners Universal Music Corp., Universal Music Publishing, Inc., and Universal Music Publishing Group (collectively, “Universal”) respectfully request that this Court grant the petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit.

### **OPINIONS BELOW**

The district court’s order granting Universal’s motion to dismiss the amended complaint (App. 145a-156a) is unreported. The district court’s order and opinion denying Universal’s motion to dismiss the second amended complaint (App. 80a-92a) is reported at 572 F. Supp. 2d 1150 (N.D. Cal. 2008). The district court’s opinion and order denying the parties’ cross-motions for summary judgment (App. 59a-79a) is unreported. The Ninth Circuit’s opinion and order affirming the district court (App. 29a-58a) is reported at 801 F.3d 1126. The Ninth Circuit’s order amending the opinion and dissent and denying Universal’s Petition for Panel Rehearing and Respondent’s Petition for Rehearing En Banc or Panel Rehearing (App. 1a-28a) is reported at 815 F.3d 1145.

### **JURISDICTION**

The Ninth Circuit entered judgment on September 14, 2015. App. 29a-58a. That court ordered amendments to the opinion and dissent and denied panel rehearing and rehearing en banc on March 17, 2016. App. 1a-28a. On May 20, 2016, Justice Kennedy issued an order extending the time for each party to file a petition for certiorari to August 12, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The provisions of 17 U.S.C. § 512 are reproduced at App 157a-174a.

## STATEMENT OF THE CASE

Whether a plaintiff, in the absence of actual injury, may seek nominal damages to vindicate a purely statutory violation, is an issue fundamental to the scope of Article III jurisdiction and the balance of judicial, congressional, and executive power.

The issue also divides the circuits. In *Carey v. Piphus*, 435 U.S. 247, 266 (1978), this Court held that “the denial of procedural due process should be actionable for nominal damages without proof of actual injury.” The Fifth and Eleventh Circuits refuse to extend *Carey* to purely statutory violations. Those circuits apply *Carey*’s rationale—that nominal damages are available to an uninjured litigant to vindicate a right that is “absolute” and of “importance to organized society” (*id.*)—only to constitutionally protected rights. In contrast, the First, Third, Sixth, and Ninth Circuits routinely extend *Carey* to statutory violations.

This case presents a compelling vehicle for addressing this important issue and resolving the conflict. The Ninth Circuit’s expansive holding grants uninjured individuals standing to sue for nominal damages for procedural violations of the Digital Millennium Copyright Act (or Online Copyright Infringement Liability Limitation Act), Pub. L. No. 105-304, 112 Stat. 2860 (1998) (“DMCA”). The decision below violates core separation-of-powers principles by engaging the judiciary in adjudicating alleged violations at the behest of a party who suffered no actual injury. And by imposing a

sweeping new obligation on all copyright holders to consider fair use before sending a takedown notice, the decision defeats a fundamental goal of the Act: to provide copyright holders an efficient means to respond to infringing material posted online. This Court should grant Universal's petition to reconcile the split and to prevent "a complainant who has no concrete injury [from] requir[ing] a court to rule on important [copyright] issues [and, in the process] distort[ing] the role of the Judiciary in its relationship to the Executive and the Legislature." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974).

## I. STATUTORY BACKGROUND

Congress enacted the DMCA in 1998 to address the unique challenges that the digital era poses to copyright protection. H.R. Rep. No. 105-551 pt. 2, at 9, 21 (1998). The DMCA advances the "mutually supportive" dual priorities of "promoting the continued growth and development of electronic commerce; and protecting intellectual property rights." *Id.* at 23. The law was passed after five years of intensive legislative investigation, reflected in a voluminous record. S. Rep. No. 105-190, at 3 (1998).

Title II addresses the liability of online service providers (OSPs) for copyright infringement that occurs online. *Id.* at 20. Congress recognized that the inevitable popularity of online sites for hosting and linking to copyrighted content would create the need for a streamlined and structured process for dealing with online copyright infringement. Thus,

Title II preserves 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. At the same time, it provides greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.

*Id.*

Codified at 17 U.S.C. § 512, Title II achieves these objectives not by creating incentives to litigate in federal court, but through a comprehensive scheme of shared responsibility between copyright holders and OSPs “to deal efficiently with network-based copyright infringement.” H.R. Rep. No. 105-551, pt. 2, at 54; see 17 U.S.C. § 512(c), (g). To address the interests of copyright holders, and in particular their “need for a rapid response to potential infringement,” section 512(c) establishes a “notice and take-down” procedure. If a copyright holder provides an OSP with notice that material residing on its site is infringing, the OSP must “expeditiously” remove or disable access to that material in order to maintain its claim to a “safe harbor” from monetary liability for storing or transmitting that material. 17 U.S.C. § 512(c)(1)(C), (c)(3); S. Rep. No. 105-190, at 21.

On the other hand, to address the “legitimate interests” of internet users “in not having material removed without recourse,” section 512(g) establishes a counter notification and put-back procedure, which obligates OSPs to restore material promptly upon receipt of a user’s counter-notification. S. Rep. No. 105-190, at 21.<sup>1</sup>

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<sup>1</sup> When S. Rep. No. 105-190 was drafted, the putback procedure was then in § 512(f) of the proposed law; the precursor to what is now § 512(f) (the remedial provision for injured parties) was in § 512(e). The quoted “without recourse” language referred to the putback procedure. See S. Rep. No. 105-190, at 49-50.

Finally, section 512(c) limits an OSP's liability when the OSP meets a number of statutory requirements, including, inter alia, responding "expeditiously" to takedown requests. 17 U.S.C. § 512(c)(1); S. Rep. No. 105-190, at 21. This cooperative process "safeguard[s] the ability of copyright owners to protect their exclusive rights in an on-line environment," which is essential to "minimize infringement and expand the Internet as a medium for exploiting copyrighted works."<sup>2</sup>

Section 512 contemplates litigation in two circumstances. First, if a copyright holder disputes a counter-notification, the copyright holder may notify the OSP within a specified time that it has sued the alleged infringer—at which point the OSP must keep the underlying material down in order to maintain its safe-harbor eligibility. 17 U.S.C. § 512(g)(2). Second, a party "injured by" a knowing and material misrepresentation may sue for damages that party "incur[s] . . . as the result of" the takedown or putback of material in reliance on that misrepresentation. *Id.* § 512(f).

## II. FACTUAL AND PROCEDURAL HISTORY

### A. Factual Background And District Court Proceedings

On February 8, 2007, Respondent Stephanie Lenz uploaded a video to YouTube, an OSP that hosts user-generated content. App. 60a, 81a. The 29-second posting features Lenz's two young children dancing to the song *Let's Go Crazy* by Prince, with Lenz's voice

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<sup>2</sup> *WIPO Copyright Treaties Implementation Act; And Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2280 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary, 105th Cong. 53 (1997) (statement of Marybeth Peters, Copyright Office).*

asking her son “what do you think of the music?” *Id.* On June 5, 2007, Lenz received an email from YouTube notifying her that it had removed her posting pursuant to a June 4, 2007, notification from Universal. *Id.* at 5a, 60a-61a. Lenz sent YouTube a counter notification on June 27, 2007, pursuant to the DMCA scheme. *Id.* By mid-July 2007, YouTube had “put back,” or reinstated, the video. *Id.* at 61a.

On July 24, 2007, Lenz filed suit against Universal seeking injunctive relief and damages for misrepresentation of copyright claims under section 512(f) of the DMCA (Count 1) and intentional interference with contract (Count 2), and a declaration of non-infringement (Count 3). App. 83a. On August 15, 2007, she amended her complaint to revise the names of the defendants. *Id.* at 147a.

On April 8, 2008, the district court granted Universal’s motion to dismiss, and permitted leave to amend Counts 1 and 2. App. 156a. The court dismissed Count 3, which had sought a declaration that the posting did not infringe any copyright, for lack of subject-matter jurisdiction. *Id.* at 154a-155a. The court held that Lenz’s claim presented no case or controversy as to copyright infringement because “Universal did not file an infringement action, and YouTube restored Lenz’s video to its site, where it remains as of the date of this Order.” *Id.* at 155a. Furthermore, “Universal has indicated it had and presently has no intention of ever asserting an infringement action directly against Lenz based on the ‘Let’s Go Crazy’ video.” *Id.*

Lenz filed a Second Amended Complaint (“SAC”) on April 18, 2008. App. 93a-144a. The SAC alleges only a single claim, for misrepresentation under section 512(f). App. 93a. The SAC dropped the request for a declaration of non-infringement, but otherwise

sought the same relief as the FAC: injunctive relief restraining Universal from bringing any lawsuit or threat against Lenz for copyright infringement in connection with the posting, damages according to proof, costs, attorneys fees, and other just and proper relief. *Id.* at 101a-102a.

The SAC asserts that, as a direct and proximate result of Universal's action, Lenz suffered injury including, but not limited to, "the financial and personal expenses associated with responding to the claim of infringement and harm to her free speech rights under the First Amendment." App. 101a. It alleges that "[b]ecause Universal's notice was intimidating, Ms. Lenz is now fearful that someone might construe some portion of a new home video to infringe a copyright. As a result, she has not posted a single video on YouTube since she received the takedown notice." *Id.* The SAC incorporates an ABC News article which reports that although Lenz's video was restored by YouTube before she initiated the lawsuit, she "was angry, and she said she wasn't ready to let it go." *Id.* at 139a.

Universal moved to dismiss Lenz's SAC. In denying the motion, the court rejected Universal's argument that Respondent failed to allege injury resulting from the alleged misrepresentation, explaining that "[a]lthough damages may be nominal and their exact nature is yet to be determined, the Court concludes that Lenz adequately has alleged cognizable injury under the DMCA." App. 91a.

After Universal obtained discovery from Lenz concerning her allegations of injury in connection with the counter notification and this litigation, Universal and Lenz each moved for summary judgment. The court denied the cross-motions. App. 59a, 75a-79a. The court interpreted section

512(c)(3)(A)(v) to require a copyright owner to make, in good faith, a subjective assessment of whether the infringing material constituted a fair use before proceeding with a takedown notice under the DMCA, but rejected Lenz's argument that the test of compliance under section 512(f) was whether the copyright holder's assertion of no fair use was objectively reasonable. *Id.* at 71a-75a (relying on *Rossi v. Motion Picture Ass'n of Am., Inc.*, 391 F.3d 1000 (9th Cir. 2004)).<sup>3</sup>

In so holding, the court rejected Universal's arguments that a valid takedown notice did not require any assessment of fair use. App. 67a-71a. The court also rejected Universal's alternative argument that Universal had formed a subjective good faith belief on fair use as a matter of law by considering that Respondent posted her video on an ad-supported commercial site, that the posting bore a title that made it retrievable by a search for the popular Prince song it contained, and that the song was immediately recognizable and played throughout the posting. *Id.* at 68a-71a.

Finally, the district court held that section 512(f) did not require Lenz to prove substantial monetary damages, and that Lenz could proceed, because "[i]t may be that Lenz may recover the *pro bono* fees as an element of damages," and Lenz "must have incurred at least minimal expenses for electricity to power her computer, internet and telephone bills, and the like, that potentially could be recoverable under § 512(f)."

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<sup>3</sup> The court also rejected Lenz's alternative argument that summary judgment was appropriate under *Rossi's* subjective "good faith" standard because Universal willfully blinded itself to the possibility that her video constituted fair use. App. 72a-74a.

App. 78a-79a. The court then certified its opinion and order for interlocutory appeal. See *id.* at 6a.

### **B. Appeal To The Ninth Circuit**

The Ninth Circuit accepted the appeal and held that “a copyright holder must consider the existence of fair use before sending a takedown notification under § 512(c).” App. 12a-13a. A copyright holder complies with section 512(c) if it forms “a subjective *good faith* belief the allegedly infringing material does not constitute fair use . . . even if [the court] would have reached the opposite conclusion.” *Id.* at 15a.

The court of appeals then held that a failure to comply with this procedural requirement automatically subjects a copyright holder to liability under section 512(f). App. 15a. Because the thrust of Lenz’s claim is that “copyright holders have been abusing the extrajudicial takedown procedures . . . by declining to first evaluate . . . fair use,” *id.* at 2a-3a, the court of appeals issued its ruling in sweeping, near-strict-liability terms: “To be clear, if a copyright holder ignores or neglects our unequivocal holding that it must consider fair use before sending a takedown notification, it is liable for damages under § 512(f).” *Id.* at 15a.

Respondent did not incur any damages. Nevertheless, the court of appeals rejected Universal’s argument that a failure to prove monetary loss from a takedown precludes the finding of “injury” that section 512(f) expressly requires. App. 18a-19a. Instead, the court of appeals stated, “[w]e hold [that] a plaintiff may seek recovery of nominal damages for an injury incurred as a result of a § 512(f) misrepresentation.” *Id.* at 18a. As a result, even in the absence of a tangible loss, the Ninth Circuit

allowed Lenz to pursue “recovery of nominal damages due to an unquantifiable harm suffered as a result of Universal’s actions.” *Id.* at 19a.

The court of appeals found support for a nominal damages remedy in Congress’s use of the phrase “any damages” rather than “monetary relief”<sup>4</sup> or “actual damages.”<sup>5</sup> App. 18a-19a & n.4. In the court’s view, nominal damages awarded in the absence of economic loss are a category of damages within the scope of section 512(f). *Id.*

Quoting *Memphis Community School District v. Stachura*, 477 U.S. 299, 305 (1986) (and omitting that decisions citations to *Carey*), the panel then looked to antecedents in the common law to determine whether a violation of the takedown procedure could be “regarded as a kind of legal damage in itself.” App. 20a (quoting 3 Dan B. Dobbs et al., *The Law of Torts* § 480 (2d ed. 2011)). The panel analogized the sending of a takedown notice without first considering fair use to a non-“physical” intentional tort, such as “defamation” or “trespass,” which is actionable in a common law court through a claim for nominal damages even absent evidence of actual harm.<sup>6</sup> App. 18a-20a.

Judge Milan Smith dissented in part, expressing a view different than the panel as to the standard for when a violation of section 512(c)(3)(A)(v) constitutes

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<sup>4</sup> Section 512(k) defines “monetary relief” as “damages, costs, attorneys['] fees, and any other form of monetary payment.” 17 U.S.C. § 512(k)(2).

<sup>5</sup> Title I of the DMCA specifies recovery for “actual damages.” *Id.* § 1203(c)(1)(A).

<sup>6</sup> The court of appeals noted that “Lenz may not recover nominal damages for ‘impairment of free speech rights’” from a private actor. App. 19a n.5.

a misrepresentation actionable under section 512(f). App. 22a-28a. Both parties sought rehearing. *Id.* at 2a. The panel issued an amended opinion and dissent, and denied both petitions. *Id.*

### **REASONS FOR GRANTING THE PETITION**

This Court has held that a person who has not suffered actual injury may pursue nominal damages to vindicate an “absolute right” of importance to an “organized society.” *Carey v. Piphus*, 435 U.S. 247, 266 (1978); *Memphis Cmty.*, 477 U.S. at 308-09 & n.11 (construing *Carey*). Two circuits have confined *Carey* to alleged constitutional violations. At least four other circuits have extended *Carey* to violations of statutory rights.

This Court should grant plenary review. This case is an excellent vehicle for addressing the conflict because the Respondent here seeks only a symbolic vindication of a bare statutory right. The Ninth Circuit has ordered a jury trial on an alleged procedural violation—sending a takedown notice without first forming a subjective good faith belief that the infringing material was not a fair use—that can have no impact on Respondent’s rights with respect to her video. Her video was restored to the Internet before this lawsuit and there can be no future dispute between the parties over it. There is no relief that a court could order that would alter Universal’s conduct with respect to that video or to Lenz. The facts thus cleanly present the important constitutional question of whether a litigant’s claim for nominal damages allows a federal court to adjudicate a procedural violation of a federal statute.

The Ninth Circuit’s ruling allows anyone to file suit under section 512(f) to challenge a copyright holder’s takedown notice as procedurally deficient, thereby

entangling the judiciary in statutory enforcement generally, and distorting legislation designed to minimize the need for litigation to address online copyright infringement. Such a radical rewriting of a federal statute is irreconcilable with Article III and the separation of powers. See John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1229 (1993) (“The one thing it [Congress] may not do is ask the courts in effect to exercise such oversight responsibility at the behest of any John Q. Public who happens to be interested in the issue.”).

This case also merits review because the Ninth Circuit’s construction of the DMCA significantly undermines the ability of copyright holders to protect intellectual property from infringement online, and thus defeats a major purpose of the DMCA. The court of appeals’ sweeping reinterpretation of the DMCA imposes upon every copyright holder the onerous duty first to “consider the existence of fair use before sending a takedown notification under § 512(c).” App. 12a-13a. On top of that, the panel’s holding that a violation of section 512(c) causes “legal damage in itself” encourages and allows any person who receives a takedown notice to bring suit. That transforms what Congress envisioned as an efficient process for rapidly responding to online infringement into an engine of new federal court litigation.

At a minimum, this Court should vacate the panel’s decision and remand for re-examination of Lenz’s standing in light of the intervening decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). There, the Court held that “Article III standing requires a concrete injury even in the context of a statutory violation.” *Id.* at 1549. A plaintiff must show that the procedural violation was sufficient to “work” some “concrete harm,” *id.* at 1550, and “cannot satisfy the

demands of Article III by alleging a bare procedural violation,” *id.* Deciding whether a procedural violation supports standing requires, at a minimum, a more careful analysis of the common law and congressional intent than the panel’s analysis here. The most analogous common law claim—one for “misrepresentation”—is not actionable absent proof of “actual economic loss.” *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 343-44 (2005). Far from displacing Article III’s injury requirement, Congress reinforced it by limiting section 512(f) to damages “incurred” by a plaintiff who suffered “injury.” Absent such injury, a putback provides all the process that Congress intended to provide.

## I.

Whether nominal damages are available to vindicate statutory rights absent actual injury is a question of exceptional importance on which the circuit courts are divided. Because Lenz suffered no actual injury, this case presents an excellent vehicle to resolve the dispute. Plenary review is particularly warranted because of the panel’s sweeping judicial revision of the DMCA.

1. In *Carey v. Piphus*, the Court considered whether a deprivation of procedural due process alone could support an award of compensatory damages. 435 U.S. at 248. The Court noted that “[r]ights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect.” *Id.* at 254. The Court concluded that Congress intended a damage award under section 1983 to be governed by the “cardinal principle” of “*compensation* for the injury caused to plaintiffs by defendant’s breach of duty.” *Id.*

at 254-57. Because procedural due process protects persons from “the mistaken or unjustified deprivation of life, liberty, or property,” the Court held that a plaintiff can recover compensatory damages only after demonstrating actual injury resulting from the deprivation. *Id.* at 259-64.

The Court explained, however, that common-law courts recognized an exception to the compensation principle to vindicate “certain ‘absolute’ rights that are not shown to have caused actual injury through the award of nominal [damages].” *Id.* at 266-67. “By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed . . . .” *Id.* at 266. The Court then held that the constitutional right to procedural due process was an absolute right:

Because *the right to procedural due process is ‘absolute’* in the sense that it does not depend upon the merits of a claimant’s substantive assertions, and *because of the importance to organized society that procedural due process be observed*, we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.

*Id.* (emphases added) (citation omitted).

In *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), the Court held that a First Amendment violation that did not cause an actual injury could not support an award of compensatory damages. Instead, relying upon *Carey*, the court noted that nominal damages “are the appropriate means of ‘vindicating’ [certain ‘absolute’]

rights” where a plaintiff fails to demonstrate actual injury. *Id.* at 308 n.11.<sup>7</sup>

2. This Court has not addressed whether *Carey*’s cautious expansion of Article III jurisdiction to allow an uninjured plaintiff to vindicate an “absolute” constitutional right of “importance to organized society” should extend to the vindication of a federal statutory right. The court of appeals, however, did not hesitate to extend *Carey* in just this way. In this respect, the decision below is consistent with other Ninth Circuit decisions allowing uninjured parties to litigate alleged violations of federal statutes and implied federal rights through claims for nominal damages. See *Praise Christian Ctr. v. City of Huntington Beach*, 352 F. App’x 196, 198 (9th Cir. 2009) (nominal damages available for alleged statutory violation); *Bernhardt v. Cty. of L.A.*, 279 F.3d 862, 872 (9th Cir. 2002) (nominal damages available for interference with “implied federal right to obtain counsel in a civil rights action”); *Draper v. Coombs*, 792 F.2d 915, 921-22 (9th Cir. 1986) (nominal damages available in § 1983 action for violations of statutory and constitutional rights).

Other circuits also have extended *Carey*, holding that, absent actual injury, nominal damages are available to vindicate the violation of statutory rights. See, e.g., *Azimi v. Jordan’s Meats, Inc.*, 456 F.3d 228, 239 (1st Cir. 2006) (nominal damages are available under 42 U.S.C. § 1981a); *Alexander v. Riga*, 208 F.3d 419, 429 (3d Cir. 2000) (nominal

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<sup>7</sup> Cf. *Texas v. Lesage*, 528 U.S. 18, 20-21 (1999) (per curiam) (“[W]here a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983.”).

damages are available for violation of 42 U.S.C. § 3613(a)); *Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224, 237 (6th Cir. 2003) (nominal damages are available for violation of 42 U.S.C. § 3617).

At least two circuits, however, have refused to extend *Carey* beyond instances of an alleged violation of rights of constitutional magnitude. These circuits adhere to the rule that, absent actual injury, a person may not vindicate a purely statutory right through nominal damages. See *La. ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 304 (5th Cir. 2000); *Walker v. Anderson Elec. Connectors*, 944 F.2d 841 (11th Cir. 1991). The split has been acknowledged by the First and Fourth Circuits. See *Azimi*, 456 F.3d at 239 (holding that nominal damages are available for 42 U.S.C. § 1981a, but acknowledging that the Eleventh Circuit in *Walker* held that nominal damages should not be awarded for a Title VII claim); *Lewin v. Cooke*, 28 F. App'x 186, 194 (4th Cir. 2002) (per curiam) (citing *Walker* for point that “[i]t is less clear whether nominal damages are also available in § 1983 actions asserting statutory rights”).

In *Walker*, the Eleventh Circuit reviewed a district court's judgment that a plaintiff “recover nothing” after a jury returned a special verdict finding that defendant violated Title VII, but declining to award either compensatory or punitive damages. 944 F.2d at 843. The plaintiff argued that the district court committed plain error in refusing to award nominal damages for the violation of Title VII. The Eleventh Circuit disagreed, holding that where a plaintiff fails to show actual injury, “a violation of purely statutory rights” is insufficient to support recovery of nominal damages. *Id.* at 845. The court explained that the reasoning of *Carey* did not apply to cases involving non-constitutional rights: “Because we find that the

reasoning in *Carey* applies only to violations of constitutional magnitude, we decline Walker's invitation to extend the rationale of *Carey* to Title VII cases and affirm the district court's denial of Walker's post-trial motion for nominal damages." *Id.*

The Eleventh Circuit has since reemphasized *Walker's* limitation on the availability of nominal damages in the context of a Fair Housing Act ("FHA") violation. See *Barker v. Niles Bolton Assocs.*, 316 F. App'x 933, 943-44 (11th Cir. 2009) (reasoning that "[a]s in *Walker*, nominal damages are not required here because this case involves only a violation of statutory rights, not constitutional rights").

The same is true in the Fifth Circuit. In *Louisiana ACORN*, the court of appeals considered a violation of the FHA. 42 U.S.C. § 3601 *et seq.* The jury awarded the individual plaintiff punitive damages, but no nominal or compensatory damages. 211 F.3d at 300. The Fifth Circuit reversed the district court's punitive damages award and affirmed the district court's denial of nominal damages. *Id.* at 306. The court rejected plaintiffs' argument that the jury's finding of an FHA violation warranted nominal damages, holding that *Memphis Community* does not apply to a "case [that] does not involve the violation of a constitutional right." *Id.* at 304.

The circuits are thus in conflict over whether Article III jurisdiction extends to claims for nominal damages to vindicate purely statutory rights. Here, it is obvious that Universal's alleged violation of a newly created procedural obligation is not an "absolute right" of "constitutional magnitude" that is of importance to "organized society." Had Lenz filed this lawsuit in the Fifth or Eleventh Circuits, those courts would have dismissed it.

3. Other decisions underscore the importance of the question presented by calling for this Court to clarify when nominal damages are available absent actual injury.

In *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1262 (10th Cir. 2004) (McConnell, J., concurring), Judge McConnell, constrained by circuit precedent to find jurisdiction, authored a separate concurrence to his own panel opinion to question the viability of the *Carey* principle where a court's judgment can no longer affect the parties' original dispute. He observed that "the proposition that a claim for nominal damages automatically precludes mootness is inconsistent with fundamental principles of justiciability." *Id.* at 1263. "It is not enough that a plaintiff wishes to have the moral satisfaction of a judicial ruling that he was right . . . the relief sought must have legal effect in determining the present and future rights and obligations of the parties." *Id.* Because an award of nominal damages, like a "declaratory judgment," has no such legal effect, he reasoned, a claim for nominal damages alone should not render a dispute justiciable. *Id.* at 1265-66.

Given the gravity of the issue, Judge McConnell called on "either an *en banc* court or the Supreme Court" to "hold that a case that is otherwise nonjusticiable on account of mootness is not saved by the mere presence of a prayer for nominal damages." *Id.* at 1263. "[I]f appending a claim for nominal damages were sufficient to create standing or to avoid mootness, litigants could manufacture Article III jurisdiction by the mere expedient of pleading. . . . Article III justiciability should not be so manipulable." *Id.* at 1266; see *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1232-33 (10th Cir. 2005)

(Tymkovich, J., concurring) (citing Judge McConnell’s concurrence in *Utah Animal Rights* and expressing “hope the United States Supreme Court or an en banc panel of this Court soon has the opportunity to address this important question”).

These calls for clarity are directly pertinent here. Like declaratory relief, an award of nominal damages provides no compensation for an injury. It is settled that a claim for a declaratory judgment alone does not create a case or controversy where the plaintiff lacks standing. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126-27 (2007). The Court also should settle the issue as to nominal damages.

4. This case provides an appropriate vehicle for this Court to resolve the circuit conflict. Lenz clearly lacks an actual, concrete injury. In addition, the court below, without carefully considering its jurisdiction, reached out to construe an important statute and to impose an onerous new obligation on all copyright holders that interferes with the purposes of the DMCA.

a. First, the “irreducible constitutional minimum of standing” requires plaintiff to demonstrate (1) injury-in-fact, that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical,” (2) fairly traceable to defendant’s conduct, and (3) likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Lenz has demonstrated none of these.

Neither the panel nor the district court could identify any evidence that Lenz sustained actual economic loss that could support compensatory damages. Any legal assistance Respondent obtained for her putback notice was “pro bono” and thus not a loss to her, see App. 5a, and in any event “a plaintiff

cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit,” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 107 (1998); see also *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000). The court of appeals’ resort to nominal damages and its analogy to defamation and trespass tacitly confirms that Lenz suffered no economic injury. See *Farrar v. Hobby*, 506 U.S. 103, 115 (1992) (“In a civil rights suit for damages . . . the awarding of nominal damages also highlights the plaintiff’s failure to prove actual, compensatory injury.”).

Nor has Lenz alleged non-pecuniary harm. Lenz claims that she “had not posted a single video on YouTube since” the takedown of her video because she was “fearful” that “someone might construe” it to infringe a copyright. App. 91a. But the court of appeals correctly noted that such alleged chilling of her expression creates no basis to seek a nominal damages remedy. *Id.* at 19a n.5; see *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1151 (2013) (“[R]espondents cannot manufacture standing merely by inflicting harm on themselves and on their fears of hypothetical future harm that is not certainly impending.”); *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) (“Allegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm . . .”).

Lenz’s frustration with having to use Congress’s putback process to restore her video to YouTube also does not support standing. A person’s “mere ‘interest in a problem,’ no matter how longstanding the interest,” is insufficient to confer standing, because Article III “serve[s] as at least a rough attempt to put the decision as to whether review will be sought in

the hands of those who have a direct stake in the outcome.” *Sierra Club v. Morton*, 405 U.S. 727, 739-40 (1972); see *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (“The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III’s requirements.”).

Lenz also lacks standing because the court could order no relief from Universal to redress any injury unique to Lenz. “In all civil litigation, the judicial decree is not the end but the means”:

Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement—what makes it a proper judicial resolution of a “case or controversy” rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*.

*Hewitt v. Helms*, 482 U.S. 755, 761 (1987). Here there is no such dispute. Pursuant to section 512(g), YouTube put back Lenz’s posting before this suit was filed, and Universal has long been barred by law from seeking to take it down. App. 154a-155a.<sup>8</sup> Thus, even if a jury found a violation of section 512(f), the court could not order any remedy that would affect Universal’s behavior toward Lenz.

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<sup>8</sup> The district court dismissed with prejudice Lenz’s claim for declaratory judgment on non-infringement because Universal had no intention of asserting an infringement claim against Lenz. App. 154a-155a. Lenz’s video remained on YouTube four years later, when the parties filed cross-motions for summary judgment, and remains there to this day. *Id.* at 61a. The Copyright Act’s three-year limitations period bars any claim for infringement against Lenz based on her posting. See 17 U.S.C. § 507(b).

Lenz's successful putback resolved her dispute just as Congress envisioned. The only purported basis for standing is the panel's holding that a violation of section 512(c)'s takedown procedures causes legal damage in and of itself. This case thus cleanly presents the question whether a plaintiff who has suffered no actual injury may nonetheless use the prospect of a nominal damages award to vindicate an alleged violation of a federal statute.

b. Second, this case is an appropriate vehicle because a federal court should be most cautious about extending its jurisdiction beyond what Article III permits when, as here, a plaintiff seeks structural reform of a statute regulating millions of transactions each day. See, *e.g.*, Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881-82 (1983) (arguing that failure to enforce Article III's core standing requirements invariably leads to "an over-judicialization of the processes of self-governance"). The panel decision imposes far-reaching obligations on copyright holders that an uninjured party otherwise could obtain only from Congress.

Copyright holders lack the information to assess all of the factors that a jury might later find pertinent to a "good faith consideration" of something as indeterminate as fair use.<sup>9</sup> That task is made even more difficult by the deluge of new material that is

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<sup>9</sup> Congress drafted 17 U.S.C. § 107 to preserve the flexibility of the fair use doctrine: "The [statutory] text employs the terms 'including' and 'such as' in the preamble paragraph to indicate the 'illustrative and not limitative' function of the examples given, which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994) (citation omitted).

posted each day, *e.g.*, *Viacom Int’l Inc. v. YouTube, Inc.*, 676 F.3d 19, 28 (2d Cir. 2012) (noting that “more than 24 hours of new video [was] uploaded to the site every minute” in March 2010, which amounts to nearly 35,000 hours of content per day uploaded to YouTube alone), and the high frequency of infringement—a 2013 study revealed, for instance, that nearly 30 percent of North American internet users engage in infringement. See David Price, NetNames, *Sizing the Piracy Universe* 8 (2013), [http://www.netnames.com/Sizing\\_the\\_piracy\\_universe/download-the-report](http://www.netnames.com/Sizing_the_piracy_universe/download-the-report). The burden of proving fair use has always been placed on those accused of infringement. Construing the DMCA to shift that burden to copyright holders for every contested takedown (at the risk of being sued for nominal and punitive damages each time) would defeat the DMCA’s aims of clarity and efficiency.

## II.

At a minimum, this Court should grant the petition, vacate the opinion of the Ninth Circuit, and remand the case for further consideration in light of this Court’s intervening decision in *Spokeo*, 136 S. Ct. 1540. A GVR order is appropriate when, as here, subsequent authority is “sufficiently analogous and, perhaps, decisive to compel re-examination of the case,” *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964) (per curiam), or where that authority creates a “‘reasonable probability’ that the Court of Appeals would reject a legal premise on which it relied and which may affect the outcome of the litigation,” *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001).<sup>10</sup>

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<sup>10</sup> See *Thomas v. Am. Home Prods., Inc.*, 519 U.S. 913, 915 (1996) (Scalia, J., concurring) (approving of the GVR practice in

1. *Spokeo* compels reexamination of the panel’s holding because *Spokeo* held that “Article III standing requires a concrete injury even in the context of a statutory violation.” 136 S. Ct. at 1549. The Court explained that “alleg[ing] a bare procedural violation, divorced from any concrete harm,” will not “satisfy the injury-in-fact requirement.” *Id.* Although “the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact,” that occurs when the violation itself imposes a concrete harm, such as a denial of access to information, for which the law can provide a remedy. *Id.* at 1549-50. A procedural violation that “may result in no harm” does not suffice for Article III. *Id.* at 1550. Because the putback addressed the only arguable harm here, *Spokeo*’s analysis defeats Respondent’s standing.

2. At a minimum, *Spokeo* requires a more careful analysis of whether the common law and the language and purpose of the DMCA support the absolute right that the court of appeals found here.

a. This Court observed in *Spokeo* that “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.” *Id.* at 1549. Here, the court of appeals summarily concluded that a violation of “[t]he DMCA is akin to a statutorily created intentional tort,” such as defamation and trespass, which are actionable in the absence of actual harm. App. 19a-20a. But the panel failed to consider a more obvious antecedent—a common law claim for misrepresentation.

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light of an intervening decision of the Court even where the case is “unimportant”).

At common law, a cause of action for “misrepresentation” requires actual economic loss. See *Dura*, 544 U.S. at 343-44. The requirement of actual loss is significant, because “[i]f actual damage is necessary to the cause of action, as in negligence, nominal damages are not awarded.” Restatement (Second) of Torts § 907 cmt. a (1979).

Moreover, the court of appeals cited no common-law precedent that permits an award of damages where the claimed misrepresentation involves an alleged failure to comply with a duty that exists, if at all, only as part of a legislation that *minimizes* resort to the courts. Properly considered, the common law would provide no support for the court of appeals’ holding.

b. Although *Spokeo* acknowledged that Congress can “define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before,” the Court confirmed that a careful analysis is needed to support such a finding. *Spokeo*, 136 S. Ct. at 1549-50. That is because Congress lacks the power to override the case or controversy limitation of Article III, see *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979) (“In no event, however, may Congress abrogate the Art. III minima . . .”), and courts must respect separation-of-powers and non-delegation concerns, *Spokeo*, 136 S. Ct. at 1546-47; see also *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923) (noting that the Framers’ reliance on Article III standing to limit judicial review reflects their view that “neither department may invade the province of the other and neither may control, direct or restrain the action of the other”).

Here, the panel gave dispositive weight to the language in section 512(f) allowing recovery of “any damages.” In the court’s view, by providing for recovery of “any damages,” rather than “actual

damages” or “monetary relief,” Congress intended to allow claims under section 512(f) for any category of damages, including nominal damages. App. 18a-19a & n.4. The panel’s cursory analysis overlooks obvious considerations that should have prompted dismissal.

First, Congress limited section 512(f) to those “injured” by a statutory violation who “incur” damages. Thus, section 512(f) limits liability to “any damages . . . *incurred* by the alleged infringer . . . *who is injured by such misrepresentation, as a result of the service provider relying upon such misrepresentation.*” 17 U.S.C. § 512(f) (emphasis added). One does not “incur” nominal damages; nominal damages instead are bestowed symbolically on those who did *not* incur any damages. See *Carey*, 435 U.S. at 266-67. Section 512(f) thus does not demonstrate any congressional intent to “identify[] and elevat[e]” a procedurally non-compliant takedown into actual injury sufficient for Article III. On the contrary, section 512(f) reinforces the importance of ensuring that a putative plaintiff has suffered actual injury.

Second, the language “any damages” cannot automatically mean “any *type of* damages,” because Congress considered a statutory damages remedy for section 512(f) and rejected it. See S. 1146, 105th Cong., sec. 102(a), § 512(b)(4) (1997) (prior version of legislation providing liability for misrepresentation “for statutory damages of not less than \$1,000, and any actual damages, including costs and attorneys’ fees”). Congress’s rejection of a statutory damages remedy is particularly significant in the context of the DMCA and copyright law more generally. Title I of the DMCA permits recovery of “statutory damages” as an alternative remedy. Pub. L. No. 105-304, 112 Stat. at 2875, sec. 103(a), § 1203(c) (remedies for violations of copyright protection and management

systems). Title II of the DMCA does not. More generally, statutory damages are a key feature of liability for copyright infringement, see 17 U.S.C. § 504(c), and have been since 1909, Act of Mar. 4, 1909, ch. 320, § 25(b), 35 Stat. 1075, 1081<sup>11</sup>; see *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (“[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (alteration and omission in original). Congress’s decision not to include a statutory damages remedy for section 512(f) confirms that “any damages” refers to any compensable economic loss, not to every conceivable category of damages.

Third, construing section 512(f) to create a cause of action for procedural violations of section 512(c) would defeat a fundamental purpose of the DMCA. Far from seeking to “give rise to a case or controversy where none existed before,” *Spokeo*, 136 S. Ct. at 1549, Congress intended to create a process “to deal efficiently with network-based copyright infringement,” S. Rep. No. 105-190, at 45. Thus, “the procedural protections afforded by the notification requirements of subsection 512(c)(3) and the

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<sup>11</sup> The award of statutory damages reflects Congress’s intent “to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits.” *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935). “Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.” *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952) (upholding statutory damage award of \$5,000 for infringement even when actual damages of only \$900 were demonstrated).

provisions for the replacement of removed or disabled materials in subsection 512[(g)] provide all the process that is due.” *Id.* at 21. The decision below defeats, rather than effectuates, Congress’s purpose. By shifting Congress’s and the Executive’s enforcement duties to politically unaccountable private parties, the decision below “distort[s] the role of the Judiciary . . . and open[s] [it] to an arguable charge of providing ‘government by injunction.’” *Schlesinger*, 418 U.S. at 222.

### CONCLUSION

For the foregoing reasons, the 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  
(213) 896-6000  
mhaddad@sidley.com

*Counsel for Petitioners*

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\* Counsel of Record