

No. 24-967

In the Supreme Court of the United States

GRANDE COMMUNICATIONS NETWORKS, LLC,
PETITIONER

v.

UMG RECORDINGS, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF

1. a. As the petition established, this case presents a fundamental question of surpassing importance under the Copyright Act: “whether an ISP is liable for contributory infringement by ‘providing its [content-neutral] services to known infringing subscribers.’” Pet. 11 (quoting Pet. App. 38a); accord Pet. I, 2, 30.

That critical question undergirds the judgment below. C.A. ROA 9925 (jury instructions). It was directly resolved by the Fifth Circuit and the district court. Pet. App. 30a, 38a-40a, 63a, 67a, 88a, 120a, 121a n.6, 122a. It is presented here in the cleanest possible fashion. Pet. 30-31 (so explaining). It implicates billions in potential liability. *E.g.*, No. 24-181 Pet. App. 10a. And it sets the ground rules nationwide for how ISPs must operate—and whether individuals, families, schools, businesses, and institutions will lose access to the modern online world (despite often doing nothing wrong). *E.g.*, Pet. 22-27.

As the government has since confirmed, this question is “legally and practically important,” and it warrants the Court’s review. U.S. Amicus Br. 7, *Cox Commc’ns, Inc. v. Sony Music Entm’t*, Nos. 24-171 & 24-181 (filed May 27, 2025).

b. Respondents have no basis for contesting the obvious certworthiness of this question. So they instead try to dodge review by blatantly rewriting the record. According to respondents, this case was always about “egregious” infringement (Br. in Opp. I, 3, 6, 13, 14, 21, 22, 24)—whatever that means. They insist “the Fifth Circuit [never] answered” whether ISPs may provide service to non-egregious (?) infringers, and petitioner would somehow lose “even if * * * ISPs need not ‘terminate service after receiving two infringement notices.’” *Id.* at 13, 22 (so

declaring—without citation). Instead, according to respondents, the real question is whether ISPs “face contributory liability when they *know* specific subscribers are committing egregious infringement yet they choose to continue providing service to those subscribers anyway”—and petitioner lost below by providing service “despite actual knowledge of egregious infringement.” *Id.* at 22, 24.

Respondents’ novel recasting is both transparent and bizarre. The Fifth Circuit did not say anything about “egregious” infringement—because *respondents’ case* was not limited to egregious infringement. The Fifth Circuit answered the very question respondents advanced below: whether “an ISP’s continued provision of internet services to known infringing subscribers * * * constitutes material contribution.” Pet. App. 40a; see also, *e.g.*, *id.* at 30a (petitioner’s “knowing provision of internet services to infringing subscribers was actionable”); *id.* at 38a (petitioner is liable for “providing its [content-neutral] services to known infringing subscribers”); *id.* at 39a (respondents “proved at trial that [petitioner] knew” “the identities of its infringing subscribers” and “made the choice to continue providing services to them anyway”). Respondents’ claims did not set any “egregious” threshold—whatever that might be. Respondents sued petitioner for providing service to “known infringing subscribers.” *Id.* at 40a. Full stop. All that mattered was petitioner received multiple notices (read: at least two) of alleged misconduct and did nothing in response.¹

¹ Respondents attack petitioner’s mention of “two notices.” Opp. 13, 22. Yet petitioner’s framing is no mystery: respondents sued petitioner for providing service to known “repeat infringers”—meaning “one who infringes * * * more than once.” *BMG Rights Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, 881 F.3d 293, 301 (4th Cir. 2018). Or put simply: twice. Thus *two notices*.

That theory was the instruction submitted to the jury. C.A. ROA 9924-9925. That same theory was featured at every stage below—in respondents’ opening, closing, expert submissions, and briefing. *E.g.*, C.A. ROA 11524-11525, 11538, 12599, 13564, 13619; C.A. Resp. Br. 19, 35-36, 52-54. And, most critically, that same theory was necessary to support the judgment. As the linchpin of their case, respondents introduced Rightscorp notices to 15,046 users. Over one-third had fewer than five notices. See C.A. ROA 45862 (PX2). And multiple works in suit involved users with only *two* notices.² The judgment includes damages for those works—despite the lack of any “egregious” infringement. C.A. ROA 10005-10006. Thus in respondents’ own words: “if this Court were to conclude that ISPs need not ‘terminate service after receiving two infringement notices’” (Opp. 22), petitioner could not be faulted for those infringing works—and the judgment could not stand.³

² See, *e.g.*, C.A. ROA 35378, 39939 (Bon Jovi, *Bad Medicine*: 2 notices); C.A. ROA 35338, 35350 (Elvis Costello, *This House Is Empty Now*: 2 notices); C.A. ROA 34840, 34859 (Richard Marx, *My Confession*: 2 notices).

³ Respondents highlight isolated examples of “around 40 subscribers” with allegedly “thousands” of notices. Opp. 10, 13, 22. That might be impressive if all 1,403 works at issue *involved those 40 subscribers*. But respondents’ theory necessarily requires notice of *specific* users engaged in *specific* wrongful acts. *E.g.*, Pet. App. 35a, 39a-40a, 54a, 62a, 67a; Opp. I, 24 (so conceding). Respondents secured damages for works involving users with only *two* notices—the very theory respondents embraced below but suddenly wish to downplay here. *E.g.*, C.A. ROA 13569 (“If the jury finds that infringement alleged in a notice actually occurred, then that means you were providing Internet service to users who are guilty of infringement, of which you had notice.”). Unless respondents plan to confess error (and exclude those damages from the judgment), they must embrace the theory that got them here.

If respondents wish to defend the *actual* judgment, they have to defend the *actual* theory that produced it: whether contributory liability exists when an ISP is aware of repeat infringement (read: two notices) and continues to provide content-neutral service. Or as respondents themselves framed the Fifth Circuit’s holding: “where, as here, an ISP knew of specific instances of repeated infringement by specific users and “chose to continue” providing services to them, a jury is entitled to find material contribution.” Opp. 12 (quoting Pet. App. 35a); accord *id.* at 14 (“an ISP’s continued provision of internet services to known infringing subscribers, without taking simple measures to prevent infringement, constitutes material contribution”) (quoting Pet. App. 40a); *ibid.* (liability for “[a]n ISP that ‘learns that specific customers use’ the service ‘to infringe[] but nonetheless’ continues serving ‘those infringing customers’”); *id.* at 16 (“a defendant who (like Grande) refused to terminate service to a particular subscriber that it knew was using its service to break the law”). There is a reason that *none* of these (candid) recaps include any “egregious” threshold—or somehow limit liability to acts of “egregious infringement.”

This is not hard. Respondents have an obvious incentive to make their actual theory look less aggressive. But it is too late to reinvent their case to avoid review, and respondents cannot conjure up an imaginary record to support the real-world judgment. Respondents prevailed below because the court held that providing service to “known infringing subscribers” was actionable (Pet. App. 40a)—and it included damages for works involving users with only two notices. Respondents can defend the actual question presented or concede the judgment is unsupported. Either way, further review is plainly warranted.

c. Aside from being divorced from reality, respondents' new theory is also half-baked. What exactly is “egregious” infringement? Respondents never say. If not two notices, where is the threshold? Maybe 10 notices? 20? 50? 500? Respondents never even try to define where their line exists. And the reason for that failure is obvious: any number above two is inherently arbitrary. If the point is that ISPs are aware of *specific* users engaged in *specific* infringement (Opp. 12), then any notice should suffice. Respondents may not like where that answer takes them—because, absurdly, it indeed demands termination for “two alleged infractions.” Opp. 13, 22.

But that was the theory respondents pressed below, and it is the theory that undergirds the real-life judgment. That theory alone is thus front-and-center for review. If respondents wish to trot out a new version, they at least have to explain how it might apply in practice. It is not enough to simply shrug and say “egregious.”⁴

d. While respondents try to cast this case as a “poor vehicle” (Opp. 13, 22), their argument only establishes how perfect the vehicle is. If ISPs can provide content-neutral service to known infringing subscribers, petitioner wins; if ISPs cannot provide content-neutral service to known infringing subscribers, petitioner loses. And if liability instead turns on “actual knowledge of egregious infringement” (Opp. 22), the case can be remanded for a retrial—where a jury can decide which, if any, of the 1,403 works were infringed after “Grande refused to terminate

⁴ For the tiny fraction of users falling in the “egregious” category (whatever its unspecified bounds), respondents ignore that “egregious” infringers are ideal targets of *direct lawsuits*. If those users are indeed downloading “thousands” of songs (Opp. 10), surely respondents will find litigation worth their while. Respondents have no excuse for instead forcing content-neutral ISPs to do the dirty work for them.

service” to “egregious” infringers. *Ibid.* It is hard to imagine a case teeing up the full issue better than this.

2. Contrary to respondents’ contention, there is an obvious conflict with *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023), and *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005)—as the government has now confirmed. U.S. Amicus Br. 8-13. Respondents have no answer for either decision. But if any doubt exists, the fact that the government reads these decisions petitioner’s way—and rejects respondents’ view—confirms the urgent need for this Court’s guidance.

a. Respondents say *Twitter* involved an “inapposite statute” (Opp. 15), which is baffling. JASTA “employs” traditional “common-law” principles. *Twitter*, 598 U.S. at 493; Pet. 14. Contributory liability under the Copyright Act employs traditional “common law principles.” *Grokster*, 545 U.S. at 930. Both JASTA and the Act reference exactly the same body of law, which applies exactly the same way. Pet. 12 n.3. There is no daylight between the two doctrines. *Twitter* did not “mention” *Sony* or *Grokster* (Opp. 16)—just as it did not mention *every* comparable case ever decided. *Twitter*’s rule still mirrors those decisions.

And *Twitter* is incompatible with respondents’ position: contrary to respondents’ view, there is no “duty” for online platforms to “terminate customers after discovering” those “customers were using the service for illicit ends.” 598 U.S. at 501. “[P]assive nonfeasance” is not “aiding-and-abetting,” and a company is not liable “merely for knowing” “wrongdoers were using its services and failing to stop them.” *Id.* at 499-500, 503.

These unequivocal directives were not limited to some “nexus” requirement (contra Opp. 16), and *Twitter* specifically applied these rules to platforms *aware* of wrongdo-

ers' improper use. 598 U.S. at 498; contra Opp. 16 (bizarrely asserting the opposite). The Court still found no basis to hold “a company liable for merely failing to block such criminals *despite knowing that they used the company's services.*” 598 U.S. at 501 & n.14 (emphasis added). It is unclear what version of *Twitter* respondents are reading, but it is apparently not the one this Court issued.

b. Respondents fare no better with *Grokster*: “in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement.” 545 U.S. at 939 n.12. Respondents cannot simply brush *Grokster* aside as an “inducement” decision (Opp. 14); it explicitly set the line for “contributory infringement,” and it excluded this scenario from the mix. 545 U.S. at 937 (“mere knowledge” “of actual infringing uses would not be enough”). Respondents cannot recalibrate this Court's balance by slapping on a new label.

Contrary to respondents' contention (Opp. 14-15), *Grokster's* facts are also night-and-day from this case. *Grokster's* entire purpose was to provide copyrighted songs for free. That was its business model. That was the source of its revenue. That was the primary reason for its existence. And the record established *Grokster* did more than simply provide a neutral service that some users unilaterally misused. *Grokster's* point was to enable and encourage that misuse. 545 U.S. at 937-941. That bears no resemblance to petitioner's provision of content-neutral internet access to the general public—acting at “arm's length, passive, and largely indifferent.” *Twitter*, 598 U.S. at 500.⁵

⁵ Respondents likewise fail to refute the circuit conflict. Opp. 18-19. For example: *Greer v. Moon*, 83 F.4th 1283 (10th Cir. 2023), was not

3. Respondents have little to say about the issue’s importance, because its profound implications are obvious. This issue has billion-dollar stakes for a key national industry. It affects internet access for thousands of individuals, families, businesses, etc. It shapes how ISPs nationwide will conduct their operations. And it dictates an important rule of law under a major federal statute (the Copyright Act). This Court does not call for the views of the Solicitor General in insubstantial cases. The legal and practical importance is self-evident. Pet. 21-30.

Respondents’ few points require little response. They highlight petitioner’s “total lack of amicus support” (Opp. 23), which is mystifying. Respondents are assuredly aware of the industrywide response both in *Cox* and the proceedings below. Petitioner and its amici chose to spare the Court duplicative reading when the same groups have already weighed in. Respondents’ comment is also a bit much when they already recognized the industry’s extreme interest—admitting the entire industry was watching (literally) each day in court: “This case is not just about Grande. The entire ISP community is watching. They’re getting direct reports from this courtroom.” C.A. ROA 13556 (“[t]here are reports going out in realtime”).

Respondents also insist “suits against ISPs are relatively rare” and only “target[] the worst offenders.” Opp. 22. This is absurd. Respondents’ campaign has targeted Cox, Charter, Astound, Frontier, Verizon, Altice, etc.—covering millions of subscribers in every major market. This is not just some isolated litigation against a tiny

limited to “a one-time take-down notice.” Opp. 18. Unlike the Fifth Circuit (Pet. App. 37a), *Greer* demanded “more [for liability] than ‘a failure to take affirmative steps to *prevent* infringement.’” Pet. 17-18. While unnecessary to justify review, there is indeed an obvious circuit conflict over contributory liability in this context. Pet. 17-20.

handful of renegade providers. It involves some of the nation’s largest and most respected ISPs—and its threat of crippling liability obviously affects all ISPs. It is cold comfort to rely on respondents’ good graces when wondering which ISP will be next.

4. a. As previously established (Pet. 23-30), this is an obvious major question. It has astounding economic and political stakes. The answer is found nowhere in the Copyright Act. This Court already established in *this* setting that this is Congress’s job—and the judiciary will not “expand the protections afforded by the copyright without explicit legislative guidance.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984). Yet there is no remote legislative guidance here. If extraordinary grants of power “are rarely accomplished through ‘modest words,’ ‘vague terms,’ or ‘subtle device[s]’” (*West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022)), they certainly are not found in a statute *silent* on secondary liability.

This is a serious policy question. It needs a legal framework with settled rules, clear enforcement mechanisms, and unambiguous legislative directives. There is no basis to impose systemic liability on an entire industry without any hint that Congress itself addressed and resolved these significant questions.

Respondents again simply shrug in response. They admit their position requires private ISPs to “conjure up entire regulatory schemes” out of whole cloth. Opp. 23. But aside from breezily waving at a few problems (*id.* at 21), they have no concrete answers for the many difficult and sensitive questions. They instead are content to leave it up to district courts and juries to implement a pseudo-administrative regime on an ad-hoc basis. That is no way to structure industrywide rules for questions of such serious

legal and practical importance. And it is reason alone for granting review.

b. Nor can respondents blame this on the DMCA. As the government confirmed, the DMCA answers nothing. U.S. Amicus Br. 13-14. It set out an affirmative defense while deliberately punting on whether underlying liability exists. This is confirmed in both the plain text (17 U.S.C. 512(l)) and the legislative reports. *E.g.*, S. Rep. No. 190, 105th Cong., 2d Sess. 19, 55 (1998) (“the Committee decided to leave current law in its evolving state”; “[n]ew section 512 does not define what is actionable copyright infringement in the online environment”; it “does not create any new liabilities for service providers or affect any defense available to a service provider”).

Respondents thus stand the DMCA upside-down in saying it somehow “confirmed” contributory liability in this context. Opp. 20. The DMCA explicitly says otherwise. And respondents are fanciful to think Congress made a judgment in 1998 (in the days of dial-up modems) regarding how theories of contributory liability ought to apply in today’s online world. U.S. Amicus Br. 14. Congress refused to balance the conflicting policy concerns back then; there is no license for the judiciary to step in and do Congress’s job now.

5. The government has confirmed that *Cox* should be granted—as it plainly should. This case remains an ideal companion to *Cox*. It presents the purest form of the question on the cleanest record. It has no vehicle concerns: respondents’ sole objection (based on “egregious” infringement) *confirms* this case is an optimal vehicle. There are no disputed facts, mitigating circumstances, or alternative grounds. There is no chance for remand on a “simple measures” instruction—which offers a path to a narrower victory in *Cox*. U.S. Amicus Br. 15-16. And there are no additional certworthy questions (such as “willfulness”)—

which could otherwise distract bandwidth from the primary issue.

This entire case turns on the core question in the ordinary operation of every ISP: whether providing service to “known infringing subscribers” is actionable. This case presents the ideal opportunity to resolve that nationwide dispute at its most fundamental level. This Court should grant in *Cox*, and it should likewise grant here—thus ensuring this mission-critical question is definitively answered for all ISPs.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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