In the Supreme Court of the United States

No. 24-171

COX COMMUNICATIONS, INC. AND COXCOM, LLC,
PETITIONERS,

v.

SONY MUSIC ENTERTAINMENT, et al.,
RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF PUBLIC KNOWLEDGE AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Public Knowledge is a nonprofit organization dedicated to preserving the openness of the Internet and the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully. Public Knowledge has extensive experience in both copyright and telecommunications policy, including promoting broadband competition, advocating for an open internet, and ensuring that communications networks remain accessible to all users.

[1] Pursuant to S. Ct. Rule 37.6, Public Knowledge states no counsel for a party authored this brief in whole or in part and no person or entity made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Respondents argue—and the Fourth Circuit agrees—that internet service providers' gatekeeper power creates a duty to disconnect in order to forestall hypothetical future infringement. Failure to do so, in this framework, creates both contributory and vicarious liability for ISPs. This framework is at odds not only with the common law of secondary liability, but the letter and history of the relevant statute. The Fourth Circuit's "continue to serve" standard attempts to conflate common law liability and the requirements of the Digital Millennium Copyright Act's statutory safe harbors. It also ignores Congress' intent and the reality of modern Internet connectivity in an attempt to create automatic liability from a failure to meet an optional safe harbor. The Court should thus decline to adopt the Fourth Circuit's rule.

ARGUMENT

The case presents a novel question: whether a broadband internet service provider (ISP), after being informed of a third party's suspicion that one of its customers has infringed copyright, carries, solely by virtue of its role as a neutral conduit, liability for any *future* acts of infringement by that same customer. This framework is at odds not only with the common law of secondary liability, but the letter and history of the relevant statute.

The reasons for this are many, and we touch on only a few here. First, Internet service providers do not perform volitional conduct necessary for direct liability. They neither possess the specific knowledge, nor perform the purposeful facilitation required by contributory liability standards; vicarious liability is foreclosed by both the language of the Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998), and the requirement of a direct financial benefit beyond ordinary subscription fees. Finally, as this Court recently held, provision of routine communications service is not enough to create liability for third party acts committed over a network.

The history and policy of online copyright liability also weigh against liability. Congress, in designing the DMCA's safe harbors, never intended for households to lose access to major telecommunications networks. At the time of the DMCA's passage, continued access was a given, thanks to the two-layer structure of access; customers relied on specialized software to carry data across a telephone line, and disconnections exclusively targeted the software layer. Most modern Americans, by contrast, have little to no choice of broadband provider, and losing access comes with

devastating consequences for a household's ability to participate in modern society.

I. ISPS DO NOT MEET ANY ELEMENT OF PRIMARY OR SECONDARY LIABILITY UNDER COMMON LAW

The Fourth Circuit's "continue-to-serve" theory distorts the doctrine of contributory infringement and nullifies explicit statutory language. Broadband Internet service providers route traffic automatically at the direction of their subscribers. In doing so, they do not perform the volitional acts necessary for infringement; they lack specific knowledge; and they do not derive direct financial benefit from the acts of infringement. Holding to the contrary would not only upend decades of precedent, but would directly undermine this Court's recent holding in *Twitter v. Taamneh*, 598 U.S. 471 (2023).

A. Direct Infringement Requires a Volitional Act, Which ISPs Do Not Perform

Copyright law imposes direct liability only on those who engage in the infringing act. This principle runs through every modern case on the subject. In *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984), the Court stressed that "the sale of copying equipment" does not itself infringe; direct liability requires the defendant to do the copying. Later, the Second Circuit in *Cartoon Network L.P. v. CSC Holdings, Inc.* [hereinafter *Cablevision*], 536 F.3d 121, 131 (2d Cir. 2008), held that a cable company that provides a cloud DVR that "automatically obeys commands" from a user to record programming, does not itself perform the volitional act of reproduction. Elsewhere, the Fourth Circuit has adopted the same reasoning with regard to ISPs, holding that "an

ISP who owns an electronic facility that responds automatically to users' input is not a direct infringer... the ISP should not be found liable as a direct infringer when its facility is used by a subscriber to violate a copyright without intervening conduct of the ISP." *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004).

That principle aligns with the architecture of the Internet. ISPs transmit packets of data initiated by subscribers. They neither select what content to send, nor "press the button" that initiates the allegedly infringing copy. Courts have consistently held that supplying technology or connectivity without triggering the copying at issue is not direct infringement. See *Cablevision*, 536 F.3d at 131-33; *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995) (even under a strict-liability statute, "there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party"); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 667 F.3d 1022, 1035 (9th Cir. 2011).

The Fourth Circuit's "continue to serve" theory in this case discards this volition requirement, recasting passive infrastructure as infringing whenever a subscriber misuses it. That rule runs counter to both common law and the language of the Digital Millennium Copyright Act. Section 512(a), 17 U.S.C. § 512(a), shields passive conduits from liability when they meet its conditions, but Section 512(l), 17 U.S.C. § 512(l), expressly provides that failing to qualify for a safe harbor "shall not bear adversely" on a defense that the ISP's conduct is not infringing. A loss of safe-harbor protection does not give rise to liability, nor does it nullify the volitional act requirement.

From a policy perspective, the "continue to serve" rule would create liability whenever an ISP continued to provide access to a subscriber that had been accused of infringement. This would, in practice, create a standing obligation for ISPs—and any other service that carries (or supports) user content—to terminate service at the *first* allegation of infringement. Because these claims need not be independently verified, email providers, cloud storage services, universities, coffee shops, and municipal Wi-Fi operators would face the same perverse incentive to terminate first and ask questions later. Innocent users would lose access to work, education, and civic life. Nor would this expansion of common law duties limit itself to copyright liability; any "failure to terminate" a customer accused of civil offenses could give rise to a novel theory of secondary liability for the offense itself.

The Court should reaffirm that passive service provision is not direct infringement, and that volition is a threshold element that plaintiffs must prove in every case.

B. Contributory Liability Requires Specific Knowledge and Purposeful Facilitation, Not Generalized Awareness of Third-Party Suspicion

Contributory liability demands more than an abstract awareness that infringement might be occurring. Liability attaches where a defendant takes "affirmative steps taken to foster infringement," by "purposeful, culpable expression and conduct." *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937 (2005). Neither generalized knowledge of potential acts, nor awareness of a third party's unvalidated suspicion is sufficient; the defendant must both have actual knowledge of specific acts *and* materially

contribute to those acts. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir. 2007). In other words, "an actor's contribution to infringement must be material to warrant the imposition of contributory liability." *Perfect 10*, 508 F.3d at 1172.

Here, ISPs do not perform "affirmative steps" relating to their subscribers' alleged infringement. Unlike the centralized file-sharing network at issue in *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), ISPs like Cox simply route traffic at the user's direction. Continuing to do so, even to a user previously accused of infringement, is no more an "affirmative step" toward future infringement than the power company continuing to provide the electricity that powers the user's laptop. A contrary rule would elevate a single, unvetted allegation to a legal mandate, creating strong incentives to over-enforce. Nor does there appear to be any limiting principle that would confine its reach to ISPs; the shadow cast by "continue to serve" rule would turn email services, cloud hosts, software repositories, and online marketplaces into copyright police, terminating accused accounts for fear that they might be held liable for the user's future actions.

C. Vicarious Liability Requires a Genuine Supervisory Relationship (Which the DMCA Expressly Rejects) and a Direct Financial Benefit

Vicarious liability in copyright rests on two elements: the right and ability to supervise the infringing activity, and a direct financial benefit flowing from it. *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307-09 (2d Cir. 1963); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262-64 (9th Cir. 1996). The "right and ability to supervise" means

more than the raw power to terminate service; it requires the capacity to oversee and control the specific acts of infringement. But Congress expressly declined to impose this duty. 17 U.S.C. § 512(m) ("Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on a service provider monitoring its service or affirmatively seeking facts indicating infringing activity…"); H.R. Rep. No. 105-551, pt. 2, at 61 (1998) ("[T]he Committee does not intend this provision to undermine the principles of new subsection (l) or the knowledge standard of new subsection (c) by suggesting that a provider must investigate possible infringements, monitor its service, or make difficult judgments as to whether conduct is or is not infringing."). Further, due to encryption, "ISPs today and in the future do not have 'comprehensive' access to users' Internet activities. HTTPS blocks the possibility of ISP access to the content of users' activities … HTTPS also blocks the possibility of ISP access to detailed URLs, which can reveal granular details of a user's search or other online activities." Peter Swire, Justin Hemmings & Alana Kirkland, *Online Privacy and ISPs: ISP Access to Consumer Data is Limited and Often Less than Access by Others* 9 (Inst. for Info. Sec. & Privacy at Ga. Tech, Working Paper, May 2016). As noted *supra*, equating "the right and ability to supervise" with "the power to terminate service" would implicate every landlord, electric utility, coffee shop, and equipment lessor as vicariously liable purely by virtue of their ability to disconnect customers. None of these entities have the ability to monitor, let alone control, end-user behavior. The Court should not attribute to these entities a power they simply do not possess.

Finally, ISPs do not receive a direct financial benefit from continuing to provide Internet access. This

requires a direct causal connection between the infringing acts and the benefit; ordinary subscription revenue is not sufficient to constitute a direct financial benefit. See *Ellison v. Robertson*, 357 F.3d 1072, 1078-79 (9th Cir. 2004) (no evidence infringing material attracted or retained subscribers). A flat monthly subscription fee does not bear a sufficient nexus to the alleged infringements to meet this criterion.

D. Taamneh Confirms That Providing Routine Infrastructure Is Not Culpable Participation

This Court has dealt with similar questions before. In *Twitter v. Taamneh*, 598 U.S. 471 (2023), this Court unanimously rejected the notion that merely providing routine services that could be misused suffices for aiding-and-abetting liability. The Court emphasized that "mere passive nonfeasance" does not create liability and that defendants must take some "affirmative act...with the intent of facilitating the offense's commission." *Taamneh,* 598 U.S. at 490 (citing *Rosemond v. United States,* 572 U.S. 65, 71 (2014)). It explained that "assistance that is merely incidental to the provision of [a] routine service" does not cross the line; liability arises only where defendants have "consciously, voluntarily, and culpably participate[d] in or support[ed] the relevant wrongdoing." *Taamneh,* 598 U. S. at 505.

That principle squarely applies here. An ISP that continues to provide a standard Internet connection—even to someone accused of infringement—is engaging in the quintessential "routine service" that *Taamneh* protects. Id. at 502. The Internet connection itself is a neutral conduit, just as payment processing or hosting services were in *Taamneh*. To hold otherwise would equate "the failure to stop" unlawful use with "culpable assistance," collapsing the distinction

between knowledge and purposeful facilitation that both *Taamneh* and *Grokster* preserve.

From a policy standpoint, *Taamneh*'s reasoning guards against transforming infrastructure providers into universal guarantors of end-user conduct. If an ISP can be held liable simply for continuing to serve an accused infringer, then email hosts, cloud storage platforms, and even public libraries could face the same peril for alleged misuse of their facilities. That would encourage mass disconnections and removals on unverified allegations, chilling lawful speech, commerce, and education—precisely the "boundless" liability this Court warned against in *Taamneh*. Id. at 488.

II. ISP-LEVEL DISCONNECTION REQUIREMENTS ARE AHISTORICAL AND CONTRARY TO PUBLIC POLICY

The Fourth Circuit's rule would create a harsh common law standard requiring ISPs to terminate service upon any allegation of infringement—a standard far removed from the measured approach Congress envisioned when crafting the DMCA. While the statute's safe harbor would shield ISPs who maintain policies for terminating repeat infringers, the underlying common law liability theory would pressure ISPs toward immediate disconnection to avoid any risk. This pressure is compounded by the fact that courts have never clearly defined what constitutes a "reasonably implemented" repeat infringer policy, leaving ISPs to guess at the safe harbor's requirements while facing potential liability for guessing wrong. This approach fundamentally misunderstands both the historical context in which the DMCA was enacted and the modern realities of Internet connectivity. The underlying technology of Internet access has changed radically from 1998 to 2025, as have

the technical, practical, and policy implications of disconnection.

A. Congress Did Not Intend to Cut Off Basic Telecommunications Access

To fully understand Congress' intent in designing the Section 512(c)(1) safe harbor, we must first understand the mechanics of Internet access at the time. In the mid-1990s, the Internet was accessed through dial-up service that sent information over the user's home telephone line.[2] See Nat'l Telecomm. & Info. Admin., Falling Through the Net: Toward Digital Inclusion: A Report on Americans' Access to Technology Tools 1 (2000) [hereinafter *Falling Through the Net III*]; Colin Crowell, *The 25th Anniversary of the Telecommunications Act of 1996*, Medium (Feb. 7, 2021), https://colincrowell.medium.com/the-25thanniversary-of-the-telecommunications-act-of-1996-88006fabdb9f [hereinafter *Crowell*] ("[I]t is important to recall that only a small percentage of Americans used the Internet in 1996. And those few who did typically relied upon dial-up access over a twisted pair of copper phone wires that allowed, at most, 56 thousand bits per second."). Getting online required two components: a working phone connection, and software to translate and route signals between the user's computer and the network. These

[2] Dedicated Service Lines (DSL) and cable modems were first introduced in the mid-1990s. However, because they required upgrades to existing infrastructure (such as replacing traditional coaxial cable with fiber-enhanced cable), dedicated Internet access lines were slow to arrive for most Americans. See Cal Broadband, *History of Cable Broadband*, https://www.calbroadband.org/broadband-facts/history-of-cable-broadband (last visited Aug. 27, 2025). By the year 2000, only 10% of Internet-connected households (4% of American households overall) used broadband to get online. Falling Through the Net III at 23.

were separate services, provided by different companies. A basic examination of history and policy makes clear that the account termination provision of Section 512(i)(1)(A) was designed to apply to *software-layer* Internet access providers; it was not intended to result in users being forced off the telephone network.

Congress in 1998 was well aware of this two-layer system. Only 18 months before the first hearings on what would later become the DMCA, *The Copyright Infringement Liability of Online and Internet Service Providers: Hearing on S. 1146 Before the S. Comm. on the Judiciary,* 105th Cong. 366 (1997), Congress had passed the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The Telecommunications Act, a "truly revolutionary" modernization of the communications regulatory framework, William J. Clinton, Remarks on Signing the Telecommunications Act of 1996, 1 Pub. Papers 186 (Feb. 8, 1996), was the result of three years of continuous work led by the United States House Committee on Energy and Commerce. See *Crowell*, supra. The bill was, among other things, an attempt to boost household connectivity by introducing competition to the phone market—something that had been lacking since the breakup of AT&T had led to emergence of local monopolies under the resulting "Baby Bells." Id.

As the Telecommunications Act sought to expand access to the "information superhighway," it took an approach that reflected the layered reality of Internet connectivity at the time. It updated, but ultimately retained, a longstanding FCC framework that divided software and network-layer connections into distinct regulatory models. Regulatory & Policy Problems Presented by the Interdependence of Computer and Communications Services & Facilities (Computer I), 7 FCC 2d 11 (1966); Federal-State Joint Board on

Universal Service, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, ¶¶61-82 (1998) [hereinafter *Stevens Report*]. Under this framework, the software-facilitated exchange of data constituted an "information service" which sat atop the "telecommunications service" of the telephone network. Stevens Report at 34. While the information service was given a light touch and largely left to thrive on its own, the telecommunications layer remained subject to significant regulation regarding build-out, upgrades, and conditions under which they could terminate subscriber service. See, e.g., 47 C.F.R. § 64.1507 (prohibiting disconnection for failure to remit certain categories of charge); 47 U.S.C. § 214 (statutory rules governing build out and discontinuance of new service areas). Notably, it banned telephone companies from discontinuing service based on disputed charges with an information service provider. Id. This illustrates a core principle governing the relationship between customers, information services, and telecommunications providers: telecommunications services were neutral, and provided service without regard to disputes happening at the information service layer.

The Telecommunications Act also directed the full force of federal policy toward *expanding* household access to the telephone network.[3] It laid out a federal universal service framework, with the goal of "ensur[ing] that consumers in all parts of the country, even the most remote and sparsely populated areas, are not forced to pay prohibitively high rates for their phone service." Stevens Report at 5. It also "required,

[3] In 1994, 6.2% of households lacked access to the telephone network; by 1997, that number had crept down to 5.9%. Nat'l Telecomm. & Info. Admin., *Falling Through the Net II: New Data on the Digital Divide* at 2 (1998). The disparities in access were greatest among low-income, rural, and central city areas. Id.

for the first time, universal service support for eligible schools, libraries and rural health care providers," Stevens Report at 6, and was forecasted to "connect every classroom in America to the information superhighway by the end of the decade." William J. Clinton, Statement on Signing the Telecommunications Act of 1996, 1 Pub. Papers 190 (Feb. 8, 1996). Congress would not have directed this kind of herculean effort toward expanding individual access to telecommunications, only to create a "copyright loophole" that empowered third parties to remove those individuals at will.

The information services layer, by contrast, enjoyed a light regulatory touch. Consumers enjoyed a dynamic market for connectivity software. While America Online, Prodigy, and CompuServe provided access for a plurality of users, Pew Research Center, News Attracts Most Internet Users: Online Use (1996), competition was fierce, and the market grew throughout the decade; by 1998, there were over 4,000 Internet access providers. Stevens Report at 33. Terminating a subscriber's account forced the user to find a new software provider—a penalty, to be sure, but (as anyone who received an endless stream of free trial CDs in the mail will attest), not an insurmountable one. Phil Edwards, *In Memoriam: AOL CDs, History's Greatest Junk Mail*, Vox (May 12, 2015), https://www.vox.com/2015/5/12/8594049/aol-free-trial-cds. At no point, however, did software-layer termination deprive the entire household of life-saving access to the telephone network.

B. Revoking Internet Access Based on Allegations of Copyright Infringement Is Contrary to Public Policy

Just as the role of the Internet has changed dramatically in the three decades since Congress first

contemplated the DMCA, the market realities of broadband access have changed as well. Regaining access after an account termination is no longer a matter of finding a new software layer provider; millions of Americans, if disconnected from their ISP, would be left stranded.

1. Dial-Up Is Extinct, and Nearly Half of All Households in 2025 Have No "Backup" ISP

A quarter-century later, we are far from the days of dial-up. "In 2023, according to data from the U.S. Census Bureau, an estimated 163,000 households in the United States were using only dial-up for Internet service — representing just over 0.1 percent of the nation's household internet subscriptions." Yan Zhuang, *AOL Will End Its Dial-Up Service (Yes, It's Still Operating)*, N.Y. Times, Aug. 11, 2025 https://www.nytimes.com/2025/08/11/business/aol-dial-up-internet.html. Instead of accessing the Internet via telephone network, most American households are now accessing their landline telephone service via *Internet* lines. Fed. Commc'n Comm'n, Office of Econ. & Analytics, Voice Telephone Services: Status as of June 30, 2024 at 3 (2025). Broadband connections provide greater speed and carrying capacity; while "[d]ial-up internet speeds average about 56 kilobits a second[,] modern connections in the United States are, on average, several thousand times faster." Zhuang, supra, § II.A.B.1.

However, this shift in service model—from a competitive software market piggybacking on a telephone provider, to integrated service provided by (often monopolistic) broadband providers—has created a precarious reality for most American households. FCC data show that, at the lowest speed benchmark (100/20 Mbps), tens of millions of Americans—just

under half of all households—have no meaningful competitive choice at all. Fed. Commc'n Comm'n, 2024 Communications Marketplace Report, FCC 24-119, 2024 WL 5330303, at *39 (2024). More than a third of households nationwide either have only a single provider at that speed tier, or lack fixed broadband access entirely. Id. While availability improved modestly between 2022 and 2023, the gap remains particularly stark in rural and Tribal areas: only 35 percent of rural households and 49 percent of Tribal households have two or more providers at 100/20 Mbps, compared to 75 percent in urban areas. In the lowest population density quartile, nearly 20 percent of locations have no fixed terrestrial provider meeting 100/20 Mbps, and another 44.6 percent have only one—leaving almost two-thirds of residents without a real choice. Id. at 40.

The picture is even bleaker at the FCC's long-term speed goal of 940/500 Mbps. Less than half of all U.S. households have access to service at this gigabit tier, and just 7 percent have more than one provider offering it. Id. at 39 (2024). That means over 93 percent of households—urban and rural alike—cannot comparison shop for gigabit speeds, and must either accept the sole offering available or forgo that level of service entirely. In rural areas, only 3 percent of households have more than one gigabit provider, underscoring how rare competitive pressure is at the fastest service levels outside dense urban cores. Id. at 40.

These numbers demonstrate that for nearly half of the population, the fixed broadband "market" is functionally a monopoly. For these households—particularly in rural and Tribal areas, where cellular network access is unreliable—terminating a subscriber's account can have devastating consequences.

Blessing a legal mechanism that mandates full disconnection in response to private accusations would "with one broad stroke bar[] access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge"—a regime "unprecedented in the scope of First Amendment speech it burdens." *Packingham v. North Carolina,* 582 U.S. 98, 107 (2017) (warning against broad restrictions on access to principal venues for speech).

2. Home Internet Access in 1998 was a Luxury Good

In 1998, Internet access was available only to a small (if growing) minority of Americans. Less than half of American adults used the Internet. Susannah Fox, Pew Research Ctr., The Internet Circa 1998 (June 21, 2007), https://www.pewresearch.org/ internet/2007/06/21/the-internet-circa-1998. Although 97% of households had access to the telephone network, only 26% used that connection for Internet access. Nat'l Telecomm. & Info. Admin., Falling Through the Net: Toward Digital Inclusion: A Report on Americans' Access to Technology Tools 1 (2000). Among low-income households, that number dropped to 4.3% Id. at 5. The majority of Internet users were educated, id. at 10, wealthy, id. at 8, and lived in urban or high-density suburban areas. Id. at 7. And the network's greatest utility, while significant, was mostly for pedestrian uses; most users accessed the Internet for work, news, and entertainment. Pew Research Center, News Attracts Most Internet Users: Online Use (1996). Put simply, users were not relying on connectivity to apply to jobs, complete homework, or speak to their doctors.

CONCLUSION

For the reasons stated above, the Court should overturn the Fourth Circuit's test and hold that continued provision of service does not give rise to secondary liability for copyright infringement.

Respectfully submitted,

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