No. 24-171

IN THE
Supreme Court of the United States

COX COMMUNICATIONS, INC., ET AL.,
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 ALTICE USA, INC., AT&T SERVICES, INC., CHARTER COMMUNICATIONS, INC., FRONTIER COMMUNICATIONS PARENT, INC., LUMEN TECHNOLOGIES, INC., T-MOBILE USA, INC., AND VERIZON SERVICES CORP. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae and their affiliates are the nation's leading internet service providers. They enable their customers to benefit from all the internet has to offer—education, work, healthcare, family connection, news, information, artificial intelligence, government services, online shopping, and entertainment. They also perform a critical public service by deploying, operating, and maintaining the networks Americans rely on for high-speed internet access. Since 1996, *amici* have invested hundreds of billions of dollars in network infrastructure. That investment has given millions of Americans the ability to access the internet at ever-increasing speeds. And it prepared the entire U.S. economy for an unexpected—but necessary—dependence on broadband networks during and after the COVID-19 pandemic.

Amici's past and current investments fulfill not just their business interests, but also federal policy goals. In 1996, Congress announced that it "is the policy of the United States" "to promote the continued development of the Internet." 47 U.S.C. § 230(b)(1). And in the last few years, Congress appropriated more than $75 billion to ensure that all Americans have access to reliable high-speed broadband.

This case strikes at the heart of that effort. The court of appeals' rule saddles internet service providers with responsibility for online copyright infringement that others commit. That is not because internet service providers culpably participate in the infringement. Quite the opposite: while a small fraction of

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

amici's customers may use their internet connections to share copyrighted material, *amici* do not encourage or assist those efforts. Nor do *amici* host infringing content on their servers or monitor what their subscribers do online. *Amici* all forbid copyright infringement on their networks and enforce that prohibition through robust anti-piracy policies. When subscribers nonetheless share copyrighted music over the internet, *amici* are mere passive conduits for the infringing activity—taking no action to assist it.

Yet the court of appeals still concluded that an internet service provider commits contributory copyright infringement whenever it fails to shut off an internet account it knows someone used for music piracy. That holding exposes providers to up to $150,000 in statutory damages per work infringed. *See* 17 U.S.C. § 504(c)(1)-(2). With thousands of works allegedly infringed (the labels count each individual song as a "work"), the damages numbers can become immense. The threat of such extortionate damages is troubling enough. But the decision below also threatens consequences beyond copyright. Under the court of appeals' expansive theory, an internet service provider acts culpably whenever it knows that some bad actor is using its service for unlawful ends but fails to stop it. *Amici* have a strong interest in correcting that erroneous ruling.

SUMMARY OF ARGUMENT

The decision below imperils public access to the internet. It adopts a theory of secondary liability—equating the provision of routine internet access with culpable aiding and abetting—that flouts longstanding common-law principles. It threatens to saddle internet service providers with responsibility for virtually every bad act that occurs online. And it threatens those providers

with massive liability if they do not carry out mass internet evictions. Beyond the $1 billion verdict Cox faced, Frontier recently resolved a lawsuit that sought more than $400 million, Altice USA is defending a lawsuit with an immense range of potential statutory damages, and Verizon faces up to $2.6 billion in potential liability—all because they failed to terminate enough internet accounts supposedly used for copyright infringement. The extortionate pressure such lawsuits exert is acute. And the mass terminations they encourage would harm innocent people by depriving households, schools, hospitals, and businesses of internet access. The threat of liability detracts from *amici*'s continued investment to fulfill Congress's goal of connecting all Americans to the internet.

Had the decision below hewed to this Court's precedents, it would not have come up with such a sweeping liability rule. Indeed, the Fourth Circuit invented that rule not only by misapplying this Court's copyright precedents, but also by upending the traditional common-law principles those precedents reflect. The Fourth Circuit's only reason for upholding contributory infringement—comparing Cox's provision of routine internet service to a bank robber's accomplice arming him with a hammer—distorted common-law notions of culpability beyond all recognition. So this Court should reverse and return contributory copyright infringement to its sensible common-law roots. Doing so will align copyright doctrine with this Court's other precedents and promote vital national interests in the continued development of the internet.

ARGUMENT

I. The Fourth Circuit's Decision Conflicts With The Common-Law Limits On Secondary Liability And This Court's Recent Decisions

Amici agree with Cox (at 21-26) that the Fourth Circuit's decision conflicts with this Court's copyright precedents. They write to amplify Cox's arguments (at 26-28) that the decision below also flouts the traditional secondary-liability principles this Court recognized in *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023), and emphasized in *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280 (2025).

A. Contributory Copyright Infringement, Like Common-Law Aiding and Abetting, Requires Active Participation in Misconduct

1. The Copyright Act contains no express cause of action for contributory copyright infringement. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984). But in cases decided when courts were inferring secondary liability from statutory silence, courts implied the "doctrine[] of secondary liability" for others' copyright violations "from common law principles"—namely, the "rules of fault-based liability derived from the common law." *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930-31, 934-35 (2005); *see also* 3 *Nimmer on Copyright* § 12.04[C][4][b] (2024) (describing "contributory infringement" as a "judge-made remed[y] imported from the common law of torts"). "[T]he concept of contributory infringement" is thus "a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another." *Sony*, 464 U.S. at 435.

Contributory copyright infringement is rooted in the law of aiding and abetting. *See*, *e.g.*, *In re Aimster*

Copyright Litig., 334 F.3d 643, 651 (7th Cir. 2003) (describing "the law of aiding and abetting" as "the criminal counterpart to contributory infringement"); *Underhill v. Schenck*, 143 N.E. 773, 776 (N.Y. 1924) ("contributing infringer" assumes the "guilt" of the principal infringer "whom he has aided and abetted"). As Professor Nimmer explained, contributory infringement draws from "indirect tort liability," including for "aiding, abetting, or encouraging the infringing act." Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 Cal. L. Rev. 941, 1012-13 (2007); *see also* Dan B. Dobbs et al., *The Law of Torts* § 741 & n.42 (2d ed. May 2023 update) (describing "aiding and abetting" as the "premise of contributory infringement"). The Fourth Circuit itself said it derived its theory of contributory copyright infringement from the "law of aiding and abetting." *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 309 (4th Cir. 2008).

But the Fourth Circuit's rule tramples the traditional common-law limits on aiding-and-abetting liability. This Court recently clarified those principles in *Twitter* and *Smith & Wesson*. *Twitter* addressed claims that social-media companies aided and abetted terrorism by knowingly allowing ISIS to use their platforms to raise funds and attract recruits. *See* 598 U.S. at 481-82. In assessing those claims, the Court invoked the same principles that have "animated aiding-and-abetting liability for centuries," searching for "conscious, voluntary, and culpable participation in another's wrongdoing." *Id.* at 493. Under the common law, the Court stressed, "truly culpable conduct" exists when "the defendant consciously and culpably participated in a wrongful act so as to help make it succeed." *Id.* at 489, 493 (cleaned up). The Court

emphasized the need for such active wrongdoing more than a dozen times.[2]

The Court reiterated that holding in *Smith & Wesson*. There, Mexico sued gun manufacturers for aiding and abetting sales to drug cartels. The complaint alleged "that the manufacturers elect to sell guns to, among others, known rogue dealers" who, in turn, supplied the drug cartels with arms. 605 U.S. at 294. But the Court, applying *Twitter*, concluded that Mexico had "not plausibly allege[d] the kind of 'conscious . . . and culpable participation in other's wrongdoing' needed to make out an aiding-and-abetting charge." *Id.* at 291 (quoting *Twitter*, 598 U.S. at 493) (ellipsis in *Smith & Wesson*); *see id.* at 292-98 (citing *Twitter* repeatedly). Instead, as in *Twitter*, the manufacturers' acts reflected "indifference, rather than assistance"—they merely transacted with third parties "whom [they] fail[ed] to make follow the law." *Id.* at 297 (cleaned up). Such failures to police third parties are "rarely the stuff of aiding-and-abetting liability." *Id.*

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[2] *E.g.*, 598 U.S. at 489 (aiding-and-abetting liability requires "truly culpable conduct"); *id.* at 490 ("culpable misconduct"); *id.* at 492 ("conscious, 'culpable conduct'") (citation omitted); *id.* at 493 ("conscious, voluntary, and culpable participation in another's wrongdoing"); *id.* at 497 ("such knowing and substantial assistance . . . that [defendants] culpably participated in the . . . attack"); *id.* at 500 ("somehow culpable with respect to the . . . attack"); *id.* at 500-01 ("culpable assistance or participation in the . . . attack"); *id.* at 503 (plaintiffs' "burden to show that defendants somehow consciously and culpably assisted the attack"); *id.* at 504 ("conscious and culpable conduct"); *id.* (aid "both significant and culpable enough to justify attributing the principal wrongdoing to the aider and abettor"); *id.* ("whether defendants culpably associated themselves with ISIS' actions"); *id.* at 506 ("The point of aiding and abetting is to impose liability on those who consciously and culpably participated in the tort at issue.").

A service provider's failure to stop bad actors from misusing the internet is not the stuff of aiding-and-abetting liability either. Under the common law, "communication-providing services" have long had no "duty" "to terminate customers after discovering that the customers were using the service for illicit ends." *Twitter*, 598 U.S. at 501. For that reason, *Twitter* held that a social platform's provision of routine communication service to terrorists is "mere passive nonfeasance" that is not culpable enough to support secondary liability. *Id.* at 500. And in words that could have been written for this case, the Court explained that it "would run roughshod over the typical limits on tort liability and take aiding and abetting far beyond its essential culpability moorings" to hold a "communication provider" liable "merely for knowing that . . . wrongdoers were using its services and failing to stop them." *Id.* at 503. Or, as the Court more recently put it, "[w]hen a company merely knows that 'some bad actors' are taking 'advantage' of its products for criminal purposes, it does not aid and abet. And that is so even if the company could adopt measures to reduce their users' downstream crimes." *Smith & Wesson*, 605 U.S. at 293 (quoting *Twitter*, 598 U.S. at 503).

2. This Court's recent cases—and *Twitter* in particular—have emphasized the long "tradition from which" aiding-and-abetting liability arises. 598 U.S. at 485. Three traditional common-law principles are especially relevant here.

First, culpable aid traditionally requires action, not inaction. Indeed, passive nonfeasance cannot support aiding-and-abetting liability "[a]bsent an 'independent duty to act.'" *Smith & Wesson*, 605 U.S. at 292 (quoting *Twitter*, 598 U.S. at 489). "[M]isfeasance rather than nonfeasance" is required. *Id.* Courts thus

demand "'[s]ubstantial assistance'" to the primary wrongdoer, which "means active participation" in that bad actor's misconduct. Restatement (Third) of Torts: Liability for Economic Harm § 28 cmt. d (2020).

Continuing to provide internet service to bad actors does not qualify. At common law, courts did not impose aiding-and-abetting liability on communication providers that continued to serve customers "after discovering that the customers were using the service for illicit ends." *Twitter*, 598 U.S. at 501 (citing *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003); *People v. Brophy*, 120 P.2d 946, 956 (Cal. Ct. App. 1942)). For example, telephone companies did not aid and abet bookies who received horse racing information over the phone. *See Brophy*, 120 P.2d at 956 ("[p]ublic utilities and common carriers are not the censors of public or private morals"). And web-hosting companies did not aid and abet illicit websites despite "profit[ing] from the sale of server space and bandwidth." *Doe*, 347 F.3d at 659. So aiding and abetting requires some affirmative act in support of the wrongdoing—not merely a failure to prevent it.

The common law took a similar approach in suits seeking to hold telegraph companies liable for transmitting defamatory messages. Because "[s]peed is the essence of the service," courts recognized that carriers could not be expected to screen each telegram for unlawful content; their "immunity . . . must be broad enough to enable the company to render its public service efficiently and with dispatch." *O'Brien v. Western Union Tel. Co.*, 113 F.2d 539, 541 (1st Cir. 1940). Courts thus treated such carriers as neutral conduits, not culpable participants in their customers' speech—even when the messages were facially defamatory. In a leading case, *Von Meysenbug v. Western Union Telegraph Co.*, 54 F. Supp. 100, 101 (S.D. Fla. 1944),

the court held that the transmission of a telegram accusing the addressee of adultery did not give rise to liability because there was no evidence the telegraph company acted culpably. *See also Mason v. Western Union Tel. Co.*, 125 Cal. Rptr. 53, 56 (Cal. Ct. App. 1975). The carriers, by providing generally available services, were not "assisting" the tortious acts that some committed using those services.

Second, substantial assistance "ordinarily means something more than routine professional services provided to the primary wrongdoer." Restatement (Third) § 28 cmt. d. "The merchant becomes liable only if, beyond providing the good on the open market, he takes steps to 'promote' the resulting crime and 'make it his own.'" *Smith & Wesson*, 605 U.S. at 292 (quoting *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.) (L. Hand, J.), *aff'd*, 311 U.S. 205 (1940)). Amazon, for example, did not aid and abet the unlawful importation of plant and animal products simply by allowing "third-party actors" to use its "fulfillment service to import" those products. *Amazon Servs. LLC v. United States Dep't of Agric.*, 109 F.4th 573, 582 (D.C. Cir. 2024). Key there was the lack of evidence that Amazon gave the third parties "'any special treatment or words of encouragement' or 'took any action at all' with respect to the unlawful acts." *Id.* (quoting *Twitter*, 598 U.S. at 498).

Providing routine services to a wrongdoer generally counts as substantial assistance only if done under "unusual circumstances" or "in an unusual way." *Halberstam v. Welch*, 705 F.2d 472, 487 (D.C. Cir. 1983); *see Twitter*, 598 U.S. at 485 (noting that *Halberstam* has "[l]ong" been "regarded as a leading case on civil aiding-and-abetting and conspiracy liability"). For example, a defendant who helped launder years of

stolen valuables, including gold ingots smelted in her garage, did enough "in an unusual way under unusual circumstances" to show she was "a willing partner" in her partner's burglaries. *Halberstam*, 705 F.2d at 486-87. And a mail-order pharmacy could be convicted for assisting a small-town doctor's illegal morphine sales when it "'actively stimulated' [the doctor's] purchases, by," among other things, "giving him special discounts for his most massive orders." *Smith & Wesson*, 605 U.S. at 292 (quoting *Direct Sales Co. v. United States*, 319 U.S. 703, 705, 711 (1943)).

Third, courts typically do not find secondary liability for insubstantial aid to economic torts, no matter the defendant's intentions. *See* Restatement (Third) § 28 reporter's note d. Even encouraging the underlying misconduct is not enough for aiding and abetting—"liability is prudently imposed only for *substantial* assistance." *Id.* (emphasis added). That rule reflects a "proportionality" principle under which "a defendant's responsibility for the same amount of assistance increases with the blameworthiness of the tortious act," and vice-versa. *Halberstam*, 705 F.2d at 484 n.13. The less blameworthy the principal tort, the more substantial the assistance must be.

Consistent with that "proportionality test," *id.*, less serious aid is needed for secondary liability in cases of serious, physical harm. The Third Restatement thus remarks that "[l]iability for mere encouragement may make sense with respect to certain kinds of torts, as when bystanders in a crowd cheer on one party who is assaulting another." Restatement (Third) § 28 reporter's note d. Verbally encouraging an assailant—"Kill him!" and "Hit him more!"—counts as aiding and abetting the assault. *Rael v. Cadena*, 604 P.2d 822, 822 (N.M. Ct. App. 1979). And telling a young motorist with a new car to "run [the car] back up here and

see what it will do" is aiding and abetting assault when the motorist strikes a bystander during a "test run." *Cobb v. Indian Springs, Inc.*, 522 S.W.2d 383, 387 (Ark. 1975). Even that "relatively trivial" aid can be culpable when the result is bodily harm. *Halberstam*, 705 F.2d at 484 n.13; *see* Restatement (Third) § 28 cmt. d ("the enormity of a wrong . . . may appropriately cause such lesser acts to be considered aiding and abetting"). But when the principal tort lacks any physical harm—like sharing a copyrighted song on the internet—courts demand far more substantial aid before finding the aider culpable. *See Halberstam*, 705 F.2d at 484 n.13.

B. The Decision Below Inverts the Common-Law Distinction Between Active Misconduct and Passive Nonfeasance

The decision below made the same errors this Court corrected in *Twitter* and *Smith & Wesson*. The court of appeals ruled that Cox materially contributed to copyright infringement by failing to cut the internet connections to accounts Cox knew were used to pirate songs. Pet. App. 26a n.4. The court did so because it thought that "supplying a product with knowledge that the recipient will use it to infringe copyrights is exactly the sort of culpable conduct sufficient for contributory infringement." *Id.* at 27a.

That holding upends traditional common-law culpability principles. Although the court below framed Cox's failure to expel accounts from the internet as active aid, the common law makes clear it is non-culpable *inaction*. That was *Twitter*'s core holding: a company that continues to provide routine communications service to a wrongdoer, even consciously, commits "mere passive nonfeasance." 598 U.S. at 500. Indeed, Cox's conduct shares all the salient features that made the conduct in *Twitter* passive: its service

was "generally available to the internet-using public with little to no front-end screening," *id.* at 498; it "transmit[ted]" subscribers' "content without inspecting it," *id.* at 499; and it "stood back and watched" while bad actors abused its service, *id.* at 499-500. To hold Cox "liable . . . merely for knowing that . . . wrongdoers were using its services and failing to stop them" would "run roughshod over the typical limits on tort liability." *Id.* at 503.

Internet service providers do no more than provide routine internet access to their subscribers in the ordinary course. Twitter similarly "supplied generally available virtual platforms" to all who visited Twitter's website or used its smartphone app. *Id.* at 505. As did the gun manufacturers in *Smith & Wesson*, which "s[old] to everyone, and on equivalent terms." 605 U.S. at 295. And the phone companies in *Brophy*, 120 P.2d at 956, and the web-hosting companies in *Doe*, 347 F.3d at 659. None of these companies was culpable enough to be an aider and abettor. That some people misuse internet access "does not justify condemning their provision whenever a given customer turns out to be crooked." *Id.* The same result should follow here.

The court of appeals erred in holding otherwise. Leaning on a faulty analogy to *United States v. Thompson*, 728 F.3d 1011 (9th Cir. 2013), the court likened Cox's continued sale of internet service to "[l]ending a friend a hammer . . . with knowledge that the friend will use it to break into a credit union ATM." Pet. App. 27a. But selling internet access "to the internet-using public" is nothing like giving a robber the tools for a robbery. *Twitter*, 598 U.S. at 498.

Thompson itself illustrates the point. The defendant there met personally with the robber and another accomplice, brought a hammer to the planning session, and handed it over alongside a "thermal lance" intended to cut through metal that the accomplice brought to the meeting. 728 F.3d at 1012-13. He then spoke with the robber *forty-five times* on the night of the crime. *See United States v. Thompson*, 539 F. App'x 778, 780 (9th Cir. 2013). That close, intentional participation justified aiding-and-abetting liability. Cox, by contrast, simply sold internet access to the general public with knowledge that some members of the public allegedly used that service to infringe. Equating that to handing a burglar his burglary tools implausibly suggests that Home Depot aids and abets every theft committed with every hammer it sells.

The Fourth Circuit's expansion of the hammer analogy beyond co-conspirators thus sweeps much too far. On the Fourth Circuit's view, virtually anyone that provides an infringer with a basic service necessary for infringement could be branded an accomplice to it. Take a power company: if it received the record labels' emailed infringement allegations and then refused to cut off the power to an infringer's house, the Fourth Circuit's rule would treat it as an aider and abettor (because online piracy requires electricity). So too with colleges that fail to expel infringing students, landlords that fail to evict infringing tenants, or operating-system providers that fail to revoke software licenses for infringers' computers. All, like Cox, supply basic services—electricity, shelter, computing power—that infringers need to share songs online. Internet service providers are no more culpable than they are.

C. The Record Labels' Arguments Lack Merit

The record labels' contrary arguments—and the arguments of courts that have agreed with them—distort both common-law secondary-liability principles and the Digital Millennium Copyright Act's statutory scheme.

1. In their supplemental brief, the labels contend (at 4, 6-7) that *Twitter* is "inapposite" because Cox had "express notice" that particular subscribers infringed. But neither *Twitter* nor the common law turns on whether the communication provider knows who the wrongdoers are. The line instead is between misfeasance (culpable participation) and nonfeasance (a failure to stop another's misuse). So *Twitter* explained that "communication-providing services" have "no duty . . . to terminate customers after discovering that the customers were using the service for illicit ends." 598 U.S. at 501. Providing routine service remains "mere passive nonfeasance," no matter how well the provider knows the identity of the wrongdoer abusing that service. *Id*. at 500.[3]

Indeed, the result in *Smith & Wesson* is inexplicable on the labels' theory. The complaint there alleged that

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[3] The labels' argument also distorts the facts of how their notices operate. As Cox explains (at 8, 35), internet service providers can glean only limited information about infringing activity from the millions of automated notices they receive from copyright owners and their agents. *Cf. O'Brien*, 113 F.2d at 541-42 (noting the "72,626" telegrams the defendant handled and observing that, "[i]f the telegraph companies are to handle such a volume of business expeditiously, it is obvious that their agents cannot spend much time pondering the contents of the messages"). Such notices generally connect an incident of alleged infringement to an IP address—not to the person actually allegedly infringing. Here, the bulk of notices Cox received connected the alleged piracy to large account holders such as universities, military housing, and regional service providers. *See* Cox Br. 11.

a "small minority" of dealers "are responsible for most of the sales to Mexican traffickers," that the manufacturers "know who those bad apple dealers are," and that they "continue to supply those dealers" to "boost their own profits." 605 U.S. at 288-89 (cleaned up). Yet this Court held—"for a package of reasons"—that those allegations showed "indifference, rather than assistance." *Id.* at 294, 297 (cleaned up). If "express notice" plus continued sales were enough, *Smith & Wesson* would have come out the other way.

The labels also gesture (Suppl. Br. 7) at an "independent duty" to act that would collapse the common law's traditional active-passive distinction. *See Smith & Wesson*, 605 U.S. at 292 ("'failures,' 'omissions,' or 'inactions'" can "support" secondary "liability" when there is "an 'independent duty to act'") (cleaned up; citation omitted). But the only duty it cites is the general duty not to contributorily infringe. *Twitter* and *Smith & Wesson* reject that bootstrapping. They make clear that any duty to terminate a customer or user must come from law independent of the mere possibility that a lawful, generally available service may be misused, or else from the provider's own affirmative, culpable participation in the wrongdoing. If a novel common-law duty to terminate identified wrongdoers existed, *Twitter* would have said so. But it did the opposite: the Court warned that imposing liability "merely for knowing that . . . wrongdoers were using [a] service[] and failing to stop them" would uproot aiding and abetting from its common-law soil. 598 U.S. at 503.

2. Some lower courts have sought to reconcile their expansive contributory-infringement rules with *Twitter* by misreading its discussion of the "nexus between the defendant's conduct and the underlying tort." *UMG Recordings, Inc. v. Grande Commc'ns Networks,*

L.L.C., 118 F.4th 697, 714 (5th Cir. 2024), *pet. for cert. pending*, No. 24-967 (U.S.). True, the victims in *Twitter* alleged no "direct nexus" between the platforms and the specific "terrorist attack" at issue. *Id.* But "the lack of allegations connecting" the platforms to the specific ISIS "attack" was not the main reason the nexus in *Twitter* was weak. 598 U.S. at 500. More important was the platforms' "attenuated . . . relationship with ISIS and its supporters"—a relationship that, like their dealings with all users, was "arm's length, passive, and largely indifferent." *Id.* An internet service provider's role in its subscribers' infringement is similarly remote.

In any event, this Court reached the nexus issue in *Twitter* only after devoting 10 pages to the common-law rule requiring "conscious, voluntary, and culpable" misconduct for aiding-and-abetting liability. *Id.* at 484-93. The decision ultimately turned on the platforms' lack of culpability, not the weakness of the nexus. *Id.* at 497-506. Indeed, "the lack of any concrete nexus" merely "put . . . to rest" "any doubt" about whether the platforms' inaction had culpably aided the attack. *Id.* at 501. So while the "lack of nexus" was one more reason the claims fell "far short," *id.* at 505, it was hardly necessary to the outcome. That is why the D.C. Circuit correctly dismissed claims that Amazon had passively aided illegal animal importation that the wrongdoers carried out via its "fulfillment services." *Amazon*, 109 F.4th at 574-75. As in *Amazon*, Cox's "mere provision of a neutral service" is not "culpable," no matter how close the literal nexus to some wrongful act. *Id.* at 575.

3. The labels also lean (Suppl. Br. 7-8) on the DMCA, implying that, because Congress offered a conditional safe harbor for ISPs that reasonably implement a repeat-infringer policy in appropriate

circumstances, 17 U.S.C. § 512(i)(1)(A), a failure to qualify points toward liability. That is doubly backwards. For one thing, Congress spoke directly to this inference and forbade it: "The failure . . . to qualify for [the safe harbor] shall not bear adversely upon the consideration of a defense" or otherwise suggest that the service provider is liable. *Id.* § 512(*l*). For another, the safe harbor is best understood as a carrot, not a stick. It offers immunity from monetary damages if an ISP adopts and reasonably implements a policy that "provides for . . . termination in appropriate circumstances." *Id.* § 512(i)(1)(A). But failure to qualify simply means that substantive copyright infringement law applies, along with its traditional defenses. And as the United States explained, the DMCA was enacted in the internet's "infancy"—Congress thus "proceeded cautiously, offering a safe harbor in specified circumstances while expressly disavowing any implication that conduct falling outside the safe harbor is infringing." U.S. CVSG Br. 14.[4] Converting the safe harbor into a rule of automatic liability for those outside it would conflict with Congress's intent, as expressed in § 512(*l*)'s text.

The safe harbor is also no substitute for the traditional limits on secondary liability because it is costly

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[4] The United States is correct that the DMCA statutory scheme "betrays no awareness whatsoever that internet users might be able directly to exchange files containing copyrighted works." *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1238 (D.C. Cir. 2003). The 1998 Congress never contemplated peer-to-peer piracy (or ISP liability for it); it enacted the § 512(a) safe harbor at a time when ISPs were both conduits and bulletin-board operators effectively hosting infringing files on their own servers. *See*, *e.g.*, *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1373-75 (N.D. Cal. 1995).

to invoke. The DMCA often asks courts to resolve a "large number[] of factual questions that can arise in connection with a claim of the safe harbor." *Capitol Recs., LLC v. Vimeo, LLC*, 826 F.3d 78, 94 (2d Cir. 2016) ("*Vimeo I*"); *see Capitol Recs., LLC v. Vimeo, Inc.*, 125 F.4th 409, 413 (2d Cir. 2025) (affirming summary judgment nine years after *Vimeo I* and holding "Vimeo is entitled to the safe harbor"). And those questions can spawn years of "sprawling, costly, and hugely time-consuming" litigation. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560 n.6 (2007).[5] This very case has already consumed nearly a decade of litigation—on the heels of another case against Cox that lasted four years before it. *See* Pet. 11-12. And the labels' pending case against Altice USA has only now reached summary-judgment briefing on the DMCA safe harbor (as well as on the underlying copyright-infringement claims) after years of discovery, dozens of depositions, and many millions of dollars in expert and legal fees.[6] If this Court were to adopt the labels' liability rule, such costly litigation over the safe harbor will continue to be the norm. Internet service providers should not be dragged through that gauntlet when the asserted theory of contributory infringement collapses at the starting line.

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[5] Affirmance would also invite costly litigation over what it means to "reasonably implement[]" a repeat-infringer policy. 17 U.S.C. § 512(i)(1)(A). This Court has cautioned that open-textured standards like reasonableness carry "special costs" and impose "burdens of broad-reaching discovery." *Harlow v. Fitzgerald*, 457 U.S. 800, 816-18 (1982).

[6] While the parties' cross-motions for summary judgment were pending, the court stayed the case at the parties' joint request pending this Court's ruling here, less than eight weeks before trial was scheduled to commence.

II. Returning Contributory Liability To Its Proper Scope Is Vital To The Future Of The Internet

The common-law principles the Fourth Circuit ignored serve a crucial function. By "run[ning] roughshod over the typical limits on tort liability" and thrusting "aiding and abetting far beyond its essential culpability moorings," *Twitter*, 598 U.S. at 503, the decision below threatens to disrupt internet access for countless Americans. Indeed, the Fourth Circuit's view of contributory infringement would force internet service providers to cut off any subscriber after receiving allegations that some unknown person used the subscriber's account for infringement. And the consequences could extend even beyond copyright. Under the court of appeals' theory, every "communication provider" could be said to act culpably whenever it knowingly "fail[s] to stop" some "bad actor[]" from exploiting its service. *Id.* Enterprising plaintiffs' lawyers thus could seek to hold internet service providers liable for every bad act that occurs online.

Such a rule thwarts federal communications policy. As early as 1996, Congress had identified the promise of the then-nascent internet, declaring it is "the policy of the United States" "to promote the continued development of the Internet." 47 U.S.C. § 230(b)(1). At the same time, Congress instructed the FCC to use its authority to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability"—internet access—"to all Americans." *Id.* § 1302(a), (d)(1). And more recently, Congress has taken steps to ensure that all Americans have access to affordable, reliable, high-speed broadband through multi-billion-dollar subsidies for household internet

subscriptions,[7] and substantial capital funds to support broadband and related projects throughout the country.[8]

Amici play a critical role in those efforts to bring broadband to all Americans. They have invested hundreds of billions of dollars to deploy and improve the networks that hundreds of millions of Americans rely on daily for internet access. Work, school, telemedicine, and keeping in touch with loved ones all depend on the ability to get online. The internet is now a vital public forum, where people "debate religion and politics," "look for work," or even "petition their elected representatives." *Packingham v. North Carolina*, 582 U.S. 98, 104-05 (2017). As the FCC noted a decade ago, "institutions and schools, and even government agencies, require Internet access for

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[7] Through the Emergency Broadband Benefit Program and the Affordable Connectivity Program, Congress appropriated nearly $17.5 billion that was used to provide more than 21 million households with a monthly subsidy for their broadband internet access. *See* Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, div. J, tit. IV, 135 Stat. 429, 1382 (2021) (appropriating $14.2 billion); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 904(b)(1), (i)(2), 134 Stat. 1182, 2130-31, 2135 (2020) (appropriating $3.2 billion).

[8] In the American Rescue Plan Act, Congress created both the $10 billion Capital Projects Fund and the $7.17 billion Emergency Connectivity Fund. *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9901(a), 135 Stat. 4, 223, 233 (codified at 42 U.S.C. § 804(a)); *id.* § 7402(c), 135 Stat. 109 (*reprinted in* 47 U.S.C. § 254 note). And the Broadband Equity Access and Deployment Program is a voluntary federal program that makes available $42.45 billion for States to fund the deployment of new networks to bring broadband to unserved and underserved areas of the country. *See* Broadband USA, *Broadband Equity Access and Deployment Program*, https://bit.ly/4m1KVuF (last accessed Sept. 3, 2025).

full participation in key facets of society."[9] That observation is even truer today. *See Moody v. NetChoice, LLC*, 603 U.S. 707, 719 (2024) (describing the "deluge" of speech that occurs on the internet); *id.* at 767 (Alito, J., concurring in the judgment) (the "modern public square").

The court of appeals' approach cuts sharply against those efforts. It could compel internet service providers to engage in wide-scale terminations to avoid facing crippling damages, like the $1 billion judgment entered against Cox here, the $2.6 billion damages figure touted by these same plaintiffs in a recent suit against Verizon,[10] or the similar figures sought from Frontier and Altice USA. Such terminations come with several significant costs.

First, an overbroad termination mandate can be dangerous. Cutting off a subscriber's internet service does not just affect the alleged infringer; it also jeopardizes innocent family members, employees, students, and community members who depend on that connection. A household may include remote workers, patients using internet-connected medical devices, or families relying on monitored security systems. For them, termination is not an inconvenience—it is a threat to livelihood, health, and safety. In underserved areas, termination can mean being severed from the modern world altogether. The collateral damage is even more acute for institutions such as coffee shops, hospitals, and universities,

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[9] Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, *Lifeline and Link Up Reform and Modernization*, 30 FCC Rcd 7818, ¶ 4 (2015).

[10] *See* Wes Davis, *Music labels sue Verizon for more than $2.6 billion*, The Verge (July 15, 2024), https://bit.ly/3XycSSc.

which have limited control over individual users but which the Fourth Circuit's rule would require the internet service provider to terminate after receiving allegations that some users committed piracy. *See* Cox Br. 35-36.

Recent events underscore the point. During the July 2025 Texas Hill Country floods, emergency communications collapsed: despite providers' best efforts, it took five days to deploy mobile radio and cell towers to restore inter-agency coordination, and coverage gaps left some residents without warnings until hours after their homes were already destroyed.[11] As FCC Chairman Carr explained, "historically, the most important action after a storm was to restore power. Nowadays, it's a balancing act to restore both power and communications."[12] In such conditions, aggressive internet terminations would only magnify the danger—shutting off access to emergency alerts, telemedicine, payroll, education platforms, and family check-ins when communities most need them.

Or consider the COVID-19 pandemic, when many *amici* voluntarily agreed to stop terminating customers for nonpayment. The FCC supported that activity through its "Keep Americans Connected Initiative," which aimed "to ensure that Americans do not lose their broadband or telephone connectivity as a result of the[] exceptional circumstances" the pandemic

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[11] *See Joint Hearing: Senate Select Committee on Disaster Preparedness and Flooding & House Select Committee on Disaster Preparedness and Flooding*, Tex. Senate & Tex. House (July 23, 2025), https://bit.ly/4m1dqZw.

[12] Noah Ziegler, *FCC Roundtable Urges Cross-Sector Collaboration in Weather Disasters*, Cablefax (July 7, 2025), https://bit.ly/4nlKs81.

created.[13] But under the court's view here, that public-minded conduct could support a finding of secondary liability.

Second, the automated processes that copyright holders use to flag copyright infringement on peer-to-peer networks are "famously flawed." *Strike 3 Holdings, LLC v. Doe*, 351 F. Supp. 3d 160, 161-62 (D.D.C. 2018), *rev'd and remanded on other grounds*, 964 F.3d 1203 (D.C. Cir. 2020). Decades ago, for example, the Penn State astrophysics department received an infringement notice from the same record companies suing here because the department's file directory included a folder named "usher," which the music industry's automated program mistook for the musician Usher. The infringement notice came during final exams and almost resulted in the department losing internet access.[14] Similarly, a student at Ithaca College received an infringement notice accusing her of illegally downloading a song that she had lawfully uploaded to her computer from a CD she bought.[15] Another student had charges brought against him by the school's Office of Judicial Affairs based on an infringement notice. The student had never even heard of the song he was accused of downloading,

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[13] FCC, *Keep Americans Connected Pledge* (updated July 8, 2020), https://www.fcc.gov/keep-americans-connected (last accessed Sept. 2, 2025). New York and New Jersey even prohibited internet shutoffs for nonpayment during the pandemic. *See* S. 1453B, 2021-2022 Legis. Sess. (N.Y. May 11, 2021) (codified at 2021 N.Y. Sess. Laws ch. 106; expired July 1, 2022), https://bit.ly/4gbmVUX; N.J. Exec. Order No. 126 (Apr. 13, 2020), https://bit.ly/4mNZuDD.

[14] *See* Declan McCullagh, *RIAA apologizes for threatening letter*, CNET (May 13, 2003), https://cnet.co/3TfXzux.

[15] *See* Clara Eisinger, *More illegal music notices issued by RIAA*, The Ithacan (Oct. 11, 2007), https://bit.ly/3XtmzRz.

and the charges were later dropped after the office suspected someone else was surreptitiously using his internet connection.[16] But the Fourth Circuit's rule would have *amici* kick him, and others like him, off the internet. *See*, *e.g.*, *Cobbler Nevada, LLC v. Gonzales*, 901 F.3d 1142, 1145, 1149 (9th Cir. 2018) (similar claim against manager of an "adult care home," whose residents were using the manager's internet subscription to infringe).

And for what? It would be one thing if the damages in these cases stemmed from any real calculation of pocket-book harm to the music-industry plaintiffs. But consumers can buy access to nearly all recorded music in existence for $11.99 per month through streaming services like Spotify,[17] download a song from iTunes for even less, or listen for free on ad-supported services like YouTube. And the individual music labels that license their catalogs to such services collect only a fraction of those amounts. Small wonder, then, that the actual monetary harm here was in the thousands of dollars for the approximately 10,000 infringed works—a number dwarfed by respondents' billion-dollar statutory-damages verdict. The result is "a copyright regime that rewards rights holders in proportion to their strategic acumen and litigation budgets—not the value of their works." *Eight Mile Style, LLC v. Spotify USA Inc.*, 2024 WL 3836075, at *22 (M.D. Tenn. Aug. 15, 2024).

Returning contributory copyright infringement to its common-law roots would guard against these outcomes. And it would not leave copyright owners

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[16] *See id.*

[17] *See* Spotify, *Premium*, https://www.spotify.com/us/premium/ (last accessed Sept. 2, 2025).

without a remedy. They can still use any evidence they collect of online infringement to file John Doe lawsuits and serve judge-issued subpoenas on internet service providers to learn the identity of the customer whose internet access was used for infringement.[18] The subpoenas can then lead to direct actions against the actual infringers.[19] Indeed, before embarking on this effort to hold internet service providers liable for their users' actions, music labels and publishers used to sue those users directly. But the industry found that suing individuals—like a 12-year-old girl,[20] a homeless man,[21] grandparents,[22] and a single mother who had shared 24 songs online[23]—created "a public-relations disaster."[24] The industry's mass litigation campaign was even unpopular among

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[18] *See*, *e.g.*, *Strike 3 Holdings, LLC v. Doe*, 964 F.3d 1203, 1214 (D.C. Cir. 2020) (reversing district court denial of copyright owner's Rule 26(d)(1) motion to serve subpoena on internet service provider to identify account holder).

[19] *See id.* at 1212 (noting that copyright owner may need to plead additional facts to allege that account holder is the infringer).

[20] *See* CNN, *12-year-old settles music swap lawsuit* (Feb. 18, 2004), https://cnn.it/47hHJW7.

[21] *See Warner Bros. Recs., Inc. v. Berry*, 2008 WL 1320969, at *4 n.1 (S.D.N.Y. Apr. 9, 2008).

[22] *See* Benny Evangelista, *Download lawsuit dismissed / RIAA drops claim that grandmother stole online music*, S.F. Chron. (Sept. 25, 2003), https://bit.ly/4cMiJaI; BBC News, *Grandfather caught in music fight* (Sept. 9, 2003), https://bbc.in/3TiVwGm.

[23] *See Capitol Recs., Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008).

[24] Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, Wall St. J. (Dec. 19, 2008), *available at* https://on.wsj.com/47aOIAj.

musicians: Chuck D of Public Enemy, for example, described the suits as "scare tactics."[25]

So the music labels no longer appear willing to sue the people who commit music piracy. Instead, they want internet service providers to enforce their copyrights for them, or to pay dearly if they fail to kick as many households off the internet as the labels want. But if piracy remains such a vital problem—as opposed to a litigation profit center for these multi-billion-dollar record labels—the labels are free to resume pursuing the infringers directly. Or as in *Grokster*, they can sue the providers of any software or websites designed and marketed for piracy. While these individual infringers and piracy-software providers may lack deep pockets and be harder to sue than internet service providers, that is no reason to upend the common-law limits on contributory infringement and thwart Congress's efforts to make high-speed internet access available to all Americans.

CONCLUSION

The court of appeals' judgment should be reversed.

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[25] Joel Selvin & Neva Chonin, *Artists blast record companies over lawsuits against downloaders*, S.F. Chron. (Sept. 11, 2003), https://bit.ly/3TiVChc.

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