

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 AMICI CURIAE AMERICAN CIVIL LIBERTIES
UNION, AMERICAN CIVIL LIBERTIES UNION OF
VIRGINIA, AND CENTER FOR DEMOCRACY AND
TECHNOLOGY IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI*¹

Amici curiae are organizations that support and advocate for internet users' free expression and other human rights. *Amici* have a strong interest in ensuring that individuals are able to access and participate in all forms of constitutionally protected speech online, as the First Amendment guarantees.

The **American Civil Liberties Union** (“**ACLU**”) is a nationwide, nonpartisan, nonprofit organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU has frequently appeared in First Amendment cases in this Court and courts around the country, both as counsel for a party and as *amicus curiae*. See, e.g., *Free Speech Coal. v. Paxton*, 606 U.S. ____ (2025) (counsel for Petitioners); *NRA v. Vullo*, 602 U.S. 175 (2024) (counsel for Petitioner); *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023) (*amicus*).

The **ACLU of Virginia** is one of the ACLU's state affiliates with approximately 37,000 members and 300,000 supporters. As an organization that advocates for freedom of expression and access to information throughout Virginia, the ACLU of Virginia and its members have a strong interest in preventing the arbitrary denial of access to the

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of the brief; and no person other than amici, their members, or their counsel contributed money intended to fund the preparation or submission of the brief.

internet. The ACLU of Virginia has appeared in courts throughout Virginia as both *amicus* and direct counsel in cases concerning the right to free expression. *See, e.g., Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019); *E.K. v. Dep't of Def. Educ. Activity*, No. 35-cv-637 (E.D. Va. Apr. 15, 2025); *In re Gender Queer*, No. CL22-1985 (Va. Cir. Ct. Va. Beach Aug. 30, 2022).

The **Center for Democracy & Technology (CDT)** is a non-profit, public interest organization that for 30 years has worked to promote the constitutional and democratic values of free expression, privacy, equality, and individual liberty in the digital age.

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Amendment guards against the possibility that the government will directly or indirectly cause a speech intermediary—such as a bookstore, a social media platform, or an internet service provider (“ISP”)—to suppress otherwise protected speech of its users for fear of liability. Where First Amendment interests are involved, this Court has long recognized the importance of caution in imposing culpability for the wrongful acts of another. *See, e.g., Smith v. California*, 361 U.S. 147 (1959); *Manual Enters., Inc. v. Day*, 370 U.S. 478 (1962); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). What’s true for analog-era intermediaries like bookstores is all the more important for ISPs.

This Court recognized the importance of appropriately calibrating contributory liability rules for the internet in *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023), and it should do so again here. To protect countless Americans’ First Amendment interests in access to the internet, this Court should make clear that the knowledge and material contribution requirements for contributory copyright liability have real force. As such, ISPs like Cox cannot be held liable for failing to terminate users based merely on notices from copyright owners—which are nothing more than untested, unverifiable *allegations*—absent conscious, voluntary, and culpable participation in the subscribers’ wrongdoing.

A contrary rule, like the Fourth Circuit’s or the one urged by Respondents here, would lead ISPs to err on the side of terminating contracts with their users

who are merely accused of infringement. For those terminated, the consequences would be severe: Losing internet access interferes with “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,” as well as the ability of “a private citizen to make his or her voice heard”—in short, it interferes with participating in many aspects of modern society. *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017); *see also United States v. Eaglin*, 913 F.3d 88, 91 (2d Cir. 2019) (citations omitted) (“to consign an individual to a life virtually without access to the Internet is to exile that individual from society”). Many Americans do not even have a choice of ISP, and could lose connectivity entirely and indefinitely. *See infra* pp. 27–29.

Expansive secondary liability rules would create a particularly drastic interference with First Amendment interests when the copyright holder goes after a transmission ISP like Cox, which does not host speech but rather transmits it. Unlike social media platforms or hosting providers where files are stored accessibly on the companies’ machines, ISPs do not store or have the ability to remove infringing files that transit their systems. The only recourse for Cox and other ISPs to avoid liability under plaintiffs’ proposed rule is to terminate accounts and block customers by Internet Protocol addresses (“IP addresses”), which are like phone numbers for the internet.

The speech implications of that remedy are huge. Customers accused of copyright infringement also transmit lawful, First Amendment-protected speech. Terminating internet access would interfere with that

speech. Moreover, IP addresses connect more people to the internet than just the accused infringer. Multiple unrelated users can (and routinely do) use the same IP address.² This is common for libraries and schools, coffee shops and cafes, and hotels and airports. These institutions are sources of internet access for millions of Americans. Even for residential accounts, the consequences of terminating internet access would not be confined to individuals accused of repeat infringement. Families share a single ISP account. Multi-user accounts are also common in shared households, a growing category.³

Because shared internet accounts are commonplace, terminating an ISP customer's account may result in the loss of internet access for innocent individuals who have not engaged in any infringement. Parents' internet access, for example, may be terminated based on the conduct of their children—or even their children's friends. A hospital that offers internet access to dozens or even hundreds of patients and their families could find critical access shut off.

² Perimeter 81, *Dedicated IP vs. Shared IP: Which One Should You Use?*, Check Point (May 1, 2024), <https://perma.cc/6MDY-DLJT> (“[S]hared IPs may pose certain risks, particularly in terms of security. If one user on the shared IP engages in malicious activities or violates terms of service, it can potentially affect the reputation and functionality of other users sharing the same IP address.”).

³ Richard Fry, *More Adults Now Share Their Living Space, Driven in Part by Parents Living with Their Adult Children*, Pew Rsch. Ctr. (Jan. 31, 2018), <https://perma.cc/48KJ-J6LP>.

In clarifying the scope of contributory liability, this Court should minimize the grave harms to protected expression that would result if ISPs were forced to terminate users based merely on unverified notices. To do that, the Court should apply its approach in *Taamneh* here. *Taamneh* interpreted a statutory provision imposing secondary liability on another kind of internet communications company—a social media platform. 598 U.S. at 483. *Taamneh* held that an internet communications company does not aid and abet wrongdoing absent an intention to assist the wrongdoer in his malfeasance, as opposed to mere indifference to that malfeasance. Under that rubric, an ISP cannot be held secondarily liable where, as here, it treats the wrongdoer’s uploaded content the same way it treats the content provided by other users. Instead, secondary liability requires conscious, voluntary, and culpable participation in the account holder’s wrongdoing. *Id.* at 492.

This Court should hold that, as in *Taamneh*, an ISP cannot be held secondarily liable for conduct that is “arm’s length, passive, and largely indifferent.” *Id.* at 500. Applying *Taamneh*’s framework to Cox’s conduct in this case, the Fourth Circuit erred in imposing secondary liability without the necessary “strong showing of assistance and scienter.” *Id.*

ARGUMENT

I. THE CONTRIBUTORY LIABILITY RULE APPLIED BY THE FOURTH CIRCUIT CONFLICTS WITH BASIC PRINCIPLES OF INTERMEDIARY LIABILITY FOR TRANSMITTING SPEECH.

A. Interpretation of the Copyright Contributory Liability Standard Must Account for Effects on Speech.

For over half a century, this Court has insisted on safeguards to avoid chilling protected speech as a collateral consequence of tort actions or criminal enforcement actions that target unprotected speech. The Court has done so by, among other things, reading stringent scienter requirements into statutes that impose liability for speech. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (per curiam) (requiring intent to incite or produce imminent lawless action for challenges to inflammatory statements); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–82 (1964) (requiring “actual malice” for defamation claims by public officials). The Court’s approach is particularly skeptical where, as here, laws potentially impose liability on intermediaries for others’ speech. Imposing liability on a speech intermediary without a sufficiently stringent scienter requirement, the Court has repeatedly warned, has a chilling effect that limits both the intermediary’s and the public’s speech rights.

In *Smith v. California*, 361 U.S. 147 (1959), for example, this Court invalidated a Los Angeles ordinance imposing strict criminal liability on a bookstore that sold obscene books. The Court

explained that strict liability would lead booksellers to remove from the shelves all but the few books they could actually inspect and feel confident did not cross the line. *Id.* at 153. In that scenario, “[e]very bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop,” and “[i]t would be altogether unreasonable to demand so near an approach to omniscience.” *Id.* (citation modified). As a result, many fewer books would be available to the public: The “self-censorship” compelled by the ordinance’s strict liability standard would “affect[] the whole public,” “imped[ing]” the “distribution of all books, both obscene and not obscene.” *Id.* at 154. The result would be a “severe limitation” on access to “constitutionally protected matter.” *Id.* at 153. Notably, the Court deemed the statute invalid because it lacked a sufficient scienter requirement. *See id.* at 154.

The Court reaffirmed these principles in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962), where a plurality held that magazine publishers could not be liable under the Comstock Act for distributing advertisements by independent photographers offering nude photographs for sale without proof that the publisher “*knew* that at least some of his advertisers were offering to sell obscene material.” *Id.* at 492 (plurality op.) (emphasis added). Liability without proof of *specific knowledge* of the character of the advertisements included in the magazine “would as effectively ‘impose a severe limitation on the public’s access to constitutionally protected matter,’ . . . as would a state obscenity statute which makes criminal the possession of obscene material

without proof of scienter.” *Id.* at 492–93 (quoting *Smith*, 361 U.S. at 153).

In addition to imposing strict scienter requirements, this Court has also more directly disapproved of expansive liability for speech intermediaries. In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), this Court held that a Rhode Island commission violated the First Amendment by threatening book distributors with liability for selling, distributing, or displaying books to youth under the age of 18 that the commission had deemed “objectionable.” *Id.* at 61, 63–64. While the First Amendment challenge in *Bantam Books* was brought by book publishers, this Court explained that the commission had violated the Constitution by threatening book *distributors* without adequate “procedures” in place to avoid over-broad enforcement. *Id.* at 61, 66. Although the state commission in *Bantam Books* had not seized or banned any books, but only leveled accusations, the commission’s “informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation” nevertheless suppressed constitutionally protected speech by making book distributors unwilling to distribute the books. *Id.* at 67. As a result, both minors and adults were “deprived of the opportunity to purchase the publications” that were not actually obscene. *Id.* at 71.

In the years following these decisions, the Court continued to recognize the importance of calibrating liability rules for speech intermediaries to avoid incentivizing the censorship of protected along with unprotected speech. *See, e.g., Hamling v. United States*, 418 U.S. 87, 123 (1974) (obscenity prosecution

against brochure distributors was not unlawful because the statute applied only to “knowing” conduct); *Ginsberg v. New York*, 390 U.S. 629, 644 (1968) (upholding a New York obscenity statute and explaining that its scienter requirement “rests on the necessity to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity” (citation modified)); see also Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. Pa. L. Rev. 11, 83 (2006) (collecting cases and concluding that “[i]n the last half century, *Smith* has regularly served as the basis for decisions rejecting the imposition of liability without fault on intermediaries who facilitate the transmission of erotic materials from speaker to listener”).

Notably, the Court has never suggested that an intermediary can be held liable based on a history of alleged violations by a third party. The question has always been whether the intermediary itself knew that the specific speech at issue was unlawful at the time it facilitated the speech. This is a key reason that, for example, courts have rejected broad prohibitions on social media use for adjudicated sex offenders instead of targeted restrictions on their online activities, see *Packingham*, 582 U.S. at 108, as well as injunctions against potential future defamation or similar “deplatforming” remedies in advance of a full adjudication on the merits. See, e.g., *McCarthy v. Fuller*, 810 F.3d 456, 462 (7th Cir. 2015) (rejecting injunction that went beyond exact circumstances of past defamation); *Sindi*

v. El-Moslimany, 896 F.3d 1, 34–35 (1st Cir. 2018) (same); *Metro. Opera Ass’n v. Local 100, Hotel Emps. & Rest. Emps. Int’l Union*, 239 F.3d 172, 177 (2d Cir. 2001) (potential for suppression of protected speech justifies universal rule that equity does not enjoin a libel or slander absent extraordinary circumstances); *Crosby v. Bradstreet Co.*, 312 F.2d 483, 485 (2d Cir. 1963) (nullifying injunction against publication of “any” statements about a person as a broad prior restraint void under the First Amendment).

The concerns that have led this Court to impose demanding scienter requirements to govern speech intermediaries’ tort and criminal liability apply equally in the context of copyright law. Indeed, compared to this Court’s decisions limiting intermediary liability in tort and criminal cases, the Fourth Circuit’s rule results in far greater interference with intermediaries not themselves accused of infringement, and who merely transport the allegedly infringing content alongside a host of unquestionably protected speech. Cox and other ISPs are even more removed from infringement than, for example, the analog intermediaries like bookstores and book distributors in *Bantam Books*; they are more analogous to trucking companies delivering the books. And *amici* are not aware of any obscenity case in which someone who merely delivered obscene materials was held liable, or enjoined from making future deliveries based on a previous violation of the law by the party ultimately responsible for the books. That would be the upshot of plaintiffs’ and the Fourth Circuit’s rule, and it is inconsistent with this Court’s First Amendment precedents.

B. Liability For Contributory Copyright Infringement Requires Affirmative Acts That Constitute Conscious, Voluntary, and Culpable Participation in a Third-Party's Direct Infringement of Plaintiff's Copyright.

To protect the public's First Amendment rights, this Court has long insisted on causation and knowledge before imposing liability on speech intermediaries. Copyright does not justify an exception, especially because common law background principles of secondary liability, which inform secondary copyright liability, also emphasize causation and knowledge.

1. Contributory copyright infringement is an application of standard common law concepts.

The Copyright Act does not explicitly define the scope of secondary liability. Restatement of the Law, Copyright, Tentative Draft No. 5 § 8.01, Comment a. The only statutory basis for contributory infringement is §106 of the Copyright Act, which gives copyright owners the exclusive rights “to do and to authorize” various acts. Because the Copyright Act expressly adopts common law principles of contributory liability, background principles of tort liability assist courts in identifying when acts amount to “authorization.” *Cf. Cnty. of Washington v. Gunther*, 452 U.S. 161, 169 (1981) (the term “authorize” will “ordinarily denote[] affirmative enabling action”); *see also* H.R. Rep. No. 94-1476, at 61 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5674 (“Use of the phrase ‘to authorize’ is intended to avoid any questions as to

the liability of contributory infringers.”); *Geophysical Serv., Inc. v. TGS-NOPEC Geophysical Co.*, 850 F.3d 785, 799 (5th Cir. 2017) (“[T]he term ‘to authorize’ in § 106 of the Copyright Act was not intended to give rise to a protectable right of authorization in copyright holders, but rather to invoke the pre-existing doctrine of contributory liability.”) (citation omitted). When courts interpret secondary liability rules for copyright, they should use those background principles, rather than creating special copyright-specific rules not provided for in the statute. *Cf. eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392–93 (2006) (invoking background equitable principles for interpreting copyright and patent acts).⁴

2. *Taamneh* provides the proper model.

To align secondary copyright liability principles with the common law, this Court does not need to write on a blank slate. The contributory liability imposed here was aiding-and-abetting liability, just as was asserted in *Taamneh*. See Pet. App. at 26a–28a; see also *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 764 (2011) (explaining, in the patent context, that contributory infringement is “the aiding and abetting of direct infringement by another

⁴ Lower courts, including the Fourth Circuit here, have sometimes improperly created special rules that relax the requirements for contributory copyright liability, abandoning background principles requiring specific knowledge and sufficiently fine-grained control. See Mark Bartholomew & John Tehranian, *The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law*, 121 Berkeley Tech. L.J. 1363, 1388–89, 1391–94 (2006) (discussing lowered standards for control and material contribution in copyright compared to trademark law).

party”). And *Taamneh*, for its part, expressly drew on the common law to set out the metes and bounds of secondary liability. *Taamneh*, 598 U.S. at 484 (aiding and abetting liability, “familiar to the common law,” must be understood “in context of the common-law tradition from which it arose”).

The Fourth Circuit’s approach below subjects ISPs like Cox to potential liability for all acts of copyright infringement committed by particular subscribers whenever the copyright owner or its agent has sent repeat notices alleging past instances of infringement by those subscribers. Pet. App. at 10a–12a. This rule cannot be reconciled with *Taamneh*. In that case, this Court relied on established common law principles to reject a rule that “would effectively hold any sort of communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them.” 598 U.S. at 503. Instead, the *Taamneh* Court unanimously held that an internet social media platform is not secondarily liable for unlawful material posted to the platform by an account holder unless the plaintiff demonstrates the platform’s conscious, voluntary, and culpable participation in the account holder’s wrongdoing.

In *Taamneh*, the families of victims of a terrorist attack sued three social media companies, claiming that the companies’ hosting and promotion of pro-terrorist content contributed to the attack. The lawsuit was brought pursuant to the Justice Against Sponsors of Terrorism Act (“JASTA”), 18 U.S.C. §2333(d)(2). JASTA imposes secondary civil liability on anyone “who aids and abets, by knowingly providing substantial assistance, or who conspires

with the person who committed such an act of international terrorism.” *Id.* The statute specifically refers to *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), as the test for “substantial assistance.” JASTA, § 2(a)(5). *Halberstam*, in turn, synthesizes common law principles of secondary liability.⁵

Under *Halberstam*’s distillation of the common law approach to secondary liability, a plaintiff must show (1) the existence of a wrongful act, (2) the defendant’s general awareness that it is playing a role in a broader wrongful enterprise, and (3) that the defendant knowingly and substantially assisted the principal violation. *Taamneh*, 598 U.S. at 486–88. *Halberstam* includes six nonexclusive factors to help determine whether a defendant’s assistance was “substantial”: (1) “the nature of the act assisted,” (2) the “amount of assistance” provided, (3) whether the defendant was “present at the time” of the principal tort, (4) the defendant’s “relation to the tortious actor,” (5) the “defendant’s state of mind,” and (6) the “duration of the assistance” given. *Halberstam*, 705 F.2d at 488–89 (emphasis omitted).

Based on these principles, this Court held in *Taamneh* that the social media companies were not contributorily liable under JASTA. The plaintiffs had claimed that ISIS was active on defendants’ social-media platforms, which are generally available to the internet-using public with little to no front-end screening by defendants; that defendants’ recommendation algorithms matched ISIS-related

⁵ The rules governing contributory copyright infringement liability are likewise judge-made. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434–35 (1984).

content to users most likely to be interested in that content; and that defendants allegedly knew that ISIS was uploading this content to such effect, but took insufficient steps to ensure that ISIS supporters and ISIS-related content were removed from their platforms. *Id.* at 498.

Taamneh concluded these allegations did not support liability because “[t]he “mere creation” of social-media platforms that are generally available to the internet-using public without “front-end screening” does not justify imposing secondary liability, even if the platforms know that bad actors are using their services. *Id.* at 499. This Court emphasized that aiding-and-abetting liability is “inherently a rule of secondary liability for specific wrongful acts,” not a free-floating duty to deter wrongdoing in general. *Id.* at 494 (cleaned up). Liability falls only on those who abetted the underlying tort “*through conscious, ‘culpable conduct.’*” *Id.* at 492 (emphasis added), *citing Camp v. Dema*, 948 F.2d 455, 460 (8th Cir. 1991). But the platforms’ relationship to the terrorist group and their audience looked like their relationship to “their billion-plus other users: arm’s length, passive, and largely indifferent.” *Taamneh*, 598 U.S. at 500. The Court emphasized that the complaint boiled down to a failure to stop ISIS from using generally available services, not actions that “culpably associated” the companies with criminal activity. *Id.* at 504. The complaint alleged, at most, “passive nonfeasance”—*i.e.*, failing to remove terrorist content from generally available platforms despite their awareness of it. *Id.* at 500. There were no allegations that defendants intentionally provided substantial aid to the terrorist

attack, consciously participated in it, gave “special treatment” or encouragement to its perpetrators, or otherwise offered targeted, knowing assistance that materially advanced that specific act. *Id.* at 499–501, 507.

Importantly, *Taamneh* confirms that where allegations rest on acts of ostensible passive nonfeasance, plaintiffs must make a strong showing of assistance and scienter. *Id.* This strong scienter element is required not only in order to protect First Amendment interests, but also because “tort law imposes liability only when someone commits an actual tort,” *id.* at 494. Without those stringent limitations, *Taamneh* recognized, “aiding-and-abetting liability could sweep in innocent bystanders as well as those who gave only tangential assistance.” *Id.* at 488.

Taamneh’s principles are entirely compatible with the standards of liability for inducing copyright infringement set out in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). *Grokster* reaffirmed that copyright law does not impose “secondary liability based on presuming or imputing intent to cause infringement solely from the design or distribution of a product capable of substantial lawful use, which the distributor knows is in fact used for infringement.” *Id.* at 933. However, where a provider goes beyond inaction to “statements or actions directed to promoting infringement,” it can be contributorily liable. *Id.* at 935. But that was true only because there, defendants’ “unlawful objective [was] unmistakable.” *Id.* at 916. Cox’s unwillingness to disconnect internet access for an entire household based on accusations of

infringement is not the same as purposeful, overt encouragement of infringement.

C. Cox's Mere Failure to Terminate Customers Based on Plaintiffs' Allegations of Repeat Infringement Do Not Meet This Court's Standard For Contributory Liability.

- 1. Merely continuing to provide "infrastructure" to someone engaged in wrongdoing is not an "affirmative act" demonstrating the requisite culpable participation.**

The same result as in *Taamneh* should obtain here. Like the social media platform defendants in that case, Cox provides internet service to the public at large in the same manner as it does to infringers—indifferently and passively. It treats infringing and non-infringing content, and all of its users regardless of what they transmit, with equal disregard. It does no front-end screening, and has no duty to do so. In fact, the Copyright Act specifically states that Cox, like any ISP, has no duty to make any affirmative investigation to discover infringement or to confirm allegations regarding its customers' alleged infringement. *See* 17 U.S.C. § 512(m) (safe harbor is not conditioned on "a service provider monitoring its service or affirmatively seeking facts indicating infringing activity").

Like the defendants in *Taamneh*, Cox may not have taken sufficient steps to prevent transmission of infringing content. But Cox's passive nonfeasance does not support secondary liability under *Taamneh*'s implementation of the *Halberstam* test or the common

law's traditional requirements for secondary liability. Sending and receiving communications over the internet, including over BitTorrent—which is what Cox's customers were evidently doing—is not obviously illegal, nor is past online behavior a guarantee of future infringement.

As a consequence, plaintiffs cannot fulfill the demanding scienter requirement that *Taamneh* applies to inaction. All plaintiffs can show is that Cox was aware of *allegations*, and that it failed to take the action—terminating the internet accounts of alleged repeat infringers—that the copyright owners demanded. That is not enough. As this Court said in *Taamneh*, “bad actors” might use “the internet generally” to “sometimes terrible” ends. 598 U.S. at 499. Nevertheless, “*we generally do not think that internet or cell service providers incur culpability merely for providing their services to the public writ large.*” *Id.* (emphasis added).

As in *Taamneh*, Cox runs an enormous network that allows millions of people “to upload vast quantities of information on a daily basis.” *Id.* at 500. And, as in *Taamneh*, there is no allegation that Cox treated the allegedly infringing transmissions differently from any other traffic sent over its network. *Id.* Like the defendants in *Taamneh*, Cox is essentially a bystander. “Such allegations do not state a claim for culpable assistance[.]” *Id.*

In fact, holding Cox secondarily liable is arguably even less appropriate than assigning liability in *Taamneh* would have been. The defendants there offered more assistance than Cox did here: As alleged in the complaint, the *Taamneh* defendants’

algorithms recommended terrorism-related content to interested users. In contrast, Cox does not promote infringing content in any way. But in both cases, the alleged wrongful act is exactly the same: passivity and indifference.

To impose aiding-and-abetting liability for passive nonfeasance, plaintiffs must make a “*strong* showing of assistance and scienter.” *Taamneh*, 598 U.S. at 500 (emphasis added). According to plaintiffs, Cox simply ignored their notices and failed to terminate users accused of infringing. First Am. Compl. and Jury Demand, *Sony Music Ent. v. Cox Commc’ns, Inc.*, No. 18-cv-950, 2019 WL 7878711, ¶ 10 (E.D. Va. Apr. 8, 2019). Plaintiffs here did not file suit against the individual account holders they demanded Cox punish, preferring instead to rest on their unverified accusations and demand that Cox terminate customer accounts without proof of underlying wrongdoing. This does not meet the scienter requirement for contributory liability under *Halberstam* or *Taamneh*.

2. Given the context—transitory network communications—Cox is technologically unable to verify allegations of infringement.

Strengthening the case for reversal, it is virtually impossible for Cox and other ISPs to investigate the alleged infringement at the heart of this case. The contributory infringement claims against Cox here involve allegedly infringing *transitory* communications—emails or other transmissions like BitTorrent traffic—sent by Cox’s customers over its network. Unlike in the case of copyright claims based on material stored by

customers on an ISP's servers, these communications are ephemeral. After they transit the ISP's network, they are gone.

As a consequence, ISPs that receive notices from copyright owners alleging that a customer's past transitory network communications are infringing are in a particularly difficult position. The Copyright Act does not prescribe any particular course of conduct that the ISP must take. In fact, the notices sent by the copyright owners to Cox have no basis in the Copyright Act. Section 512 of the Act, 17 U.S.C. § 512, contains no provision authorizing copyright owners to send notices relating to transitory network communications; nor, unlike in the case of notice sent relating to allegedly infringing material hosted on an ISP's servers, 17 U.S.C. § 512(c), or allegedly infringing links maintained by the ISP, 17 U.S.C. § 512(d), does the statute contain any requirement that Cox or any other ISP "take down" any transitory network communication that is the subject of a notice. And indeed, such a requirement would be nonsensical, because in the case of transitory network communications like those at issue in this case, there is nothing available for the ISP to "take down."

Crucially, the copyright owners' extra-statutory notices are not proof that any particular Cox subscriber has infringed a copyright; the notices are nothing more than allegations that infringing communications associated with a particular IP address transited the ISP's network at a certain date and time. Moreover, because the communications referenced in the notices are not available to the ISP—in the ordinary case, they have transited the network and are gone—the copyright owner's

allegations cannot be confirmed, or even meaningfully held up to scrutiny.

The ISPs inability to confirm or rebut copyright owners' infringement allegations for transitory network communications means that secondary liability in this context should be particularly narrowly drawn. The Fourth Circuit held that Cox had continued to provide internet access "with knowledge that [its] subscribers are infringing" and that doing so "is consistent with at least reckless disregard for the copyright holder's rights" and therefore "is willful." *BMG Rts. Mgmt. LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 312–13 (2018). But secondary liability for copyright infringement, including contributory liability, requires actual *proof* of an underlying act of direct infringement. Restatement of the Law, Copyright, Tentative Draft No. 5 § 8.01, Comment c; *Cf. Venegas-Hernández v. Peer*, 424 F.3d 50, 57–59 (1st Cir. 2005) (music publisher not liable for unauthorized grant of license to a third party to perform or reproduce copyrighted work when "there was no proof that the songs had been copied or performed under the mistaken licenses."). A third party's allegations of copyright infringement—even repeat allegations—are not proof.

This is especially true given that many of the notices sent to ISPs by copyright owners and their agents are automatically generated, without any evidence (or claim) of human review. Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown in Everyday Practice* 2 (March 22, 2017), <https://perma.cc/J5G8-J55J> ("Urban, *et al.*") (describing the authors' quantitative analysis of machine-generated notices). There have long been

concerns with the reliability of machine-generated infringement notices. One is that machines cannot check the context of a use to distinguish between legitimate infringement and non-infringing uses (such as a licensed or fair use). Another is that machine-generated notices often contain errors. One recent study examining a sample of more than 3 million notices generated between 2011 and 2015 found that at least 5.5% of the notices were missing descriptions of the copyrighted work alleged to be infringed. In addition, at least 9.8% of the takedown notices either failed to include a takedown request or misidentified the allegedly infringing site or provided an inactive URL in the takedown requests. Daniel Seng, *Copyrighting Copywrongs: An Empirical Analysis of Errors with Automated DMCA Takedown Notices*, 37 Santa Clara High Tech. L. J. 119 (2021) (“Seng study”). In other words, out of the sample of 3 million notices, nearly half a million files and webpages would have been wrongfully removed if these takedown requests were treated as gospel. Applied to Cox or any transmission ISP, the accounts of half a million people could have been terminated based on a variety of errors.

Another study looking at a random sample of DMCA takedown notices sent during a six-month period in 2013 found a high error rate in the notices generated by the automated notice-sending systems increasingly used by rights-holders. *See* Urban, *et al.* at 2. Analysis of that sample reveals that 4.2% of the requests “were fundamentally flawed because they targeted content that clearly did not match the identified infringed work.” *Id.* at 11. Additionally, over 28% of the notices had other characteristics raising

concern about the validity of the claim. Over 6% targeted content with potential fair use defenses. *Id.* at 12. Many others led to dynamic results or aggregator pages that made identifying the targeted content difficult. *Id.* at 11. The rise of notices generated by artificial intelligence promises to make the situation worse. See Emanuel Maiberg, *How OnlyFans Piracy is Ruining the Internet for Everyone*, 404 Media (Sep. 1, 2025), <https://perma.cc/WT5W-4WHW>.

Researchers have also documented many instances of abusive notices. According to one survey, “[n]early every OSP [online service provider; equivalent to ISP] recounted stories of deliberate gaming of the DMCA takedown process.” Urban, *et al.* at 40. Abusive DMCA notices appeared targeted to “harass competitors, to resolve personal disputes, to silence critics, or to threaten the OSP or damage its relationship with its users.” *Id.* Often, they even “ignored fair use defenses” or “targeted non-infringing material,” with the goal only of “remov[ing] content considered undesirable to the filer.” *Id.*

Consider, for example, copyright notices intended not to enforce copyright, but rather for purposes of “reputation management”—i.e., targeting critics. One investigation, for example, found that many DMCA takedown notices were directed at removing unfavorable news articles about the alleged criminal activities of a group of Russian businessmen. See Lumen Database Team, *Over Thirty Thousand DMCA Notices Reveal an Organized Attempt to Abuse Copyright Law*, Medium (Apr. 22, 2022), <https://perma.cc/846G-3N7J>. See also Glyn Moody, *How Backdated Articles Abuse the DMCA’s Takedown*

System to Remove Legitimate News Items, Walled Culture (May 17, 2022), <https://perma.cc/CK2E-HYNV>; *DOJ Orders doTerra Distributors to Pay \$15,000 Each after TINA.org Complaint*, Truth In Advertising (Jan. 30, 2023), <https://perma.cc/NJC5-MBUR> (recounting abuse of DMCA to silence critics).

Or consider DMCA notices improperly issued in order to harm competitors. As a representative for the online marketplace Etsy explained, attackers will send multiple notices in rapid succession, then demand that users be terminated as “repeat infringers.” *Tr. of Section 512 Pub. Roundtable* 240:8–17, U.S. Copyright Off. Section 512 Study (May 3, 2016), <https://perma.cc/CVJ9-UXAC>. One group of fraudulent claims resulted in the removal of over 100,000 businesses’ websites, costing millions of dollars and thousands of hours in lost employee time. Lex Lumina, *Lex Lumina Files Suit on Behalf of Google Against DMCA Fraudsters*, Lex Lumina LLP (Nov. 14, 2023), <https://perma.cc/262K-QFFK>. Another report documents the fraudulent use of DMCA notices targeted at e-commerce platform Shopify. Glyn Moody, *How the DMCA is Being Weaponized Against E-Commerce Sites*, Techdirt (Nov. 20, 2023), <https://perma.cc/8RCB-L4D9>. Likewise, Amazon has explained that half of the takedown notices sent to Kindle Direct are from competitors trying to suppress competition. *Statement of Professor Rebecca Tushnet on “The Digital Millennium Copyright Act at 22: What is it, why was it enacted, and where are we now?”* 10, U.S. Senate, Comm. on the Judiciary Subcomm. on Intell. Prop. (Feb. 11, 2020), <https://perma.cc/494P-LXNL>.

It is worth emphasizing that most of the notices that have been studied were produced in the context of allegedly infringing content *hosted* (i.e., stored at the customer’s instance) by ISPs. It is more difficult to study the error rate in notices that relate to transitory network communications, because, as noted earlier, in the ordinary case neither the ISP nor anyone else has access to the impugned content by the time the notice is received. This makes the concerns about mistaken or abusive notices, if anything, even greater for transitory network communications: a critic or rival of a copyright holder could lose internet access entirely based on inaccurate, incomplete, or abusive accusations of use of an internet connection to infringe, with no means of after-the-fact substantiation.

Indeed, “every motion picture studio and record label has been accused of copyright infringement at least three times, and I bet they would not like to have their internet services terminated [I]f accusation makes somebody an infringer, then most of the major copyright holders are repeat infringers by that standard. That can’t be the case.” *Tr. of Section 512 Study* 296:6–12, U.S. Copyright Off. Section 512 Public Roundtable (May 12, 2016), <https://perma.cc/A2AR-24NV>. Many large companies that produce copyrighted content have also defended themselves against, and lost, at least one copyright infringement lawsuit in the past.⁶ So has President

⁶ See, e.g., *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023) (magazine); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014) (studio); *N.Y. Times*

Trump’s campaign.⁷ Under the Fourth Circuit’s backwards-looking logic, their service providers should all refuse service to them in case they continue to infringe.

3. The consequences for ISP customers whose accounts are terminated are very severe.

Weighed against the serious proof problems associated with Respondents’ unsubstantiated allegations, the consequences they demand—an ISP terminating a customer based on a copyright holder’s allegations—are very severe. This flouts the balancing approach of the background law of aiding and abetting.

Given the lack of ISP competition for many Americans, termination from an ISP can amount to losing access to the internet. Nationwide, more than 70 million people—over 20% of the U.S. population—have access to just one provider of fixed-line

Co., Inc. v. Tasini, 533 U.S. 483 (2001) (publisher and database provider); *Stewart v. Abend*, 495 U.S. 207 (1990) (television network); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (magazine); *Ringgold v. Black Ent. Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997) (television network); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505 (9th Cir. 1985) (studio-owned hotel); *Roy Export Co. v. Columbia Broadcasting Co.*, 672 F.2d 1095 (2d Cir. 1982) (television network); *Columbia Pictures Indus., Inc. v. Miramax Films Corp.*, 11 F. Supp. 2d 1179 (C.D. Cal. 1998) (studio); *Woods v. Universal City Studios, Inc.*, 920 F. Supp. 62 (S.D.N.Y. 1996) (studio).

⁷ See, e.g., *Grant v. Trump*, 749 F. Supp. 3d 423 (S.D.N.Y. 2024); *Isaac Hayes Enters., LLC v. Trump*, No. 24-cv-3639, 2024 WL 4148758 (N.D. Ga. Sep. 11, 2024).

broadband home internet access. H. Trostle & Christopher Mitchell, *Profiles of Monopoly: Big Cable and Telecom* 39, Inst. for Loc. Self-Reliance (Aug. 2020), <https://perma.cc/SK68-GPR3>. For all of these people, termination by a single ISP means loss of broadband internet access entirely. Likewise, terminating a student's access to the university network is "tantamount to expelling them from the university." *Tr. of Section 512 Pub. Roundtable* 287:9–11, U.S. Copyright Off. Section 512 Study (May 12, 2016), <https://perma.cc/A2AR-24NV>.⁸

This makes termination by an ISP in response to notices sent regarding a customer's transitory network communications entirely different—and likely much more disruptive to the customer's life—than, for example, terminating a *particular service*, such as a social media platform terminating a customer's social media account as a result of the content they have uploaded, as in *Taamneh*. And the weighty consequences of termination sharply

⁸ Mobile broadband is, at best, an incomplete substitute for fixed-wire broadband. Fed. Commc'ns Comm'n., *2020 Broadband Deployment Rep.* ¶ 12, 35 F.C.C. Rcd. 8986 (June 24, 2020), <https://perma.cc/37CX-TBDW>. Among other problems, most mobile broadband plans feature monthly data caps that users quickly exceed if they use mobile data for necessary day-to-day functions, such as telecommuting or remote education. See Stan Horaczek, *Here's How Much Internet Bandwidth You Actually Need to Work from Home*, Popular Sci. (Mar. 12, 2020), <https://perma.cc/8TJA-QDGB>; Todd Haselton, *Your Phone's Unlimited Data Plan Isn't Really Unlimited—This is What You Really Get*, CNBC (July 14, 2018), <https://perma.cc/WMX5-M865>. The overcharges that mobile broadband users accrue when they exceed data caps makes mobile broadband untenable for most users as a primary broadband connection to the internet.

distinguish ISPs' role in alleged infringement from that of "[l]ending a friend a hammer . . . with knowledge that the friend will use it to break into a credit union ATM," Pet. App. at 27a. It is more like providing shoes—a basic requirement for much of ordinary life—to a person who has, in the past, been accused of running from the scene of a crime. That is, the nature of the assistance—a basic tool necessary to a huge amount of legitimate conduct versus a tool suited to do damage—is sharply different in ways that the court below dismissed but that are vitally important.

II. THE FOURTH CIRCUIT'S OVERLY BROAD INTERPRETATION OF THE WILLFULNESS TEST AS APPLIED TO ISPS WILL FURTHER RESULT IN THE SUPPRESSION OF LAWFUL SPEECH.

The Fourth Circuit's definition of willful secondary infringement was also wrong. Section 504(c)(2) of the Copyright Act provides that "[i]n a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000." 17 U.S.C. § 504(c)(2). The Copyright Act does not define "willfulness," but Congress intended to limit enhanced statutory damages for willful infringement to exceptional cases. *See* H.R. Rep. No. 94-1476, at 162–63 ("Clause (2) of section 504(c) provides for exceptional cases in which the maximum award of statutory damages could be raised from \$10,000 to \$50,000 [now, from \$30,000 to \$150,000].").

The Fourth Circuit based its holding that Cox was a willful contributory infringer on Cox's (supposed) knowledge of its *subscribers'* infringement. In its telling, "[c]ontributorily (or vicariously) infringing *with knowledge that one's subscribers are infringing* is consistent with at least reckless disregard for the copyright holder's rights" and, therefore, "is willful." *BMG Rts. Mgmt.*, 881 F.3d at 312–13 (emphasis added). This was error. Cox neither knew that the challenged subscribers were infringing copyrights nor that its own role as a passive internet conduit would ultimately be held by the Fourth Circuit to be contributory infringement.⁹

As noted above, the contributory copyright infringement claims against Cox involve transitory communications sent by Cox's customers over its network, and for an ISP like Cox to be secondarily liable for the copyright infringement of its customers, it must possess proof of underlying direct infringement. *See supra*, at 22. Courts should be very

⁹ In intellectual property cases, it is well established that the required state of mind is not merely awareness of the conduct but awareness of the illegality of the conduct, because the mere act of, say, sending an email or internet post, without more, is not an obviously culpable act. *See, e.g., Grokster*, 545 U.S. at 933 (requiring a purpose to promote infringement for inducement liability); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U. S. 476, 488 (1964) (requiring proof of knowledge that the conduct was infringing for contributory infringement liability; "a violator of § 271(c) must know "that the combination for which his component was especially designed was both patented and infringing"); *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011) (in patent law, "we now hold that induced infringement under §271(b) requires knowledge that the induced acts constitute patent infringement").

cautious in determining willfulness in this context. For reasons set forth above, *see supra* at 20–27, notices sent by copyright owners that allege infringement—even repeated notices—are not proof of infringement, much less proof that more infringement will occur in the future. And so, in declining to terminate customers based on unproven allegations, an ISP like Cox is not exhibiting any sort of deliberate disregard of the copyright holder’s rights. Rather, the ISP is engaged in reasonable interest-balancing: The copyright owner’s infringement allegations must be balanced, at very least, against the speech interests of the ISP’s customers, the speech interests of others not accused of wrongdoing who use the customer’s IP address to access the internet, and the due process interests of the ISP’s customers in not having their internet access terminated without proof of wrongdoing.

In light of these competing interests, there was no basis for the Fourth Circuit to hold that Cox either was aware of or willfully blind to the fact that *its own* conduct was infringing.¹⁰ This is not a case like *Grokster*, 545 U.S. at 933, where a network operator

¹⁰ As others who have considered the question have recognized, willfulness in this context entails knowledge that *one’s own conduct* constitutes an infringement. *See RCA/Ariola Int’l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 779 (8th Cir. 1988) (retailers cannot be held to be willful contributory infringers based on knowledge that purchasers of cassette duplication services were directly infringing: such knowledge “does not show that the [retailers’] employees understood their own actions to be culpable”); Melville B. Nimmer & David Nimmer, 3 *Nimmer On Copyright* § 14.04(B)(3) (1996) (for infringement to be willful, it must be done “with knowledge that [one’s] conduct constitutes copyright infringement”).

has gone beyond inaction to “statements or actions directed to promoting infringement.” In such cases, the imposition of statutory damages for willful copyright infringement may be appropriate. But here, there is no allegation that Cox explicitly or implicitly marketed its service as being particularly useful for infringers or encouraged subscribers to use Cox’s internet service to infringe.

In short, given the appropriately narrow scope of secondary liability under *Taamneh* and longstanding common law principles, the Fourth Circuit erred when it imposed willfulness damages in a case that involves only passive inaction in response to customer activity that was not facially unlawful, was only *alleged* to be unlawful, and where Cox had no opportunity or capability to verify the allegations. That faulty legal conclusion carries particularly troubling consequences because Cox is an intermediary for the online speech of vast numbers of Americans, and imposing overly broad secondary copyright liability endangers their First Amendment rights.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

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