

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 FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Did the Fourth Circuit err in holding that an internet service provider (ISP) can be held liable for “materially contributing” to copyright infringement merely because the ISP knew that people were using certain accounts to infringe but did not terminate access, without proof that the ISP engaged in affirmative conduct with the purpose of furthering infringement?

2. Did the Fourth Circuit err in holding that mere knowledge that a customer was engaged in illegal conduct suffices to find an ISP’s conduct willful under 17 U.S.C. §504(c), without proof that the ISP knew its own conduct in not terminating the customer was illegal?

CORPORATE DISCLOSURE STATEMENT

Arista Music; Arista Records, LLC; Colgems-EMI Music Inc.; EMI Al Gallico Music Corp.; EMI Algee Music Corp.; EMI April Music Inc.; EMI Blackwood Music Inc.; EMI Consortium Music Publishing Inc. (d/b/a EMI Full Keel Music); EMI Consortium Songs, Inc. (d/b/a EMI Longitude Music); EMI Feist Catalog Inc.; EMI Miller Catalog Inc.; EMI Mills Music, Inc.; EMI U Catalog Inc.; EMI Unart Catalog Inc.; Jobete Music Co., Inc.; LaFace Records LLC; Provident Label Group, LLC; Screen Gems-EMI Music, Inc.; Sony Music Entertainment; Sony Music Entertainment US Latin LLC; Sony Music Publishing (US) LLC (f/k/a Sony/ATV Music Publishing LLC); Stone Agate Music; Stone Diamond Music Corp.; Volcano Entertainment III, LLC; and Zomba Recordings LLC are wholly owned, indirect subsidiaries of Sony Group Corporation, a publicly held company organized under the laws of Japan. No publicly held company owns more than 10% of Sony Group Corporation's stock.

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traded) own more than 10% of Warner Music Group Corp.'s stock. No other company owns 10% or more of Warner Music Group Corp.'s stock.

Bad Boy Records LLC is a joint venture in which BB Investments LLC, a wholly owned indirect subsidiary of Warner Music Group Corp., holds a 50% interest. Bad Boy Records, which is not a publicly traded company, holds the remaining 50% interest in Bad Boy Records LLC.

Capitol Records, LLC; Music Corporation of America, Inc. (d/b/a Universal Music Corp.); Polygram Publishing, Inc.; Songs of Universal, Inc.; UMG Recordings, Inc.; Universal Music Corporation; Universal Music Publishing AB; Universal Music Publishing Inc.; Universal Music Publishing MGB Ltd.; Universal Music-MGB NA LLC; Universal Music – Z Tunes LLC; Universal/Island Music Ltd.; Universal/MCA Music Publishing Pty. Ltd.; and Universal Publishing Ltd. are wholly owned indirect subsidiaries of Universal Music Group N.V., a Netherlands public limited company. Bollore SE owns more than 10% of Universal Music Group N.V.'s stock. No other company owns 10% or more of Universal Music Group N.V.'s stock.

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INTRODUCTION

Cox's brief portrays this as a case about whether "providing general-purpose products or services to the public" knowing that some users may misuse them to infringe triggers secondary liability. Petr.Br.21. It is not. No one thinks that merely providing goods or services capable of infringing uses constitutes contributory liability. But the law is quite different when it comes to one who supplies a good or service to known serial infringers knowing that they will likely continue using it to infringe. When a supplier does *that*, this Court held long ago that it is liable for the infringement it knowingly facilitates. And *that* is what this case is about—as a 12-day trial made crystal clear. As that trial record confirms, Cox made a deliberate and egregious decision to elevate its own profits over compliance with the law, supplying the means for massive copyright infringement to specific users that it knew were "habitual offenders" because "we want to hold on to every subscriber we can." C.A.App.1484. Indeed, the manager responsible for compliance with the Digital Millenium Copyright Act (DMCA) was openly contemptuous of the statute, telling his team "F the dmca!!!" C.A.App.1495. *That* conduct—not some hypothetical defendant providing a service knowing only that some anonymous user would likely misuse it—is what led the jury to find contributory infringement. That verdict fully comports with the facts, this Court's precedent, and Congress' policy judgment in the DMCA.

Cox's contrary arguments ignore the record and distort the law. While Cox has much to say about the perils of hair-trigger liability for one-off infringement,

it ignores the district court's unchallenged holding that the three (and often more) infringement notices Cox received for each subscriber at issue sufficed to establish that Cox knew each was likely to infringe again. While Cox waxes poetic about the centrality of internet access to modern life, it neglects to mention that it had no qualms about terminating 619,711 subscribers for nonpayment over the same period that it terminated just 32 for serial copyright abuse. And while Cox stokes fears of innocent grandmothers and hospitals being tossed off the internet for someone else's infringement, Cox put on zero evidence that any subscriber here fit that bill. By its own admission, the subscribers here were "habitual offenders" Cox chose to retain because, unlike the vast multitude cut off for late payment, they contributed to Cox's bottom line. The facts fully explain and justify the decision below.

As for the law, much of Cox's argument rests on a variation of the mistake this Court corrected in *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005): Cox assumes that because *Grokster* condemned a particularly egregious example of inducement, that is the only form of secondary liability. But just as "*Sony* [*Corp. v. Universal City Studios*, 464 U.S. 417 (1984)] did not displace other theories of secondary liability," *id.* at 934, neither did *Grokster*. And this Court held long before *Grokster* or *Sony* that those who provide goods or services to a specific customer "with the expectation that [they] would be used" to infringe are contributorily liable if they are. *Henry v. A.B. Dick Co.*, 224 U.S. 1, 48-49 (1912), *overruled on other grounds*, *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917). Cox identifies no reason to disturb that longstanding and commonsense rule.

Nor does it provide a justification for rendering the DMCA's safe harbor a nullity. Cox says this Court should wait until Congress weighs in, but Congress already has—clearly and unequivocally—by presuming liability for ISPs that choose to knowingly facilitate infringement but creating a limitation of liability for ISPs that adopt and enforce reasonable policies to terminate repeat infringers. Cox could not even conjure a material factual dispute over whether it complied with that safe harbor; denying liability on these facts would render it a dead letter.

Cox identifies no basis to disturb the jury's finding that its contributory infringement was willful either. Cox did not preserve its instructional objection, which is both meritless and irrelevant, as the jury was instructed on two other theories of willfulness and plainly found at least one of them. The problem for Cox is that it is long past the time for hypotheticals. There was a trial, and the evidence showed a shocking disregard for respondents' rights and open contempt for Congress' effort to strike a balance between the interests of ISPs and the need to preserve copyrights in the digital age. If Cox was looking to avoid liability for its subscribers' infringement, Congress gave it a path. But that path requires reasonable responses to infringement, including termination of repeat infringers where appropriate. Cox chose a radically different path—adopting a patently unreasonable 13-strike policy and then refusing to terminate even known habitual offenders—because Cox wanted to keep the money flowing in. That path led directly to the jury's finding of willful contributory infringement, and it should lead straight to affirmance.

STATEMENT OF THE CASE

A. Legal Background

The promise of copyright law is that, by “secur[ing] a fair return for an ‘author’s’ creative labor,” the law “stimulate[s] artistic creativity for the general public good.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). Indeed, the Constitution makes clear that copyright law is designed to “promote the progress of science and the useful arts” by, *inter alia*, securing to authors “the exclusive Right to their ... Writings.” U.S. Const. art.I. §8.cl.8. The Copyright Act accomplishes that end by granting authors exclusive rights to reproduce and distribute copyrighted works, 17 U.S.C. §106, and by declaring “[a]nyone who violates” those rights liable for infringement, *id.* §501(a). Although the statute “does not expressly render anyone liable for infringement committed by another,” *Sony*, 464 U.S. at 434-35, this Court has long held that it incorporates “well established” “common law principles” “of secondary liability,” *Grokster*, 545 U.S. at 930-31—including the principle that “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer,” *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted).

For well over a century, courts have applied those settled principles to impose liability on those who materially contribute to infringement by providing known infringers with tools essential for continued infringement. As far back as 1912, for instance, this Court held that selling mimeograph ink to a known

infringer “with the expectation that it would be used” to infringe triggered contributory liability because courts can presume “the purpose and intent that it would be so used.” *A.B. Dick*, 224 U.S. at 48-49. There was no argument that the seller induced the infringer to infringe; it was enough that the seller knowingly supplied the infringer with the tools to do so. In short, “the principle that parties who provide the fora of communication of infringement are also liable for copyright infringement is not new to copyright law.” Jane C. Ginsburg, *Putting Cars on the “Information Superhighway”*, 95 Colum.L.Rev. 1466, 1492 (1995); see also, e.g., *Deutsch v. Arnold*, 98 F.2d 686, 688 (2d Cir. 1938) (Hand, J.) (noting that a landlord would be liable for contributory copyright infringement upon “proof that” it “knew that acts of infringement were proposed at the time when the lease was made”); *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F.Supp. 399, 404 (S.D.N.Y. 1966) (similar for advertising agency marketing bootleg phonographs).

Congress recognized this long tradition when it enacted the DMCA in 1998. As the internet was starting to flourish, Congress saw the threat that virtually costless, nearly instantaneous, and perfect copying posed to creators, and the need to strike a balance between “artistic protection” and “technological innovation.” *Grokster*, 545 U.S. at 928. For their part, “[t]elephone companies and commercial Internet service providers” saw the potential for secondary infringement liability, and lobbied intensely for certain “narrow carve-outs.” Litman, *Digital Copyright* 122, 134-36 (2001).

Congress was not deaf to ISPs' concerns, but it stopped well short of absolving them of any liability for the infringement their services enable. To the contrary, Congress shared rightsholders' view that ISPs—no less than copy shops, dance halls, and mimeograph-ink suppliers in the pre-internet era—should face liability in appropriate circumstances. So “[r]ather than embarking upon a wholesale” revision of “contributory ... liability” “doctrine[],” Congress took up the ISPs’ call “to create a series of ‘safe harbors,’ for certain common activities,” thereby “preserv[ing] strong incentives for” ISPs to help prevent their services from being used to infringe. S.Rep.105-190 at 19-20 (1998); *accord* H.R.Rep.105-551.pt.2 at 49-50 (1998). Most notably, the DMCA creates “limitations on liability” protecting an ISP from monetary liability if—but “only if”—the ISP “has adopted and reasonably implemented, and informs subscribers ... of, a policy that provides for the termination in appropriate circumstances of subscribers ... who are repeat infringers.” 17 U.S.C. §512(i)(1)(A). The safe harbor for ISPs does not stand alone, but is complemented by other provisions which protect parties, typically websites hosting third-party content, from liability for infringing content residing on their networks, as long as they expeditiously remove it after being notified in accordance with the statute’s notice-and-takedown procedures. *See id.* §512(c). The common thread in these provisions is that parties are not free to engage in or facilitate infringement when rightsholders provide them with knowledge of the infringing conduct.

Congress made clear that this safe harbor was a new defense, not a new cause of action, such that “the

failure of a service provider’s conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider’s conduct is not infringing.” *Id.* §512(l). But the safe harbor only makes sense—and can only operate as a “*limitation on liability*” that strikes a balance between the interests of creators and ISPs—on the understanding that ISPs face “legal exposure for infringements that may occur” when they continue providing service to subscribers they know are serial infringers. S.Rep.105-190 at 120; *accord* H.R.Rep.105-551.pt.2 at 49-50.

B. Factual Background

1. Respondents are the world’s leading record companies and music publishers. They represent the rights for many of the most recognizable singers and songwriters of all time—artists ranging from Bob Dylan, Bruce Springsteen, and Beyoncé, to Eminem, Eric Clapton, and Gloria Estefan. The songs in their catalogs have knit together countless iconic moments, from Hollywood (the opening sequence in *Top Gun*), to Broadway (the musical *Jersey Boys*), to sports (the past ten Super Bowl halftime shows). And they supply the soundtrack for daily commutes, family vacations, weddings, and more. *See, e.g.,* Tr.223-24.

Music piracy robs these artists of their “exclusive right[s]” to the tune of billions of dollars a year. C.A.App.314-15. The effect falls not just on artists and their labels, but also on the production engineers, union musicians, and creative teams who support the industry. C.A.App.280-83. Although music piracy is not a new problem, it has grown exponentially owing to the internet, which enables anyone with access to

make and share innumerable costless and perfect copies. C.A.App.324-27. Today, most infringement occurs on peer-to-peer file-sharing protocols like BitTorrent, which enable viral uploading and downloading of pirated music faster than ever, leaving behind no fingerprints beyond a ten-digit IP address that only an ISP can tie to the user. C.A.App.333-34, 363-65, 368-69, 371-76, 386. Unlike earlier methods of infringement—e.g., bootleg CD manufacturers—peer-to-peer file-sharing protocols lack a central hub that law enforcement can shutter. C.A.App.316, 324-25, 330-31. And unlike earlier methods, peer-to-peer protocols are not constrained by the need to create physical copies; BitTorrent enables *tens of thousands* of people to trade pirated music simultaneously. C.A.App.375.

To vindicate the rights of the artists they represent, respondents worked with the Recording Industry Association of America (RIAA) to hire antipiracy vendors to monitor popular peer-to-peer protocols for infringement. C.A.App.356-61, 383-84. Those vendors search for users who are distributing infringing digital copies to the world for free, confirm and collect their IP addresses, and then send a contemporaneous notice to the corresponding ISP certifying the IP address, the date and time of the infringement, the work infringed, and the peer-to-peer protocol used. C.A.App.341, 356-61.

A typical notice can be found at C.A.App.1127-30. As that example reflects, these notices are intended to help the ISP identify and educate the infringer, with the goal of stopping infringement. They are designed to be shared directly with the infringer, letting them

know that unlawful infringement has been detected on their IP address, warning that “[d]istributing copyrighted works on a peer to peer system is a public activity visible by other users on that network,” providing instructions on how to secure their computer, referring them to a website “contain[ing] valuable information about what is legal and what is not when it comes to copying music,” and offering a phone number and email “[i]f [they] have questions” or want to dispute the notice. C.A.App.1127-28.

Many ISPs have been willing to work with the recording industry to devise sensible plans to address these notices. ISPs typically forward the first notice to the subscriber with a letter providing additional information to help them “review the complaint and, if it is valid, promptly remove or disable access to the infringing material.” C.A.App.1126. When “the company that’s receiving them takes them seriously and acts upon them,” these notices have often proven “successful” in “mak[ing] the infringement stop.” Tr.233-34.

2. Cox provides high-speed internet to over 6 million residences and businesses, making it one of the largest ISPs in the country. C.A.App.1613. That makes the extent to which Cox takes its legal responsibilities seriously (or not) critical.

Cox has plenty of resources to protect copyrights. It has over 20,000 employees, generates over \$10 billion in annual revenue, and rakes in over \$4.3 billion in annual profit—a figure dwarfing the annual profits of all respondents combined. C.A.App.1613, 1705. Like other ISPs, Cox has a public-facing acceptable-use policy that purports to prohibit use of

its network for copyright infringement and demands that all account holders—residential or business—“require others using the Service via your account to abide by th[os]e terms.” C.A.App.1389-1408. Cox would have this Court believe that this policy was Cox’s north star, and that Cox set the bar on policing subscriber infringement. But, unfortunately for Cox, there is a record here, and it tells a very different story. Notwithstanding Cox’s effort to paint itself as an industry leader in compliance, the evidence confirms that Cox well understood that it was not meeting industry standards, let alone setting them. *See, e.g.*, C.A.App.1451, 1454 (internal audit noting that Cox lagged beyond “best in class” competitors). In fact, what set Cox apart is how uniquely *disinterested* it proved in stopping its paying users from infringing, even as it terminated internet access for hundreds of thousands of users for late payments.

Cox initially gave identified infringers three strikes, but over time that swelled to ten, then 12, and ultimately 13—all while simultaneously watering down the consequences of striking out from mandatory termination, to discretionary termination, to (literally) just “a stern warning.” C.A.App.407-12, 558-59, 1388, 1419, 1434-35, 1480, 1484. And in practice, 13 strikes could really mean *thousands* owing to Cox’s disinterest in enforcing its unusually lenient policy. For example:

- Cox chose not to notify users of their first strike, C.A.App.539, and then counted only one strike per day no matter how rampant a subscriber’s infringement on any given day. C.A.App.537. A subscriber who generated hundreds of notices

for dozens of works in a 24-hour binge would get only one strike.

- No matter how many notices Cox received in a 24-hour period, it would address only a small fraction from each third-party vendor, and would selectively “blacklist[]” disfavored vendors and “silently -delete-” any notice they sent. C.A.App.1494. For instance, Cox would address only 22% of RIAA notices “because [it] had instituted this unilateral cap.” Tr.315-16. It just ignored the rest. C.A.App.498-500. Cox imposed these arbitrary restrictions even though “the system from a technical perspective could have easily handled a substantially larger number of complaints.” Tr.2883.
- No matter how many customers reached their thirteenth strike in a day, Cox would take action only against the first 300 (an arbitrary limit usually reached “by 9 or 10 am”), C.A.App.475-76, 1477, and would promptly restore their service and reset their strike count after “a stern warning,” C.A.App.468.
- If a subscriber did not hit 13 strikes within six months, Cox would reset their strike count to zero. C.A.App.182.

None of this was because Cox doubted that these repeat infringers would infringe again. To the contrary, its own internal assessment was that anyone who reached six notices “most likely” (a) was indeed infringing, (b) had failed to take basic steps to secure their network with a password, or (c) had been compromised. C.A.App.1369. Yet Cox kept supplying known repeat infringers nonetheless.

As one would expect, Cox’s failure to meaningfully address repeat infringement begot more and more infringement. At one point, peer-to-peer file sharing ballooned to a whopping 21% of all traffic on Cox’s network. C.A.App.1717; *see* C.A.App.1542 (noting that 99.97% of peer-to-peer content is infringing). With that volume, notices added up quickly. During the two-year period at issue, Cox received roughly 5.8 million infringement notices—though, due to its self-imposed throttling practice, it deleted roughly two-thirds of them. C.A.App.494-95. That was not an accident; the trial record revealed that the very people at Cox responsible for DMCA compliance held these notices and the DMCA itself in open contempt. *See infra*.

3. Increasingly frustrated with Cox’s refusal to take repeat infringement seriously, rightsholders were forced to litigate. In 2014, BMG Rights Management (US) LLC became the first to sue, alleging “that Cox was vicariously and contributorily liable for acts of copyright infringement by its subscribers.” *BMG Rights Mgmt. (US) LLC v. Cox Comm’cns, Inc. (BMG)*, 881 F.3d 293, 300 (4th Cir. 2018).¹

Cox tried to invoke the DMCA’s safe harbor, but the district court held on summary judgment “that no reasonable jury could find that” Cox’s practice of giving subscribers nominally 13 (and functionally thousands) of strikes was a “reasonabl[e] ... policy that provides for the termination in appropriate

¹ One “infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.” *Grokster*, 545 U.S. at 930.

circumstances of subscribers ... who are repeat infringers.” *Id.* (quoting 17 U.S.C. §512(i)(1)(A)). As the Fourth Circuit put it: “Cox formally adopted a repeat infringer ‘policy,’ but ... made every effort to avoid reasonably implementing that policy. Indeed, in carrying out its thirteen-strike process, Cox very clearly determined *not* to terminate subscribers who in fact repeatedly violated the policy.” *Id.* at 303.

A jury found Cox liable for willful contributory infringement, but not vicarious infringement, and awarded \$25 million in damages on 1,397 copyrights. *Id.* at 300; *see BMG*, 199 F.Supp.3d 958, 963 (E.D.Va. 2016). Cox appealed, and the Fourth Circuit affirmed the district court’s holding that Cox did not qualify for the DMCA’s safe harbor, *see* 881 F.3d at 301-05, and its willfulness instruction, *see id.* at 312-13. But the court found the district court’s contributory-infringement instruction imprecise, so it vacated the damages award and remanded with instructions to use a narrower instruction. *See id.* at 307-11, 314. The case settled on the eve of a second trial. *See* Dkt.1019, No. 1:14-cv-1611 (E.D.Va. Aug. 24, 2018).

C. Procedural Background

1. Respondents “don’t sue anyone lightly.” Tr.231. Nor, contrary to Cox’s suggestions, has it ever been their goal “to require” hair-trigger “terminations” of anyone who violates their copyrights. C.A.App.323. Respondents *want* subscribers to use the internet to lawfully access the wealth of copyrighted works widely available via *lawful* business models like Apple Music. But respondents also “want responsible companies to do responsible things, to work with their customers to stop infringements.” C.A.App.323. So once Cox

proved unwilling to take the reasonable steps Congress envisioned in the DMCA, respondents had little choice but to sue Cox for contributory and vicarious copyright infringement.

Respondents did not seek, as Cox suggests, to hold Cox liable for failing to terminate subscribers for isolated acts of infringement. Cox's 13-strike policy and its lax enforcement efforts gave respondents a target-rich environment, and they limited their claims to works infringed by subscribers who generated at least three infringement notices across 2013 and 2014, for a total of 10,017 copyrighted works. Pet.App.6a, 10a, 43a. Those subscribers were not guilty, as Cox suggests, of just "a few illegal downloads worth, on average, \$1 each," *contra* Petr.Br.44; each one engaged in the far more devastating conduct of *uploading* copyrighted works for the entire world to download for free, *see* C.A.App.364, 368, 374. Even so, respondents did not push the "two-notices-and-terminate theory" that Cox now tries to attribute to them. *Contra* Petr.Br.14-15. As the Universal Music representative repeatedly said: "[W]e don't want anybody terminated. What we want is Cox to work with its subscribers to stop the infringement." Tr.265.

Cox did not dispute that its subscribers infringed those 10,017 works. Pet.App.32a. Nor did it even try to invoke the DMCA safe harbor given its impossibly permissive policies and the Fourth Circuit's holding in *BMG*. Pet.App.6a. And Cox forfeited any challenge to the district court's summary-judgment holding that the three or more infringement notices respondents sent for each subscriber at issue sufficed as a matter of law to prove Cox's knowledge of each subscriber's

future intent to infringe. Pet.App.163a-72a. Cox instead hinged its case on its view that it simply was not liable for knowingly continuing to provide internet service to known, repeat infringers.

2. The jury heard evidence over a 12-day trial. Pet.App.10a. That evidence underscores why it was unimpressed with Cox's post hoc narrative casting itself as an industry compliance "pioneer" that was simply reluctant to deprive its subscribers of access to the promise of the internet. In reality, the evidence overwhelmingly showed that the Cox officials charged with policing infringement made little effort and were openly contemptuous of the DMCA and their legal obligations.

There is perhaps no better illustration of that than Jason Zabek, the longtime head of Cox's abuse and safety team responsible for addressing copyright violations. Culture starts at the top, and Zabek set it quite clearly when he announced on a team-wide email: "F the dmca!!!" C.A.App.1495. That attitude permeated both the policies Zabek set for the company and the example he set for his team.

For instance, Zabek repeatedly increased how many strikes Cox would tolerate while watering down the consequences for accumulating them, despite acknowledging that this was "help[ing] ... the law breaking customers." C.A.App.1479. Zabek issued, via a "high-importance" email, what he dubbed an "unwritten semi-policy" of "reactiv[ating]" any "customer ... terminated for DMCA" "after you give them a stern warning," because "we want to hold on to every subscriber we can." C.A.App.1484. When confronted with evidence of serial infringement, Zabek

instructed his employees to stand down. *See, e.g.*, C.A.App.224 (Employee: “Here is another example of a customer that I consider an habitual abuser.” Zabek: “It is fine. We need the customers.”). When an employee actually took the rare step of disconnecting a serial infringer, Zabek responded by explaining why he “would have allowed them back on”: because “DMCA [violations] do[] not hurt the network like [cyber] attack[s], spam or hacking,” and “the needs of the company” favor “keep[ing] customers and gain[ing] more [revenue-generating units].” C.A.App.1480.

Unsurprisingly, that “F the dmca!!!” mentality was not confined to Zabek. When Joe Sikes, Zabek’s longtime second-in-command, received higher-than-normal infringement notices on back-to-back days, he responded by saying “WE NEED TO CAP THESE SUCKERS!”—i.e., not the infringing subscribers, but the services sending the notices. C.A.App.1482. When a member of Cox’s abuse team identified a serial infringer, another top Zabek lieutenant responded, “This customer will likely fail again, but let’s give him one more chan[c]e. he pays 317.63 a month.” C.A.App.1499; *accord, e.g.*, C.A.App.1498 (“This Customer pays us over \$400/month and if we terminate their internet service, they will likely cancel the rest of their services.”); C.A.App.1426 (explaining that, even with “excessive violations,” “[i]t is not likely that we would terminate a [Cox Business] customer for DMCA violations”); *see also* C.A.App.433. While any company serious about policing infringement would have been alarmed to hear its top rights-protector express such disdain for copyright law, the only evident concern Zabek’s “F the dmca!!!”

declaration prompted was about the paper trail, not the sentiment. As another executive told Zabek: “Sorry to be Paranoid Panda here, but please stop sending out e-mails saying F the law ... If we get sued, those e-mails are discoverable and would not look good in court.” PX.336.*available.at.D.Ct.Dkt.162-8*.

Indeed. None of this looked good in court. And to state the obvious, these are no “stray messages between a handful of Cox employees,” *contra* Petr.Br.12. They are contemporaneous communications memorializing “unwritten semi-polic[ies]” set by the people Cox put in charge of guarding copyrights. See C.A.App.441 (“Mr. Zabek and Mr. Sikes provided guidance and the direction” and “set the tone for [Cox’s] abuse group”). Cox expressly promised at trial “to stand shoulder to shoulder[with] Mr. Zabek and Mr. Sikes. There will be no throwing them under the bus.” Tr.7. It is far too late to start now.

Conspicuously absent from the trial record, by contrast, is any evidence that Cox stayed its hand in the face of repeat infringement notices out of concern about inadvertently depriving innocent grandparents, hospitals, military barracks, or colleges of internet access. *Contra* Petr.Br.11, 44. Indeed, while Cox now claims that infringement notices are “notoriously unreliable,” Petr.Br.10, its fact witness conceded that they were “presum[ptively]” “valid,” Tr.1257, and its expert witness estimated the risk of inaccuracy at “in the range of ... 1 percent,” Tr.2359. The only evidence of anything close to an “institutional” customer was *respondents’* evidence that a fraternity house racked up 67 infringement notices—and Cox chose to collect

\$12,525 from them rather than try to stop the infringement. C.A.App.601, 720-21, 1714. Any suggestion that Cox has the kinds of institutional clients about which it now professes such concern was refuted by unrebutted evidence that military bases use MILNET (a private secure version of the internet supplied by DoD), and that most hospitals and colleges conduct official business on “their own parallel internet network” provided by “a consortium” called “Internet2.” Tr.2880-82.

Conversely, the evidence revealed that Cox showed no compunction about “throwing innocent users off the internet en masse,” Petr.Br.11, when doing so served Cox’s bottom line. Over a period during which Cox received 163,148 notices of infringement, Cox terminated just 32 subscribers (all residential customers) for copyright infringement. Pet.App.9a. Over that same period, Cox terminated 619,711 subscribers for nonpayment (597,796 residential; 21,915 business). C.A.App.1511-12, 1721.

3. Consistent with *Gershwin* and *BMG*, the district court instructed the jury that it could find Cox liable for contributory infringement if it found that Cox “induced, caused, or materially contributed to the infringing activity.” C.A.App.801. And the court instructed the jury that it could find Cox *willfully* liable if it found “that Cox had knowledge that its subscribers’ actions constituted infringement of plaintiffs’ copyrights, acted with reckless disregard for the infringement of plaintiffs’ copyrights, or was willfully blind to the infringement of plaintiffs’ copyrights.” C.A.App.804.

The jury returned a unanimous verdict across the board. Although its willfulness finding increased Cox's statutory damages exposure to \$150,000 per work, the jury awarded slightly less than two-thirds of that maximum per work, arriving at a damages award of \$1 billion (out of the more than \$1.5 billion Congress authorized). Pet.App.10a-11a; *see* C.A.App.822-23.

4. Cox appealed to the Fourth Circuit, which, in a unanimous opinion authored by Judge Rushing, affirmed on contributory infringement but reversed the vicarious-infringement verdict. The court did not address the jury instructions, as it concluded that Cox had "not challenge[d]" them "on appeal." Pet.App.34a. And it concluded that Cox forfeited any challenge to the district court's holding that three or more notices about a subscriber sufficed "to establish [Cox's] knowledge that the same subscriber was substantially certain to infringe again." Pet.App.22a-24a. That forfeiture largely controlled the case, because "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." Pet.App.27a. But because the court concluded (over respondents' objection) that the facts did not support vicarious liability, it vacated the jury's unapportioned damages award and remanded for a new trial on damages. Pet.App.29a.

SUMMARY OF ARGUMENT

I. Under this Court's long-standing precedent, one who provides someone with a tool to commit copyright infringement knowing that they plan to use it to do so is liable for contributory infringement. That rule is grounded in settled secondary-liability

principles, and it applies with full force to those who sell goods or services to the general public that can be put to infringing and noninfringing uses. To be sure, such providers cannot be held liable simply because they make their goods or services available knowing that some users out there may someday misuse them. But they are not immune from ordinary principles of secondary liability just because their products can be put to permissible uses. And when providers offer an ongoing service and obtain affirmative evidence of its unlawful use by particular users, they cannot put their heads in the sand and continue to profit from those users' ongoing misuse.

That well-established principle suffices to resolve this case. Try as Cox does to make this a case about merely unleashing a staple product on the market, Cox cannot ignore the reality—and the record—that it chose to continue providing service to specific customers that it knew were using the service to infringe. The district court found that Cox *knew* that the specific subscribers at issue—each of whom had already used its service to infringe at least three times—were repeat infringers likely to infringe again, and Cox abandoned any challenge to that finding.

This case thus has nothing to do with Cox's professed concerns about hair-trigger terminations, or unknowing misuse of Cox's services, let alone about innocent grandmothers or hospitals. If Cox had merely declined to terminate service when it had a credible reason to doubt that the subscriber was responsible for the infringement, or employed a more graduated approach toward institutions that provide critical services, then this case would not be here.

Respondents would not have sued and, if they had, Cox likely would have successfully invoked the DMCA's safe harbor, which leaves *responsible* ISPs with plenty of room to craft policies tailored to address such eminently reasonable concerns. This case is about whether an ISP who has no compunction about terminating customers for late payment can keep serving known repeat infringers that it knows will keep infringing—not because it harbors doubts that they are in fact “law break[ers],” C.A.App.1479, but because these “habitual abuser[s],” C.A.App.224, who “will likely fail again,” C.A.App.1499, pay on time, and “we want to hold on to every subscriber we can,” C.A.App.1484. Nothing in law or logic supports letting an ISP that acts with such shocking disregard for copyrights off the hook scot-free, and the DMCA forecloses any suggestion that Congress would tolerate such a profoundly inequitable result.

II. Cox's (unpreserved) challenge to the willfulness instruction fares no better. An ISP that not only knows how its customers plan to misuse its internet service, but also knows that their planned misuse constitutes copyright infringement, willfully contributes to that infringement if it chooses to facilitate it. That follows from the same principles that give rise to contributory liability (albeit for slightly different reasons), as well as from the settled (and unchallenged) rule that reckless disregard for infringement of copyrights constitutes willfulness. After all, it is hard to understand knowingly facilitating copyright infringement as anything *other* than reckless disregard for copyrights.

That renders Cox's forfeited instructional challenge irrelevant twice over, as the jury was instructed that it could find willfulness based on reckless disregard and willful blindness too, and Cox challenges neither of those instructions. So even if the knowledge instruction was somehow error, the jury's willfulness finding should be preserved—both because a finding of knowledge would necessarily include a finding of reckless disregard, and because the evidence leaves no doubt that the jury would have found willfulness with or without the knowledge instruction. Indeed, routinely discarding evidence of infringement, choosing to serve a known serial infringer because, e.g., “he pays 317.63 a month,” and responding to Congress' effort to protect responsible actors by declaring “F the dmca!!!” is precisely the kind of highly culpable conduct that enhanced damages exist to remedy and deter.

ARGUMENT

I. Providing Known Infringers With A Tool For Infringement Knowing They Will Likely Use It To Keep Infringing Exposes The Provider To Contributory Infringement.

A. Cox's Egregious Actions Fit Comfortably Within Settled Principles of Secondary Liability for Copyright Infringement.

It is bedrock copyright law that “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer.” *Gershwin*, 443 F.2d at 1162 (footnote omitted), *cited with approval in Grokster*, 545 U.S. at 930-31, and *Sony*, 464 U.S. at 437 n.18.

Applying that rule, this Court has long recognized that those who provide goods or services that can be used to engage in infringement can face contributory liability in two circumstances. First, if they take “active steps ... to encourage direct infringement,” like “advertising an infringing use or instructing how to engage in an infringing use,” they face inducement liability. *Grokster*, 545 U.S. at 936. Second, if they “continue[] to supply [their] product to one whom [they] know[] ... is engaging in ... infringement,” then they face material-contribution liability. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854 (1982); *see also, e.g., VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 745 (9th Cir. 2019) (collecting cases). Indeed, this Court held all the way back in 1912 that selling mimeograph ink to a known infringer “with the expectation that [the ink] would be used” to infringe triggered contributory liability even though there was no inducement, because on those kinds of facts courts can presume “the purpose and intent that [the product] would be so used.” *A.B. Dick*, 224 U.S. at 48-49; *see also Deutsch*, 98 F.2d at 688.

As those decisions underscore, an ongoing supplier of a product or service stands in a different position from one who simply launches a staple product onto the market. When in the course of that ongoing relationship, the supplier learns that the product or service is being unlawfully employed, it is not free to ignore that knowledge and continue with business as usual. That species of liability is grounded in the common-law and commonsense rule that if someone “knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact

desired to produce the result.” Restatement (Second) of Torts §8A cmt.b (1965).²

That rule has been applied to ISPs for basically as long as they have existed—and “correct[ly]” so, according (at least at one point) to one of Cox’s amici and the Department of Justice. Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 Geo. L.J. 1833, 1873-74, 1880, 1890 (2000); see Working Grp. on Intellectual Prop. Rights, *Intellectual Property & the National Information Infrastructure* 114-24 & app.3 (1995), <http://bit.ly/46L9Pcy>. And under any fair reading of this record, it suffices to resolve this case.

Contrary to what Cox suggests, it was not held liable for contributory infringement for “[p]roviding [c]ommunications [i]nfrastructure [t]o [t]he [g]eneral public” “in the form of a general-use internet connection.” Petr.Br.21, 33. As Congress understood in enacting the DMCA, a general-use internet connection can be used for good or misused to destroy valuable copyrights. And Cox was held liable here not merely because it supplied that general-use connection, but because, when confronted with evidence that specific subscribers were misusing that connection to infringe and were likely to keep doing so,

² Cox urges the Court to rely on the Third Restatement instead of the Second. Petr.Br.38. But it offers no good reason to discard the Restatement passed contemporaneous with the Copyright Act in favor of a version passed 45 years later. Cf. *Kansas v. Nebraska*, 574 U.S. 445, 475-76 (2015) (Scalia, J., concurring in part and dissenting in part) (noting the “questionable value” of “modern Restatements”).

Cox decided to continue providing them service instead of making any meaningful effort to stop their infringement.

Implicitly recognizing that those damning facts are fatal under century-old precedents, Cox tries to paint a very different picture. But after a 12-day trial, the facts are no longer open to dispute. Respondents did not sue Cox over simply providing a connection, or for unwittingly facilitating infringement, or even over isolated incidents of which Cox *was* aware. Cox gave respondents such a target-rich environment that they confined their lawsuit to instances in which Cox had received at least three notices that a subscriber was unlawfully uploading copyrighted content. And the district court found three such notices sufficient to establish that Cox knew that the subscriber was likely to infringe again, in a holding to which Cox forfeited any challenge long ago. Pet.App.163a-72a.

This case thus does not involve whether an ISP could be held liable for failing to terminate a subscriber who infringed only once, *contra* Petr.Br.37. To the contrary, respondents appreciate that most people will stop infringing if they receive even one notice that they did something unlawful—which is why Cox’s arbitrary limits on, e.g., how many notices it would process each day were so frustrating. *See supra* pp.10-11. This case likewise does not ask whether sending a service provider a notice of potential unlawful conduct will *always* suffice to establish knowledge, *see* Petr.Br.37, as Cox has never denied that it was aware of the notices, or claimed that it missed them for any reason other than its decision to throw two-thirds of them out. The district court

found that Cox *knew* the subscribers at issue were likely to continue infringing, rendering any disputes about what evidence suffices to establish such knowledge beside the point.³

Nor is the question here whether ISPs have “an absolute duty to terminate service regardless of how unreasonable it would be to do so.” *Contra* Petr.Br.41. Any viable argument about the reasonableness of Cox’s efforts exited this case along with Cox’s safe-harbor defense. While Cox all but ignores the DMCA and its safe harbor, the statute would have been front and center if Cox had any argument that it had acted reasonably—say, by declining to terminate subscribers who were working hard to investigate and remediate a network vulnerability, or by taking a more graduated approach toward institutional subscribers like hospitals and universities. After all, the DMCA requires only “a policy that provides for the termination *in appropriate circumstances* of subscribers ... who are repeat infringers,” 17 U.S.C. §512(i)(1)(A) (emphasis added), not a policy of termination at all costs. *See infra* Part I.C.

But Cox did not come close to satisfying that statutory standard. The extensive record established that Cox’s policy was to terminate virtually *nobody*, no

³ That forecloses the government’s attempt to analogize this case to “a store that sells hammers to all comers without excluding known thieves.” U.S.Br.25. The district court did not just find that Cox knew these subscribers had infringed in the past. It found that Cox knew they were likely to use its service to do so *in the future*. Judge Rushing thus had it exactly right when she analogized Cox’s behavior to “lending a friend a hammer ... with knowledge that the friend will use it to break into a credit union ATM.” Pet.App.27a-28a.

matter how certain it was that the subscriber had used its service to infringe repeatedly and was likely to keep doing so. As the very people overseeing Cox's rights-management division acknowledged, they *knew* that these "habitual infringers" "w[ould] likely fail again," C.A.App.1499, but they continued to supply them with a necessary tool for infringement anyway, because "DMCA [violations] do[] not hurt the network like [cyber] attack[s], spam or hacking," C.A.App.1480, and "We need the customers," C.A.App.224, especially because serial infringers consume more bandwidth and thus pay more money, C.A.App.1717; *see also* C.A.App.1498-99. In short, Cox chose to continue supplying known infringers with a tool that it knew they would likely use to infringe again, because Cox cared more about its bottom line than about the rights of artists and songwriters "to secure a fair return for [their] creative labor." *Aiken*, 422 U.S. at 156.

That makes this a particularly straightforward contributory-liability case, as the facts fit squarely into the classic material-contribution paradigm: Cox continued to provide known infringers with something it knew could be used to infringe, "with the expectation that it would be used" by them to continue infringing. *A.B. Dick*, 224 U.S. at 48-49. And Cox did so because it did not want to lose the revenue that serving those infringers generated, even though Cox knew that it came at the expense of copyright holders. If providing a known infringer with tools that one knows the infringer will likely use to infringe again, out of an unabashed desire to profit at the expense of copyright holders, does not constitute "materially contributing"

to infringement, then it is difficult to fathom what does.

B. Cox’s Exceedingly Crabbed Conception of Contributory Infringement Finds No Support in the Cases It Invokes.

Unable to credibly dispute the facts, Cox tries to rewrite the law to excuse its egregious behavior. In its view, contributory liability arises only when someone provides a good or service “with the object of promoting its use to infringe copyright.” Petr.Br.26 (quoting *Grokster*, 545 U.S. at 936-37). In other words, Cox would limit contributory liability to cases of affirmative inducement, like *Grokster*, and would immunize those who knowingly facilitate and profit from infringement. That bespoke standard would collapse the distinction between inducing infringement and materially contributing to it—an outcome that finds no support in the cases Cox invokes. Those cases instead stand only for the undisputed propositions that inducement is one species of contributory infringement and that material contribution cannot be assessed at a level of generality so high as to render merely selling goods or services to the public with knowledge that some unidentified people might misuse them enough to establish secondary liability.

1. *Sony* made that point in the context of a staple article of commerce that involved no ongoing relationship or knowledge of user-specific misuse. *Sony* addressed whether Betamax’s manufacturer could be held liable for infringement when Betamax purchasers used them to record copyrighted movies broadcast on TV. In concluding that it could not, the

Court began by emphasizing that there was “no evidence” *either* that Sony had “encouraged” the infringement, *or* that Sony had any “ongoing relationship” with “the direct infringer” when “the infringing conduct occurred.” To the contrary, “[t]he only contact between Sony and the users ... that [wa]s disclosed by this record occurred at the moment of sale.” 464 U.S. at 438. Only after ruling out *both* of those traditional paths to secondary liability—i.e., inducement and material contribution—and thus distinguishing cases like *A.B. Dick*, did the Court turn to whether having “sold equipment with constructive knowledge of the fact that [its] customers may use that equipment to make unauthorized copies of copyrighted material” sufficed to give rise to secondary liability. *Id.* at 439.⁴ And the Court concluded that “the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes.” *Id.* at 442.

That might matter if respondents were trying to hold Cox liable merely for providing a one-off internet access device, or for offering access knowing only that some people might use it to infringe. But that is not remotely what this case is about. And nothing in *Sony* suggests that secondary liability is not available against one who provides an ongoing service to specific subscribers with knowledge that they are using it to commit ongoing infringement. To the contrary, *Sony*

⁴ While *Sony* sometimes speaks in terms of “vicarious liability,” the Court noted that it was using that term as a secondary-liability catchall, not as a concept distinct from “contributory” liability. *See id.* at 435.

suggests precisely the opposite, as the Court emphasized that the analysis would be different if “the ‘contributory’ infringer” had an “ongoing relationship” with the direct infringers when “the infringing conduct occurred” that put it “in a position to control the use of copyrighted works.” *Id.* at 437.

Cox next tries to infer from *Grokster* a blanket rule that “[t]here is no contributory liability unless the defendant ‘distribute[d] a device’” (or, presumably, a service) “with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement.” Petr.Br.26 (quoting *Grokster*, 545 U.S. at 936-37). But that argument repeats the same mistake *Grokster* corrected. *Grokster* rejected the lower court’s over-reading of *Sony* by clarifying that the distributor of a device capable of noninfringing uses can still be held liable under the inducement theory of contributory infringement if (as was the case there) it actively encourages people to use the device to infringe. 545 U.S. at 936-37. But *Grokster* certainly did not hold that inducement is the *only* theory of liability available against the distributor of a product—let alone that it is the only theory available against the provider of an ongoing service. Nor did the Court need to confront that question, as *Grokster* had structured its product so that it “had no agreed-upon right or current ability to supervise its use.” *Id.* at 914. Cox’s argument thus rests on the same fallacy this Court rejected in *Grokster*—i.e., that by explicitly addressing one theory of secondary liability, this Court implicitly rejected all others. That (il)logic fares no better here. “*Sony* did not displace other theories of secondary liability,” *id.* at 934, and neither did *Grokster*.

All of that renders Cox’s discussion of the staple-article doctrine unhelpful. No one—not Cox, not respondents, not the Congress that crafted the DMCA—thinks that ISPs merely launch an internet-access device into the stream of commerce with no ongoing relationship with those who purchase it, no means of control, and knowledge of potential misuse. To the contrary, Congress erected the safe harbor on the assumption that ISPs have ongoing relationships with their “subscribers” and *can* take “appropriate” steps to “terminat[e]” those who they learn are “repeat infringers.” 17 U.S.C. §512(i)(1)(A). Given that relationship—not to mention the copious evidence that Cox knew specific customers were “habitual abuser[s]” but kept supplying them because it purportedly “need[ed] the customers,” C.A.App.224—no one is suggesting that liability may be inferred from the bare fact that Cox supplied a service that it knows is capable of infringement. “[T]he purpose and intent” to facilitate infringement arises from Cox’s decision to continue providing access to particular subscribers “with the expectation that it would be used” by them to infringe. *A.B. Dick*, 224 U.S. at 48-49. Nothing in the staple-article doctrine or any of this Court’s cases purports to immunize providers on facts like those.

The government leans even harder into this patent-law analogy, suggesting that a merchant can sell to customers with perfect knowledge of their intended illegal use so long as it is selling a staple article. *See, e.g.*, U.S.Br.15-17. That is a radical overstatement of the law, as *Sony* and *Grokster* (and the government’s briefs in those cases) confirm. At the government’s urging, *Grokster* expressly *rejected* the argument that *Sony* somehow immunized *Grokster*

from liability simply because its file-sharing platform was capable of noninfringing uses. *See* 545 U.S. at 932-34. The government's real argument thus ends up being that only inducement should count, *see* U.S.Br.17—and that argument finds no more purchase in patent law than it does in the DMCA.

With good reason. After all, if only inducement counted, then ISPs would effectively have blanket immunity from contributory liability. That is a step that Congress conspicuously *declined* to take—and it is a position that would leave ISPs, ink suppliers, and copy shops with zero liability, no matter how much knowledge they had, and no matter how much infringement they knowingly unleashed. That extreme and unpalatable position is necessitated by Cox's extreme disregard for copyrights and the massive infringement it was knowingly facilitating.

2. With no footing in copyright or even patent law, Cox goes further afield to invoke aiding-and-abetting cases in other contexts. Those cases literally distinguish themselves by not even mentioning copyright law, but they also reflect the same undisputed principle as *Sony* and *Grokster*: Merely providing a good or service to the public with knowledge that it *may* be put to unlawful purposes does not give rise to secondary liability. But that is just the starting point. The interesting question is what happens when a product or service is provided by someone who knows it will be used unlawfully (and is openly contemptuous of the laws that will be violated to boot). In those circumstances, aiding-and-abetting law does not provide the immunity Cox seeks.

Take, for instance, *Twitter v. Taamneh*, 598 U.S. 471 (2023). That case involved an effort to hold social-media companies liable for allegedly aiding and abetting an act of terrorism under the Justice Against Sponsors of Terrorism Act (“JASTA”). The allegations were not that any company knowingly allowed a particular user to employ its service to promote terrorism. The plaintiffs instead argued that the companies were liable because they continued to make their services available to the public even though they knew some users and content would inevitably escape their efforts to prevent their services from being used to promote terrorism. *See id.* at 480-84. In fact, the plaintiffs conceded that companies *did* remove users and content promoting terrorism when they learned of them. *See id.* at 498 n.13. They just alleged that the companies did not do enough to find those users or that content. *That* is why the Court described their theory as “rest[ing] less on affirmative misconduct and more on ... mere passive nonfeasance.” *Id.* at 500.

That is about as far from these facts as it gets. Indeed, *Taamneh* would have come out quite differently if the plaintiffs had alleged that the companies had a policy of refusing to even consider terminating specific users they *knew* were habitually using their services to promote terrorism because they “pay[] us over \$400/month,” C.A.App.1498, all the while proclaiming “F the ATA and JASTA!!!” *Taamneh* thus reflects the same principles at issue in *Sony* and *Grokster*: “[I]nternet or cell service providers” do not ordinarily “incur culpability merely

for providing their services to the public writ large.” 598 U.S. at 499.⁵

Cox tries to draw a different rule from *Taamneh*, fixating on the Court’s observation that “plaintiffs identif[ied] no duty that would require defendants or other communication-providing services to terminate customers after discovering that the customers were using the service for illicit ends.” *Id.* at 501; see Petr.Br.31. But the very framing of that sentence begs the question whether copyright law imposes such a duty—a question *Taamneh*, a non-copyright case, had no occasion to contemplate. Indeed, the most striking sign of *Taamneh*’s irrelevance is that it did not so much as mention *Sony*, *Grokster*, *Gershwin*, or copyright law.⁶

Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos, 605 U.S. 280 (2025), is, if possible, even further afield. That case involved an effort to hold U.S. firearms manufacturers liable for allegedly

⁵ The government therefore misses the mark in noting that “[i]t would be anomalous to hold that communications-service providers have a *greater* duty to prevent use of their services to commit copyright infringement than to prevent use of their services to facilitate terrorist acts.” U.S.Br.24. If ISPs started ignoring notifications that specific subscribers are using their services to promote terrorism, or giving promoters of terrorism 13 strikes before terminating services, liability would and should follow in due course. Nothing in *Taamneh* is to the contrary.

⁶ It is also telling that both of the non-copyright cases that *Taamneh* cited in support of Cox’s favored sentence involved defendants who allegedly failed to stop conduct of which they were *not* specifically aware. See *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003); *People v. Brophy*, 120 P.2d 946, 956 (Cal.Dist.Ct.App. 1942).

“aid[ing] and abett[ing] unlawful sales routing guns to Mexican drug cartels.” *Id.* at 285. But the manufacturers were not in an ongoing relationship with any wrongdoers, let alone with the cartels whose criminal activity they were accused of aiding and abetting. They merely sold firearms to distributors, who in turn sold them to dealers, some of whom allegedly were in cahoots with the cartels. *Id.* at 295. The Court thus, without so much as a nod to copyright law, rejected the aiding-and-abetting claim based on the same selling-an-article-without-more-is-not-enough principle that no one here disputes: “A manufacturer of goods is not an accomplice to every unaffiliated [party] whom it fails to make follow the law.” *Id.* at 297. Once again, *Smith & Wesson* becomes a fundamentally different case with an ongoing relationship and knowledge of ongoing misuse by specific customers, and with defendants openly contemptuous of the law.

Unlike *Smith & Wesson*, this is not a case about whether suppliers have a duty to root out “unidentified ‘bad actors’ ... mak[ing] illegal use of their wares.” *Id.* at 296-97. Respondents have already done that hard work for Cox. The only question here is whether an ISP has some special immunity from ordinary secondary-liability doctrine that empowers it to keep facilitating infringement once it *knows* it is going on, out of an unabashed desire to pad its own revenues at the expense of copyright holders. Nothing in *Smith & Wesson* or any other case Cox cites suggests that the answer is yes.

3. Cox’s invocation of landlord-tenant and utilities cases further undermines its cause. Cox tries

to compare the ISP/subscriber relationship to a landlord who leases premises to an infringer for a fixed rental and does not participate in the infringing activity. Petr.Br.25; *see also* Petr.Br.33, 35-36 (analogizing to FedEx, AT&T, and an electric company). But courts routinely distinguish between those who provide the means for infringement—e.g., dance halls or mimeograph ink—and those who provide electricity or general-use premises. There is, after all, a reason the DMCA provides a safe harbor for ISPs and not landlords or FedEx.

Even in the landlord-tenant context, moreover, the law *does* “impos[e] liability on a landlord for the actions of a tenant” “when a landlord knows that the tenant is engaging” in unlawful conduct—a knowledge-based “exception to the general rule of landlord immunity” that is designed “to prevent a landlord from knowingly profiting (via the receipt of rent) ... while passing the liability buck onto the tenant.” *Bowers v. Wurzburg*, 528 S.E.2d 475, 479-82 (W.Va. 1999) (collecting sources); *see Deutsch*, 98 F.2d at 688. And “[a] public utility has not only the right, but a duty to refuse to render service for criminal purposes.” *Rubin v. Pa. Pub. Util. Comm’n*, 177 A.2d 128, 131 (Pa.Sup.Ct. 1962); *see also, e.g.*, Press Release, Dep’t of Just., *United States Files Complaint Against Telecommunications Service Provider for Assisting and Facilitating Illegal Robocalls* (May 12, 2023), <https://perma.cc/D4CA-QA55> (“VoIP providers ... that bury their heads in the sand when their customers use their services to break the law can expect to hear from the FTC.”). Knowledge makes all the difference, as “there is simply no case to be made consistent with reality as to why the law should not

provide the public with a remedy against a landlord out of possession and control who rents a powder factory to a known pyromaniac.” *Benlehr v. Shell Oil Co.*, 402 N.E.2d 1203, 1207 (Ohio Ct. App. 1978).

Direct Sales Co. v. United States, 319 U.S. 703 (1943), likewise supports respondents, not Cox. The mail-order pharmacy was held liable there because it “sold morphine sulphate to [one doctor] in such quantities, so frequently and over so long a period”—and after “the Bureau of Narcotics informed” the pharmacy “it was being used as a source of supply by convicted physicians”—that “it must have known” the doctor was “distributing the drug illegally.” *Id.* at 705, 707. *Direct Sales* thus confirms that any “stimulation or active incitement” required can be inferred from continuing to sell to someone knowing that they will use the product unlawfully. *Id.* at 712 & n.8.

As all of those cases reflect, it is one thing to say that general service providers should not have a duty to ferret out illegal use of their services. It is quite another to bless a provider’s decision to continue supplying service when faced with glaring evidence of illegality because the provider wants to keep customers. If anything, *that* is a rule that would stand traditional secondary-liability doctrine on its head, *contra* U.S.Br.24—and destroy the incentives that the *actual* governing legal principles create in the process. Compare Petr.Br.36, with, e.g., *United States v. Blodgett*, 2018 WL 1902359, at *1 (D. Alaska 2018) (noting that “FedEx cooperates with law enforcement to do package watches”). Cox’s view thus not only would let ISPs entirely off the hook for the very liability that Congress recognized can and should

exist, but would eliminate secondary liability in all manner of areas where it has long been a critical tool for deterring service providers from knowingly choosing to facilitate specific unlawful conduct.

C. The DMCA Further Undermines Cox’s Novel View of the Law.

Cox acts as if Congress has been asleep at the switch, and any liability for knowingly continuing to supply the means for continuing infringement must await congressional intervention. But Congress has long acted against the understanding that courts have developed and applied secondary-liability doctrines to infringement—and it did so in this specific context by enacting the DMCA and its safe harbor.

The entire structure of that provision forecloses Cox’s argument that contributory infringement exists only when one provides a good or service “with the object of promoting its use to infringe copyright.” Petr.Br.26. Indeed, if that were the law, then the safe harbor would not exist, as there would be no need to limit the liability of ISPs who receive knowledge that their customers are using the service for repeat infringement but stop short of actively inducing that infringement. Yet Congress saw fit to enact a safe harbor and confined it to ISPs that “adopt[] and reasonably implement[] ... a policy that provides for the termination in appropriate circumstances of subscribers ... who are repeat infringers.” 17 U.S.C. §512(i)(1)(A). The safe harbor, like the DMCA’s notice-and-take-down provisions, *see supra* p.6, presumes that once ISPs gain knowledge of infringing activity, they risk liability if they do nothing. The express purpose of the safe harbor was to “strong[ly]

incentiv[ize]” ISPs to take reasonable and appropriate steps to terminate repeat infringers. S.Rep.105-190 at 20. But the only thing that drives that incentive is the threat of liability for doing nothing to terminate known repeat infringers. Cox’s position thus would render the most apposite statutory text meaningless.

With little to say about the safe harbor, Cox tries to shift the focus to §512(l), which provides that “[t]he failure of a service provider’s conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense ... that the service provider’s conduct is not infringing.” But that misses the point. As that text makes clear, Congress designed the safe harbor as a “limitation of liability,” not as a cause of action, so it makes perfect sense that the failure to qualify for its “limitation of liability” does not ipso facto make the defendant liable or defeat other possible defenses. But the safe harbor does operate as a “limitation of liability,” and it cannot function in that manner if there is no liability to limit. The safe harbor thus presupposes that an ISP’s liability is not already limited to a far narrower set of circumstances, such that ISPs may simply continue to serve repeat infringers with full knowledge that they will continue to infringe on a massive scale. Cox’s miserly conception of secondary liability would render the safe harbor somewhere between a nullity and nonsensical. This Court, by contrast, has repeatedly emphasized and applied “the commonsense proposition ‘that Congress presumably does not enact useless laws.’” *Garland v. Cargill*, 602 U.S. 406, 427 (2024).

In reality, Congress was not blindly protecting ISPs against a phantom risk of liability, or failing to appreciate “how the internet would develop.” Petr.Br.45. It was legislating against the “background of common-law ... principles” of secondary liability, *Samantar v. Yousuf*, 560 U.S. 305, 320 n.13 (2010)—including the principle, reiterated more than a decade earlier in *Sony*, that contributory liability can attach when a merchant has an “ongoing relationship” with a customer and “[i]s in a position to” prevent the customer’s infringement but chooses not to, 464 U.S. at 437-38. See *Bartenwerfer v. Buckley*, 598 U.S. 69, 80 (2023) (“this Court generally assumes that, when Congress enacts statutes, it is aware of this Court’s relevant precedents”); Scalia & Garner, *Reading Law* 322-26 (2012). Congress thus created a safe harbor because it understood that ISPs do *not* have to actively promote their services for infringement to risk secondary liability. And Congress confined that safe harbor to ISPs that make reasonable efforts to terminate repeat infringers because it did *not* consider protecting internet access more important than protecting copyrights.

All of that makes the government’s professed concern about not “giv[ing] ISPs a powerful incentive to err on the side of termination,” U.S.Br.29, mystifying. Cox itself had no hesitation about erring on the side of termination when it came to late-paying customers. And Congress acted to curb the true problematic incentive—namely, that ISPs’ profit motives will leave them with “a powerful incentive to err on the side” of retaining known infringers as long as they pay their monthly bills. The whole point of the safe harbor is to counter that profit motive by giving

ISPs a contrary incentive to avoid liability by terminating “repeat infringers.” Congress understood that profit is a powerful motivator, and thus adopted the safe harbor to create “a strong incentive[]” for ISPs “to cooperate” with “copyright owners” “to detect and deal with copyright infringements.” S.Rep.105-190 at 20. But without any meaningful secondary liability, there is nothing to power the safe harbor’s incentives, and the hopefully outlying facts of this case would become commonplace.

Cox’s repeated insistence that “[o]nly Congress is empowered to create a duty to terminate internet service,” *e.g.*, Petr.Br.19, rings equally hollow. No one has “impose[d] an absolute duty to terminate service regardless of how unreasonable it would be to do so,” *contra* Petr.Br.41, U.S.Br.29-30, and no one is asking this Court to do so. Congress itself legislated a policy that favors reasonable and appropriate measures, not the extremes of absolute duties to terminate or absolute immunity for anything short of *Grokster*-style inducement. If Cox truly had adopted and enforced a “reasonabl[e]” policy of terminating repeat infringers only “in appropriate circumstances,” 17 U.S.C. §512(i)(1)(A), then the DMCA’s safe harbor would end this case. Indeed, DMCA aside, Cox may have been able to avoid liability had it adopted reasonable and commonsense measures to try to address known repeat infringers through measures short of termination. Under the Ninth Circuit’s “simple measures” approach, for instance, that kind of policy may well have sufficed to avoid liability even if it did not satisfy the DMCA’s safe harbor. *See Perfect 10, Inc. v. Amazon.com*, 508 F.3d 1146, 1172 (2007).

Cox now claims that it could have prevailed under the “simple measures” test, Petr.Br.41-43, but Cox did not ask for a simple-measures instruction, *see* D.Ct.Dkt.606-1.at.31. For good reason: The facts foreclosed Cox’s resort to that test just as squarely as they foreclosed resort to the DMCA’s safe harbor. The evidence shows that Cox was not making *any* serious effort to stop these repeat subscribers from infringing—which explains why Cox puts most of its eggs in the basket of insisting that it need not take any “affirmative steps to prevent infringement” at all. Petr.Br.41. And the record confirms that the reason Cox did not embrace that approach was not for fear of unwittingly punishing Grandma for Junior’s infringement or depriving hospitals of internet access. Cox chose to tolerate “habitual abuser[s]” because “We need the customers.” C.A.App.224. It does not take an act of Congress to confirm that such a callous response to knowing facilitation of infringement fits comfortably within the bounds of secondary liability.

Cox complains that qualifying for the safe harbor is a “crapshoot” owing to its flexible “reasonableness” standard. Petr.Br.44. That is a strange complaint from a company whose conduct was so far removed from reasonableness that it lost its safe-harbor defense on summary judgment. It is stranger still given that “[r]easonableness generally has signified the most relaxed”—and thus, in this context, pro-defendant—“regime of judicial inquiry.” *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 54 n.17 (1977) (Brennan, J., dissenting). The flexibility inherent in that standard works in *favor* of ISPs, reflecting Congress’ recognition that there is no one-size-fits-all way to address this thorny problem. *See, e.g., Ventura*

Content, Ltd. v. Motherless, Inc., 885 F.3d 597, 613-19 (9th Cir. 2018) (allowing provider who relied on “judgment, not a mechanical test, to terminate infringers based on the volume, history, severity, and intentions behind a user’s infringing content” to invoke DMCA safe harbor). And the safe harbor has, for the most part, proven successful in incentivizing ISPs to work cooperatively with rightsholders to curb infringement. In the nearly three decades since the DMCA was enacted, there have been a mere handful of suits against ISPs for contributory infringement—including the two against Cox plus another against a Texas-based ISP known as Grande Communications Networks, LLC. It should come as no surprise that Grande, like Cox, could not successfully invoke the safe harbor: “In one year alone, around 40 subscribers passed the 1,000 infringements milestone—and one infringed nearly 14,000 times (38 times a day)—yet still Grande did not lift a finger.” BIO at 1, 9-11, *Grande Commc’ns Networks, LLC v. UMG Recordings, Inc.*, No. 24-967 (U.S. May 9, 2025).

There is thus nothing but self-serving rhetoric to back Cox’s breathless claims that affirming would somehow expose ISPs to liability any time they fail to stop any infringement (or other misconduct) on their services. Affirming would just signal that an ISP cannot give known infringers 13 strikes, then refuse to enforce even that lax policy against “habitual abusers” because the ISP wants to keep customers, all while telling employees responsible for enforcing the policy to “F the dmca!!!” This is not a case where Cox came within a hair’s breadth of qualifying for the safe harbor. Instead, this should be a cautionary tale that ISPs cannot put profit above the responsibility to

ensure that their own services do not become a haven for known repeat infringers. If these facts are not enough to trigger liability for contributory infringement, then the safe harbor and Congress' hope to strike a balance that protected copyrights in the digital millennium are both a dead letter.

II. The Jury's Willfulness Finding Is Legally And Factually Sound.

It takes more than a little chutzpah to suggest that an ISP that routinely deleted infringement notices without even reading them, and kept serving customers that it knew were likely to keep infringing so it could keep their subscription fees, does not come within the class of "most culpable infringers" for whom "Congress reserved enhanced damages." *Cf.* U.S.Br.33. And chutzpah is not the only problem with Cox's position: The Fourth Circuit held that Cox forfeited any challenge to the willfulness instruction. Pet.App.34a. But forfeiture aside, the jury instruction was correct, and the evidence more than suffices to prove willfulness with or without the lone piece of it Cox challenges.

1. The Copyright Act provides for statutory damages of "a sum of not less than \$750 or more than \$30,000" per infringed work. 17 U.S.C. §504(c)(1). If the plaintiff proves "that infringement was committed willfully," then the maximum per-work award increases "to a sum of not more than \$150,000." *Id.* §504(c)(2). Conversely, if the defendant proves that he or she "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright," then the minimum is reduced "to a sum of not less than \$200." *Id.*

The district court instructed the jury that, to find willfulness, it must find “that Cox had knowledge that its subscribers’ actions constituted infringement of plaintiffs’ copyrights, acted with reckless disregard for the infringement of plaintiffs’ copyrights, or was willfully blind to the infringement of plaintiffs’ copyrights.” C.A.App.804. Cox challenges only the first prong of that instruction—i.e., that “knowledge that its subscribers’ actions constituted infringement of plaintiffs’ copyrights” suffices. According to Cox, the court should have instructed that Cox must know that *its own* conduct constituted contributory infringement; it is not enough that Cox knew it was facilitating someone else’s infringement.

Cox insists that such knowledge must be required, because otherwise every contributory infringer would be a willful infringer too. Petr.Br.47. Cox is mistaken. For both direct and contributory liability, copyright infringement is a strict-liability tort. *See* 5 Patry on Copyright §17:167 (Sept. 2025); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996). So while a defendant must know that it is facilitating the infringing conduct to face secondary liability, it does not need to know that the conduct is infringement. It is enough that the defendant acted with “the purpose and intent that it[s] good or service] would be so used.” *A.B. Dick*, 224 U.S. at 48-49. Grokster could not have escaped secondary liability, for instance, if it mistakenly thought that all the conduct it was encouraging was fair use, any more than its users could have escaped liability if they did not realize that their file-sharing was infringement.

Willfulness, by contrast, focuses on whether the defendant knew that its conduct constituted infringement. And in the context of secondary liability, the sensible way to answer that question is by asking whether the defendant knew that the conduct it was facilitating was infringement. After all, one can be held liable for providing a good or service to someone with knowledge that they plan to use it to engage in conduct that constitutes infringement because, in such circumstances, courts may presume that the provider acted with “the purpose and intent that it[s] good or service] would be so used.” *A.B. Dick*, 224 U.S. at 48-49. So if the defendant not only knows how the primary actor intends to use the service, but also knows that the intended use constitutes infringement—i.e., it knows that it is facilitating not just habitual users, but habitual abusers—then the purpose and intent *to infringe* may be presumed. Cox’s contrary view would leave §504(c) treating those who knew they were facilitating infringement no differently from those who did not—a result that makes little sense given the statute’s tripartite scheme.

As the Fourth Circuit explained, moreover, “knowledge that one’s subscribers are infringing is consistent with *at least* reckless disregard for the copyright holder’s rights.” *BMG*, 881 F.3d at 313 (emphasis added). And as Cox itself admits, one “who knows (or recklessly disregards the likelihood) that he, himself, is infringing necessarily “disregard[s]” ... the copyright holder’s rights.” Petr.Br.53. One who knowingly facilitates conduct that they know constitutes copyright infringement is thus by definition acting with reckless disregard for the

copyright holder's rights. That alone renders this dispute largely academic, as Cox never even purported to challenge the instruction that "reckless disregard for the infringement of plaintiffs' copyrights" suffices to show willfulness, C.A.App.804, and it concedes that the issue is "not disputed here," Petr.Br.47 n2. But it also shows why there was no instructional error at all.

Notably, neither Cox nor the government points to any case holding that someone who knowingly facilitates conduct that they know is unlawful must also know that knowingly facilitating unlawful conduct is unlawful to act "willfully." They instead just point to cases "rejecting enhanced damages when a" *primary* violator of the law "acted in ignorance or good faith" or "did not intend any infringement." Petr.Br.51. But §504(c) speaks directly to those who fit that bill: The statutory minimum is reduced to \$200 if the defendant "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright." 17 U.S.C. §504(c)(2).⁷ It is hard to see how one who knows they are facilitating infringement could ever show that they had no idea that their own acts constituted infringement. The law, after all, generally presumes that people—and certainly sophisticated multi-billion-dollar

⁷ Cox tries to make something of the fact that §504(c)(2) uses the phrase "his or her acts" when identifying the showing to reduce the statutory minimum. Petr.Br.52. But if this Court were to ascribe that wording to anything more than the fact that the statute is focused on direct, not secondary, liability, then the Court would likewise have to ascribe meaning to the fact that Congress did *not* use that language when setting forth the standard for willfulness. See 17 U.S.C. §504(c)(2); *Russello v. United States*, 464 U.S. 16, 23 (1983).

companies—have at least a modicum of intelligence. And if Cox really thought it could make that showing, then it should have tried. Cox presumably did not do so because it is difficult to fathom a jury taking any such claim seriously when Cox’s internal documents show that it knew full well that its decision to tolerate repeat infringement might land it in litigation. *E.g.*, PX.336. Cox’s professed concerns about defendants who have no idea that they are facilitating infringement thus do not move the needle.

2. Even assuming that Cox’s unpreserved challenge to the willfulness instruction had merit, that would not warrant disturbing the jury’s willfulness finding.⁸ Cox does not dispute that the district court permissibly instructed the jury that it could also find willfulness if Cox acted with “reckless disregard for” or “willful[] blind[ness] to the infringement of plaintiffs’ copyrights.” C.A.App.804; *see* Petr.Br.47.n.2, U.S.Br.31. And wholly apart from whether knowledge of infringement and reckless disregard are two sides of the same coin, there is ample evidence that Cox acted with both. Indeed, the record overwhelmingly supports the conclusion that Cox *knew* “that its actions constituted contributory ... infringement,” Petr.Br.54, rendering any potential instructional error doubly harmless.

Cox cannot claim that it did not know that the conduct in which the repeat infringers at issue were engaged was infringement; Cox itself described them as “law breaking customers.” C.A.App.1479. And Cox

⁸ At most, it might warrant vacatur of the Fourth Circuit’s decision and remand for that court to address harmlessness in the first instance.

cannot claim that it did not know they were likely to continue infringing, as the district court found otherwise, in a finding that Cox did not challenge. Nor can Cox seriously claim that it did not understand that continuing to supply service to those subscribers might constitute contributory infringement. The whole reason Cox putatively prohibited its subscribers from infringing and implemented a (toothless) DMCA program is because it recognized that it faced a very real risk of contributory liability if it did not address repeat infringers—as confirmed by the wealth of evidence that key executives understood the value of trying to fit within the DCMA’s safe harbor. *See, e.g.*, C.A.App.1484.

In short, Cox did not fail to appreciate the law; it just decided that it was more interested in maximizing profits than in trying to comply with it. If Cox really thought its “unwritten semi-policy” of reactivating serial infringers after “a stern warning” and its special exception for serial infringers with “a Cox.net email” were permissible ways to address serial infringement, then it would not have instructed employees to “not talk about” them publicly and to make sure to “not forward” emails announcing them. C.A.App.1484-85.

Indeed, even now, Cox continues to display a remarkably callous disregard for the rights of artists and songwriters, repeatedly emphasizing that this case concerns only 1% of its subscribers, and trying to trivialize their serial infringement as “a few illegal downloads worth, on average, \$1 each.” Petr.Br.44. That ignores the size of Cox’s customer base; even 1% of 6 million subscribers would be 60,000 repeat infringers. And it ignores the fact that the subscribers

at issue here were not merely caught downloading a few works; they were caught acting as a worldwide distributor of multiple works for free through a notoriously viral pirate network. Given the speed and perfection with which legions of repeat infringers could copy and distribute respondents' works, absent liability, respondents would soon be unable to charge law-abiding customers anything like \$1 per download. Finally, Cox's argument ignores Congress' judgment that protecting creators is so critical that even the most innocent of infringers—which Cox and its serially infringing subscribers most certainly are not—should pay up to \$30,000 per infringement, no matter how little it may have cost them to get the copyrighted material lawfully.

At bottom, Cox may not think that helping 60,000 of its subscribers distribute more than 10,000 copyrighted works for free is a very big deal, but Congress, at least a century's worth of this Court's cases, and respondents' experiences with the real-world effects of infringement beg to differ. So did the jury who saw all the evidence and heard all the testimony in this case: A group of real-world individuals who undoubtedly depend on internet access in their own day-to-day lives did not hesitate to find Cox liable for willful contributory infringement. This Court should not either.

CONCLUSION

The Court should affirm.

Respectfully submitted,

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