No. 25-1111

IN THE
Supreme Court of the United States

ROXANA TOWRY RUSSELL,
Petitioner,

v.

WALMART INC., AND WAL-MART.COM USA, LLC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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Roxana Towry Russell respectfully submits this supplemental brief to address the impact of the Court's decision in *Cox Communications, Inc.* v. *Sony Music Entertainment*, 607 U.S. __, No. 24-171 (U.S. Mar. 25, 2026), on her pending petition for certiorari.

In the decision below, the Ninth Circuit held it could assess the sufficiency of the evidence supporting a jury verdict by reviewing the denial of a *pre-verdict* motion for JMOL under Rule 50*(a)*. Pet. 16. The Ninth Circuit then reviewed the evidence de novo, declared it insufficient, and ordered partial JMOL for Walmart. Pet. 16-17. As Russell's petition explains, that decision conflicts with decisions from every other circuit. Pet. 18-25. It also contravenes this Court's decision in *Unitherm Food Systems, Inc.* v. *Swift-Eckrich, Inc.*, 546 U.S. 394 (2006). Pet. 25-29. The Rule 50 issue warrants review, and reversal—whether summarily or on plenary review. Pet. 29-33.

The petition also presents a second issue. Having ruled it could evaluate the sufficiency of the evidence, the Ninth Circuit held there was insufficient evidence to find Walmart secondarily liable for infringement of Russell's copyrighted photographs—photographs that appeared in online product listings Walmart used to sell infringing knockoffs of Russell's copyrighted lamps. Pet. 16-18, 33. Because the then-pending *Cox* case was set to address the proper standard for secondary copyright-infringement liability in the internet context, Russell urged that the Court should, at minimum, hold her petition and then GVR following its decision in *Cox*. Pet. 33-35.

The Court decided *Cox* on March 25. The decision confirms a GVR would be appropriate—and underscores the need for review of the threshold Rule 50 error.

1. *Cox* involved an internet service provider that had been found secondarily liable for contributory copyright infringement because it "continu[ed] to provide Internet service to subscribers whose IP addresses it knew were associated with infringement." *Cox*, slip op. at 5. The Court's decision clarified the legal standard for contributory copyright-infringement liability, explaining that the defendant must have "intended that the provided service be used for infringement," and that such intent can be shown "if the [defendant] induced the infringement." *Id.* at 7. Specifically, the Court adopted the standard articulated by Justice Ginsburg's concurrence in *Grokster*, holding that a defendant "induces infringement if it actively encourages infringement through specific acts." *Ibid.* (citing *Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U. S. 913, 942 (2005) (Ginsburg, J., concurring)).

Under that clarified standard, the Court concluded that Cox had not "'induce[d]' or 'encourage[d]' its subscribers to infringe in any manner." *Cox*, slip op. at 9. The Court

emphasized that Cox had "limited knowledge" of how its "services are used" and "cannot directly control" its users. *Id.* at 3.

2. *Cox* calls into question the Ninth Circuit's ruling that the evidence here was insufficient to support secondary infringement liability. Under *Cox*, inducement sufficient for secondary (contributory) liability exists where the defendant "actively encourages infringement through specific acts." *Cox*, slip op. at 7 (citing *Grokster*, 545 U. S. at 942 (Ginsburg, J., concurring)). The decision below did not articulate an "actively encourag[e]" standard, much less apply that standard in light of this Court's new guidance. See Pet. App. 6a. Consistent with this Court's typical practice, a GVR would allow the Ninth Circuit to reconsider its decision under *Cox*'s clarified standard.

Remand could make a difference here. Ample evidence supports a finding that Walmart (at least) "actively encouraged" infringement of Russell's copyrighted photographs. The infringing photographs appeared in Walmart.com product listings for knockoff lamps that were "[s]old & shipped *by Walmart*." Pet. App. 4a (emphasis added); see Pet. 10. Indeed, the Ninth Circuit agreed Walmart was liable for infringing Russell's copyrights in *the lamps* that were sold *using* those photographs and listings. Pet. App. 3a-4a. Even if (as Walmart contends) the photographs were uploaded by Sunsea, a drop-ship vendor (DSV), the record shows Walmart's active encouragement of, and control over, its DSVs' activities. Pet. 11-12, 34. Walmart "*requires* [DSVs] to post photographs on their listings." 4-ER-272-273 (emphasis added). Walmart insists that DSVs post "high-quality" photographs, and it "work[s] with [them] to improve pictures." 4-ER-279-285; see Pet. App. 41a; 7-ER-898-904. Walmart can "override" the "content uploaded by the suppliers." 4-ER-280-282.

And Walmart exercises "'*final say* when it comes to the content that appears on [Walmart's] site.'" *Ibid.* (emphasis added); see Pet. App. 8a (Desai, J., dissenting).

Evidence that Walmart insisted Sunsea use high-quality photographs in listings to promote knockoff lamps sold and shipped by Walmart, and that Walmart held final say over the listings' content, readily supports a finding that Walmart (at least) actively encouraged Sunsea's infringement of Russell's copyrighted photographs. Indeed, two of the four judges who assessed the trial record below—the district judge who heard the witnesses and Judge Desai in dissent—concluded that Walmart's "control" was so substantial as to support *direct* liability for the infringing photographs. Pet. App. 7a-9a; *id.* at 40a-44a. At a minimum, that control supports a finding that Walmart actively encouraged the infringement—and thus is secondarily liable under *Cox*.

The evidence supporting secondary liability here contrasts sharply with the evidence in *Cox*. See Pet. 34. Cox had "limited knowledge" of how its "services are used" and "c[ould]not directly control" its users. *Cox*, slip op. at 3. Walmart, meanwhile, not only knew about the infringing listings—which touted that the infringing products were "[s]old & shipped by Walmart"—but also exercised "final" editorial "say" over the listings. Walmart did far more than merely "continuing to provide" a service it knew was supporting infringement. *Cox*, slip op. at 5. Plainly, this case could come out differently on remand.

3. The need to return this case to the Ninth Circuit underscores why review on the Rule 50 issue is warranted. Reevaluating Walmart's sufficiency challenge in light of *Cox* is necessary only insofar as the Ninth Circuit can properly review the sufficiency of the evidence. As the petition explains, it cannot. Because Walmart never

appealed or challenged the denial of its post-verdict Rule 50*(b)* motion, there is no permissible "basis for review of [Walmart's] sufficiency of the evidence challenge in the Court of Appeals." *Unitherm*, 546 U.S. at 407. The Ninth Circuit's ruling that it could review evidentiary sufficiency by reviewing the denial of Walmart's pre-verdict Rule 50*(a)* motion, Pet. 16, defies this Court's direction in *Unitherm* that a litigant "may *not* challenge the sufficiency of the evidence on appeal on the basis of the District Court's denial of its Rule 50*(a)* motion," 546 U.S. at 405 (emphasis added); see Pet. 20-29. Walmart has yet to reconcile the decision below with *Unitherm* or the wall of precedent from other circuits.

Rather than remand for the Ninth Circuit to perform a sufficiency-of-the-evidence review it lacks authority to conduct, the most appropriate resolution of this case is to review and reverse on the Rule 50 issue, either summarily or on plenary review. At a minimum, however, the Court should GVR with instructions to reconsider the decision below in light of both *Cox* and *Unitherm*. Pet. 34-35.

CONCLUSION

The Court should grant plenary review or summarily reverse on the first question presented in Russell's petition. Alternatively, the Court should GVR for further consideration in light of *Cox* and *Unitherm*.

Respectfully submitted.

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