

No. 24-967

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In the  
**Supreme Court of the United States**

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GRANDE COMMUNICATIONS NETWORKS, LLC,

*Petitioner,*

v.

UMG RECORDINGS, INC. et al.,

*Respondents.*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Fifth Circuit**

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**BRIEF IN OPPOSITION**

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## **QUESTION PRESENTED**

Whether, as every court of appeals to consider the question has held, an Internet Service Provider can be held contributorily liable for its subscribers' copyright-infringing activity when it knew that specific subscribers were using the service to engage in egregious infringement but nevertheless continued to serve those same subscribers while eschewing any efforts to deter them from future infringement.

### **PARTIES TO THE PROCEEDING**

Respondents (plaintiffs-appellees below<sup>1</sup>) are UMG Recordings, Inc.; Capitol Records, LLC; Warner Records Inc. (f/k/a Warner Bros. Records Inc.); Sony Music Entertainment; Arista Records, LLC; Arista Music; Atlantic Recording Corporation; Capitol Christian Music Group, Inc.; Elektra Entertainment Group Inc.; Fonovisa, Inc.; Fueled by Ramen, LLC; LaFace Records, LLC; Nonesuch Records Inc.; Rhino Entertainment Company; Roadrunner Records, Inc.; Roc-A-Fella Records, LLC; Tooth & Nail, LLC; and Zomba Recording, LLC.

Petitioner (defendant-appellant below) is Grande Communications Networks, LLC.

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<sup>1</sup> Respondents also filed a conditional cross-appeal below, but the court of appeals did not reach it. Pet.App.11a-12a.

**CORPORATE DISCLOSURE STATEMENT**

UMG Recordings, Inc.; Capitol Records, LLC; Capitol Christian Music Group, Inc.; Fonovisa, Inc.; Roc-A-Fella Records, LLC; and Tooth & Nail, LLC 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.

Warner Records Inc.; Atlantic Recording Corporation; Elektra Entertainment Group Inc.; Fueled by Ramen, LLC; Nonesuch Records Inc.; Rhino Entertainment Company; and Roadrunner Records, Inc. are wholly owned, indirect subsidiaries of Warner Music Group Corp., a publicly traded company. AI Entertainment Holdings LLC and certain of its subsidiaries (which are not publicly 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.

Sony Music Entertainment; Arista Records, LLC; Arista Music; LaFace Records, LLC; and Zomba Recording, 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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## INTRODUCTION

Grande Communications Networks, LLC asks this Court to review a question that is not only uncertworthy, but utterly divorced from reality: “Whether an ISP is liable for contributory copyright infringement by ... failing to terminate ... access after receiving two third-party notices alleging [that] someone at a customer’s IP address has infringed.” Pet.I. In truth, Grande had a policy to *never* terminate service to a customer for engaging in copyright infringement. As Grande’s corporate representative candidly and colorfully put it, Grande “could have received a thousand notices about a customer, and it would not have terminated that customer for copyright infringement.” Pet.App.7a. That was not hyperbole. The trial record demonstrated that Grande *knew* that dozens of its users infringed more than 1,000 times—and one infringed nearly 14,000 times—annually, yet Grande did *nothing* in response. And Grande eschewed even more modest measures, like temporary suspensions or action-inducing notices—even after it was put on notice that its knowing indifference could subject it to secondary liability for copyright infringement. That is a one-way ticket to liability in any jurisdiction. It is also the plainly correct result under a straightforward application of this Court’s precedents.

Both this Court and Congress have recognized the important role that contributory liability plays in protecting copyrights from infringement. Indeed, this Court made that exact point in both *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and *MGM Studios Inc. v. Grokster, Ltd.*, 545

U.S. 913 (2005). And despite Grande's suggestion that the courts have somehow usurped the role of the political branches, Congress has also acted in the form of a safe harbor in the Digital Millennium Copyright Act (DMCA). That safe harbor protects ISPs from facing liability for damages for secondary copyright infringement, but only if they adopt and reasonably implement policies that terminate repeat infringers (among other things). 17 U.S.C. §512(i)(1)(A). Needless to say, Grande's policy of never terminating users who infringe on a massive scale, even as it promptly dropped users who failed to pay their monthly subscription fees, does not satisfy that safe harbor.

Given the clear direction from this Court and Congress, it is no surprise that every circuit to confront the question of ISPs' contributory liability for knowing infringement has come out the same way. While Grande tries to cobble together a split from dictum and/or cases arising in inapposite contexts, the Fourth, Fifth, and Ninth Circuits have all answered the question actually presented here—which involves knowing facilitation of massive infringement, not hair-trigger liability for a second third-party notice—the same way.

In sum, there is no doubting that the internet is rife with copyright infringement, or that ISPs provide the means to access file-sharing services that facilitate copyright infringement on a massive scale. In that context, copyright holders are not going after ISPs with good-faith policies that occasionally allow a repeat infringer to slip through the cracks. Copyright holders are instead targeting the worst offenders:

companies that refuse to terminate paying customers even when they are put on notice that the customers are exploiting the service to repeatedly infringe copyrights. That is why Grande was sued, and that is why the Fifth Circuit ruled against Grande. There is nothing certworthy here.

## STATEMENT OF THE CASE

### A. Legal Background

1. Hornbook copyright law teaches 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 Pub. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted), *cited with approval in Grokster*, 545 U.S. at 930. This case involves a straightforward application of that “induce[], cause[] or materially contribute[]” standard to an ISP that continued to provide high-speed internet service to specific, identifiable subscribers even after it knew that they were using the service to commit egregious copyright infringement.

Grande spends much of its brief proclaiming that its liability poses a political question that demands action from the political branches. But Congress has already spoken. Through the DMCA, Congress legislated against the backdrop of well-established contributory-infringement principles and provided ISPs with a safe harbor from contributory-infringement damages 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 DMCA thus not only expressly contemplates that ISPs may face secondary liability for infringement by their users, but also expressly contemplates termination as the appropriate response to subscribers who engage in repeat infringement.

There is nothing particularly novel about either of those propositions. This Court has long recognized that those who provide goods or services that can be used to engage in copyright infringement can be held contributorily liable if they provide them to someone they know is using them for that impermissible purpose. For instance, the Court held all the way back in 1912 that selling mimeograph ink to a well-known infringer “with the expectation that [the ink] would be used” to infringe triggers contributory liability because in such circumstances courts can presume “the purpose and intent that it would be so used.” *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).

To be sure, the mere provision of goods or services capable of infringing uses, standing alone, is not enough to render the provider liable. For instance, in *Sony Corporation of America v. Universal City Studios, Inc.*, this Court confronted whether a Betamax manufacturer could be held contributorily liable for copyright infringement because those devices could be used to record copyrighted content on TV. After “a quite detailed recitation of the findings of the District Court,” 464 U.S. at 421, this Court answered no, because “[t]he only contact between” the Betamax manufacturer and its customers “disclosed

by th[e] record occurred at the moment of sale,” *id.* at 438. In other words, the manufacturer had no knowledge or control over whether any particular customer used the Betamax for illicit purposes as opposed to a “commercially significant noninfringing use[.]” *Id.* at 442. But the Court expressly cautioned that contributory liability *could* attach if, for instance, a different record “demonstrated that” a manufacturer had an “ongoing relationship” with a customer and “was in a position to” stop the customer’s infringement but chose not to do so. *Id.* at 437-38 & n.18.

The Court returned to contributory liability 20 years later in *Grokster*, which asked whether the “notorious file-sharing service” Grokster could be held contributorily liable for copyright infringement on a “record ... replete with evidence” that it “clearly voiced the objective that recipients use it to download copyrighted works, and ... took active steps to encourage infringement.” 545 U.S. at 923-24, 926. The Court had little trouble answering yes. To be sure, supplying that software with “mere knowledge” that it “could be used to infringe” was not enough to trigger contributory liability. *Id.* at 937. But *Grokster* reiterated that, *inter alia*, a defendant who is not just aware of the potential for infringement, but takes “affirmative steps ... to foster” it, can be held “liable for the resulting acts of infringement.” *Id.*

Both *Sony* and *Grokster* are thus grounded in the critical distinction between merely providing a good or service that can be used for permissible and impermissible purposes, and knowingly providing it to someone who plans to use or is using it for the latter. That critical distinction is why, for instance, “[l]ending

a friend a hammer is innocent conduct,” but “doing so with knowledge that the friend will use it to break into a credit union ATM supports a conviction for aiding and abetting bank larceny.” *Sony Music Ent. v. Cox Commc’ns, Inc.* (“Cox”), 93 F.4th 222, 236 (4th Cir. 2024) (collecting cases). And it is why “supplying a product with knowledge that the recipient will use it to infringe copyrights is exactly the sort of culpable conduct sufficient for contributory infringement.” *Id.* In short, as courts have consistently recognized in a wide variety of contexts, an entity in an ongoing service relationship with a customer can face contributory liability if the entity knows the customer is using the service to commit copyright infringement but chooses to continue providing service to the customer anyway.

2. Over the past several years, lower courts have begun to apply these principles to the context at issue here: whether ISPs and mobile wireless carriers on notice that specific subscribers are using their internet service to egregiously infringe copyrights can be held contributorily liable for the subscribers’ infringement if the ISPs continue to provide service to those subscribers. With the benefit of *Sony*, *Grokster*, and the DMCA, that task has proven neither difficult nor divisive. Three circuit courts have weighed in—the Ninth Circuit, the Fourth Circuit, and the Fifth Circuit in the decision below—and the verdict has been unanimous. Each court has recognized contributory liability for ISPs that fail to take the steps to satisfy the DMCA safe harbor and had actual knowledge of, or were willfully blind to, specific instances of infringement and did nothing to stop it.

In *Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068 (9th Cir. 2013), the Ninth Circuit considered a contributory-infringement claim brought by content creators alleging that their copyrights were infringed on wireless networks operated by AT&T and other mobile carriers. Although Judge O’Scannlain’s opinion for the court concluded that their claim suffered from pleading deficiencies, he went on to explain that a mobile wireless carrier could be held contributorily liable if the carrier was either on notice “of specific acts of infringement” or “‘willfully blind’ to ... infringement that was occurring” and “fail[ed] to implement a digital rights management system” to curb that infringement. *Id.* at 1071-73.

In 2018, the Fourth Circuit relied on *Luvdarts* to conclude that Cox Communications, Inc., an ISP, could be held contributorily liable for infringement on its network when it intentionally continued to provide service to specific users after learning that they were engaged in substantial infringement. See *BMG Rights Mgmt. (US) LLC v. Cox Comm’cns, Inc.* (“*BMG*”), 881 F.3d 293 (2018). Cox’s conduct was egregious: It purported to adopt a policy of taking action against users credibly accused of infringement, but the policy gave infringers 13 strikes and *never* actually resulted in the termination of a serial infringer’s access. See *id.* at 303. And internal e-mails unearthed in discovery explained that complete absence of actual terminations: Cox followed “an unwritten semi-policy” of continuing to provide repeat infringers with internet access in order to keep “collect[ing] ... payments for their account.” *Id.*; see also *id.* at 304-05 (manager’s direction to not terminate a repeat infringer because “[t]his customer pays us over

\$400/month’ and ‘[e]very terminated Customer becomes lost revenue” (alterations original)). The Fourth Circuit unsurprisingly held that “a reasonable jury” presented with that evidence could find that “Cox knew of specific instances of infringement or was willfully blind to such instances” and “nonetheless” continued providing “subscription services” “to those infringing customers,” rendering it contributorily liable. *Id.* at 308, 311-12.

Just this past year, the Fourth Circuit applied that precedent in affirming a jury verdict holding Cox contributorily liable for copyright infringement in a separate case. Far “more than mere failure to prevent infringement,” the trial record proved “that Cox knew of specific instances of repeat copyright infringement occurring on its network, that Cox traced those instances to specific users, and that Cox chose to continue providing monthly internet access to those users despite believing the online infringement would continue because it wanted to avoid losing revenue.” *Cox*, 93 F.4th at 236. That evidence, Judge Rushing explained for the court, “suffic[ed] to support a finding that Cox materially contributed to copyright infringement occurring on its network.” *Id.* at 237.

Cox has asked this Court to weigh in on that case, *see* Case No. 24-171 (petition filed Aug. 15, 2024), and the copyright holders cross-petitioned on the question of whether Cox could also be held vicariously liable, *see* Case No. 24-181 (petition filed Aug. 16, 2024). *See generally Grokster*, 545 U.S. at 930 (distinguishing contributory from vicarious liability and noting that one “infringes vicariously by profiting from direct infringement while declining to exercise a right to stop

or limit it”). Late last year, the Court called for the views of the Solicitor General on both questions. *See* Order, Case Nos. 24-171 & 24-181 (Nov. 25, 2024).

## **B. Procedural Background**

In the decision below, the Fifth Circuit became the third court of appeals to confirm that an ISP that fails to take advantage of the DMCA safe harbor can be held contributorily liable for subscribers’ copyright infringement when the record establishes that the ISP had actual knowledge of past infringement by specific subscribers yet took no meaningful steps to prevent those subscribers from continuing to infringe and instead chose to continue providing internet service to those same subscribers anyway.

1. Grande Communications Networks, L.L.C., is an ISP serving the state of Texas. Pet.App.2a. Around the time this Court decided *Grokster*, Grande adopted a policy that, upon receiving notice that a subscriber engaged in copyright infringement, Grande would take real action. Specifically, Grande would temporarily suspend the infringer’s service, inform the infringer of the illicit activity, and upon resuming service, apply punitive measures (up to and including account termination) if the infringement continued. Pet.App.6a-7a. But a few years later, when a private equity firm acquired Grande and installed new management, Grande jettisoned that graduated abuse policy and adopted an avowedly hands-off response to copyright infringement under which it would *never* terminate a subscriber’s account for copyright infringement. Pet.App.7a. As Grande’s corporate representative explained at trial, Grande “could have received a thousand notices about a customer, and it

would not have terminated that customer for copyright infringement.” Pet.App.7a. Indeed, Grande eschewed even the most modest mechanisms to dissuade “infringing subscribers, such as suspending their accounts or requiring them to contact Grande to maintain their services.” Pet.App.7a.

In short, even when confronted with credible evidence of “specific IP addresses of subscribers engaging in infringing conduct,” “Grande made the choice to continue providing services to them anyway, rather than taking simple measures to prevent infringement.” Pet.App.39a. That dramatic indifference to known copyright infringement stands in stark contrast to Grande’s zero-tolerance policy for nonpayment: Notwithstanding its professed concerns about the plight of repeat infringers denied Internet access, *see* Pet.21, “Grande terminated non-paying subscribers 100% of the time,” resulting in Grande “terminat[ing] ‘thousands’ of subscribers” “during the time period relevant to this case,” Pet.App.9a.

Grande’s new management stuck with its do-nothing policy even for customers guilty of the most egregious infringement. Indeed, it turns out that the corporate representative’s reference to ignoring 1,000 notices was neither hypothetical nor exaggeration. 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. Pet.App.8a. Nor did Grande budge when an employee raised “concern[s]” that its “no limits” policy ran afoul of the law. Pet.App.8a (internal email noting that “some of Grande’s subscribers were ‘up to their 54th [infringement]

notice”). Indeed, the only thing that finally got Grande to change its lawless stance was this lawsuit: Roughly a month after Respondents filed their complaint, Grande resumed terminating subscribers for copyright infringement. Pet.App.8a-10a.

2. Respondents, a group of major record labels, sued Grande for contributory copyright infringement in April 2017. Pet.App.2a.<sup>2</sup> After a three-week trial and a day-and-a-half of deliberating, the jury returned a unanimous verdict holding Grande liable for willfully contributing to the infringement of over 1400 sound recordings. Pet.App.10a. Although the Copyright Act authorizes statutory damages of up to \$150,000 for each work willfully infringed, the jury awarded \$33,333 per recording, resulting in a total verdict of \$46.7 million. Pet.App.10a-11a (citing 17 U.S.C. §504(c)(1)-(2)).

On appeal, Grande challenged, *inter alia*, the verdict, the denial of its motion for judgment as a matter of law, and various aspects of the jury instructions. Hewing closely to the approach of its sister circuits, the Fifth Circuit unanimously affirmed. Recognizing the “seminal” rule “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,’” Pet.App.22a (quoting *Gershwin*, 443 F.2d at 1162), the Fifth Circuit joined the Fourth and Ninth

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<sup>2</sup> Respondents also brought a vicarious-infringement claim, but the district court dismissed it at the pleading stage, and Respondents declined to challenge the dismissal on appeal after they prevailed on their contributory-infringement claim. Pet.App.10a.

Circuits in holding that “where, as here, an ISP knew of specific instances of repeated infringement by specific users and ‘chose to continue’ providing services to them, a jury is entitled to find material contribution because the ISP’s conduct exceeds ‘mere failure to prevent infringement,’” Pet.App.35a (quoting *Cox*, 93 F.4th at 236). The court accordingly found “no basis to reverse the jury’s verdict.” Pet.App.40a.

Grande sought rehearing en banc, which the Fifth Circuit denied without recorded dissent. Pet.App.133a-34a.

### **REASONS FOR DENYING THE PETITION**

In the decision below, the Fifth Circuit joined the Fourth and Ninth Circuits in holding that an ISP that fails to take the steps necessary to qualify for the DMCA safe harbor can be held liable for contributory copyright infringement when the factual record shows that it knew that specific subscribers were committing rampant copyright infringement yet continued to provide service to those subscribers anyway. That consensus approach accords with this Court’s decisions, with common-law secondary-liability principles, and with Congress’ judgment in the DMCA that ISPs who fail to “adopt[] and reasonably implement[]” policies “provid[ing] for the termination in appropriate circumstances of subscribers ... who are repeat infringers” should *not* be excused from secondary liability for copyright infringement. 17 U.S.C. §512(i)(1)(A). Despite its claims of “a clear and intractable [circuit] conflict,” Pet.2, Grande identifies not a single jurisdiction in which an ISP facing such facts has escaped contributory liability—because none

exists. Unless and until such a split materializes, there is no need for this Court to intervene.

Intervention is doubly unwarranted because this case is (at most) a second-best vehicle. Unlike the petitioners in *Cox*, who have at least presented a question mapping on to the facts of these cases, Grande contrives a hypothetical: whether ISPs must terminate service “based on two alleged infractions often resulting in less than a few dollars of actual harm.” Pet.22. At the risk of gross understatement, that is not this case, where even a thousand notices did not move Grande to take action. And that is not the question the Fifth Circuit answered. Nor is it one that is likely to materialize given that copyright holders tend to target the worst offenders (i.e., Grande), and the DMCA protects 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) (emphasis added). In short, the court below did not hold, and Respondents did not suggest, that ISPs are liable for literally any infringement they learn of on their services. But when ISPs adopt a conscious policy of continuing to enable known infringers no matter how egregious their infringement—while not hesitating to terminate service to users who fail to pay—the DMCA confirms that the ISPs should be liable under long-settled principles of contributory liability. To the extent Grande thinks that ISPs need more protection than Congress already provided, it should direct its efforts to the other side of First Street.

**I. The Decision Below Is Correct, And It Does Not Conflict With Decisions From This Court Or Any Other.**

1. As explained, the circuits are unanimous—and unanimously correct: An ISP that eschews the DMCA safe harbor and continues to provide known, egregious copyright infringers with the means for continued infringement is liable for contributory infringement. As the canonical formulation goes, “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).

*Grokster* involved the “inducement” prong—i.e., when a company markets a product by “advertising an infringing use or instructing how to engage in an infringing use.” 545 U.S. at 935-36. But inducement is just one path to liability, and this case exemplifies the “causes or materially contributes” prongs. An ISP that “learns that specific customers use” the service “to infringe, but nonetheless” continues serving “those infringing customers ... knows that its action ... is substantially certain to result in infringement, and so an intent to cause infringement may be presumed.” *BMG*, 881 F.3d at 308; *see also Henry*, 224 U.S. at 48-49. And “an ISP’s continued provision of internet services to known infringing subscribers, without taking simple measures to prevent infringement, constitutes material contribution.” Pet.App.40a; *see also, e.g., Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 943 (9th Cir. 2011) (“There is no question that providing direct infringers with server

space satisfies th[e material contribution] standard”). In short, “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.” *Cox*, 93 F.4th at 236.

Despite Grande’s claims, that unanimous approach is in no way “incompatible” with *Grokster*. *Contra* Pet.15. To the contrary, *Grokster* reinforces the conclusion that those who provide goods or services that are “capable of substantial noninfringing uses” may nevertheless be held contributorily liable if they “intentional[ly] facilitat[e]” use of their good or service for “infringement.” 545 U.S. at 939 & n.12. And *Grokster* confirms that “evidence of unlawful objective” can be supplied by “showing that” the provider did not “attempt[] to develop filtering tools or other mechanisms to diminish the infringing activity”—i.e., exactly what Respondents proved here. *Id.* at 939; *see also Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1171-72 (9th Cir. 2007) (Ikuta, J.).

2. Given *Grokster* and well-entrenched principles of secondary copyright infringement, it is little surprise that Grande instead emphasizes this Court’s decision in *Twitter v. Taamneh*, 598 U.S. 471 (2023), a case addressing whether social-media services that host content posted by terrorist groups can be held liable for “aid[ing] and abet[ting] ... acts of international terrorism” under the Justice Against Sponsors of Terrorism Act (JASTA). *Id.* at 483. But *Taamneh* is as far afield as that sounds.

*Taamneh* dealt with how to interpret an inapposite statute that directs courts to a distinct body of aiding-and-abetting law and has no safe harbor. *Id.*

at 483-85. It therefore unsurprisingly made no mention of *Sony*, *Grokster*, or the DMCA. It is also readily distinguishable: In *Taamneh*, there was no “direct nexus” between the provision of service and the unlawful activity—i.e., a terrorist attack on a nightclub, *id.* at 506; here, Grande’s liability was premised on the direct relationship between its ongoing provision of high-speed internet services and its subscribers’ use of those services to infringe copyrights.

Moreover, *Taamneh* did not involve a service provider who decided to continue serving a specific customer it knew was using the service to break the law. The allegations there were instead much more akin to the allegations in *Sony*—i.e., that the social-media services should be held liable because they continued providing their services even though they were aware that they could be, and sometimes were, used to spread ISIS propaganda. *Id.* at 478, 499. It was in *that* context that the Court said that “plaintiffs identify 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. And both cases the Court cited in support of that proposition involved defendants who failed to stop the transmission of unlawful content of which they were not specifically aware, not a defendant who (like Grande) refused to terminate service to a particular subscriber that it knew was using its service to break the law. *Taamneh* thus in no way disturbs the long-settled rule that there *is* a duty in copyright law not to “cause[] or materially contribute[] to the infringing

conduct of another.” *Gershwin*, 443 F.2d at 1162 (footnote omitted).

Regardless, the Fifth Circuit’s decision sits comfortably with *Taamneh*’s discussion of secondary-liability principles. When an ISP is on notice of massive infringement by a particular customer and continues servicing that customer nevertheless, the ISP is (at the very least) “generally aware of [its] role as part of an overall illegal or tortious activity” in a very different way than if it merely knows that its service is *capable* of being used unlawfully. 598 U.S. at 486. And the ISP is “knowingly and substantially assist[ing]” the infringement, as continuing to serve specific known infringers not only makes their future infringement “foreseeable,” but “perform[s] a function crucial to” future infringement by providing those known infringers with the internet access they need to continue infringing. *Id.* at 486-87.

True, “merchants” with an “attenuated ... relationship with [a] wrongdoer” are not “liable for any misuse of their goods and services”; “those who merely deliver mail or transmit emails” are not typically “liable for the tortious messages contained therein.” *Id.* at 489. But merchants who provide services to a wrongdoer knowing full well that the wrongdoer wants and needs those services in order to break the law *can* be held liable for their misuse. That such conduct falls short of “encouraging, soliciting, or advising the commission of the offense” is of no moment. *Id.* at 490. At bottom, continuing to serve a customer despite knowing that customer is relying on the service to break the law constitutes “conscious,

voluntary, and culpable” conduct with “a direct nexus” to the illegal activity. *Id.* at 493, 506.

3. While downplaying the unanimity of courts addressing the question directly at issue here, Grande claims that “[t]he Fifth Circuit’s decision also conflicts with settled law in [two] other circuits.” Pet.17. That would be news to those circuits, as Grande’s purported split does not withstand scrutiny.<sup>3</sup>

In the first case Grande cites, *Greer v. Moon*, 83 F.4th 1283 (10th Cir. 2023), an author sued a blog operator after a third party uploaded the author’s copyrighted content to the blog and the blog refused the author’s request to remove the infringing content. Properly understood, the case concerns how a website operator must respond to a one-time take-down notice; it has no bearing on the steps an ISP must take when it learns that a customer is relying on the ISP’s services as a necessary ingredient for continuing infringement. To the extent *Greer* is relevant at all, it actually buttresses the decision below: The Tenth Circuit deemed the blog operator contributorily liable because it not only “refused” to prevent ongoing infringement by “honoring the [takedown] requests,” but took steps that effectively guaranteed that future infringement would continue unabated. *Id.* at 1295. In the same way, by continuing to provide high-speed internet to, e.g., a customer with a history of infringing

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<sup>3</sup> There is, however, a circuit split about when ISPs can be held vicariously liable. See Pet. for Writ of Cert., *Sony Music Ent. v. Cox Comm’ns, Inc.*, No. 24-181 (U.S. filed Aug. 16, 2024) (overviewing the split); see also *supra* pp.8-9. But vicarious liability is no longer at issue in this case. See *supra* n.2.

38 times a day, Grande effectively guaranteed that future infringement would continue unabated.

Grande's second case, *EMI Christian Music Group, Inc. v. MP3tunes, LLC*, 844 F.3d 79 (2d Cir. 2016), is even farther afield. There, the Second Circuit confronted a follow-on question to *Grokster*: whether the CEO of an illicit filesharing service could himself be contributorily liable for infringement that took place on the service. The panel answered that question affirmatively based on the facts before it, which revealed that the CEO "personally encouraged his employees" to pirate copyrighted material. *Id.* at 99-101. How that factbound conclusion relates to this case is a mystery, but what is certain is that *EMI Christian* does not help Grande: As was true there, the factual record here establishes that Grande engaged in egregious conduct expressly aimed at enriching the company at copyright holders' expense. *See supra* pp.9-11. Again, that is a one-way ticket to liability in any jurisdiction. Moreover, it bears emphasis that the Second Circuit provided the canonical formulation of contributory infringement liability in *Gershwin*, and the Fourth, Fifth, and Ninth Circuit all applied that decision to reach the same result in the context at issue here. Under those circumstances, the claim that those three uniform decisions have opened a split with the Second Circuit would certainly surprise the three courts uniformly applying *Gershwin*.

4. The uniformity of the circuits in this context belies Grande's repeated efforts to cast the decision below as "unworkable" or "untenable." Pet.21. In reality, the Fifth Circuit's decision is a measured,

common-sense response to a problem that has been robbing copyright owners of billions of dollars a year and threatening to stifle a vast creative community that depends on “secur[ing] a fair return for an author’s creative labor.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); see Ash Johnson, *22 Years After the DMCA, Online Piracy is Still a Widespread Problem*, Info. Tech. & Innovation Found. (Feb. 7, 2020), <https://bit.ly/4458vl5>. In arguing otherwise, Grande largely ignores the fact that this case deals with the continued provision of services to known, identifiable, repeat infringers, not an effort to hold Grande or any other ISP liable for any and all user infringement on its service.

Grande also all but ignores the DMCA, relegating it to a lone footnote. See Pet.29 n.10. That would be remarkable even if Grande did not repeatedly insist that the question presented is so important that it cannot be left to judicial development so the political branches must intervene. In reality, Congress *has* intervened: It has provided a limited protection for ISPs that Grande could not begin to satisfy given its complete indifference to ongoing infringement and refusal to terminate even known serial infringers.

To be sure, Congress provided that failure to qualify for the safe harbor does not itself prove that an ISP has engaged in infringement. 17 U.S.C. §512(*l*). But the very existence of the safe harbor confirms Congress’ understanding that there are circumstances under which ISPs can and should face secondary liability for their users’ infringement. It likewise underscores that terminating repeat infringers is an appropriate and necessary step to protect valuable

copyrights from being eviscerated in the digital age. Indeed, the whole point of the safe harbor is to provide a “strong incentive[]” for ISPs “to cooperate” with “copyright owners” “to detect and deal with copyright infringements that take place in the digital networked environment,” in order to minimize their own liability risk. S. Rep. 105-190 at 20 (1998). There would be no incentive to cooperate—let alone a strong one—if there were no risk of contributory liability for the kind of complete indifference to copyrights and copyright infringement that Grande displayed.

The DMCA also largely defeats the parade of horrors Grande seeks to evoke through its long list of purportedly unanswered questions. *See* Pet.24-26. An ISP that adopts and implements a policy under which it excuses isolated instances of infringement owing to babysitter misuse can rest easy in the protection of the DMCA’s safe harbor so long as it *does* terminate users who engage in rampant infringement or continue to infringe after being warned. So, too, with an ISP that takes a more tailored or graduated approach toward accounts that serve “facilities, dorms, hospitals, coffee shops, businesses, etc.,” Pet.24-25, so long as it *does* step in when a coffee shop or comparable facility refuses to take steps to responsibly secure its network. The problem for Grande is that it had no termination policy at all, and was instead content to allow even the most egregious infringers to continue using its service so long as they kept paying their bills. Those facts readily suffice to demonstrate causing and materially contributing to infringement, and they would trigger liability in every circuit that has addressed the question. If Grande thinks the safe harbor should be radically expanded to

allow the kind of shocking disregard for copyrights it displayed, it should take that up with Congress, not this Court.

## **II. This Case Is A Poor Vehicle, And Grande's Question Presented Does Not Merit Review.**

Even if the Court were inclined to add to what it has already said about the scope of contributory liability for copyright infringement, this would not be the case. Grande's petition tees up a question about whether ISPs must terminate service "based on two alleged infractions often resulting in less than a few dollars of actual harm." Pet.22. But Grande refused to terminate service under *any* circumstance, even after receiving thousands (or tens of thousands) of credible infringement notices about a single customer. And Grande could not find refuge in the DMCA because it consciously declined to embrace or enforce any termination policy whatsoever. So even if this Court were to conclude that ISPs need not "terminate service after receiving two infringement notices" to avoid liability, Pet.30, that is worlds away from saying that an ISP like Grande should get off scot-free for refusing to lift a finger despite actual knowledge of egregious infringement. And it would have little real-world impact since a service that *did* enforce a termination policy but excused one-off instances of "\$2 harm," Pet.10, would likely have a much stronger argument for DMCA protection. In short, there is a reason suits against ISPs are relatively rare even though online copyright infringement is ubiquitous: Litigation is expensive, so copyright holders seeking to stem the tide of online copyright infringement train their sights on the worst offenders—e.g., Grande and

Cox—not ISPs that act with alacrity on the third notice or cases where the actual damage is only \$2.

Rather than entertain hypothetical questions from ISPs that have wantonly disregarded copyrights and facilitated millions of acts of known infringement, the question that really merits this Court’s attention is why egregious offenders like Grande and Cox do not also face liability for vicarious infringement. *See supra* n.3. The contributory-infringement question, by contrast, simply does not merit review. It is not the subject of any circuit split. And Grande’s total lack of amicus support is hardly indicative of an industry desperate for “immediate rules establishing what a content-neutral ISP must do to avoid massive liability in the ordinary course of business.” *Contra* Pet.10. Most ISPs already know that the first step to avoiding liability is to avoid the kind of profits-first-compliance-never approach adopted by Grande. And beyond that, if ISPs really want to “avoid massive liability,” then they can simply avail themselves of the safe harbor Congress provided in the DMCA to “incentiv[ize]” ISPs “and copyright owners to cooperate to detect and deal with copyright infringements.” S. Rep. 105-190 at 20. It is that legislative judgment, not the decision below, that “put[s] the burden on private ISPs to conjure up entire regulatory schemes to police and enforce” copyright protection. *Contra* Pet.3.

For good reason. As a practical matter, ISPs are the only private entity with the power to prevent online infringement on peer-to-peer file-sharing networks. Enlisting them in the fight against infringement “stimulate[s] artistic creativity for the general public good.” *Twentieth Century Music*, 422

U.S. at 156. Giving them a pass, by contrast, would frustrate—and, ultimately, silence—artists and authors tired of watching the fruits of their labors evaporate. Correctly recognizing those stakes, and correctly applying this Court’s precedents, the Fifth Circuit joined the Fourth and Ninth Circuits in concluding that bad-actor ISPs can face contributory liability when they *know* specific subscribers are committing egregious infringement yet they choose to continue providing service to those subscribers anyway. There is no reason to second-guess that conclusion, or to spare Grande from the consequences of its decision to elevate its own profits over Respondents’ copyrights.

### CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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