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

BRIEF OF ALTICE USA, INC., FRONTIER COMMUNICATIONS PARENT INC., LUMEN TECHNOLOGIES, INC., AND VERIZON AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

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

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

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

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of the intention to file this brief.

customers may use their internet connections to share copyrighted material, *amici* do not participate in, encourage, or in any way assist those efforts. In fact, *amici* forbid copyright infringement through robust anti-piracy policies and programs. When subscribers violate those policies and share copyrighted music over the internet, *amici* are mere passive conduits for the infringing activity—taking no action to assist it. Indeed, *amici* neither host infringing content on their servers nor monitor what their subscribers do online.

Yet the court of appeals still concluded that an internet service provider like Cox can be secondarily liable whenever the provider knows an account has been used for music piracy and fails to terminate the account holder's internet service. That holding exposes internet service providers to up to $150,000 in statutory damages per work infringed. 17 U.S.C. § 504(c)(1)-(2). At thousands of works allegedly infringed, the numbers can quickly become immense. The decision below also threatens consequences beyond copyright. Under the court of appeals' expansive theory, an internet service provider acts culpably whenever it knowingly fails to stop some bad actor from exploiting its service. The common law does not tolerate such boundless liability. *Amici* write to explain why the court of appeals' erroneous ruling raises profound questions that warrant this Court's review.

SUMMARY OF ARGUMENT

The decision below imperils the future of the internet. It exposes internet service providers to massive liability if they do not carry out mass internet evictions. For example, Cox faced a $1 billion verdict, Frontier is currently defending a $400 million lawsuit, Altice USA is defending a lawsuit with an immense range of potential statutory damages, and recent press reports

suggest Verizon is facing up to $2.6 billion in potential liability—all because they failed to terminate internet accounts allegedly used for copyright infringement. The extortionate pressure such lawsuits exert is acute. And the mass terminations they encourage would harm innocent people by depriving households, schools, hospitals, and businesses of internet access. The threat of liability detracts from *amici*'s continued innovation to fulfill Congress's goal of connecting all Americans to the internet.

The Court should grant certiorari to avoid that outcome. Had the decision below hewed to this Court's precedents, it would not have come up with such a sweeping liability rule. The Fourth Circuit invented that rule not only by misapplying this Court's copyright precedents, but also by upending the traditional common-law principles those precedents reflect. Indeed, the Fourth Circuit's only reason for upholding contributory infringement here—comparing Cox's provision of routine internet service to a bank robber's accomplice arming him with a hammer—distorted common-law notions of culpability beyond all recognition. That ruling warrants this Court's review and correction. Returning contributory infringement to its common-law moorings will resolve a circuit split, align copyright doctrine with this Court's other precedents, and promote vital national interests in safeguarding the continued development of the internet.

ARGUMENT

I. The Fourth Circuit's Decision Conflicts With The Traditional Common-Law Limits On Secondary Liability Set Forth In *Twitter*

Amici agree with Cox that the Fourth Circuit's decision deepens a circuit split and conflicts with this Court's precedents addressing secondary copyright

infringement. Pet. 15-29. They write to amplify Cox's arguments (at 27-28) that the decision below also flouts the traditional secondary-liability principles this Court recently recognized in *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023). That conflict heightens the need for certiorari.

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

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

Contributory copyright infringement is rooted in the law of aiding and abetting. *See*, *e.g.*, *In re Aimster Copyright Litig.*, 334 F.3d 643, 651 (7th Cir. 2003) (describing "the law of aiding and abetting" as "the criminal counterpart to contributory infringement"); *Underhill v. Schenck*, 143 N.E. 773, 776 (N.Y. 1924) ("contributing infringer" assumes the "guilt" of the principal infringer "whom he has aided and abetted"). As Professor Nimmer explained, contributory infringe-

ment draws from "indirect tort liability," including for "aiding, abetting, or encouraging the infringing act." Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 Cal. L. Rev. 941, 1012-13 (2007); *see also* Dan B. Dobbs et al., *The Law of Torts* § 741 & n.42 (2d ed. May 2023 update) (describing "aiding and abetting" as the "premise of contributory infringement"). The Fourth Circuit itself said it was deriving its theory of Cox's contributory infringement from the "law of aiding and abetting." *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 309 (4th Cir. 2008).

But the Fourth Circuit's rule runs roughshod over the traditional common-law limits on aiding-and-abetting liability. This Court recently clarified those principles in *Twitter*. That case addressed claims that Twitter and other social-media companies aided and abetted terrorism by knowingly failing to stop ISIS from using their platforms to raise funds and attract recruits. *See* 598 U.S. at 481-82. In assessing those claims, the Court invoked the same principles that have "animated aiding-and-abetting liability for centuries," searching for "conscious, voluntary, and culpable participation in another's wrongdoing." *Id.* at 493. Under the common law, the Court stressed, "truly culpable conduct" exists when "the defendant consciously and culpably participated in a wrongful act so as to help make it succeed." *Id.* at 489, 493 (cleaned up). The Court emphasized the need for such active wrongdoing more than a dozen times.[2]

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[2] *E.g.*, 598 U.S. at 489 (aiding-and-abetting liability requires "truly culpable conduct"); *id.* at 490 ("culpable misconduct"); *id.* at 492 ("conscious, 'culpable conduct'") (citation omitted); *id.* at 493 ("conscious, voluntary, and culpable participation in another's wrongdoing"); *id.* at 497 ("such knowing and substantial assistance . . . that [defendants] culpably participated in the . . . attack"); *id.* at 498 ("culpably associated themselves with the . . .

A communication provider's failure to stop bad actors from misusing its service does not qualify. Under the common law, this Court explained, "communication-providing services" have no "duty" "to terminate customers after discovering that the customers were using the service for illicit ends." *Id.* at 501.[3] For that reason, the Court held that the social-media companies' continued provision of routine communication service to terrorists was "mere passive nonfeasance" that did not amount to culpable aid. *Id.* at 500. And in words that could have been written for this case, the Court explained that it "would run roughshod over the typical limits on tort liability and take aiding and abetting far beyond its essential culpability moorings" to hold a "communication provider" liable "merely for knowing that . . . wrongdoers were using its services and failing to stop them." *Id.* at 503.

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attack, participated in it as something that they wished to bring about, or sought by their action to make it succeed") (cleaned up); *id.* at 500 ("somehow culpable with respect to the . . . attack"); *id.* at 500-01 ("culpable assistance or participation in the . . . attack"); *id.* at 503 (plaintiffs' "burden to show that defendants somehow consciously and culpably assisted the attack"); *id.* at 504 ("conscious and culpable conduct"); *id.* (aid "both significant and culpable enough to justify attributing the principal wrongdoing to the aider and abettor"); *id.* ("whether defendants culpably associated themselves with ISIS' actions"); *id.* at 506 ("The point of aiding and abetting is to impose liability on those who consciously and culpably participated in the tort at issue.").

[3] Internet service providers may choose to take advantage of the Digital Millennium Copyright Act's safe harbor by reasonably implementing a policy that provides for the termination of repeat infringers in appropriate circumstances. *See* 17 U.S.C. § 512(i)(1)(A). But the DMCA does not create an independent basis for liability. It does not make a repeat-infringer termination policy mandatory, and a company's failure to reasonably implement one does not suggest that it is liable as a contributory infringer. *See id.* § 512(*l*).

2. *Twitter* drew heavily on common-law principles, emphasizing the long "tradition from which" aiding-and-abetting liability arises. 598 U.S. at 485. Three of those principles are especially relevant.

First, passive nonfeasance cannot support aiding-and-abetting liability. Aiding and abetting instead requires "'[s]ubstantial assistance'" to the primary wrongdoer, which "means active participation" in that bad actor's misconduct. Restatement (Third) of Torts: Liability for Economic Harm § 28 cmt. d (2020). "The defendant must have associated himself in some way with the principal in bringing about the commission of the crime." *Aguilar v. PNC Bank, N.A.*, 853 F.3d 390, 403 (8th Cir. 2017) (cleaned up). "[M]ere negative acquiescence is not sufficient." *Id.*

A business that merely knows some people are using its product for nefarious ends is not liable as an aider and abettor, even if it consciously fails to stop them. At common law, courts did not impose aiding-and-abetting liability on companies that served customers "after discovering that the customers were using the service for illicit ends." *Twitter*, 598 U.S. at 501 (citing *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003); *People v. Brophy*, 120 P.2d 946, 956 (Cal. Ct. App. 1942)). For example, telephone companies did not aid and abet the bookies who received horse racing information over the phone. *See Brophy*, 120 P.2d at 956 ("[p]ublic utilities and common carriers are not the censors of public or private morals"). And web-hosting companies did not aid and abet illicit websites despite "profit[ing] from the sale of server space and bandwidth." *Doe*, 347 F.3d at 659. Aiding and abetting requires some act to support the wrongdoing—not mere knowledge that a customer is doing something wrong.

Second, substantial assistance "ordinarily means something more than routine professional services provided to the primary wrongdoer." Restatement (Third) § 28 cmt. d. Amazon, for example, did not aid and abet the unlawful importation of plant and animal products simply by allowing "third-party actors" to use its "fulfillment service to import" those products. *Amazon Servs. LLC v. United States Dep't of Agric.*, 109 F.4th 573, 582 (D.C. Cir. 2024). Key there was the lack of evidence that Amazon gave the third parties "'any special treatment or words of encouragement' or 'took any action at all' with respect to the unlawful acts." *Id.* (quoting *Twitter*, 598 U.S. at 498).

Providing routine services to a wrongdoer generally counts as substantial assistance only if done under "unusual circumstances" or "in an unusual way." *Halberstam v. Welch*, 705 F.2d 472, 487 (D.C. Cir. 1983); *see Twitter*, 598 U.S. at 485 (noting that *Halberstam* has "[l]ong" been "regarded as a leading case on civil aiding-and-abetting and conspiracy liability"). For example, a defendant who helped launder years of stolen valuables, including gold ingots smelted in her garage, did enough "in an unusual way under unusual circumstances" to show she was "a willing partner" in her partner's burglaries. *Halberstam*, 705 F.2d at 486-87.

Third, courts typically do not find secondary liability for insubstantial aid to economic torts, no matter the defendant's intentions. *See* Restatement (Third) § 28 reporter's note d. Even encouraging the underlying misconduct is not enough for aiding and abetting—"liability is prudently imposed only for substantial assistance." *Id.* That rule reflects a "proportionality" principle under which "a defendant's responsibility for the same amount of assistance increases with the

blameworthiness of the tortious act," and vice-versa. *Halberstam*, 705 F.2d at 484 n.13. When the harm is just money, more substantial assistance is necessary.

Consistent with that "proportionality test," *id.*, less substantial assistance is needed for secondary liability in cases of serious, physical harm. The Third Restatement thus remarks that "[l]iability for mere encouragement may make sense with respect to certain kinds of torts, as when bystanders in a crowd cheer on one party who is assaulting another." Restatement (Third) § 28 reporter's note d. For example, verbally encouraging an assailant—"Kill him!" and "Hit him more!"—counts as aiding and abetting the assault. *Rael v. Cadena*, 604 P.2d 822, 822 (N.M. Ct. App. 1979). And telling a young motorist with a new car to "run [the car] back up here and see what it will do" is aiding and abetting assault when the motorist strikes a bystander during a "test run." *Cobb v. Indian Springs, Inc.*, 522 S.W.2d 383, 387 (Ark. 1975). Even that "relatively trivial" aid can be culpable when the result is bodily harm. *Halberstam*, 705 F.2d at 484 n.13; *see* Restatement (Third) § 28 cmt. d ("the enormity of a wrong . . . may appropriately cause such lesser acts to be considered aiding and abetting"). But when the principal tort is less "blameworth[y]"—like sharing a copyrighted song on the internet—courts demand far more substantial aid before finding the aider culpable. *Halberstam*, 705 F.2d at 484 n.13.

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

The decision below made the same errors this Court corrected in *Twitter*. The court of appeals ruled that Cox materially contributed to its subscribers' infringement by knowingly failing to cut their internet

connections. Pet. App. 26a n.4. It did so because it thought that "supplying a product with knowledge that the recipient will use it to infringe copyrights is exactly the sort of culpable conduct sufficient for contributory infringement." *Id.* at 27a.

That holding upends traditional common-law culpability principles and conflicts with *Twitter*. *First*, Cox offered only passive aid to alleged infringers. The court of appeals held that Cox knew of instances of copyright infringement and failed to terminate service despite that knowledge. *See id.* Although the court below framed that as active aid, the common law makes clear it is non-culpable *inaction*. That was *Twitter*'s core holding: a communication provider that continues to provide its routine service to a wrongdoer, even consciously, commits "mere passive nonfeasance." 598 U.S. at 500. To hold Cox "liable . . . merely for knowing that . . . wrongdoers were using its services and failing to stop them" would "run roughshod over the typical limits on tort liability and take aiding and abetting far beyond its essential culpability moorings." *Id.* at 503.

Second, Cox provided routine services to its subscribers in an ordinary way. The same was true of Twitter, which "supplied generally available virtual platforms that ISIS made use of." *Id.* at 505. And of the phone companies in *Brophy*, which knew illegal bookies used their phone lines. 120 P.2d at 956. And of the web-hosting companies in *GTE*, whose "services likewise may be used to carry out illegal activities." 347 F.3d at 659. The result here should have been the same as in all those cases—no liability. That some people misuse internet access "does not justify condemning their provision whenever a given customer turns out to be crooked." *Id.*; *see also Grokster*, 545 U.S. at 937 (cautioning against "trenching on regular

commerce or discouraging the development of technologies with lawful and unlawful potential").[4]

The court of appeals erred in holding otherwise. Leaning on a faulty analogy to *United States v. Thompson*, 728 F.3d 1011 (9th Cir. 2013), the court concluded that Cox's continued sales of internet service was like "[l]ending a friend a hammer . . . with knowledge that the friend will use it to break into a credit union ATM." Pet. App. 27a. But lending a friend a hammer, especially when done in unusual circumstances, is nothing like supplying a "generally available" service "to the internet-using public." *Twitter*, 598 U.S. at 498. *Thompson* itself illustrates the point. The hammer-lending defendant there attended an in-person meeting with his bank-robber "friend" and a second accomplice, right before the robbery. 728 F.3d at 1013. The defendant brought a hammer, and the second accomplice brought a "thermal lance," which is "a tool designed to cut through metal using extreme heat." *Id.* at 1012-13. Each gave the tool he brought to the robber for the specific purpose of enabling the robbery. And then the defendant participated in "forty-five calls" with the robber—"the leader of the conspiracy"—"during the evening of the crime." *United States v. Thompson*, 539 F. App'x 778, 780 (9th Cir. 2013). Giving the bank robber a hammer under those unusual circumstances justified liability for aiding and abetting larceny. *See id.* Cox's continued

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[4] As Cox explains (at 9), internet service providers can glean only limited information about infringing activity from the millions of automatic notices they receive. Such notices generally connect an episode of alleged infringement only to an IP address —not to the person actually doing the alleged infringing. Here, the bulk of notices Cox received connected the alleged piracy to large account holders such as universities, military housing, and regional service providers. *See* Pet. 11.

provision of routine internet access, which it (like *amici*) offers the general public, is not comparable.

* * *

The court of appeals might not have made these errors had it applied *Twitter*. And Cox flagged that decision in a supplemental filing nine months before the court of appeals ruled here. No. 21-1168, ECF 87. But for unexplained reasons, *Twitter* goes unmentioned in the court's opinion.

Yet *Twitter* confirms that the court erred. By "hold[ing] a[] . . . communication provider liable for . . . wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them," the court "r[a]n roughshod over the typical limits on tort liability and t[ook] aiding and abetting far beyond its essential culpability moorings." 598 U.S. at 503. Just as this Court granted certiorari and reversed in *Twitter*, *see id.* at 482, 507, it should do the same here.

II. The Question Presented Is Exceptionally Important To The Future Of The Internet

Twitter's warning about the dangers of "run[ning] roughshod" over traditional secondary-liability limits is particularly salient here. 598 U.S. at 503. The Fourth Circuit's view of contributory infringement would force internet service providers to cut off any subscriber after receiving allegations that some unknown person used the subscriber's connection for copyright infringement. And the consequences could extend even beyond copyright. Under the Fourth Circuit's theory, a "communication provider" could be said to act culpably whenever it knowingly "fail[s] to stop" some unknowable "bad actor[]" from exploiting its service. *Id.* Enterprising plaintiffs' lawyers could seek to hold internet service providers liable for every bad act that occurs online.

Such a rule thwarts federal communications policy. As early as 1996, Congress had identified the promise of the then-nascent internet, declaring it is "the policy of the United States" "to promote the continued development of the Internet." 47 U.S.C. § 230(b)(1). At the same time, Congress instructed the Federal Communications Commission to use its authority to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability"—internet access—"to all Americans." *Id.* § 1302(a), (d)(1). And more recently, Congress has taken steps to ensure that all Americans have access to affordable, reliable, high-speed broadband through multi-billion-dollar subsidies for household internet subscriptions,[5] and substantial capital funds to support broadband and related projects throughout the country.[6]

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

[6] In the American Rescue Plan Act, Congress created both the $10 billion Capital Projects Fund and the $7.17 billion Emergency Connectivity Fund. *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9901(a), 135 Stat. 4, 223, 233 (codified at 42 U.S.C. § 804(a)); *id.* § 7402(c), 135 Stat. 109 (*reprinted in* 47 U.S.C. § 254 note). And the Broadband Equity, Access, and Deployment Program is a voluntary federal program that makes available $42.45 billion for States to fund the deployment of new networks to bring broadband to unserved and underserved areas of the country. *See* Broadband USA, *Public Notice Posting of State and Territory BEAD and Digital Equity Plan, Initial Proposals, and Challenge Process Portals*, *available at* https://bit.ly/456Ptrs (last accessed Sept. 4, 2024).

Amici play a critical role in those efforts to bring broadband to all Americans. They have invested hundreds of billions of dollars to deploy and improve the networks that hundreds of millions of Americans rely on daily for internet access. Work, school, telemedicine, and keeping in touch with loved ones all depend on the ability to get online. As the FCC noted, "institutions and schools, and even government agencies, require Internet access for full participation in key facets of society."[7]

The court of appeals' approach cuts sharply against those efforts. It would compel internet service providers to engage in wide-scale terminations to avoid facing crippling damages, like the $1 billion judgment entered against Cox here, the $2.6 billion damages figure touted by these same plaintiffs in a recent suit against Verizon,[8] or the similarly immense figures sought from Frontier and Altice USA. Such terminations come with several significant costs.

First, an overbroad termination requirement based on allegations of copyright infringement can be dangerous. When *amici* terminate a subscriber's internet account, it affects not just the subscriber but also risks affecting the subscriber's family, business, school, or community. For example, people in a subscriber's household—who did not infringe and may have no connection to the infringer—may be home-based employees using the internet service to work, or may rely on internet-connected medical devices for their

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

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

health and internet-monitored security systems for their safety. Losing internet access puts them at risk. For some customers in rural and hard-to-serve places where there is only one internet service provider, this means being cut off from the rest of the modern world. And the effect is even more pronounced for coffee shops, hospitals, regional internet service providers, and universities—all of which the Fourth Circuit swept up in its categorical rule. *See* Pet. 34-35.

Second, the automated processes that copyright holders use to flag copyright infringement on peer-to-peer networks are "famously flawed." *Strike 3 Holdings, LLC v. Doe*, 351 F. Supp. 3d 160, 161-62 (D.D.C. 2018), *rev'd and remanded on other grounds*, 964 F.3d 1203 (D.C. Cir. 2020). For example, decades ago the Penn State astrophysics department received an infringement notice from the same record companies suing here because the department's file directory included a folder named "usher," which the music industry's automated program mistook for the musician Usher. The infringement notice came during final exams and almost resulted in the department losing internet access.[9] Similarly, a student at Ithaca College received an infringement notice accusing her of illegally downloading a song that she had uploaded to her computer from a CD.[10] Another student had charges brought against him by the school's Office of Judicial Affairs based on an infringement notice. The student had never even heard of the song he was accused of downloading, and the charges were later dropped after the office suspected someone hacked his

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

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

IP address.[11] But the Fourth Circuit's rule would have *amici* kick him, and others like him, off the internet.

Third, the costs of termination are high. Given the extraordinary COVID-19 pandemic, many *amici* stopped terminating customers for nonpayment or other reasons. The FCC supported that activity through its "Keep Americans Connected Initiative," which aimed "to ensure that Americans do not lose their broadband or telephone connectivity as a result of the[] exceptional circumstances" the pandemic created.[12] But under the court's view here, that public-minded conduct would support a finding of secondary liability.

Terminating a customer's internet access prevents anyone from using that connection not just for copyright infringement, but also for any legitimate purpose. Termination prevents everyone who relies on a shared internet connection—in a household, coffee shop, office, school, library, or hospital—from using the internet for any purpose. They cannot look for a job, pay their bills, read the news, communicate with co-workers, post homework assignments, or check prescription medications. Termination also punishes family members, patrons, co-workers, teachers, students, doctors, nurses, and patients for the actions of one individual. And because it is possible to connect to someone else's Wi-Fi without their knowledge or consent, the infringing individual may have no connection to those who will bear the costs of losing internet access. *See*, *e.g.*, *Cobbler Nevada, LLC v. Gonzales*, 901 F.3d 1142, 1145, 1149 (9th Cir. 2018)

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[11] *See id.*

[12] FCC, *Keep Americans Connected Pledge* (updated July 8, 2020), https://www.fcc.gov/keep-americans-connected (last accessed Sept. 4, 2024).

(similar claim against manager of an "adult care home" whose residents were using the manager's internet subscription to infringe).

And for what? It would be one thing if the damages in these cases stemmed from any real calculation of pocket-book harm to the music-industry plaintiffs. But consumers can buy access to nearly all recorded music in existence for $11.99 per month through streaming services like Spotify,[13] download a song from iTunes for even less, or listen for free on YouTube. And the individual labels that license their catalogs to such services collect only a fraction of those amounts. Small wonder, then, that the actual monetary harm here was in the thousands of dollars for the approximately 10,000 infringed works—a number dwarfed by respondents' billion-dollar statutory-damages verdict. The result is "a copyright regime that rewards rights holders in proportion to their strategic acumen and litigation budgets—not the value of their works." *Eight Mile Style, LLC v. Spotify USA Inc.*, 2024 WL 3836075, at *22 (M.D. Tenn. Aug. 15, 2024).

Returning contributory copyright infringement to its common-law roots would guard against these outcomes. And it would not leave copyright owners without a remedy. They can still use any evidence they collect of online infringement to serve subpoenas to learn the identity of the customer whose internet access was used for infringement.[14] The subpoenas can then lead to direct actions against the actual

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[13] *See* Spotify, *Premium*, https://www.spotify.com/us/premium/ (last accessed Sept. 4, 2024).

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

infringers.[15] Indeed, before embarking on this effort to hold internet service providers liable for their users' actions, music labels and publishers used to sue those users directly. But the industry found that suing individuals—like a 12-year-old girl,[16] a homeless man,[17] grandparents,[18] and a single mother who had shared 24 songs online[19]—created "a public-relations disaster."[20] The industry's mass litigation campaign was even unpopular among musicians: one artist, for example, described the suits as "scare tactics."[21]

So the music labels no longer appear willing to sue individual people who commit music piracy. Instead, they want internet service providers to enforce their copyrights for them, or to pay dearly if they fail to do so to the labels' liking. But if piracy remains such a vital problem—as opposed to a litigation profit center

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

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

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

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

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

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

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

for these multi-billion-dollar record labels—the labels are free to start again pursuing the infringers directly. Or as in *Grokster*, they can sue the providers of any software or websites designed and marketed for piracy. While these individual infringers and piracy-software providers may lack deep pockets and be harder to sue than internet service providers, that is no reason to upend the common-law limits on contributory infringement and thwart Congress's efforts to make high-speed internet access available to all Americans.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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