

No. 24-171

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IN THE  
**Supreme Court of the United States**

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COX COMMUNICATIONS, INC. and COXCOM, LLC,  
*Petitioners,*

*v.*

SONY MUSIC ENTERTAINMENT, ET AL.,  
*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**REPLY BRIEF FOR PETITIONERS**

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## INTRODUCTION

Plaintiffs do not dispute that the Fourth Circuit installed a copyright regime that requires ISPs to reflexively terminate the internet access of entire households and businesses upon a couple accusations of infringement, or that innocent users could lose their internet lifelines merely because a guest downloaded a couple of songs. Pet. 35. And they do not dispute that to avoid liability under the Fourth Circuit's rule, ISPs must sever connections to hospitals, universities, and regional ISPs. *Id.*

Plaintiffs express no compunction about any of this. They say the concern is “overblown.” Opp. 32. But in this case, they won \$1 billion on the theory that Cox should have cut 57,000 internet connections after a second infringement accusation. They depict Cox as especially culpable, but are suing multiple ISPs on the same theory.

This is possible only because of the widespread confusion about how this Court's decades-old contributory-liability rulings map onto the modern internet. This Court must resolve the confusion—and hold that ISPs are not required to police everything that happens online—before it is too late.

## I. The Fourth Circuit’s Material-Contribution Standard Warrants Review.

### A. The circuits have adopted conflicting material-contribution standards.

Plaintiffs cannot persuasively reconcile the three-way circuit conflict. And tellingly, they do not even address how the Fifth Circuit’s recent opinion in *UMG Recordings, Inc. v. Grande Communications Networks, L.L.C.*, 118 F.4th 697 (5th Cir. 2024), deepens the morass.

1. Plaintiffs do not dispute that both the Second and Tenth Circuits apply the rule “drawn straight from *Grokster*: Contributory liability flows from ‘distribut[ing] a device *with the object of promoting its use to infringe* copyright, as shown by clear expression or other affirmative steps taken to foster infringement.” Pet. 17 (quoting *EMI Christian Music Grp., Inc. v. MP3Tunes, LLC*, 844 F.3d 79, 100 (2d Cir. 2016)). Plaintiffs’ efforts to reconcile this rule with the Fourth Circuit’s are unpersuasive.

As to the Second Circuit, Plaintiffs do not deny that *EMI* conflicts with the decision below, but urge this Court to ignore it because *EMI* addressed only “the inducement strand of contributory infringement,” Opp. 10-11. Wrong. *EMI* also approved this jury instruction: “[A] defendant ‘*materially contributes* ... if [he] engages in personal conduct that is part of, encourages, or assists the infringement.” 844 F.3d at 100 (emphasis added).

Plaintiffs also misapprehend *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 693 (2d Cir. 1998). *Matthew Bender* rejected liability where the service at issue had “substantial, if not overwhelming, noninfringing uses,” and “[t]here [was] no evidence that plaintiffs ha[d] encouraged the users of their products to [infringe].” *Id.* at 706-07. Contrary to Plaintiffs’ assertion, it did not hold that a product “capable of substantial noninfringing uses” can *never* be the subject of a contributory-infringement claim. Opp. 11 (citation omitted). Far from being “rejected” by *Grokster, id.*, *Matthew Bender’s* rule *is Grokster*.

Regarding the Tenth Circuit, Plaintiffs are wrong in asserting that “*Greer* and the Fourth Circuit in the decision below applied the same rule.” Opp. 12. The Tenth Circuit found that the defendant “materially contribute[d]” to the direct infringement because he not only knew of, but also “encourage[d] ... users’ direct copyright infringement.” *Greer v. Moon*, 83 F.4th 1283, 1294-95 (10th Cir. 2023). Further, the Tenth Circuit noted, the “failure to take affirmative steps to *prevent* infringement” cannot constitute material contribution. *Id.* at 1295 (quoting *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 939 n.12 (2005)). Despite quoting the same line from *Grokster*, the Fourth Circuit disregarded it in holding that “supplying a product with knowledge [of future infringement]” is sufficient to state a material-contribution claim. Pet. App. 27a. This mere-knowledge approach is precisely what *Grokster*, *EMI*, *Matthew Bender*, and *Greer* prohibit.

2. Regarding the Ninth Circuit’s failure-to-take-simple-measures standard, Plaintiffs do not dispute

that it conflicts with the Fourth Circuit’s approach, nor that the Fourth Circuit ignored the standard entirely. Pet. 21. Plaintiffs also do not dispute that Cox “already implements onerous measures to stop infringement,” which forecloses culpability under that standard. *See id.*

Plaintiffs falsely assert that Cox executed an “about-face from its position below, where it successfully argued that this standard does not apply in this context.” Opp. 10. Cox advanced the same topline position in the Fourth Circuit: Contributory infringement requires affirmative conduct, per *Grokster*, and the simple-measures test violates this rule by triggering liability based on inaction. Cox CA4 Br. 45-47. But Cox alternatively argued: “Even if the ‘simple measures’ test could apply to an ISP, neither Plaintiffs nor the district court identified any ‘simple measure’ tailored to ending the infringement that Cox failed to take.” Cox CA4 Br. 49. It is therefore untrue that the Fourth Circuit adopted the toughest possible standard because “Cox convinced the Fourth Circuit to not apply” the simple-measures test. Opp. 9.

**3.** Which brings us to the Fifth Circuit’s enigmatic opinion in *Grande*, a similar case pitting the music industry against an ISP.

In upholding the material-contribution verdict in that case, the court adopted the Ninth Circuit’s “simple measures” test as a limit on liability: “[I]f such measures are unavailable to the defendant, liability is inappropriate.” 118 F.4th at 716; *see id.* at 719. That put it squarely in conflict with the Fourth



Circuit. In fact, in distinguishing the conduct of the ISP there (*Grande*) from Cox’s conduct, the Fifth Circuit explained that it believed Cox would prevail under the standard: “[U]nlike Cox—which implemented a ‘graduated response system,’ ... *Grande* took *no* action in response to its subscribers’ repeated infringements.” *Id.* at 719 (citations omitted); *see id.* at 716.

Yet *Grande* also upheld the jury instructions by invoking Fourth Circuit reasoning that cannot be reconciled with the Ninth Circuit’s simple-measures requirement. Echoing the Fourth Circuit, it stated 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.” *Id.* at 717. It is unclear how the Fifth Circuit reconciled this language with its simultaneous embrace of the Ninth Circuit’s simple-measures test, which is an “additional step before allowing a finding of contributory liability.” *Id.* at 715.

Whether the Fifth Circuit’s analytical straddle puts it in the Fourth Circuit’s camp or the Ninth Circuit’s, or in a camp of its own, it further confirms that the intractable split demands this Court’s intervention.

#### **B. The Fourth Circuit’s approach conflicts with *Grokster* and *Twitter*.**

Plaintiffs fail to reconcile the Fourth Circuit’s opinion with *Grokster* and *Twitter*.

1. Plaintiffs suggest that *Grokster* announced only an “inducement rule,” rather than an overarching principle of secondary liability that “distributing a multi-use product” is insufficient to trigger liability “without proof of ‘affirmative steps taken to foster infringement.’” Opp. 18 (citation omitted). They say that when *Grokster* emphasized the need for the “acute fault” that comes with “affirmative steps” and “purposeful, culpable expression and conduct,” it intended an implicit exception: “Unless you re-label it a ‘material contribution’ claim—then you don’t need any affirmative conduct at all, and mere knowledge that someone will likely infringe is enough.” *Grokster* explained that “a court would be unable to find contributory liability”—not just inducement liability—“based merely on a failure to take affirmative steps to prevent infringement, if the device was otherwise capable of substantial noninfringing uses.” 545 U.S. at 939 n.12 (cleaned up).

Plaintiffs are also wrong that the Fourth Circuit’s equation of knowledge with “culpable conduct” is consistent with “rules of fault-based liability.” Opp. 16-17. Like the Fourth Circuit, they point to the rule that a person “will be presumed to intend the natural consequences of his act.” Opp. 16; Pet. App. 28a. But Plaintiffs take this principle from the beginning of the Restatement, which addresses the “intent” of an “actor” who commits an “act.” Restatement (Second) of Torts § 8A cmt. b (1965); Opp. 16 n.3. The rules on *secondary* liability for *not* acting appear in the chapter addressing “Contributing Tortfeasors”: “[F]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he ... knows that the other’s conduct consti-

tutes a breach of duty *and* gives substantial assistance or encouragement to the other.” Restatement of Torts (Second) § 876 (emphasis added). Just like *Grokster* says.

2. Next, Plaintiffs argue Cox was more than a passive actor because it made “repeated decisions to continue providing service to subscribers” despite knowledge of likely infringement. Opp. 17-18. “[C]ontinu[ing] [to] provid[e] service” is just a rephrasing of the passive conduct of not throwing subscribers off the internet. Purported “increasingly liberal policies” on termination are the same thing. Opp. 16-17. And the internal emails griping about the tsunami of automated notices could not have contributed to the infringement since no user saw them.

3. Finally, Plaintiffs incorrectly argue that the Fourth Circuit “does not break with *Twitter*.” Opp. 21. Plaintiffs do not argue that *Twitter*’s aiding-and-abetting principles are inapplicable—only that their application is “unclear.” Opp. 21. Plaintiffs thus spill ink distinguishing *Twitter* on its facts—ignoring that what matters is that *Twitter* applied a different *legal* rule. Pet. 27-29. Plaintiffs argue that *Twitter* involved “passive nonfeasance” while Cox’s conduct was “not nearly so passive.” Opp. 22. Yet Plaintiffs’ account of why Cox was not “so passive” is just the same allegations about what Cox “knew” about subscribers’ “infringement on its network.” *Id.* That is the exact analytical error that this Court reversed in *Twitter*—“elid[ing]” the “fundamental question” of whether “defendants consciously, voluntarily, and culpably participate[d] in or support[ed]” wrongdo-

ing, by focusing only on the “defendants’ state of mind.” *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 503-04 (2023).

## **II. The Fourth Circuit’s Willfulness Standard Warrants Review.**

Plaintiffs avoid responding to the second question presented by recasting it. That question acknowledges that willfulness can be satisfied with proof of either knowledge or “reckless disregard[].” Pet. i; *see* Pet. 32-33. But knowledge or reckless disregard *of what?* Was it enough to prove Cox’s knowledge or reckless disregard that its subscribers were infringing, or must Plaintiffs prove that Cox knew or recklessly disregarded the risk that “its own conduct in not terminating [its subscribers] was unlawful”? Pet. i. Plaintiffs dodge that question by building their entire response around the irrelevancy that willfulness can be proven by demonstrating reckless disregard.

### **A. The Eighth and Fourth Circuits are in conflict.**

All agree that “every circuit” applies the same rule that “[a] secondary infringer acts willfully when its conduct reflects a reckless disregard for a copyright holder’s rights.” Opp. 24-25. But that is not the conflict. The conflict is that the Fourth Circuit’s willfulness standard is satisfied with proof that a defendant has knowledge (or has recklessly disregarded) “that one’s subscribers are infringing,” whereas the Eighth Circuit holds that willfulness requires that the defendants also knew (or recklessly

disregarded) that “*their own actions* [were] culpable.” Pet. 30. In the Eighth Circuit, mere knowledge that someone else is infringing copyrights does not make a defendant reckless, while the Fourth Circuit holds that the very same knowledge establishes recklessness.

Plaintiffs recast the Eighth Circuit’s opinion in *RCA/Ariola International, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773 (8th Cir. 1988), as a case where some of the defendants “were held liable for *direct* infringement.” Opp. 27. They evidently mean that *RCA* does not address the willfulness standard for secondary infringers. *Id.* That is wrong. The case addressed the liability of two sets of businesses: (1) the manufacturer of a tape duplicating machine; and (2) retailers who allowed customers to use these machines in their stores to illegally duplicate tapes. *RCA*, 845 F.2d at 776-77. Both businesses knew that the retailers’ customers were using the machines to infringe. *Id.*

The court concluded that the manufacturer was vicariously liable for the infringement. Yet, the court found that it was not willful for “relying on th[e] position” that it did not have to “tak[e] positive steps to make sure no customer used the machines to infringe.” *Id.* at 779. The court also concluded that the retailers were properly held liable for “substantial participation” in the customers’ infringement. *Id.* Yet it found that their infringement was not willful: It was not enough for them to know that customers’ “activities were ‘against the law,’” if they did not “underst[and] their own actions to be culpable.” *Id.* Both holdings amount to the same rule: For willful-

ness, knowing that *someone else* is violating the law is not the same as knowing that *you yourself* are violating the law—whether the liability is direct or secondary. The Fourth Circuit’s decision conflicts with that rule.

**B. The Fourth Circuit’s willfulness standard is wrong.**

Neither can Plaintiffs defend the Fourth Circuit’s rule with their repeated distraction that “reckless disregard” suffices for willfulness. Opp. 28.

Plaintiffs first claim that “a defendant acted willfully if he materially contributed to conduct the defendant *knew* was against the law.” Opp. 29. That is logically wrong. If that defendant knew someone else was violating the law, but reasonably believed he was a bystander with no duty to stop that conduct, that is not “the definition of recklessness,” Opp. 29. A defendant’s “good-faith, reasonable belief in the lawfulness of its own conduct” forecloses recklessness, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69–70 (2007), as Plaintiffs themselves admit, Opp. 29–30.

Plaintiffs then insinuate that the jury actually made a direct finding that Cox *was* reckless—not just that it had knowledge of subscriber infringement—and therefore “found [that] Cox *lacked* such good-faith and reasonable beliefs.” Opp. 30. But as Plaintiffs elsewhere concede (at 32), the jury instruction permitted the jury to find willfulness if Plaintiffs proved “that Cox had knowledge that its subscribers’ actions constituted infringement of

plaintiffs copyrights, acted with reckless disregard ..., or was willfully blind to ... infringement of plaintiffs' copyrights." CA App. 804. The instructions never directed the jury to evaluate *Cox's* conduct, as opposed to *Cox's* subscribers'. *Id.*

The Fourth Circuit permitted a five-fold increase in statutory damages based on the same finding of knowledge necessary to prove the underlying contributory-infringement claim. Pet. 34. Plaintiffs claim there is a distinction: Willfulness requires knowledge that subscribers' actions "*constituted infringement*" while "[c]ontributory liability requires only 'knowledge of the infringing *activity*.'" Opp. 30-31. Yet just pages earlier, Plaintiffs said that the contributory-liability standard applied in this very case required "supplying a product with knowledge that the recipient will use it *to infringe*." Opp. 7 (emphasis added). Plaintiffs' confusion is understandable—the lower courts are befuddled, too. *Supra* 8-10. But the record is clear: The exact same showing that purportedly made *Cox* liable in the first place automatically subjected it to enhanced penalties. That cannot be right.

### **III. This Case Is An Ideal Vehicle.**

Plaintiffs' claimed vehicle issues are illusory.

They start with a two-sentence assertion that they could "satisfy even *Cox's* preferred [material-contribution] rule." Opp. 31. But that is based on the same false assertion that *Cox* took affirmative steps to foster infringement.

Similarly misguided is Plaintiffs' argument that the district court's erroneous jury instruction on willfulness is not "outcome-determinative." Opp. 31. To be clear, Plaintiffs tacitly concede that a new trial would be required, making the issue outcome-determinative on appeal; they argue only that a properly instructed jury could reach the same conclusion "on remand." Opp. 31-32. But without an instruction that essentially directs a verdict on willfulness, the next jury could find that Cox reasonably believed—indeed, *still* believes—it had no legal obligation to cut the internet lifeline to tens of thousands of customers just because it knows that someone on those accounts probably would illegally download music again.

#### **IV. The Questions Presented Are Important.**

Plaintiffs do not dispute that to avoid liability in this case, Cox needed to kick 57,000 homes and businesses off the internet over just a two-year period the moment each received a second infringement accusation. And the music industry has brought or threatened the same claims against nearly every major ISP. Yet Plaintiffs dismiss the concern about "mass terminations" as "overblown, misplaced, and hypocritical." Opp. 32.

Plaintiffs' main rationale for arguing that this is not an emergency is the Digital Millennium Copyright Act's safe harbor for ISPs that "reasonably implement" a policy *terminating repeat infringers*. This is no comfort to homes and businesses, because it means that the only way for ISPs to avoid liability is by reflexively evicting them from cyberspace. Re-



ardless, the DMCA safe harbor is scant protection for ISPs as a voluntary affirmative defense that “shall not bear” on liability. 17 U.S.C. § 512(*l*). It is also too murky to lend comfort to ISPs or users. The requirement of a “reasonably implemented” termination policy is no protection from the whims of a jury. And what are “appropriate circumstances” for throwing a family of five or a hospital off the internet? Plaintiffs’ theory here is that a mere *two* allegations of infringement are enough. So Plaintiffs’ invocation of the DMCA hardly solves the problem of mass terminations—it embraces it.

Plaintiffs cry “hypocri[sy]” because Cox terminates subscribers when they do not pay their bills. True, after months of nonpayment, Cox—like any business—stops providing services for free. That does not justify forcing every ISP to conduct mass internet evictions for infractions worth, on average, \$1 each. CA App. 767, 770, 775.

In the face of these consequences, this Court has neither the luxury nor the need for further “percolation.” *Contra* Opp. 33. *Sony* was decided 40 years ago; *Grokster* 20 years later. Since then, the lower courts have diverged on what those foundational precedents require, and how they should apply to the modern internet. Percolation will only make it worse. And in the meantime, ISPs will have to cut entire homes and businesses off the internet any time the music industry accuses some anonymous user of downloading a song or two. Review is urgently needed.

**CONCLUSION**

The Court should grant the petition.

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