No. 24-181

In The

Supreme Court of the United States

SONY MUSIC ENTERTAINMENT, ET AL.,

Petitioners,

v.

COX COMMUNICATIONS, INC. AND COXCOM, LLC,

Respondents.

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

BRIEF OF NATIONAL MUSIC PUBLISHERS' ASSOCIATION, RECORDING INDUSTRY ASSOCIATION OF AMERICA, AMERICAN ASSOCIATION OF INDEPENDENT MUSIC, ASSOCIATION OF AMERICAN PUBLISHERS, NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL, AND SONGWRITERS OF NORTH AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT.. 6

ARGUMENT 9

I. The Fourth Circuit's Minority Rule Narrowing Vicarious Liability Departs from a Century of Copyright Law and Encourages a Race to the Bottom for Protecting Copyrights Online....... 9

  A. The Common Law Embraces a Flexible, Enterprise-wide Financial Interest Test to Incentivize All Who Profit from Infringement to Police It..................... 10

  B. The Fourth Circuit's Minority Rule Provides a Roadmap to Profit from Infringement.. 17

II. Review Is Crucial to Protect the Balance Struck by Congress in the DMCA................ 20

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

A&M Records v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) 13

BMG Rights Mgmt. (US) LLC v. Cox Commc'n, Inc., 881 F.3d 293 (4th Cir. 2018) 24

Capitol Records, Inc. v. MP3Tunes, LLC, 821 F. Supp. 2d 627 (S.D.N.Y. 2011) 23

Ellison v. Robertson, 357 F.3d 1072 (9th Cir. 2004) 16

EMI Christian Music Grp., Inc. v. MP3tunes, LLC, 844 F.3d 79 (2d Cir. 2016) 17

Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Ass'n, 554 F.2d 1213 (1st Cir. 1977) 15

Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259 (9th Cir. 1996) 15

Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519 (2013) 22

Leonard v. Stemtech Int'l Inc., 834 F.3d 376 (3d Cir. 2016) 16

MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) 9, 10

Polygram Int'l Publ'g, Inc. v. Nev./TIG, Inc., 855 F. Supp. 1314 (D. Mass. 1994) 13

Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304 (2d Cir. 1963)........................ 10, 12

Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) 18, 19

STATUTES

17 U.S.C. § 512(a)-(d) 21

17 U.S.C. § 512(i).. 21

OTHER AUTHORITIES

Ash Johnson, *22 Years After the DMCA, Online Piracy Is Still a Widespread Problem*, Info. Tech. & Innovation Found. (Feb. 7, 2020)....... 20

H.R. Rep. No. 105-551, pt. 2 (1998) 22

S. Rep. No. 105-190 (1998)................................ 22

Section 512 of Title 17, U.S. Copyright Office... 21

INTEREST OF *AMICI CURIAE*[1]

The National Music Publishers' Association ("NMPA") is a nonprofit trade association representing the United States music publishing and songwriting industry. Over the last one hundred years, NMPA has served as the leading voice representing American music publishers before Congress, in the courts, within the music, entertainment and technology industries, and to the public. NMPA's membership includes "major" music publishers affiliated with large entertainment companies as well as independently owned and operated music publishers of all sizes representing musical works of all genres. Taken together, compositions owned or controlled by NMPA's hundreds of members account for the vast majority of musical compositions licensed for commercial use in the United States.

The Recording Industry Association of America ("RIAA") is a nonprofit trade organization that supports and promotes the creative and financial vitality of recorded music and the people and

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[1] Counsel of record for all parties received timely advance notice of intent to file. S. Ct. R. 37.2. No counsel for any party authored this brief in whole or in part, and no such counsel nor any party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than *amici curiae* made a monetary contribution intended to fund the brief's preparation or submission. Certain of the plaintiffs in this lawsuit are among the members (or affiliates of such members) of *amici* the National Music Publishers' Association and the Recording Industry Association of America, each of whom also represents the interests of hundreds of other companies in the music industry.

companies that create it. RIAA's several hundred members make up this country's most vibrant and innovative music community. RIAA members create, manufacture, and/or distribute sound recordings representing the majority of all legitimate recorded music consumption in the United States, and own copyrights and/or other exclusive rights in sound recordings embodying the performances of some of the most popular and successful recording artists of all time.

The American Association of Independent Music ("A2IM") is a 501(c)(6) not-for-profit trade organization headquartered in New York City that exists to support and strengthen the independent recorded music sector and the value of recorded music copyrights. Membership currently includes a broad coalition of hundreds of independently owned American music labels. A2IM represents these independently owned small and medium-sized enterprises' interests in the marketplace, in the media, on Capitol Hill, and as part of the global music community. In doing so, it supports a key segment of America's creative class that represents America's diverse musical and cultural heritage. Billboard Magazine identified the independent music label sector as over 40 percent of the music industry's global recorded music revenue in 2020 based on copyright ownership.

The Association of American Publishers, Inc. ("AAP") represents book, journal, and education publishers in the United States on matters of law and policy, including major commercial houses, small and independent houses, and university presses and other

noncommercial scholarly publishers. AAP seeks to promote an effective and enforceable framework that enables publishers to create and disseminate a wide array of original works of authorship to the public on behalf of their authors and in furtherance of informed speech and public progress.

The Nashville Songwriters Association International ("NSAI") is the world's largest not-for-profit trade association for songwriters. NSAI was founded in 1967 by 42 songwriters including Eddie Miller, Marijohn Wilkin, Kris Kristofferson, Felice and Boudleaux Bryant, and Liz and Casey Anderson as an advocacy organization for songwriters and composers. NSAI has around 4,000 members and 100 chapters in the United States and abroad. NSAI is dedicated to protecting the rights of songwriters in all genres of music and addressing needs unique to the songwriting profession. The organization has participated in Copyright Royalty Board trials resulting in historically higher mechanical royalty rates for American songwriters, was instrumental in the drafting and adoption of the Music Modernization Act, and created the first "group" copyright infringement insurance policy for songwriters. Governed by a Board of Directors composed entirely of professional songwriters, NSAI features a number of programs and services designed to provide education and career opportunities for songwriters at every level.

Songwriters of North America ("SONA") is a membership-based advocacy organization formed by songwriting partners Michelle Lewis and Kay Hanley along with music attorney Dina LaPolt in 2015. SONA

is run by and for professional songwriters. The organization advocates on behalf of songwriters' interests before legislative bodies, administrative agencies, and the courts. SONA is an open and diverse community that unites enthusiastic music creators and thoughtful business leaders to create a unified voice to protect artistic expression, compensation, and the rights of songwriters in North America.

As organizations representing a wide array of copyright owners, the question presented here—concerning the proper scope of vicarious liability for copyright infringement—is exceptionally important for *amici* and their members, along with the artists, songwriters, and authors they represent and serve. All of *amici*'s members suffer from the type of rampant infringement that Cox's lax policies facilitated and from which Cox profited. And many of their members are solo creators or small business owners—like songwriters, artist-owned labels, and small publishers—who lack the resources needed to bring cases like this against Fortune 500 internet service providers like Cox. They depend upon *amici*'s advocacy on their behalf to protect their creative work and livelihoods, and to help hold the copyright enforcement line against rampant online piracy.

Recognizing that the internet enabled mass infringement by facilitating the distribution of unlimited unauthorized digital copies of copyrighted works, Congress created special rules for internet service providers. Taking as a given the well-established backdrop of copyright law (including secondary liability and the enterprise-focused understanding of financial interest underlying

vicarious infringement doctrine), Congress, in the Digital Millenium Copyright Act (DMCA) shielded internet service providers from monetary liability—including secondary liability. But that shield is available *only* if such service providers take reasonable steps to forestall infringement that, practically speaking, only they are able to police, and from which they clearly profit. By refusing to take these reasonable steps, Cox disqualified itself from the DMCA's safe harbor, as the Fourth Circuit confirmed in a holding long since past challenge.

Breaking with other circuits, the Fourth Circuit nonetheless permitted Cox to dodge liability for vicarious copyright infringement. The court did so by adopting an unjustifiably narrow view of the elements of that claim. The Fourth Circuit's outlier rule ignores decades of copyright precedent and shields businesses from vicarious liability unless plaintiffs can prove that the business profited from the infringing act itself in the form of either (1) payments specifically connected to the infringing activity alone or (2) customers being attracted to the service specifically (and only) for the purposes of infringement.

The Fourth Circuit's rule marks a stark break from a century of vicarious liability precedent, including precedent that informed the balance Congress struck in drafting the DMCA. Indeed, no other court of appeals applies the Fourth Circuit's rule, with good reason. Given common features of internet service—including that the internet can be used for both legitimate and infringing purposes—the Fourth Circuit's artificial constraints will almost never be met in a digital infringement case. Thus,

absent the Court's review, the Fourth Circuit's ruling will upset the balance struck by Congress and prompt a race to the bottom to see how little can be done to deter online piracy by the very actors best positioned to curb it.

The courts of appeals are divided, the Fourth Circuit is on the wrong side of the split, and the question is of exceptional importance. This Court should grant review and reverse the Fourth Circuit's ruling as to vicarious liability.

INTRODUCTION AND SUMMARY OF ARGUMENT

The scale of online piracy is vast, and the technology is ever-evolving, but the problem of businesses profiting from the infringement of copyrighted music created and performed by others is ages old. For a century, copyright law has had to grapple with the limits of vicarious liability for businesses that profit from infringement—and could help stop it if they had any incentive to do so.

The settled answer, until now, is that a business is vicariously liable when its enterprise gains commercially from infringement, and declines to exercise its ability to control or stop that infringement. The Fourth Circuit's approach—which effectively requires plaintiffs to prove that a specific dollar of profit came from a specific infringement—is an abrupt break from the common law. Under the long-standing approach now disregarded in the Fourth Circuit, financial interest is a flexible test that encompasses any way in which infringement aids an

enterprise's commercial prospects. Using infringement to attract, or "draw," customers is just one way of showing financial interest—not a per se requirement in every case. Nor must infringing activity be the sole reason that a customer walks in a business's door or signs up for its services.

Congress legislated against this common-law backdrop in enacting the DMCA. In particular, rather than altering the traditional rules of copyright liability, Congress chose instead to leave vicarious liability law as it found it. On top of that common-law foundation, to address concerns regarding the challenges of copyright enforcement in the digital era, Congress established a framework to shield internet service providers that take reasonable steps to protect copyright holders' property rights.

Cox refused to take those reasonable steps, choosing profit over termination of repeat infringers, so it cannot avail itself of the DMCA safe harbor from monetary liability. But that no longer matters, if the Fourth Circuit's rule holds, because the court's rule effectively immunizes internet service providers from claims of vicarious liability, whether they meet Congress's requirements or not.

The Fourth Circuit's vicarious liability holding is worthy of this Court's review even though the Fourth Circuit affirmed Cox's liability for contributory infringement. Given the disparate requirements for each theory of secondary liability, contributory infringement is not a substitute for vicarious liability. Creators like the songwriters, composers, authors, and performers represented and served by *amici* need the full quiver of common law arrows to be able to

effectively deter copyright infringement—especially in the digital realm.

Regardless of the availability of contributory infringement liability, the Fourth Circuit's vicarious liability holding upends the careful balance Congress struck in drafting the DMCA. Moreover, Cox also seeks to overturn the Fourth Circuit's (correct) ruling on contributory liability. Cox's question presented does not merit review. But if that effort is successful *and* this Court declines to review the Fourth Circuit's ruling on vicarious liability, Congress's comprehensive DMCA safe-harbor regime will effectively cease to exist.

By narrowing vicarious liability to situations where a business's profits must be directly tied to the infringing act, the Fourth Circuit's rule encourages a race to the bottom on (non-)policing of infringing activity. Why would a profit-maximizing internet service provider bother to take even reasonable steps to prevent or mitigate infringement when it can instead decline to terminate repeat infringers, continue to collect their subscription fees, and avoid vicarious liability anyway? The Court's review is urgently needed to restore uniformity in the courts of appeals and enforce the balance struck by Congress for this crucial aspect of copyright law.

ARGUMENT

I. The Fourth Circuit's Minority Rule Narrowing Vicarious Liability Departs from a Century of Copyright Law and Encourages a Race to the Bottom for Protecting Copyrights Online.

The technology of online piracy may be new, but profiting from unauthorized copies of creators' work is not. And, long ago, copyright law evolved from a narrow focus on the specific person who makes or distributes a copy to address the conduct of those who profit from infringement and have the ability to control it. Such doctrines of "secondary liability" for copyright infringement "emerged from common law principles." *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005). Those longstanding principles recognize that, when "a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers," making secondary liability—including vicarious liability—"the only practical alternative." *Id.* at 929-30. These principles apply whether at a dance hall, a swap meet, or online.

Particularly in the online context, where infringement is easy but copyright protection is hard, vicarious liability plays a crucial role in holding accountable those actors that profit from infringement and have the ability to control it—thereby protecting the ability of singers, songwriters, authors, composers, and musicians to safeguard their livelihoods and continue their creative endeavors.

One "infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it." *Id.* at 930 (citing *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963)). Thus, to be vicariously liable, an entity must have the "right and ability to supervise" the infringer and a "direct financial interest" in the infringement. *Shapiro*, 316 F.2d at 307. Only the financial-interest element is at issue here. On that prong, the Fourth Circuit's abrupt (and unprecedented) departure from the broader rule applied in other courts of appeals created a roadmap for internet service providers, in particular, to eliminate any meaningful guardrails against infringement—and profit from it—while facing no vicarious liability.

The Fourth Circuit's cramped approach cannot be squared with decades of common law principles establishing the sweep of vicarious liability. Because the Fourth Circuit has broken with other circuits, and effectively given a free pass to entities that profit from digital piracy and decline to exercise their authority to stop it, this Court's review is urgently needed.

A. The Common Law Embraces a Flexible, Enterprise-wide Financial Interest Test to Incentivize All Who Profit from Infringement to Police It.

As Petitioners explain, Pet. 12-25, the Fourth Circuit stands alone among the courts of appeals in limiting the requisite financial interest to an entity's profit from the specific act of infringement itself, as opposed to embracing any profit from the enterprise

in which infringement occurs (and thereby is expected to aid the enterprise's commercial success). Beyond opening a chasm in vicarious liability doctrine from other circuits—reason enough to grant review—the Fourth Circuit's approach would eviscerate vicarious liability in practice, particularly in the online context where making and distributing infringing copies is as easy as the click of a button.

Vicarious liability developed to place the cost of infringement on those who profit from it and are able to police it. But under the Fourth Circuit's myopic view of "profit," it ceases to serve that purpose. A business can profit from infringement in many ways beyond collecting payments specifically attributable to each act of infringement. For example, the entrance fee for a dance hall is not song-based. But under the Fourth Circuit's approach, an enterprise can profit from allowing infringement without bearing infringement's cost, as long as it does not charge specifically for (or its profits cannot be specifically traced to) each infringing act.

The upshot for secondary infringers: any incentive to police against infringement evaporates. As here, an internet service provider can decide to keep collecting the (generally higher) subscription fees from repeat infringers, Pet. App. 16a, 18a, so long as it structures its business with flat fees and bundled services so that the extra dollars from that infringing activity—indisputably part of why repeat infringers use the service—cannot easily be traced "directly [to] *the copyright infringement itself*." Pet. App. 17a (emphasis in original). The common law has never

(until now) so narrowly constrained what constitutes a financial interest in infringement.

1. The touchstone of vicarious liability is the principle that the cost of copyright infringement should fall upon the entity that benefits from it and has the ability to to police it. *See* Pet. 29-31. Vicarious liability emerged from the "dance hall" cases from the 1920s, where proprietors of dance halls were liable for infringement when they hired bands that performed infringing music. *Shapiro*, 316 F.2d at 307; *see also* Pet. 13-14. The proprietors were liable because of their ability to exercise control over the bands' infringement, and because the bands' activity—performing music, both infringing and non-infringing—"provide the proprietor with a source of customers and enhanced income" from the dance hall as a whole. *Shapiro*, 316 F.2d at 307.

In a seminal case from the 1960s, the Second Circuit explained the principles underlying vicarious liability when applying it to a department store chain where infringing records were sold by an independent concessionaire, who paid a commission to the department store on all records sold, "whether 'bootleg' or legitimate." *Id.* at 308. The court explained that "the imposition of vicarious liability … cannot be deemed unduly harsh or unfair" because the department store "has the power to police carefully the conduct of its concessionaire." *Id.* The copyright judgment against the store would "simply encourage it to do so, thus placing responsibility where it can and should be effectively exercised." *Id.*

Shapiro's reasoning, especially its reliance on the store's ability to police the concessionaire's infringing

conduct, comports with the historic rationale for vicarious liability, which has roots in enterprise theory. *Polygram Int'l Publ'g, Inc. v. Nev./TIG, Inc.*, 855 F. Supp. 1314, 1325 (D. Mass. 1994). Enterprise theory explains how "[w]hen an individual seeks to profit from an enterprise in which identifiable types of losses [such as infringement] are expected to occur, it is ordinarily fair and reasonable to place responsibility for those losses on the person who profits." *Id.* This has the "added benefit of creating a greater incentive for the enterprise to police its operations." *Id.*; *cf. A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001) ("To escape imposition of vicarious liability, the reserved right to police must be exercised to its fullest extent.").

Because vicarious liability exists, at common law, to ensure that enterprises that profit from infringement pay for it, the financial-interest component has long been measured at the enterprise level, too. If the business expects its commercial success to be aided by infringing activity, then it possesses the requisite financial interest in infringement. This financial interest (together with the requisite authority, not at issue in this case) yields the corresponding obligation to police against infringement. Failure to meet that obligation, and allowing the infringing activity to go unchecked, may financially benefit the enterprise, but also exposes it to vicarious liability. In breaking the link between enterprise profit and obligation-to-police, the Fourth Circuit's decision represents an about-face from a century's worth of copyright law.

2. Until the Fourth Circuit's decision here (except for a few district court decisions, *see* Pet. 23-25), financial interest has been a flexible test that is satisfied by a causal link between the infringing activity and any direct financial benefit to the enterprise, including—but not limited to—showing that the availability of the infringing work to the enterprise's customers is *part* of what attracts or "draws" customers to the enterprise. The Fourth Circuit's holding that there is no qualifying financial interest unless "copyright infringement draws customers to the defendant's service or incentivizes them to pay more," Pet. App. 16a, narrows the traditional common law rule in two indefensible ways. First, financial interest in infringement isn't limited to situations where infringement is a "draw." Second, the Fourth Circuit's apparent conception of "draw" as limited to situations where the infringing actitity is the *sole* attraction for customers is contrary to the well-established contours of the doctrine.

a. Draw emerged as a way to *extend* vicarious liability, not to cabin it. Return to the department store that received a percentage of every record sale from its concessionaire (whether infringing or not). Now suppose the department store ran the numbers and figured it could make the same revenue (or more) if it classified concessionaires into tiers based on their average sales and charged a different flat fee for each tier, with the concessionaires with the highest sales—who also tended to be the ones who sold the most bootleg records—paying more. Same amount of infringing activity, contributing about the same amount of revenue to the store's bottom line, just

structured differently. In that circumstance, does it make sense for vicarious liability to evaporate?

No. In *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996), the operator of a flea market where vendors sold "bootleg" copies of music recordings tried just this tactic. It argued that it obtained no direct financial benefit from its vendors' infringement because it received no revenue "directly tied to the sale of particular infringing items." *Fonovisa*, 76 F.3d at 263. Instead, it received flat fees from all vendors and those who entered the market. *Id.* Harkening back to the dance-hall cases, the Ninth Circuit held that it was enough that the market operator "reap[ed] substantial financial benefits from admission fees, concession stand sales and parking fees, all of which flow directly from customers who want to buy the counterfeit recordings at bargain basement prices." *Id.* The court explained that this conclusion was "fortified" by the fact that the infringing conduct "enhance[d] the attractiveness of the [market] to potential customers." *Id.* The court thereby crystallized the concept of "draw," whereby financial interest can be shown when infringing activity (mixed in among all kinds of non-infringing activity) makes the defendant's services more attractive to potential customers. *Id.*

But draw has never been the only way to establish a financial interest in infringement. Patrons likely did not go to the racetrack to hear the music played between races, but the track's business nonetheless profited from infringing music that entertained patrons who were not "absorbed in watching the races." *Famous Music Corp. v. Bay State*

Harness Horse Racing & Breeding Ass'n, Inc., 554 F.2d 1213, 1214 (1st Cir. 1977). Supplement buyers didn't visit a biotech company's website seeking infringing photos of stem cells, but the business nonetheless profited from the photos because they lent legitimacy to the company's products and thus encouraged sales. *Leonard v. Stemtech Int'l Inc.*, 834 F.3d 376, 389 (3d Cir. 2016). Draw is "sufficient" to establish a financial interest in infringing activity, *Ellison v. Robertson*, 357 F.3d 1072, 1078 (9th Cir. 2004)—but not necessary.

b. The Fourth Circuit's conception of "draw" is also far too narrow. Because of its tunnel vision on profit from the "copyright infringement itself," Pet. App. 17a, as opposed to profit from the business in which the infringement occurs, the Fourth Circuit effectively cabined "draw" to situations where the infringing activity was the *sole* reason certain customers were drawn to Respondents' services. Repeatedly emphasizing that subscribers pay higher prices for faster data for both infringing and non-infringing purposes, the Fourth Circuit appeared to reason that this dual purpose alone negated any financial interest in the higher monthly revenues generated by data-hungry repeat infringers whom Cox declined to terminate because it benefited from their monthly fees. Pet. App. 18a-19a.

But it has long been the rule that financial interest is present even when infringing activity is only part of the reason that a business is attractive to consumers or makes commercial gains. There is no "quantification requirement" for "any financial benefit a defendant reaps." *Ellison*, 357 F.3d at 1078-79. A

sufficient financial interest can be shown even where "infringing material" is "not the primary, or even a significant draw" for subscribers. *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 99 (2d Cir. 2016).

At bottom, financial interest is—or was, before the Fourth Circuit struck out on its own (wrong) path—a flexible concept designed to impose incentives to police infringement on those whose businesses profit from infringement, and could stop it, but choose not to. Vicarious liability thus counterbalances the incentive that would otherwise be present (and in fact operated here) to let infringement continue because of the revenues it generated. *See, e.g.*, Pet. App. 60a-61a (describing testimony that Cox "looked at customers' monthly payments when considering whether to terminate them for infringement").

B. The Fourth Circuit's Minority Rule Provides a Roadmap to Profit from Infringement.

Absent review, the Fourth Circuit's blinkered construction of financial interest will eviscerate crucial protections for copyright owners suffering from online piracy. Given the staggering scope of digital copyright infringement, vicarious liability for those who profit from, and decline to police, others' infringement is crucial for meaningful protection of copyrights online.[2] Yet the Fourth Circuit's rule

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[2] For peer-to-peer networks sharing infringing material, only the internet service provider is able to identify the direct infringer. *See* Pet. App. 8a-9a.

makes it easy for internet service providers to avoid such liability.

The Fourth Circuit's recipe for avoiding vicarious liability while continuing to collect higher revenues from infringing subscribers is easy to follow: (1) provide internet access that can be used for infringing or non-infringing activity (always true); (2) charge tiered flat fees (in as many tiers you want, so data-hungry infringers still pay more); and (3) be especially lenient to repeat infringers and retain those subscribers to keep their higher monthly payments, but don't advertise your leniency. Those who benefit from it can spread the word for you. Let the infringement happen, and enjoy the freedom from vicarious liability all the way to the bank.[3]

Any internet service provider could follow that roadmap, and let infringement run rampant on their platforms, while benefitting from maintaining the resulting higher subscriber count and higher data fees. And the profits will keep rolling in even though this scenario should fall squarely within the "circumstances in which it is just to hold one individual accountable for the actions of another." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464

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[3] The need to clarify and reinforce the vicarious liability standard is especially pronounced in this dispute, where Cox is also challenging the Fourth Circuit's holding that a jury properly found Cox liable for willful contributory infringement. *See* Pet. No. 24-171. Cox's petition does not merit review. But if Cox prevails in pursuing that argument and the Fourth Circuit's holding on vicarious liability stands, Cox could escape liability altogether notwithstanding its role as the only party capable of stopping the infringement on its network.

U.S. 417, 435 (1984). Shorn of the modern technology, Cox's financial interest in customers who are interested in infringing music is much like the paradigmatic vicarious infringers—dance halls where the band's performance of music (including infringing music) makes the dance hall more attractive to customers. *Id.* at 437 n.18.

Closing its eyes to this financial interest in permitting infringement for business gain, the Fourth Circuit substituted a profit-from-infringement-itself needle that is near-impossible to thread. Even for the paradigmatic dance hall—or modern-day bar. Suppose a person stops in for a drink. He just wants to catch up with friends; he knows the bar has live music, but not which band is playing, what music they plan to perform, or whether the performance is infringing. As it turns out, the performance is good, the band is playing some of his favorite music, and the vibe is energizing. He and his friends decide to stay a little longer and order a second round of drinks and some appetizers to enjoy the scene. They didn't go to the bar specifically for the music, the music wasn't the only thing that convinced them to stay later at the bar, and they didn't pay the bar anything at all for the music—they paid the same for their food and drinks as they would have on a night with no band. Nonetheless, making the music available worked just as the bar hoped it would, aiding the bar's commercial success. If the bar owner has sufficient ability to control the band, and the band played some infringing music, the bar owner should be vicariously liable—and would be, under the majority rule going back to the 1920s.

But not, now, in the Fourth Circuit. Under the rule announced in this case, because the patrons were neither drawn to the bar specifically (and solely) because of infringing music nor paid more for that music, there will be no vicarious liability exposure—even though the bar owner benefited financially from the infringement and could have prevented it. That even a dance hall wouldn't pass the Fourth Circuit's test is a strong indicator that the decision starkly curtails vicarious liability, making this Court's review urgently needed.

Online piracy in the U.S. alone is responsible for tens of billions in lost income for musicians, songwriters, filmmakers, and other creators. Ash Johnson, *22 Years After the DMCA, Online Piracy Is Still a Widespread Problem*, Info. Tech. & Innovation Found. (Feb. 7, 2020), https://tinyurl.com/57u5zkk8. Its costs fall on rightsholders of all types and sizes, from major record companies and large publishers to independent labels, individual songwriters, and authors that often lack the resources or ability to pursue direct infringers. Such cases are often near-impossible in the digital era, anyway—making it all the more crucial that vicarious liability provide the incentive for those who profit from infringement to exercise their ability to stop it. The vicarious-liability-free-infringement door opened by the Fourth Circuit should quickly be shut by this Court.

II. Review Is Crucial to Protect the Balance Struck by Congress in the DMCA.

There is nothing special about internet service providers that justifies the Fourth Circuit's

curtailment of vicarious liability. Especially because Congress has already specifically addressed the balance between protecting copyright holders while shielding internet service providers from unwarranted liability in the DMCA. Thus, any concerns about difficulties of policing given the ease of infringement have already been addressed by the balance Congress struck. That balance starts from the premise that internet service providers would face vicarious liability under traditional common law principles, and provides them a safe harbor affirmative defense if and when they meet certain reasonable requirements. DMCA safe harbor requirements vary depending on the online services provided. *See* 17 U.S.C. § 512(a)-(d); *Section 512 of Title 17*, U.S. Copyright Office, https://tinyurl.com/68thya5e. But one key element applicable across the board is adopting and "reasonably implement[ing]" a repeat-infringer termination policy. 17 U.S.C. § 512(i).

An earlier case conclusively determined that Cox did not qualify for that safe harbor. Pet. App. 39a n.4. But by shielding internet service providers generally from vicarious liability, the Fourth Circuit has effectively rendered that earlier ruling irrelevant. If Cox has no vicarious liability exposure, it has no need for the DMCA or any incentive to comply with the minimal requirements for safe harbor eligibility. That

upends the balance struck by Congress and weighs heavily in favor of this Court's review.[4]

Congress wanted to shield responsible internet service providers—those (unlike Cox) who took action to police infringement—from being held monetarily liable for nothing more than "receiving a one-time set-up fee and flat periodic payments for service from a person engaging in infringing activities." S. Rep. No. 105-190, at 44 (1998). At the same time, the safe harbor reflects the enterprise theory that underpins vicarious liability, "preserv[ing] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements," *id.* at 20, so that people "who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others [] know that there is a realistic threat of losing that access." H.R. Rep. No. 105-551, pt. 2, at 61 (1998).

In adopting the repeat-infringer-policy requirement, Congress understood that vicarious liability would otherwise be possible for internet service providers under traditional common law principles. *See* S. Rep. No. 105-190, at 19 ("[T]he Committee decided to leave current law [including vicarious liability] in its evolving state."); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 538 (2013) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)) ("Statutes which invade the common law

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[4] Of course, failure to qualify for the DMCA's safe harbor does not automatically mean that an internet service provider will be liable. Every element of the common law claim must still be proven.

... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.”).

The Fourth Circuit’s demand for specific revenue generated directly by an infringing act excused Cox from vicarious liability based on common features of internet service, like flat fees and the intermingling of legitimate and infringing uses. *See* Pet. App. 18a-19a. If the Fourth Circuit’s test were right, Congress would hardly have had reason to create a safe harbor from vicarious liability (and internet service providers would have no incentive to comply with its requirements), because few if any internet service providers would ever satisfy the narrowed financial interest test. But Congress *did* create a safe harbor, recognizing that standard features of providing internet service could otherwise give rise to vicarious liability under the common law, not excuse it.

Congress hinged its safe harbor on the internet service provider’s demonstration of willingness to terminate repeat offenders—precisely the step Cox refused to take because the repeat infringers brought in revenue, and more than most. *See* Pet. App. 16a, 18a. The DMCA’s repeat-infringer-policy requirement is “essential to maintain[ing] the strong incentives for service providers to prevent their services from becoming safe havens or conduits for known repeat copyright infringers.” *Capitol Records, Inc. v. MP3Tunes, LLC*, 821 F. Supp. 2d 627, 637 (S.D.N.Y. 2011) (quoting *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1178 (C.D. Cal. 2002)). Consistent with the mindset displayed in this case—

as one Cox employee wrote in an email, "F the dmca!!!" Pet. App. 44a—Cox fell far wide of the mark on its repeat-infringer-policy during the infringement timeframe here. *See* Pet. App. 39a n.4.

Specifically, Cox adopted a "thirteen-strike" policy and then "made every effort to avoid reasonably implementing that policy." *BMG Rights Mgmt. (US) LLC v. Cox Commc'n, Inc.*, 881 F.3d 293, 303 (4th Cir. 2018). Cox "very clearly determined *not* to terminate subscribers who in fact repeatedly violated the policy." *Id.* In the relevant timeframe, Cox "*never* terminated a subscriber for infringement without reactivating them." *Id.* Why? Profit. *See, e.g.*, *id.* at 305 (declining to terminate a "customer [who] pays us over $400/month"); Pet. App. 16a ("This customer will likely fail again, but let's give him one more chan[c]e. [H]e pays 317.63 a month."). The very same profit that deterred Cox from terminating known infringers should have counted as a direct financial interest—and would have counted in any other court of appeals.

Because the Fourth Circuit does not count that profit as sufficient, its approach effectively confers the benefits of the DMCA safe harbor (no monetary liability), while jettisoning the requirements for that benefit (taking minimal steps to curb online infringement). It thereby destroys the incentive to guard against infringement that Congress created in the DMCA, reinforcing the urgent need for review.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted.

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