

No. 24-171

IN THE
Supreme Court of the United States

COX COMMUNICATIONS, INC. AND COXCOM, LLC,

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 IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Fourth Circuit err in affirming the jury's verdict that an internet service provider was contributorily liable for copyright infringement, when the provider knew that specific subscribers were using its service to flagrantly infringe and continued to supply those repeat infringers with service?

2. Consistent with common-law principles this Court has recognized, every court that has considered the question holds that a defendant can be held liable for willfully violating the Copyright Act when the defendant either knew that his conduct constituted copyright infringement or acted in reckless disregard of the copyright holder's rights.

Did the Fourth Circuit err in upholding a jury instruction allowing the jury to find willfulness if "Cox had knowledge that its subscribers' actions constituted infringement of plaintiffs' copyrights, acted with reckless disregard for the infringement of plaintiffs' copyrights, or was willfully blind to the infringement of plaintiffs' copyrights"?

PARTIES TO THE PROCEEDING

Petitioners in this Court are Cox Communications, Inc. and CoxCom, LLC.

Respondents are Sony Music Entertainment; Arista Music; Arista Records, LLC; LaFace Records LLC; Provident Label Group, LLC; Sony Music Entertainment US Latin LLC; Volcano Entertainment III, LLC; Zomba Recordings LLC; Sony Music Publishing (US) LLC (f/k/a Sony/ATV Music Publishing LLC); EMI Al Gallico Music Corp.; EMI Algee Music Corp.; EMI April Music Inc.; EMI Blackwood Music Inc.; Colgems-EMI Music Inc.; EMI Consortium Music Publishing Inc., d/b/a EMI Full Keel Music; EMI Consortium Songs, Inc., d/b/a EMI Longitude Music; EMI Feist Catalog Inc.; EMI Miller Catalog Inc.; EMI Mills Music, Inc.; EMI Unart Catalog Inc.; EMI U Catalog Inc.; Jobete Music Co., Inc.; Stone Agate Music; Screen Gems-EMI Music, Inc.; Stone Diamond Music Corp.; Atlantic Recording Corporation; Bad Boy Records LLC; Elektra Entertainment Group Inc.; Fueled by Ramen LLC; Roadrunner Records, Inc.; Warner Records Inc. (f/k/a Warner Bros. Records Inc.); Warner-Tamerlane Publishing Corp.; W Chappell Music Corp., d/b/a WC Music Corp. (f/k/a WB Music Corp.); Unichappell Music Inc.; Rightsong Music Inc.; Cotillion Music, Inc.; Intersong U.S.A., Inc.; Warner Chappell Music, Inc. (f/k/a Warner/Chappell Music, Inc.); W.C.M. Music Corp. (f/k/a W.B.M. Music Corp.); UMG Recordings, Incorporated; Capitol Records, LLC; Universal Music Corporation; Universal Music-MGB NA LLC; Universal Music Publishing Inc.; Universal Music Publishing AB; Universal Publishing Limited; Universal Music Publishing MGB Limited; Universal Music – Z Tunes LLC; Universal/Island

Music Limited; Universal/MCA Music Publishing Pty. Limited; Polygram Publishing, Inc.; and Songs of Universal, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents are Sony Music Entertainment; Arista Music; Arista Records, LLC; LaFace Records LLC; Provident Label Group, LLC; Sony Music Entertainment US Latin LLC; Volcano Entertainment III, LLC; Zomba Recordings LLC; Sony Music Publishing (US) LLC (f/k/a Sony/ATV Music Publishing LLC); EMI Al Gallico Music Corp.; EMI Algee Music Corp.; EMI April Music Inc.; EMI Blackwood Music Inc.; Colgems-EMI Music Inc.; EMI Consortium Music Publishing Inc., d/b/a EMI Full Keel Music; EMI Consortium Songs, Inc., d/b/a EMI Longitude Music; EMI Feist Catalog Inc.; EMI Miller Catalog Inc.; EMI Mills Music, Inc.; EMI Unart Catalog Inc.; EMI U Catalog Inc.; Jobete Music Co., Inc.; Stone Agate Music; Screen Gems-EMI Music, Inc.; and Stone Diamond Music Corp. are wholly-owned, indirect subsidiaries of Sony Group Corporation, which is a publicly-held company organized under the laws of Japan. No publicly-held company owns more than 10% of Sony Group Corporation's stock.

Respondents Atlantic Recording Corporation; Elektra Entertainment Group Inc.; Fueled by Ramen LLC; Roadrunner Records, Inc.; Warner Records Inc. (f/k/a Warner Bros. Records Inc.); Warner-Tamerlane Publishing Corp.; W Chappell Music Corp., d/b/a WC Music Corp. (f/k/a WB Music Corp.); Unichappell Music Inc.; Rightsong Music Inc.; Cotillion Music, Inc.; Intersong U.S.A., Inc.; Warner Chappell Music, Inc. (f/k/a Warner/Chappell Music, Inc.); and W.C.M. Music Corp. (f/k/a W.B.M. Music Corp.); are wholly-owned, indirect subsidiaries of Warner Music Group Corp., a publicly traded company with more than ten percent (10%) of its stock owned by AI Entertainment

Holdings LLC and certain of its subsidiaries, which are not publicly traded companies.

Respondent Bad Boy Records LLC is a joint venture in which Atlantic Recording Corporation, an indirectly wholly-owned subsidiary of Warner Music Group Corp., holds a fifty percent (50%) interest. Bad Boy Records, which is not a publicly traded company, holds the remaining fifty percent (50%) interest in Bad Boy Records LLC.

Respondents UMG Recordings, Incorporated; Capitol Records, LLC; Universal Music Corporation; Universal Music-MGB NA LLC; Universal Music Publishing Inc.; Universal Music Publishing AB; Universal Publishing Limited; Universal Music Publishing MGB Limited; Universal Music – Z Tunes LLC; Universal/Island Music Limited; Universal/MCA Music Publishing Pty. Limited; Music Corporation of America, Inc., d/b/a Universal Music Corp.; Polygram Publishing, Inc.; and Songs of Universal, Inc. are wholly owned indirect subsidiaries of Universal Music Group N.V., a Netherlands public limited company. Compagnie de Cornouaille SAS and PS VII Master, L.P. own more than 10% of Universal Music Group N.V.'s stock. No other company owns 10% or more of Universal Music Group N.V.'s stock.

STATEMENT OF RELATED CASES

U.S. Supreme Court:

- *Sony Music Entertainment, et al., v. Cox Communications, Inc. and CoxCom, Inc.*, No. 24-181 (Aug. 16, 2024) (petition for a writ of certiorari)

U.S. Court of Appeals for the Fourth Circuit:

- *Sony Music Entertainment, et al. v. Cox Communications, Inc. and CoxCom, LLC*, No. 22-1451 (appeal of a post-trial ruling under Federal Rule of Civil Procedure 60(b)) (judgment not yet entered)
- *Sony Music Entertainment, et al. v. Cox Communications, Inc. and CoxCom, LLC*, No. 21-1168 (Feb. 20, 2024) (decision below)

U.S. District Court for the Eastern District of Virginia:

- *Sony Music Entertainment, et al. v. Cox Communications, Inc. and CoxCom, LLC*, No. 1:18-cv-00950-LFO-JFA (March 23, 2022) (order denying relief under Federal Rule of Civil Procedure 60(b))

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE STATEMENT	iv
STATEMENT OF RELATED CASES	vi
TABLE OF AUTHORITIES.....	ix
INTRODUCTION.....	1
STATEMENT	3
REASONS FOR DENYING THE PETITION.....	9
I. THE FOURTH CIRCUIT’S MATE- RIAL-CONTRIBUTION HOLDING DOES NOT BREAK WITH ANY OTHER CIRCUIT AND IS CORRECT	9
A. There Is No Split	9
B. The Fourth Circuit’s Contributory-Liability Holding Is Consistent With This Court’s Precedents	14
1. The Decision Below Is Consistent With <i>Grokster</i>	14
2. The Decision Below Does Not Break From <i>Twitter</i>	20
II. THE FOURTH CIRCUIT’S WILLFULNESS STANDARD DOES NOT SPLIT WITH ANY COURT AND IS CORRECT	24
A. There Is No Split	24

TABLE OF CONTENTS—Continued

	<u>Page</u>
B. The Fourth Circuit’s Willfulness Standard Is Consistent With This Court’s Precedents And With The Federal Copyright Enforcement Scheme.....	28
III. THIS IS A POOR VEHICLE TO REVIEW ISSUES OF LIMITED PRACTICAL EFFECT.....	31
A. Cox’s Petition Is A Poor Vehicle For This Court’s Review.....	31
B. Cox’s Attempts To Inflate The Importance Of The Fourth Circuit’s Material-Contribution Holding Fail.....	32
C. To The Extent The Material-Contribution Question Is Recurring, That Favors Allowing Further “Percolation”	33
CONCLUSION	35

TABLE OF AUTHORITIES

	<u>Page(s)</u>
CASES:	
<i>Arizona v. Evans</i> , 514 U.S. 1 (1995).....	34
<i>BMG Rts. Mgmt. (US) LLC v. Cox Comm’ns, Inc.</i> , 881 F.3d 293 (4th Cir. 2018).....	3, 4, 5, 6, 7, 15, 17, 19, 25, 28, 29
<i>Doe v. GTE Corp.</i> , 347 F.3d 655 (7th Cir. 2003).....	23
<i>EMI Christian Music Group, Inc. v. MP3Tunes, LLC</i> , 844 F.3d 79 (2d Cir. 2016)	10
<i>F. W. Woolworth Co. v. Contemp. Arts</i> , 344 U.S. 228 (1952).....	33
<i>Flava Works, Inc. v. Gunter</i> , 689 F.3d 754 (7th Cir. 2012).....	14
<i>Gershwin Pub. Corp. v. Columbia Artists Management, Inc.</i> , 443 F.2d 1159 (2d Cir. 1971)	5, 11, 14, 30
<i>Greer v. Moon</i> , 83 F.4th 1283 (10th Cir. 2023)	12
<i>Henry v. A.B. Dick Co.</i> , 224 U.S. 12 (1912).....	17
<i>In re Frontier Comm’ns Corp.</i> , 658 B.R. 277 (Bankr. S.D.N.Y. 2024)	12, 21

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
<i>Lyons P'ship, L.P. v. Morris Costumes, Inc.</i> , 243 F.3d 789 (4th Cir. 2001).....	24
<i>Maslenjak v. United States</i> , 582 U.S. 335 (2017).....	34
<i>Matthew Bender & Co. v. West Publishing Co.</i> , 158 F.3d 693 (2d Cir. 1998)	11, 14
<i>MCA Television Ltd. v. Feltner</i> , 89 F.3d 766 (11th Cir. 1996).....	28
<i>Metro-Goldwyn-Mayer Studios, Inc. v. Grokster</i> , 545 U.S. 913 (2005).....	1, 2, 5, 7, 11, 12, 15, 16, 17, 18, 19
<i>Perfect 10, Inc. v. Amazon, Inc.</i> , 508 F.3d 1146 (9th Cir. 2007).....	9, 10, 11, 14, 18
<i>Perfect 10, Inc. v. Giganews, Inc.</i> , 847 F.3d 657 (9th Cir. 2017).....	10
<i>Perfect 10, Inc. v. Visa Intern. Service Ass'n</i> , 494 F.3d 788 (9th Cir. 2007).....	9, 10, 11
<i>RCA/Ariola International, Inc. v. Thomas & Grayston Co.</i> , 845 F.2d 773 (8th Cir. 1988).....	24, 25, 27, 30
<i>Safeco Ins. Co. of Am. v. Burr</i> , 551 U.S. 47 (2007).....	28, 30
<i>Shapiro, Bernstein & Co. v. H.L. Green Co.</i> , 316 F.2d 304 (2d Cir. 1963)	5

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
<i>Sony Corp. of America v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984).....	11, 15, 17
<i>Sony Music Ent. v. Cox Comm’ns, Inc.</i> , 426 F. Supp. 3d 217 (E.D. Va. 2019)	6
<i>Twitter, Inc. v. Taamneh</i> , 598 U.S. 471 (2023).....	2, 20, 22
<i>UMG Recordings, Inc. v. Grande Communications Network Inc.</i> , No. 23-50162 (5th Cir. Oct. 9, 2024)..	18, 21, 23, 34
<i>UMG Recordings, Inc. v. Verizon Comm’ns Inc.</i> , No. 1:24-cv-5285 (S.D.N.Y. Sept. 5, 2024).....	21
<i>Unicolors, Inc. v. Urban Outfitters, Inc.</i> , 853 F.3d 980 (9th Cir. 2017).....	24
<i>VHT, Inc. v. Zillow Group, Inc.</i> , 918 F.3d 723 (9th Cir. 2019).....	10
<i>Warner Records, Inc. v. Altice USA, Inc.</i> , No. 2:23-cv-576 (E.D. Tex. Sept. 12, 2024).....	22
<i>Yellow Pages Photos, Inc. v. Ziplocal, LP</i> , 795 F.3d 1255 (11th Cir. 2015).....	24
<i>Zomba Enters., Inc. v. Panorama Records, Inc.</i> , 491 F.3d 574 (6th Cir. 2017).....	24, 28

TABLE OF AUTHORITIES—Continued

	<u>Page(s)</u>
STATUTES:	
17 U.S.C. § 504(1)-(2)	6
17 U.S.C. § 512(a).....	5
17 U.S.C. § 512(i)(1)(A)	5, 33
OTHER AUTHORITIES:	
5 <i>Nimmer on Copyright</i> § 14.04[B][3][a] (2024).....	24, 28
Alfred C. Yen, <i>Torts and Construction of Inducement and Contributory Liability in Amazon and Visa</i> , 32 Colum. J.L. & Arts 513 (2009).....	14
Mark Bartholomew & Patrick F. McArdle, <i>Causing Infringement</i> , 64 Vand. L. Rev. 675 (2011)	13
Restatement (Second) of Torts (1965)	16
Restatement (Third) of Torts (2010).....	16, 19

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BRIEF IN OPPOSITION

INTRODUCTION

Cox has presented two different questions for this Court's review. Neither is worthy of it.

Cox's first question presented concerns the proper standards governing material contribution, one element of contributory liability for copyright infringement. The Fourth Circuit began its material-contribution analysis by quoting the very rule Cox invokes: "[I]n the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial noninfringing uses." *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 545 U.S. 913, 939 n.12 (2005); *see* Pet. App. 27a. And the

Fourth Circuit’s conclusion that “[s]upplying a product with knowledge that the recipient will use it to infringe copyrights” is sufficient to find liability in light of “the common law rule that a person is presumed to intend the substantially certain results of his act,” Pet. App. 27a, is rooted in *Grokster* itself.

Cox’s asserted “three-way” split over the proper material-contribution standard is neither “three-way” nor a “split.” Cox cites cases from the Ninth Circuit that Cox itself successfully urged the Fourth Circuit to reject as inapposite; a Second Circuit case that does not concern material contribution; a Second Circuit case that applied a rule this Court has since rejected; and a Tenth Circuit case that is on all fours with the decision below.

Cox’s argument that the Fourth Circuit’s holding conflicts with *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023), is equally bereft of merit. *Twitter* concerned the meaning of “aiding and abetting” in the context of the Justice Against Sponsors of Terrorism Act. Even if *Twitter* did apply here, Cox’s conduct easily satisfies the requirement of “knowing and substantial assistance.” *Id.* at 491. Cox knew that specific users were repeatedly infringing Plaintiffs’ copyrights and would continue to do so. Cox responded by repeatedly loosening and refusing to enforce its termination “policy,” choosing instead—over and over again—to protect its own profits by continuing to provide high-speed internet service to infringing users. *See* Pet. App. 29a.

Cox’s second question presented has to do with the willfulness standard for secondary liability. But its claimed one-to-one split with the Eighth Circuit relies on an unfortunate misreading of that case. Cox also concedes its second question away by recognizing that

willfulness can be alternatively shown with evidence that the defendant recklessly disregarded the law. *See* Pet. 32-33. And the jury instruction here allowed the jury to find that Cox acted willfully if it acted in a way that falls into the heartland of recklessness: contributing to conduct Cox *knew* constituted copyright infringement.

Finally, this is a poor vehicle to address either of Cox's two questions presented. Neither of Cox's issues are outcome-determinative; Cox would be liable for willfully committing contributory infringement under even Cox's fictitious standards. And Cox's contrived arguments about the tenuous state of the internet are both wrong and disingenuous. Cox has no problem severing the "internet lifeline for tens of thousands of homes and businesses," Pet. 2, when its own revenue is on the line: Cox terminated over 600,000 subscribers for failure to pay their bills during the two-year period relevant here. During that same period, it terminated 32 subscribers for copyright infringement.

This Court should deny the petition.

STATEMENT

1. Plaintiffs hold the copyrights to many of the most recognizable songs in the world. Those songs are frequently pirated on online peer-to-peer platforms—a type of technology that fosters a staggering amount of infringement. *See* Pet. App. 8a-9a; *BMG Rts. Mgmt. (US) LLC v. Cox Comm'ns, Inc.*, 881 F.3d 293, 298-299 (4th Cir. 2018) (explaining two of these platforms).

For several years, the Recording Industry Association of America (RIAA) monitored these peer-to-peer platforms and sent internet service providers like Cox infringement notices when subscribers unlawfully distributed or downloaded Plaintiffs' works. *See* Pet.

App. 8a-9a. The RIAA ultimately sent Cox more than 160,000 of these notices during the relevant time period. *See* Pet. App. 9a.

Cox responded—but not in the way you might expect. First, it loosened its copyright-enforcement policies; then, it refused to enforce them altogether. *See id.* Cox “capped the number of notices it would accept from RIAA.” *Id.* Cox relaxed its termination policy to give an infringer *13 strikes* before Cox would terminate that user’s internet. *Id.*; *see also* *BMG*, 881 F.3d at 303-305. Cox actually gave infringers 14 strikes because it “took no action on the first” infringement notice “for each subscriber.” Pet. App. 9a. Cox also developed an “unwritten semi-policy” of terminating and then immediately reactivating infringers’ accounts, which gave those infringers a clean slate—and Cox more money. *See* CA4 J.A. 1484-85 (Vol. V) (terminating and reactivating serial infringers’ service so that Cox could “collect a few extra weeks of payments for their account ;-”).

Cox eventually shifted away from its termination-reactivation semi-policy. Instead, Cox simply stopped terminating infringing subscribers. *See* Pet. App. 119a (noting 20 terminations for copyright infringement despite receiving 5.8 million notices during 22-month period). Again and again, when faced with the decision whether to terminate a serial infringer, Cox opted instead to keep the subscription revenues rolling. *See* Pet. App. 17a (“This customer will likely fail again, but let’s give him one more chan[c]e. * * * [H]e pays 317.63 a month.”); Pet. App. 120a (“This Customer pays us over \$400/month and if we terminate their * * * internet service, they will likely cancel the rest of their services”).

2. In 2018, Plaintiffs sued Cox for contributory and vicarious infringement of over 10,000 copyrighted sound recordings and musical compositions.

The two forms of secondary liability for copyright infringement “emerged from common law principles and are well established in the law.” *Grokster*, 545 U.S. at 930. One “infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.” *Id.* (citing *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963)). “One infringes contributorily by intentionally inducing or encouraging direct infringement.” *Id.* (citing *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)).

As an internet service provider, Cox could have avoided a secondary-liability lawsuit altogether. In the Digital Millennium Copyright Act (DMCA), Congress immunized online service providers from copyright liability—as long as they can show that they “adopted and reasonably implemented * * * a policy that provides for the termination in appropriate circumstances of subscribers * * * who are repeat infringers.” 17 U.S.C. § 512(a), (i)(1)(A). This statutory safe harbor was unavailable to Cox, however; the Fourth Circuit had already concluded that Cox failed “to enforce the terms of its policy in any meaningful fashion.” *BMG*, 881 F.3d at 303; *see supra* p. 4; CA4 J.A. 1496 (Vol. V) (head of Cox’s copyright-enforcement efforts announcing “F the dmca!!!” to his team). Because Plaintiffs’ case concerned Cox’s conduct during the same timeframe, “Cox face[d] the secondary liability claims here without that protection.” Pet. App. 8a.

The District Court ruled on summary judgment that “[n]o genuine issue of material fact remains” as to “the knowledge element” of contributory infringement, because RIAA’s infringement notices showed that Cox had “knowledge of specific conduct which allegedly infringed all sound recordings and musical compositions identified in suit.” *Sony Music Ent. v. Cox Comm’ns, Inc.*, 426 F. Supp. 3d 217, 233 (E.D. Va. 2019). The remaining issues went to a jury.

After twelve days of trial, the jury found Cox liable for both contributory infringement and vicarious infringement. Pet. App. 10a. The jury also found that Cox’s conduct was “willful,” triggering enhanced statutory damages under the Copyright Act. *See id.*; 17 U.S.C. § 504(c)(1)-(2). The relevant jury instruction tethered willfulness to whether “Cox had knowledge that its subscribers’ actions constituted infringement of plaintiffs’ copyrights, acted with reckless disregard for the infringement of plaintiffs’ copyrights, or was willfully blind to the infringement of plaintiffs’ copyrights.” CA4 J.A. 804 (Vol. II) (Aug. 27, 2021). The Fourth Circuit had previously upheld that instruction in *BMG*. *See BMG*, 881 F.3d at 312-313 & n.7. The jury awarded Plaintiffs \$1 billion in damages. Pet. App. 11a.

2. The Fourth Circuit affirmed the District Court’s judgment as to willful contributory infringement, reversed as to vicarious liability, and remanded for a new trial on damages. Pet. App. 7a.¹

¹ Plaintiffs have sought certiorari on the Fourth Circuit’s vicarious-liability holding. *See Sony Music Entertainment, et al. v. Cox Communications, Inc.*, No. 24-181 (Aug. 16, 2024).

On appeal, Cox argued that Plaintiffs had failed to establish that Cox was contributorily liable because Plaintiffs failed to show that Cox either knew about or materially contributed to its users' direct infringement. *See* Pet. 20a-21a, 26a n.4. After concluding that Cox had forfeited its knowledge argument, *see* Pet. App. 23a-25a, the Fourth Circuit upheld the contributory-liability verdict, concluding that “[t]he evidence was sufficient to support a finding that Cox materially contributed to copyright infringement occurring on its network and that its conduct was culpable.” Pet. App. 28a.

The Fourth Circuit opened its material-contribution analysis by observing “that ‘mere[] * * * failure to take affirmative steps to prevent infringement’ does not establish contributory liability ‘in the absence of other evidence of intent.’” Pet. App. 27a (quoting *Grokster*, 545 U.S. at 939 n.12). But, the court continued, “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.* As the court explained, “[i]n such a situation, providing the means to infringe *is* culpable pursuant to the common law rule that a person is presumed to intend the substantially certain results of his acts.” *Id.* (citing *BMG*, 881 F.3d at 307). “This accords with principles of aiding and abetting liability in the criminal law.” *Id.*

Applying this standard, the Fourth Circuit concluded that the evidence “showed more than mere failure to prevent infringement.” Pet. App. 28a. As the court summarized:

The jury saw evidence that Cox knew of specific instances of repeat copyright infringement

occurring on its network, that Cox traced those instances to specific users, and that Cox chose to continue providing monthly internet access to those users despite believing the online infringement would continue because it wanted to avoid losing revenue. [Plaintiffs] presented extensive evidence about Cox’s increasingly liberal policies and procedures for responding to reported infringement on its network, which [Plaintiffs] characterized as ensuring that infringement would recur. And the jury could have interpreted internal Cox’s emails and chats as displaying contempt for laws intended to curb online infringement. [*Id.*]

The court recognized that “Cox’s anti-infringement efforts and its claimed success at deterring repeat infringement are also in the record.” *Id.* But the court rejected Cox’s invitation to “weigh the evidence at this juncture.” *Id.* The court accordingly affirmed “the jury’s verdict finding Cox liable for contributory infringement.” *Id.*

3. Cox sought panel rehearing and rehearing en banc on the contributory-infringement and willfulness issues. The Fourth Circuit denied rehearing. Pet. App. 182a.

REASONS FOR DENYING THE PETITION**I. THE FOURTH CIRCUIT'S MATERIAL-CONTRIBUTION HOLDING DOES NOT BREAK WITH ANY OTHER CIRCUIT AND IS CORRECT.****A. There Is No Split.**

The “basic test” for contributory infringement is whether the defendant “(1) has knowledge of another’s infringement and (2) either (a) materially contributes to or (b) induces that infringement.” *Perfect 10, Inc. v. Visa Intern. Service Ass’n*, 494 F.3d 788, 794-795 (9th Cir. 2007). This case concerns the “material contribution” element.

Cox claims there is “a three-way circuit split over whether and under what circumstances an online service provider ‘materially contributes’ to copyright infringement.” Pet. 16. Cox is off base. Cox’s Ninth Circuit cases apply a standard that Cox convinced the Fourth Circuit to not apply in this context. Cox’s Second Circuit cases either do not concern material contribution or apply a rule that this Court has since rejected. Cox’s Tenth Circuit case is in accord with the decision below. And what Cox calls “confusion” in the lower courts concerns issues not relevant here.

Ninth Circuit. Cox argues that the decision below splits with the Ninth Circuit’s “simple measures” standard. *See* Pet. 19-21. Under that test, “a computer system operator can be held contributorily liable if it has actual knowledge that specific infringing material is available using its system and can take simple measures to prevent further damage to copyrighted work, yet continues to provide access to infringing works.” *Perfect 10, Inc. v. Amazon, Inc.*, 508 F.3d 1146,

1172 (9th Cir. 2007) (emphases, quotation marks, and citations omitted). Cox’s argument here is a pure about-face from its position below, where it successfully argued that this standard does not apply in this context.

To quote Cox’s opening Fourth Circuit brief, the Ninth Circuit applies its “simple measures” test “in only one context: where a platform or website knows that its own servers provide ready access to a specific infringing work (e.g., a copyrighted photo).” Cox CA4 Opening Br. 47. The cases Cox cites in its petition bear out that observation: *Perfect 10 v. Amazon*, 508 F.3d at 1172, concerned specific photos accessible on Google’s search-engine results page; and *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 671-672 (9th Cir. 2017), and *VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723, 745-746 (9th Cir. 2019), concerned specific photos on the defendant’s own computer servers. *Compare Perfect 10 v. Visa*, 494 F.3d at 800 (declining to apply “simple measures” test in secondary-infringement case against credit-card companies). Cox argued below that this situation is different because an ISP “can neither remove nor disable access to the infringing material.” Cox CA4 Opening Br. 48 (quotation marks omitted). The Fourth Circuit apparently found these arguments persuasive; it did not even mention the “simple measures” test in its opinion.

Second Circuit. Cox also argues that the decision below splits with two Second Circuit cases. *See* Pet. 17-18. That is wrong as well.

Cox’s “split” is supposedly about “material-contribution standards,” Pet. 16, but its lead-off Second Circuit case, *EMI Christian Music Group, Inc. v. MP3Tunes, LLC*, 844 F.3d 79 (2d Cir. 2016) (discussed at Pet. 17),

was not a material-contribution case. It arose under the inducement strand of contributory infringement: The defendant was alleged to have “personally encouraged” infringement, and the “entire point” of the defendant’s software “was to make more music available” for infringing downloads. *Id.* at 100. Thus, the “rule” the Second Circuit applied—and that Cox quotes on page 17 of its petition—was *Grokster*’s “inducement rule.” *Grokster*, 545 U.S. at 836-937 (emphasis added). But material contribution and inducement are alternative ways of establishing contributory liability. See *Gershwin*, 443 F.2d at 1162 (a contributory infringer is one who “induces, causes, or materially contributes to the infringing conduct of another”); see also, e.g., *Perfect 10 v. Amazon*, 508 F.3d at 1170 n.11 (“*Grokster* did not suggest that a court must find inducement in order to impose contributory liability under common law principles.”); *Perfect 10 v. Visa*, 494 F.3d at 794-795 (explaining that material-contribution and inducement are alternative theories for contributory-infringement liability). *EMI Christian*’s application of this Court’s inducement rule to resolve an inducement case is irrelevant here.

So is Cox’s backup Second Circuit case, *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 693 (2d Cir. 1998). The Second Circuit there read this Court’s decision in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), as holding that “the provision of equipment does not amount to contributory infringement if the equipment is ‘capable of substantial noninfringing uses.’” *Matthew Bender*, 158 F.3d at 706 (quoting *Sony*, 464 U.S. at 442). A few years after *Matthew Bender*, the lower court in *Grokster* read *Sony* the same way. See *Grokster*, 545 U.S. at 934. This Court, however, rejected that “erroneous

understanding of *Sony*,” which merely “limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product.” *Id.* “The *Sony* rule” that Cox touts *Matthew Bender* as applying, Pet. 18, is no longer a valid interpretation of that case. See *In re Frontier Comm’ns Corp.*, 658 B.R. 277, 290 n.8 (Bankr. S.D.N.Y. 2024) (recognizing as much).

Tenth Circuit. Cox contends that the decision below splits with *Greer v. Moon*, 83 F.4th 1283 (10th Cir. 2023), *cert. denied*, 144 S. Ct. 2451 (2024) (mem.). See Pet. 18-19. But the Tenth Circuit in *Greer* and the Fourth Circuit in the decision below applied the same rule: Material contribution requires something “more than ‘a failure to take affirmative steps to prevent infringement.’” *Greer*, 83 F.4th at 1295 (quoting *Grokster*, 545 U.S. at 939 n.12); *accord* Pet. App. 27a (quoting same rule).

In *Greer*, the Tenth Circuit concluded that the *pro se* complaint sufficiently pled material contribution at the motion-to-dismiss stage because the defendant had “mockingly posted” the plaintiff’s repeated requests that the defendant take the plaintiff’s copyrighted works off the defendant’s website. *Greer*, 83 F.4th at 1295. Such conduct, the Tenth Circuit concluded, “amounted to encouragement of [the website] users’ direct copyright infringement.” *Id.*

Here, the Fourth Circuit concluded that Plaintiffs cleared *Grokster*’s bar because the evidence presented to the jury showed that Cox “chose to continue to providing monthly internet access to” specific users it knew were repeat infringers “despite believing the online infringement would continue,” all while repeatedly loosening its “policies and procedures for responding to reported infringement on its network”

and “displaying contempt for laws intended to curb online infringement.” Pet. App. 27a. This affirmative conduct would lead to liability under *Greer*, just as it did below.

Cox’s attempt to wedge the Fourth and Tenth Circuits apart (at 21-22) distorts the decision below. The Fourth Circuit’s careful consideration of *Grokster* was not “lip service.” Pet. 21. The court did not collapse contributory liability’s knowledge and material-contribution prongs; it delineated between the two, discussing each in separate parts of the opinion. Compare Pet. App. 21a-25a (discussion of knowledge) with Pet. App. 25a-28a (discussion of material contribution). And the court’s discussion of Cox’s conduct makes clear that more is required than merely failing “to terminate users at the first allegations of repeat infringement.” Pet. 22.

“Confusion.” Finally, Cox tries to buttress its nonexistent split with a discussion of what it calls the “confusion over what qualifies as material contribution after *Grokster*.” Pet. 22. Any such confusion has nothing to do with the issues in this case.

The 2009 and 2011 law review articles Cox cites focus on the Ninth Circuit’s “simple measures” test. See Mark Bartholomew & Patrick F. McArdle, *Causing Infringement*, 64 Vand. L. Rev. 675, 679-680 & nn.24-28 (2011) (citing only “simple measures” cases);²

² These authors’ proposed solution to this so-called confusion is to “adopt[] the analytical principles of a nonlegal field”—epidemiology. See Bartholomew & McArdle, *supra*, at 680-681. Under these principles, courts would determine whether a defendant’s conduct contributed to an act of infringement by “us[ing] a model permitting causal findings when an act is part of a single

Alfred C. Yen, *Torts and Construction of Inducement and Contributory Liability in Amazon and Visa*, 32 Colum. J.L. & Arts 513, 529-530 (2009). But thanks to Cox’s successful arguments below, the Fourth Circuit ruled that test was irrelevant here. *See supra* pp. 9-10.

Judge Posner’s 2012 decision expressing dissatisfaction with the way the courts have been formulating contributory liability for half a century, *see Gershwin*, 443 F.2d at 1162, does not support Cox’s argument, either. *See* Pet. 22-23 (discussing *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 757 (7th Cir. 2012)). Judge Posner’s preferred formulation—“personal conduct that encourages or assists the infringement,” *id.* at 757 (quoting *Matthew Bender*, 158 F.3d at 706, and citing *Perfect 10 v. Amazon*, 508 F.3d at 1172)—is simply an abbreviation of the *Gershwin* standard. And in any event, Cox’s conduct—choosing to provide internet service to flagrant infringers who Cox knows will continue to infringe, all while mocking copyright law—no doubt “assists” its users’ infringement.

There is no split. This Court should deny the petition.

B. The Fourth Circuit’s Contributory-Liability Holding Is Consistent With This Court’s Precedents.

1. The Decision Below Is Consistent With *Grokster*.

a. This Court has twice addressed contributory infringement. In *Sony*, this Court held that a company

sufficient casual mechanism.” *Id.* at 729. According to the authors, this is “best demonstrated through graphical representations,” i.e., pie charts. *Id.* at 727.

cannot be contributorily liable for copyright infringement for merely selling a commercial product that can be used for infringement but is also “capable of substantial noninfringing uses.” *Sony*, 464 U.S. at 442.

In *Grokster*, this Court clarified that *Sony* does not mean “that whenever a product is capable of substantial lawful use, the producer can never be held contributorily liable for third parties’ infringing use of it.” *Id.* at 934. Instead, this Court explained that such a producer could be held contributorily liable if there was some other evidence of unlawful intent. *See id.* at 934-935. For example, a defendant could be held contributorily liable if it “induces commission of infringement by another.” *Id.* at 935. *Grokster* cautioned that “in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial noninfringing uses.” *Id.* at 939 n.12.

The Fourth Circuit applied *Grokster* to the letter. It noted “that ‘mere[] * * * failure to take affirmative steps to prevent infringement’ does not establish contributory liability ‘in the absence of other evidence of intent.’” Pet. App. 27a (quoting *Grokster*, 545 U.S. at 939 n.12). But “[s]upplying a product with knowledge that the recipient will use it to infringe copyrights is exactly the sort of culpable conduct sufficient for contributory infringement,” in light of “the common law rule that a person is presumed to intend the substantially certain results of his act.” *Id.* (citing *BMG*, 881 F.3d at 307). And in that regard, “[t]he evidence was sufficient to support a finding that Cox materially contributed to copyright infringement occurring on its

network and that its conduct was culpable.” Pet. App. 28a. As the court explained,

The evidence at trial, viewed in the light most favorable to Sony, showed more than mere failure to prevent infringement. The jury saw evidence that Cox knew of specific instances of repeat copyright infringement occurring on its network, that Cox traced those instances to specific users, and that Cox chose to continue providing monthly internet access to those users despite believing the online infringement would continue because it wanted to avoid losing revenue. Sony presented extensive evidence about Cox’s increasingly liberal policies and procedures for responding to reported infringement on its network, which Sony characterized as ensuring that infringement would recur. And the jury reasonably could have interpreted internal Cox emails and chats as displaying contempt for laws intended to curb online infringement. [*Id.*]

The decision below adheres to the same “rules of fault-based liability derived from the common law” this Court invoked in *Grokster*, 545 U.S. at 934-935. One such rule is that a person “will be presumed to intend the natural consequences of his act.” *Id.* at 932 (quotation marks and citation omitted).³ This rule is

³ See also Restatement (Second) of Torts § 8A cmt. b (1965) (if a person “knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he has in fact desired to produce the result”); Restatement (Third) of Torts § cmt. c (2010) (“[K]nowledge that harm is substantially certain to result is sufficient to show that the harm is intentional.”).

why “there is no injustice in presuming or imputing an intent to infringe where a defendant distributes a product that is ‘good for nothing else’ but infringement.” *Id.*

That same logic carries through to where a defendant sells a product to someone the defendant *knows* will use the product to infringe. See *BMG*, 881 F.3d at 307. Over one hundred years ago, this Court “affirmed a judgment for contributory infringement based on the defendants’ sale to a specific person with knowledge that the product would be used to infringe, even though the product—ink—also had noninfringing uses.” *BMG*, 881 F.3d at 307 (citing *Henry v. A.B. Dick Co.*, 224 U.S. 12 (1912), *overruled on other grounds by Motion Picture Parents Co. v. Universal Manufacturing Co.*, 243 U.S. 502 (1917)). “The Court reasoned that because the defendants sold the ink ‘with the expectation that it would be used’ to infringe, ‘the purpose and intent that it would be so used’ could be presumed.” *Id.* (quoting *Henry*, 224 U.S. at 49). The same principle “applies equally” in cases, like *BMG* and like this case, involving “subscription services”: When a company knows that its action “is substantially certain to result in infringement, * * * an intent to cause infringement may be presumed.” *Id.* at 308. See also *Grokster*, 545 U.S. at 932-933 (citing *Henry*); *Sony*, 464 U.S. at 441-442 (citing *Henry*).

The rule underpinning the decision below is thus rooted in the same common-law principles this Court discussed in *Grokster*. And the Fourth Circuit’s application of that rule is entirely correct: Cox’s repeated decisions to continue providing service to subscribers that Cox knew used—and would continue to use—its service to infringe is more than sufficient for a jury to

find Cox contributorily liable for copyright infringement. Pet. App. 28a.

b. Cox’s arguments that the decision below conflicts with *Grokster* misinterpret that case, misread the decision below, and—as the Fourth Circuit observed—“ignore[] the evidence before the jury.” *Id.*

Cox first describes *Grokster* as holding that “distributing a multi-use product with ‘mere knowledge of infringing potential’ does not ‘subject a distributor to liability,’ without proof of ‘affirmative steps taken to foster infringement.’” Pet. 24 (quoting *Grokster*, 545 U.S. at 919, 937). That is wrong. Cox is braiding together snippets of “the inducement rule” this Court articulated in *Grokster*: “[O]ne who distributes 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, is liable for the resulting acts of infringement by third parties.” *Grokster*, 545 U.S. at 936-937.

Again, though, this is a material-contribution case. A defendant need not go as far inducing an infringement for contributorily liability to attach; the defendant can also be contributorily liable for materially contributing to that infringement. *See Perfect 10 v. Amazon*, 508 F.3d at 1170 n.11 (“*Grokster* did not suggest that a court must find inducement in order to impose contributory liability under common law principles.”); *supra* p. 11. Cox’s attempt to graft this Court’s inducement rule into the material-contribution context confuses the sufficient for the necessary. *See UMG Recordings, Inc. v. Grande Communications Network Inc.*, Case No. 23-50162, Slip. Op. 23 (5th Cir. Oct. 9, 2024) (agreeing that the “distinction between the

material-contribution and inducement standards of liability is evident”).

Cox next construes the decision below to impose liability based on the “mere understanding that some of one’s products will be misused.” Pet. 26 (quoting *Grokster*, 545 U.S. at 932-933). That—again—reinterprets the record in favor of a story the jury and the District Court did not accept. The decision below makes clear that the requisite “knowledge” is knowledge that a *specific* customer will use the product to infringe. See Pet. App. 27a (“[L]easing a VCR to a customer—innocent conduct by itself—can support contributory liability if the lessor knows the customer is substantially certain to use it for copyright infringement”). *BMG*, from which the decision below drew that example, makes clear that intent can be imputed only based on sales to “specific customers.” *BMG*, 881 F.3d at 308. This accords with the common-law principle that imputing intent based on knowledge that harm is substantially certain to occur is limited to situations where “the conduct will bring about harm to a particular victim.” Restatement (Third) of Torts, § 1 cmt. e. And as the Fourth Circuit explained, the evidence was more than sufficient to clear this bar. See *supra* p. 8.⁴

⁴ Cox’s amicus Professor Yen, for his part, argues that Cox did not actually “know with substantial certainty that individual subscribers” would infringe again. Yen Amicus Br. 8. But the Fourth Circuit concluded that Cox “forfeited” that argument. Pet. App. 24a. Professor Yen’s analogy to railroads and power companies who know that “eventually someone” will be injured by their services, Yen Amicus Br. at 9-10, is meritless; “Cox knew of specific instances of repeat copyright infringement occurring on its network” and had “traced those instances to specific users,” Pet. App. 28a.

In the end, Cox tries to cast itself, against the verdict of a jury, as “a passive service provider who has done nothing to encourage infringement and lacks even the slightest interest in infringement occurring.” Pet. 26. Cox disparages as “makeweights” the evidence the jury heard of its flagrant disregard for copyright protections, *see supra* p. 8, and downplays as “workplace griping” emails from a “mid-level employee saying, ‘F the dmca!!!’” Pet. 26. That “mid-level employee” was the head of the team charged with addressing copyright infringement on Cox’s internet service. The jury resoundingly rejected Cox’s storyline. This Court should as well.

2. The Decision Below Does Not Break From *Twitter*.

In *Twitter*, this Court reaffirmed longstanding common-law aiding-and-abetting principles in the context of the Justice Against Sponsors of Terrorism Act (JASTA). The plaintiffs in that case alleged that social-media companies had aided and abetted a terrorist act because the companies “knew that ISIS was using their platforms” to promote terrorism “but failed to stop it from doing so.” *Twitter*, 598 U.S. at 478; *see also id.* at 481-482. Allegedly, the companies knew that ISIS supporters were using their platforms “just like everyone else.” *Id.* at 498. The companies’ alleged affirmative conduct involved “creating their platforms and setting up their algorithms.” *Id.* Once those “were up and running, defendants at most allegedly stood back and watched.” *Id.* at 499. There were no allegations that the ringleader of the ISIS terrorist attacks “himself ever used” the social-media platforms. *Id.* at 498. Nor were there allegations that ISIS members

used the platforms to carry out the terror attacks at the center of plaintiffs' complaint. *Id.*

This Court found those allegations insufficient to make out an aiding-and-abetting claim. After surveying the common law, this Court explained that aiding-and-abetting liability requires "that the defendant have given knowing and substantial assistance to the primary tortfeasor." *Id.* at 491. These "twin requirements" of knowledge and assistance "work[] in tandem, with a lesser showing of one demanding a greater showing of the other." *Id.* at 491-492. Under that rule, the plaintiffs' allegations failed: "The fact that some bad actors took advantage of these platforms" to spread their message "is insufficient to state a claim that the defendants knowingly gave substantial assistance." *Id.* at 503.

The decision below does not break with *Twitter*. At the threshold, it is unclear whether *Twitter's* discussion of aiding-and-abetting principles in the JASTA context has any bearing on contributory copyright infringement. This developing issue is being actively litigated in the lower courts, *see* Mem. Of Law In Support of Verizon's Motion To Dismiss, *UMG Recordings, Inc. v. Verizon Comm'ns Inc.*, No. 1:24-cv-5285 (S.D.N.Y. Sept. 5, 2024) (internet service provider citing *Twitter* as support for its argument that it was not contributorily liable for copyright infringement), and early results have not favored the copyright defendants. *See, e.g., Grande Communications*, Case No. 23-50162, Slip. Op. 32 (5th Cir. Oct. 9, 2024) ("*Twitter* does not control because it was litigated pursuant to the Justice Against Sponsors of Terrorism Act, not the Copyright Act."); *Frontier*, 658 B.R. at 299 (concluding that *Twitter* does not undermine the traditional

standard for contributory copyright liability); Report & Recommendation at 5, *Warner Records, Inc. v. Altice USA, Inc.*, No. 2:23-cv-576 (E.D. Tex. Sept. 12, 2024), Dkt. No. 75, *adopted on* Sept. 27, 2024, Dkt. No. 87 (same).

In any event, to the extent *Twitter* is even relevant, the decision below fully aligns with that case. *Twitter* rejected the plaintiffs’ allegations because they “rest[ed] less on affirmative misconduct” and more on “passive nonfeasance.” *Twitter*, 598 U.S. at 500. Cox was not nearly so passive. Indeed, Cox’s liability is only more apparent under *Twitter*’s knowledge-versus-assistance balancing test: Cox knew of specific instances of infringement on its network, knew that those acts of infringement were committed by specific users, and knew that those users would continue to infringe. Cox knew these serial infringers were not using its network “just like everyone else.” *Id.* at 498. Cox nonetheless chose to retain those subscribers, repeatedly prioritizing cash over copyright. Thus, as the decision below properly recognized, holding Cox contributorily liable in this context “accords with principles of aiding and abetting liability.” Pet. 27a.

Cox’s attempts to shoehorn this case into *Twitter* fail. Cox’s argument reduces down to its refrain that it “simply provides infrastructure that some users unfortunately choose to use for illicit purposes.” Pet. 28; *accord* *Altice USA, Inc. et al. (Altice) Amicus Br. 10-11*. That is revisionist history.⁵ And Cox’s discussion

⁵ More a friend of the party than of the court, *Altice* argues that Cox cannot be contributorily liable because it “suppl[ies] a ‘generally available’ service ‘to the internet-using public.’” *Altice Amicus Br. 11* (quoting *Twitter*, 598 U.S. at 498). Cox was not

of the Seventh Circuit’s 2003 decision in *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003), gets Cox nowhere. The “web hosting company” there was “indifferent to the content of what it transmit[ted].” *Id.* at 659. In stark contrast, the jury below heard copious evidence that Cox knew that specific users were using its network to infringe, but nonetheless chose to keep those users on its network.

Just last week, the Fifth Circuit came to a similar conclusion. In *Grande Communications*, the Fifth Circuit held that *Twitter* does not foreclose material-contribution liability where the ISP had committed more than “mere passive nonfeasance.” Case No. 23-50162, Slip. Op. 26 (Oct. 9, 2024). Just like Cox, the defendant-ISP in *Grande Communications* created a policy to “never to terminate subscribers for copyright infringement” and applied that policy even after learning that certain customers were “repeatedly” using the ISP’s tools to infringe. *Id.* at 25. The Fifth Circuit rightly held that under those circumstances, material-contribution liability is “consistent with th[is] Court’s holding in *Twitter*.” *Id.* at 26.

held secondarily liable for being an internet service provider. A jury found it secondarily liable for knowingly supplying the internet to specific subscribers Cox knew would use the internet to infringe.

II. THE FOURTH CIRCUIT'S WILLFULNESS STANDARD DOES NOT SPLIT WITH ANY COURT AND IS CORRECT.

A. There Is No Split.

Cox asserts a one-to-one split between the Fourth and Eighth Circuits over the willfulness standard for secondary copyright infringers, based on the Eighth Circuit's 1988 decision in *RCA/Ariola International, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773 (8th Cir. 1988). Cox is wrong. Both circuits apply the same rule, drawn from the general copyright willfulness standard applied in every circuit: A secondary infringer acts willfully when its conduct reflects a reckless disregard for a copyright holder's rights.

1. Every circuit that has considered the question holds that a defendant's conduct is "willful" under the Copyright Act when the defendant either knew that its conduct constituted copyright infringement, or "recklessly disregarded a copyright holder's rights." *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 799 (4th Cir. 2001); *accord Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 584-585 (6th Cir. 2017); *RCA/Ariola*, 845 F.2d at 779; *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 992 (9th Cir. 2017); *Yellow Pages Photos, Inc. v. Ziplocal, LP*, 795 F.3d 1255, 1271-72 (11th Cir. 2015) (and collecting cases from the Second, Fifth, and Seventh Circuits); *see also* 5 *Nimmer on Copyright* § 14.04[B][3][a] (2024). By definition, a reckless defendant "lack[s] actual knowledge" of his wrongdoing. 5 *Nimmer on Copyright* § 14.04[B][3][a]; *Unicolors*, 853 F.3d at 992 (explaining that recklessness "does not require a showing of actual knowledge"); *RCA/Ariola*, 845 F.2d at 779 (similar).

The Fourth and Eighth Circuits have both applied this standard when considering the willfulness of a secondary infringer.

In *BMG*, the Fourth Circuit applied the “reckless disregard” standard to uphold a jury instruction identical to one given in this case. That instruction directed the jury that it could find that Cox acted willfully if the plaintiffs, among other options, “prove[d] by a preponderance of the evidence that Cox had knowledge that its subscribers’ actions constituted infringement of plaintiffs’ copyrights.” *BMG*, 881 F.3d at 312 & n.7; see CA4 J.A. 805 (Vol. II). Cox challenged that instruction, arguing that it “incorrectly required ‘the jury to analyze Cox’s knowledge of its *subscribers’* actions,’ rather than Cox’s knowledge that *its actions* constitute an infringement.’” 881 F.3d at 312. The Fourth Circuit rejected that argument. As the court explained, “Cox does not dispute that willfulness in copyright law is satisfied by recklessness, and the case law defines recklessness broadly.” *Id.* The court noted that it had previously held that “copyright infringement is willful if the defendant ‘recklessly disregards a copyright holder’s rights,’” and that the Second Circuit had as well. *Id.* The Fourth Circuit accordingly concluded that “[c]ontributorily (or vicariously) infringing with knowledge that one’s subscribers are infringing is consistent with at least reckless disregard for the copyright holder’s rights.” *Id.* at 313.

The Eighth Circuit applied this same “reckless disregard” rule to a secondary infringer in *RCA/Ariola*. *RCA/Ariola* involved two sets of defendants: (1) retailers that had a particular type of cassette-duplicating machine at their stores, and (2) the machines’ manufacturer. *RCA/Ariola*, 845 F.2d at 776. The

manufacturer had included copyright warnings on the machine and had also sent the retailers a letter “saying it was legal for customers to duplicate anything for private use” but “warn[ing] the retailers not to assist in the copying.” *Id.* at 778. The retailers did not follow this guidance. When copyright investigators visited these retail locations and asked for assistance in using the machines to duplicate copyrighted works, employees eagerly complied—in some instances “completing the entire copying process” themselves. *Id.* at 777; *see also id.* at 781.

On summary judgment, the district court concluded that the plaintiff “had proved a clear case of direct infringement against the retailers,” *id.* at 777, and that the manufacturer was vicariously liable for that infringement, *see id.* at 778, but that neither the direct nor vicarious infringements were willful. *Id.* at 779-780.

The Eighth Circuit affirmed the liability holdings and agreed with the district court that the plaintiff had failed to prove willfulness as to either the direct or secondary infringers. *See id.* at 779-780. As for the retailers, the Eighth Circuit rejected the plaintiff’s argument that “it has shown willfulness because it has shown various remarks by the retailer’s employees that the *investigators’* activities were ‘against the law.’” *Id.* (emphasis added). In the court’s view, “[t]his does not show that the employees understood their own actions to be culpable.” *Id.* at 779-780. As for the manufacturer, the court concluded that the manufacturer “was not reckless in relying on” its counsel’s opinion that “there would be no liability for occasional copying of protected materials by customers unassisted by the retailers.” *Id.* at 779.

2. Cox’s attempt to manufacture a one-to-one split is based on its mistaken view that the Eighth Circuit “peg[s]” the willfulness of a secondary infringer “to whether the defendant understood that *its own* conduct was unlawful.” Pet. 29. Cox wrongly reads *RCA/Ariola* as holding that the retail-employees’ knowledge that some customers were directly infringing failed to “render *the retailers’ secondary infringement* willful.” Pet. 30 (emphasis added). But Cox ignores that the retailers were held liable for *direct* infringement. See *RCA/Ariola*, 845 F.2d at 777 (“The magistrate concluded that RCA had proved a clear case of direct infringement against the retailers”); *id.* at 778 (noting that the district court adopted the recommendations in this regard); *id.* at 781 (rejecting the retailers’ argument “that the district court erred in holding them to be direct infringers”). The customers had nothing to do with it. So of course when the Eighth Circuit considered the retailers’ willfulness, the court focused on whether their “employees understood their own actions to be culpable.” *Id.* at 779. After all, it was the retailers’ conduct that was at issue. When the Eighth Circuit considered the willfulness of the *secondary* infringer in that case—the manufacturer—it applied the “reckless disregard” standard. *Id.* at 779-780. And that standard does not require a defendant to have understood that its own conduct was unlawful.

Cox tries to salvage its reading of *RCA/Ariola* by stressing the case’s reliance on Nimmer and touting the cases that agree with that treatise. See Pet. 30-31. But Nimmer also articulates the “reckless disregard” standard. See *supra* p. 24. And Cox’s two cases (on 31) are no help; both are direct-infringement cases. See

Zomba, 491 F.3d at 579-581; *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 768 (11th Cir. 1996).

In short, the Eighth Circuit case *Cox* holds up as creating a shallow split with the Fourth Circuit does not say what *Cox* says it does. There is no split.

B. The Fourth Circuit’s Willfulness Standard Is Consistent With This Court’s Precedents And With The Federal Copyright Enforcement Scheme.

1. This Court has explained that, “where willfulness is a statutory condition of civil liability,” it generally covers “not only * * * knowing violations of a standard, but reckless ones as well.” *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007) (collecting cases). “This construction reflects common law usage, which treated actions in ‘reckless disregard’ of the law as ‘willful’ violations.” *Id.* And “the common law has generally understood” recklessness “as conduct violating an objective standard: action entailing an ‘unjustifiably high risk of harm that is either known or so obvious that it should be known.’” *Id.* at 68.

Copyright law has adopted these common-law principles. A defendant acts “willfully” for purposes of the Copyright Act when he knew his conduct constituted copyright infringement, or when he “ ‘recklessly disregards’ a copyright holder’s rights, even if lacking actual knowledge of infringement.” 5 *Nimmer on Copyright* § 14.04[B][3][a]; *see also supra* p. 24.

The Fourth Circuit’s conclusion that “[c]ontributorily (or vicariously) infringing with knowledge that one’s subscribers are infringing” constitutes willful conduct, *BMG*, 881 F.3d at 313, is consistent with these principles. Crucially, “knowledge that one’s

subscribers are infringing” means knowledge that one’s “subscribers’ actions *constituted* copyright infringement.” *Id.* at 312 n.7 (jury instruction) (emphasis added). Thus, under this standard, a defendant acted willfully if he materially contributed to conduct that the defendant *knew* was against the law. That is the definition of recklessness.

2. Cox’s arguments against the Fourth Circuit’s standard—which, again, is the same standard that all federal courts apply—fail.

Cox argues that the Fourth Circuit’s approach violates the “principle[]that willfulness centers on knowledge of one’s own culpability.” Pet. 33. But Cox concedes, as it did in the Fourth Circuit, that willfulness can be satisfied by recklessness. *See* Pet. i (“Generally, a defendant cannot be held liable as a willful violator of the law * * * without proof that it knew or recklessly disregarded a high risk that its *own* conduct was illegal.”); Pet. 32 (acknowledging that willfulness is met by “inexcusable carelessness” or where the defendant is “recklessly ‘falling down in its duty’” (emphasis omitted)); Pet. 33 (endorsing this Court’s holding that willfulness under the Age Discrimination in Employment Act depends on whether the defendant “knew or showed reckless disregard for the matter of whether its conduct was prohibited” (emphasis omitted)); *BMG*, 881 F.3d at 312 (“Cox does not dispute that willfulness in copyright law is satisfied by recklessness.”). As these concessions indicate, a defendant’s knowledge of its own culpability is unnecessary. It suffices instead that a defendant recklessly disregarded a copyright holder’s rights.

Cox’s repeated refrain that a defendant cannot act willfully when the defendant came to a “good-faith,

reasonable belief in the lawfulness of its own conduct,” Pet. 32, assumes the answer (and again bucks the jury verdict). Recklessness by definition means that a defendant did not have a reasonable belief in the legality of its own conduct. *See Safeco*, 551 U.S. at 69-70; *compare RCA/Ariola*, 845 F.2d at 779 (finding no willfulness where secondary infringer relied on advice of counsel). The jury thus found Cox’s conduct willful, not despite Cox’s “good-faith and reasonable beliefs,” Pet. 34, but because Cox *lacked* such good-faith and reasonable beliefs.

By allowing enhanced damages for such “willful” violations of the law, Congress clearly intended to impose the heaviest deterrence on the worst offenders—those who knowingly violated the law or who recklessly disregarded it. That neatly describes a defendant who induces, causes, or materially contributes to conduct the defendant knows is copyright infringement. There is nothing “topsy-turvy,” Pet. 34, about a regime in which defendants who facilitate what they know is copyright infringement face the same penalties as defendants that commit what they know is copyright infringement.

Cox also argues that the Fourth Circuit has collapsed willfulness into contributory liability. *See* Pet. 33-34. Not so. Contributory liability requires only “knowledge of the infringing *activity*.” *Gershwin*, 443 F.2d at 1162 (emphasis added). The jury instruction here, approved by the Fourth Circuit in *BMG*, allowed willfulness based on something more—Cox’s “knowledge that its subscribers’ actions *constituted infringement* of plaintiffs’ copyrights.” CA4 J.A. 804 (Vol. II) (emphasis added). The difference is between knowing what a user *is doing* (downloading

copyrighted materials from a peer-to-peer platform), and knowing what that means *as a legal matter* (committing direct copyright infringement). As is reflected in willfulness’s other prong—committing an act that the defendant knows constitutes copyright infringement—these different levels of knowledge are different in kind.

III. THIS IS A POOR VEHICLE TO REVIEW ISSUES OF LIMITED PRACTICAL EFFECT.

A. Cox’s Petition Is A Poor Vehicle For This Court’s Review.

Even if Cox’s questions presented warranted this Court’s review, this would be a poor vehicle to address them because the issues are not outcome-determinative.

On material contribution, Cox’s decisions to retain known infringers on its service, despite knowing those users would infringe again—all while openly mocking the law—would satisfy even Cox’s preferred rule of “affirmative steps to foster infringement.” Pet. 16; *see* Yen Amicus Br. 11 (conceding that ruling for Cox “does not necessarily mean that [Cox] should ultimately win this case”). This is not a case about a passive actor.

On willfulness, not even Cox argues that the Fourth Circuit’s rule was outcome-determinative. That is because it was not. The instruction that Cox challenges gave the jury three different ways to find willfulness: Cox’s “knowledge that its subscribers’ actions constituted infringement of plaintiffs’ copyrights,” Cox’s “reckless disregard for the infringement of plaintiffs’ copyrights,” *or* Cox’s willful blindness “to the infringement of plaintiffs’ copyrights.” CA4 J.A. 804 (Vol. II).

Cox challenges only the first clause. Indeed, Cox concedes that recklessness suffices to show willfulness. *See supra* p. 29. And there was more than enough evidence presented at trial for the jury to conclude that Cox recklessly disregarded Plaintiffs’ copyrights, given its operating ethos of “F the dmca!!!” CA4 J.A. 1495 (Vol. V); *see also* Pet. App. 17a (“This customer will likely fail again, but let’s give him one more chan[c]e. * * * [H]e pays 317.63 a month.”); Pet. App. 120a (“This Customer pays us over \$400/month and if we terminate their * * * internet service, they will likely cancel the rest of their services”); CA4 J.A. 1485 (Vol. V) (terminating and reactivating serial infringers’ service so that Cox could “collect a few extra weeks of payments for their account ;-)”). Cox will thus face enhanced statutory damages on remand no matter the outcome of Cox’s petition.

B. Cox’s Attempts To Inflate The Importance Of The Fourth Circuit’s Material-Contribution Holding Fail.

Cox’s argument—that the Fourth Circuit’s material-contribution holding threatens “mass evictions” from the internet, Pet. 34—is overblown, misplaced, and hypocritical.

First, the decision below would be relevant only where an internet service provider is found ineligible for safe-harbor protection under the DMCA. Cox finds itself in that unenviable subcategory. Holding Cox—which received 163,148 infringement notices during the claim period, Pet. App. 9a—contributorily liable

for materially contributing to serial copyright infringement hardly constitutes a national emergency.⁶

Second, termination of internet access is not a “disproportionate punishment” for repeat infringers. Pet. 35; *accord* Altice Amicus Br. 14-15, 16-17. It is exactly the punishment Congress envisioned in the DMCA for repeat infringers. *See* 17 U.S.C. § 512(i)(1)(A) (creating safe harbor for online providers that “adopt[] and reasonably implement[] * * * a policy that provides for the termination in appropriate circumstances of subscribers * * * who are repeat infringers.”).

Finally, this Court should take Cox’s concerns about terminating internet access with a healthy serving of salt. *See* Pet. 35. During the time period at issue here, Cox terminated over 600,000 subscribers for not paying their bills. When Cox’s money is on the line, Cox clearly has no problem “irreparably cut[ting]” its customers “off from society.” *Id.*

C. To The Extent The Material-Contribution Question Is Recurring, That Favors Allowing Further “Percolation”.

Of the Courts of Appeal, the Fourth Circuit was the first to pass on whether and how an internet service provider who is found ineligible for the DMCA safe harbor can be secondarily liable for acts of

⁶ Cox and its amici also point to the amount of damages at stake in this case and others like it. *See* Pet. 35; Altice Amicus Br. 14. Cox earned \$8.3 billion in net profits during the relevant time period. CA4 J.A. 584. And although Altice complains that statutory damages awards do not reflect “any real calculation of pocketbook-harm to the music-industry plaintiffs,” Altice Br. 17, the whole point of the Copyright Act’s statutory-damages scheme is to provide for damages when harm is difficult to calculate. *F. W. Woolworth Co. v. Contemp. Arts*, 344 U.S. 228, 233 (1952).

infringement on its network. Last week, the Fifth Circuit became the second, issuing a decision consistent with the Fourth Circuit’s approach. *See supra* p. 23; *Grande Communications*, Case No. 23-50162, Slip. Op. 30-32 (5th Cir. Oct. 9, 2024).

As Cox points out, this issue has arisen in several other lower courts. *See* Pet. 37. This ongoing litigation favors denying the petition, not granting it. Allowing these other cases to proceed apace “could yield insights (or reveal pitfalls)” that could inform whether and how this Court ultimately addresses this issue. *Maslenjak v. United States*, 582 U.S. 335, 354 (2017) (Gorsuch, J., concurring in part and concurring in the judgment); *see also, e.g., Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (“[W]hen frontier legal problems are presented, periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.”). This Court should decline Cox’s invitation to short-circuit this process. Instead, it should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

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