

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

REPLY BRIEF FOR THE PETITIONERS

Edward Williams	E. Joshua Rosenkranz
Abigail Colella	<i>Counsel of Record</i>
Kamilyn Y. Choi	Christopher J. Cariello
ORRICK, HERRINGTON &	Alexandra Bursak
SUTCLIFFE LLP	Gavin McGimpsey
2100 Pennsylvania Ave. NW	ORRICK, HERRINGTON &
Washington, DC 20037	SUTCLIFFE LLP
	51 West 52nd Street
Roman Martinez	New York, NY 10019
Sarang V. Damle	(212) 506-5000
Brent T.F. Murphy	jrosenkranz@orrick.com
LATHAM & WATKINS LLP	
555 Eleventh Street NW	
Washington, DC 20004	

Counsel for Petitioners

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INTRODUCTION

For years, Plaintiffs have deluged the nation's ISPs with automated notices, then sued those ISPs on the same flawed theory: Once an ISP receives two notices for any internet account, it must terminate the account—or become a willful contributory infringer for all future infringement. That theory prevailed below. Though Plaintiffs now try to distance themselves from this two-notices-and-terminate rule, it is what they must defend. Their defense fails as a matter of law on every level, no matter how much invective Plaintiffs hurl at Cox, how many times they quote internal emails, or how often they invoke the jury.

Plaintiffs ignore multiple cases holding that there can be no contributory/aiding-and-abetting liability unless the defendant engaged in an affirmative, culpable act with the purpose of furthering the misuse. They ignore *Kalem's* rule that knowledge or indifference is not enough. *Grokster's* statement that failure to affirmatively prevent infringement does not give rise to liability. *Twitter's* admonition that communications providers do not incur liability for offering their services to the general public.

On the other side of the ledger, Plaintiffs cannot quote a single sentence from this Court's copyright cases suggesting anything like Plaintiffs' notice-and-terminate rule, let alone applying it to a provider of communications infrastructure. Their favorite patent case, *Henry v. A.B. Dick*, is just a classic example of selling a product specially designed to infringe, which everyone agrees is a material contribution.

With no cases supporting their position, Plaintiffs urge this Court to draw a remarkable, and legally impermissible, *inference* that Congress assumed Plaintiffs' rule was the law when it passed the Digital Millenium Copyright Act (DMCA). But the DMCA declined to impose liability on ISPs while also expressly prohibiting the very inference Plaintiffs propose.

As the Government and amici of all stripes attest, Plaintiffs' notice-and-terminate regime would have seismic and dangerous ramifications. Only Congress has the power to impose a framework with such vast national implications. This Court should reject Plaintiffs' attempt to empower courts and juries to set post hoc and ad hoc standards.

The judgment should be reversed.

ARGUMENT

I. Plaintiffs' Two-Notices-And-Terminate Rule Will Yield Mass Terminations.

Plaintiffs strain to temper the theory that won them a \$1 billion judgment and to deny its consequences. They say they are not “push[ing]” a “two-notices-and-terminate theory”; that they do not “want anybody terminated” at all. Resp.Br.14 (quotation marks omitted). They insist this case is about an especially “egregious” outlier ISP, Resp.Br.1, 22, 28, and how it tolerated “habitual offenders,” Resp.Br.1-3, 27, 31, 42-43. But the record, and at points Plaintiffs' own brief, belies all this.

To start, Plaintiffs acknowledge that their case rests on infringement by subscribers with “at least three ... notices.” Resp.Br.14; *see* Resp.Br.25. Which means Cox is liable for failure to terminate after the second notice. Plaintiffs only underscore their two-strikes rule by emphasizing this case “does not involve whether an ISP could be... liable for failing to terminate a subscriber who infringed only *once*.” Resp.Br.25 (emphasis added); *see* Resp.Br.1 (“one-off infringement” not targeted). So when Plaintiffs refer to “habitual offenders,” they mean any subscriber who has received two notices of infringement.

That has always been Plaintiffs’ theory. *See* Pet.App.10a (acknowledging Plaintiffs’ two-and-terminate rule); Pet.App.145a-146a (same); *see also* U.S.Br.6. In their view, if an ISP simply knows of future infringement yet “continue[s] providing [internet] service,” Resp.Br.20, it is liable for the next download. That is the rule the Fourth Circuit condoned, when it reasoned that “supplying a product with knowledge that the recipient will use it to infringe copyrights is exactly the sort of culpable conduct sufficient for contributory infringement.” Pet.App.27a.

As to the consequences, Plaintiffs suggest, but never actually say, that their rule will not trigger mass evictions from the internet. They cannot deny that the courts below applied this two-notice threshold uniformly across 57,000 homes and businesses. The record unquestionably shows that included “hospitals,” J.A.280-281, and “senior citizens,” J.A.413, dorms and barracks, and even *regional ISPs*, Petr.Br.11 (citing J.A.330-331, 537).

Plaintiffs also weakly contest that an ISP has only one viable way to avoid the crushing liability of their rule: Throw all these homes and businesses off the internet. All they can say is that the DMCA provides protection. But notice how tentative their assurance is: “Cox *may* have been able to avoid liability had it adopted reasonable and commonsense measures to try to address known repeat infringers through measures short of termination.” Resp.Br.41 (emphasis added); *see* Resp.Br.2, 20. “May” is the best they can offer because they cannot deny that the DMCA’s reasonableness standard puts ISPs at the mercy of unpredictable juries. Petr.Br.45-46; *see* CSCC Br.26; Altice Br.18; *cf.* Google Br.14-16 (explaining how incorrect and abusive notice practices complicate responsive measures). And “may” is scant solace to a company confronting billions in potential liability. Plaintiffs have never disputed these facts: Cox’s anti-infringement program suspended over 67,000 accounts during the claim period alone, J.A.519, and deterred 98% of infringers, Petr.Br.10-11. If Plaintiffs can now vilify that program as a failure to “tak[e] *any* serious effort to stop these infringers from infringing,” Resp.Br.42, no ISP is safe.

Just look at Plaintiffs’ litigation docket. Plaintiffs have filed 11 cases against ISPs—much more than “a mere handful,” Resp.Br.43—hurling the same invective at each and characterizing each as “uniquely *dis*-interested” in stopping infringement, Resp.Br.10.¹

¹ The six cases cited at Pet.37 and two cases against Cox, plus *UMG Recordings, Inc. v. Bright House Networks, LLC*, No. 8:19-cv-00710 (M.D. Fla.); *UMG Recordings, Inc. v. Charter*

Each case follows their playbook here. Step 1: Strip each ISP of the DMCA safe harbor by depicting it as an egregious outlier. Step 2: Seek massive liability on the same two-notices-and-terminate standard. *See* Alice Br.3.

Plaintiffs' paper trail is too long for them to escape. As the Government agrees, affirming here will inevitably force ISPs into the mass evictions Plaintiffs have long advocated. U.S.Br.29-30.

II. Providing Communications Infrastructure To The General Public Does Not Materially Contribute To User Infringement.

Cox and the Government have laid out a simple culpable-conduct rule derived from this Court's copyright and aiding-and-abetting cases: Contributory liability depends on proof of an affirmative act demonstrating a culpable intent to further infringement. Petr.Br.22; U.S.Br.10, 21-22. Applying that rule here simply reaffirms what this Court has stated as self-evident: "[I]nternet or cell service providers [do not] incur culpability merely for providing their services to the public writ large," *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 499 (2023), or for "failure to ... prevent infringement," *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 939 n.12 (2005). Plaintiffs cannot prevail under that standard, because they cannot dispute Cox's page-one assertions that it did not encourage anyone to infringe,

Communications, Inc., No. 1:21-cv-02020 (D. Colo.); and *Warner Records Inc. v. Charter Communications, Inc.*, No. 1:19-cv-00874 (D. Colo.).

design or adapt its service to facilitate or conceal infringement, or build its business on infringement, Petr.Br.1—and in fact prohibited and actively discouraged infringement, Petr.Br.9-12.

So Plaintiffs maintain that an ISP *is* liable merely for providing internet service if it knows that a specified account has infringed and is likely to infringe again. This Court has repeatedly rejected a knowledge exception to the contributory-liability rules and should do so again here.

A. Contributory infringement requires affirmative, culpable conduct with the purpose of fostering infringement.

Plaintiffs leave uncontested most of the premises underlying the culpable-conduct rule, as well as the key principles flowing therefrom. Petr.Br.24-33; *accord* U.S.Br.10. Plaintiffs do not dispute that contributory liability is aiding-and-abetting (i.e., accomplice) liability. Nor that it is “cabin[ed] ... to cases of truly culpable conduct,” *Twitter*, 598 U.S. at 489, requiring proof that a defendant “participate[d] in” a wrong “as in something that he wishes to bring about and seeks by his action to make succeed,” *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280, 291 (2025) (cleaned up).

Plaintiffs also ignore the legal ramifications of their decision to sue *the internet*. They attack not a pirate streaming website nor a disruptive music platform, but basic communications infrastructure constituting “the mother of all multi-use technology” offered “to the general public on uniform terms.” Petr.Br.1,

33. They cannot reconcile that attack with this Court’s (above-quoted) position that “internet or cell service providers [do not] incur culpability merely for providing their services to the public writ large.” *Twitter*, 598 U.S. at 499.

Plaintiffs’ principal response to the culpable-conduct rule is to bludgeon a strawman. Plaintiffs quote *Gershwin*’s line that “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct ... may be held liable.” Resp.Br.22 (quoting *Gershwin Publ’g Corp. v. Columbia Artists Mgmt.*, 443 F.2d 1159, 1162 (2d Cir. 1971)). Plaintiffs claim that the culpable-conduct rule “would limit contributory liability to cases of affirmative inducement” and “collapse the distinction between inducing infringement and materially contributing to it.” Resp.Br.28, 30, 32.

The culpable-conduct rule does not, however, eliminate material-contribution liability. Cox enumerated several fact patterns under which a technology provider could be found to have engaged in some culpable act materially contributing to infringement, but without inducement. Petr.Br.32. The rule just recognizes that *any* theory of contributory liability—however labeled—requires affirmative, culpable conduct with the object of furthering infringement. Material contribution is not a no-fault alternative path to contributory liability.

Grokster confirms this. It starts by discussing the fault-based “common law” principles underlying contributory infringement (citing to *Gershwin*). 545 U.S. at 930-36. It identifies two ways to find such fault.

One is classic material contribution: selling something “‘good for nothing else’ but infringement,” from which one can “presum[e] or imput[e] [the seller’s] intent to infringe.” *Id.* at 932; Petr.Br.25-26. The other is “direct evidence of unlawful purpose,” such as “induc[ing]” infringement or “entic[ing] or persuad[ing] another’ to infringe.” *Grokster*, 545 U.S. at 935; Petr.Br.22-23, 26. Conduct with a culpable purpose is the throughline across all species of contributory infringement—whether it is evinced by how the defendant designed its product or business, or by some act of encouragement or concealment, the defendant must have the “object of promoting its [technology’s] use to infringe copyright, as shown by clear expression or other affirmative steps ... to foster infringement.” *Grokster*, 545 U.S. at 936-37. The “two categories” simply “capture different culpable behavior.” *Id.* at 942 (Ginsburg, J., concurring).

Twitter says this, too. A defendant is not an accomplice unless it “take[s] some ‘affirmative act’ ‘with the intent of facilitating the offense’s commission.’” 598 U.S. at 490. That “intentional participation can come in many forms, including abetting, inducing, encouraging, soliciting, or advising.” *Id.* “Regardless of the particulars, however, it is clear that some culpable conduct is needed.” *Id.*

What Plaintiffs are really complaining about is that a culpable-conduct rule makes it difficult to establish a material-contribution claim *in a case like this*—against the neutral provider of a technology with countless uses, most noninfringing. That hardly abolishes a form of liability. So Plaintiffs and their amici need not worry about the continued vitality of

material-contribution liability—they just need to pick defendants who actually did something wrong.

Plaintiffs argue that *Twitter* and *Smith & Wesson* “literally distinguish themselves by not even mentioning copyright law.” Resp.Br.32. But *Twitter* *did* discuss aiding-and-abetting liability for “infrastructure,” including “internet or cell service providers,” 598 U.S. at 499—literally the context here. And both cases distilled “several ancillary principles” of “[f]ederal aiding-and-abetting law” from various contexts. *Smith & Wesson*, 605 U.S. at 291-92. Plaintiffs offer no reason why this Court should depart from its long history of invoking “principles recognized in” other “part[s] of the law” when deciding copyright cases. *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62-63 (1911) (citing cases concerning “spirituous liquor” sales).

B. Knowledge cannot transform passive provision of infrastructure into purposeful, culpable conduct.

Plaintiffs urge this Court to ignore everything it has said requiring affirmative conduct and rejecting secondary liability for infrastructure providers, because “[k]nowledge makes all the difference.” Resp.Br.36. They proclaim that their mere-knowledge theory of secondary liability “has been applied to ISPs for basically as long as they have existed.” Resp.Br.24. But they cite no case that has ever done so. *See* Cotropia Br.9-11. And this Court’s cases explicitly reject their theory.

1. Under Plaintiffs’ standard, a defendant is contributorily liable merely for providing a customer with

“a tool ... knowing that they plan to use it” to infringe. Resp.Br.19, 23. It does not matter if that tool is communications infrastructure; if that infrastructure has a universe of other uses; or if others—even *thousands* of others—who have never infringed depend on the very same connection. To get there, Plaintiffs propose a new presumption of culpability: When the defendant knows of a specified customer’s misuse, “courts can presume the [defendants’] purpose and intent” to promote that customer’s misuse. Resp.Br.5 (cleaned up); *see* Resp.Br.23.

Plaintiffs’ new presumption makes no sense. Where a technology is “good for nothing else” but infringement, it is natural to “presum[e]” that the defendant intends that it be used for that unlawful purpose. *Grokster*, 545 U.S. at 932. Not so for multi-use technologies—and certainly not communications infrastructure. An ISP that knows of a customer’s misuse could have any number of reasons to continue offering the technology, having nothing to do with *promoting* misuse:

- Perhaps policing copyright infringement is expensive or administratively burdensome. (It is. *See* Internet Society Br.10-11; CSCC Br.22-24.)
- The provider might deem it unfair to punish innocent people who are also using the technology. (Who wouldn’t? *See* Engine Br.17-22; Internet Society Br.9-12.)
- Or termination of service could have an array of devastating consequences disproportionate

to the harms of copyright infringement. (Amici think so. *See* ACLU Br.27-29; EFF Br.30-31.)

- A provider could conclude that persistent anti-infringement measures short of termination will ultimately prove effective. (Cox’s were, overwhelmingly. *See* Petr.Br.10-11.)
- Or maybe the provider is just plain indifferent to how its service is used. (Not so here, where Cox sought to prevent infringement—but a plausible posture.)

The law cannot presume a culpable purpose from mere knowledge when there are so many non-culpable reasons for continuing to provide customers access to critical communications infrastructure.

Plaintiffs also ignore all the ways in which this Court has already rejected their mere-knowledge presumption. A century ago, *Kalem* said that everything up to and including a seller’s “indifferen[ce]” or “knowledge” of misuse is insufficient to trigger liability. 222 U.S. at 62. Plaintiffs devoutly ignore *Kalem*—a copyright case cited seven times in Cox’s brief. They also ignore this Court’s position a half century ago that there is no secondary liability based only on a “continuous course of sales” to users “with knowledge” of their wrongful use. *Direct Sales Co. v. United States*, 319 U.S. 703, 712 n.8 (1943); *see* Petr.Br.31-32.

Particularly damning is the Government’s point that Plaintiffs’ “theory mirrors the one this Court

rejected” in a near-identical context in *Twitter*, U.S.Br. 23. Plaintiffs are flatly incorrect in asserting that “[t]he allegations” there “were not that any company knowingly allowed a particular user to employ its services to promote terrorism.” Resp.Br.33. The “plaintiffs allege[d] that Google reviewed and approved ISIS videos on YouTube,” 598 U.S. at 505, and “[e]ven when Defendants have received complaints about ISIS’s use of their platforms,” defendants “permitted the account to remain active,” Complaint at J.A.134-135, *Twitter v. Taamneh*, No. 21-1496 (U.S.); see Petr.Br.27, 30; U.S.Br.24-25.

Plaintiffs are therefore wrong in speculating that *Twitter* “would have come out quite differently” had the plaintiffs there discovered internal emails of the sort that discovery revealed in this case. Resp.Br.33. *Twitter* dismissed the plaintiffs’ claim *on the pleadings*. So did *Smith & Wesson*. For all anyone knew, Twitter’s CEO himself *had* exclaimed “F the ATA!!” *Contra* Resp.Br.33. It simply did not matter what internal communications or policies discovery could have uncovered (which further underscores the legal irrelevancy of the emails Plaintiffs repeatedly tout, see *infra* 21-22). See U.S.Br.24-25.

2. Plaintiffs offer nothing this Court has said in any copyright case to support them. Instead, they derive their stated rule from two non-copyright cases. See Resp.Br.23.

Their most-cited case is the contributory patent case, *Henry v. A.B. Dick*, 224 U.S. 1 (1912), *overruled on other grounds by*, *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917). They

claim it shows that selling a good “with the expectation that [it] would be used’ to infringe” supports contributory liability. Resp.Br.2 (quoting *Henry*, 224 U.S. at 49); see Resp.Br.5, 23, 27, 29, 31. But they ignore a key feature of *Henry*: The defendant there sold ink that was “neither a staple article of commerce nor a public commodity required in the ordinary affairs of life,” unlike, say, the internet. *A.B. Dick Co. v. Henry*, 149 F. 424, 425 (C.C.S.D.N.Y. 1907). It was “a special ink made specially for use on [patented] machines.” *Id.* That is the only reason this Court was able to conclude that the ink “sale was with the purpose and intent that it would be so used.” 224 U.S. at 49. *Henry* thus falls comfortably within *Sony*’s—and the Patent Act’s—taxonomy of cases imposing liability for selling an “item ... ‘especially’ made” to infringe. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 436 (1984); see U.S.Br.14-16, 26 (discussing 35 U.S.C. § 271(c)).

The other case—from which Plaintiffs quote their proposed standard—is the trademark case *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 854 (1982). See Resp.Br.23. *Inwood* held that a manufacturer committed secondary trademark infringement by selling a generic drug to pharmacists knowing they were unlawfully selling it with infringing labels. But *Sony* held “we do not look to the standard for contributory infringement set forth in *Inwood*,” “[g]iven the fundamental differences between copyright law and trademark law.” 464 U.S. at 439 n.19. Plaintiffs do not ask this Court to overrule *Sony*. Nor do they address the obvious difference between a seller who profits directly when its products are passed off as name-brand wares and one who has

no financial interest in how a multi-use technology is used.

Plaintiffs’ lower-court cases do not recognize their theory either. For example, Plaintiffs incorrectly portray *Deutsch v. Arnold*, 98 F.2d 686 (2d Cir. 1938), as holding “that a landlord would be liable for contributory ... infringement upon ‘proof that’ it ‘knew that acts of infringement were proposed at the time ... the lease was made,’” Resp.Br.5; see Resp.Br.23. But the case merely *rejects vicarious liability* for a landlord while observing the absence of any proof of knowledge; it never suggests that knowledge alone would justify liability.

In truth, the circuits have largely *rejected* Plaintiffs’ knowledge-driven rule. See, e.g., *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 759 (7th Cir. 2012) (“common law notions of remoteness” preclude liability based on defendant’s “know[ledge]”); *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 796 (9th Cir. 2007) (rejecting material contribution for “continuing to process credit card payments to the infringing websites despite having knowledge of ongoing infringement”).

Plaintiffs also invoke a comment from the Second Restatement, discussed in detail in Cox’s brief (at Petr.Br.37-38), stating that an actor is presumed to “desire[] to produce” consequences that are “substantially certain[] to result from his act.” Resp.Br.23-24 (quoting Restatement (Second) of Torts § 8A cmt. b (1965)). But Plaintiffs do not even try to harmonize this general statement with *Twitter’s* lengthy discussion of principles drawn from the Second

Restatement’s more directly relevant aiding-and-abetting provision; in the context of secondary liability, *Twitter* was clear that continued service is “passive nonfeasance,” not the requisite “affirmative misconduct.” 598 U.S. at 484-93, 500; *see* Petr.Br.27. Nor do Plaintiffs offer a substantive response to the Third Restatement’s clarification that “in many situations a defendant’s knowledge of substantially certain harms is entirely consistent with the *absence* of any liability in tort.” Restatement (Third) of Torts: Phys. & Emot. Harm § 1 cmt. e (2010) (emphasis added); Petr.Br.38.

Otherwise, Plaintiffs drop a cursory citation to the “cases” “collect[ed]” by *VHT, Inc. v. Zillow Group, Inc.*, 918 F.3d 723, 745 (9th Cir. 2019). Resp.Br.23. Those cases all apply the Ninth Circuit’s simple-measures test. Plaintiffs do not address the argument that this rule is equally defective. Petr.Br.41-43. Nor do they ask this Court to adopt the test or affirm on that basis.

3. In a variation on their mere-knowledge theme, Plaintiffs argue that an “ongoing relationship” between a defendant and an infringer can support liability without proof of an affirmative act purposely promoting infringement. Resp.Br.23-24. But *Direct Sales* rejected that theory too, with its treatment (quoted above) of a “continuous course of sales.” 319 U.S. at 712 n.8. *Grokster*, too, stated that acts extending the relationship—such as “offering customers technical support or product updates”—do not “support liability in themselves.” 545 U.S. at 937.

Plaintiffs misread *Sony* to support their continued-relationship exception. Resp.Br.28-30. *Sony* merely observed that “the label ‘contributory infringement’ has been applied in a number of lower court copyright cases involving an ongoing relationship between the direct infringer and the contributory infringer.” 464 U.S. at 437. It cited “dance hall cases” holding a proprietor liable when the orchestra it *hires* infringes, on the theory that the proprietor “authorized” the conduct. *Id.* at 437 & n.18. This Court “contrasted” the dance-hall cases “with the so-called landlord-tenant cases,” where, despite the ongoing relationship, the landlord is too remote from tenants’ infringement to be held liable for it. *Id.*; see Petr.Br.24-25.

C. The DMCA does not support Plaintiffs’ mere-knowledge theory.

Plaintiffs end with a legislative argument that is as wrong as it is peculiar. They say the DMCA “forecloses Cox’s argument” because it “presumes that once ISPs gain knowledge of infringing activity” they are liable. Resp.Br.38. While asserting that Congress expressed the intention “clearly and unequivocally,” Resp.Br.3, Plaintiffs quote nothing from the statute stating any such presumption. Plaintiffs would be on thin ice even if they could point to a clear and unequivocal statement from, say, a Senate Report. But the legislative history says the opposite. See S. Rep. No. 105-190, at 55 (1998) (“Enactment of section 512 does not bear upon whether a service provider is or is not an infringer when its conduct falls within the scope of section 512.... [L]iability in these circumstances would be adjudicated based on the doctrines

of direct, vicarious or contributory liability ... articulated ... in the court decisions.”). So Plaintiffs offer only an oblique inference: *If* Congress thought that “contributory infringement exists only when one provides a good or service ‘with the object of promoting its use to infringe copyright,’” they posit, then “the safe harbor would not exist” because any ISP without such culpable purpose could not be liable. Resp.Br.38. Because Congress *did* create a safe harbor *protecting* ISPs, Plaintiffs conclude, it must have presumed back in 1998 that the common law would hold modern ISPs like Cox liable for not terminating infringing customers.

This inference fails for multiple reasons. First, in “treat[ing] Section 512 as evidence of what [the] common-law rules are or should be,” Plaintiffs “ask[] the Court to draw the very inference that Section 512(*l*) disapproves.” U.S.Br.29; *see* Petr.Br.45 (discussing § 512(*l*)).

Second, even without § 512(*l*), the DMCA says nothing about liability and does not create any duty for service providers. “Congress’ silence is just that—silence.” *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987); *see O’Gilvie v. United States*, 519 U.S. 79, 89-90 (1996).

Third, the inference is illogical. Section 512 provides a safe harbor for four sorts of “service providers,” not just conduit ISPs like Cox. So Plaintiffs are drawing an inference not from § 512’s enactment, but from Congress’s decision to *include conduit ISPs* while enacting broad protection for other services providers. Congress may well have protected ISPs

because it considered them to be the *least* culpable and worried that omitting them would lead litigants like Plaintiffs to infer that Congress must have assumed that ISPs should be subject to liability.

More fundamentally, Plaintiffs misconstrue the safe harbor's purpose. You build a safe harbor because you expect storms, not because you assume every ship of every kind will inevitably sink. Plaintiffs have no response to the point that Congress enacted § 512 because it anticipated *lawsuits*, not because it assumed *liability* for every type of covered service provider under every circumstance. Petr.Br.45. With the internet in its infancy, Congress had no way of knowing how the ISP-customer relationship would evolve. *See* Altice Br.17 & n.4; Google Br.11-14. No idea what sorts of ancillary services ISPs would develop, including potentially services that could affirmatively assist infringement. Moreover, given the dearth of law on secondary liability for ISPs, and the “law in its evolving state” in this pre-*Grokster* world, S. Rep. No. 105-190, at 19, Congress had no reason to assume liability and no way to predict how the case law would evolve.

So Congress opted not to dictate or assume anything about ISP duties, in favor of a voluntary system of safe harbors that encouraged (but did not compel) service providers to address infringement. The safe harbor covers every variety of copyright claims—not just the knowledge-only theory Plaintiffs propound here, to which there is no reason to believe Congress gave a moment's thought. That approach was far from “nonsensical,” and it did not make the DMCA “useless.” Resp.Br.39 (quotation marks omitted).

If anything, the DMCA's light-touch approach reflects Congress's understanding that widespread public access to the internet is too important to trigger draconian liability frameworks like Plaintiffs'. *See, e.g.*, EFF Br.29-30; Altice Br.19-21. They have no answer to the Government and the broad spectrum of amici who agree that such frameworks would yield devastating results for users who have infringed, users who have not, and many rightsholders as well. U.S.Br.29-30; *see, e.g.*, Engine Br.22-29 (harm to startups and creative industries). Nor do they address the ramifications of their theory beyond copyright. Grande Br.16-18. Plaintiffs' lawyers do not need a DMCA to start deluging ISPs with notices of all sorts of wrongdoing and then sue them for failure to terminate.

A duty for ISPs to terminate on notice must come from Congress. Petr.Br.43-46. It is Congress's prerogative to make policy in highly regulated, high-stakes contexts that so directly impact the public interest. Grande Br.5-14. That Congress has not adopted Plaintiffs' preferred policy approach to the internet does not mean that it "has been asleep at the switch." Resp.Br.38. It just means Congress has not adopted Plaintiffs' preferred policy approach to the internet. It is not for courts to do Plaintiffs' bidding on issues of such immense consequence.

D. Plaintiffs' rhetorical arguments are legally insufficient and wrong.

The rest is rhetoric. Most of Plaintiffs' vitriol against Cox and its anti-infringement program is

demonstrably false.² But more important, it fails to prove what the law requires: that Cox engaged in affirmative conduct with the purpose of fostering infringement. Cox is not “ignor[ing]” the record, Resp.Br.1; *see* Resp.Br.10, 12, 17, 20, 24, 26, 42, by simply pointing out that Plaintiffs’ favorite excerpts are no substitute for that required minimum showing.

1. Cox’s anti-infringement program. Plaintiffs launch a barrage of critiques about how Cox processed notices and what steps it took. These attacks further confirm that Plaintiffs’ claim improperly “rests less on affirmative misconduct and more on an alleged failure to stop” misuse. *Twitter*, 598 U.S. at 500. Such a theory fails unless Plaintiffs “identify some independent duty in tort,” *id.* at 501, dictating the requirements of an ISP’s anti-infringement program. But there is no such duty. So every time Plaintiffs refer to Cox’s “compliance with the law,” Resp.Br.1, or its “legal obligations,” Resp.Br.15, they are just begging the question whether Cox had such obligations in the first place, despite this Court’s teachings (in *Grokster* and elsewhere) that Cox did not. *Supra* 6-9.

Moreover, Plaintiffs’ criticisms of Cox’s anti-infringement program are both *qualitative* and *subjective*. Plaintiffs are just insisting in purple tones that Cox’s program did not measure up to some unidentified standard that exists only in Plaintiffs’ own minds.

² Compare, e.g., Resp.Br.10 (citing J.A.481-482 to assert Cox lagged in anti-infringement metrics), *with* J.A.480-482 (discussing data usage, not infringement); *and* Resp.Br.17 (arguing individualized termination assessments are “absent from the trial record”), *with* J.A.223-224, 236 (discussing such assessments).

For example, Plaintiffs rail against what they call a “13 strikes” program. Resp.Br.10-11, 43. That branding might play in front of a jury. But Plaintiffs point to no evidence that any aspect of Cox’s anti-infringement system fell short of some rule or norm for an ISP serving 6 million homes and businesses. Petr.Br.43. They are also conspicuously silent about the point that the anti-infringement program they negotiated with ISPs was less robust, at least on the one dimension most relevant here: It never required termination of any customer. Petr.Br.11-12.

What the undisputed record *does* show is that Cox’s system was *quantitatively* and *objectively* effective at deterring infringement—98% effective. Petr.Br.10-11. Which further underscores the importance of leaving the line-drawing to Congress and expert agencies, not lay juries.

2. *Internal emails.* Plaintiffs repeatedly tout nine emails that former Cox employees sent between 2009 and 2014 that deride notice senders or the DMCA. *E.g.*, Resp.Br.1, 15-17, 22, 27, 31, 33, 42. As explained above (at 12), this Court’s pleading-stage dismissals in both *Twitter* and *Smith & Wesson* establish that internal emails like these are irrelevant, because they cannot convert passive provision of internet services into culpable conduct.

Anyway, the emails do not even suggest that Cox “preferred that customers infringe, let alone that they encouraged [them] to do so,” a point Plaintiffs never contest. U.S.Br.28; *see* Petr.Br.40. Even accepting Plaintiffs’ characterization of the emails as “openly contemptuous” of a voluntary safe-harbor statute,

Resp.Br.1, the emails do not show that Cox “join[ed] both mind and hand” with infringing users or intended to promote infringement. *Smith & Wesson*, 605 U.S. at 298 (quoting *Direct Sales*, 319 U.S. at 713).

3. Cox’s “profit motive” and terminations for non-payment. Plaintiffs argue that Cox “provide[d] ... known infringer[s] with tools ... out of an unabashed desire to profit at the expense of copyright holders.” Resp.Br.27. They base this on internal communications in which two employees decide not to terminate subscribers because they “pay[] 317.63” or “over \$400/month.” Resp.Br.16. Plaintiffs also note that Cox “terminat[ed] 619,711 subscribers for non-payment,” versus only a few dozen for infringement. Resp.Br.2, 18.

This argument mistakenly equates Cox’s desire *to have paying subscribers* with a desire for *those subscribers to infringe*. The Fourth Circuit rejected the same fallacy when Plaintiffs used it to defend the now-dead vicarious-infringement verdict: “Cox’s financial interest in retaining subscriptions to its internet service[s] did not give it a financial interest in its subscribers’ myriad online activities, whether acts of copyright infringement or any other unlawful acts.” Pet.App.18a. In short, Cox has no profit motive to *foster infringement*. It just has an interest in selling internet service to all comers.

That same interest is why Cox, like any business, cannot provide service indefinitely to subscribers who refuse to pay. Cox does not hastily terminate subscribers for non-payment. J.A.368-369. But a

necessary condition for running a business selling internet services is getting paid for those services. That Cox treats unverifiable \$1 infringement accusations from complete strangers differently from verified failure to pay hundreds hardly proves that Cox culpably participates in its customers' infringement.

Lost in all this rhetoric is any recognition that Plaintiffs have other recourse. Plaintiffs are free to protect their rights by returning to their practice of suing direct infringers. *See, e.g.*, Grande Br.12 (discussing suits against direct infringers and subpoenas to identify direct infringers). Or they can collaborate with ISPs to design—and help fund—an anti-infringement program that is more to their liking. Cox has no fondness for copyright infringement. Cox just resists a rule that treats ISPs as the world's internet police and imposes crushing liability whenever strangers lob unverifiable accusations of customer wrongdoing.

This Court should reverse.

III. Cox's Response To Its Customers' Infringement Was Not Willful Unless Cox Knew (Or Recklessly Disregarded) That Its Own Actions Were Infringing.

At a minimum, this Court should vacate the Fourth Circuit's erroneous willfulness instruction, which impermissibly quintupled Cox's damages exposure, contributing to a billion-dollar judgment.

Petr.Br.46-54. Plaintiffs’ scant defense of that standard and their efforts to avoid the issue are meritless.

Plaintiffs lead with a one-sentence forfeiture argument. At the cert. stage, they (belatedly) asserted that Cox did not raise the issue before the panel. *See* Supp.Br.8-9. Now they up the ante with this false assertion: “The Fourth Circuit held that Cox forfeited any challenge to the willfulness instruction.” Resp.Br.44. The page they cite related to an entirely different damages issue. Pet.App.34a n.7. The truth is the panel did not address—and could not have addressed—the willfulness instruction. Cox, and the panel, were stuck with the Fourth Circuit’s prior opinion in *BMG Rights Management (US) LLC v. Cox Communications, Inc.*, 881 F.3d 293 (4th Cir. 2018). So Cox expressly preserved this challenge for later review in the district court, J.A.89, 362-363, and before the panel, J.A.96 n.3, ultimately raising it in an en banc petition. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (issue preserved where futile to fully brief before circuit court); *see also* U.S.Br.8.

On the merits, Plaintiffs concede that “[w]illfulness ... focuses on whether the defendant knew that *its* conduct constituted infringement.” Resp.Br.46 (emphasis added). And they do not dispute the corollary that a defendant’s good faith, non-reckless understanding that it is complying with its legal obligations negates willfulness. *See* Petr.Br.49. But Plaintiffs nevertheless claim that directing the jury to focus on the defendant’s knowledge of *someone else’s* conduct is “the sensible way to answer th[e] question.”

Resp.Br.46. It is hard to see the sense in asking the jury to answer the wrong question.

Plaintiffs' defense of the instruction gets off to an inauspicious start by positing that "contributory ... copyright infringement is a strict-liability tort." Resp.Br.45. That is plainly wrong; contributory liability is "fault-based." *Grokster*, 545 U.S. at 934.

Plaintiffs then try to squeeze more mileage out of their proposed presumption that if an ISP "knows that [a customer's] intended use [of the service] constitutes infringement ... then the purpose and intent *to infringe* may be presumed." Resp.Br.46. This application of the presumption fails for the same reasons already discussed. *See supra* 10-13.

Plaintiffs are also wrong in repeatedly conflating an ISP's knowledge that a specified user is infringing with knowledge that the ISP is itself illegally "facilitating" the misuse unless it cuts the cord. Resp.Br.46-48; *see* Petr.Br.53-54. If the United States Government rejects that equation, U.S.Br.23-24, then surely an ISP can reasonably reject it.

Plaintiffs make the same mistake in reframing the same argument as a "reckless disregard for the copyright holder's rights." Resp.Br.46-47. An ISP with a non-reckless belief that it is *not* a contributory infringer is, by definition, *not* recklessly disregarding anyone's copyright interests. The defendant believes that it is showing all the regard the law demands. Plaintiffs do not overcome that logic by taking out of context (at Petr.Br.46) Cox's acknowledgment that "[a] *direct infringer* who knows (or recklessly

disregards ...) that he, himself, is infringing necessarily disregards the copyright holder’s rights,” but that “does *not* necessarily hold for *secondary infringers*.” Petr.Br.53 (cleaned up; emphasis added). They also cannot overcome the error in the first part of the instruction by positing that the jury *could have* reached the same conclusion without that shortcut.

The rest of Plaintiffs’ argument—starting with “chutzpah,” Resp.Br.44, and culminating with their greatest hits about “callous disregard” of the law, Resp.Br.49—reads like a jury argument. Plaintiffs can try to prove on remand that the evidence “overwhelmingly support[ed] the conclusion that Cox *knew* that its actions constituted contributory infringement.” Resp.Br.48 (cleaned up). But that is no basis for affirmance, because the jury could have rejected Plaintiffs’ one-sided presentation, for reasons Cox explained, Petr.Br.10-12, 53-54, and to which Plaintiffs do not respond.

CONCLUSION

This Court should reverse the liability verdict or at a minimum remand for retrial under the proper willfulness standard.

Respectfully submitted,

Edward Williams
Abigail Colella
Kamilyn Y. Choi
ORRICK, HERRINGTON &
SUTCLIFFE LLP
2100 Pennsylvania Ave.
NW
Washington, DC 20037

Roman Martinez
Sarang V. Damle
Brent T.F. Murphy
LATHAM & WATKINS LLP
555 Eleventh Street NW
Washington, DC 20004

E. Joshua Rosenkranz
Counsel of Record
Christopher J. Cariello
Alexandra Bursak
Gavin McGimpsey
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

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