No. 23-50162

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UMG Recordings, Incorporated; Capitol Records, L.L.C.; Warner Bros. Records, Incorporated; Sony Music Entertainment; Arista Records, L.L.C.; Arista Music; Atlantic Recording Corporation; Capitol Christian Music Group, Incorporated; Elektra Entertainment Group, Incorporated; Fonovisa, Incorporated; Fueled by Ramen, L.L.C.; LaFace Records, L.L.C.; Nonesuch Records, Incorporated; Rhino Entertainment Company; Roadrunner Records, Incorporated; Roc-A-Fella Records, L.L.C.; Tooth & Nail, L.L.C.; Zomba Recording, L.L.C.,

Plaintiffs-Appellees/Cross-Appellants,

v.

Grande Communications Networks, L.L.C.,

Defendant-Appellant/Cross-Appellee,

On Appeal from the United States District Court
for the Western District of Texas
No. 1:17-cv-00365 (Hon. David A. Ezra)

BRIEF OF *AMICI CURIAE* USTELECOM – THE BROADBAND ASSOCIATION AND CTIA – THE WIRELESS ASSOCIATION IN SUPPORT OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record for *amici curiae* USTelecom – The Broadband Association and CTIA – The Wireless Association certifies that the following listed persons and entities, in addition to those listed in Defendant-Appellant/Cross-Appellee's Certificate of Interested persons, have an interest in this brief. These representations are made so that judges of this Court may evaluate possible disqualification or recusal.

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These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

/s/ *Scott H. Angstreich*
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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae USTelecom — The Broadband Association ("USTelecom") and CTIA — The Wireless Association ("CTIA") are trade associations. Their members include the largest providers of broadband internet access service over wireline and wireless communications networks, both within this Circuit and nationwide. *Amici*'s members enable their broadband customers to benefit from all the internet has to offer, including for education, work, healthcare, accessing news, information, government services, online shopping, and entertainment through streaming music and video services. While some tiny fraction of their members' customers also may make use of their broadband connections to share copyrighted material unlawfully, those members do not participate in, encourage, or in any other way assist those efforts. To the contrary, *amici*'s members actively discourage copyright infringement.

The district court concluded that an internet service provider, like Grande, can be secondarily liable for its customers' direct copyright violations if the provider knows of the violations and fails to take the purportedly "simple" or

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no counsel for any party authored this brief in whole or in part, nor did any party or other person or entity other than *amici curiae* make a monetary contribution to the brief's preparation or submission.

"basic" measure of terminating their internet access. But the Supreme Court recently reaffirmed that common-law aiding-and-abetting liability — which is the source of the judicially implied cause of action for contributory copyright infringement — does not extend so far. As the Court explained, it would "run roughshod over the typical limits on tort liability and take aiding and abetting far beyond its essential culpability moorings" if a "communication provider" could be held liable "merely for knowing that the wrongdoers were using its services and failing to stop them." *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 503 (2023). The district court's judgment rests on legal determinations and jury instructions that violate those limits.

In addition, the district court's conclusion that terminating internet access is a "simple" or "basic" response to copyright infringement conflicts with federal broadband policy. Through statutes enacted over the last 25 years, Congress has adopted the federal policy of ensuring that all Americans have high-speed internet connections. Subjecting internet service providers to potentially ruinous liability if they do not treat termination as a commonplace response to alleged copyright infringement — rather than the extraordinary remedy it is, which should be a last resort — would undermine those federal efforts. "Simple" termination of alleged infringers would harm innocent customers, by regularly depriving entire households, schools, hospitals, and businesses of internet service critical to their

access to news and information, education, health, and work. And the threat of massive liability for failing to take that "simple" measure would discourage providers from undertaking the new broadband deployments that Congress has recognized are necessary to connect all Americans to the internet.

For both reasons, the Court should reverse the district court's judgment.

INTRODUCTION AND SUMMARY OF ARGUMENT

Internet service providers perform a critical function by developing, operating, and maintaining the networks that their customers rely on for high-speed internet access. From 1996 through 2022, internet service providers invested $2.1 trillion — including $102.4 billion in 2022 alone — in network infrastructure, providing consumers with the capability to access the internet at ever-increasing speeds. It was internet service providers' massive investments over the years that prepared not only individuals and businesses, but also the entire U.S. economy, for the unexpected but necessary increased reliance on broadband networks during the COVID-19 pandemic.

Internet service providers' past and current investments not only reflect their business interests, but also fulfill federal policy goals. In 1996, Congress announced that it "is the policy of the United States to promote the continued development of the Internet." 47 U.S.C. § 230(b)(1). And in the past few years, Congress has appropriated more than $75 billion to close the digital divide and

ensure that all Americans have access to affordable, reliable, high-speed broadband. That total includes nearly $17.5 billion to provide qualifying low-income households with monthly subsidies to buy broadband service.[2] As of September 2023, more than 21 million households are receiving that monthly subsidy.[3] Congress created a $10 billion fund for critical capital projects to enable remote work, education, and health monitoring.[4] Congress appropriated another $7.17 billion for schools and libraries to buy broadband service that their students and patrons can use, including at home.[5] And Congress appropriated nearly $42.5 billion for the Broadband Equity, Access and Deployment Program, which will fund the deployment of new broadband networks in currently unserved and underserved areas throughout the nation.[6]

The legal rulings underlying the judgment here — which treat terminating internet service as a "simple" or "basic" measure to which providers should resort

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[2] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, div. C, tit. VIII, § 30015, 135 Stat. 429, 912 (2021) (appropriating $14.2 billion); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, tit. IX, § 904, 134 Stat. 1182, 2130 (2020) (appropriating $3.2 billion).

[3] Universal Service Admin. Co., *ACP Enrollment and Claims Tracker*, https://bit.ly/3PToXxr.

[4] American Rescue Plan Act of 2021, Pub. L. No. 117-2, tit. IX, § 9901, 135 Stat. 4, 233 (2021).

[5] *Id.*, tit. VII, § 7402, 135 Stat. at 109.

[6] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, div. F, tit. I, § 60102, 135 Stat. at 1182-84.

routinely[7] — are contrary to that federal policy. Those rulings also conflict with Supreme Court precedent, as *Twitter* confirms. There, Justice Thomas, writing for a unanimous Court, synthesized decades of common-law aiding-and-abetting doctrine. He reaffirmed the need to "cabin aiding-and-abetting liability to cases of truly culpable conduct." 598 U.S. at 489. That "bad actors . . . are able to use" a platform "for illegal . . . ends" does not make the provider liable as "we generally do not think that internet or cell service providers . . . would normally be described as aiding and abetting, for example, illegal drug deals brokered over" their services. *Id.* at 499. And the Court concluded by holding that a "communication provider" cannot be held "liable . . . merely for knowing that . . . wrongdoers were using its services and failing to stop them." *Id.* at 503.

Yet the district court here instructed the jury that it should find Grande liable based on the very facts *Twitter* held insufficient: knowledge that wrongdoers were infringing using Grande's internet service and Grande's passive failure to stop them.[8] That was error, and this Court should reverse the judgment.

[7] Summary Judgment Order at 41-42 (ROA.6418-19); Jury Instruction No. 16 (ROA.9924-25); JMOL Order at 19-20 (ROA.11033-34).

[8] Jury Instruction No. 16 (ROA.9924-25); *see also* Summary Judgment Order at 41-42 (ROA.6418-19); JMOL Order at 14-15, 19-20 (ROA.11028-29, 11033-34).

ARGUMENT

I. *Twitter* Demonstrates the Error in the District Court's Rulings on Contributory Copyright Infringement

A. *Twitter*'s Holding on the Limits of Common-Law Aiding-and-Abetting Liability Applies to Contributory Copyright Infringement

The Copyright Act does not contain an express cause of action for contributory copyright infringement. *See Sony Corp. v. Universal City Studios,* 464 U.S. 417, 434 (1984). Instead, courts have implied the "doctrine[] of secondary liability" for others' copyright violations "from common law principles" — namely, "rules of fault-based liability derived from the common law." *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930-31, 934-35 (2005); *see also Sony*, 464 U.S. at 435 (describing contributory infringement as a "species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another"); 3 Nimmer on Copyright § 12.04 (2023) (describing "contributory infringement" and a "judge-made remed[y] imported from the common law of torts").

As numerous courts and commentators have recognized, the fault-based rules of liability that give rise to contributory copyright infringement as a form of secondary liability are rooted in the law of aiding and abetting. Judge Posner described the "law of aiding and abetting" as "the criminal counterpart to contributory infringement." *In re Aimster Copyright Litig.*, 334 F.3d 643, 651 (7th

Cir. 2003).[9] And David Nimmer explains that contributory infringement also draws from "indirect tort liability," including for "aiding, abetting, or encouraging the infringing act." Peter S. Menell & David Nimmer, *Unwinding* Sony, 95 Cal. L. Rev. 941, 1012-13 (2007); *see also* Dan B. Dobbs *et al.*, *The Law of Torts* § 741 & n.42 (2d ed. May 2023 update) (describing "aiding and abetting" as the "premise of contributory infringement"); *BMG Rts. Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 309 (4th Cir. 2018) (citing Restatement (Second) of Torts § 876 as "provid[ing] another analog to contributory infringement").

The Supreme Court recently corrected the Ninth Circuit's erroneous application of those same common-law aiding-and-abetting principles. *Twitter* addressed claims that Twitter and other social-media companies aided and abetted terrorism by knowingly failing to stop ISIS from using their platforms to raise funds and attract recruits. *See* 598 U.S. at 481-82. Those claims arose under the Justice Against Sponsors of Terrorism Act ("JASTA"), which Congress enacted after appellate courts held that the Antiterrorism Act did not impliedly authorize

[9] Contributory infringement liability for other intellectual property — patents, trademarks, and service marks — similarly derives from the common law of aiding-and-abetting. *See*, *e.g.*, *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 764 (2011) (characterizing contributory patent infringement as "the aiding and abetting of direct infringement by another party"); *1-800 Contacts, Inc. v. JustLens.com, Inc.*, 722 F.3d 1229, 1240 (10th Cir. 2013) (explaining that contributory infringement of trademarks and service marks is "[a]kin to aiding and abetting").

secondary civil liability. *See id.* at 482-83. JASTA's civil remedy uses the common-law "phrase 'aids and abets'" and identifies a D.C. Circuit case involving civil common-law aiding-and-abetting liability as "'providing the proper legal framework'" for determining liability. *Id.* at 484-85 (quoting JASTA). In assessing Twitter's alleged secondary liability for its users' conduct, the Court therefore surveyed "the common-law tradition from which" aiding-and-abetting liability arises. *Id.* at 485; *see also id.* at 488-93 (discussing the "ancient criminal law doctrine" of "aiding and abetting" that "has substantially influenced its analog in tort," and citing Restatement (Second) of Torts § 876 as setting out the basis for that analog) (cleaned up).

The Court first identified the "long recognized . . . need to cabin aiding-and-abetting liability to cases of truly culpable conduct." *Id.* at 489. As the Court twice stated, such "truly culpable conduct" exists only where "the defendant consciously and culpably participated in a wrongful act so as to help make it succeed." *Id.* at 493 (cleaned up); *accord id.* at 497. Applied to the facts in *Twitter*, the Court found that allegations Twitter "knew that ISIS was uploading . . . content" that Twitter's "algorithms matched . . . to users most likely to be interested in [ISIS] content" and "took insufficient steps to . . . remove[]" the ISIS content from Twitter "fall short" of facts sufficient for aiding-and-abetting liability. *Id.* at 497-98.

In reversing the Ninth Circuit's contrary conclusion, the Court relied on many features of Twitter's relationship with its users that apply equally to internet service providers and their customers. For example, "ISIS was able to upload content to [Twitter] and connect with third parties, just like everyone else." *Id.* at 498. Similarly, all internet users can use their internet connection to share content with third parties, including documents, audio files, photos, and videos. The *Twitter* plaintiffs did not allege that Twitter "gave ISIS any special treatment or words of encouragement." *Id.* Nor do *amici*'s members encourage or give special treatment to those few who choose to engage in piracy using their internet access. And, as the Court noted, there is no "reason to think that [Twitter] carefully screened any content before allowing users to upload it." *Id.* at 499. Internet service providers similarly do not inspect the content that their users send over their internet connections.

Those features together led the Supreme Court to characterize Twitter and the other social-media companies' alleged aid to terrorists as mere "passive assistance." *Id*. Those companies did not fund, materially assist, or encourage ISIS's unlawful conduct. They did not engage in any "affirmative misconduct" at all. *Id*. at 500. Rather, they supplied generally available platforms while "fail[ing] to stop ISIS from using these platforms." *Id*. Under traditional common-law principles, such passive inaction — a company's simple failure to *stop someone*

else from misusing its widely available product — is not culpable. *See id.* at 500-03. Indeed, the common law has "long been leery of imposing aiding-and-abetting liability for mere passive nonfeasance." *Id*. at 500.

Twitter makes clear that the same distinction applies to internet services. The Court recognized explicitly that Twitter and other social media platforms — which "bad actors like ISIS [can] use . . . for illegal . . . ends" — are no different from "cell phones, email, or the internet generally." *Id.* at 499. But "internet . . . providers" do not "aid[] and abet[]" the bad acts that their users commit, even if availability of internet access "made the [offense] easier." *Id.* And in words that could have been written for this case, the Court explained that it "would run roughshod over the typical limits on tort liability and take aiding and abetting far beyond its essential culpability moorings" if a "communication provider" could be held "liable . . . merely for knowing that . . . wrongdoers were using its services and failing to stop them." *Id.* at 503.

B. The District Court Instructed the Jury To Find Liability on Evidence that *Twitter* Holds Is Insufficient for Aiding-and-Abetting Liability

The district court instructed the jury that it should find Grande liable if "Grande knew of specific instances" in which "users of Grande's internet service used that service to infringe" the record companies' copyrights and failed to "take basic measures to prevent" that infringement. Jury Instruction No. 16 (ROA.9924-

25). That instruction mirrored the "rule of liability" the district court had "distill[ed]" from prior caselaw: that an internet "service provider[] like Grande can be held contributorily liable if it has *actual* knowledge" of specific instances of infringement and can, but fails, to "take simple measures to prevent" further infringement. Summary Judgment Order at 41-42 (ROA.6418-19) (cleaned up). The district court found that Grande had failed to take what the court deemed a "simple measure at its disposal — terminating the internet services of repeat infringers" — but that a genuine dispute of material fact existed as to actual knowledge. *Id.* at 42 (ROA.6419). And in denying Grande's post-trial motion for judgment as a matter of law, the district court cited evidence that "Grande knew of specific instances of infringement" and failed to take the supposedly "simple measure" of terminating service. JMOL Order at 14, 19-20 (ROA.11028, 11033-34).[10]

[10] In divining this rule of liability, the district court did not rely on Congress's enactment of the Digital Millennium Copyright Act's additional defense for internet service providers faced with copyright infringement lawsuits based on actions of their users, *see* 17 U.S.C. § 512(a), (i), (k)(1). Nor could it. As the district court correctly found, that Act did not create new liabilities for internet service providers or alter the requirements for finding copyright infringement. JMOL Order at 34 (ROA.11048). And Congress stated that failing to qualify for that additional defense "shall not bear adversely upon" other defenses, including (as here) "that the service provider's conduct is not infringing." *Id.* § 512(*l*). While the district court suggested that § 512 shows it is "fair to apply th[e] doctrine of contributory infringement" to internet service providers, JMOL Order at 36

The district court held — and instructed the jury to find — that Grande is "liable . . . merely for knowing that . . . wrongdoers were using its services and failing to stop them." *Twitter*, 598 U.S. at 503. The court's judgment thus "run[s] roughshod over the typical limits on tort liability and takes aiding and abetting far beyond its essential culpability moorings." *Id.* Just as the Ninth Circuit erred in allowing claims to go forward against Twitter when the plaintiff alleged "only that [Twitter] supplied generally available virtual platforms that ISIS made use of, and that [Twitter] failed to stop ISIS despite knowing it was using those platforms," *id.* at 505, the district court erred in allowing the jury to find Grande liable for failing to stop known copyright infringers from using its generally available service. In that way, the district court allowed the jury to hold Grande liable based on the very "passive nonfeasance" *Twitter* held is not culpable. *Id*. at 500.

This district court is not alone in finding that internet service providers can be liable for such inaction. A court in the Eastern District of Virginia allowed a $1 billion judgment against an internet service provider to stand where, as here, the jury found a "knowing failure to prevent infringing actions" by internet users. *Sony Music Ent. v. Cox Commc'ns, Inc.*, 426 F. Supp. 3d 217, 231 (E.D. Va.

(ROA.11050), *Twitter* confirms that it is fair to do so only where the provider engages in independently culpable conduct, *see*, *e.g.*, 598 U.S. at 490.

2019); *see also Sony Music Ent. v. Cox Commc'ns, Inc.*, 464 F. Supp. 3d 795, 815-16 (E.D. Va. 2020) (denying motion for judgment as a matter of law).[11]

Other district courts, including in this Circuit, have similarly concluded that allegations of knowledge and a failure to terminate users are enough to allow contributory copyright infringement claims against an internet service provider to go forward. *See*, *e.g.*, *BMG Rts. Mgmt. (US) LLC v. Altice USA, Inc.*, 2023 WL 3436089, at *12 (E.D. Tex. May 12, 2023); *Bodyguard Prods., Inc. v. RCN Telecom Servs., LLC*, 2022 WL 6750322, at *9 (D.N.J. Oct. 11, 2022); *UMG Recordings, Inc. v. Bright House Networks, LLC.*, 2022 WL 4552434, at *3 (M.D. Fla. July 1, 2022). In the most recent of those — issued less than a week before *Twitter* — a district court in this Circuit surveyed the pre-*Twitter* case law and concluded that "failing to terminate known repeat infringers" is "clearly sufficient to properly state a claim for contributory infringement." *Altice USA*, 2023 WL 3436089, at *13. Justice Thomas's survey of the applicable "common-law tradition" led to the opposite conclusion: aiding-and-abetting liability applies only "to cases of truly culpable conduct" and not to what is at most the "passive

[11] The Fourth Circuit heard oral argument in *Cox* in March 2022. *See* https://bit.ly/3r5fcmh (audio recording). The parties addressed the relevance of *Twitter* in Rule 28(j) letters in May 2023. *See* https://bit.ly/3RmuKwp (Cox letter); https://bit.ly/3Rh0Slb (Sony et al. letter). As of September 27, 2023, the Fourth Circuit had not yet ruled.

assistance" of "fail[ing] to stop" a bad actor from using a generally available service. *Twitter*, 598 U.S. at 485, 489, 499-500.

It is unclear why all these courts went astray. After all, the Supreme Court had stated in *Grokster* that "mere knowledge of infringing potential or of actual infringing uses would not be enough" and that "a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement." *Grokster*, 545 U.S. at 937, 939 n.12. Instead, "purposeful, culpable expression and conduct" is required for contributory infringement. *Id.* at 937. In *Grokster*, evidence of that culpable conduct was "unmistakable," as the defendants "aim[ed] to satisfy a known source of demand for copyright infringement" and "respond[ed] affirmatively to requests for help in locating and playing copyrighted materials." *Id.* at 938-39, 940. No such evidence existed here. *See*, *e.g.*, Grande Br. 26, 42-53.

But whatever the reason courts in this Circuit and others departed from *Grokster*, *Twitter* confirms that those courts erred. By "hold[ing] a[] . . . communication provider liable for . . . wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them," those courts have "run roughshod over the typical limits on tort liability and take aiding and abetting far beyond its essential culpability moorings." 598 U.S. at 503. Just as the

Supreme Court reversed the Ninth Circuit there, *see id.* at 507, this Court should reverse the judgment here.

II. Treating Termination of Internet Access as a "Simple" or "Basic" Measure Is Contrary to Federal Communications Policy

Twitter's warning about the dangers of "run[ning] roughshod" over traditional secondary-liability limits is particularly salient here. *Id*. at 503. As far back as 1996, Congress had identified the promise of the then-nascent internet, declaring that it is the "policy of the United States" to "promote the continued development of the Internet." 47 U.S.C. § 230(b)(1). Congress simultaneously instructed the Federal Communications Commission to use its authority to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability" — that is, internet access — "to all Americans." *Id.* § 1302(a), (d)(1).

More recently, Congress has directly taken on the task of ensuring that all Americans have access to affordable, reliable, high-speed broadband. Through the Emergency Broadband Benefit and the Affordable Connectivity Program, Congress has appropriated nearly $17.5 billion dollars that is being used to provide more than 21 million households with a monthly subsidy for their broadband internet access.[12] In the American Rescue Plan Act, Congress created both the $10

[12] *See supra* p. 4 and note 2.

billion Capital Projects Fund and the $7.17 billion Emergency Connectivity Fund.[13] As of September 2023, nearly $8 billion from the capital fund has been disbursed to support broadband and related projects in 47 states and three territories,[14] while nearly $7 billion from the connectivity fund is committed to support around 18 million students, 11,000 schools, and 1,000 libraries nationwide.[15] And States are in the process of submitting their plans for drawing on the $42.5 billion Broadband Equity, Access, and Deployment Program to fund the deployment of new networks to bring broadband to unserved and underserved areas of the country.[16]

Amici's members play a critical role in bringing broadband to all Americans. They have invested more than $2.1 trillion — and hundreds of billions of dollars in recent years — to deploy and improve the wired and wireless networks that hundreds of millions of Americans rely on daily for internet access. Years ago,

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[13] *See supra* notes 4-5.

[14] *See* Press Release, U.S. Dep't of the Treasury, *Treasury Department Announces Approval of Federal Funds to Help Close Digital Divide in Puerto Rico as Part of President Biden's Investing in America Agenda* (Sept. 6, 2023), https://bit.ly/3PSnoQn.

[15] *See* Press Release, Federal Communications Commission, *FCC Announces $7 Million in Emergency Connectivity Funding for Schools and Libraries* (Sept. 6, 2023), https://bit.ly/45RhlRk.

[16] *See* Broadband USA, *Public Notice Posting of State and Territory BEAD and Digital Equity Plans/Proposals*, https://bit.ly/456Ptrs.

this Court recognized "the ubiquity and importance of the Internet to the modern world" and that "access to . . . the Internet is essential to functioning in today's society." *United States v. Duke*, 788 F.3d 392, 400 (5th Cir. 2015). The importance of internet access has only grown since then. Work, school, telemedicine, keeping in touch with loved ones, and entertainment all depend on internet access.

Terminating a customer's internet access prevents anyone from using that connection not just for copyright infringement, but also for any other purpose. Termination thus prevents everyone — in a household, coffee shop, office, school, library, or hospital — who relies on a shared internet connection from using the internet for any purpose, whether remote work, accessing educational or health resources, seeking news or other information, or for entertainment. It punishes family members, patrons, co-workers, teachers, students, and doctors, nurses, and patients for the actions of one individual. And because it is possible to connect to someone else's WiFi without their knowledge or consent, that infringing individual may have no connection to those who will bear the devastating costs of internet access termination.

Termination is thus not "simple" or "basic," as the district court believed. Summary Judgment Order at 42 (ROA.6419) (stating that "Grande has at least one simple measure at its disposal — terminating the internet services of repeat

infringers — to prevent further damages to copyrighted works"); JMOL Order at 19-20 (ROA.11033-34) (citing evidence that Grande did not to take the "simple measure" of terminating service to support the jury's verdict); Jury Instruction No. 16 (ROA.9924-25).[17] It is instead a drastic and overbroad remedy, with severe consequences for non-infringers.[18]

Yet the district court's approach could compel internet service providers to engage in wide-scale terminations to avoid facing crippling damages, like the $1 billion judgment entered against Cox Communications.[19] Creating such an incentive to knock entire families offline — not to mention schools, libraries, hospitals, and businesses — would undermine Congress's goal of ensuring that all Americans have broadband internet access. It would also create massive

[17] At the charging conference, the district court explained that "basic" in the jury instruction is his replacement for "simple" in the summary judgment decision. *See* ROA.13383:18-23 ("I just don't like the word 'simple'.").

[18] This appeal does not involve the additional defense Congress enacted that is available to internet service providers who have "reasonably implemented" a policy that includes "the termination in appropriate circumstances" of "repeat infringers." 17 U.S.C. § 512(a), (i)(1)(A). But the same Congressional federal broadband policies call for interpreting "reasonably implemented" and "appropriate circumstances" to limit termination to only the most egregious cases. So interpreted, the additional defense would help prevent copyright law from interfering with federal broadband policy, even if contributory infringement were to reach more broadly than *Twitter* allows.

[19] *See supra* pp. 12-13 and note 11.

disincentives for providers to invest in the new broadband networks that Congress recognizes are needed to close the digital divide.

Returning contributory copyright infringement to its common law roots and furthering federal broadband policy would not leave copyright owners without a remedy. They can use any evidence they collect of online infringement to serve subpoenas to learn the identity of the customer whose internet access was used for infringement.[20] The subpoenas can then lead to direct actions against the actual infringers.[21] Indeed, before embarking on this effort to hold internet service providers liable for their users' actions, music labels and publishers sued those users directly. But the industry found that suing individuals was unpopular. Or, as in *Grokster*, they can sue the providers of any software or websites that are designed and marketed for piracy. While those individual infringers and providers of piracy software may lack deep pockets and be harder to sue than internet service providers, that is no reason to ignore the common law limits on contributory infringement or interpret those limits in a way that undermines federal broadband policy and harms the public.

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

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

CONCLUSION

The Court should reverse the district court's judgement.

Respectfully submitted,

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September 27, 2023

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the applicable type-volume limitation set forth in Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,485 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Word 2016 in a proportionally spaced typeface (Times New Roman, 14-point).

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September 27, 2023

CERTIFICATE OF SERVICE

I hereby certify that, on September 27, 2023, I electronically filed the foregoing brief with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in this case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

/s/ *Scott H. Angstreich*
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September 27, 2023