

No.

In the Supreme Court of the United States

GRANDE COMMUNICATIONS NETWORKS, LLC,
PETITIONER

v.

UMG RECORDINGS, INC., ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents an exceptionally important question under the Copyright Act. It involves a nationwide litigation campaign by the U.S. recording industry to impose massive liability on internet-service providers (ISPs)—for supplying content-neutral internet access to arm's-length customers who unilaterally engage in copyright violations.

The question presented is:

Whether an ISP is liable for contributory copyright infringement by (i) providing content-neutral internet access to the general public and (ii) failing to terminate that access after receiving two third-party notices alleging someone at a customer's IP address has infringed.

II

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

Petitioner is Grande Communications Networks, LLC, the appellant/cross-appellee below and defendant in the district court. Grande Communications is owned by Grande Parent LLC and does business as part of Astound Broadband; no publicly held company owns 10% or more of its stock.

Respondents are UMG Recordings, Inc.; Capitol Records, LLC; Warner Bros. Records Inc.; Sony Music Entertainment; Arista Records, LLC; Arista Music; Atlantic Recording Corporation; Capitol Christian Music Group, Inc.; Elektra Entertainment Group, Inc.; Fonovisa, Inc.; Fueled by Ramen, LLC; LaFace Records, LLC; None-such Records, Inc.; Rhino Entertainment Company; Roadrunner Records, Inc.; Roc-A-Fella Records, LLC; Tooth & Nail, LLC; and Zomba Recording, LLC, the appellees/cross-appellants below and plaintiffs in the district court.

III

RELATED PROCEEDINGS

United States District Court (W.D. Tex.):

UMG Recordings, Inc., et al. v. Grande Communications Networks, LLC, No. 1:17-cv-365 (Jan. 30, 2023) (final judgment)

UMG Recordings, Inc., et al. v. Grande Communications Networks, LLC, No. 1:17-cv-365 (May 11, 2023) (post-judgment order)

United States Court of Appeals (5th Cir.):

UMG Recordings, Inc., et al. v. Grande Communications Networks, LLC, No. 23-50162 (Oct. 9, 2024) (judgment)

UMG Recordings, Inc., et al. v. Grande Communications Networks, LLC, No. 23-50162 (Dec. 6, 2024) (order denying rehearing)

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Grande Communications Networks, LLC, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-49a) is reported at 118 F.4th 697. The post-judgment opinion of the district court (App., *infra*, 50a-85a) is unreported but available at 2023 WL 11938218. The opinion of the district court on summary judgment (App., *infra*, 86a-132a) is reported at 384 F. Supp. 3d 743.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2024. A petition for rehearing was denied on

December 6, 2024 (App., *infra*, 133a-134a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 106 of the Copyright Act, 17 U.S.C. 106, provides in pertinent part:

Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

* * * * *

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; * * *

* * * * *

Section 501 of the Copyright Act, 17 U.S.C. 501, provides in pertinent part:

Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 * * * is an infringer of the copyright * * * .

* * * * *

INTRODUCTION

This case presents a clear and intractable conflict over a significant question under the Copyright Act: whether an ISP is liable for contributory infringement by providing content-neutral internet access to the general public and failing to terminate that access after receiving notice that someone at a customer's IP address has infringed.

This case readily satisfies the traditional criteria for granting review. The question is exceptionally important.

It has astounding legal and practical stakes. It has split the circuits. The latest decisions (from the Fourth and Fifth Circuits) have sharply departed from this Court’s precedent. And there is an urgent need for intervention: respondents’ theory does not resemble any kind of traditional common-law liability. It flunks the tests this Court recognized in *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023), and *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). And it targets not individual incidents but systemic concerns—putting the burden on private ISPs to conjure up entire regulatory schemes to police and enforce unwritten copyright rules (or face crushing liability).

This Court has long recognized the importance of protecting key industries from undue interference and preserving clear, efficient, workable rules for regulated actors. Yet while respondents pitch their position as straightforward, nothing about their proposed scheme is simple or easy. They brush aside the real-world challenges it thrusts upon others, and shrug at the severe hardship it would impose on families, businesses, schools, hospitals, and major institutions. It endangers jobs, livelihoods, health, education, emotional wellbeing, and political engagement. And the upshot of respondents’ position is clear: ISPs will be forced to terminate access to thousands of users (many of whom did nothing wrong) or face intolerable costs—despite the lack of any “duty that would require defendants or other communication-providing services to terminate customers after discovering that the customers were using the service for illicit ends.” *Twitter*, 598 U.S. at 501.

This is a major question. It involves considerations of vast economic and political significance. The answer is not found in the Copyright Act (which does not even expressly

authorize contributory liability). The consequences are vital to the nation’s ISP industry and the public’s ability to access broadband—which is essential to every component of modern daily life. An issue of such obvious magnitude is one that Congress would necessarily reserve for itself—as this Court recognized decades earlier. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984). And yet respondents seek to impose systemic liability on an entire industry without any plausible hint that Congress itself addressed these difficult questions and resolved the conflicting policy concerns.

At bottom, this is a policy question for the political branches. It falls plainly outside the common-law footprint (which otherwise rejects respondents’ theory).¹ It needs a regulatory framework with settled rules, clear enforcement mechanisms, and unambiguous legislative guidance. It should not be announced in scattershot fashion by district-court judges on an ad-hoc basis—a process that will wreak havoc on the public and the entire ISP industry for potentially decades. Yet under the Fifth Circuit’s decision, that is precisely where this mission-critical industry is headed.

¹ Indeed, this Court has twice summarized the dispositive legal rule in a manner that should have directly resolved these cases: “passive assistance” is not “active abetting,” and “a contrary holding would effectively hold any sort of communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them. That conclusion would run roughshod over the typical limits on tort liability and take aiding and abetting far beyond its essential culpability moorings.” *Twitter*, 598 U.S. at 500, 503; see also *Grokster*, 545 U.S. at 937 & 939 n.12 (“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”).

This Court has already called for the views of the Solicitor General in a related case (*Cox Commc'ns, Inc. v. Sony Music Entm't*, No. 24-171), reflecting the issue's obvious importance. That case presents certain complexities this case does not—including an alternative ground that could obviate the need to decide the fundamental question presented here. This case would serve as an ideal companion to *Cox* in definitively resolving these urgent issues.

Because the Fifth Circuit wrongly decided a fundamental question of federal law, the petition should be granted.

STATEMENT

1. The Copyright Act grants copyright owners the “exclusive right[] to do and to authorize” certain acts, including reproducing and distributing copyrighted works. 17 U.S.C. 106. The Act also deems “[a]nyone who violates any of th[ose] exclusive rights” an “infringer.” 17 U.S.C. 501(a). But the Act’s text is limited to direct liability; nothing in the Act “expressly render[s] anyone liable for infringement committed by another.” *Grokster*, 545 U.S. at 930. This Court has nonetheless read “doctrines of secondary liability” into the Act’s silence, applying “common law principles” that “are well established in the law.” *Ibid*.

One such doctrine is contributory liability: “[o]ne infringes contributorily by intentionally inducing or encouraging direct infringement.” *Grokster*, 545 U.S. at 930.

2. a. Petitioner is a “large internet service provider” in Texas. App., *infra*, 2a. It operates as part of Astound Broadband, which is the nation’s sixth largest telecommunications provider, serving eight of the top ten metro markets in the United States. It provides content-neutral internet service to the general public. It does not monitor its customers’ internet traffic and has no means to confirm

what any given user is doing. It cannot confirm who is using a connection at any given IP address; it cannot control what sites or content any given user accesses, and it cannot verify what any user has accessed in the past. It cannot even determine whether traffic from a given IP address was generated by an actual subscriber, a subscriber's guest, or an unauthorized third party. See, *e.g.*, C.A. ROA 12858-12871.

Respondents are “a group of major record labels.” App., *infra*, 2a. They have long targeted music piracy on so-called “peer-to-peer” (P2P) file-sharing networks. *Id.* at 3a-4a. This case involves BitTorrent, a “decentralized” P2P network that permits “anonymous” file-sharing without any “single company or entity manag[ing] the distribution of its software.” *Id.* at 4a. While BitTorrent users can be identified by their IP address, it takes the operating ISP “to match specific IP addresses to specific internet users.” *Id.* at 4a.

Respondents have contracted with certain third-party companies with “proprietary technology” capable of “infiltrat[ing] BitTorrent and identify[ing] infringing users by their IP addresses.” App., *infra*, 4a. One such company (Rightscorp) sent petitioner “more than 1.3 million infringement notices” from 2011 to 2017, each supposedly “document[ing] a specific instance of a Grande subscriber agreeing to distribute a copy of a copyrighted work without authorization.” *Id.* at 8a.

b. In the early 2000s, petitioner sometimes suspended or terminated a customer's internet access upon receiving infringement notices. App., *infra*, 6a-7a. It subsequently abandoned that practice in 2009, opting instead for a more-calibrated approach: it would “notify subscribers” of “infringement complaints,” suggest “possible causes,” and “advise[] that any infringing conduct is unlawful and

should cease.” *Id.* at 7a. But it would “no longer terminate[] subscribers for copyright infringement, no matter how many infringement notices [petitioner] received.” *Ibid.*

3. In April 2017, respondents sued petitioner for “both contributory and vicarious copyright infringement.” App., *infra*, 10a. According to respondents, once petitioner has notice that some user at a specific IP address has allegedly engaged in a violation, petitioner is required to terminate service upon notice of a second violation—otherwise petitioner is thereafter contributorily liable for the third-party user’s actions at that IP address. App., *infra*, 33a (targeting ISPs for “material contribution” when “they knowingly provide infringing customers with the necessary tools to infringe—in particular, a high-speed connection to the internet”).

The district court ultimately dismissed respondents’ vicarious-infringement claim (App., *infra*, 10a) and denied petitioner’s safe-harbor defense under the Digital Millennium Copyright Act, 17 U.S.C. 512 (App., *infra*, 92a-102a). After a three-week trial, the jury found petitioner liable for “contributory copyright infringement of 1,403 of [respondents’] sound recordings.” *Id.* at 2a, 10a. It declared that infringement “willful” and “awarded \$46,766,200 total in statutory damages, or \$33,333 per song.” *Id.* at 10a-11a.

Petitioner filed a post-judgment motion challenging the legal validity of the contributory-infringement finding. According to the district court, contributory liability required a showing that petitioner “induced, caused, or materially contributed to the infringing activity.” App., *infra*, 65a. The jury was instructed that standard was met “when a defendant can take basic measures to prevent further damages to copyrighted works, yet intentionally

continues to provide access to infringing sound recordings.” *Ibid.* The district court ultimately rejected petitioner’s challenge: petitioner “ha[d] at least one simple measure at its disposal—terminating the internet services of repeat infringers,” and “failing to terminate infringing subscribers is enough to constitute material contribution.” *Id.* at 66a.

4. The Fifth Circuit affirmed. App., *infra*, 1a-49a.

As the court explained, petitioner’s attack on “material-contribution liability” was “the crux of its appellate challenge.” App., *infra*, 21a. While acknowledging petitioner “ma[de] several strong arguments,” it “ultimately” declared each point “unavailing.” *Ibid.*

The Fifth Circuit initially reaffirmed its past decisions upholding “the validity of material-contribution claims for contributory copyright infringement.” App., *infra*, 22a. It explained those claims are rooted in “common-law principle[s],” and noted this Court “expressly embraced the common-law standards for contributory infringement” in *Sony* and *Grokster*. *Id.* at 23a.

The court then declared those standards were satisfied: petitioner “provided [its] subscribers with the tools necessary to conduct those infringements (i.e., high-speed internet access) and continued doing so after learning that those subscribers were repeatedly using those tools to infringe.” App., *infra*, 29a. It accordingly held that petitioner’s “knowing provision of internet services to infringing subscribers was actionable.” *Id.* at 30a.

The Fifth Circuit next rejected petitioner’s challenge to the “simple measures” standard, which the courts below borrowed from the Ninth Circuit. App., *infra*, 31a. According to the Fifth Circuit, this standard adds a defense “even when the defendant provides the tools necessary for infringement”—excusing the defendant when there are

no “simple measures to prevent further damage to copyrighted works.” *Ibid.* Here, however, the Fifth Circuit found petitioner “had available to it at least one basic measure: it could have terminated high-speed internet services to known, repeat infringers.” *Id.* at 33a.

The Fifth Circuit finally confronted petitioner’s contention that the district court applied the wrong standard “as a matter of law,” “flout[ing] *Grokster* and *Twitter*” by permitting secondary liability “even in the absence of affirmative, culpable conduct.” App., *infra*, 33a. The Fifth Circuit “acknowledge[d] this [was] a closer question,” but it still rejected petitioner’s challenge. *Ibid.*

The court followed the Fourth Circuit’s conclusion that liability is appropriate “if the service provider learns that its customers are using its services to infringe and ‘nonetheless renews the lease to those infringing customers.’” App., *infra*, 34a. The court recognized petitioner’s argument that such a conclusion was inconsistent with *Grokster* and *Twitter*—which generally foreclose liability for merely failing “to take affirmative steps to prevent infringement.” *Id.* at 35a. While admitting “[t]hese are not weak arguments,” it limited *Twitter* as arising under a different statute, and cabined *Grokster* as dealing with “inducement liability,” not contributory infringement. *Id.* at 36a. It concluded that petitioner “took *no* action in response to its subscribers’ repeated infringements,” and still “provided its services knowing that its customers were using them to infringe.” *Id.* at 37a. Because petitioner “continue[d] providing its services to known infringing subscribers”—and failed to affirmatively prevent

their misconduct—the court upheld the verdict of contributory infringement. *Id.* at 38a-40a.²

REASONS FOR GRANTING THE PETITION

The case for immediate review is overwhelming. There is palpable confusion nationwide about secondary liability in this critical context—dictating whether an entire industry is on the hook for the wrongful acts of unrelated third parties. The Fifth Circuit refused to follow this Court’s unmistakable guidance on what is required to show secondary liability. And this was not some minor or insignificant error. It affects a key national industry in a profound way. It affects how that industry can operate and provide service to millions of individuals, families, businesses, institutions, and the government itself.

It is essential, now, to set immediate rules establishing what a content-neutral ISP must do to avoid massive liability in the ordinary course of business. And it is equally essential, now, for all subscribers (large and small) to understand their own rights and the costs of potentially forfeiting internet access should ISPs be forced to terminate connections prematurely in response to two unsubstantiated allegations of infringement (a staggering penalty for a \$2 harm).

At bottom, this question is not even plausibly addressed by the Copyright Act. It implicates matters of overriding economic and social significance. It involves aggressive theories of industrywide liability that flout traditional common-law principles and are found nowhere in the text of any enacted federal law. If respondents’ view is somehow correct, it is essential to make that default

² The Fifth Circuit separately concluded the district court miscalculated statutory damages as a matter of law. It accordingly vacated the award and remanded for a new trial on damages. App., *infra*, 48a.

clear to Congress—who can course-correct if necessary. And if petitioner’s view is correct, then at least Congress (and copyright holders) will have a clear baseline from which to consider new legislation—some federal enactment that (for the first time) actually addresses any of these sensitive issues.

But it is inconceivable to think the answer is to leave these mission-critical questions to the ad-hoc decision-making of random juries and scattered district courts. That is an invitation for disaster: those judicial actors cannot sensibly develop a reticulated, pseudo-regulatory framework by piecemeal adjudication while ISPs struggle to comply with an endless flood of robo-notices targeting third-party conduct—where the customer relationship is “arm’s length, passive, and largely indifferent.” *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 500 (2023).

The decision below conflicts with decisions of this Court and other circuits. It raises issues of surpassing importance for a core national industry—and literally millions of internet users relying on this basic good to conduct every facet of daily life. This Court’s immediate intervention is warranted—whether here, in *Cox*, or both.

A. The Decision Below Cements A Square, Intolerable Conflict Over A Fundamental Question Under The Copyright Act

The decision below entrenches an undeniable conflict over a core question under the Copyright Act: whether an ISP is liable for contributory infringement by “providing its [content-neutral] services to known infringing subscribers.” App., *infra*, 38a.

The Fifth Circuit erred in imposing duties that contravene traditional common-law rules and are found nowhere in any statute. Its position destabilizes the industry and creates debilitating risks for ISPs and their subscribers. It conflicts with this Court’s unambiguous decisions and

those from other circuits, and the resulting confusion and harm is intolerable. There is a compelling need to restore a sensible regulatory scheme and correct these obvious mistakes. Review is immediately warranted.

1. The Fifth Circuit’s position is squarely at odds with this Court’s decisions.

a. In *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023), this Court summarized the dispositive legal rule in a manner that should have directly resolved this case: there is no “duty” for online platforms to “terminate customers after discovering that the customers were using the service for illicit ends.” 598 U.S. at 501. The Court drew a stark line between “passive assistance” and “active abetting,” and it refused to declare a “communication provider liable” for “wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them.” *Id.* at 499, 503. The opposite conclusion—exactly the one the Fifth Circuit embraced below—would “run roughshod over the typical limits on tort liability and take aiding and abetting far beyond its essential culpability moorings.” *Id.* at 503.

The Fifth Circuit’s decision is irreconcilable with *Twitter*’s holding. *Twitter* analyzed the traditional common-law principles of secondary liability; those same principles apply here.³ The Fifth Circuit faulted petitioner for

³ See *Twitter*, 598 U.S. at 488, 497-498 (“we turn to the common law of aiding and abetting”; applying “common-law principles”); *Metro-Goldwyn-Mayer Studios Inc. v. Gorkster, Ltd.*, 545 U.S. 913, 930 (2005) (copyright “doctrines of secondary liability emerged from common law principles”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984) (“the concept of contributory infringement is merely 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”); see also App., *infra*, 22a (“contributory-infringement claims stem from ‘the common law’”).

failing to “terminate[] high-speed internet services to known, repeat infringers” (App., *infra*, 33a); this Court disavowed any such “duty” to “terminate [known] customers” “using [a] service for illicit ends” (598 U.S. at 501). The Fifth Circuit faulted petitioner for “t[aking] *no* action in response to its subscribers’ repeated infringements” (App., *infra*, 37a); this Court declared such “passive non-feasance” beyond the bounds of “aiding-and-abetting liability” (598 U.S. at 500).

“At bottom,” as in *Twitter*, respondents’ claim “rests less on affirmative misconduct and more on an alleged failure to stop [infringers] from using these platforms.” 598 U.S. at 500. It ignores that petitioner created a content-neutral service “generally available to the internet-using public” and “agnostic” as to how it is used. *Id.* at 498-499. It makes no difference that petitioner “provide[d]” “the infrastructure” allowing others to misbehave; an infringer’s “ability to benefit from these platforms was merely incidental to [petitioner’s] service[] and general business model[]”—those infringers could use the service “just like everyone else,” and once the service “w[as] up and running, [petitioner] at most allegedly stood back and watched.” *Id.* at 498-499, 504. But “[t]he mere creation of those platforms, however, is not culpable.” *Id.* at 499. Contrary to the Fifth Circuit’s view, there is no basis to hold “a company liable for merely failing to block such criminals despite knowing that they used the company’s services.” *Id.* at 499, 501 & n.14; see also *id.* at 505 (rejecting alleged secondary liability where “defendants supplied generally available virtual platforms that ISIS made use of,” and “defendants failed to stop ISIS despite knowing it was using those platforms”).

It is puzzling what else the Fifth Circuit wanted. It suggested *Twitter* “does not control because it was liti-

gated pursuant to the Justice Against Sponsors of Terrorism Act, not the Copyright Act.” App., *infra*, 36a. This is bizarre: “JASTA employs the common-law terms ‘aids and abets,’ which is why the Court’s analysis applied to JASTA, “*as elsewhere*,” to define traditional common-law secondary liability. *Twitter*, 598 U.S. at 493 (emphasis added); see also *id.* at 484-485 (so explaining). *Twitter* focused on common-law principles pulled from other sources; it raised general concerns that apply identically here; and it nowhere even hints it was applying a JASTA-specific standard. The same traditional principles govern both there and here—and the Fifth Circuit’s contrary position is baseless. See, e.g., *Amazon Servs. LLC v. U.S. Dep’t of Agric.*, 109 F.4th 573, 581 (D.C. Cir. 2024) (contrary to the Fifth Circuit, having no trouble understanding this point: “*Twitter* turned centrally on the longstanding meaning of the statutory phrase ‘aids and abets,’ not on the ‘additional context’ provided in JASTA”; “[t]hat is why the decision in *Twitter* emphasized the ‘conceptual core that has animated aiding-and-abetting liability for centuries’”) (citations omitted).

It is also odd for the Fifth Circuit to suggest the Copyright Act somehow deviates from traditional common-law principles. See App., *infra*, 29a-30a n.10. This Court has suggested otherwise (e.g., *Grokster, Ltd.*, 545 U.S. at 930), and it is a mystery from where else those principles might emerge—given the Copyright Act itself is *silent* as to secondary liability. Courts are necessarily implying such liability into the Act, and the source is the traditional common-law rules. E.g., *Sony*, 464 U.S. at 435.

In short, unlike the Fifth Circuit, it cannot be enough to say petitioner had specific knowledge of specific infringing users and *still* provided service. E.g., App., *infra*, 26a, 29a, 35a, 39a. *Twitter* rejected that exact proposition. The online services were aware of wrongdoers and failed

to cut them off; here, respondents say petitioner was aware of wrongdoers and failed to cut them off. The “passive[]” failure to “terminate customers after discovering that the customers were using the service for illicit ends” is insufficient for secondary liability. *Twitter*, 598 U.S. at 500-501. A content-neutral ISP is not “liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them.” *Id.* at 503; see also, *e.g.*, *Amazon Servs.*, 109 F.4th at 583 (“The Department’s finding of liability ‘rests less on affirmative misconduct and more on an alleged failure’ to stop [third parties] from using Amazon’s infrastructure in importing products unlawfully. Such ‘passive nonfeasance’ does not amount to conscious and culpable participation in the circumstances.”) (citing *Twitter*, 598 U.S. at 499-500).⁴

b. This Court has applied those same traditional principles in the copyright context—and its holding again is incompatible with the Fifth Circuit’s position.

In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), the Court again disclaimed any affirmative duty to terminate users or actively prevent infringement: “mere knowledge of infringing potential or of *actual infringing uses* would not be enough here to subject a distributor to liability.” 545 U.S. at 937 (emphasis added). On the contrary: “in the absence of other evidence of [culpable] intent,” contributory liability cannot be

⁴ To the extent respondents believe petitioner is somehow liable for modifying its 2009 practice (where some accused subscribers were supposedly terminated), App., *infra*, 7a, respondents are plainly wrong. The point is illogical: if termination was not required in the first place, then eliminating a termination policy cannot possibly create liability. This is not a one-way ratchet: if traditional common-law principles permit “passive nonfeasance” (*Twitter*, 598 U.S. at 500), an ISP’s decision to revert to the baseline cannot create fault because it previously *exceeded* the common law’s requirements.

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; contra App., *infra*, 38a-39a (holding the opposite: premising liability on petitioner’s failure to take affirmative steps to prevent infringement).

Grokster’s holding maps out perfectly here. Petitioner’s content-neutral service has countless “noninfringing uses,” and petitioner was not required “to take affirmative steps to prevent infringement.” *Grokster*, 545 U.S. at 939 n.12. This should have foreclosed liability: respondents were required to identify “evidence” of “intent to *promote* infringing uses.” *Id.* at 931. Passively tolerating a third party’s arm’s-length misconduct is not *promoting* that misconduct; it is “mere passive nonfeasance.” *Twitter*, 598 U.S. at 500. The fact that petitioner had “knowledge that some” users might “infringe” was irrelevant with a content-neutral service “capable of commercially significant noninfringing uses.” *Grokster*, 545 U.S. at 931.⁵

The Fifth Circuit’s primary response is to cabin *Grokster* to “inducement liability.” App., *infra*, 36a. This is thin gruel. *Grokster* was setting the line for where companies could be contributorily liable. It is perplexing to think *Grokster*’s direct language *foreclosing* liability would have

⁵ The only debatable textual hook for secondary liability is found in Section 106, which grants copyright owners exclusive rights “to do and to *authorize*” certain conduct. 17 U.S.C. 106 (emphasis added); see H.R. Rep. No. 1476, 94th Cong., 2d Sess. 61 (1976) (so suggesting). But that limited textual license—“to authorize”—goes beyond any indirect or passive nonfeasance. It describes affirmative action *approving* infringing conduct. That does not describe offering a content-neutral service to the general public while remaining indifferent how that service is used.

come out the other way had the plaintiff slapped a different label on the identical claim.⁶ This Court presumably meant what it said: “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.” 545 U.S. at 939 n.12. That plain statement cannot be brushed aside so easily.

2. The Fifth Circuit’s decision also conflicts with settled law in other circuits. See, e.g., *Cobbler Nevada, LLC v. Gonzales*, 901 F.3d 1142, 1148 (9th Cir. 2018) (“circuit courts approach contributory liability through varying lenses”).

a. The decision below cannot be squared with the Tenth Circuit’s decision in *Greer v. Moon*, 83 F.4th 1283 (10th Cir. 2023). In *Greer*, a website operator refused to remove copyrighted content uploaded by third-party users. 83 F.4th at 1288-1291. In addressing contributory infringement, the Tenth Circuit, unlike the Fifth Circuit, disavowed the theory that the operator could be liable for failing to take affirmative steps to terminate a known violation: “We discern no error in the district court’s explanation that contributory liability requires more than ‘merely “permitting” the infringing material to remain on the website.’” *Id.* at 1294-1295 (searching for “more than

⁶ In fact, this Court has previously recognized that “the lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn,” and secondary-liability claims may require courts to consider “arguments and case law which may also be forwarded under * * * other labels.” *Sony*, 464 U.S. at 435 n.17. It would thus be odd for *Grokster* to hermetically seal contributory infringement from “inducement liability.”

‘a failure to take affirmative steps to *prevent* infringement’”) (citing *Grokster*, 545 U.S. at 939 n.12); contra App., *infra*, 37a (reaching opposite conclusion).

The Tenth Circuit nevertheless found potential liability—but only because the complaint alleged the operator went beyond mere passive conduct: the operator “not only expressly refused to remove the materials,” but “encourage[d]” users to engage in “[f]urther infringement.” 83 F.4th at 1295. That additional, culpable conduct might satisfy the standards identified in *Twitter* and *Grokster*, but there was no comparable conduct here—and the Fifth Circuit repudiated that any such conduct was required. This case would have been decided the opposite way had it arisen in Colorado instead of Texas.

b. The Fifth Circuit’s decision likewise conflicts with established law in the Second Circuit. Contrary to the Fifth Circuit, the Second Circuit requires culpable conduct to establish “contributory liability”: “[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.” *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 99-100 (2d Cir. 2016) (emphasis added); see also *id.* at 100 (understanding *Grokster* to require more than “knowledge that [a product] may be put to infringing uses”—it must “show[] statements or actions directed to *promoting infringement*”) (emphasis added); see also, e.g., *Matthew Bender & Co. v. West Publ’g Co.*, 158 F.3d 693, 706 (2d Cir. 1998) (“In determining whether liability is foreclosed by substantial noninfringing uses, the Supreme Court in *Sony* emphasized that the alleged contributory infringer did not *influence or encourage* unlawful copying with the equipment it provided.”) (emphasis added).

This focus on culpable intent—acting with the actual *object* of promoting infringement—is found nowhere in the Fifth Circuit’s operative rationale. While the Fifth Circuit authorizes contributory infringement when a content-neutral service fails to affirmatively *prevent* infringement (*e.g.*, App., *infra*, 37a), the Second Circuit demands an affirmative showing that the actor intentionally “promoted” the infringing conduct (*EMI*, 844 F.3d at 99-100); see also *J & J Sports Prods., Inc. v. RK Soto Enters. Inc.*, No. 17-2636, 2020 WL 7684894, at *14 (E.D.N.Y. Feb. 7, 2020) (a “general ability to supervise the establishment’s operations” is insufficient where the defendant was not “involved in the decision to broadcast” the copyrighted work); *MerchDirect LLC v. Cloud Warmer, Inc.*, No. 17-4860, 2019 WL 4918044, at *5 (E.D.N.Y. Sept. 30, 2019) (describing *EMI* as upholding contributory liability where defendant “personally encouraged corporate executives and customers to engage in infringing activity”). The Second Circuit’s decisions are consistent with this Court’s views; the Fifth Circuit’s are not.

c. While the Fifth Circuit’s position conflicts with Tenth and Second Circuit precedent, it is consistent with law in the Ninth Circuit. In *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), the Ninth Circuit adopted the same standard ultimately endorsed by the Fifth Circuit below: “we hold that 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 copyright works yet continues to provide access to infringing works.” 508 F.3d at 1172 (citations omitted); see also *ibid.* (“a service provider’s knowing failure to prevent infringing actions could be the basis for imposing contributory liability”).

In that case, the Ninth Circuit found that “Google could be contributorily liable if it had knowledge that infringing * * * images were available using its search engine, could take simple measures to prevent further damage to [the] copyrighted works, and failed to take such steps.” 508 F.3d at 1172. In so holding, the Ninth Circuit embraced a standard directly at odds with *Twitter* and the Second and Tenth Circuits. See, e.g., *Twitter*, 598 U.S. at 503 (a platform is not “liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them”); *Greer*, 83 F.4th at 1294-1295 (“contributory liability requires more than ‘merely “permitting” the infringing material to remain on the website”); contra, e.g., *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 671-672 (9th Cir. 2017) (asking whether the defendant was “able to take simple measures to remove infringing materials from its servers”).

d. Finally, the Fifth Circuit’s approach largely tracks Fourth Circuit precedent: each authorizes “contributory copyright infringement” where an ISP “intentionally continue[s] to provide its internet services to infringing subscribers.” App., *infra*, 34a (describing *Sony Music Entm’t v. Cox Commc’ns, Inc.*, 93 F.4th 222 (4th Cir. 2024), and *BMG Rights Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, 881 F.3d 293 (4th Cir. 2018)). The one difference: the Fifth Circuit includes “the ‘simple measures’ standard” while the Fourth Circuit does not. *Id.* at 31a. As the Fifth Circuit explained, that standard provides a modest additional protection to defendants (while still departing from this Court’s traditional common-law principles): it “offer[s] defendants a way out if they have no ‘simple’ (or ‘basic’) means of avoiding secondary liability.” *Id.* at 32a.

* * *

The stark conflict over this vital legal question warrants immediate review. The decision below contravenes

this Court's decisions, conflicts with other circuits, and threatens a key national industry and the wellbeing of thousands of individuals, families, businesses, and institutions—all based on an indefensible reading of traditional common-law principles that this Court has already rejected.

Respondents' position is unworkable and deeply concerning. It misstates the law and produces grave practical problems. It will interfere with the entire ISP industry and unduly harm innocent subscribers. The debate has been fully exhausted at the district and circuit level. There is an urgent need to restore clarity and correct the Fifth Circuit's mistake.

This Court has already called for the views of the Solicitor General in *Cox*. This case would serve as an ideal companion (or alternative) to that case—directly presenting the fundamental question of contributory infringement in its purest form. Until this Court intervenes, the ISP industry (and its millions of customers) will have no reliable way to structure their behavior. This Court's immediate guidance is essential.

B. Whether ISPs Are Liable For Subscribers' Copyright Violations Is A Nationwide Question Of Exceptional Importance

The question presented is of surpassing legal and practical importance. It presents a clear, entrenched conflict on a significant legal question that affects a critical national industry and millions of stakeholders. The Fifth Circuit's decision ignores the serious costs of cutting off service, the untenable task of forcing ISPs to regulate this sensitive issue, and the profound problem of asking ISPs and courts to craft an unwritten regulatory scheme without any legislative guidance—a strong indication that Congress nowhere authorized this staggering liability. The existing uncertainty is untenable, and the industry

will remain in turmoil until this Court provides a definitive answer. The need for further review is self-evident.

1. First and foremost, respondents wrongly ignore the sensitive and difficult policy questions inherent in cutting off internet access—including the grave and obvious hardship for tens of thousands of users, and the unfairness of punishing an entire household, business, school, hospital, hotel, facility, dorm, etc., for a single individual's misfeasance.

Terminating online access is no minor thing. It threatens the jobs of remote workers. It threatens the ability of children to engage in remote learning. It threatens the health of those with connected medical devices. The list is easy to expand. Virtually every component of today's social and economic existence is tied to the internet—and cutting off service threatens massive disruption to work, education, health, learning, entertainment, political engagement, social interaction, and basic wellbeing. It has devastating effects on families and their livelihoods, and can shut down businesses and essential facilities. The costs are patently unreasonable under any metric, and there is no indication, anywhere, that Congress felt this kind of drastic punishment was warranted based on two alleged infractions often resulting in less than a few dollars of actual harm.

And this says nothing about the deeper unfairness and costs of punishing entire households (or entire facilities) because a single individual happened to download as few as two songs on two separate occasions. It is absolutely common for families, businesses, apartment buildings, universities, etc., to share a single internet connection or account. So take a family: this could mean terminating service to 4-6 people (including parents working from home) simply because one person—or even a transient

guest—happened to misuse the connection (often unbeknownst to others). Or take the same result for a dorm. Or a coffee shop. Or a hospital. Or a hotel. Or a military barracks.

If a proposed legal rule imposes staggering and disproportionate harm in common scenarios, one has to wonder if the legal rule is correct. Here, respondents say everyone loses—in devastating ways—whenever anyone associated with any IP address twice engages in even minor acts of infringement. It is bizarre to say an ISP should face jaw-dropping liability for failing to mete out the harshest punishment possible (with predictable collateral damage) based on a two-dollar crime.⁷

2. Even were this extreme punishment warranted, respondents paint the ISPs’ task as simple and straightforward, but this stands reality upside-down. Respondents ignore the significant practical challenges that ISPs face in making termination decisions, especially without any clear framework dictating when action is required—or what process and protections subscribers should receive.

The record labels bombard ISPs with millions of alleged infringement notices (App., *infra*, 8a; Cox Pet. App. 9a; Cox Pet. 10; Sony Opp. 4)—typically sending hundreds of notices each day. Yet there is absolutely no guidance or framework establishing the bounds of liability. Just a few examples:

⁷ Respondents’ belief that this punishment is warranted (after receiving a second notice) is absurd under any reasonable measure. If respondents disagree, they are always free to pursue claims against subscribers directly—and see how a court or jury reacts to their position. See Altice Amicus Br. 18, *Cox Commcn’s, Inc. v. Sony Music Entm’t*, No. 24-171 (filed Sept. 16, 2024) (direct suits were “a public-relations disaster”).

******How many notices are enough? Two? Ten? What if the first notice is doubtful—or the subscriber offers a legitimate excuse or promises not to do it again? Still credit the violation? What if the notices are separated in time (say the second arrives a year after the first? six months? five weeks?)? When, if ever, does the clock reset? What if a notice flags hundreds of downloads in a single session? What if a longtime user uncharacteristically downloads songs on two consecutive days? Terminate immediately? What if two separate users admit responsibility for the two separate notices? Does that still require termination? What if the IP address never receives another notice? If access is terminated, when can it be restored? Ever? Do ISPs have an obligation to notify their competitors so they too can refuse to serve that customer? Can an ISP sign up a customer despite being flagged by a different ISP? Do those past strikes count or not?

******Respondents' robo-vendors are not infallible. There is a risk of false accusations or simple mistakes. See, *e.g.*, Altice Amicus Br. 15-16 (providing examples). What happens if a subscriber objects or denies the allegation? What opportunity do subscribers have to respond? What process is required? An in-person hearing? Any ability to submit evidence? What investigation is mandated? What notice is sufficient? What proof is required? Who decides whether the label or the subscriber is correct? And how is the ISP supposed to do any of this—given that it cannot monitor any user's activity, has no access to a subscriber's hard drive, has no way of verifying anything, and cannot even determine which individual person was using the tar-

geted IP address (an especially acute problem when dealing with facilities, dorms, hospitals, coffee shops, businesses, etc.)?⁸

****What excuses/explanations are acceptable? Any? Are any second- or third-chances allowed? What if the subscriber was hacked? What if the subscriber was unaware how to install a WiFi password? What if the subscriber was clueless about a babysitter's improper use? Or a child's (or her friend's)? What if another incident occurs despite a parent first attempting a mild punishment? No chance to try again? What about honest mistakes? Still terminate?**

****What leniency is permitted? Any? And based on what factors? What if a parent had no idea about a child's or spouse's infringement? What if they will lose their job? What if a child will miss school or assignments? What if the family has special medical needs, has connected medical devices, or lives in a rural area and uses telehealth services? Is it fair for the ISP to consider the stakes—including situations where terminating access will devastate a family's livelihood and wellbeing?**

****What flexibility is permitted for connections used by dozens or hundreds of users? Does the same "two-strikes-and-you're-out" policy apply? Does it matter if the IP address is exposed to different users at different times (like**

⁸ Respondents even overlook the technical challenges of matching the correct user with a corresponding IP address. Assignments of IP addresses to subscribers change over time, and it is not always obvious which subscriber is responsible for which action on which date. As a result, ISPs cannot even be perfectly confident that the right person is being served with the right notice. Nor is there any other way around this, given the practical impossibility of monitoring (much less recording) the entirety of all internet activity conducted across a global system. C.A. ROA 12859-12860. ISPs simply have no way to verify the allegations. *Id.* at 12869.

hotels with guests)? Does it matter what policies those facilities enforce?

******ISPs received instructions (from various state actors) not to terminate internet access during the recent pandemic. Yet respondents' theory requires termination anyway. This leaves ISPs in an impossible bind. What are ISPs supposed to do? Ignore the States and risk regulatory action, or follow state directives and risk massive damages? How, if at all, do state directives affect liability? And how can respondents possibly justify countermanding regulatory orders and seeking damages for failing to terminate during such periods?

******What resources are required? Are ISPs supposed to invest in hiring entire staffs and departments to review, investigate, adjudicate, and resolve hundreds of robo-complaints, all because respondents would rather not do the hard work themselves—or sue the actual infringers?

In short, there is no clear framework dictating when action is required. Respondents' theory (which the Fifth Circuit has now endorsed) effectively demands a pseudo-governmental regulatory body operating privately inside each ISP—with a still-unwritten and still-unknown scheme of detailed regulations. And respondents are quick to demand termination upon receiving a second notice, but they apparently cannot be bothered to spell out the details of their own scheme.

Respondents cannot simply brush these issues aside as someone else's problem. Respondents expect to collect up to \$150,000 for each infringed work—and yet there is no statutory framework or legal guidance, anywhere, making clear precisely when an ISP should take action or what action is necessary. ISPs should not be left to fend for themselves, and they should not face crushing liability for not knowing how to resolve competing private disputes about whether infringement actually exists or what

remedial actions suffice in response. And yet that is precisely the outcome of the decision below—with ISPs everywhere scrambling to find ways to protect themselves against ad-hoc determinations by individual courts and juries in lawsuits seeking crippling liability.⁹

The bottom line: Respondents cannot rightfully foist a pseudo-regulatory scheme on private ISPs together with government-like duties to police third-party conduct on their content-neutral service—despite having no direct control over what any subscriber does; no way to limit or monitor their conduct; no way to track or confirm their activity; and no ready means of responding to hundreds of robo-blasts each day from an entity with every incentive to maximize allegations of infringement. Petitioner is unaware of “any case holding such a company liable for merely failing to block [identified wrongdoers] despite knowing that they used the company’s services.” *Twitter*, 598 U.S. at 501 n.14; see also *Grokster*, 545 U.S. at 937, 939 n.12. And it is especially difficult to fathom such a duty in the face of practical obstacles as serious as these.

These problems are all the more egregious given that none of this is even necessary. Copyright holders have a clear right to sue those directly responsible for infringing conduct (and the right to force ISPs to reveal the identities of those parties). Respondents may not wish to do that for political or public-relation reasons. See Cox Pet. 8. But

⁹ Indeed, under Fourth and Fifth Circuit precedent, ISPs are left with an impossible choice: terminate access immediately for users who may have done nothing wrong (at a grave cost to individuals, businesses, etc.), or terminate access too late and face crushing liability. And these suits threaten to drive smaller ISPs out of business—harming competition, risking access in rural markets, and defeating Congress’s goal of universal broadband coverage. See *Altice Amicus Br.* 12-19.

that is their choice—and it is on them for refusing to invoke the rights Congress actually provided via statute.

These concerns underscore only some of the immediate issues generated by the decision below. The profound need to correct that decision cannot be overstated.

3. As this illustrates, there is a clear danger of presuming Congress (silently) intended the Copyright Act to address these issues at all—and compelling reasons for courts to hesitate before judicially crafting an industry-wide framework for a major policy question that Congress itself did not address. “In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests.” *Sony*, 464 U.S. at 431. Indeed, if Congress had “wanted to impose a duty to remove content on these types of entities,” it presumably would have “done so by statute.” *Twitter*, 598 U.S. at 501 n.14.

This is a serious question with sensitive and difficult considerations on all sides. It involves industry-wide rules and liability; it implicates massive economic and political stakes; it risks holding private actors responsible for policing the conduct of unrelated third parties in enforcing the separate rights of independent actors. And this scheme looks nothing like an ordinary copyright case (much less traditional common-law secondary liability): it targets an industry-specific regulatory framework dictating how ISPs (as private actors) must govern and enforce federal law on their networks. In sum, “[t]his is no ‘everyday exercise of federal power.’ It is instead a significant encroachment into the lives—and health—of” countless citizens and a major corporate industry. *NFIB v. Department of Labor, OSHA*, 595 U.S. 109, 117 (2022) (internal citation omitted).

Respondents may wish to force the judiciary and ISPs to address these difficult questions without legislative guidance. But this is precisely the kind of “question of deep economic and political significance” that “Congress would likely have intended for itself.” *Biden v. Nebraska*, 143 S. Ct. 2355, 2375 (2023) (internal quotation marks omitted); see also *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). It calls for a clear and detailed regulatory framework. And while it would be one thing if the common law already provided clear rules in this area, the only rule it does provide forecloses liability: there is no duty targeting passive activity or the failure to take affirmative action when providing a content-neutral service to the public at large. *Twitter*, 598 U.S. at 501 & n.14, 503.¹⁰

The Fifth Circuit was mistaken in imposing duties that contravene the common law and are not found in any statute. Its views destabilize the industry and create serious risks for ISPs and their subscribers. Its decision conflicts with this Court’s authority and decisions from other circuits, and the resulting confusion is untenable. Review is

¹⁰ To be clear: Petitioner is not suggesting the Copyright Act precludes all secondary liability—although the Act is silent on the question. *Sony*, 464 U.S. at 434. That ship has sailed after *Sony* and *Grokster*. But petitioner is saying that it is extraordinary to presume Congress delegated to the courts the responsibility of crafting an industrywide set of rules for ISPs to enforce on a systemic level—while making the sensitive judgment-calls reserved for Congress in setting this kind of fundamental public policy. That is directly at odds with “[t]he judiciary’s reluctance to expand the protections afforded by the copyright without explicit legislative guidance.” *Id.* at 431. Nor is the DMCA’s safe harbor an answer. That provision confirms on its face that Congress was preserving any and all defenses and not deciding whether ISPs might be passively liable for copyright infringement on their networks. See 17 U.S.C. 512(l); S. Rep. No. 190, 105th Cong., 2d Sess. 19 (1998).

urgently warranted, and there is a distinct need to swiftly correct these mistakes.

C. This Case Is A Perfect Vehicle For Deciding The Question Presented—Whether Alone Or As An Ideal Companion To *Cox*

1. This case is an ideal vehicle for deciding this significant question. The dispute turns on a pure question of law: the legal standard for assessing contributory infringement against ISPs providing content-neutral internet access to the general public. It has no factual or procedural impediments. The question presented was exhaustively vetted and squarely resolved at each stage below. There are no alternative issues; no conceivable obstacles; and no doubt the issue is outcome-determinative. The question arises in its purest form with the greatest potential to produce an industrywide answer for all ISPs. If ISPs must terminate service after receiving two infringement notices, petitioner loses; if ISPs are not liable for “mere passive nonfeasance,” petitioner wins. The answer turns strictly on the proper legal framework and legal duties. App., *infra*, 33a, 37a (this is “a matter of law” with “no factual dispute”). The vehicle is as clean as it gets.

2. The Court should grant review in this case alone or together as a companion to *Cox*. To be perfectly clear: *Cox* raises the same question and is an appropriate vehicle. But the Court may benefit from considering the two cases together.

First, the petitioner in *Cox* has advanced an “alternative” argument: the Fourth Circuit’s failure to adopt a “simple-measures” standard. Cox Pet. 21; Cox Reply 3-4. Cox maintains it “already implements onerous measures to stop infringement,” and further asserts its liability would be “foreclose[d] * * * under that standard.” Cox Reply 4; see also Cox Pet. 10-11 (“For 95% of the 1% of

subscribers alleged to infringe—Cox’s graduated-response system worked to prevent further infringement.”); App., *infra*, 32a n.12, 37a (“Cox favorably ‘addressed the simple-measures test as an alternative to *Grokster*’s affirmative-conduct standard,” and its “‘graduated response system’” may satisfy such a test).

If this Court agrees, it could ultimately reverse in *Cox* without deciding the core question presented here—thus leaving the question unresolved for ISPs like petitioner. Granting review in both cases would maximize the Court’s options and provide a direct opportunity to resolve the industrywide dispute.¹¹

Second, the respondents in *Cox* have contested the adequacy of that vehicle. Cox Br. in Opp. 31. They maintain that “copious evidence” showed Cox was not “a passive actor” and would lose even under “Cox’s preferred [legal] rule.” *Id.* at 23, 31; see also *id.* at 16, 18, 20 (asserting the jury heard evidence of Cox’s “flagrant disregard for copyright protections,” and Cox “ignore[s] the evidence before the jury”). To be perfectly clear again: petitioner believes these objections are baseless under any fair reading of the Fourth Circuit’s decision and simple common sense. (It is unclear, for example, how Cox’s *internal* dialogue could possibly promote *external* infringement.) But to the extent the Court wishes to avoid these distractions (or secure a backup should they unexpectedly prove substantial), this case again is an ideal companion to guarantee a decision on this exceptionally important issue.

¹¹ Because petitioner received a “simple-measures” instruction below, the same risk is not present in this case. The fundamental legal question is exclusively teed up for resolution, and there is no danger of leaving the industry in the dark if Cox wins based on its fact-specific program.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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