No. 24-181

IN THE

Supreme Court of the United States

SONY MUSIC ENTERTAINMENT, ET AL.,

Petitioners,

v.

COX COMMUNICATIONS, INC. and COXCOM, LLC,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

A defendant is not vicariously liable for another's copyright infringement unless "the defendant [1] profits directly *from the infringement* and [2] has a right and ability to supervise the direct infringer." *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 n.9 (2005) (emphasis added). Respondent Cox Communications charges the same flat fee for internet service regardless of what users do on the internet. The Fourth Circuit ruled that Cox does not therefore meet the first element when its customers use the internet to infringe copyrighted works, noting that "it is the infringement itself that must in some fashion profit the defendant for vicarious liability to attach." Pet. App. 20a.

The question presented is:

Whether the Fourth Circuit correctly held that vicarious liability requires proof that the defendant profited from the acts of infringement and not just that it profited from the broader operation in which the infringement occurs.

CORPORATE DISCLOSURE STATEMENT

Cox Communications, Incorporated, is the parent corporation of CoxCom, LLC. Cox Communications, Incorporated, is owned by Cox Enterprises, Inc. Neither Cox Communications, Incorporated, nor CoxCom, LLC, is a publicly held corporation, and no publicly held corporation owns 10% or more of either of them.

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INTRODUCTION

Petitioners want to make a terrible situation even worse. This petition arises from the same judgment as Cox's petition in *Cox Communications, Inc. v. Sony Music Entertainment*, No. 24-171. That parallel petition seeks review of the Fourth Circuit's conclusion that an internet service provider, or "ISP," can be held liable for its users' copyright infringement if it knows that someone on that account is likely to infringe but does not terminate the account. Cox's petition explains that even with that knowledge element, an ISP is not contributorily liable without an affirmative, culpable act. And it recounts the devastating societal consequences of a rule that requires mass evictions from the internet. Cox Pet. 34-38.

Petitioners here are the music-industry plaintiffs in the same underlying case.[1] In an attempt to revive a different theory of secondary liability that the Fourth Circuit rejected—vicarious liability—their petition advocates a legal rule that drives those devastating consequences to the furthest extreme imaginable: that an ISP is strictly liable for every act of infringement that occurs on its network.

The Fourth Circuit rejected vicarious liability under the rule this Court recognized in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, because it found no evidence that Cox "profits directly

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[1] To avoid confusion between the two petitions, we call them "Plaintiffs."

from the infringement" of its customers. Pet. App. 11a (quoting 545 U.S. 913, 930 n.9 (2005)). Cox simply provides internet service for a flat fee. It makes the same amount of money when its customers use the internet to work remotely, order groceries, stream Netflix, or watch cat videos as it does when its customers infringe copyrights—or, for that matter, perpetrate identity theft, spew hate speech, or sell counterfeit goods. Same flat fee. Every circuit to address the issue rejects vicarious liability under these circumstances.

Seeking to avoid this settled law, Plaintiffs trot out a radical new theory: that vicarious liability does not require proof that a service provider makes more money when its customers infringe, but merely requires proof that the provider generally makes money in the internet business. Under this theory, the plaintiff need not prove that the ISP is in the least bit culpable, that it knew about the infringement, or that it made a single extra penny because of the infringing activity. The plaintiff need prove only that the ISP "expects to profit from the broader operation in which the infringement occurs"—here, offering internet access. Pet. 2. In other words, because Cox, like any ISP, has a financial interest in offering internet service to customers, it is liable for anything those customers do online. To state the argument is to refute it. There is no such form of liability—not in copyright law or anywhere else.

This Court should deny Plaintiffs' petition.

To start, there is no circuit conflict. Every circuit follows *Grokster*'s above-quoted rule: Vicarious liabil-

ity attaches only when the defendant "profits directly *from the infringement*." 545 U.S. at 930 n.9 (emphasis added). The only other circuit to address vicarious liability for online service providers is the Ninth Circuit, and that opinion is both consistent with and liberally quoted in the Fourth Circuit's analysis. Plaintiffs invoke court of appeals opinions that have addressed vicarious liability in wildly disparate contexts—a dance hall's liability for the live band it enlists to entertain its patrons, or a flea market's liability for the infringing sales from its stalls. But these cases—nearly all of which the Fourth Circuit quoted, discussed, or cited supportively—follow the same consensus rule. And in each, liability attached because the defendant *did* profit directly *from the infringement*.

Plaintiffs' approach is also legally wrong. This Court correctly stated the rule in *Grokster*. In copyright law as everywhere else, vicarious liability is grounded in respondeat superior—the doctrine that holds a principal liable for an agent's conduct. Vicarious copyright liability follows the same foundational logic: For liability to attach, the direct infringer must be acting on the defendant's behalf. And a customer does not act on an ISP's behalf when she decides to use the internet to infringe copyrights, with no benefits (direct or otherwise) to the ISP.

Even if this Court were interested in considering Plaintiffs' proposed rule, this case is not the right vehicle. For one thing, Plaintiffs never proposed that rule below. Moreover, there is a very good chance that this Court will not even reach the issue Plaintiffs present, because Plaintiffs' claim fails the other

element of vicarious liability: ISPs have neither the right nor the ability to supervise what their customers do online. ISPs simply transmit data. It was undisputed that Cox cannot monitor where its customers go or block access to certain sites. Cox raised that deficit below and would press it as an alternative ground for affirmance in any merits brief should this Court grant cert.

This Court should deny Plaintiffs' petition, grant Cox's petition, and focus its attention on the proper contours of liability based on culpable contribution to infringing conduct.

STATEMENT OF THE CASE

Cox's petition in No. 24-171 (Cox Pet. 5-15) provides the statutory, factual, and procedural background of this litigation. Described here are additional points relevant to Plaintiffs' petition.

Plaintiffs Base Vicarious-Infringement Claims On Cox's Provision Of Flat-Rate Internet Services

Cox is an ISP that provides internet, telephone, and cable television service for a flat monthly fee to 6 million homes and businesses in 18 states. CA App. 395, 1124-25, 1613. To meet the needs of its varied subscribers, Cox offers different levels of services, and charges a different flat rate for each level. CA App. 644-45. Across the board, though, Cox's relationship with its customers is the same: The subscriber pays Cox a flat monthly fee and, in exchange, Cox gives the subscriber internet access.

Once a subscriber is hooked up to the internet, it is undisputed that Cox cannot control the customer's online behavior. Cox cannot track users or selectively block content. As an ISP, it simply provides the cables, machinery, and basic infrastructure needed to send and receive data online.

Some of Cox's customers—less than 1% on this record—illegally download music. CA App. 264. Plaintiffs sent Cox notices accusing those particular accounts of infringing. Cox responded by creating a first-of-its-kind "graduated response program" that started with emails and educational materials to accused customers, then escalated to service suspensions and mandated conversations with Cox investigators about how to stop the infringement. Ultimately, the program drove 95% of accused infringers to stop infringing. CA App. 660, 1735.

Unsurprisingly and appropriately, Cox's program focused on behavior modification rather than simply kicking every accused infringer off the internet—both because cutting internet access could be catastrophic for real people who depend on their internet connection, many of them completely innocent of infringement, and because Cox, like any business, wishes to retain customers if possible. Accordingly, Cox advised customers on how to stop others from using their account to infringe—for instance, by securing open wireless networks, or "check[ing] all of the computers in their household for" platforms used in music piracy, and "speak[ing] to other members of their household (particularly … children, roommates, etc) about … downloading/sharing files." CA App. 1497.

There was no evidence that Cox was more tolerant of infringement than other ISPs, or that Cox's anti-infringement policies in any way attracted would-be infringers. On the contrary, Cox's program was significantly *more* aggressive in deterring infringement than the efforts of other ISPs, and, as a result, its network had *half* the average amount of infringing traffic. CA App. 569, 572, 680-82, 1059.

Nor was there evidence suggesting that Cox earned more money if a customer infringed. While Cox charged higher flat monthly fees for faster service, extensive consumer research proved subscribers value internet speed for a myriad of legal uses—like Netflix and other streaming video applications. CA App. 635-36, 638-43, 645, 1071, 1073. Plaintiffs' expert repeatedly conceded he had no information about "why any individual subscriber did anything" with respect to their choice of internet plans. CA App. 622. So the evidence did not indicate that any customer paid Cox more because of a desire to infringe.

The District Court Approves A Vicarious-Liability Theory Based On Cox's Retention Of Accused Infringers

Plaintiffs brought suit in July 2018. In addition to their contributory-infringement theory, discussed in detail in Cox's petition, Plaintiffs alleged that Cox was vicariously liable for its customers' infringement.

Vicarious copyright liability requires that the defendant both have "the right to supervise the infring-

ing conduct" and reap a "direct financial benefit" from the infringing conduct. 6 *Patry on Copyright* §§ 21:66, 21:68. In cases that involve a fee for service, Congress and the courts of appeals universally agree that receiving a recurring flat-fee payment does not "constitute receiving a 'financial benefit directly attributable to the infringing activity.'" *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004) (quoting S. Rep. No. 105-190, at 44-45 (1998)). One recognized exception to that rule is "'where the value of the service lies in providing access to infringing material'" and thus "the *infringing activity constitutes a draw* for subscribers, not just an added benefit." *Id.* (emphasis added); *see Leonard v. Stemtech Int'l Inc.*, 834 F.3d 376, 389 (3d Cir. 2016); *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 99 (2d Cir. 2016). This is commonly referred to as the "draw" rule.

On the facts of this case, Plaintiffs could not satisfy the draw rule, nor otherwise tie user infringement directly to Cox's bottom line. So they adopted a novel vicarious-liability theory: that Cox derived a direct financial benefit simply because it declined to terminate infringing subscribers' internet service and continued collecting those subscribers' monthly fees. CA App. 829, 856.

The jury held Cox liable under theories of contributory and vicarious liability. The flaws in Plaintiffs' contributory-liability theory are raised by Cox's petition (at 15-29). As for vicarious liability, the district court held that Plaintiffs demonstrated a sufficient "causal connection" between the alleged infringement and financial benefit to Cox, "no matter

how small." CA App. 880. That purported connection was based on evidence that, in some instances of alleged infringement, Cox employees "looked at customers' monthly payments when considering whether to terminate them for infringement." CA App. 880-81.

The Fourth Circuit Rejects Vicarious Liability

The Fourth Circuit reversed in relevant part because Plaintiffs "failed, as a matter of law, to prove that Cox profits directly from its subscribers' copyright infringement." Pet. App. 12a.

The Fourth Circuit cited this Court's opinion in *Grokster* for the proposition that "in every case, the financial benefit to the defendant must flow directly from the third party's acts of infringement to establish vicarious liability." Pet. App. 16a (citing 545 U.S. at 930 & n.9); *accord* Pet. App. 11a-12a (same). The court meticulously reviewed decades of case law—including virtually every authority cited in the Petition. *See* Pet. App. 11a-16a. And it explained why each of them—from the dance-hall and flea-market cases to cyberspace cases involving Napster and AOL—is consistent with the direct-financial-benefit requirement. *See, e.g.*, Pet. App. 14a-16a (citing *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263 (9th Cir. 1996); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001); *Ellison*, 357 F.3d at 1079).

Plaintiffs attempted to overcome that general rule about flat fees on the theory that "the ability to infringe was a draw for customers" or made custom-

ers "'willing to pay more.'" Pet. App. 17a-18a. But the court found no evidence to support that theory and, thus, no evidence to satisfy *Grokster*'s requirement of "a direct financial benefit from [Cox's] subscribers' infringement of Plaintiffs' copyrights." Pet. App. 19a.

Applying that rule here, the Fourth Circuit noted that Cox charges flat fees for internet access and that "a subscriber's decision to download or distribute a copyrighted song without permission does not benefit Cox." Pet. App. 12a. It then rejected the district court's reliance on evidence that purported to show Cox considered revenue when deciding to terminate subscribers for alleged infringement. Pet. App. 17a. Of course, Cox "would necessarily lose money if it canceled subscriptions," meaning that it "profits directly from the sale of internet access" writ large—but not from the alleged infringement itself. Pet. App. 17a. Cox would profit from those retained subscriptions "no matter what [the subscribers] did online," the court explained, "even if all of its subscribers stopped infringing." Pet. App. 17a. It also rejected Plaintiffs' fallback arguments that a direct financial benefit could be demonstrated merely based on Plaintiffs' "characterization that [Cox had] a high volume of infringing activity in general" or the fact that Cox subscribers paid "higher monthly fees for increased data allowances," regardless of how they used that data. Pet. App. 17a-18a. Plaintiffs' petition does not challenge any of these rulings.

Cox also argued that its inability to supervise its subscribers' online activity provided an independent reason the vicarious-liability verdict must be set aside. Cox CA4 Br. 32-35. Because it reversed vicari-

ous liability on Cox's lack of a direct financial interest in the alleged infringement, the Fourth Circuit did not address the additional issue whether Cox had the right and ability to control the alleged infringers. *See* Pet. App. 18a-19a.

REASONS TO DENY CERTIORARI

Plaintiffs do not challenge the Fourth Circuit's extensive holdings as to why the evidence failed as a matter of law to show that Cox garnered a financial benefit directly from its subscribers' infringement. And they do not dispute that this Court has said that they had to prove "the defendant profits directly *from the infringement*." *Grokster*, 545 U.S. at 930 n.9 (2005) (emphasis added). Their only argument in favor of certiorari is that this Court was wrong in articulating that rule. According to Plaintiffs, it is enough to prove that the defendant profits from the "operation in which infringement occurs." Pet. 2.

This Court should deny Plaintiffs' petition because (I) no circuit has accepted Plaintiffs' approach, so there is no circuit conflict; (II) their theory is wrong; and therefore (III) it is not important to break new ground and this case is not a suitable vehicle to address the issue anyway.

I. There Is No Circuit Split.

Plaintiffs claim that the Fourth Circuit created a conflict with five other circuits, and now "stands alone among the courts of appeals in 'demand[ing] proof that the defendant profits directly from the *acts of infringement* for which it is being held ac-

countable.'" Pet. 21 (quoting Pet. App. 17a). There is no such split. Every circuit to consider the question of vicarious liability for online service providers is aligned with the Fourth Circuit's approach. § I.A. Beyond that factual context, the circuits uniformly agree that a defendant must profit from the infringement—not just from a broader "operation" in which infringement occurs. § I.B.

A. Every circuit to address the online-service-provider context rejects vicarious liability for want of a direct financial benefit from the infringement.

Only two circuits have considered whether an online service provider should be held vicariously liable for copyright infringement, and they are in complete agreement. In addition to the Fourth Circuit, the other circuit is the Ninth Circuit in *Ellison*. In *Ellison*, AOL provided its subscribers with access to an online forum, and even "store[d] and retain[ed] files attached to" forum postings "on the company's servers." 357 F.3d at 1075. The plaintiff, who owned the copyrights on books that visitors shared on that forum, sued AOL, trying to hold it vicariously liable. *Id.*

The Ninth Circuit rejected the plaintiffs' theory, holding that AOL was not liable as a matter of law because "no jury could reasonably conclude that AOL received a direct financial benefit *from providing access to the infringing material*." 357 F.3d at 1079 (emphasis added). It was in this context that the Ninth Circuit (quoting DMCA legislative history) explained that when an online service provider col-

lects "'flat periodic payments for service,'" that generally "would not constitute receiving a 'financial benefit directly attributable to the infringing activity.'" *Ellison*, 357 F.3d at 1079 (quoting S. Rep. No. 105-190, at 44-45). It also recognized the exception to that rule where "the *infringing activity constitutes a draw* for subscribers." *Id.* (emphasis added). In light of this, "the central question of the 'direct financial benefit' inquiry in th[at] case [wa]s whether the *infringing activity* constitute[d] a draw for subscribers, not just an added benefit." *Id.* (emphasis added). The court repeatedly emphasized that the benefit needed to arise from the infringing act, not just from an overall enterprise. The court thus ruled for AOL because there was no evidence that AOL "attracted or retained subscriptions *because of the infringement* or lost subscriptions *because of* AOL's … obstruction of the *infringement*." *Id.* (emphasis added).

To say that is the same holding as the Fourth Circuit's is an understatement: The Fourth Circuit here quoted liberally from *Ellison* in support of its position. Pet. App. 15a, 18a. Yet Plaintiffs ignore everything *Ellison* said that was directly on point—and paradoxically list the Ninth Circuit on the other side of a circuit conflict. Pet. 17-18. They mention *Ellison* in passing, and only to quote *Ellison*'s observation that vicarious liability can attach "regardless of *how substantial* the benefit is." Pet. 18 (emphasis in original) (quoting 357 F.3d at 1079). But that comment is about the size of the profit; it does not override *Ellison*'s overarching holding that there must be a direct "causal relationship" between the profits and "the infringing activity." 357 F.3d at 1079. What was missing in *Ellison*, and what the Fourth Circuit

found missing here, was any profit—of any size—"because of the infringement." *Id.*; *see* Pet. App. 15a-17a (noting that this case lacks the same evidence the copyright holder lacked in *Ellison*); Pet. App. 19a.

As Plaintiffs concede, Pet. 23-25, their position is also inconsistent with other district court cases involving efforts to hold an ISP vicariously liable for subscriber infringement. *Bright House* and *Grande* held that a defendant ISP was not vicariously liable because the mere availability of infringing content on the internet is insufficient to show a direct financial benefit. *UMG Recordings, Inc. v. Bright House Networks, LLC*, No. 19-cv-710, 2020 WL 3957675, at *4-5 (M.D. Fla. July 8, 2020); *UMG Recordings, Inc. v. Grande Commc'ns Networks, LLC*, No. A-17-CA-365, 2018 WL 1096871, at *10 (W.D. Tex. Feb. 28, 2018). As both cases recognized, copyrighted music is "available on the Internet generally," and there was nothing unique about the ISP defendants' internet service that drew in customers wanting to infringe. *Grande*, 2018 WL 1096871, at *10.

B. Beyond the online-service-provider context, circuits also agree that vicarious liability depends on a direct financial benefit from the infringement.

1. Outside the context of online service providers, there is also broad consensus that vicarious liability depends on proof of a direct financial benefit *from the infringement.* The courts of appeals have uniformly and repeatedly demanded precisely that causal connection—usually quoting this Court's view

that vicarious liability applies only when the defendant "profits directly *from the infringement*." *Grokster*, 545 U.S. at 930 n.9 (emphasis added).[2] As one leading copyright treatise categorically observes, "[c]ase law under the 1976 Copyright Act has … requir[ed] a direct financial benefit rather than the 'indirect' financial benefit alternative." 6 Patry on Copyright § 21:68. So it is no surprise that Plaintiffs unearth not a single quotation from a court of appeals that has ever expressly rejected the requirement that the defendant have a direct interest in infringing conduct.

2. Plaintiffs' argument that there is a conflict on that point revolves largely around a revisionist reimagining of vicarious-liability cases originating a century ago. Because no case has ever actually stated the rule they propose, Plaintiffs fumble with various formulations, such as imposing liability "where the defendant profited from the operation in which

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[2] *Ellison*, 357 F.3d at 1078 ("Ellison must show that AOL derived a direct financial benefit from the infringement[.]"); *Leonard*, 834 F.3d at 388 ("a plaintiff must prove that the defendant had … a direct financial interest in [infringing] activities"); *EMI*, 844 F.3d at 99 ("Vicarious liability for copyright infringement may arise only when the defendant had … an obvious and direct financial interest in the exploitation of copyrighted materials." (cleaned up)); *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354, 355 (7th Cir. 1929) (vicarious liability applies "if the [infringing] playing be for the profit of the proprietor"); *see Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Ass'n, Inc.*, 554 F.2d 1213, 1214-15 (1st Cir. 1977) ("proprietor of a public establishment" cannot "reap the benefits of countless violations" by entity it hired to "[t]o entertain its patrons").

infringement occurred." Pet. 13. Or where the defendant "expects commercial gain from the enterprise." Pet. i. Or where "the defendant expects commercial gain from the broader operation in which infringement occurs." Pet. 16. But no circuit has ever adopted any of these rules—even implicitly. Rather, they uniformly require direct financial benefit from the infringement.

In arguing otherwise Plaintiffs pretend that "direct financial benefit from infringement" means something it does not. At various points, Plaintiffs characterize it as "requir[ing] evidence of a profit from the sale of a specific product," Pet. 25; *see also* Pet. 32—as if the rule requires proof of a pro rata cut of profits from the infringement. But as discussed, the rule requires only proof of a "causal relationship" between "the infringing activity" and the benefit to the defendant, which can be proven with evidence that the infringing activity "draw[s] customers" to the business. *Ellison*, 357 F.3d at 1079.

The cases Plaintiffs cite reflect nothing but that classic definition of vicarious liability, yielding different results in different factual contexts. In particular, each was a classic draw scenario. None of the cases Plaintiffs cite would come out differently in the Fourth Circuit; the opinion below embraced them all and distinguished them because the plaintiffs there could prove what Plaintiffs here could not.

Plaintiffs first argue that the Fourth Circuit's ruling conflicts with the dance-hall cases. Pet. 13. In these cases, the owner of a dance hall is liable when the band it hires to entertain its patrons plays in-

fringing songs. As Plaintiffs point out, the iconic case is *Dreamland Ball Room*, 36 F.2d at 355; *see* Pet. 13-14. But the court there linked the dance hall's benefit directly to the infringement: It upheld vicarious liability because the "*playing*"—i.e., the act of infringement—was "for the profit of the proprietor of the dance hall." *Dreamland Ball Room,* 36 F.2d at 355. (emphasis added). As the Fourth Circuit recognized, this case, and others like it, come out the way they do because "the band's infringing performances of copyrighted songs 'provided the proprietor with a source of customers and enhanced income.'" Pet. App. 14a n.2 (quoting *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963)). In other words, the direct financial benefit in these cases is the infringement's "draw" to customers; the "infringing performances enhance the attractiveness of the venue." *Fonovisa*, 76 F.3d at 263.

Plaintiffs are, therefore, wrong to describe these cases as imposing liability only because "the defendant profited from the larger operation in which infringement occurred." Pet. 15. None of the cases say that; each of the dance-hall-style cases Plaintiffs cite has the same configuration—a proprietor enlists another to provide entertainment to customers, which draws those customers to the business.[3]

Properly understood, these cases are fully consistent with the Fourth Circuit's analysis, because

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[3] *See* Pet. 15-16 (citing *Famous Music Corp.*, 554 F.2d at 1214; *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1163 (2d Cir. 1971)).

this case lacks a financial benefit from the infringement (in the form of a draw to customers or any other form). Pet. App. 17a-18a. Plaintiffs lost because the behavior of Cox's users has no impact on Cox's finances. Cox charges a flat fee, regardless of what users do online, and—unlike the dance-hall cases—the Fourth Circuit found that infringement did not serve as a "draw." Specifically, the Fourth Circuit emphasized that there was no evidence that Cox purposefully "employ[ed]" acts of infringement to attract subscribers; at most, some evidence suggested that Cox "declined to terminate infringing subscribers' internet service in order to continue collecting their monthly fees," "*no matter what* they did online," infringing or otherwise. Pet. App. 16a-17a (emphasis added).

For these reasons, Plaintiffs cannot place the dance-hall cases in opposition to the Fourth Circuit by pointing out that the defendants in those cases did not "bargain[] for a discount on [the band's] fees based on their intention to play infringing music." Pet. 13-14. That just illustrates Plaintiffs' sleight of hand as to what qualifies as a direct financial benefit. The Fourth Circuit did not require proof of profit on a specific transaction or on sale of a specific product; it simply required some causal connection between the infringement and Cox's profits. A draw will suffice, but there was none here. In short, Plaintiffs lost on the facts.

For similar reasons, Plaintiffs do not move the needle with a truncated quote from a Seventh Circuit case describing the dance-hall cases. *See In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir.

2003). That case did not decide any vicarious-liability issue—and certainly did not reject the universal rule requiring proof that any benefit to the defendant must arise from the infringement. Plaintiffs merely quote dicta saying that "it does not seem like an apt description of the dance hall" to say it "benefits *directly* from the infringement that [it] encourages." *Id.* at 654 (emphasis added). The court was simply commenting that "direct" does not mean the benefit must be a cut of the profits. That is evident from the very next sentence, observing that a dance hall "*does* benefit" from the "lower costs" of music performed without paying the proper royalties. *Id.* (emphasis added). And the court emphasized that the dance hall's relationship to the band was "analogous to the relation of a principal to an agent" that is the hallmark of vicarious liability. *Id.*

In the end, Plaintiffs merely cherry-pick some of the language in these dance-hall cases to create the misimpression of tension with the Fourth Circuit's opinion. Beyond failing on its own terms, the whole exercise is misguided, because Cox is nothing like a dance hall. It is a passive communications-services provider. It does not enlist subscribers to engage in specified conduct on its behalf. Cox's subscribers are not its employees or agents; they do not work in service of Cox's "enterprise," and their online behavior is in no way "for the profit of" Cox. If one were to try to map the dance-hall roles onto this context, Cox's subscribers would be *the patrons* paying to *come to dance*, not *the hired band*. No circuit would think that a case about dance-hall bands would bind it to reach the same conclusion as a case about ISPs or vice versa.

3. Plaintiffs find no refuge in modern cases either. They claim that "the Ninth, Third, and Second Circuits have held [that] Plaintiffs can show profit through evidence that the defendant expects commercial gain from the broader operation in which infringement occurs." Pet. 16. None of those circuits adopts anything like that rule, and they are all perfectly aligned with the Fourth Circuit's ruling here, because they all involve draws.

Ninth Circuit. The clearest illustration of how much Plaintiffs have to stretch to manufacture a circuit conflict is that they depict the Ninth Circuit in opposition to the Fourth Circuit's opinion here, even though the Ninth Circuit's ruling in *Ellison* is so squarely aligned with the Fourth Circuit that it served as the opinion's template. *Supra* 11-13.

In contrast to the passing mention of *Ellison*, Plaintiffs give primacy to *Fonovisa*, another, much older, Ninth Circuit case in the entirely different context of a "swap meet." 76 F.3d at 263-64. A swap meet is a physical marketplace that attracts people specifically intending to engage in "the sale of pirated recordings." *Id.* The Ninth Circuit found the owner of the marketplace vicariously liable only because the opportunity to make those infringing purchases was clearly a "'draw' for customers," just as the performance of infringing music was a draw for the dance halls. *Id.* The Ninth Circuit thus linked the financial benefit to the infringing acts, not just to the operation of the business. The Fourth Circuit applied the same rule but held that Plaintiffs failed to introduce facts showing that "the ability to infringe was a

draw for customers." Pet. App. 17a. Plaintiffs cannot use *Fonovisa* to circumvent their failures of proof.

Third Circuit. Plaintiffs assert that the Third Circuit *does not* require "proof that the defendant profits directly from the *acts of infringement*." Pet. 21 (citation omitted). But here, again, that is because Plaintiffs refuse to acknowledge the consensus among circuits that a plaintiff can prove a direct financial benefit "where the availability of infringing material acts as a draw for customers." *Leonard*, 834 F.3d at 389 (quoting *Ellison*, 357 F.3d at 1078, 1079). In *Leonard*, the court found the defendant vicariously liable on the basis that the infringing images "len[t] legitimacy to [the defendant's] products" sold on various websites, resulting in an "infer[ence] that the images could have drawn customers to buy the product." *Id.* The Third Circuit linked the benefit directly to the infringement, not just to being in business.

Plaintiffs do not change any of this with the assertion that *Leonard* "look[ed] only to the defendant vicarious infringer's motives" in determining vicarious liability. Pet. 23. Plaintiffs are referring to evidence the court cited in support of finding *draw*: It focused on testimony that the "defendant had used the photographer's works to enhance the attractiveness of [its] website," rather than data showing that the photographs did, in fact, draw customers. Pet. 23 (citing *Leonard*, 834 F.3d at 389). That just shows that there are various ways of proving draw. Nothing in that case suggests that profit motive alone can support vicarious liability without evidence of direct

financial benefit, in the form of draw or otherwise, from the infringement itself.

Second Circuit. The Second Circuit, too, tethers direct financial benefit to the infringement itself. In *EMI*, the court pointed to testimony that the defendant's employees "emphasized the availability of free [infringing] music" on one website to "driv[e] traffic" to another site where users could pay to store the infringing songs. 844 F.3d at 86-87, 99. There was also evidence that the defendant himself encouraged users and employees to upload infringing songs to expand the first website's library and make it more appealing to users. *Id.* at 99. These are clear examples of how the draw rule plays out in practice to hold defendants vicariously liable. The court linked the defendant's "obvious and direct financial benefit" directly to the "infringement that drew subscribers to [the defendant's service]," not just to his profit from operating a business. *Id.*

District Courts. In support of their rule, Plaintiffs also rely on a handful of district court cases that are all variations on the dance-hall theme. *See* Pet. 20-21 (citing *J & J Sports Prods., Inc. v. Enriquez*, No. 19-CV-2384, 2019 WL 4963108, at *4 (E.D.N.Y. Oct. 7, 2019); *Polygram Int'l Publ'g, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1330 (D. Mass. 1994); *Broad. Music, Inc. v. Blumonday, Inc.*, No. CV-N-92-676, 1994 WL 259253, at *2 (D. Nev. 1994); *Realsongs v. Gulf Broad. Corp.*, 824 F. Supp. 89, 92 (M.D. La. 1993); and *Buck v. Pettijohn*, 34 F. Supp. 968, 968 (E.D. Tenn. 1940)). But these cases, too, all satisfied the draw rule. Whether the plaintiff is a horse-racing track, music-festival promoter, trade

show, restaurant, or radio station, each directly benefits from the conduct of a direct infringer engaged to attract customers. Nothing in these cases suggests a legal rule inconsistent with the Fourth Circuit's.

II. The Fourth Circuit's Vicarious-Liability Holding Is Correct.

This petition is not worthy of review for the additional reason that the Fourth Circuit correctly applied fundamental principles of agency law, this Court's case law, legislative history, and sound policy to conclude that vicarious liability requires proof that the defendant benefited directly from the infringement. None of these sources supports Plaintiffs' position that the profit component of vicarious liability can be based on nothing but proof that "the defendant benefits from the operation as a whole, as opposed to the infringement itself." Pet. 28. Indeed, Plaintiffs' theory reads the "direct[]" benefit requirement out of *Grokster*'s clear rule that vicarious liability requires the defendant to have "profit[ed] *directly from the infringement*." 545 U.S. at 930 n.9 (emphasis added).

A. All agree that "[v]icarious liability for copyright infringement is an 'outgrowth of the agency principles of respondeat superior.'" Pet. App. 12a (quoting *Fonovisa*, 76 F.3d at 262); *see Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62-63 (1911); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984). In recognition of that fact, vicarious liability attaches only when the defendant has an agency-like relationship with the infringer: "the right and ability to supervise the infringing activity

and also … a direct financial interest in such [infringing] activities." Pet. App. 12a (quoting *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004)).

These boundaries are important. Unlike contributory infringement, which requires proof that a defendant knew about and materially contributed to infringement, vicarious liability is available even when the defendant (the principal) had no knowledge of its agent's wrongful conduct and did nothing to contribute to the wrongful conduct. *E.g.*, *Gershwin Publ'g Corp.*, 443 F.2d at 1162. Imposing liability based solely on the existence of a relationship with the direct infringer, rather than the principal's conduct, is therefore the core feature of vicarious infringement—and it only makes sense in the context of the agency-like relationships in which vicarious liability arose.

Thus a department store that collects commissions from a concessionaire's infringing sales and a dance hall that draws crowds by hiring infringing musicians are both vicariously liable under an agency theory because the direct infringer acted on their behalf and to their benefit: The defendants invited the infringer onto their property to enhance their business and revenue, they can readily detect and prevent the infringement, and they directly profit from it. *See Shapiro, Bernstein*, 316 F.2d at 306-08. The same cannot be said of cases like this. An internet subscriber is not acting on the ISP's behalf, and the ISP, unlike a dance-hall proprietor, certainly has not commissioned and paid for the infringement.

Courts have cautiously applied vicarious copyright infringement outside the setting of traditional employer-employee relationships, as exemplified by the dance-hall cases. *E.g.*, *Dreamland Ball Room,* 36 F.2d at 355 (dance hall may be liable even if orchestra is technically an "independent contractor")*;* *Shapiro, Bernstein*, 316 F.2d at 309 (similar). In such cases, the requirement that the defendant directly benefit from the acts of infringement serves as a critical limitation on liability: It ensures that vicarious liability is limited to defendant-infringer relationships that approximate the doctrine's origins in respondeat superior. Removing the causal requirement of a direct financial benefit from infringement would completely unmoor vicarious liability from its common-law underpinnings—contrary to Congress' intent, *infra* 27-28—and convert it into a strict-liability regime where defendants are automatically liable for any infringement that takes place on their premises or for using their products and services. The Fourth Circuit was correct to reject Plaintiffs' invitation to impose such boundless liability.

This Court's precedent likewise supports the Fourth Circuit's approach. Although this Court has never squarely decided a vicarious copyright infringement case, its decisions endorse the direct-financial-benefit requirement. For example, as noted, *Grokster* explicitly articulated the rule that vicarious liability is unavailable unless "the defendant profits *directly from the infringement* and has a right and ability to supervise the direct infringer." 545 U.S. at 930 n.9 (emphasis added).

Similarly, this Court's decision in *Sony* emphasized the need for an agency-like relationship to support vicarious liability. It explained that lower courts had developed a distinction between the "so-called 'dance hall cases,'" where proprietors control, authorize, and profit directly from the infringing acts, and "the so-called landlord-tenant cases, in which landlords … leased premises to a direct infringer for a fixed rental and did not participate directly in any infringing activity." *Sony*, 464 U.S. at 437 n.18. In the landlord-tenant-type cases, such defendants were "not to be liable for contributory infringement." *Id.* That distinction reflects the broader *Grokster* rule that the profits must be causally connected to the acts of infringement: Unlike the dance-hall proprietor, a landlord profits from renting the apartment, not from a tenant's alleged infringement.

B. Plaintiffs do not address these principles from *Grokster* or *Sony*, the only two Supreme Court cases discussing principles of secondary liability under the Copyright Act of 1976. Instead, signaling just how weak their position is, they invoke just one Supreme Court case, *Herbert v. Shanley Co.*, 242 U.S. 591 (1917). Pet. 25-28. Plaintiffs never even cited that century-old case to the Fourth Circuit—and for good reason: It is a statutory-construction case that has nothing to do with vicarious liability.

Herbert's facts were along the lines of the dance-hall cases: It held a hotel liable for hiring an orchestra to play music for restaurant patrons. Specifically, *Herbert* held that the hotel was primarily liable for infringement under a provision of the long-since repealed Copyright Act of 1909 that defined infringe-

ment to include "perform[ing] the copyrighted [musical] work publicly for profit." Copyright Act of 1909, ch. 320, § 1, 35 Stat. 1075, 1075 (repealed by the Copyright Act of 1976). The hotel had argued that the plaintiffs had not satisfied the "for profit" element because patrons paid for their meals but did not pay extra for the music, and this Court rejected that position. 242 U.S. at 593.

Plaintiffs do not explain how the interpretation of a since-repealed statutory phrase on primary liability has any bearing on the proper scope of secondary liability under common-law principles in a different statute.

Worse, Plaintiffs do not even invoke *Herbert* for a proposition that has any relevance here. They say *Herbert* proves "that the Copyright Act does *not* require evidence of a profit from the sale of a specific product." Pet. 25. But that just exhibits the same confusion as to what the direct-financial-benefit rule requires. *Supra* 15. The rule does not require proof of "profit from the sale of a specific product." And the Fourth Circuit did not hold that it does. The Fourth Circuit held that liability depends on financial benefit from *the infringement*. *Herbert* is entirely consistent with that approach. The infringing musical performances were an "object" that motivated customers to patronize the restaurant—i.e., a draw—such that revenue from the meals was a direct financial benefit to the restaurant. *Herbert*, 242 U.S. at 595. As in the dance-hall cases, the infringing performances were a draw. That is all that *Herbert* meant in the one sentence Plaintiffs feature, stating that the "for profit" statutory requirement was satis-

fied as long as the defendant's "purpose of employing [the orchestra] is profit." *Id.* The only reason the hotel would profit from the infringing performance is if it helped draw customers to the restaurant. *Id.*

C. Plaintiffs also argue that the Fourth Circuit's decision conflicts with "congressional purpose," by which they mean it conflicts with one sentence in a House Report on the 1976 Act. Pet. 28-29. They are wrong about that sentence and ignore far more relevant legislative history that supports the Fourth Circuit's holding.

The report Plaintiffs invoke explains why the committee rejected a provision that would have overruled the dance-hall cases. H.R. Rep. No. 94-1476, at 159-160 (1976). In describing existing law, Congress noted that a nightclub owner is subject to vicarious liability only if he expects *both* "commercial gain from the operation" as a whole *and* "direct or indirect benefit from the *infringing performance*." H.R. Rep. No. 94-1476, at 159-60 (emphasis added). That passage simply does not say that courts would impose vicarious liability based solely on "evidence that the defendant benefits from the operation as a whole." Pet. 28.

The legislative history that Plaintiffs ignore came in the context of discussing 17 U.S.C. § 512(c) of the DMCA, a safe harbor designed to "codify" elements of established vicarious-liability law, including the "direct financial benefit" requirement. H.R. Rep. No. 105-551(I), at 25 (1998) (discussing preliminary version of DMCA); S. Rep. No. 105-190, at 44 (discussing final version). In explaining that term,

Congress observed that in the case of "a service provider conducting a legitimate business[,] … receiving a one-time set-up fee and flat periodic payments for service ... would not constitute receiving a 'financial benefit directly attributable to the infringing activity.'" S. Rep. 105-190, at 44. Nor would other payment structures "where the infringer makes the same kind of payment as non-infringing users of the provider's service." *Id.* The exception, Congress noted, is the draw rule, "where the value of the service lies in providing access to infringing material." *Id.* at 44-45. Congress twice endorsed *Marobie-FL, Inc. v. National Association of Fire Equipment Distributors*, 983 F. Supp. 1167, 1179 (N.D. Ill. 1997), which held that a provider of web-hosting services that charged "a flat fee of $67.50 each quarter," received no "financial benefit" from its customers' infringement and was therefore not vicariously liable. H.R. Rep. No. 105-551(I), at 26; S. Rep. No. 105-190, at 19 n.20, 44.

These explicit discussions of direct financial benefit disprove Plaintiffs' assertion that the Fourth Circuit's "understanding of profit" cannot be "reconcile[d] with Congress's understanding" of vicarious infringement. Pet. 29.

D. Cox's parallel cert. petition explains the disastrous societal consequences of a rule that imposes undue secondary liability on an ISP. Even a liability rule that requires proof that the ISP knows that a particular infringer will continue to infringe threatens mass evictions from the internet, effectively banishing millions from modern society. Plaintiffs' petition here drives those consequences to the fur-

thest extreme imaginable. Under Plaintiffs' strict-liability approach, a plaintiff need not prove that the ISP is in the least bit culpable. Nor that the ISP even knew that the infringer was likely to infringe, nor that the ISP made a single extra penny because of the infringing activity. All the plaintiff needs to prove is that the ISP "expects to profit from the broader operation in which the infringement occurs," Pet. 2—which every commercial enterprise does.

Plaintiffs' rule would mean that an ISP has a financial interest in—and is therefore liable for—virtually *anything* a user wishes to do online. So ISPs would not only be required to execute mass internet evictions at the slightest allegation of copyright infringement, but they would need to police the internet and terminate users upon any hint or accusation of misconduct—practices as invasive as they are draconian. That would imperil the livelihoods, safety, and social connections of a massive universe of downstream users who rely on internet connections to run businesses, pay bills, apply to jobs, read the news, connect with friends and family, petition their representatives, and attend school.

Appropriate guardrails on vicarious liability are thus at least as critical as limits on contributory infringement to ensuring ISPs can continue providing important online services to hundreds of millions of people.

Plaintiffs address none of this. They argue that the Fourth Circuit's decision violates "first principles," Pet. 29, derived from the "foundation of secondary liability," Pet. 31. But the "foundation" of

vicarious liability—and the relevant source of "first principles"—is respondeat superior, which supports the Fourth Circuit's approach and is starkly inconsistent with Plaintiffs' approach.

Plaintiffs try to override all the relevant principles with a notion about imposing liability on the "least cost avoider" for online harms. Pet. 29-31. *Contra* Felix T. Wu, *The Structure of Secondary Copyright Liability*, 61 Hous. L. Rev. 385, 400 (2023) (rebutting the notion that Cox is the least cost avoider). Plaintiffs seem to think that this principle requires imposing liability on ISPs without regard to fault, simply to "create[] an incentive … to prevent the harm at the lowest cost" or "distribute the costs … to others." Pet. 30-31 (citation and internal quotation marks omitted). But this Court has flatly rejected any such notion in favor of a balance that puts heavy weight on countervailing concerns about the negative consequences of secondary liability.

In *Sony*, for instance, the seller of a videocassette recorder is better positioned than anyone else to prevent users from infringing and to distribute the costs of infringement to other customers. But this Court refused to impose liability on the manufacturers. It reasoned that broad liability would deter the creation and use of multi-purpose devices and therefore fail to "strike a balance between a copyright holder's legitimate demand for effective … protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce." 464 U.S. at 442. Even in *Grokster*, where the Court ultimately deemed secondary liability appropriate, this Court emphasized that secondary liabil-

ity must be limited "to instances of more acute fault than the mere understanding that some of one's products will be misused" in order to "leave[] breathing room for innovation and a vigorous commerce." 545 U.S. at 932-33.

III. The Question Presented Is Not Important And This Case Is Not A Suitable Vehicle.

A. Absent a circuit conflict, there is no reason for this Court to reach out to decide Plaintiffs' question presented. Plaintiffs are just wrong in suggesting that this Court needs to decide the issue simply because it has never addressed it. Pet. 33-34. This Court does not ordinarily take a case when, as here, the lower courts are in agreement. *See Braxton v. United States*, 500 U.S. 344, 347 (1991).

Plaintiffs are also wrong to assert that review is warranted because of collateral consequences of the Fourth Circuit's opinion in other contexts. Plaintiffs offer four stylized scenarios for which they say the opinion below would preclude liability. Pet. 31-33. In the unlikely event courts decide those scenarios as Plaintiffs predict, future parties are free to seek review. But, more importantly, the scenarios are untroubling because there would plainly be liability in each:

- The hypothetical restaurant that broadcasts copyrighted music to enhance its paying customers' dining experience is a *direct* infringer violating the public-performance right. *See Broad. Music, Inc. v. Meadowlake, Ltd.*, 754 F.3d 353, 354 (6th Cir. 2014). And if it hires a

band that attracts customers by playing copyrighted music, it is vicariously liable under the draw theory, per the dance-hall cases.

- The company that airs a commercial using copyrighted music is also a direct infringer. And since the whole point of a commercial is to attract customers, there is a draw there too.

- When an investment bank's analyst redistributes copyrighted spreadsheets to clients or a law firm associate misappropriates a Westlaw account, the bank and firm, as employers, are liable under respondeat superior.

Here, again, Plaintiffs seem to think that the reason the Fourth Circuit would not hold these defendants liable is because they think the Fourth Circuit requires proof that the defendant made a profit by selling infringing material. That is wrong for the reasons already explained. *Supra* 15. Moreover, unlike these scenarios, Plaintiffs forget that they are trying to hold Cox vicariously liable not for anything it has done, and not for the infringing acts of its employees or agents, but for the infringing acts of its *customers*.

B. This case is also a bad vehicle for determining the scope of vicarious liability for two reasons. First, this Court may end up not deciding the issue. Cox also contested the second element of vicarious liability—whether it had the right and ability to supervise the direct infringer. Cox CA4 Br. 32-35. That element is plainly not satisfied as a matter of law, be-

cause it is undisputed that Cox cannot monitor its subscribers' internet activities. CA App. 422, 529-30. The Fourth Circuit declined to decide the issue, because its ruling on direct financial benefit resolved the claim. Pet. App. 12a. But if this Court grants cert., Cox will raise the issue in its merits brief as an alternative ground for affirmance. If this Court addresses that issue instead, there will be no need to address the question presented. At a minimum, this Court should wait for a vehicle that does not have the baggage or risk of an additional issue.

Second, Plaintiffs did not preserve the question presented. Before the Fourth Circuit, Plaintiffs accepted that they had to tie Cox's alleged benefit to the infringement itself. They acknowledged the draw rule was one way of showing a direct financial benefit. Sony CA4 RB 34-36. They argued that they satisfied the direct-financial-benefit requirement because "repeat infringers were particularly profitable" or because terminating infringing accounts would have resulted in "less revenue" for Cox and served as less of a draw to "would-be infringers." Sony CA4 RB 33-34. The Fourth Circuit rejected these arguments because Plaintiffs did not prove the infringement drew customers or otherwise establish a direct financial benefit from the infringement.

But Plaintiffs never made the argument they make now—that there is no such requirement. They never argued a plaintiff need not prove that "defendant profit[ed] directly from the act of infringement itself," Pet. 4, but only that "the defendant expects commercial gain from the enterprise in which the infringement occurs," Pet. i. They cannot compensate

for their failure of proof under the standard they embraced by urging an expansive new standard that obviates such proof.

CONCLUSION

Plaintiffs' petition for a writ of certiorari should be denied.

Respectfully submitted,

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