No. 24-171

In the Supreme Court of the United States

COX COMMUNICATIONS, INC., ET AL.,

Petitioners,

v.

SONY MUSIC ENTERTAINMENT, ET AL.,

Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the Fourth Circuit

BRIEF OF X CORP. AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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INTEREST OF AMICUS CURIAE[1]

This case presents important questions regarding the correct legal standards governing claims of secondary liability for copyright infringement. X Corp. has a substantial interest in the standard by which companies that provide the public with new technology for gathering information and sharing expression—from social media platforms to generative AI tools—could become liable for third parties' use of that technology to engage in copyright infringement.

X Corp. is an American tech company established in 2023 as the successor to Twitter, Inc., which was founded in 2006. Since March 28, 2025, X Corp. has been a wholly owned indirect subsidiary of xAI Holdings Corp. X Corp. provides an internet communications platform to the public, with which hundreds of millions of users create hundreds of millions of posts every day to share their views, engage with the views of others, and follow current events. People who promise to follow X Corp.'s rules and terms of use may post messages that can also contain images, videos, and links to other websites or media sources. This feature that permits members of the public to instantaneously express themselves—without first undergoing a review or selection by a publisher—has led to claims of infringement against X Corp. for secondary liability, even though X Corp.'s terms of service require each of its users to agree to this statement:

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part, and that no person other than amicus or its counsel contributed money intended to fund preparing or submitting this brief.

> You represent and warrant that you have, or have obtained, all rights, licenses, consents, permissions, power and/or authority necessary to grant the rights granted herein for any Content that you submit, post or display on or through the Services. You agree that such Content will not contain material subject to copyright or other proprietary rights, unless you have necessary permission or are otherwise legally entitled to post the material and to grant us the license described above.[2]

X Corp. respects intellectual property and is itself the owner of intellectual property. It has adopted robust procedures and policies aimed at reducing instances of copyright infringement on its platform. But this has not insulated X Corp., or other technology companies, from the prospect of staggering statutory damages from claims of secondary infringement. X Corp. is gravely concerned that this problem could become existential for technology companies—and result in substantial censorship of its users—if the Court endorses the Fourth Circuit's holding that merely letting accounts that may belong to repeat infringers continue to have access to a service may render a company culpable for copyright infringement. This is particularly so given that in X Corp.'s experience, the alleged "repeat infringers" are not typically those who intend to illicitly distribute full copies of copyrighted materials. Rather, they include everyday users who happen to make innocuous posts such as brief videos of themselves at events or at the gym that

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[2] *X Terms of Service*, Section 3 (effective Nov. 15, 2024), https://x.com/en/tos.

capture copyrighted music incidentally playing in the background.

X Corp. submits this brief to inform the Court that the Fourth Circuit's expansion of secondary liability to include merely "supplying a product with knowledge that the recipient will use it to infringe copyrights," Pet. App. 27a, is an incorrect application of a doctrine that should be "cabin[ed]" to "cases of truly culpable conduct." *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 489 (2023). The Fourth Circuit's conclusion that a company's inaction or non-feasance can support a $1 billion award for contributory liability cannot be squared with this Court's decision in *Taamneh*, which requires "affirmative and culpable" participation in the underlying misconduct. 598 U.S. at 505. Though *Taamneh* was not a copyright case, it raised an issue at the heart of the present case: what does the common law invariably require for imposing contributory liability? As the successful petitioner in *Taamneh* and a platform that the public entrusts with hosting billions of posts containing expression of hundreds of millions of Americans each day, X Corp. is well suited to provide assistance to the Court and show how the legal standards for contributory infringement affect both the technology industry's effort to bring innovative products to the public and freedom of expression on the internet. For the reasons provided below, we urge the Court to reverse the Fourth Circuit and hold that contributory liability, as this Court explained in *Taamneh*, cannot be imposed without conscious and culpable participation in the offense alleged.

SUMMARY OF ARGUMENT

This Court's unanimous opinion in *Twitter, Inc. v. Taamneh*, 598 U.S. 471 (2023), applied the well established common-law principles of contributory liability to internet tools. That decision and its significant guidance—that aiding-and-abetting liability is permissible only where the evidence establishes active and culpable participation in the third-party's misconduct—applies to copyright infringement, which is also governed by common-law principles.

This Court's indirect-liability decisions in copyright cases involving new technology—namely *Sony Corp. of Am. v. Univ. City Studios, Inc.*, 464 U.S. 417 (1984), and *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005)—are consistent with the common-law principles for indirect liability this Court confirmed in *Taamneh*. The Court has ***never*** held that merely providing (or continuing to provide) to known "infringers"—many of whom, in our experience, are not nefarious actors but regular Americans posting everyday things on the internet that inadvertently sweeps in snippets of copyrighted material—the products or services that could be used to infringe copyrights constitutes the active and culpable participation required to establish that the defendant "materially contributed" to the users' infringement. The Fourth Circuit's unjustified deviation from *Taamneh*, *Sony*, and *Grokster* requires reversal.

Further, the lower courts' confusion over the standard that governs secondary copyright infringement suggests that this Court should expressly clarify that the failure to take affirmative steps to terminate

services of accounts that may be used by known infringers (the Fourth Circuit) or to take other "simple measures" (the Ninth Circuit) is not, on its own, sufficient to establish secondary liability. A requirement of conscious and culpable participation in making the direct infringement succeed is not only the necessary corollary of *Taamneh*, it also is compelled both by the copyright law's goal of balancing the protection of copyright owners against promotion of innovation that benefits the public, as well as the limits of copyright that are dictated by the need to preserve First Amendment speech rights. *See Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 16 (2021) ("[c]opyright has practical objectives" and "grants an author an exclusive right to produce his work …, not as a special reward, but in order to encourage the production of works that others might reproduce more cheaply"); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (copyright law contains "built-in First Amendment accommodations").

ARGUMENT

I. THE DECISION BELOW IMPERMISSIBLY EXPANDS CONTRIBUTORY LIABILITY FOR COPYRIGHT INFRINGEMENT BEYOND THE LIMITS SET FORTH IN *TAAMNEH*

A. *Taamneh* Confirmed that Contributory Liability Must Be Based on Culpable Participation in Misconduct.

1. Contributory liability in copyright law is a common-law doctrine. The Copyright Act permits a copyright owner to "institute an action" against "an infringer of the copyright" who violates one or more of

the exclusive rights in the copyrighted works. 17 U.S.C. § 501(a)-(b). An "infringer" has traditionally been interpreted to include both direct and indirect infringers. Section 106 provides that a copyright owner has both the exclusive rights to "reproduce," "prepare derivative works," "distribute," publicly "perform," and publicly "display" their copyrighted works, and "to ***authorize***" those acts. Thus, even though this Court has stated that the Copyright Act "does not expressly render anyone liable for infringement committed by another," *Sony*, 464 U.S. at 434, the inclusion of the term "to authorize" ensures that the common law of contributory infringement would be applied in the 1976 Act. *See* 6 William F. Patry, *Patry on Copyright*, § 21:43, Westlaw (2025).

Although a claim for copyright infringement may be asserted against alleged indirect infringers, Congress has never prescribed a particular standard for imposing secondary liability for infringement of the Section 106 rights.[3] *See Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1161–62 (2d Cir. 1971) ("Although the Act does not specifically delineate what kind or degree of participation in an infringement is actionable, it has long been held that one may be liable for copyright infringement even though he has not himself performed the protected composition."). Rather, the standards that govern "the non-statutory tort of contributory infringement,"

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[3] Congress referenced one example of indirect infringement: "a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., 61 (1976).

Sony, 464 U.S. at 428, "emerged from common law principles," *Grokster*, 545 U.S. at 930. The common-law principles of "accomplice" liability, *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62–63 (1911), and aiding-and-abetting liability shaped the contours of the "knowing[] participat[ion]" that would be sufficient to contributory liability for a third party's infringing conduct, *Gershwin*, 443 F.2d at 1162.[4] *See In re Aimster Copyright Litig.*, 334 F.3d 643, 651 (7th Cir. 2003) ("the law of aiding and abetting" is "the criminal counterpart to contributory infringement"); Dan B. Dobbs et al., *The Law of Torts* § 741 & n.42 (2d ed. May 2023 update) ("aiding and abetting" is the "premise of contributory infringement").

2. In *Taamneh*, this Court applied long-standing common-law principles of contributory liability to a dispute in the digital age. The Justice Against Sponsors of Terrorism Act (JASTA) provided that "[v]ictims of terrorist acts … may seek to recover from those who aided and abetted the terrorist act that injured them." 598 U.S. at 478; *see* 18 U.S.C. § 2333(d)(2). Under the JASTA, victims of a terrorist attack and their family members sued the operators of social media platforms—Google (YouTube), Meta

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[4] Contributory infringement, despite occasional misplaced comments, is not a form of "enterprise liability." *See* Bruce E. Boyden, *The Persistence of Legal Error*, Marquette Law School Faculty Blog (Feb. 15, 2011), https://law.marquette.edu/facultyblog/2011/02/the-persistence-of-legal-error/. Enterprise liability is a form of (or according to some, very close to) strict liability; that is contrary to the requirement that the contributory infringer possess knowledge of the direct infringement. *See* Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 Vand. L. Rev. 1285 (2001).

(Facebook), and X Corp. (Twitter)—seeking to hold them secondarily liable for terrorist acts. The plaintiffs alleged that the tech company defendants had provided platforms to ISIS and its adherents who "used these platforms for years as tools for recruiting, fundraising, and spreading their propaganda" that were needed to commit the terrorist attack. *Taamneh*, 598 U.S. at 481.

Like the Copyright Act, the JASTA did not expressly set forth the standards for secondary liability. This Court thus turned to "the common law, which has long held aiders-and-abettors secondarily liable for the wrongful acts of others." *Id.* at 484. Based on a survey of aiding-and-abetting precedent in this Court and the lower courts, the Court identified the following "clear guideposts," *id.* at 506, for determining the appropriateness of secondary liability:

First, secondary liability is not "boundless": it must be "cabin[ed]" to "truly culpable conduct." *Id.* at 488–89. Specifically, this Court warned that "aiding-and-abetting liability" should not be "taken too far" to sweep in "ordinary merchants [who] could become liable for any misuse of their goods and services." *Id.* at 489. That is because secondary liability does not aim to impose liability on those "who gave only tangential assistance"—such as those who "merely deliver mail or transmit emails"—for "the tortious messages contained therein." *Id.* at 488–89 (citing Restatement (Second) of Torts § 876, Comment *d*, Illus. 9 (1979)).

Second, the limited situations where "truly culpable" conduct leads to secondary liability generally require affirmative and active conduct, *i.e.*, "wrongful conduct, bad acts, and misfeasance," and not "mere

omissions, inactions, or nonfeasance." *Id.* at 489 (quotation marks and citation omitted).

Third, the "conceptual core that has animated aiding-and-abetting liability for centuries" requires that a defendant be held liable only when it "consciously and culpably 'participate[d]' in a wrongful act so as to help 'make it succeed.'" *Id.* at 493 (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)). This requirement ensures that "passive actors like banks" do not become liable for "their customers' crimes by virtue of carrying out routine transactions." *Id.* at 491.

Applying these principles, this Court unanimously held that the social media platforms were not secondarily liable for the terrorist attack. *Id.* at 497–98. Like Respondents here, the plaintiffs in *Taamneh* argued that the tech company defendants should be liable for the terrorist attack because they possessed knowledge that "ISIS has used their platforms for years," but "failed to … remove a substantial number of ISIS-related accounts, posts, and videos." *Id.* at 481.

But the defendants' alleged "insufficient steps to ensure that ISIS supporters and ISIS-related content were removed from their platform" did not mean that the defendants "culpably associated themselves" with the terrorist attack, or "participated in it as something that they wished to bring about, or sought by their action to make it succeed." *Id.* at 498, 505 (quoting *Nye & Nissen*, 336 U.S. at 319); *see also Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280, 293 (2025) ("[w]hen a company merely knows that 'some bad actors' are taking 'advantage' of

its products for criminal purposes, it does not aid and abet[,] … even if the company could adopt measures to reduce their users' downstream crimes" (quoting *Taamneh*, 598 U.S. at 503)). Absent "any special treatment or words of encouragement" to ISIS, the tech companies could not be contributorily liable for providing their services to "the internet-using public." *Taamneh*, 598 U.S. at 498–99; *see also id.* at 500 (noting that "defendants' relationship with ISIS and its supporters appears to have been the same as their relationship with their billion-plus other users: arm's length, passive, and largely indifferent").

3. Even though the Fourth Circuit purportedly based its decision on the principles of aiding-and-abetting liability, it failed to acknowledge *Taamneh*. Pet. App. 27a. Instead, the court below reached a diametrically opposite conclusion, based on the same critical set of facts: the court of appeals upheld the jury verdict of contributory liability because Cox purportedly took "insufficient steps" to ensure that the direct infringers were "removed" from internet access. But the trial record showed that Cox, like the tech company defendants in *Taamneh*, made its internet service generally available to "the internet-using public," without giving "any special treatment or words of encouragement" to those users who have engaged in copyright infringement. *See* Pet. App. 26a (holding that "a reasonable jury could have found that Cox provided that service 'with actual knowledge' of infringement occurring 'on specific subscribers' accounts,' yet 'fail[ed] to address' that infringement occurring on its network" (citation omitted)).

The Fourth Circuit concluded that "supplying a product with knowledge that the recipient will use it

to infringe copyrights is exactly the sort of ***culpable conduct*** sufficient for contributory infringement." Pet. App. 27a (emphasis added). That cannot be squared with this Court's unequivocal statement in *Taamneh* that such knowledge does not rise to "conscious[] and culpabl[e] 'participat[ion]' in a wrongful act so as to help 'make it succeed." 598 U.S. at 493, 498.

The Fourth Circuit also erroneously assumed that a defendant who continued to provide an essential tool for free speech to the so-called "repeat infringers" is "presumed to intend the substantially certain results" that those users would commit copyright infringement. Pet. App. 27a-28a. But the law creates no such presumption of intent. To the contrary, this Court held that permitting even a ***known*** terrorist organization to post on the platform was not sufficient to find a culpable intent. *Taamneh*, 598 U.S. at 498–99. Presuming that the internet service provider intended its users to infringe copyright would be even more attenuated here. At that point, the defendant knows only that a content owner believes that one of its works may have been infringed. But those copyright-infringement notices not infrequently contain mis-identification of copyrighted works and other errors. Further, they do not only target "pirates" or other bad actors who aim to illicitly distribute full copies of copyrighted films, music, or books. Rather, in X Corp.'s experience, copyright-infringement notices implicate ordinary Americans posting about the events and experiences in their lives that incorporate portions of copyrighted works. Declining to take away an important tool of expression from these ordinary Americans is not the kind of inaction that the doctrine

of contributory or aiding-and-abetting liability was meant to reach. Indeed, this Court expressly excluded the providers of these free speech tools from liability. *Id.* at 489 (contributory infringement law is designed to avoid liability for those who "merely deliver mail or transmit emails").

Nor can the Fourth Circuit's decision be reconciled with this Court's precedent by limiting *Taamneh* to actions brought under the JASTA. This Court interpreted "[t]he phrase 'aids and abets'" not just under the JASTA, but "***as elsewhere***" under the common law, as requiring "a conscious, voluntary, and culpable participation in another's wrongdoing." *Id.* at 493 (emphasis added). The common-law principles that "animated aiding-and-abetting liability for centuries" also govern the standard for secondary liability in copyright context. *Id.*; *see also Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403 (S.D.N.Y. 1966) ("the basic common law doctrine that one who knowingly participates in or further a tortious act is jointly and severally liable with the prime tort-feasor is applicable in suits arising under the Copyright Act").

The Fourth Circuit contravened the common-law principles governing aiding-and-abetting liability for at least two additional reasons. ***First***, the law does not impose a duty on "communication-providing services to terminate customers after discovering that the customers were using the service for illicit ends." *Taamneh*, 598 U.S. at 501. Thus, absent a finding of culpable participation, companies cannot be held liable. ***Second***, aiding-and-abetting liability requires conduct that is tethered to the specific instance of misconduct—not any aid that is tangentially related to

the possibility of a future commission of a tort. *See id.* at 506 ("[t]he point of aiding and abetting is to impose liability on those who consciously and culpably participated in the ***tort at issue***" (emphasis added)); *see, e.g.*, *Landy v. Fed. Deposit Ins. Corp.*, 486 F.2d 139, at 159–63 (3d. Cir. 1973) (no aiding-and-abetting liability in securities case where the defendants "were not involved in any manner with the sale of the [particular] shares," even where they had allegedly assisted with executing other transactions).

B. *Taamneh* Is Consistent with *Sony* and *Grokster*.

1. The principles explained in *Taamneh* are consistent with the law governing contributory copyright infringement: to be liable, a defendant must have "materially contributed"—not merely passively contributed—to the acts of direct infringement. *See Fortnightly Corp. v. United Artists Tel., Inc.*, 392 U.S. 390, 397 (1968) ("mere quantitative contribution cannot be the proper test to determine copyright liability" because that would extend indirect liability to "the shopkeeper who sells or rents television sets, and, indeed, every television set manufacturer").

The Court affirmed the principle that passive participation is insufficient in its 1984 *Sony* decision. *Sony* addressed whether the producer of then-new Betamax technology "'contributed' to the infringement of the copyright" by supplying "a piece of equipment that is generally capable of copying" copyrighted televised programs on a VHS tape. 464 U.S. at 437–38. Because the Betamax recorder was "capable of substantial noninfringing uses," Sony's sale of it "to the general public" could not form the basis for

contributory infringement. *Id.* at 456. This adoption of the staple article of commerce doctrine limited the scope of contributory infringement to "truly culpable conduct." *Taamneh*, 598 U.S. at 489. The *Sony* decision recognized the truism that dual use technology, such as the platform offered by X Corp., can always be used by some to infringe, but so long as that technology is not "good for nothing else" the public interest in the non-infringing uses dictates a finding of no contributory infringement. *See Sony*, 464 U.S. at 443. Thus, "[w]hen a charge of contributory infringement is predicated entirely on the sale of an article of commerce that is used by the purchaser to infringe …, the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes." *Id.* at 438–39, 440, 442.

Sony also provided important guidance on the requisite level of "culpable participation" for contributory infringement. The manufacturer's general awareness that the product could (or even would) serve infringing uses would not be sufficient to support liability for third-party users' subsequent direct infringement. The staple article of commerce doctrine prevented contributory liability from becoming boundless by "absolv[ing] the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and limit[ed] liability to instances of more acute fault than the mere understanding that some of one's products will be misused." *Grokster*, 545 U.S. at 932–33 (discussing *Sony*).

The Ninth Circuit had noted that Sony was aware that some consumers used the Betamax to make

unauthorized copies of copyrighted television shows. *See Univ. City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 976 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984) ("[t]he record establishes that appellees knew and expected that Betamax's major use would be to record copyrighted programs off-the-air"). That did not alter this Court's analysis of contributory liability for the supplier, even though "Sony's advertisements urged consumers to buy the VCR to 'record favorite shows' or 'build a library' of recorded programs." *Grokster*, 545 U.S. at 931 (quoting *Sony*, 464 U.S. at 459 (Blackmum, J., dissenting)).

These advertisements failed to provide "evidence that Sony had expressed an object of bringing about taping in violation of copyright or had taken active steps to increase its profits from unlawful taping." *Id.* at 931 (discussing *Sony*). There was no evidence that Sony treated these infringers differently or provided special aid for their unlawful taping.

2. Twenty years after *Sony*, the Court again addressed indirect copyright infringement and applied the same common-law principles the Court would later rely upon in *Taamneh*. The question presented

in *Grokster* was: "where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses," what "statements or actions directed to promoting infringement" would permit indirect liability? 545 U.S. at 935. The Court based its decision on the following principles:

First, secondary infringement applies only to "culpable expression and conduct." 545 U.S. at 937. Prior to the Court's opinion in *Grokster*, there were two distinct types of secondary liability: (1) vicarious liability; and (2) contributory infringement. Both require an act of direct infringement. Without direct infringement, there is nothing to "contribute to," or to be vicariously liable for. In *Grokster*, the Court created what may be a third category of secondary liability—inducement—that is applicable only to circumstances where infringement arises out of the use of a product that has other substantial non-infringing uses. *See Concord Music Grp., Inc. v. X Corp.*, 2024 WL 945325, at *6 (M.D. Tenn. Mar. 5, 2024) ("*Grokster* was not intended to be a comprehensive statement of the boundaries of contributory infringement under the Copyright Act, but rather a response to the specific pattern of behavior before the Court").

Grokster did not attempt to cut back on application of the staple article of commerce doctrine to contributory infringement claims based solely on "material contribution" theory; it instead decided the case on the new inducement theory, which provides a narrow exception to the *Sony* doctrine. The Court adopted this "sensible" approach because it is limited to imposing liability on only "one 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." *Grokster*, 545 U.S. at 936–37.

Second, the Court confirmed that "mere[] … failure to take affirmative steps to prevent infringement" does not induce infringement "in the absence of other evidence of intent." *Grokster*, 545 U.S. at 939 n.12. This principle is later reflected in *Taamneh* where the Court confirmed that "mere omission, inactions, or nonfeasance" cannot be the basis for secondary liability. 598 U.S. at 489.

Third*,** only evidence of "intentionally*** inducing or encouraging direct infringement," such as the distribution of "a device with the object of promoting its use to infringe copyright … or other ***affirmative*** steps taken to foster infringement," can support inducement liability. *Id.* at 930, 936–37 (emphasis added). The Court justified the defendants' liability under the limited doctrine of inducement because "[t]he record [was] replete with evidence that from the moment Grokster and StreamCast began to distribute their free software, each one clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement." *Id.* at 923–24. Indeed, the defendants' "business models" evinced that "their principal objective was use of their software to download copyrighted works." *Id.* at 926. It was a "classic" case in which "one induces commission of infringement by another, or 'entic[es] or persuad[es] another' to infringe, … as by advertising." *Id.* at 935 (citation omitted). The Court would require the same in *Taamneh* by requiring conscious and culpable participation in the misconduct to be secondarily liable for it. *See Taamneh*, 598 U.S. at 493.

3. *Sony* and *Grokster*—reinforced by *Taamneh*—govern this case. The Court stated in each of the three cases that declining to take action based on the knowledge that others have put the defendant's products to infringing uses is an insufficient basis for imposing indirect liability for third parties' infringement. That is why the Court declined to impose contributory liability on Sony even though the record showed that Sony "knew and expected that Betamax's major use would be to record copyrighted programs off-the-air." *Sony*, 659 F.2d at 975. Likewise, the defendants in *Grokster* were "aware that users employ their software primarily to download copyrighted files, even if the decentralized FastTrack and Gnutella networks fail to reveal which files are being copied, and when." *Grokster*, 545 U.S. at 923. But the Court said that even the "knowledge of … actual infringing uses would not be enough … to subject a distributor to liability." *Id.* at 937. The Court exercised proper "reluctance to find[ing] liability when a defendant merely sells a commercial product suitable for some lawful use." *Id.* at 936. The Court again declined to adopt an indirect liability rule that would render "ordinary merchants," "banks" facilitating "routine transactions," and those who "generally" offer services "to the internet-using public" liable for someone else's misuse of their products or services. *Taamneh*, 598 U.S. at 489, 491, 498.

The Fourth Circuit held that "supplying a product with knowledge that the recipient will use it to infringe copyrights is exactly the sort of culpable conduct sufficient for contributory infringement," Pet. App. 27a. That holding cannot be squared with *Sony* or *Grokster* no more than it can be reconciled with

Taamneh. This Court should correct the error of the court of appeals by holding that absent "clear expression or other affirmative steps taken to foster infringement," *Grokster*, 545 U.S. at 936–37, or "culpable participation" in the infringement, *Taamneh*, 598 U.S. at 493, passive inaction with respect to infringement notices cannot result in liability for secondary copyright infringement. *See also Concord Music Grp.*, 2024 WL 945325, at *7 (no authority "support[s] an argument that the operator of a social media platform materially contributes to infringement simply because there are some preventive steps that the operator could have taken but did not").

II. THE COURT SHOULD CLARIFY THAT *TAAMNEH* APPLIES TO COPYRIGHT

A. Clarification Is Needed to Address Lower Courts' Confusion.

In addition to reversing the Fourth Circuit, this Court should provide the clarification that the common-law principles in *Taamneh* that circumscribe contributory liability to its proper limits apply to copyright infringement. As noted above, the appropriate standard for contributory infringement where a staple article of commerce is involved is more than knowledge that others have put the defendant's products to infringing uses. This Court should now expressly require "culpable intent" to cause infringement by "consciously and culpably" inducing the infringement. *Taamneh*, 598 U.S. at 500. That standard would avoid future errors of holding that a simple failure to prevent repeat or known infringers—including those whose accounts had been

temporarily suspended, or whose posted content had been removed based on notices of copyright infringement—from remaining on the service can constitute contributory infringement.

Without this Court's guidance, companies that engage in "mere" creation and provision of "cell phones, email, or the internet generally" will face the prospect of liability to the content industry, even though this Court has said that those who provide these articles of commerce are "not culpable." *Id.* at 499. The confusion over secondary infringement is pervasive; circuits beyond the Fourth have also taken contributory liability "too far" to hold "ordinary merchants … liable for any misuse of their goods and services." *Id.* at 489.

For example, the Ninth Circuit has correctly recognized that *Grokster* applied "rules of fault-based liability derived from the common law." *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170 (9th Cir. 2007) (quoting *Grokster*, 545 U.S. at 934–35). But it inexplicably deviated from those common-law principles to conclude that "a computer system operator can be held contributorily liable" if the operator can "'take simple measures to prevent further damage' to copyrighted works, … yet continues to provide access to infringing works." *Id.* at 1171 (quoting *Religious Tech. Ctr. v. Netcom On-Line Comm. Servs., Inc.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995)). This "simple measures" test cannot be squared with the longstanding common-law principles that cabin liability to "unmistakable" and "culpable" participation in the wrongful conduct. *See Grokster*, 545 U.S. at 937, 940.

Likewise, based on a misreading of *Sony*, the district court in *N.Y. Times Co. v. Microsoft Corp.*, 2025

WL 1009179 (S.D.N.Y. Apr. 4, 2025)—a consolidated case involving 12 suits brought against artificial intelligence companies—declined to dismiss a claim for contributory infringement, finding that the plaintiffs had plausibly alleged knowledge of alleged third-party infringement by customers of those generative AI products. The district court based its decision on its belief that *Sony* and *Grokster* had provided no guidance on liability based on material contribution. 2025 WL 1009179, at *11. But as discussed, *Sony* squarely (and solely) addressed the material contribution prong of contributory infringement, and *Grokster* discussed the limited circumstances—plainly inapplicable in the AI case—where specific, additional inducing conduct may justify the imposition of indirect liability notwithstanding the existence of substantial noninfringing uses. The erroneous efforts to render the staple article of commerce doctrine inapplicable to the new AI technology may be symptomatic of a greater problem: the lower courts lack proper guidance from this Court on the proper standards for contributory infringement.

B. Clarification Is Needed to Balance Protection with Free Speech and Innovation.

As the Court recognized in *Taamneh*, there is a danger that an overbroad application of contributory infringement "would run roughshod over the typical limits on tort liability and taking aiding and abetting far beyond its essential culpability moorings." 598 U.S. at 502–03. Indeed, without this Court's guidance, the misapplication of contributory infringement law

could wreak havoc on the tech industry, including the nascent AI industry.

That is because if contributory liability is not confined to "truly culpable conduct," *id.* at 489, it may become too costly to offer technological innovations to the public. Although copyright owners may assert their claims against individual infringers for direct infringement, they do not generally do so. Instead, as in this case, content owners assemble thousands of copyrighted works allegedly infringed by someone else, and sue service providers on theories of secondary liability in pursuit of massive verdicts like the billion dollars awarded by the jury here. Companies offering innovative technology to the internet-using public have no choice but to constrain their actions in the face of that uncertainty and existential risk.

There is no evidence Cox derived a penny from its subscribers' conduct. Cox's entry level monthly fee for internet service for families is $9.95 per month. That subscription fee must be multiplied by 10,000 to arrive at the jury's award *per work*. A subscription *for all songs* on Apple Music costs $10.99 a month. To allow a billion dollar award against a party that did not itself directly infringe, did not participate in the infringement, and did not financially benefit from infringing uses versus non-infringing uses by its subscribers is a grotesque distortion of the purposes of copyright law and common-law principles of liability. Appropriate standards for contributory infringement, based on *Taamneh*, can prevent this.

Otherwise, there will remain significant risks to freedom of expression on the internet, because ISPs, social media, and tech companies will be coerced to

clamp down on ***any*** possibility of a user posting a potentially copyrighted material in the future to avoid billion dollar judgments. As noted above, *see supra* Section I.A, copyright infringement notices often sweep in ordinary Americans posting about their lives or making other original content. The lower courts' erroneous liability standards, without this Court's correction, will continue to place on the companies two equally untenable options: a massive, even existential, liability risk or a need to take away an important free speech tool from their customers, users, or subscribers. There has been an evergreen threat of substantial legal liability from providing a tool for learning and expression. The adoption of the Fourth Circuit's standard would encourage companies to be overly aggressive in terminating ordinary users' accounts to avoid liability so as to avoid the risk that "repeat infringers" would post even innocuous content that may contain a copyrighted work. That kind of policy would pose a substantial encroachment on free speech rights, contrary to copyright law's built-in First Amendment protections. *Eldred*, 537 U.S. at 219 (copyright law contains "built-in First Amendment accommodations"); *see also Golan v. Holder*, 565 U.S. 302, 328–29 (2012) (referring to "speech-protective purposes and safeguards embraced by copyright law").

Copyright law is also of course intended to "Promote the Progress of Science," U.S. Const. art I., § 8, cl. 8, and the public interest undergirds all its elements. *See Sony*, 464 U.S. at 429 (the grant of copyright is "a means by which an important public purpose may be achieved"). As this Court explained in *Grokster*, where the defendant sells "an item with

substantial lawful as well as unlawful uses," adopting a rule that limits liability to "instances of more acute fault than the mere understanding that some of one's products will be misused" will "leave[] breathing room for innovation and a vigorous commerce." 545 U.S. at 932–33.

CONCLUSION

For those reasons, the Court should reverse the judgment of the court of appeals and hold that contributory liability requires conscious and culpable participation in copyright infringement.

Respectfully submitted.

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