

SUPREME COURT OF THE UNITED STATES

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COX COMMUNICATIONS, INC., ET AL.,)
 Petitioners,)
 v.) No. 24-171
SONY MUSIC ENTERTAINMENT, ET AL.,)
 Respondents.)
- - - - -

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9
10 Washington, D.C.
11 Monday, December 1, 2025
12

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:05 a.m.
16

17 APPEARANCES:

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6 MALCOLM L. STEWART, ESQ.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 24-171, Cox
5 Communications versus Sony Music Entertainment.

6 Mr. Rosenkranz.

7 ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

8 ON BEHALF OF THE PETITIONERS

9 MR. ROSENKRANZ: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 The Fourth Circuit held that a
12 provider of basic communications infrastructure
13 to millions of homes and businesses can be held
14 liable because it did not kick enough accused
15 infringers off the Internet. No notion of tort
16 or copyright law ever conceived can support
17 that theory.

18 This Court explicitly rejected the
19 theory in *Twitter*, where it said, "Plaintiffs
20 have identified no duty that would require
21 communication-providing services to terminate
22 customers after discovering that the customers
23 were using the service for illegal ends." This
24 Court said in *Grokster* that liability cannot be
25 predicated on "mere failure to take affirmative

1 steps to prevent infringement."

2 Reaffirming those basic principles
3 resolves this case. No case has suggested that
4 knowledge alone can create the necessary
5 culpability to -- to find someone liable for
6 infringement.

7 The case -- the consequences of
8 Plaintiffs' position are cataclysmic. There is
9 no sure-fire way for an ISP to avoid liability,
10 and the only way it can is to cut off the
11 Internet not just for the accused infringer but
12 for anyone else who happens to use the same
13 connection. That could be entire towns,
14 universities, or hospitals.

15 Turning Internet providers into
16 Internet police for all torts perpetrated on
17 the Internet will wreak havoc with the
18 essential medium through which modern public
19 engages in commerce and speech. This Court
20 should reverse.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: How far do you go
23 with Twitter? We were dealing with a totally
24 different matter in Twitter than we have here.

25 MR. ROSENKRANZ: Well, Your Honor,

1 the -- the question of how far one goes with
2 Twitter, when you think about the different --

3 JUSTICE THOMAS: In the sense how does
4 it apply here?

5 MR. ROSENKRANZ: Oh. So -- so Twitter
6 held several things that are -- that are fully
7 applicable here. The first is that
8 contributory liability requires malfeasance
9 with the purpose of fostering the bad act, that
10 there's no liability for passive non-feasance,
11 and there's -- there's no liability for sales
12 to the general public on the same terms
13 regardless of any eventual use.

14 Twitter is -- we -- we are an a
15 fortiori case of Twitter. Twitter at least had
16 those communications on its own server. They
17 were visible to Twitter. What our -- what our
18 customers do is invisible to us in real time.

19 Now knowing that a particular
20 account -- account will infringe does not make
21 us an accomplice, which is what's required for
22 contributory liability. Continuing to supply
23 the Internet is just not the same as joining
24 with the tortfeasor in "mind and hand" in the
25 infringement as in something that the ISP wants

1 to bring about.

2 JUSTICE THOMAS: What -- what is the
3 basis of -- of this contributory liability?

4 MR. ROSENKRANZ: Your Honor, the basis
5 of contributory liability for copyright, as
6 this Court recognized in Sony, is just sort of
7 adopting the common law in a world in which the
8 Copyright Act itself does not prescribe
9 secondary --

10 JUSTICE THOMAS: So do we do that in a
11 broad adoption of common law, say as we had in
12 Halberstam, or do we -- is it narrower than
13 that?

14 MR. ROSENKRANZ: Well, Your Honor, it
15 must be, I would say, the narrowest version of
16 common law that is available precisely because
17 Congress did not speak directly to it. And so
18 I would say Halberstam merely articulates a way
19 of getting at the ultimate principles that the
20 Copyright Act -- excuse me, that contributory
21 liability is directed at, but Twitter and Smith
22 & Wesson apply it to the exact sorts of
23 circumstances here, which is where you've got
24 an arm's-length seller selling to millions and
25 millions of people --

1 JUSTICE KAGAN: I guess I wonder,
2 Mr. Rosenkranz -- this goes back to Justice
3 Thomas's first question -- whether this really
4 is a fortiori from -- from Twitter, meaning
5 Twitter, we spent a lot of time talking about
6 the fact that the -- the companies, Facebook
7 and so forth, didn't know of any particular
8 conduct that had led to the attack. It wasn't
9 even clear that the terrorists in Twitter had
10 used those companies to plan the attack. So we
11 said that there was no real nexus between the
12 companies and the actual communications that
13 created the legal issue.

14 Now, here, your client has received
15 notice as to particular people doing particular
16 infringements of copyright, and I -- I would
17 think that that's a step further from Twitter.

18 MR. ROSENKRANZ: Well, so, Your Honor,
19 it's -- it's a step further in one respect and
20 it's a step in the other direction on the other
21 end of the spectrum. So, on one end of the
22 causation spectrum, we can't see in real time
23 what people are doing. That, as I said,
24 distinguishes us from Twitter and makes us more
25 remote.

1 You are right that on the other end of
2 the spectrum, there's a slightly greater nexus,
3 but I hasten to add it is still a limited
4 nexus. When we get pinged about a regional ISP
5 with tens of thousands of users, we know that
6 somewhere someone in that community has
7 infringed.

8 JUSTICE KAGAN: That's true sometimes.
9 It's not true other times. And it -- it --
10 it -- there's no evidence that it's true here.
11 In other words, there are plenty of times where
12 you're getting -- you know, that there's a link
13 to a specific individual and -- and you know
14 who that individual is, you would not have to
15 cut off anybody else, and -- and you know that
16 that individual has infringed.

17 MR. ROSENKRANZ: Your Honor, I beg to
18 differ. There is literally not a single place
19 in this record where a specific individual was
20 identified. If you -- let's take the smallest
21 unit, a household. You still don't know who
22 the individual is.

23 I also beg to differ on the first half
24 of what you said, Your Honor, that there's no
25 evidence that what I've described has happened

1 here. Page 11 of our opening brief gives you
2 the -- the nature of the highest recidivist
3 infringers. They are 15 regional ISPs, 10
4 universities, nine hotels, and so forth. Those
5 are the entities that are most likely to be cut
6 off first because those are the ones that
7 accrue the greatest number of --

8 JUSTICE SOTOMAYOR: But you're
9 going --

10 CHIEF JUSTICE ROBERTS: How --

11 JUSTICE SOTOMAYOR: -- to the greatest
12 degree. The safe harbor doesn't require you
13 necessarily to terminate someone, but what I'm
14 troubled by is that you got these reports and
15 it's about 1 percent of your customer base
16 who's infringing.

17 There are things you could have done
18 to respond to those infringers and the end
19 result might have been cutting off their
20 connections, but you stopped doing anything for
21 many of them. You didn't -- you didn't try to
22 work with universities and ask them to start --
23 to look at an anti-infringement notice to their
24 students. You could have worked with a
25 multi-family dwelling and asked the people in

1 charge of that dwelling to send out a notice or
2 to do something about it.

3 You did nothing. And, in fact,
4 counselor, your clients' sort of laissez faire
5 attitude towards the Respondents is probably
6 what got the jury upset, meaning you're talking
7 something very different than Twitter, where
8 it's not even clear the -- that their websites
9 were being used for the specific attack at
10 issue.

11 Here, you know that a particular
12 location is infringing, and most of the time
13 you're doing nothing. Why aren't you
14 contributing to that infringement?

15 MR. ROSENKRANZ: So, Your Honor, a
16 couple of things. First, on the -- on the
17 first point you made, the DMCA does purport to
18 require termination, and it is the failure to
19 terminate --

20 JUSTICE SOTOMAYOR: But there's 10
21 steps be -- at least 10 steps before that.

22 MR. ROSENKRANZ: No, no, I -- I'm
23 talking about the DMCA, the statute itself --

24 JUSTICE SOTOMAYOR: The statute.

25 MR. ROSENKRANZ: -- the safe harbor.

1 And that was the theory of liability, that we
2 did not terminate people enough. Plaintiffs in
3 their brief to this Court for the first time
4 have made the assertion that you will find
5 nowhere in the court of appeals brief that we
6 did nothing.

7 The notion that Cox did nothing is
8 absurd. I will mention just three facts that
9 are undisputed. First, Cox invested its own
10 resources to create the first-of-its-kind
11 anti-infringement program. There was no
12 precedent for that.

13 Second, under that program, Cox sent
14 out hundreds of warnings a day. To your point,
15 Your Honor, that we didn't work with
16 universities, we most certainly did. The first
17 several steps, the 13 steps, are all about
18 contacting them, cutting them off, that is,
19 suspending their accounts, which we did 67
20 times -- 67,000 times in the course of this
21 period. That's thousands every month -- month.

22 And, third, the program stopped
23 infringement by 98 percent of the people who
24 were accused of infringement.

25 That is not nothing, Your Honor.

1 CHIEF JUSTICE ROBERTS: Well --

2 JUSTICE BARRETT: Could I ask you a --

3 CHIEF JUSTICE ROBERTS: -- you -- you
4 say you're -- you're comfortable -- or not
5 comfortable, but you -- you don't like the
6 Ninth Circuit's test, but then you go on to say
7 that you've already taken a lot of measures and
8 that those have been highly effective and they
9 far exceed any conceivable notion of simple
10 measures.

11 So why should we be terribly worried
12 about that? You're able to comply with it.
13 You don't -- so what's wrong with that? It
14 doesn't present such a burden to you. You say
15 you far exceed it.

16 MR. ROSENKRANZ: Well, so, Your Honor,
17 you're asking what's -- what is the problem
18 with the simple measures test?

19 CHIEF JUSTICE ROBERTS: Yeah.

20 MR. ROSENKRANZ: Oh. Well, so --

21 CHIEF JUSTICE ROBERTS: Because you
22 still believe you far exceed whatever
23 conceivable notion of simple measures.

24 MR. ROSENKRANZ: We most certain --
25 yes, Your Honor. Sorry. I did not mean to --

1 CHIEF JUSTICE ROBERTS: Okay. So
2 what's wrong with that test?

3 MR. ROSENKRANZ: So what is wrong with
4 that test is that it does not comply with what
5 this Court has said and the common law has been
6 saying for a hundred years.

7 CHIEF JUSTICE ROBERTS: Okay. But
8 that's different than saying what -- what the
9 practical impact on you is.

10 MR. ROSENKRANZ: I'm -- I'm not
11 complaining about the practical impact on us.
12 We easily meet the simple measures test. And I
13 would underscore that Plaintiffs have not asked
14 this Court to apply the simple measures test
15 and have not argued that we could not meet the
16 simple measures test.

17 JUSTICE JACKSON: Okay. But -- but
18 they do --

19 JUSTICE BARRETT: Counsel, can I --
20 oh.

21 JUSTICE JACKSON: Go ahead.

22 JUSTICE BARRETT: What incentive would
23 you have to do anything if you won? If you --
24 if you win and mere knowledge isn't enough, why
25 would you bother to send out any note --

1 notices in the future? What would your
2 obligation be?

3 MR. ROSENKRANZ: Your Honor, for the
4 simple reason that Cox is a good corporate
5 citizen that cares a lot about what happens on
6 its system. We do all sorts of things that the
7 law does not require us to do.

8 JUSTICE BARRETT: But don't you do
9 these notices in an effort to get the safe
10 harbor and aren't you sending these notices to
11 avoid liability? You would have no liability
12 risk, right, if you win going forward?

13 MR. ROSENKRANZ: That is correct, but
14 I want to underscore my -- my answer to --

15 JUSTICE GORSUCH: Whoa. Let me stop
16 you there. I mean, if -- if purpose is the
17 test, nobody -- very few bad actors come out
18 and say: I intended to do something awful.
19 You infer it from circumstances. And a jury
20 could still infer purpose from your knowledge
21 and some other actions, right?

22 MR. ROSENKRANZ: So -- but, Your
23 Honor, my answer is no. And -- and I agree
24 with you that the way one conducts this
25 analysis is not to say, oh, purpose is the

1 test. The way one conducts the analysis is to
2 assess --

3 JUSTICE GORSUCH: So you disagree with
4 the government on that?

5 MR. ROSENKRANZ: No, I don't think the
6 government is saying that purpose is the
7 standard, but we -- what the government --

8 JUSTICE GORSUCH: That's exactly how I
9 read its brief. Perhaps I'm missing something
10 and Mr. Malcolm can help me there.

11 MR. ROSENKRANZ: What -- what the
12 government and we both contend is that there
13 are acts that can be -- from which one can
14 impute intent, and in the context of a seller,
15 in particular, a seller of communications
16 technology, this Court has held that you --
17 you -- that -- that unless it is a technology
18 that is incapable of multiple uses, that is,
19 non-infringing uses, you don't infer intent
20 from what is an --

21 JUSTICE GORSUCH: We don't have to go
22 that far, though, to recognize that the jury
23 instructions here were improper, do we?

24 MR. ROSENKRANZ: No, you -- you don't
25 have to go that far to recognize that -- that

1 both the jury instructions here and, in
2 particular, the Ninth Circuit's holding that
3 the instructions as applied to this set of
4 facts could -- could sustain liability.

5 JUSTICE GORSUCH: So let me -- let me
6 ask you if I've got it right, okay, the
7 narrowest version of your argument, perhaps not
8 everything you want.

9 That the statute doesn't mention
10 secondary liability, so we should be cautious.
11 And, in fact, in Central Bank of Denver, we
12 refused to infer secondary liability in a
13 statute that had no explicit cause of action.
14 But here we are, Sony did it, so okay. The
15 narrowest version of that requires purpose.

16 And we've said that many times,
17 knowledge isn't enough. There are various ways
18 one can infer purpose, such as through
19 inducement or -- or the fact that the thing
20 you're selling doesn't have any other lawful
21 use.

22 There may be other ways to infer
23 purpose. And the jury instructions here didn't
24 contain purpose, just knowledge. So,
25 therefore, reverse. Anything wrong with that

1 syllogism?

2 MR. ROSENKRANZ: There's nothing wrong
3 with the syllogism. Just one quibble. We're
4 not challenging the jury instructions. We're
5 making a JMOL argument. But, yes, everything
6 else you said I completely agree with, that
7 what the -- what the Fourth Circuit did was to
8 say that continuing to provide Internet service
9 with the knowledge that someone on that account
10 is likely to infringe again, that that is the
11 culpable act. And that is just absolutely not
12 correct.

13 This Court rejected that exact theory
14 in Twitter. I would remind the Court to the
15 questions asked earlier about whether Twitter
16 goes that far. There was knowledge in Twitter
17 of actual accounts. I understand it was not
18 knowledge of specific acts of terrorism, but --
19 but -- but knowledge was very much a part of
20 that case.

21 JUSTICE JACKSON: So is it your view
22 that selling Internet services can never be
23 called culpable conduct? Is that the position
24 that you're taking?

25 MR. ROSENKRANZ: Your Honor, the

1 position we're taking is not that an ISP can
2 never be culpable. But an ISP can be culpable
3 only if it engages either in clear expression,
4 such as inducement, or in affirmative acts that
5 align itself --

6 JUSTICE JACKSON: And the affirmative
7 act can't be continuing to provide Internet
8 services to a known infringer?

9 MR. ROSENKRANZ: That is correct
10 because that is simply another way of packaging
11 the non-feasance.

12 JUSTICE JACKSON: All right. Let me
13 give you a hypothetical and you tell me whether
14 or not liability lies.

15 Suppose I come to you and I want to
16 buy your services. I tell you that I as a
17 customer am addicted to infringing on the
18 Internet. I've been sued before. I know what
19 I'm doing is illegal, but I just keep doing it.

20 And not only that, Cox, based on where
21 I live, is my only option. At my new house,
22 it's the only way that I can get Internet
23 services. If Cox sells to me knowing all of
24 that, you still say no liability for -- for
25 secondary liability in that situation?

1 MR. ROSENKRANZ: That's correct, Your
2 Honor. That's a difficult hypothetical that
3 pushes the envelope.

4 JUSTICE JACKSON: That's the point of
5 the hypothetical.

6 (Laughter.)

7 MR. ROSENKRANZ: Yeah, understood.
8 Let me just underscore the facts you recited
9 are -- are facts that would make it totally
10 plausible and, in fact, would invite the I --
11 the Plaintiffs here to sue that infringer
12 directly. They have recourse in a situation
13 like that.

14 JUSTICE JACKSON: Can I follow up?

15 CHIEF JUSTICE ROBERTS: Thank -- sure.

16 JUSTICE JACKSON: I just wanted to
17 say, under those facts, would there be
18 liability under common law sort of general
19 aiding-and-abetting principles? Wouldn't that
20 be enough to sustain liability?

21 MR. ROSENKRANZ: No, Your Honor.
22 The -- the reason that it wouldn't be enough
23 for Cox in this case is exactly the reason that
24 it wouldn't be enough under the common law.
25 The common law also requires a culpable act,

1 not the equivocal act of selling to everyone on
2 equal terms. Smith & Wesson says that, and
3 Twitter says that too.

4 CHIEF JUSTICE ROBERTS: Thank you --

5 MR. ROSENKRANZ: That is an equivocal
6 act that does not align oneself, that does not
7 align the seller with the purpose of promoting
8 infringement.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas, anything?

12 Justice Alito?

13 JUSTICE ALITO: You have competitors
14 in providing Internet services. Would you
15 dispute the proposition that your client has a
16 financial incentive not to become known as an
17 Internet service provider that is aggressive in
18 terminating service for -- for infringers?

19 MR. ROSENKRANZ: Your Honor,
20 hypothetically, I can imagine that being true,
21 but the facts of this case are 21 percent of
22 traffic to the other ISPs was infringing. We
23 were two-thirds of that. So the -- the notion
24 that we had a -- a particularly impressive
25 track record of reducing infringement did --

1 did not deter us from -- excuse me -- of
2 reducing infringement did not deter us from
3 having a program that worked to the point of
4 98 percent success.

5 JUSTICE ALITO: Is there evidence in
6 the record that you have a financial incentive
7 not to terminate infringers?

8 MR. ROSENKRANZ: We -- we have a
9 financial incentive, like any business does, to
10 keep our customers. But the Fourth Circuit
11 found -- and this was a basis for rejecting
12 vicarious liability -- that we did not have a
13 financial incentive to increase infringement.

14 JUSTICE ALITO: If purpose is the
15 test, would you disagree that there can be
16 circumstances in which a repeated refusal to do
17 anything about infringement by the holder of a
18 single-user account could be sufficient to give
19 rise to an inference of purpose?

20 Suppose that we're talk --- we're not
21 talking about a multi-user account. We're
22 talking about an individual-user account, and
23 the copyright holder notifies the ISP that this
24 particular account has -- over the course of
25 six months has violated the copyright 50 times.

1 And the ISP does nothing in response to that
2 notification, and then, after the 50th notice,
3 it begins to send out just a very tepid
4 warning, what you're doing is really not very
5 nice. But 50 more occur over the course of the
6 next six months. At some point -- and this
7 could go on indefinitely. At some point would
8 there be enough to infer a purpose?

9 MR. ROSENKRANZ: No, Your Honor,
10 because there could be all sorts of reasons why
11 an ISP does not want to cut off a customer.
12 And it's not just a customer who, in your
13 hypothetical, confesses that he's going to
14 continue infringing.

15 I think that -- another way of
16 answering the question is think about the flip
17 side. In order to capture that fringe case, we
18 would have to create a world in which ISPs are
19 going after everyone who infringes, including
20 not just that one individual user of which we
21 have no evidence in this record that we ever
22 knew about that one person but the regional
23 ISPs and the hospitals and the universities,
24 because that is a world in which, at \$150,000
25 per pop, the ISP has a huge financial incentive

1 to cut off the accused infringer at the word
2 "go."

3 I will underscore that -- that in that
4 table on page 11, of the 49 infringers who had
5 more than a hundred notices, only one was a
6 single-unit home. Everything else were the
7 sorts of businesses and multi-unit dwellings
8 that I described.

9 JUSTICE ALITO: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Sotomayor?

12 JUSTICE SOTOMAYOR: Your last
13 concession, doesn't that suggest, even if there
14 is some error here, that you've admitted some
15 liability potentially when you say there was
16 one single-person home involved?

17 MR. ROSENKRANZ: Well, so two --

18 JUSTICE SOTOMAYOR: Because that would
19 seem to me the clear example of Justice
20 Jackson's hypothetical, which is, if I'm a gun
21 dealer and I'm selling to someone who says to
22 me "I'm going to kill my wife with this gun," I
23 think the common law would say you knew what he
24 was going to do with the gun, you joined in.
25 Why isn't your continuing to provide Internet

1 service the same --

2 MR. ROSENKRANZ: Well, so -- so a
3 couple of answers, Your Honor.

4 JUSTICE SOTOMAYOR: -- when you know
5 that that particular location is going to
6 continue to infringe?

7 MR. ROSENKRANZ: So -- so a couple of
8 answers. I -- I certainly didn't concede that
9 there would be liability. I said, of the top
10 recidivists, there was only one single-family
11 home. We still don't know the identity of
12 the --

13 JUSTICE SOTOMAYOR: Why does that
14 matter?

15 MR. ROSENKRANZ: Excuse me?

16 JUSTICE SOTOMAYOR: Meaning, if you
17 know that a particular location and someone in
18 it is committing a crime and you're supplying
19 to that person and perhaps others, it doesn't
20 matter what the others are doing, but you know
21 some person in that home is infringing, why
22 aren't you participating by giving them the
23 tool to infringe?

24 MR. ROSENKRANZ: Well, because, Your
25 Honor, it needs to be an act that unequivocally

1 demonstrates --

2 JUSTICE SOTOMAYOR: Why?

3 MR. ROSENKRANZ: -- a purpose.

4 JUSTICE SOTOMAYOR: You're -- you're
5 thinking of Betamax. But, in Betamax, it was a
6 piece of equipment where the seller had no
7 continuing connection to the equipment. You
8 sold the equipment. Somebody could use it
9 legitimately or not. You couldn't control
10 them. But, here, you have control over the
11 instrument of infringement.

12 MR. ROSENKRANZ: Your Honor, I'm not
13 just talking about the Sony case. Grokster
14 reiterated the same point, Twitter. If the
15 rule was that there -- that -- that the rule is
16 different if there's an ongoing relationship,
17 then Twitter would have come out differently.

18 By the way, so -- Direct Sales
19 underscores that point too, and that was 80
20 years ago. That is part of the --

21 JUSTICE SOTOMAYOR: That -- what it
22 said was these people were selling something
23 that they knew this doctor would be using
24 illegally. He would be prescribing -- or not
25 prescribing. He would be giving away drugs not

1 in accordance with medical standards.

2 MR. ROSENKRANZ: No, Your Honor.

3 JUSTICE SOTOMAYOR: So how is that
4 different from this situation?

5 MR. ROSENKRANZ: This Court explained
6 in Smith & Wesson why it's different, and that
7 was -- and it said explicitly it was not just
8 that there were -- that there was an ongoing
9 relationship. There were on --

10 JUSTICE SOTOMAYOR: No, you're -- you
11 can't win on Smith & Wesson because, in Smith &
12 Wesson, the manufacturer sold to dealers, who
13 in turn sold to individuals, to individual gun
14 stores. But all right. Thank you, counsel.

15 MR. ROSENKRANZ: Well, can I just
16 answer the question, though? I'm not citing
17 Swith & Mess -- Smith & Wesson in answer to
18 your question. I'm citing Smith & Wesson for
19 its analysis of Direct Sales.

20 And what the Court said in Smith &
21 Wesson about Direct Sales was ongoing wasn't
22 enough. It was the stimulation of further
23 sales and -- and treating that buyer
24 differently from others, that was the key that
25 created culpability.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 JUSTICE KAGAN: I take it that -- from
3 your answers that it really doesn't matter
4 whether Cox is a good corporate citizen. You
5 know, there's a lot of talk in your brief and
6 in Mr. Clement's brief, is it a good corporate
7 citizen, is it a bad corporate citizen? But,
8 as I understand your argument, it could be the
9 worst corporate citizen of all time and still
10 it doesn't matter, that there would be no
11 liability. Is that -- is that right?

12 MR. ROSENKRANZ: That's correct. But
13 I was making the point earlier about the
14 corporate citizen in response to the question
15 why would an ISP continue to provide
16 anti-infringement programs if they don't have
17 to, and I was simply saying --

18 JUSTICE KAGAN: Okay. But it's
19 basically irrelevant to the matter at hand, to
20 the liability rule?

21 MR. ROSENKRANZ: It is irrelevant,
22 both the invective from Plaintiffs and my
23 protestation --

24 JUSTICE KAGAN: Your crowing. And if
25 that's so, what would the safe harbor provision

1 mean? It would seem to be, you know,
2 utterly -- it would seem to do nothing.

3 MR. ROSENKRANZ: Well, so, Your Honor,
4 Congress can --

5 JUSTICE KAGAN: Why would anybody care
6 about getting into the safe harbor if there's
7 no liability in the first place --

8 MR. ROSENKRANZ: Well --

9 JUSTICE KAGAN: -- is, I suppose, the
10 question?

11 MR. ROSENKRANZ: Right. So -- so
12 Congress can adopt a safe harbor for all sorts
13 of reasons. Here, Congress did it to assure
14 service providers at a point in time at which
15 the law was really unknown.

16 JUSTICE KAGAN: Right, but -- right.
17 I -- I take your point about how Congress may
18 have thought this was a good thing to do
19 because we don't know what the liability rule
20 is. But, once the liability rule becomes what
21 you think the liability ought to be, do you
22 agree that then the -- the safe harbor
23 provision is not going to be doing anything at
24 all?

25 MR. ROSENKRANZ: Twenty-seven years

1 later, the safe harbor provision, by light of
2 this Court's ruling that came a generation
3 after the --

4 JUSTICE KAGAN: You agree?

5 MR. ROSENKRANZ: Correct. Yes, I
6 agree.

7 JUSTICE KAGAN: Okay. Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch?

10 Justice Kavanaugh?

11 JUSTICE KAVANAUGH: On the word
12 "purpose," I think that's going to be key, and
13 it's kind of a slippery word in this context.
14 I want to make sure I nail down what you mean
15 in response to Justice Gorsuch about what can
16 be used to show purpose.

17 Mere knowledge alone cannot show
18 purpose. Purpose can't be inferred from mere
19 knowledge is your point, correct?

20 MR. ROSENKRANZ: That is correct, with
21 one caveat. It can be shown when it is --
22 when -- when the only use of the -- of the
23 device is an infringing use.

24 JUSTICE KAVANAUGH: I'm assuming that
25 there are substantial non-infringing uses.

1 MR. ROSENKRANZ: Correct.

2 JUSTICE KAVANAUGH: And then you go to
3 the next step, which is purpose. And I want to
4 make sure mere knowledge, not good enough.
5 What is good enough under our precedents in
6 your view, if you could articulate it clearly,
7 what you think is good enough to show purpose?

8 MR. ROSENKRANZ: So there are two
9 things that are good enough. One is
10 inducement, which are mainly -- generally words
11 that are directed at encouraging infringement.

12 The other is affirmative conduct
13 directed at -- at fostering infringement. For
14 example, if an ISP were to provide an
15 anti-infringement detection buster, you know,
16 something that hides the ISP address from the
17 MarkMonitors of the world that detect
18 infringement, that would be an affirmative act
19 that's built into its device that aligns itself
20 as someone who desires for the infringement to
21 occur.

22 Another possibility is if the ISP
23 creates a service that is uniquely designed to
24 help individuals take streaming services, the
25 songs off of streaming services, download them,

1 and swap them. Those are two -- and they're
2 classic examples of affirmative conduct that
3 amounts to material contribution.

4 JUSTICE KAVANAUGH: So that's
5 affirmative conduct. What are some examples of
6 inducement?

7 MR. ROSENKRANZ: Oh, a -- here, let me
8 help you infringe. We have an infringement
9 hotline.

10 JUSTICE KAVANAUGH: So advertisements
11 or specific pitches that are designed -- this
12 is -- I don't want to put words in your mouth,
13 but is that what you're getting at?

14 MR. ROSENKRANZ: Sure. Or even an
15 employee who will instruct people how to go
16 about getting BitTorrent on their computers.

17 JUSTICE KAVANAUGH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett?

20 JUSTICE BARRETT: So, in your
21 understanding of Twitter, would it be enough
22 for contributory or vicarious liability, aid
23 and abet -- aiding and abetting if Twitter knew
24 that a particular account was being used for
25 child trafficking and didn't take it down,

1 didn't cut the user off? They know it, but
2 they're not doing anything to facilitate or
3 encourage. Twitter obviously has -- X has lots
4 of other purposes.

5 MR. ROSENKRANZ: So I think that
6 that's a hard case. I don't know what -- how
7 Twitter would come out on that. But everything
8 Twitter said about affirmative conduct and
9 malfeasance versus non-feasance, I would say,
10 would drive the -- the conclusion the same way
11 that Twitter ultimately drove it.

12 Now I can imagine a court -- this
13 Court someday carving out an exception for life
14 and limb or imminent danger of physical harm,
15 but --

16 JUSTICE BARRETT: But your basic
17 answer is that based on your understanding of
18 Twitter, unless we carved out that kind of
19 exception, your theory of aiding and abet --
20 aiding-and-abetting liability anyway is that
21 there would not be liability?

22 MR. ROSENKRANZ: That's correct. I
23 mean, this Court said in Twitter what I said
24 right at the outset of my argument, that
25 Plaintiffs have identified no duty that would

1 require communication-providing services to
2 terminate customers, terminate them after
3 discovering that the customers were using the
4 service for illicit ends.

5 I'm just reading what this Court said
6 in Twitter.

7 JUSTICE BARRETT: Well, you know,
8 Justice Kagan is right that in Twitter and in
9 Smith & Wesson, it was a bit more attenuated.
10 You're putting it out in commerce, but the --
11 the knowledge link was not as strong as in the
12 hypothetical I gave you or in the hypothetical
13 that Justice Jackson gave you.

14 Do you understand aiding-and-abetting
15 liability to be coextensive with the kind of
16 contributory infringement liability we're
17 talking about here? In other words, is
18 anything that we say here, if we adopt your
19 theory here, is that necessarily going to carry
20 over to the aiding-and -- aiding-and-abetting
21 context?

22 MR. ROSENKRANZ: I -- I would think
23 so, Your Honor. This Court has always treated
24 those two lines of cases interchangeably. When
25 this Court asks what the common law is of

1 copyright contributory liability, it is looking
2 to, back -- you know, back to Kalem, accomplice
3 liability.

4 So what this Court says here will
5 apply to other contexts, except if there's a
6 statute that changes the common law. And vice
7 versa, what this Court said in Twitter and in
8 Smith & Wesson should apply with full force to
9 this version of common law liability.

10 JUSTICE BARRETT: Last question, and
11 this is a record-based question just so that I
12 can be clear on how this works. So this
13 department that sends the notices, the one that
14 Paranoid Panda, the employee, was concerned
15 about, is it dedicated entirely to copyright
16 infringement, or is it also detecting accounts
17 and taking them down either because of failure
18 to pay or -- or other kinds of things?

19 MR. ROSENKRANZ: So, Your Honor, it's
20 called the abuse team and so it tracks all
21 sorts of abuses. It got 5.7 million notices in
22 the particular period. It was reacting not
23 just to copyright but to the point I was
24 beginning to make earlier. It reacts to
25 phishing, it reacts to fraud claims, it reacts

1 to hacking, none of which there is a legal duty
2 to act.

3 CHIEF JUSTICE ROBERTS: Justice
4 Jackson?

5 JUSTICE JACKSON: So I guess I'm not
6 sure I understood your answer to Justice
7 Barrett's question about the coextensive nature
8 of aiding-and-abetting liability and the kind
9 of liability we're talking about here because I
10 understood you to be rejecting material
11 contribution, and I thought material
12 contribution was a form of aiding-and-abetting
13 liability. So maybe I'm confused. Are you
14 rejecting the material contribution theory?

15 MR. ROSENKRANZ: No, absolutely not,
16 Your Honor. We embrace the full breadth of
17 contributory liability that includes inducement
18 and includes material contribution. And I gave
19 Justice Kavanaugh a few examples of thing --

20 JUSTICE JACKSON: Of how material
21 contribution works in your view?

22 MR. ROSENKRANZ: How it would work
23 in -- in the ISP context. I'll -- I'll hasten
24 to add, though, the fact that there are not a
25 lot of examples is a function of Plaintiffs'

1 decision to sue the one technology that is
2 least likely to fit a fact pattern of material
3 contribution. A -- an --

4 JUSTICE JACKSON: But that's only if
5 you define it as being only Grokster or Sony.
6 In other words, it depends on how you define
7 "material contribution," and I -- I take your
8 definition to be narrower than what I think
9 Respondents will say.

10 MR. ROSENKRANZ: Oh, it's definitely
11 narrower than what the Respondents will say
12 because Respondents have never purported to
13 identify an affirmative act to foster
14 infringement. Their argument is knowledge
15 alone is what -- what satisfies --

16 JUSTICE JACKSON: And your argument is
17 knowledge plus providing the service, the
18 providing the service, Internet service, is not
19 an affirmative act, is that -- do I have that
20 right?

21 MR. ROSENKRANZ: That is correct. We
22 are providing the Internet service and
23 declining to terminate. That's what we were
24 held liable --

25 JUSTICE JACKSON: To individual

1 customers or ISP addresses, which makes it,
2 some would say, different than Twitter because
3 Twitter was just -- they were putting up a
4 platform that people were using.

5 But you've got contracts with
6 individual people that you're providing
7 Internet service to, correct?

8 MR. ROSENKRANZ: So -- so contracts,
9 yes, but there was an ongoing relationship in
10 Twitter with all of the customers --

11 JUSTICE JACKSON: But I mean known,
12 known, in ways that you can isolate the I --
13 ISP address and the places where the
14 infringement is coming from.

15 MR. ROSENKRANZ: We know the IP
16 address. If it's a regional ISP --

17 JUSTICE JACKSON: Mm-hmm.

18 MR. ROSENKRANZ: -- there are 10,000
19 possible homes or businesses who could be
20 infringing, and, as I was saying earlier,
21 that's the first that will have to get cut off
22 under this liability scheme.

23 JUSTICE JACKSON: All right. Well,
24 let me ask you just in copyright law in
25 general, my understanding is that Congress's

1 goals are key, and I appreciate your view, and
2 it's true that Congress hasn't provided
3 statutory liability, but I do think, based on
4 the statute that we have here, Congress
5 understood that common law liability could
6 arise.

7 And so what occur -- what -- what
8 concerns me a bit is your encouraging us to
9 adopt a common law rule that would essentially
10 eliminate liability in this situation. I guess
11 I'm coming at this by looking, as -- as several
12 of my colleagues have pointed to, the safe
13 harbor.

14 Congress told us in the legislative
15 history what the safe harbor was about. In --
16 in -- in one of the reports, the House report,
17 Congress said that it wanted to "preserve
18 strong incentives for service providers and
19 copyright owners to cooperate, to detect and
20 deal with copyright infringements."

21 And so, even though there isn't
22 secondary liability in the statute, it appears
23 as though Congress sought to use the liability
24 risk that exists in the common law to
25 incentivize this cooperation. And, as several

1 have pointed out, you -- you seem to be
2 undermining that because we no longer have the
3 incentives if we interpreted this the way that
4 you would have us do.

5 MR. ROSENKRANZ: So -- so two answers,
6 Justice Jackson. The first is, just to
7 continue the answer I was giving earlier,
8 Congress had no clue what the liability would
9 end up being against four different types of
10 service providers for -- back then, service
11 providers were confronting all sorts of
12 theories of liability. It included direct
13 liability because you have to copy --

14 JUSTICE JACKSON: Right, but I'm
15 positing that Congress's interest was not
16 necessarily to protect ISPs. I appreciate that
17 that -- that's in there. But what I'm pointing
18 to is the part of the legislative history in
19 which Congress said we are setting this up as
20 an incentive for these ISPs to actually do
21 things to address copyright infringement.

22 MR. ROSENKRANZ: Right. So -- so a
23 couple of answers to that. First -- I will get
24 to the legislative history in a moment, but,
25 first and foremost, what Congress said was in

1 512(l) that the failure to satisfy a safe
2 harbor "shall not adversely bear on liability."
3 And it punctuated this point in the Senate
4 report. It was "leaving current law in its
5 evolving state" because it had no idea and most
6 certainly couldn't agree upon --

7 JUSTICE JACKSON: Correct. And the
8 evolving state allowed for liability under
9 certain circumstances. So, if we now interpret
10 this to not allow for liability, I'm a little
11 worried we're undermining Congress's intent.

12 MR. ROSENKRANZ: Your Honor, Congress
13 had no idea what the liability would allow.
14 There was no case at that point providing for
15 liability for ISPs, that is, holding them
16 liable ultimately.

17 I will also underscore there was no
18 such thing as a conduit ISP. That was a
19 creature of 512(a). The AOLs of the world were
20 hosting content.

21 So Congress -- you -- you -- one
22 cannot impute to Congress any view and
23 certainly not any unified view about what the
24 liability rules would be in the absence of the
25 DMCA.

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Stewart.

5 ORAL ARGUMENT OF MALCOLM L. STEWART
6 FOR THE UNITED STATES, AS AMICUS CURIAE,
7 SUPPORTING THE PETITIONERS

8 MR. STEWART: Thank you, Mr. Chief
9 Justice, and may it please the Court:

10 In Grokster, this Court held that one
11 who distributes a device with the object of
12 promoting its use to infringe copyright can be
13 held liable for its users' infringement. In
14 Twitter and Smith & Wesson, the Court
15 emphasized that to be liable for aiding and
16 abetting, a person must participate in the
17 primary violation as in something that he
18 wishes to bring about and seeks by his -- seek
19 by his action to make it succeed.

20 Thus, both in copyright law and more
21 generally, this form of secondary liability is
22 reserved for persons who act for the purpose of
23 facilitating violations of law. Because Cox
24 simply provided the same generic Internet
25 services to infringers and non-infringers

1 alike, there is no basis for inferring such a
2 purpose here.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: Mr. Stewart, in Sony,
5 Justice Stevens was clear that there was no
6 secondary liability provision in the copyright
7 law, and he relied on the existence of
8 secondary liability in -- in the patent statute
9 and borrowed from that for his argument that
10 there -- there would be secondary liability in
11 copyright.

12 How much should we borrow from either
13 patent law or from common law with respect
14 to -- in developing our secondary liability
15 jurisprudence under copyright?

16 MR. STEWART: I think probably the
17 first place you would look is general
18 principles of aiding-and-abetting law, which
19 are common law principles. But, if the Court
20 thinks maybe intellectual property cases are
21 different, it could look to Congress's
22 codification of secondary liable -- liability
23 principles in the Patent Act.

24 And it's very clear that in patent
25 cases, the Patent Act doesn't provide for

1 secondary liability in circumstances like
2 these. The Patent Act in 35 U.S.C. 271(b) says
3 whoever actively induces infringement of a
4 patent is liable. And Section 271(c) says
5 anyone who sells a device that is specially
6 suited to patent infringement, not capable of
7 substantial non-infringing uses, with knowledge
8 of its special character, is liable. There's
9 nothing in the Patent Act that says, if you
10 sell a multi-use device to a person that you
11 know is going to use it for infringement, you
12 can be liable on that basis.

13 So I think it would be unusual to
14 adopt a special rule of copyright law and
15 ignore the rule of patent law that Congress has
16 actually adopted in the U.S. Code.

17 JUSTICE KAVANAUGH: Do you read patent
18 law then to be the same as the common law of
19 aiding and abetting?

20 MR. STEWART: I think -- yes. I mean,
21 I think the patent law, as it's currently
22 codified, incorporates the two bases for
23 secondary liability that the Court adopted in
24 Grokster and Stony -- and Sony as principles of
25 copyright law. That is, in Grokster, it said

1 the -- the -- the law that one who induces
2 infringement can be held liable was a common
3 law principle before it was codified in 1952,
4 and we adopt it here as a principle of
5 copyright law.

6 Similarly, in Sony, said we adopt the
7 staple article of commerce doctrine from patent
8 law as a principle of copyright law, that
9 ordinarily, if you sell a staple article of
10 commerce, one capable of both infringing and
11 non-infringing uses, you won't be liable for
12 the misuse made by individual customers.

13 And I -- to -- to -- I'm sorry.

14 JUSTICE BARRETT: Go ahead.

15 MR. STEWART: I was going to say, to
16 follow up on Twitter, the -- the two things
17 that we think -- we agree that the suit in
18 Twitter had problems that -- in addition to the
19 ones that we're noting here; that is, even if
20 the platforms in Twitter had highlighted
21 content celebrating ISIS, they could have been
22 liable for aiding and abetting a particular
23 attack only if a causal connection could be
24 shown between those videos and the attack, and
25 there was no such proof.

1 But I think two aspects of Twitter are
2 deeply relevant. The first is five different
3 times the Court in Twitter quoted in whole or
4 in part the standard that I just read that a
5 person who aids and abet -- who is liable for
6 aiding and abetting must be shown to have
7 participated in the wrongdoing as something he
8 wishes to succeed. And that standard can't be
9 satisfied here.

10 The second thing the Court in Twitter
11 emphasized time after time was that, at worst,
12 the platforms had simply treated ISIS the same
13 as they had treated other users, the --

14 JUSTICE BARRETT: So does that mean
15 that your answer to the question I asked
16 Mr. Rosenkranz is that, yes, Twitter would not
17 be liable for facilitating child trafficking if
18 it knew that a particular user was using its
19 account --

20 MR. STEWART: It -- it --

21 JUSTICE BARRETT: -- for that purpose?

22 MR. STEWART: -- it wouldn't be
23 secondarily liable. That is, I think lurking
24 in Twitter was the idea -- and the companion
25 case, Google versus Gonzalez -- was the idea

1 that perhaps a platform like YouTube or
2 Twitter, a platform on which potentially
3 infringing or otherwise unlawful content
4 actually appears, the platform could be held
5 directly liable on the theory that it has -- it
6 was speaking the words as well as assisting
7 the -- the third-party content provider in
8 doing so.

9 And this is a little far down in the
10 weeds, but, in the Communications Decency Act
11 of 230 -- of 1996, 230(c)(1) said generally
12 that platforms that host third-party content
13 will not be treated as the publisher or speaker
14 of that third-party content. But there's --

15 JUSTICE BARRETT: But, for purposes of
16 aiding and abetting, your answer is the same?

17 MR. STEWART: For purposes of aiding
18 and abetting, the answer is the same. And --
19 and, obviously --

20 JUSTICE GORSUCH: Mr. -- sorry.
21 Please.

22 MR. STEWART: -- direct copyright
23 infringement is a strict liability offense.
24 That is, if you think of the platform as the
25 person who's actually speaking or publicly

1 performing the infringing video, then it
2 doesn't matter whether the platform wants to
3 infringe. It can be held liable on that basis.

4 But, because Cox just provides the
5 infrastructure, there's no plausible theory of
6 direct liability.

7 JUSTICE GORSUCH: Mr. Stewart, I --
8 I -- I -- I see our discussion revolving around
9 the following dispute: Okay, purpose is the
10 standard. We'll accept that for now. And,
11 under patent law, you say there are two and
12 only two ways you can infer that intent from
13 knowledge, inducement and special -- specially
14 equipped things that can only predominantly be
15 used for infringing purposes.

16 MR. STEWART: Right.

17 JUSTICE GORSUCH: Is that right?

18 MR. STEWART: Yes.

19 JUSTICE GORSUCH: Okay. Well, at
20 common law, there were no such limitations in
21 terms of those two buckets, right? You could
22 infer purpose from a wide variety of things.

23 Are you asking us not to go there?

24 MR. STEWART: I think you can still
25 that -- do that with respect to what I would

1 call targeted assistance, that is, if you are
2 providing assistance to a particular person and
3 you're not providing it to anyone else and you
4 know that person is using that assistance to
5 commit a violation of law.

6 JUSTICE GORSUCH: Well, that kind of
7 falls into the second bucket under patent law
8 in my mind, you know, creating or doing
9 something that's only -- only going to
10 infringe.

11 MR. STEWART: Yes. And -- and it --
12 yes. Exactly.

13 JUSTICE GORSUCH: But what I'm asking
14 is, okay, under patent law, you're saying those
15 are the exclusive ways you can infer intent
16 from knowledge.

17 MR. STEWART: Those are the only ones
18 that are codified in the Patent Act.

19 JUSTICE GORSUCH: Okay. And one could
20 make an argument, because this is an implied
21 cause of action, we should be cautious and we
22 shouldn't go further than patent law, and I
23 understand that argument.

24 MR. STEWART: Right.

25 JUSTICE GORSUCH: But, if -- at common

1 law, there were no such two buckets. There
2 were many ways you could infer purpose from
3 knowledge and other acts.

4 So are -- are you asking us not to go
5 there because it's an implied cause of action?
6 Are you -- or one might say you could reverse
7 the Fourth Circuit simply for failing to apply
8 the purpose test and go back and do it again,
9 your JMOL analysis, with the correct mens rea.

10 MR. STEWART: I -- I -- I -- we're not
11 asking the Court to disturb the -- the existing
12 body of copyright law, except with respect to
13 ISPs. That is, in Sony, the -- the Court noted
14 with seeming approval that there were various
15 lower court cases involving things like dance
16 halls where people were held secondarily
17 liable --

18 JUSTICE GORSUCH: So, if I -- I --
19 just -- so, if I can just summarize it, I'm
20 sorry to interrupt, but -- so you're saying, at
21 least for ISPs, we should go no further than
22 patent law?

23 MR. STEWART: Yes, and -- and
24 particularly with what I would regard as kind
25 of at the opposite extreme from non-targeted

1 assistance. That is, in cases like Grokster
2 and Twitter and in this case, we're looking at
3 a pretty narrow subset of aiding and abetting.
4 We're asking when can a person who provides a
5 good or service to the general public be liable
6 for misuse of that good or service by some
7 member of the public, and a lot of --

8 JUSTICE GORSUCH: Last question then.
9 Why shouldn't we just say, as we might, that
10 the common law require purpose, the Fourth
11 Circuit analyzed it under knowledge being
12 sufficient, reverse, go back and do your JMOL
13 analysis again?

14 MR. STEWART: I think you could
15 absolutely do that. And the flaw in the court
16 of appeals decision was that it acknowledged
17 the purpose language, but it said we typically
18 infer a purpose to cause a particular event
19 from knowledge that the event is substantially
20 certain to occur.

21 And I think there are bodies of law
22 where we care more about knowledge than purpose
23 or objective. But there are others where we
24 don't. And, for instance, in equal juris --
25 protection jurisprudence, there's a fundamental

1 difference between a state doing something
2 because it will produce a racially disparate
3 impact and doing something for race --
4 race-neutral reasons even though it will
5 produce a race -- racially disparate impact.

6 CHIEF JUSTICE ROBERTS: Thank --

7 MR. STEWART: And --

8 CHIEF JUSTICE ROBERTS: -- thank you,
9 counsel.

10 Justice Thomas, anything?

11 Justice -- Justice Sotomayor?

12 JUSTICE SOTOMAYOR: Are you worried
13 that our holding -- going back to Justice
14 Barrett's earlier question of Mr. Rosenkranz,
15 aren't you worried that a holding by us as
16 broad as you're stating it would be a
17 disincentive for ISP providers to provide any
18 aid to copyright holders? Why would they
19 bother?

20 MR. STEWART: I mean, they --

21 JUSTICE SOTOMAYOR: I mean, I've never
22 heard of prosecutors ever relying on good
23 citizenship concepts.

24 MR. STEWART: I -- I -- I -- I agree
25 with that. And the ISPs might not bother.

1 I -- I would push back a little bit against the
2 assumption that good -- good corporate
3 citizenship would necessarily mean terminating
4 repeat infringers.

5 Imagine a case in which a person --
6 the individual was sued as a direct infringer
7 and a jury found that on multiple occasions
8 this person had used the Internet to commit
9 direct infringement.

10 Clearly, the Court could award damages
11 and, under the Copyright Act, the Court would
12 have authority to fashion an injunction that
13 was reasonably designed to prevent further
14 infringement.

15 But could the district court enjoin
16 the person from ever using the Internet again?
17 I don't think so. I think the -- the general
18 rule that equitable relief is supposed to be
19 tailored to the wrongdoing --

20 JUSTICE SOTOMAYOR: I don't think
21 you're answering my question.

22 MR. STEWART: I -- I --

23 JUSTICE SOTOMAYOR: What -- what is
24 left for any inducement for ISPs to in good
25 faith try to control infringement?

1 MR. STEWART: I -- I -- I would agree
2 that not much economic incentive would be left.
3 I'm simply questioning whether that's a bad
4 thing. That is, if we don't think a district
5 court could enjoin a repeat infringer from
6 again using the Internet, I don't --

7 JUSTICE SOTOMAYOR: Well, I'm not
8 thinking, you're -- you are, but I think
9 Congress was thinking that there had to be some
10 inducement and that's why they provided the
11 safe harbor.

12 MR. STEWART: They -- they provided
13 the safe harbor, but they also provided kind of
14 the takedown notice provisions of the -- the
15 DMCA, and nothing -- no notices like the ones
16 that were sent here are contemplated by the
17 DMCA.

18 The DMCA does contemplate notices in
19 which different kinds of Internet company may
20 be informed there are particular infringing
21 works on your platform and we want you to take
22 those down.

23 And if the Internet companies do that,
24 the result is a much more targeted approach.
25 It's that you get rid of the infringing

1 materials, but the rest of the platform remains
2 intact and people can use it.

3 The -- the approach of terminating all
4 access to the Internet based on infringement,
5 it seems extremely overbroad given the
6 centrality of the Internet to modern life and
7 given the First Amendment.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?
9 Justice Gorsuch?

10 Justice Kavanaugh?

11 JUSTICE KAVANAUGH: In your brief, you
12 want us to go further than what Justice Gorsuch
13 suggested. As I understood his question to
14 you, it was, should we just say mere knowledge
15 is not enough to show purpose and you said --
16 and -- and send it back? And you said that
17 could be okay. But, obviously, in your brief,
18 you -- you wanted us to go further than that
19 and spell out what could show purpose.

20 So what's the advantage of going
21 further versus saying less?

22 MR. STEWART: Well, the -- the
23 advantage, I guess, is the same one that the
24 Court perceived in Twitter, whereas the Court
25 held that the case should have been dismissed

1 on the pleadings.

2 And the idea was a suit in which all
3 you could show was that the defendant had
4 provided kind of generic services to the
5 general public and that some people had misused
6 it and the -- the defendant had failed to make
7 that stop, that wasn't enough even to get past
8 12(b)(6).

9 And so I think there -- there would be
10 an advantage to making clear that in the
11 future, not only should the -- the ISPs win at
12 the end of the day, but they shouldn't be
13 subject to the burdens of litigation if -- if
14 that's all you have.

15 JUSTICE KAVANAUGH: When I asked
16 Mr. Rosenkranz to spell out what could be done
17 to show purpose, do you agree with his answer
18 on that?

19 MR. STEWART: I -- I mean, I guess
20 the -- the thing I would emphasize, and I'm
21 sorry, I don't remember the -- the precise
22 deal -- details of his answer, are I would
23 emphasize the -- the differences between
24 targeted assistance and provision of general
25 purpose technology. That is, there are an

1 infinite --

2 JUSTICE KAVANAUGH: What do you mean
3 by "targeted assistance"?

4 MR. STEWART: There -- there are an
5 infinite number of situations in which somebody
6 may provide assistance to one person that he
7 isn't providing to anyone else with --

8 JUSTICE KAVANAUGH: Such as?

9 MR. STEWART: Such as, in the dance
10 hall cases, the -- the proprietor of the dance
11 hall was hiring a band to play and the band
12 was --

13 JUSTICE KAVANAUGH: What would be the
14 equivalent here?

15 MR. STEWART: I mean, the -- I don't
16 think there would be an ISP equivalent unless,
17 as Mr. Rosenkranz suggested, the company --
18 the -- Cox provided some special service that
19 would only be useful for infringers. In that
20 case, you could say that this is targeted at --
21 at infringement.

22 The point about the -- the targeting
23 is often, when you do something for one person
24 that you don't do for anyone else and you know
25 that person will use the assistance to commit a

1 legal violation, it's reasonable to infer
2 that's why you provided the assistance.

3 But, when you are providing Internet
4 service to every member of the public who will
5 pay the fee, infringers and non-infringers
6 alike, there's no basis for that --

7 JUSTICE KAVANAUGH: On -- on the
8 patent law analogy, Mr. Clement in his brief
9 relies heavily on the Henry case from 1912 and
10 says that it shows that selling a good with the
11 expectation that it would be used to infringe
12 supports contributory liability.

13 So that's a case heavily relied on. I
14 want to get your response to that.

15 MR. STEWART: I -- I guess I'd make
16 two different points about that. The first is,
17 as Cox's reply brief points out, if you look
18 back at the trial court opinion in Henry, the
19 court's opinion recites that the ink that was
20 being sold was a specially suited ink,
21 specially developed for a mimeograph of this
22 type.

23 And the trial court opinion also
24 reflects that the defendant went to the offices
25 of the purchaser and told her, I'll sell you

1 this ink for your mimeograph, but pour it into
2 an old jar that was provided to you by the
3 patent holder and throw my jar away.

4 And so the word "expectation"
5 originally came from the -- the trial court's
6 opinion. That was the certified facts. And so
7 I think Henry on its facts was a good case for
8 secondary liability.

9 The other thing I would say is, even
10 if you read Henry as standing for a broader
11 proposition, namely, that if you sell a
12 multipurpose product to a particular customer
13 that you know will use it to infringe, you can
14 be held liable, that's been superseded by the
15 Patent Act, in which Congress codified other
16 rules of contributory infringement in patent
17 case but not that one.

18 JUSTICE KAVANAUGH: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Barrett?

22 JUSTICE BARRETT: Mr. Stewart, you
23 told Justice Gorsuch -- this is follow-up to
24 the same question Justice Kavanaugh asked --
25 that it would -- you would be satisfied with

1 our sending it back to the Fourth Circuit and
2 saying purpose is what you need; you said
3 knowledge was enough, that's wrong, although
4 you would prefer for us to say purpose can be
5 shown in these two specific ways.

6 MR. STEWART: Right.

7 JUSTICE BARRETT: What would be the
8 advantage as you see it of our taking the
9 narrow approach and sending it back just based
10 on purpose? What do you think we might leave
11 open, that we might want to leave open, that
12 falls outside of those two categories?

13 MR. STEWART: I -- I guess, in part,
14 I'll -- I'll want to hear Mr. Clement's
15 presentation because I would want to know does
16 he think there is a plausible basis on which
17 his client might still seek to prevail under a
18 purpose standard when purpose is understood
19 really intent to bring the result about and
20 desire that it succeed. If Mr. Clement thinks
21 we -- on the existing record we might be able
22 to show that even in this case, that would
23 weigh in favor of sending it back.

24 JUSTICE BARRETT: Well, even apart
25 from this case, you know, we're thinking about

1 aiding-and-abetting liability, we're thinking
2 about beyond this case. I mean, are there
3 scenarios in which you can imagine it being a
4 bad thing for us to say these are the two ways
5 that you can show purpose because we might be
6 ruling out secondary liability in other
7 contexts?

8 MR. STEWART: I -- I would just make
9 it clear that you are limiting your holding to
10 situations in which the plaintiff seeks to
11 impose liability for selling a generic product
12 to a mass audience, and in that circumstance,
13 we're comfortable saying these are -- these are
14 basically the only two ways.

15 But we would not want the Court to
16 foreclose the possibility that purpose could be
17 shown in a variety of ways when you're
18 providing what I referred to as targeted
19 assistance.

20 JUSTICE BARRETT: How broad do you
21 understand Mr. Clement's theory to be? If, for
22 example, the recording industry or Sony has
23 vendors that detect, as here, that particular
24 households, particular -- particular IP
25 addresses are engaged in infringing activity,

1 what if they also sent notices to the electric
2 company because, clearly, you can't run the
3 Internet unless you have electricity for the
4 modem and said you are supplying this service
5 and now you have knowledge that it's also --
6 that it's being used for infringement?

7 MR. STEWART: I -- I -- I think
8 Mr. Clement would probably say that the DMCA
9 reflects a special focus on Internet companies
10 and that it is a justification for inferring
11 potential liability in that scenario and
12 there's no DMCA equivalent for electric
13 companies.

14 CHIEF JUSTICE ROBERTS: Justice
15 Jackson?

16 Thank you, counsel.

17 MR. STEWART: Thank you.

18 CHIEF JUSTICE ROBERTS: Mr. Clement.

19 ORAL ARGUMENT OF PAUL D. CLEMENT
20 ON BEHALF OF THE RESPONDENTS

21 MR. CLEMENT: Mr. Chief Justice, and
22 may it please the Court:

23 This Court's cases recognize that
24 liability for copyright infringement is not
25 limited to direct infringers but extends to

1 those who induce, cause, or materially
2 contribute to the infringement of others. And
3 a classic form of material contribution is to
4 provide the means of infringement to a specific
5 known infringer, knowing that infringement is
6 substantially certain to follow. That
7 combination of knowledge of a specific consumer
8 and an ongoing relationship is critical to
9 distinguish culpable conduct from simply
10 engaging in a one-and-done sale of an item that
11 can be used in a way to infringe but is
12 generally used lawfully.

13 Now, on this record, there -- it is
14 beyond dispute that Cox provided the service to
15 known infringers with substantial knowledge
16 that what they themselves called habitual
17 abusers would continue to infringe. That
18 reality, along with a record chockful of Cox's
19 admissions that it held the copyright laws and
20 the DMCA in contempt, is what requires Cox to
21 insist on the extreme position that they can
22 continue to provide service to habitual abusers
23 in perpetuity without consequences.

24 That rule has nothing to recommend it
25 and was admitted today would render the DMCA

1 and the cooperation it is intended to foster a
2 dead letter. Why bother with a safe harbor?
3 Why limit lie -- why worry about a limitation
4 on liability, which is the express text of the
5 DMCA, if there's no liability to limit? Why
6 bother cooperating with copyright holders? Why
7 bother having a reasonable and appropriate
8 system for taking down repeat infringers if
9 you're allowed to behave entirely unreasonably?

10 So, in all of this, you see that the
11 position that's being advocated by Cox is a
12 product of the record in this case. If Cox is
13 right on the law, then Cox could take tens of
14 thousands of copyright notices and throw them
15 in the trash, and they could have its employees
16 say "F the DMCA." That is, in fact, what the
17 record says, which is why they're asking you
18 for an extreme rule.

19 I welcome the Court's questions.

20 JUSTICE THOMAS: How would you give or
21 provide any contours to your approach? We
22 admit -- we know that secondary liability is
23 atextual. Are there any limits? Justice
24 Stevens seemed to go to great length in Sony to
25 try to peg it to or attach it to the copy --

1 the patent laws, patent statute.

2 What would limit your approach?

3 MR. CLEMENT: So what would limit my
4 approach is I would say that the provider of
5 the service has to know that specified
6 customers are substantially certain to
7 infringe, and that is, to my understanding, the
8 standard that's long prevailed in the trademark
9 context under the Inwood case, where this
10 Court, based on a lower court opinion by Judge
11 Friendly that was based in part by a district
12 court -- earlier district court opinion by
13 Judge Wyzanski, which was based on the common
14 law, says that you can have liability under the
15 trademark laws if you either induce or you
16 provide the means of infringement to a specific
17 known infringer. So that is the standard.

18 And I think, if you limit it to
19 knowledge of specific known infringers and you
20 require -- and not purpose but intent that
21 requires you to know that providing the service
22 to that customer will make infringement
23 substantially certain, I think that provides a
24 strict limit and plenty of guidance for the
25 lower courts.

1 JUSTICE THOMAS: So, when we had
2 Grokster up here, we were -- we had a -- we
3 used a much more targeted approach. I don't
4 think -- how far would Grokster get you?

5 MR. CLEMENT: Well, Grokster wouldn't
6 get me very far in this case because this Court
7 in Grokster rested its holding on inducement.
8 But, if you look at the briefs in Grokster, if
9 you look at the oral argument and what the
10 lawyer for Grokster himself told this Court,
11 that was all because --

12 JUSTICE THOMAS: That wasn't you, was
13 it?

14 MR. CLEMENT: It was not. It was
15 Mr. Taranto, who's a fine federal judge now.

16 JUSTICE THOMAS: Okay.

17 (Laughter.)

18 MR. CLEMENT: And what -- what
19 Mr. Taranto told this Court was that there --
20 that -- that the norm of contributory liability
21 was actually material contribution. But that
22 wasn't at issue in the Grokster case because
23 the Grokster technology was structured so that
24 Grokster didn't know about the infringement of
25 any particular customer.

1 So that's why inducement was where
2 this Court essentially had to go in the
3 Grokster case, but I don't think it meant to
4 eliminate what it was told by all the parties,
5 including the United States, and I did
6 represent them, that the -- that material
7 contribution was an important part of secondary
8 copyright law.

9 JUSTICE JACKSON: Mr. Clement, can I
10 just clarify your standard, because I'm trying
11 to understand does it have purpose or what I
12 would call intent in it or not?

13 MR. CLEMENT: Yes, it has intent.

14 JUSTICE JACKSON: And how so?

15 MR. CLEMENT: It -- it -- you have to
16 show -- that's where the substantially certain
17 comes. You have to know that the person you're
18 providing the service to is substantially
19 certain to infringe.

20 JUSTICE JACKSON: But that's just
21 knowledge of what the person is going to do.
22 If we listen carefully to -- to the Solicitor
23 General's representative here, it's more like
24 you have to want that thing to occur.

25 MR. CLEMENT: So it's -- what I'm

1 offering you is not just knowledge. It is
 2 intent, and it is intent under the common law.
 3 And if you look at the Restatement that was the
 4 governing Restatement at the time that both the
 5 '76 Act was passed and the DMCA was passed,
 6 it's Section 8A of the Restatement (Second) of
 7 Torts, and it's using the definition of intent
 8 for purposes of intentional tort, and all these
 9 aiding-and-abetting torts at common law are
 10 intentional torts.

11 And it says there's two ways to show
 12 intent. One is what you would think of as
 13 purpose, that you actually have the design of
 14 carrying out the primary wrongdoer's purpose.
 15 But the second thing and is -- equally
 16 qualifies and is equally intent is when you
 17 provide or do an act knowing that certain
 18 results are substantially certain. Under the
 19 common law, you --

20 JUSTICE KAGAN: So, Mr. Clement --

21 MR. CLEMENT: -- are charged with
 22 intent.

23 JUSTICE KAGAN: -- that might be under
 24 the common law, but I would think that if you
 25 are to read Twitter and then to read Smith &

1 Wesson, which basically was all derived from
2 Twitter, what those two decisions are saying is
3 that that's not the standard we're using for
4 aiding-and-abetting liability.

5 And I would say, you know, if you read
6 those cases, and there are distinctions in --
7 in the facts of those cases, but there are
8 three big principles that come out. You know,
9 one is, Mr. Stewart said five times, Twitter
10 said seek by your action to make it occur, like
11 want to do it, want to have this happen. Smith
12 & Wesson probably adds a couple more times to
13 that. So that's one.

14 The second is this real distinction
15 between non-feasance and misfeasance. If all
16 you do is say we're not doing anything, that
17 does not suffice.

18 And the third is this distinction
19 between treating the customer just like you
20 treat everybody else on the one hand and on the
21 other hand providing special assistance.

22 And if you look at those three things,
23 you fail on all of them, and -- and -- and that
24 is because those three things are kind of
25 inconsistent with the intent standard that you

1 just laid out.

2 MR. CLEMENT: Well, I mean, they would
3 also be inconsistent with Halberstam.
4 Halberstam does not have a purposeful intent.
5 In fact, if you look at the three factors of
6 Halberstam, which we -- I think Congress at
7 least took to be the platonic statement of the
8 common law, I mean, it talks about knowledge.
9 It doesn't talk about purpose at all.

10 And, of course, it would have to.
11 Linda Hamilton didn't have the purpose of
12 killing Halberstam. She probably didn't even
13 have the specific purpose of facilitating the
14 sort of night ventures out by her live-in sort
15 of paramour.

16 So what -- what counts at the common
17 law and is always counted at the common law is
18 intent, and intent can be showed either by
19 purpose and design, and so I'm -- I'm sure that
20 the Smith & Wesson decision was carefully
21 worded to capture that aspect of it.

22 But I don't think there was any
23 occasion there to jettison essentially half of
24 the common law standard, which is this intent
25 where you are charged with the sort of -- those

1 consequences that are substantially certain to
2 follow from your actions.

3 JUSTICE KAVANAUGH: I -- I don't --

4 MR. CLEMENT: I would certainly hope
5 not. Now it --

6 JUSTICE KAVANAUGH: Sorry.

7 MR. CLEMENT: Go ahead.

8 JUSTICE KAVANAUGH: I don't see -- to
9 broaden out Justice Kagan's question, I don't
10 see your formulation of intent in our copyright
11 cases either, in Kalem, in Grokster, in Sony,
12 or in the patent law context in Henry either.
13 That seems to suggest a more affirmative
14 advertisement, promotion, instruction kind of
15 formulation to get to purpose.

16 So can you deal with the -- the
17 copyright case law more generally?

18 MR. CLEMENT: I -- I'd be delighted
19 to. And the copyright law, if you go all the
20 way back to the Harper case in 1886, has this
21 notion of material contribution. And material
22 contribution is an absolute critical aspect of
23 copyright secondary liability as it's developed
24 over the years.

25 And I think it's important to

1 understand that, yeah, you're right, you know,
2 Grokster, as I tried to explain, didn't focus
3 on material contribution, but that's because
4 the knowledge of specific infringing works was
5 missing there essentially by design of the --
6 the product.

7 Now Sony I think actually does talk a
8 fair amount about material contribution, and
9 what it talks about is -- it says a couple of
10 things. In the text around Footnote 18, it
11 makes clear that one of the things that made
12 that body of case law inapplicable, and it
13 talks about the dance hall cases and a whole
14 bunch of common law cases, those aren't
15 applicable there because there's no ongoing
16 relationship.

17 And it sort of -- and -- and so, in
18 that context where it's a one-and-done sale,
19 then you really are forced to rely on the
20 patent context of -- of -- of -- of a staple
21 article of commerce that you just launch in and
22 you have no way of -- of -- of -- of
23 ascertaining any knowledge.

24 I think, though, it's very telling
25 that in Footnote 19 Judge -- Judge -- Justice

1 Stevens refers to the trademark law. Now he
2 says the trademark law is not as apposite there
3 as the patent law, but that's because trademark
4 law is actually narrower in most respects, but
5 he specifically cites this Court's decision in
6 Inwood Labs, and Inwood Labs could not be
7 clearer that the standard is inducement or
8 material contribution as defined exactly as I'm
9 defining it, which is to provide the means of
10 infringement to a customer you know is going to
11 use it to infringe.

12 JUSTICE ALITO: Mr. Clement --

13 MR. CLEMENT: And I'll give you
14 substantially certain on top of that.

15 JUSTICE ALITO: -- Mr. Clement, the
16 United States tells us that the decision of the
17 Fourth Circuit in your opinion -- your position
18 would threaten universal Internet access and
19 emphasizes the problems that would be -- that
20 are encountered when that decision in your
21 position are applied to a university account
22 shared by thousands of students, maybe 50,000
23 students and tens of thousands of staff members
24 or a regional ISP.

25 And I really don't see how your

1 position works in that context, but maybe you
2 can explain how it could.

3 MR. CLEMENT: So I -- I think the way
4 that my position works most readily is that
5 the -- the safe harbor, I think, provides
6 plenty of room for ISPs to handle things like
7 multi-user accounts, fraternities, and the like
8 differently, and you can have a different
9 policy under those.

10 The way this case was litigated below,
11 my friends on the other side, I mean, you know,
12 the -- that chart on page 11 that was a
13 demonstrative that wasn't even introduced into
14 evidence, they didn't make a big pitch that,
15 like, our liability should be limited to just
16 those customers.

17 Part of the reason is because what the
18 record does reflect in things that are in
19 evidence, transcript -- trial transcript pages
20 810 to 811 shows that 95 percent of the
21 customers covered by the 57,000 sort of
22 customers that are part of the -- the universe
23 that makes up the 10,000 infringement,
24 95 percent of those are residential customers.
25 Only 5 percent are business customers.

1 So I think there's a reason they
2 didn't try to limit their liability to the
3 5 percent and they -- they took a position that
4 was essentially we stand or fall together.

5 JUSTICE ALITO: Well, what's -- what
6 is an ISP supposed to do with a university
7 account that has, let's say, 70,000 users?
8 What is the university supposed to do in your
9 view?

10 MR. CLEMENT: The -- the university is
11 supposed to -- under those circumstances, the
12 ISP is supposed to sort of have a conversation
13 with the -- with the university.

14 Now the ISP's policy to the university
15 says you can't have -- you can't use this
16 service or allow your service to be used for
17 copyright infringement. So that's --

18 JUSTICE ALITO: So, all right, the ISP
19 tells the university: Look, you know, a lot of
20 your -- your 50,000 students are infringing my
21 copyright, do something about it.

22 Now the university then has to try to
23 determine which particular students are
24 engaging in this activity. And let's assume it
25 can even do that. And so then it -- it knocks

1 out a thousand students, and then another
2 thousand students are going to pop up doing the
3 same thing. I just don't see how it's workable
4 at all.

5 MR. CLEMENT: Well, look, I'm not sure
6 that -- this record certainly doesn't support
7 the notion that there are universities that
8 have sort of undifferentiated service to 70,000
9 students or whatever the hypo is. I don't
10 actually think that's how it works in practice.

11 JUSTICE ALITO: How does it work in
12 practice?

13 MR. CLEMENT: Well, the way it works
14 in practice is with, let's say -- let me -- let
15 me take something that I know a little bit
16 better like a hotel. And so, like, a hotel has
17 lots of guests.

18 So the hotel is provided Internet
19 service and the hotel then can do things
20 starting with terms of use, but a lot of hotels
21 actually don't provide their guests -- at least
22 in a normal way don't provide their guests with
23 services at a speed that are sufficient to do
24 peer-to-peer downloading precisely because they
25 don't want to be in the position of having

1 guests that are staying there largely so they
2 can sort of upload and download copyrighted
3 works.

4 And if a particular hotel wants to be,
5 you know, the --

6 JUSTICE ALITO: Do you think that's
7 what a university should do so students
8 can't -- students have -- are restricted in --
9 in -- in what they can do?

10 MR. CLEMENT: I don't think it would
11 be the end of the world if universities
12 provided service at a speed that was sufficient
13 for most other purposes but didn't allow the
14 students to take full advantage of BitTorrent.
15 I could live in that world.

16 But, in all events, this isn't a case
17 that's just about universities. We've never
18 sued the universities. We've sued Cox. We've
19 sued Grande, and I think it's worth, in
20 thinking about the consequences of this case, I
21 think it's worth taking a quick look at the
22 brief in opposition in the Grande case, which
23 is being held for this case because that's a
24 case where the ISP did exactly what my friend's
25 position would incentivize --

1 JUSTICE BARRETT: Mr. --

2 MR. CLEMENT: -- which is they did
3 nothing with the notices.

4 JUSTICE BARRETT: It seems like you're
5 asking us to rely on your good corporate
6 citizenship too that you wouldn't go after
7 the -- the university or the hospital or that
8 sort of thing. I mean, if we decide the case
9 in your favor, you could. You're just saying
10 you wouldn't?

11 MR. CLEMENT: I -- I don't think that
12 we could. We certainly couldn't readily. And,
13 again, I think that there's going to be a -- I
14 mean, first of all, you know, the hospitals are
15 in sort of a different position. They're kind
16 of like more the intermediary where, you
17 know -- and -- and there's no safe harbor
18 that's specific to hospitals and universities.

19 I mean, you know, Congress was very
20 focused in 1998 on the role of ISPs in all of
21 this and they wanted to create an incentive for
22 the ISPs to adopt reasonable measures. And I
23 think that would certainly accommodate measures
24 that treat multi-user addresses quite
25 differently from residential customers.

1 JUSTICE BARRETT: If you lose, what is
2 the effect on your copyright holders? Like,
3 let's -- you -- you know because you monitor
4 and then send the ISPs the accounts that are
5 downloading the copyrighted material, right?
6 So you could still try to protect your
7 copyright, but it wouldn't be as deep a pocket
8 and it would be a lot worse, right, if you had
9 to go after the individual users themselves,
10 but you wouldn't be without recourse?

11 MR. CLEMENT: We would -- we would be
12 without scalable functional recourse. And if
13 you look at the Seventh Circuit's Aimster
14 decision, like even back then, Judge Posner had
15 a nice phrase for what direct infringement is,
16 which is it's a teaspoon solution to an ocean
17 problem. So, if my clients are limited to
18 direct infringement actions, they are in very,
19 very dire straits.

20 But it's worse than that because the
21 key thing about the safe harbor is the safe
22 harbor is not only what gives the -- the ISPs
23 an incentive to behave responsibly. It's also
24 what gives them an incentive to come to the
25 table and have negotiations with the content

1 community. And if you look at the -- the
2 Motion Pictures Association brief, they talk
3 about this at length.

4 And if you look at the report of the
5 copyright office, they put together a 200-page
6 report on 512 and the safe harbors, and what
7 they talk about is how important it is for
8 essentially both sides to have skin in the
9 game.

10 JUSTICE KAGAN: I guess, if you win,
11 why would they cooperate? If -- if you win, it
12 seems to me that the best response that Cox
13 could have is just to make sure that it doesn't
14 read any of your notices ever again because all
15 of your position is based on Cox having
16 knowledge of this.

17 Right now, Cox is agreeing to
18 participate in this notice system, but why
19 doesn't Cox just walk away from the deal and
20 say, you know, we're -- we just don't care what
21 our users are doing on our -- on our
22 infrastructure?

23 MR. CLEMENT: So, if we win and they
24 do that, then they're not going to be able to
25 take advantage of the safe harbor. I cert --

1 JUSTICE KAGAN: They don't need to
2 take advantage of the safe harbor because,
3 without knowledge, they're not going to have
4 liability.

5 MR. CLEMENT: I -- I think there's a
6 concept in the law called willful blindness,
7 Your Honor, and I think willful blindness would
8 satisfy the common law standard for aiding and
9 abetting. And so, if somebody can't -- you
10 know, if -- if you have, like, the hammer of
11 the month club and you keep on giving a hammer
12 to somebody who is, you know --

13 JUSTICE KAGAN: So you think, if Cox
14 says we're not interested in reading your
15 notices anymore, that would count as willful
16 blindness?

17 MR. CLEMENT: I do.

18 JUSTICE JACKSON: Mr. --

19 JUSTICE KAVANAUGH: Can I ask a
20 question, a separation-of-powers question here.
21 Justice Alito referred to the policy issues,
22 and you argue that the policy issue is going
23 the other way, the ocean problem. On the law,
24 we're obviously debating exactly what "purpose"
25 means and encompasses in this context.

1 But, to go back to Justice Thomas's
2 question, Congress has not enacted a statute
3 here for secondary liability. And in our
4 implied-rights-of-actions cases in multiple
5 contexts that Justice Gorsuch referred to
6 earlier, we read those implied rights of action
7 narrowly and let Congress debate issues like
8 the ones you and Justice Alito were discussing.

9 Why shouldn't that be a kind of
10 tiebreaker here of letting Congress solve the
11 issues that you're raising?

12 MR. CLEMENT: Well, I -- I think it
13 shouldn't for a couple of reasons. First of
14 all, I don't think you're dealing with an
15 implied cause of action. I think you are
16 dealing with an express cause of action in --
17 in the Copyright Act, and the question is, to
18 what extent does it reach sort of secondary
19 infringement?

20 And I think, at this point, it's too
21 late to say that Congress hasn't endorsed it.
22 Let me point to three things if I could. One
23 is the addition in 1976 to -- in -- in the
24 basic provision of rights to copyright holders,
25 Congress added the words "to authorize." So

1 it's no longer you just have the exclusive
2 rights to do certain things, like copy and
3 distribute, but you now have the exclusive
4 right to authorize it. And for those that want
5 to take a peek at a Senate report, that --
6 those words were added specifically to capture
7 secondary liability. So Congress starting in
8 '76 expressly adopted it.

9 But then the DMCA, for reasons that
10 we've already talked about, I don't think can
11 be reasonably understood except against the
12 backdrop of secondary liability. And Congress
13 put specific weight -- and, again, this is the
14 Senate report -- but it looked at three
15 contemporaneous cases. There was the Playboy
16 case. I think the case that's most instructive
17 is the Netcom case, which was right -- it was a
18 '95 case, and that was a case that said, well,
19 for somebody who's like an ISP -- I'm sure my
20 friend will say it's not exactly like the ISP
21 today -- but somebody who's very much like an
22 ISP, there was no vicarious liability because
23 they didn't make money off of the infringing,
24 but there was material contribution liability.

25 So that's the evolving common law that

1 Congress is passing. And so I think Congress
2 embodies that in the DMCA safe harbor, but just
3 as a cherry on the sundae, in the same DMCA
4 provision that I only came across over the
5 weekend but still is in there, 17 U.S.C.
6 1201(c)(2) is another provision that sort of
7 says that the anti-circumvention provisions are
8 not designed to change the rules of vicarious
9 and contributory liability.

10 So I think there are multiple textual
11 acknowledgments of vicarious and -- vicarious
12 and contributory infringement in the code that
13 distinguish this from your sort of classic --

14 JUSTICE GORSUCH: Well --

15 MR. CLEMENT: -- implied-rights-of-
16 action case.

17 JUSTICE GORSUCH: -- Mr. Clement,
18 though, just to follow up on that, I -- I --
19 taking all that as given, Congress still hasn't
20 defined the contours of what secondary
21 liability should look like. Here we are
22 debating them, right? So shouldn't that be a
23 flag of caution for us in expanding it too
24 broadly?

25 MR. CLEMENT: Well, I think it would

1 be a cautionary tale to not go beyond the
2 common law.

3 JUSTICE GORSUCH: Well, a cautionary
4 tale maybe to take account of where patent law
5 is, that Sony relied on in part, for example.
6 I mean, in Central Bank of Denver, as you well
7 know, the Court refused to imply any
8 aiding-and-abetting liability under the
9 Securities Exchange Act, and, you know, so Sony
10 sits in some tension with our law right there.
11 And --

12 MR. CLEMENT: Well, but that -- that
13 was --

14 JUSTICE GORSUCH: -- isn't that a flag
15 on the field for us?

16 MR. CLEMENT: I don't -- I mean, you
17 know, look, Central Bank of Denver, you already
18 have, like, a made-up cause of action, and the
19 question is, do we make up a bow on the made-up
20 cause of action? I think that's different from
21 what you have in a case like this.

22 JUSTICE GORSUCH: So -- so one -- one
23 made -- one made-up theory is -- is okay; two,
24 bad?

25 MR. CLEMENT: No. I really do think

1 here, given all the text that you have and the
2 Court's precedents, which aren't nothing, that
3 it's too late to sort of say this is all like
4 an implied cause of action.

5 JUSTICE GORSUCH: For sure. I accept
6 that, but doesn't it suggest some -- some
7 caution here?

8 MR. CLEMENT: Look, it's always good
9 to have caution.

10 JUSTICE GORSUCH: Okay. Good. Good.

11 MR. CLEMENT: But I would look -- I
12 would look not just to the patent law; I would
13 look to the trademark law, and I would take the
14 trouble --

15 JUSTICE GORSUCH: I -- I understand
16 that.

17 MR. CLEMENT: -- I would take the
18 trouble to trace it back --

19 JUSTICE GORSUCH: All right. But let
20 me ask you this.

21 MR. CLEMENT: -- to the common law.

22 JUSTICE GORSUCH: Even under your
23 standard, that's not what the Fourth Circuit
24 did, right? It didn't say did you have
25 specific knowledge of individual users who are

1 infringing and did you do something special
2 with regard to them such that you were
3 substantially certain that you would -- that
4 you know that they would, in fact, infringe.

5 We -- we'd have to reverse under your
6 standard too --

7 MR. CLEMENT: I don't think so, but --

8 JUSTICE GORSUCH: -- the one you're
9 pedaling today.

10 MR. CLEMENT: I -- I --

11 JUSTICE GORSUCH: That's not -- that's
12 not what they held.

13 MR. CLEMENT: Well, I think you and I
14 just read the Fourth Circuit case differently.
15 I read the Fourth Circuit opinion by Judge
16 Rushing to specifically say the substantial
17 certainty test is what's being applied and is
18 what makes it --

19 JUSTICE GORSUCH: In gross. They --
20 they applied it in gross. And we've got an
21 amicus brief from some intellectual property
22 scholars that say that was wrong.

23 MR. CLEMENT: Well, you've got a brief
24 from some other intellectual property lawyers
25 who --

1 JUSTICE GORSUCH: Well, fair enough.

2 Fair enough.

3 MR. CLEMENT: -- you know, professors
4 who say that was exactly right.

5 JUSTICE GORSUCH: Fair enough. But
6 they did do it in gross rather than say I have
7 knowledge of a specific student at the computer
8 lab --

9 MR. CLEMENT: Oh, oh.

10 JUSTICE GORSUCH: -- at -- at
11 Georgetown University. That -- that -- that's
12 not what happened in this case.

13 MR. CLEMENT: No, but I actually think
14 it is, but it -- it's a little bit opaque in
15 the opinion because this case --

16 JUSTICE GORSUCH: A little bit opaque.

17 MR. CLEMENT: No, no. But it's opaque
18 for a very specific reason, because, you know,
19 this case sort of piggybacks on the earlier BMG
20 decision. And in the BMG decision, the Fourth
21 Circuit says that once you have knowledge that
22 the same customer or address is going to --

23 JUSTICE GORSUCH: No, not address, not
24 address because there could be a lot of people
25 at the address. The customer. And that

1 analysis isn't what the Fourth Circuit did.

2 MR. CLEMENT: Well, I -- I think the
3 customer did it as to the bill payer, the
4 account holder --

5 JUSTICE GORSUCH: Yes.

6 MR. CLEMENT: -- which, of course, is
7 the same unit that Cox uses when there's
8 non-payment.

9 JUSTICE GORSUCH: I appreciate that.
10 But that -- that -- that isn't --

11 MR. CLEMENT: When -- when -- when Cox
12 doesn't get payment from grandma, they don't --

13 JUSTICE GORSUCH: But that isn't the
14 common -- that isn't common law even under the
15 Restatement.

16 MR. CLEMENT: I think that is the
17 common law still. I don't think you need --

18 JUSTICE GORSUCH: I know a group of
19 people, I know somebody in this group of people
20 was involved and I did nothing. That's --
21 that's -- that's not substantial certainty.

22 MR. CLEMENT: So, with -- with
23 residential customers, I think it is, but in
24 all events, that was ruled on in summary
25 judgment in this case. And then what the

1 Fourth Circuit did -- and I don't think you can
2 read this part of the opinion differently --
3 they said that Cox forfeited any argument that
4 they didn't have knowledge to the specific
5 customers.

6 JUSTICE GORSUCH: All right. Thank
7 you.

8 JUSTICE JACKSON: Mr. -- Mr. Clement,
9 can I just bear down a little bit on your test
10 because I'm still trying to understand it with
11 respect to intent.

12 You say that the intent aspect of this
13 is established by knowledge that a customer --
14 specific knowledge that a customer is
15 substantially certain to infringe. And I guess
16 where I want to go with that in asking you is,
17 once that is established, is that an inference
18 of intent? Is there something that the
19 defendant could do in response to establish --
20 to rebut that inference, or are you saying that
21 all that is necessary is for the plaintiff to
22 show that and then the intent, to the extent
23 it's an element, is satisfied and that's it?

24 MR. CLEMENT: I don't -- what I would
25 say is I think that's enough on the intent

1 element to get to the jury. It's not enough to
2 get directed verdict in my favor.

3 JUSTICE JACKSON: Okay.

4 MR. CLEMENT: But it's enough to get
5 to the jury. And Cox can go and they can try
6 to argue that, oh, no, we had the purest
7 intent, we tried really, really hard --

8 JUSTICE JACKSON: Could they point to
9 all the things that they did that they say was
10 enough for the safe harbor even though the
11 court -- the other court found it wasn't?
12 Could they point to those sorts of things as
13 evidence to rebut this suggestion that they
14 intended for this to happen?

15 MR. CLEMENT: Yes. But, of course, I
16 could point to the "F the DMCA" e-mail --

17 JUSTICE JACKSON: Yes. Sure.

18 MR. CLEMENT: -- and I think I'd
19 probably do all right on that exchange.

20 JUSTICE JACKSON: Sure.

21 MR. CLEMENT: And, you know, keep in
22 mind this went to a jury and it went to a jury
23 of 12 people who probably didn't want to lose
24 their Internet connection. And yet, hearing
25 all the evidence here, they had very little

1 trouble saying this is a case where there is
2 material contribution. This is a case where
3 there should be aiding-and-abetting liability
4 because of the conduct that took place here.

5 And I guess I would just sort of take
6 a step back from this to say, you know, if you
7 think about this kind of in Halberstam or
8 Twitter terms, you know, there's two kind of
9 elements that are critical. One is the intent
10 element. And if you look at Twitter and you
11 look at Halberstam, the intent level is not
12 purposeful.

13 And then the other question, of
14 course, is material contribution or, in
15 aiding-and-abetting terms, substantial
16 assistance. And I think the one way in which
17 the copyright laws, the trademark laws, are a
18 little bit different is I think they do think
19 that when you are providing the means of
20 infringement to somebody, I mean, that's pretty
21 easy to show that that is material
22 contribution, substantial assistance.

23 And so, if you're looking to
24 distinguish the FedEx's of the world, the
25 electrical companies of the world, I'm going to

1 agree with Mr. Stewart, I thought he did an
2 excellent job of sort of parroting what my
3 answer would have been with respect to the
4 DMCA, but I would also say, you know, there's a
5 difference when you're providing the means of
6 infringement, which is what the ISPs do in
7 these cases. That is going to be material
8 contribution if you're doing it with knowledge
9 of specific customers and what they're likely
10 to do.

11 And that's true in the trademark
12 context as well, where you're providing it --
13 you know, the Inwood case is you had a drug
14 manufacturer who's giving it to somebody and
15 they know that person, that generic person is
16 passing them off as branded pharmaceuticals,
17 and that's where this Court said, yeah, there's
18 liability for that.

19 JUSTICE KAGAN: So there was a
20 scenario in the Smith & Wesson case which we
21 didn't quite have to grab hold of because of
22 the way the complaint was framed, but suppose
23 that the complaint had said there's a
24 manufacturer and it provides guns to dealers,
25 and it knows to a certainty that there's a

1 specific dealer that's a bad-apple dealer
2 that's passing this on to Mexican drug
3 traffickers.

4 Is the manufacturer then liable for
5 all the harm that that causes?

6 MR. CLEMENT: I mean, there was, like,
7 a separate question of proximate cause in that
8 case that this Court didn't reach --

9 JUSTICE KAGAN: Right. Put that
10 aside.

11 MR. CLEMENT: -- and I don't know the
12 answer to, but I -- I think, you know, and --
13 and I think there were questions at oral
14 argument about red-flag dealers and if you had
15 specific knowledge you were providing them to
16 the red-flag dealers. I think that probably
17 would satisfy the -- the -- the -- the intent
18 standard at least at the common law. Again, I
19 don't know all of the details of the PCLAA or
20 whatever it is that was at issue there, so I
21 don't want to sort of speak against any of my
22 other clients.

23 (Laughter.)

24 MR. CLEMENT: But -- but I -- but I --
25 but I do think that with respect to the common

1 law intent, that would be -- that would be
2 satisfied.

3 JUSTICE JACKSON: What about
4 willfulness? Can you speak to the argument
5 that willfulness here requires that the
6 defendant understand that its own conduct is
7 unlawful?

8 MR. CLEMENT: So I -- I think they're
9 wrong about that. I think they're wrong about
10 that for reasons that are textual and also
11 reasons that have to do with kind of the common
12 law and the way that it treats aiding and
13 abetting or secondary liability.

14 So, if you think about the common law,
15 you are -- if you have aiding and abetting,
16 then you are essentially on the hook for the
17 consequences of the mens rea of the person
18 you're assisting and your own sort of mens rea
19 beyond aiding and abetting doesn't count.

20 So, if I aid and abet a first-degree
21 murderer, I'm -- you know, either criminally or
22 civilly, I'm on the hook for the first-degree
23 murder and -- but whereas, if I aid and abet --
24 now all my conduct is exactly the same and I
25 aid and abet somebody in manslaughter, the

1 consequences are different.

2 And then, if you look at the text
3 here, the relevant text is 504 of the Copyright
4 Act. It actually doesn't focus on the mental
5 state of the infringer. It asks whether the
6 infringement was willful. And, of course, in
7 this context, it's the direct infringer who's
8 doing the infringement.

9 CHIEF JUSTICE ROBERTS: Thank you.

10 Justice Thomas, anything further?

11 Justice Alito?

12 Justice Sotomayor?

13 JUSTICE SOTOMAYOR: We are being put
14 to two extremes here. The other side says
15 there's no liability because we're just putting
16 out into the stream of commerce a good that can
17 be used for good or bad and we're not
18 responsible for the infringers' decision.

19 We have the other side, which you're
20 moving away from Respond -- Petitioners' and
21 the SG's position that the only way you can
22 have aiding and abetting in this field is if
23 you have purpose, all right, and you're saying
24 we don't have to prove purpose, we have to
25 prove only intent, correct? That's the other

1 extreme.

2 But what Justice Alito said, and some
3 of this is that the Internet is so amorphous
4 and what it can or cannot do I'm not sure
5 about, we're being told that ISPs only know who
6 their customer is, and their customer could be
7 a region. And if it's a region, to say that
8 because one person in that region continues to
9 infringe, that the ISP is materially supporting
10 that infringement because it's not cutting off
11 the Internet for the 50,000 or 100,000 people
12 who are represented by that customer, there is
13 a feeling of how can I say there's a purpose to
14 participate in that situation, whereas I could
15 see a purpose on single-family homes because,
16 there, they're usually limited by the number of
17 people and one could say, if you know that it's
18 one or two or a family of five or whatever
19 number it is, it's small, that surely I'm
20 materially contributing there.

21 How do we announce a rule that deals
22 with those two extremes?

23 MR. CLEMENT: So, I -- I mean, you
24 know, my -- my -- my front-line answer would be
25 I think the safe harbor takes care of the

1 regionalized piece. And, frankly, I'm not that
2 worried about the regionalized piece because,
3 if -- if that were really the problem, we could
4 go after the regionalized piece.

5 JUSTICE SOTOMAYOR: Well, you told me
6 that there were 95 percent of the infringements
7 here were of residences, so you could go after
8 those 95 percent.

9 MR. CLEMENT: Right. And we could
10 probably figure out who the regional ISP is and
11 then go after its customers. That's why I'm
12 not going to die on the hill of the regional
13 ISPs. And I think you could -- I mean, you
14 know, material support, I mean, you know,
15 heaven knows this Court remembers from Twitter
16 that, you know, by the time you look at the
17 common law, you had six factors under
18 Halberstam for what is substantial assistance.

19 So there's clearly enough sort of --
20 if -- if you want to, if that's the -- if
21 that's the hypo that's concerning you, then you
22 can certainly sort of come up with a definition
23 of "material contribution" that carves that
24 out. I think the --

25 JUSTICE SOTOMAYOR: Give it to me.

1 MR. CLEMENT: What's that?

2 JUSTICE SOTOMAYOR: Give it to me.

3 I'm inviting you to help me.

4 MR. CLEMENT: And I'm inviting you to
5 take my help.

6 JUSTICE SOTOMAYOR: Establish --

7 MR. CLEMENT: I mean, I -- I don't
8 want to, like -- you know, it's -- it's hard to
9 just absolutely give it away in a case where
10 that's not the way the case was litigated, but
11 I am telling you that, you know, my -- my
12 friend I thought was remarkably candid in
13 admitting that if you adopt their position,
14 that really is an extreme position. The DMCA
15 and the safe harbors are a dead letter.

16 If you carve out regional ISPs, the
17 safe harbor is alive and well, and equally
18 importantly, the incentives for both sides to
19 come and to try to have a reasonable
20 negotiation are alive and well.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?
22 Justice Gorsuch?

23 JUSTICE GORSUCH: If we were to -- I
24 think Justice Kagan's right that our -- our --
25 our precedents speak of purpose, and we have

1 two options. One, we could take the additional
2 step and say that because this is an
3 implied-ish cause of action, we're going to
4 construe it very narrowly, look to the patent
5 law and JMOL.

6 The other alternative would be to say
7 it's purpose and reverse and remand. And
8 Mr. Malcolm invited you to say whether you
9 thought you could prevail under that standard
10 below.

11 MR. CLEMENT: Well, obviously, I
12 prefer Door Number 3, but I would also prefer
13 what --

14 JUSTICE GORSUCH: I understand Door
15 Number 3.

16 MR. CLEMENT: Whatever the standard
17 is, I'd prefer -- I -- I'd prefer a chance to
18 pursue that. And I would think, even under
19 purpose, there has to be room for treating
20 somebody that says "F the DMCA" differently
21 from somebody that tries their level best to
22 comply and doesn't.

23 JUSTICE GORSUCH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh?

1 JUSTICE KAVANAUGH: You're drawing a
2 distinction between intent and purpose, and you
3 also, though, rely on the Henry case quite a
4 bit from 1912 in the patent context.

5 And, there, the Court said there must
6 be "an intent and purpose that the article sold
7 will be so used" and then says "it may also be
8 inferred where its most conspicuous use is one
9 which will cooperate in an infringement when
10 sale to such user is invoked by advertisement,"
11 though advertisement as an example of when
12 there's an intent and purpose.

13 And then, in Kalem, which is argued
14 within a week of Henry back in 1911, Kalem's
15 the copyright case, of course, in the reply
16 brief, the other side points out that you
17 ignore Kalem in your brief, but Kalem itself
18 says in the copyright context, the defendant
19 not only expected but invoked by advertisement
20 the use of its films for dramatic reproduction
21 of the story.

22 The word "advertisement" appears in
23 both cases. Henry says intent and purpose.
24 Get your response to that.

25 MR. CLEMENT: So let me take them in

1 turn. I mean, Henry says intent and purpose,
2 but it also says you can infer that sort of
3 compound if you know that the user is going to
4 use it unlawfully. And, like, you know, I
5 mean, to me, you know, the right way to look at
6 this is consistent with the Re- --

7 JUSTICE KAVANAUGH: I'm not sure it
8 says that, but anyway, keep going.

9 MR. CLEMENT: It -- it -- it -- not
10 maybe in the same line, but I think it says it
11 elsewhere. At least that's what I take from
12 the opinion. Maybe I'm -- maybe I'm misreading
13 it.

14 JUSTICE KAVANAUGH: Got it. Okay.
15 Go.

16 MR. CLEMENT: But that's certainly --
17 that's certainly why we were relying on the --
18 sort of the Henry case, because you were
19 providing it knowing it would be misused.
20 So -- so -- so that's part of the answer on
21 Henry.

22 But, again, then you get to Kalem.
23 And Kalem, yes, like, obviously, if you have
24 inducement cases, that's what -- that's what
25 advertising goes to. It goes to inducement

1 cases. But inducement cases are -- you know,
2 historically, if you look at all of the
3 contributory infringement cases, inducement is
4 the smaller subset.

5 And the dominant subset is material
6 contribution, where you're providing material
7 support, substantial assistance, went to
8 somebody you know that it's an infringer. And
9 that's why, like, you can get the people who
10 are just packing and shipping the bootleg
11 records, right? Like, you know, they don't,
12 like, care what's in the box. They're just
13 getting paid for doing it. But you still say
14 and -- and always have said that they are
15 liable. That's -- I mean, that's certainly the
16 dominant common law rule. It's the rule in the
17 trademark context as well.

18 So let me just say a word about Kalem.
19 Mean, Kalem, again, you know, is a case where
20 you have, you know, the -- the promoter of the
21 motion picture that's made from the book, so
22 it's an easy case. And the language they talk
23 about where Justice Holmes goes back to a
24 couple of Supreme Judicial Court of
25 Massachusetts opinions and talks about

1 indifference, the Court specifically says we
2 don't have to get into those niceties here. So
3 what they're relying on in Kalem, which is why
4 we ignored it, is the purest form of dicta.

5 JUSTICE KAVANAUGH: Got it. Thank
6 you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 Justice Jackson?

10 Thank you, counsel.

11 Mr. Rosenkranz, rebuttal?

12 REBUTTAL ARGUMENT OF E. JOSHUA ROSENKRANZ

13 ON BEHALF OF THE PETITIONERS

14 MR. ROSENKRANZ: Thank you, Your
15 Honor.

16 Plaintiffs' test relies on specific
17 known infringers who are certain to keep
18 infringing. If Plaintiffs want to bring an
19 action that is based upon specific known
20 infringers who are -- who are certain to keep
21 infringing, they can bring that case under
22 their rule against ISPs.

23 This Court cannot affirm on that
24 basis, though, and neither can the courts
25 below. Let's talk about how this case was

1 tried.

2 There is no proof of any specific
3 known infringer that is a human being who
4 actually did any of the things that some of
5 these hypotheticals spun out. Even if you
6 focus on households, there is no way to
7 disaggregate, precisely for the reason that
8 Justice Gorsuch points out, Plaintiffs tried a
9 case in gross as to 57,000 subscribers, no
10 individual circumstances. Plaintiffs --
11 Plaintiffs never tried to disaggregate in any
12 way as to the people who they see -- who they
13 claim can sustain this verdict.

14 Saying that the DMCA shows that there
15 is liability in a world of uncertainty is not
16 how this Court reads statutes. You can't infer
17 liability from the blank page. And Congress
18 said not to do that. The DMCA is also no
19 panacea. ISPs have no certainty that they will
20 keep the safe harbor. A lay jury decides
21 whether an ISP has acted reasonably and whether
22 terminations are appropriate.

23 Justice Alito asked, what is an ISP
24 supposed to do when confronted with a
25 university? My friend gave an answer, have a

1 conversation. That's a terrible answer from
2 the perspective of the company that is trying
3 to figure out what its legal obligations are
4 facing crushing liabilities.

5 I have an answer. When Justice
6 Barrett asked about recourse, the university --
7 the I -- the Plaintiffs have recourse. How
8 about a conversation with the ISPs where they
9 talk about how to work out things together?
10 Maybe they kick in a little money. Now they
11 won't get billion-dollar verdicts, but if they
12 believe that the programs that Cox and others
13 have aren't satisfactory, they can design
14 better programs and help pay for them.

15 If the Court has no further questions,
16 we respectfully request that the court below be
17 reversed.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 The case is submitted.

21 (Whereupon, at 11:46 a.m., the case
22 was submitted.)

23

24

25

Official - Subject to Final Review

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