

# SUPREME COURT OF THE UNITED STATES

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IN THE 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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Pages: 1 through 105

Place: Washington, D.C.

Date: December 1, 2025

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3       COX COMMUNICATIONS, INC., ET AL.,     )  
4                                   Petitioners,         )  
5                               v.                                 ) No. 24-171  
6       SONY MUSIC ENTERTAINMENT, ET AL.,     )  
7                                   Respondents.         )  
8       - - - - -

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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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23       the Petitioners.

24       PAUL D. CLEMENT, ESQUIRE, Alexandria, Virginia; on  
25       behalf of the Respondents.

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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(1) 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 so advertisement as an example of when there's  
12 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

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