

No. 24-171

IN THE
Supreme Court of the United States

COX COMMUNICATIONS, INC., *et al.*,

Petitioners,

v.

SONY MUSIC ENTERTAINMENT, *et al.*,

Respondents.

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

**BRIEF *AMICUS CURIAE* OF
FLOOR64, INC. D/B/A THE COPIA INSTITUTE
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICUS CURIAE¹

Amicus Copia Institute submits this brief to highlight the ways this dispute implicates the First Amendment by affecting online speech and the ability for anyone to facilitate it.

The Copia Institute is the think tank arm of Floor64, Inc., the privately-held California small business behind Techdirt.com (“Techdirt”).² As a think tank the Copia Institute produces evidence-driven articles and papers³ as well as other forms of expressive output such as podcasts⁴

1. No counsel for any party authored this brief in whole or in part. Amicus and its counsel authored this brief in its entirety. No person or entity other than amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

2. See Kashmir Hill, *An Internet Veteran’s Guide to Not Being Scared of Technology*, NEW YORK TIMES (Jul. 29, 2023), <https://www.nytimes.com/2023/07/29/technology/mike-masnick-techdirt-internet-future.html> (profiling its founder, owner, and editor Michael Masnick).

3. See, e.g., Mike Masnick, *Protocols, Not Platforms: A Technological Approach to Free Speech*, TECHDIRT (Aug. 28, 2019), <https://www.techdirt.com/2019/08/28/protocols-not-platforms-technological-approach-to-free-speech/>. This paper is credited with inspiring the development of the Bluesky social media platform. *A Note About the Knight Institute, X, and Bluesky*, KNIGHT FIRST AMENDMENT INSTITUTE (Nov. 25, 2024), <https://knightcolumbia.org/blog/a-note-about-the-knight-institute-x-and-bluesky>.

4. See, e.g., Mike Masnick, *Announcing Ctrl-Alt-Speech: A New Podcast About Online Speech*, TECHDIRT (Mar. 7, 2024), <https://www.techdirt.com/2024/03/07/announcing-ctrl-alt-speech-a-new-podcast-about-online-speech/>.

and games⁵ that examine the nuances and assumptions underpinning technology policy. Armed with its insights it then regularly submits advocacy instruments such as regulatory comments and amicus briefs, including before this Court, with recent submissions in *Tiktok v. Garland*, No. 24-696, *Murthy v. Missouri*, No. 23-411, *Moody v. NetChoice*, No. 22-277, and *Gonzalez v. Google*, No. 21-1333, which all involved similar issues as those present here: the expressive rights of Internet platforms and those that use them.⁶

The goal of all of the Copia Institute’s efforts is to educate courts, lawmakers, and other regulators—as well as innovators, entrepreneurs, and the public—and influence good policy that promotes and sustains innovation and expression. It also does so through Techdirt, an online

5. See, e.g., Mike Masnick, *Trust & Safety Tycoon: Try Your Hand At Managing A Social Media Trust & Safety Team*, TECHDIRT (Oct. 17, 2023), <https://www.techdirt.com/2023/10/17/trust-safety-tycoon-try-your-hand-at-managing-a-social-media-trust-safety-team/> (adding “Trust and Safety Tycoon” to “Moderator Mayhem” in its game catalog, each enabling players to experience the difficulties of effective platform moderation given various competing pressures that typically bear on the site management experience). It also recently funded the development of its latest game, “One Billion Users,” thanks to the use of other Internet platforms including Kickstarter and Bluesky. Mike Masnick, *Success! One Billion Users Will Go Into Production (Late Backers Welcome)*, TECHDIRT (Dec. 20, 2024), <https://www.techdirt.com/2024/12/20/success-one-billion-users-will-go-into-production-late-backers-welcome/>.

6. The Copia Institute also submitted a brief in *Andy Warhol Foundation Visual Arts v. Goldsmith*, No. 21-869, discussing the First Amendment issues involved in copyright.

publication that has chronicled technology law and policy for nearly 30 years. In this time it has published more than 80,000 articles regarding subjects such as freedom of expression, copyright, and platform moderation—issues at the heart of this matter—as well as other related topics including cybersecurity, competition policy, and the impact of technology on civil liberties generally. Furthermore, the company is not just a speaker regularly availing itself of its First Amendment protections to engage in its own expression but also a platform provider itself, soliciting what has amounted to over two million reader comments, which is a form of user expression that advances discovery and discussion. The company then uses other Internet platforms of various types to promote its own expression and engage with its audiences.

The Copia Institute therefore submits this brief wearing two hats: as a longtime commenter on the issues at the heart of this challenge, and as an example of those whose own First Amendment rights, as both a platform operator and user, are threatened by a legal regime that could hold Petitioner Cox Communications (“Cox”) liable, as the lower courts have allowed here.

SUMMARY OF ARGUMENT

Amicus Copia Institute submits this brief *amicus curiae* to caution that this case not be treated as just a copyright case, or mere filesharing case, or even a Digital Millennium Copyright Act (“DMCA”) case. The dispute here is not so esoteric; rather, this is a case whose outcome will ultimately bear on all online expression in both its practical and legal effects because, at its heart, it is a case

about secondary liability for the online platforms⁷ that facilitate online expression—including, ultimately, *any* form of secondary liability arising from their users—and whether that secondary liability can constitutionally be a basis for regulatory pressure causing platforms to police user expression. The answer must be no, as subjecting them to such liability regimes, as Cox was here, abrogates both platforms’ own First Amendment rights and those of their users.

ARGUMENT

I. A legal regime that could hold Cox liable offends the First Amendment

Answering the question of whether Cox should be liable for its users’ activity requires asking what, if anything, Cox should have done differently to avoid liability, and what the consequences would have been to its speech interests, and those of its users, if it had. Because if the only way to avoid liability is for a platform to act against those interests, effectively under penalty of law and significant liability if it does not, then that law is unconstitutional.

7. The lower courts have tended to use “service providers,” or just “providers” to describe the intermediaries who enable expression to be shared and exchanged on the Internet because this is the term used by the DMCA, the statute Cox had sought to invoke at an earlier stage of this dispute to insulate it from charges of secondary liability. This brief, however, frequently uses “platform” interchangeably with “provider,” as has this Court in much of its relevant jurisprudence related to online speech issues, to drive home the point that the issues raised here are exactly the same as those this Court has addressed in these other cases. *See, e.g., Moody v. NetChoice*, 144 S. Ct. 2383, 2393 (2024).

A. There is a prior restraint problem

This Court has long held it anathema to the First Amendment for speakers and speech to suffer punitive consequences—a prior restraint—before there has been proper adjudication to determine whether those consequences are deserved. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Yet, like in *Bantam Books v. Sullivan*, this case is all about punitive consequences to speech interests flowing from what were but mere accusations and not “judicial determinations” of actual wrongdoing. *Id.* (holding it was prior restraint to subject expression to the judgment of non-judicial decisionmakers). The case against Cox is premised on the idea that, when presented with these accusations of its users’ alleged wrongdoing, it did not itself inflict a punitive consequence upon them, in this case by not terminating their accounts, and, because it did not, it was then due its own punitive consequences, first losing its safe harbor protection for not having exercised this extrajudicial enforcement on its users, and then finding itself in line for shared liability on a legal theory premised largely on its awareness of those accusations.

But the fundamental problem with accusations is that they are often wrong, which is why due process is required to determine whether an accusation is sound *before* a resulting legal consequence can be meted out. *See Bantam*, 372 U.S. at 71-72. So when the only way for Cox to have avoided this trouble is if it had automatically treated every accusation as valid, with no adjudication, it is problematic on several fronts.

One is as a matter of statutory construction, because allowing Cox to be liable at all misconstrues the language

of the DMCA in at least two ways. One way is that Cox, as a provider of “transitory digital network communications,” was entitled to the 512(a) safe harbor. 17 U.S.C. § 512(a). But this safe harbor is not conditioned on the provider doing anything in response to accusations of infringement. *Id.* In fact, this safe harbor imposes no obligation to even receive them at all. *See id.* The “takedown notices” that the DMCA authorizes to convey these infringement accusations to platforms are entirely creatures of the 512(c) safe harbor, which is used by platforms that store information “at the direction of users.” 17 U.S.C. § 512(c)(3).⁸ As a result, even if every takedown notice Cox ever received had been a valid accusation that it ignored, its safe harbor against any claim of liability should never have been in jeopardy.⁹

The other chief way that Cox’s fate was inconsistent with the language of the DMCA is that, even for providers using those safe harbors conditioned on responding to takedown notices, none are conditioned on terminating users in response to infringement *allegations*. The statute only requires there to be a policy for terminating repeat infringers “in appropriate circumstances.” 17 U.S.C.

8. The 512(d) safe harbor for providers of information location tools is also partially conditioned on receiving 512(c) takedown notices. 17 U.S.C. § 512(d)(3). But the 512(a) safe harbor makes no such cross-reference.

9. It also means that any accusation sent to Cox via a “takedown notice” was simply just an accusation, rather than any sort of formal notice with statutory force. But because providers using 512(c) and (d) safe harbors do receive accusations via formal notices, it is important to remain focused on the fact that, formal or not, these notices are still just accusations of wrongdoing and not adjudicated findings.

§ 512(i)(1)(A) (“The limitations on liability established by this section shall apply to a service provider only if [it] has adopted and reasonably implemented [...] a policy that provides for the termination in appropriate circumstances of subscribers and account holders [...] who are repeat infringers.”). Courts had previously read this provision to afford the platforms flexibility in how they responded to repeat infringers. *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109-10 (9th Cir. 2007) (“The statute permits service providers to implement a variety of procedures, but an implementation is reasonable if, under ‘appropriate circumstances,’ the service provider terminates users who repeatedly or blatantly infringe copyright.”). But that language about “repeat infringers” must be interpreted as *adjudicated* infringers. Otherwise it would require providers to inflict an unconstitutional prior restraint on their users if those users could be deemed infringers based solely on accusation, and effectively punished for it by being terminated, without a court ever having weighed in.¹⁰

Cox’s experience also illustrates why interpreting the provision without that implicit “adjudicated” caveat would be so constitutionally problematic. During the period that the Respondent was sending its takedown notices, others were sending theirs. *BMG Rts. Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, 881 F.3d 293, 299-300 (4th Cir. 2018). Cox’s alleged failure to act on them—in particular, by not terminating users targeted by them—became the

10. Termination also functions as a prospective punishment, against future infractions, and is thus an unconstitutional prior restraint for that reason as well. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 720 (1931) (“Subsequent punishment for such abuses as may exist is the appropriate remedy[.]”).

basis of an earlier lawsuit, *BMG Rights Management v. Cox Communications*, which resulted in Cox losing its safe harbor protection. *Id.* at 300. But that litigation itself revealed that many of the takedown notices Cox had received were in fact invalid—in fact, they were so invalid that an entire set of plaintiff claims were dismissed from the lawsuit because the plaintiff had no right to enforce a copyright in the implicated works. *BMG Rts. Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, 149 F. Supp. 3d 634, 643-653 (E.D. Va. 2015). Nevertheless, despite the presence of so many invalid claims, it was held against Cox, in *BMG* as well as this case, that it had not treated all the other infringement accusations it had received as presumptively valid, even though none of them had ever been legally tested and, given the invalidity of so many, Cox had reason to be skeptical of their legitimacy. *See, e.g.*, C.A.App.538 (“[W]e have seen issues of false allegations against subscribers. [W]e have documented cases where complaints came in against IP addresses that weren’t even in use in our network. So we know that some portion of the complaints that we get are false accusations.”).

But *amicus* Copia Institute writes because it is not just Cox that can find itself at the receiving end of invalid takedown notices. The danger of a regulatory scheme that requires platforms to presume all accusations as valid is that they are so often not. *See, e.g.*, Jennifer M. Urban, Joe Karaganis, & Brianna L. Schofield, *Notice and Takedown in Everyday Practice* (“Urban”) 88 (UC Berkeley Public Law Research Paper No. 2755628, 2017), <https://ssrn.com/abstract=2755628>. And not just in this case, with respect to this provider, or this sort of conduit provider, but in all cases, with all providers, including those using the 512(c) safe harbor as platforms hosting stored expression,

where these takedown notices conveying mere accusations result in the removal of that speech, if not also eventually the speaker behind it.¹¹ These platforms help weave the rich fabric of the Internet, offering any sort of Internet service that can be imagined, including social media, video hosting, music hosting, photo hosting, general cloud storage, consumer reviews, fundraising, community-created encyclopedias, and more—they are every sort of platform facilitating any sort of user expression, including protected, lawful expression that is vulnerable to a takedown demand.

Even when such accusations are sent by mistake the censorial effect is still destructive to lawful expression, which has now incurred an undeserved punitive consequence. Urban, at 96-97. It is even destructive to the interests of creatives and copyright holders themselves, because it means that there is nothing to stop someone from taking down their own expressive works. *See, e.g.,* Timothy Geigner, *Bungie, YouTuber Settle Lawsuit Over Fraudulent DMCA Takedowns For YouTube Videos*, TECHDIRT (Mar. 29, 2024), <https://www.techdirt.com/2024/03/29/bungie-youtuber-settle-lawsuit-over-fraudulent-dmca-takedowns-for-youtube-videos/>. But the bigger threat to lawful expression comes from when aspiring censors deliberately use takedown notices to target speech they disfavor and cause it to be disappeared. *See, e.g.,* Stephanie Kirchgaessner, *Top FDA official demands removal of YouTube videos in which he criticized Covid vaccines*, THE GUARDIAN (Aug. 31, 2025), <https://www.theguardian.com/us-news/2025/aug/31/>

11. Also affected are platforms using the 512(d) safe harbor, which help that expression be found.

fda-official-youtube-videos. Or, worse, cause a speaker to be silenced. *See, e.g.*, Andy Maxwell, *TV Museum Will Die in 48 Hours Unless Sony Retracts YouTube Copyright Strikes*, TORRENTFREAK (Sep. 4, 2023), <https://torrentfreak.com/tv-museum-will-die-in-48-hours-unless-sony-retracts-youtube-copyright-strikes-230904/>. *See also* Urban, at 47 (explaining “strikes,” as a mechanism some platforms use to track infringement accusations against users for termination purposes). In fact, if platforms must terminate users because they’ve received multiple accusations, there may be no need to send multiple takedown notices to quiet a speaker because even one can cow their target into removing their own potentially lawful expression, no matter how non-infringing, in order to avoid accruing a “strike” and putting their ability to speak through the service at all at risk. Given that getting terminated can mean getting cut off from long-cultivated audiences and potentially even livelihoods, it is a risk many speakers can ill afford to take. *See* discussion *infra* Section I.B.

While takedown notices are supposed to be sent “under penalty of perjury,” 17 U.S.C. § 512(c)(3)(A)(vi), and in theory the DMCA provides a remedy when they are wrongful, 17 U.S.C. § 512(f), in practice it is near impossible for someone whose lawful speech has been unduly removed by an invalid takedown notice to obtain a remedy. *See, e.g.*, *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1153-1156 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 2263 (2017) (allowing but nevertheless frustrating a mom’s recovery under 512(f) for having had her lawful speech—a video of her child dancing to a fair use of music—removed via an invalid takedown notice). Because senders know their accusations can have this censorial effect, with little practical risk to themselves, there is little

to deter them from sending illegitimate notices and lawful speech frequently and inevitably ends up undeservedly censored. *See* Eric Goldman, *In 512(f), the “F” Stands for “Futility”*, TECHNOLOGY & MARKETING LAW BLOG (Aug. 15, 2025), <https://blog.ericgoldman.org/archives/2025/08/in-512f-the-f-stands-for-futility-shaffer-v-kavarnos.htm>.

Nevertheless, despite the epidemic of invalid takedown notices, the theory of liability raised in these Cox cases requires platforms to automatically treat all these accusations as inherently legitimate. Every concern about “knowledge” frets that Cox knew users were infringing and yet did nothing, with all that “knowledge” predicated on the notices it received. The theory further suggests that if the platform knew of a past infringement it was obligated to presume to know that the next thing the user would do would also be infringing. But acting upon such presumptions is the essence of prior restraint, where future expression is restricted as a result of a past wrong. *Near*, 283 U.S. at 713. Even where a past wrong may have actually been committed such a prior restraint on future expression is still unconstitutional. *Id.* at 720 (“He does not lose his right by exercising it.”). But the expressive harm is even more severe where, as here, the past act was only allegedly wrongful, and especially when, as here, the conclusion that knowledge of infringement was truly imparted via these notices cannot withstand scrutiny. As *BMG v. Cox* evinced, all Cox actually had knowledge of was that there was an *accusation* of infringement. But it did not know, nor could it know,¹² whether there actually was any infringement—and, as all those dismissed claims

12. *See also* Brief for Petitioner at 10 (observing that it had no way of knowing, even presuming an infringement accusation were valid, which user committed it).

showed, in many cases there was not. Yet Cox was still expected to act as though there were, and under risk of great penalty if it did not.

Although on occasion platforms do refuse to act upon certain takedown notices that they become aware of and suspect to be invalid, given the sheer number they receive¹³ they can defend only the smallest proportion of their users and an even smaller proportion of their expression,¹⁴ and they attempt it at great legal peril because refusing a takedown notice can jeopardize their safe harbor protection and risk shared liability. Having an “opportunity” to defend against the accusations also does not avoid the prior restraint problem, because a consequence has already accrued if that defense needs to be made to forestall further penalty. *See Near*, 283 U.S. at 721.¹⁵

13. *See id.* at 8 (“By 2008, the music industry was flooding ISPs with millions of notices a year.”).

14. *See Moody*, 144 S. Ct. at 2395 (“The biggest social-media companies—entities like Facebook and YouTube—host a staggering amount of content. Facebook users, for example, share more than 100 billion messages every day. And YouTube sees more than 500 hours of video uploaded every minute.”).

15. The DMCA includes a “putback” provision allowing users whose expression is removed to defend it to the platform. 17 U.S.C. § 512(g)(2). Yet not only is it inadequate doctrinally to still demand an accused user defend himself within this system of extrajudicial censorship, but history has also shown it to be inadequate practically to defend against wrongful takedown demands. *Urban*, at 44-46. Furthermore, it applies only to formal takedown demands for the 512(c) safe harbor and not the informal accusations made under the 512(a) safe harbor that never result in anything being “taken down.”

Additionally, as a practical matter, platforms are also generally ill-equipped to know, or expediently discover, who the legitimate copyright holder is, whether the notice has been sent by an authorized agent, or whether a challenged use of a work is either licensed or fair. In fact, the DMCA itself notably excuses platforms from having to police their users' activity themselves as a condition of their safe harbor protection, as they are not in a position to do so effectively. 17 U.S.C. § 512(m)(1). But that provision, along with the safe harbor system itself, are all obviated when the only way for a platform to protect itself is to presume every accusation brought to it is valid and automatically act against the user and their expressive activity, regardless of whether the user's online activity was lawful and *despite* it may well being. *See Bantam*, 372 U.S. at 70 (finding a legal regime untenably hostile to protected expression when it lacked safeguards to ensure that non-wrongful, protected expression would not be suppressed too).

The resulting speaker terminations, and 512(c) speech removals, all punitive consequences aimed at suppressing expression, *see Near*, 283 U.S. at 711, are all restraints upon expressive rights prior to a proper judicial determination that such consequence is warranted. Likewise is the looming secondary liability causing Cox to apply these sanctions, as both a prior restraint on Cox itself, to force it to act in the wake of an accusation, *see Bantam*, 372 U.S. at 67-68 ("Silverstein's compliance with the Commission's directives was not voluntary."), and on the affected users. As this Court has recently found, applying legal pressure to a third party as a means of affecting another *indirectly* is legally no different than applying that legal pressure to them directly. *Nat. Rifle*

Association of America v. Vullo, 144 S. Ct. 1316, 1322 (2024); *see also* discussion *infra* Section I.C. But when it happens without proper adjudication first it is, like in *Bantam*, “a scheme of state censorship effectuated by extralegal sanctions” and thus an unconstitutional prior restraint. *Bantam*, 372 U.S. at 71-72.

B. There is a *Packingham* problem

Even when infringement accusations are valid the extrajudicial remedy Cox was expected to apply if it wanted to avoid liability—terminating users—is not. Nor could it have been even if it were a penalty imposed by law directly on the user after sufficient due process.

As this Court found in *Packingham v. North Carolina*, being kept off the Internet is too severe a penalty even for adjudicated criminals who have caused tangible harm to the physical well-being of their victims. 137 S. Ct. 1730, 1737 (2017) (“Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.”). Meanwhile copyright infringement is not even a criminal offense except in limited circumstances inapplicable to this or most other cases involving Internet platforms or their users. *See* 17 U.S.C. § 506. And to the extent it causes harm, that harm is only economic, and itself debatable. Mike Masnick, *The Sky Is Rising 2024 Edition: Rather Than Destroying Culture, The Internet Has Saved The Content Industries*, TECHDIRT (Jan. 22, 2024) <https://www.techdirt.com/2024/01/22/the-sky-is-rising-2024-edition-rather-than-destroying-culture-the-internet-has-saved-the->

content-industries/. To allow such a penalty here, one that this Court already deemed intolerable in circumstances far more consequential, would yield the absurd result of effectively treating copyright infringement as a worse offense than some of the world’s most heinous crimes. *Packingham*, 137 S. Ct. at 1736 (“The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people.”).

But even if the same reasoning of *Packingham* were to be applied afresh to the copyright context, and not just comparatively, forcing platforms to terminate users would still fail to survive even intermediate scrutiny. *Id.* To survive intermediate scrutiny, a law must be “narrowly tailored to serve a significant governmental interest.” *Id.* The goal of copyright law is to promote the progress of science and art. U.S. Const. art. I, § 8, cl. 8. But even to the extent that such promotion is a significant interest for the government to pursue, driving away the speakers and speech who were contributing to it is entirely inconsistent with that policy value. The regulatory means of account terminations are simply not narrowly tailored enough to survive scrutiny because termination does not just target infringing behavior but also non-infringing. *Packingham*, 137 S. Ct. at 1736 (“[T]he law must not ‘burden substantially more speech than is necessary to further the government’s legitimate interests.’”). Once users are terminated they cannot engage in any sort of expressive activity, no matter how lawful. *Id.* at 1737 (“[T]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.”). And this Court has already found such a hit to speech rights, even to those of convicted criminals, to be a hit too hard. *Id.* (“Even convicted criminals—and in some instances

especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.”).

In *Packingham* this Court was also contending with a law that ostensibly targeted the use of a subset of Internet services, namely “social media.” *Id.* at 1736-1737. But it recognized that the law potentially had the effect of putting all of the riches of the Internet beyond the reach of certain people. *Id.* at 1737 (“By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.”). The case against Cox illustrates how the termination provision threatens the same breadth of offerings because Cox is a general purpose ISP. While it would still be plenty problematic to cut users off from the various specialized services, including those eligible for the 512(c) safe harbor like “social media,”¹⁶ cutting them off from full-service broadband ISPs causes even more serious harm to speakers because the broadband ISP market is not a particularly competitive one. See Mike Masnick, *Just A Click Away: How To Improve Broadband Access*, Techdirt (Jul. 18, 2022), <https://www.techdirt.com/2022/07/18/just->

16. It is a live concern that this case will bear on. See, e.g., *Concord Music Group, Inc. v. X Corp.*, No. 3:23-cv-00606, slip op. at 18 (M.D. Tenn. Mar. 5, 2024) (order denying defendant’s motion to dismiss a contributory liability claim partly on the basis of the provider allegedly not having terminated repeat infringers).

a-click-away-how-to-improve-broadband-competition/. Users may effectively have only one choice of provider, if they want to be able to use the Internet at all. *See, e.g.*, Karl Bode, *Two Decades Later And The FCC Is Still Trying To Crack Down On Anti-Competitive Deals Between Landlords And Broadband Monopolies*, TECHDIRT (Mar. 18, 2024), <https://www.techdirt.com/2024/03/18/two-decades-later-and-the-fcc-is-still-trying-to-crack-down-on-anti-competitive-deals-between-landlords-and-broadband-monopolies/>. Consequently, if they lose access to that provider's services then they may lose access to the Internet altogether. Given how ubiquitously important the Internet is, *see, e.g.*, *Packingham*, 137 S. Ct. at 1735-1736, losing online access is a particularly injurious consequence to a speaker and disproportionate to the harm alleged, even one that might be deserving of some sort of penalty.

And it is completely untenable to inflict such a penalty on a speaker who is not deserving, not just on the basis of unfounded accusations but possibly no accusation at all. As Cox also points out, cutting off a "user" may involve cutting off what is essentially a service provider itself, terminating entire households full of users, hospitals, hotels, coffee shops, universities, military barracks, or even regional ISPs providing service to potentially thousands or tens of thousands of their own users. Brief for Petitioner at 9. Were these accounts to be terminated it would mean not just one speaker being denied the ability to speak anymore via the platform but multiple, and potentially countless, and based on nothing that they themselves have done. There is unlikely to be any legitimate government interest that such an injustice could possibly advance.

C. There is a *Vullo* problem

Every speaker on the Internet is dependent on other systems and services to get their expression online. *See* discussion *infra* Section II.C. As a result, when a state actor wants to target their speech it may seem more expedient to pressure the services Internet speakers depend on, to cause the services to act against those speakers or their speech, rather than it trying to reach the speakers or speech directly, which may be less practical, if not constitutionally forbidden outright.

But this tactic is just as unconstitutional as what this Court deemed so in *Vullo*. There this Court found that the government violated the NRA's First Amendment rights by exploiting its dependency on other parties and using pressure on those other parties as a means of pressuring it. *Id.* at 1331 (“The analogy is to killing a person by cutting off his oxygen supply rather than shooting him.”). Targeting a speaker did not suddenly become constitutional just because it was applied to a middleman as opposed to the target the state actor was trying to reach. *Id.* at 1326. Yet the same constitutional infirmity with this regulatory approach applies here. Just as a state actor there could not pressure an intermediary another depended on as a means of affecting that other's expression, neither can it impose laws that pressure Internet intermediaries to interfere with online expression. The First Amendment forbids it, for any purpose—even copyright.¹⁷

17. It makes no difference if the user were actually culpable because, without a judicial finding, no one actually knows whether the user is indeed culpable. And this regulatory model, of pressuring the platform to sanction the user instead of a court, means that no one will ever know before the sanction is applied.

This regulatory model also affects the rights of the platform too, which has its own First Amendment rights. *See Near*, 283 U.S. at 720 (finding that these rights could not be ignored because the regulatory target was in the “business” of facilitating the publication of the allegedly objectionable material). Ordinarily the editorial discretion platforms exercise in choosing what speakers and speech to associate with is protected by the First Amendment, just as traditional press outlets’ choices have been. *Moody*, 144 S. Ct. at 2405 (2024). But that discretion is lost when platforms are forced by legal pressure to make certain decisions with respect to their users or their users’ expression. While the government can attempt to persuade platforms to act in certain ways, when it uses its power coercively, the constitutional problem arises. *See Murthy v. Missouri*, 144 S. Ct. 1972, 2010 (2024) (Alito, J., dissenting) (citing *Vullo*, 144 S. Ct. at 1326). Such coercion is present here. Per the DMCA, at least as the lower courts here interpreted it, Cox had to “decide” to terminate its users if it wanted to retain its statutory defense against liability. So would all other platforms, including those using the 512(c) safe harbor, who would also need to remove any other user expression accused of being infringing. 17 U.S.C. § 512(c)(1)(C). But when the decision to remove speakers or speech is an offer they effectively cannot refuse without risking ruinous consequences then it is not much of a choice after all.

The conditional nature of the DMCA, which forces platforms make the “choice” to act against speakers or speech, or else risk potentially enormous liability, creates an equally enormous legal pressure subordinating their First Amendment-protected editorial and associative discretion. But the real culprit taking away that discretion

is the threat of secondary liability itself and the risk of having to be responsible for what their users do. This looming liability is the real gun to platform providers' heads, because losing the safe harbor would not matter so much if the consequences of losing it were not so dire. It is this legal pressure that ultimately forces them to act against their users and their expression and thus creates a constitutional problem.

II. A legal regime that could hold Cox liable would affect all online expression

This case involves liability for copyright infringement. And it arises from conduct—filesharing—that may often be infringing. But that the accused users themselves may in fact be culpable should not distract from what is at issue in this case. This case is not about holding Internet users themselves liable for their own actions; it is about holding someone *else* liable for them. But if such secondary liability can be tolerated here, for copyright, it can be tolerated for any other form of alleged liability targeting any sort of platform, and not just 512(a) conduit providers like Cox, but all Internet platforms. The practical consequence of such a liability model will be the chilling of all Internet expression, no matter how lawful or beneficial, by chilling the platforms that enable it.

A. Targeting platforms with secondary liability inherently affects user expression

Although the way the DMCA is currently interpreted has some constitutional infirmities, the basic idea of providing platforms protection from liability arising from how their users used their services is nevertheless

an important one, for the same reason that “Section 230” is also important. *See* 47 U.S.C. § 230(c); *see also* Brief *amicus curiae* of M. Chris Riley, Floor64, Inc. d/b/a The Copia Institute, and Engine Advocacy (“Gonzalez Amicus”), *Gonzalez v. Google*, 598 U.S. 617 (2023) (21-1333). The Internet is a communications medium that inherently depends on intermediaries to help expression get from one person to another. These intermediaries come in all sorts of shapes and sizes. The four DMCA safe harbors catalog several buckets that they may fall into, but within each category the types of service providers are myriad, ranging from providers of high-capacity backbone infrastructure, to ISPs like Cox that serve as the onramps for users to connect to the wider Internet, to other forms of online services that help users express themselves and interact with others’ online expression, which can include email, social media, marketplaces, streaming services, or online storage, to name just a few. Together they allow people to engage with expression in infinite ways, be it contemporaneously or asynchronously, via one-to-one communications or one-to-many, and via stored information or live exchange. And a fundamental reality is that no Internet communication could happen at all but for these providers being available, and able, to help facilitate that exchange of expression.

But it is also a fundamental reality that few if any intermediaries could be available and able to help facilitate the exchange of expression were it not legally safe to do that helping. Whether it is a statute or doctrinal limitation on secondary liability providing that safety, that protection is still crucial. If platforms could be forced to share in whatever liability might be manifest in the expression they help facilitate—or even simply

have to answer for accusations of liability—it would be too risky to help facilitate very much of it, or even any of it. *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). Even the smallest providers can facilitate expression in enormous amounts, especially in proportion to their own size and resources. Intermediary platforms are not necessarily all large, well-capitalized companies; intermediary services can even be offered by non-profits or even individuals, like those with their own blogs that allow for user interaction in comments, or those who run their own social media instances. *See* Gonzalez Amicus at 1-2.

Furthermore, it is not just ultimate liability that is an issue for intermediaries; even if there were no liability manifest in the user content, simply having to defend against accusations of liability, even when non-meritorious, can itself be ruinous. *See, e.g., UMG Recordings, Inc. v. Shelter Capital Partners*, 718 F. 3d 1006, 1011 (9th Cir. 2013) (holding the platform non-labile after it was bankrupted by the defense); Mike Masnick, *Veoh Still Not Dead Enough For Universal Music; Asks Court To Rehear Case Yet Again*, TECHDIRT (Feb. 11, 2010), <https://www.techdirt.com/2013/04/08/veoh-still-not-dead-enough-universal-music-asks-court-to-rehear-case-yet-again/>. The cost can be tremendous to defend a single accusation, let alone multitudinous ones arising from any sort of volume of user activity.¹⁸ Statutes like the DMCA,

18. Engine, Startups, Content Moderation, & Section 230 at 4-5, available at <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/61b26e51cdb21375a31d312f/1639083602320/Startups%2C+Content+Moderation%2C+and+Section+230+2021.pdf>.

or the less-conditional Section 230,¹⁹ are intended to provide platforms with the safety they need to be in the business of facilitating expression. *Shelter Capital*, 718 F. 3d at 1014; *Zeran*, 129 F.3d at 330-331. Without that safety platforms’ ability to perform that facilitation will be compromised. *See Fair Housing Coun. Of San Fernando Valley v. Roommates. Com, LLC*, 521 F. 3d 1157, 1174 (9th Cir. 2008) (observing that, without protection, platforms would face “death by ten thousand ducks bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of their users.”). They would need to police the nearly infinite and infinitely varied volume of user expression, which is an impossible task. Already platforms cannot even reliably know whether user expression is infringing; they are certainly not going to be able to know if it potentially violates all other law, arising from potentially infinite jurisdictions. Putting a liability onus on them means that they will have no choice but to suppress much of it, if not turn it away outright.

This resulting suppression of online activity is often also not just a collateral effect; in many instances it is the goal of the regulatory scheme. Allowing it here would greenlight the practice of regulating online speech via middleman pressure. *See* discussion *supra* Section I.C.

19. Section 230 protects platforms from most forms of liability. 47 U.S.C. § 230(c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”). Although its protection is not conditional on platforms satisfying any particular criteria, as the DMCA’s is, it does not apply to “intellectual property” liability, 47 U.S.C. § 230(e)(2), which is instead in the purview of the DMCA when it comes to copyright.

Such an outcome would be bad even when the potential liability in the user activity is something that can constitutionally be deemed wrongful, because, even as in this filesharing case, there is still a due process problem with people suffering a punitive consequence for their online activity without proper adjudication. But it is even worse when it is used as a way of regulating user speech in ways where the Constitution would prevent it. *See, e.g.,* Mike Masnick, *Trump Promises To Abuse Take It Down Act For Censorship, Just As We Warned*, TECHDIRT (Mar. 6, 2025), <https://www.techdirt.com/2025/03/06/trump-promises-to-abuse-take-it-down-act-for-censorship-just-as-we-warned/> (describing how a law ostensibly intended to cause platforms to moderate non-consensual imagery was ripe to be weaponized as a means to force them to take down political speech). *See also* Mike Masnick, *Amy Klobuchar Wants To Break The Internet Because Someone Made A Stupid Satirical Video About Her*, TECHDIRT (Aug. 21, 2025), <https://www.techdirt.com/2025/08/21/amy-klobuchar-wants-to-break-the-internet-because-someone-made-a-stupid-satirical-video-about-her/> (describing a legislative proposal that would make it impossible for platforms to allow AI imagery to be used in protected expression); Mike Masnick, *Bipartisan Group Of Senators Introduce New Terrible ‘Protect The Kids Online’ Bill*, TECHDIRT (May 2, 2024), <https://www.techdirt.com/2024/05/02/bipartisan-group-of-senators-introduce-new-terrible-protect-the-kids-online-bill/> (describing a legislative proposal that would affect young people’s ability to exercise their First Amendment rights online by forcing platforms to keep them off); Cathy Gellis, *Senator Klobuchar Proposes An Unconstitutional Law That Would Kill Legions Of People If Trump Were Still President*, TECHDIRT (Jul. 26, 2021), <https://www.techdirt.com/2021/07/26/senator-klobuchar-proposes-an-unconstitutional-law-that-would-kill-legions-of-people-if-trump-were-still-president/>

techdirt.com/2021/07/26/senator-klobuchar-proposes-unconstitutional-law-that-would-kill-legions-people-if-trump-were-still-president/ (describing a legislative proposal to force platforms to moderate health information as policymakers preferred); Cathy Gellis, *Creating State Action Via Antitrust Law And Making The People Who've Been Wrong About The Constitutionality Of Content Moderation Suddenly Right*, TECHDIRT (Jun. 28, 2021), <https://www.techdirt.com/2021/06/28/creating-state-action-via-antitrust-law-making-people-whove-been-wrong-about-constitutionality-content-moderation-suddenly-right/> (describing past legislative proposals to break up platform companies that do not moderate as the government prefers).

As a regulatory practice, secondary liability for platforms is also self-defeating. Platforms are already working to solve the problems regulation cares about. Many have entire Trust & Safety departments dedicated to the task and there are conferences, trade groups, and software companies to support them. *See, e.g.*, Mike Masnick, *Trust & Safety Professional Association Launches: This Is Important*, TECHDIRT (Jun. 17, 2020), at <https://www.techdirt.com/2020/06/17/trust-safety-professional-association-launches-this-is-important/>. There is an entire industry built up around helping platforms institutionally innovate solutions to some of the toughest human problems as they are reflected online. Toby Shulruff, Jeff Lazarus, and Amanda Menking, *Voices of Trust & Safety: Origins and Evolutions* (2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5361961. Meanwhile individual human operators of small platforms also do the best they can, exercising their own personal rights to editorial and associative discretion. *See* Gonzalez

Amicus at 24. As Congress understood when it passed Section 230, to get the best regulatory results—the most beneficial expression online, and the least deleterious—platforms need to be free to moderate their platforms, associating with and disassociating with speakers and speech, as they see fit. *Zeran*, 129 F. 3d at 331. The DMCA too, even though it encroaches upon that protected discretion, was still intended to provide platforms with at least some protection so that they could remain in the business of intermediating expression while also removing infringing material without risking liability for these efforts. *Shelter Capital*, 718 F. 3d at 1014. Ultimately the most effective regulatory schemes are those that make it possible for platforms to solve the problems we want them to solve, either themselves or via a competitive landscape where more and better platforms can always come into existence. Secondary liability against them inevitably prevents that potential and always comes at the cost of the expressive function platforms are needed to deliver.

B. There is nothing about copyright, filesharing, or Cox that justifies secondary liability

Secondary liability for platforms is chilling to the expressive rights of both them and their users. If nevertheless it is allowed here, for Cox, for copyright, for a case about filesharing, there is no limiting principle preventing a similar liability regime from forcing any other platform to answer for any other accused wrongdoing arising from their users. The same constitutional defects present here could arise in potentially infinite contexts.

Part of that danger is due to there being nothing so exceptional about copyright that would justify forgiving

the constitutional defects in a case like this one, and only in a case like this one. Filesharing itself, even if often done for infringing purposes, would still not warrant it. At essence “filesharing” is simply the technical means to efficiently exchange information online, and like so many other technologies helping informational content be created and consumed, it is also used for non-infringing purposes. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 942 (2005) (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984)). Copyright law itself must also co-exist with the First Amendment, *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003), which prohibits prior restraint. Concerns about infringement, however apt, cannot justify playing with a different set of constitutional rules, especially not when straying from them inevitably leads to censorship—including of the very creative works copyright law is supposed to incentivize. The constitutional authority for having copyright law at all is granted for the purpose of promoting the exchange of ideas and information; when the resulting law instead has a smothering effect on that exchange, it is no longer meeting its constitutionally-prescribed purpose and cannot be tolerated, let alone privileged.

Furthermore, it is copyright exceptionalism itself, opening the door to expansive secondary liability, that has allowed this self-defeating harm. Because Section 230 has effectively barred secondary liability for most other liability contexts other than copyright, there has been a steady stream of examples of attempts to shoehorn other liability complaints into the copyright claims in order to tap into the censorial power of this sort of copyright liability regime. See, e.g., Peter Guest, *Exposed documents*

reveal how the powerful clean up their digital past using a reputation laundering firm, REST OF WORLD (Feb. 3, 2022), <https://restofworld.org/2022/documents-reputation-laundering-firm-eliminialia/>.

Continuing this sort of copyright exceptionalism therefore raises at least two concerns. One is that copyright infringement claims become a pretextual vehicle for holding platforms liable for their users' expression. But the other is that if an exception is carved out for copyright, to justify its expansive secondary liability as distinct from ordinary circumstance, that distinction may soon disappear as a similar rationale gets employed in future non-copyright matters as a path for finding secondary liability despite the restraint ordinarily required by common law doctrine. *See, e.g., Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206, 1222 (2023). Instead of being the exception, it may now become the rule.

This evolutionary dynamic is not a hypothetical concern, as the sort of expansive secondary liability regime at issue here has already become a tempting tool for regulators to deploy in other contexts, where traditional doctrine would have otherwise counseled restraint. Section 230 currently does a lot of heavy lifting to keep expansive secondary liability for non-copyright reasons at bay, but Section 230 is a statute that Congress could repeal or otherwise attempt to limit via other legislation, should it choose to. What truly protects online speech are the constitutional principles that prevent holding platforms secondarily liable for their users' expressive activity at all.

Unfortunately, applying pressure through secondary liability has lately become an appealing regulatory model to lawmakers everywhere, possibly because they see it apparently working here, in the copyright context. A

great deal of brewing regulation, and some laws already recently passed,²⁰ is built around applying a penalty to platforms if users are able to use their services in ways the lawmakers disfavor. But it is all still impermissible pressuring of platforms as a means of affecting online expression. All of these legislative proposals aimed at platforms are built around the idea that the way to control what people can say or do online is to squeeze the intermediary they need to do it so that the intermediary acts against them, without due process, and without the government needing to try to target them directly. Each one of these proposals is constitutionally suspect though, for the same reasons that secondary liability here is. *See* discussion *supra* Section I.A-C.

That the DMCA has nevertheless been chugging along for nearly 30 years does not obviate the inherent constitutional problem. For one thing, the problem has gotten worse, and this Cox case is an example of that worsening trend because of how the preceding lower court decisions have reduced the protective utility of the DMCA safe harbors. Furthermore, if the liability against Cox is allowed to stand, it will fundamentally change the legal universe in which platforms operate, making the facilitation of anyone's online activity a much more fraught endeavor for all platforms to continue. As a result, many will stop, thus depleting the ability for anyone to speak online, or otherwise heavily constrain how they can be used, which will lead to the same deleterious effect on online expression. It will also not just be the broadband providers affected, but any sort of platform, helping users and expression to interact online in myriad ways.

20. *See* discussion *supra* Section II.a.

The principles espoused in *Vullo* have also not been directly applied to platform liability before now. This case is the first, but surely not the last, to put these sorts of constitutional questions squarely before this Court. For the previously described reasons, this Court should find that this regulatory model, of holding platforms responsible for their users' activity, is inherently suspect, not just here, in copyright cases, but in all cases. Exonerating it here is only going to encourage it to spread, as is evident from how this regulatory model has already proliferated in so many legislative proposals in so many other liability contexts. That it has been tolerated for so long appears to have created the illusion that there is no significant constitutional defect with it, when there always has been. It is simply finally time to notice.

CONCLUSION

For the foregoing reasons, Cox should not be found liable for the allegedly infringing acts of their users.

Respectfully submitted,

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