

No. 23-50162

**United States Court of Appeals
for the Fifth Circuit**

UMG RECORDINGS, INCORPORATED; CAPITOL RECORDS, L.L.C.;
WARNER BROS. RECORDS, INCORPORATED; SONY MUSIC
ENTERTAINMENT; ARISTA RECORDS, L.L.C.; ARISTA MUSIC;
ATLANTIC RECORDING CORPORATION; CAPITOL CHRISTIAN MUSIC
GROUP, INCORPORATED; ELEKTRA ENTERTAINMENT GROUP,
INCORPORATED; FONOVISA, INCORPORATED; FUELED BY RAMEN,
L.L.C.; LAFACE RECORDS, L.L.C.; NONESUCH RECORDS,
INCORPORATED; RHINO ENTERTAINMENT COMPANY; ROADRUNNER
RECORDS, INCORPORATED; ROC-A-FELLA RECORDS, L.L.C.; TOOTH
& NAIL, L.L.C.; ZOMBA RECORDING, L.L.C.,

Plaintiffs—Appellees/Cross-Appellants,

versus

GRANDE COMMUNICATIONS NETWORKS, LLC,

Defendant—Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:17-CV-000365-DAE

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No. 23-50162

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may exercise possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument would assist the Court in resolving the complex issues arising from a three-week trial in which a jury found Grande secondarily liable for infringing 1,403 copyrighted songs and awarded \$46.7 million in statutory damages, on grounds that Grande provided internet service to the direct infringers.

This appeal presents important questions of first impression in this Circuit about whether, and in what circumstances, an internet service provider may be held secondarily liable for the conduct of users of its service. Is purposeful, culpable conduct required? Is it enough to show that an internet service provider failed to terminate the internet service of accused bad actors? Do the district court's legal rulings run afoul of U.S. Supreme Court case law controlling the legal standard for contributory liability and the evidence required to meet that standard? The answer to these questions must also account for the U.S. Supreme Court's June 2023 decision in *Twitter, Inc. v. Taamneh*, [598 U.S. 471, 499](#) (2023), holding that online service providers cannot be held secondarily liable merely for failing to stop known wrongdoers from using their services.

Oral argument would help the Court tackle these issues.

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JURISDICTIONAL STATEMENT

- A. The district court had subject matter jurisdiction under [28 U.S.C. § 1331](#) (federal question) and [28 U.S.C. § 1338\(a\)](#) (copyright actions).
- B. This Court has jurisdiction over this appeal from a final judgment under [28 U.S.C. § 1291](#).
- C. The district court entered a final judgment on January 30, 2023. [ROA.10033](#). Grande filed a renewed JMOL and alternate new-trial motion on February 27, 2023 ([ROA.10552](#)) and a notice of appeal on March 1, 2023. [ROA.10569](#). After the district court denied Grande's post-judgment motion on May 11, 2023 ([ROA.11015](#)), Grande amended its notice of appeal on June 8, 2023 to add that ruling. [ROA.11056](#).
- D. This appeal is from a final order or judgment that disposes of all parties' claims.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The U.S. Supreme Court has approved two bases for contributory copyright infringement liability: (1) distributing a commodity used solely for infringement, and (2) inducing others to commit infringement. Here, Grande did not shut off internet access to accused copyright infringers. Did the district court err in ruling that Grande could be secondarily liable because it did not take “basic measures” to stop infringement?

2. Regarding the sufficiency of the evidence:

A. Courts have consistently held that online content providers cannot be contributorily liable for infringing use of their services unless they directly and substantially assist the infringing conduct. The evidence at trial showed that Grande merely provided content-neutral internet access to its subscribers, some of whom were accused infringers. Did the district court err in concluding that there was legally sufficient evidence of contributory infringement?

B. Fifth Circuit precedent prohibits a finding of direct copyright infringement without a side-by-side comparison of the copyrighted work and the alleged copy. At trial, the Labels did not introduce into evidence the copyrighted songs allegedly infringed by Grande’s

subscribers, and so the jury had no opportunity to compare any copyrighted work to any alleged copy. Did the district court err in concluding there was legally sufficient evidence of copying?

3. Under [17 U.S.C. § 504\(c\)](#), statutory damages for copyright infringement are assessed on a per-work basis, and “all the parts of a compilation . . . constitute one work.” Many of the 1,403 songs in suit were registered in groups with the Copyright Office as compilations—*i.e.*, musical albums. Did the district court err in granting judgment as a matter of law that all 1,403 songs were eligible for a separate award of statutory damages?

STATEMENT OF THE CASE

A. Facts relevant to issues presented for review

1. The parties

Defendant-Appellant Grande is a Texas internet, cable TV, and landline phone provider.¹ As an internet service provider (“ISP”), Grande provides internet service to its subscribers for a flat monthly fee. Grande does not and cannot monitor what internet users do online. [ROA.12858-74](#).

Plaintiffs-Appellees (the “Labels”) are the three major U.S. record labels: UMG Recordings, Inc. (a/k/a Universal), Sony Music Entertainment, and Warner Brothers Records, Inc., along with various affiliated entities. Together, the Labels own 80% of the U.S. market for recorded music. [ROA.11594-95](#). The Labels coordinate litigation through their trade group, the Recording Industry Association of America (“RIAA”). [ROA.3008](#).

2. Background of ISP copyright litigation

In 2010, a California start-up called Rightscorp began working on ways to monetize online piracy of music and video content. [ROA.11736-38](#). Rightscorp developed software designed to identify unauthorized file sharing over BitTorrent

¹ In 2022, years after this case was filed, Grande and several other ISPs under common ownership rebranded as Astound Broadband. Grande remains a distinct legal entity.

and similar peer-to-peer networks.² [ROA.11736-38](#). Rightscorp’s software would then send automated emails—“notices”—to the BitTorrent user’s ISP. [ROA.11752, 349190](#). These emails asked the ISP to forward the notice to the relevant subscriber and included a link for the subscriber to contact Rightscorp and settle the claim for a small sum, say \$30. [ROA.11853, 349190](#).

Rightscorp marketed its services to rightsholders and proposed to split the proceeds of any settlements with them. *See, e.g.,* [ROA.349260](#). Shortly after launching, Rightscorp began working with BMG, a major music publishing company, sending emails to ISPs around the country accusing their subscribers of infringing the copyrights in BMG’s portfolio. [ROA.11738, 349190](#).

In 2014, BMG partnered with Rightscorp to sue an ISP, Cox Communications, for contributory and vicarious copyright infringement. The theory of BMG’s case was that Cox was secondarily liable for its subscribers’ music piracy because it continued providing internet access to the subscribers Rightscorp accused of copyright infringement. Complaint (ECF No. 1), *BMG Rights Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, No. 1:14-cv-1611 (E.D. Va.).

² Describing a file-sharing network as “peer-to-peer” means that the computers participating in the network connect with one another directly, without any central hub. [ROA.11739-40](#). This means that the network is decentralized and cannot be shut down at a single source. [ROA.12035-36](#).

In 2016, a jury returned a verdict in BMG’s favor, awarding \$25 million in statutory damages. The Fourth Circuit reversed, finding that the district court erred in instructing the jury that Cox could be liable if it “knew or should have known” of infringement on its network. *BMG Rights Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, [881 F.3d 307, 310](#) (4th Cir. 2018). The case settled before retrial.

3. The Labels’ agreement with Rightscorp

After the *Cox* jury verdict but before the Fourth Circuit’s reversal, RIAA bought copyright notices from Rightscorp so that the Labels could pursue a copycat case against Grande. [ROA.13448-49, 349321](#). Rightscorp never sent copyright complaints to Grande on the Labels’ behalf.³ However, BMG and the Labels frequently have overlapping rights. For example, Rightscorp had sent notices to Grande regarding the Aerosmith song “Angel” because BMG (presumably) owns the composition copyright to that song. [ROA.349190](#). Universal owns Aerosmith’s studio recording of that song. [ROA.339110](#). RIAA therefore decided to buy the notices Rightscorp sent for BMG and repurpose them in a Label-led lawsuit. RIAA agreed to pay Rightscorp \$400,000 for the automated emails Rightscorp had sent to

³ Rightscorp pitched its services to RIAA, but RIAA decided not to hire them after analyzing their system. [ROA.13153-57](#).

Grande and agreed to pay Rightscorp hourly fees for deposition and trial testimony. [ROA.349321-22](#).

A few months later, the Labels filed suit against Grande and its management company, Patriot Media Consulting, in the Western District of Texas, asserting claims for contributory and vicarious copyright infringement. [ROA.98](#).

B. Relevant procedural history

At the pleading stage, the district court dismissed the Labels' vicarious infringement claim against Grande and both claims against Patriot Media under Rule 12, leaving only the Labels' contributory infringement claim. [ROA.984](#).

Grande's defense under the Digital Millennium Copyright Act ("DMCA") safe harbor, [17 U.S.C. § 512\(a\)](#), was also resolved before trial. [ROA.1017](#). Section 512(a) provides online "service providers" with a defense to copyright infringement claims if, among other things, they enforce a policy for terminating the accounts of "repeat infringers" in "appropriate circumstances." [17 U.S.C. § 512\(a\), \(i\)](#). Grande did not decide to implement a DMCA termination policy until after the verdict in *Cox*, and it then took additional time for Grande to develop a DMCA process. As a result, Grande did not actually begin terminating subscriber accounts pursuant to its DMCA policy until June 2017, after the lawsuit was filed.

[ROA.12457](#). On that basis, the district court granted summary judgment that Grande was not eligible for the section 512(a) safe harbor. [ROA.6430](#).

Grande moved for summary judgment on various grounds, including that there was no evidence that the Labels owned over 350 of the registered copyrights in suit. [ROA.3054-55](#). Although discovery had already closed, the Labels then produced thousands of additional pages of ownership evidence. Grande moved to exclude this evidence as untimely and prejudicial, given that Grande had devoted significant time and money to uncovering these defects by analyzing the ownership evidence timely produced in discovery. [ROA.3497](#). The court not only permitted the late production but also chastised Grande for not alerting the Labels about the deficiencies in their evidence before the close of discovery. [ROA.6049-50](#).

The district court then denied Grande's summary-judgment motion, and it also denied the Labels' summary-judgment motion on liability. [ROA.6430](#). Nevertheless, before trial, the district court concluded that it had actually granted summary judgment for the Labels on copyright ownership and therefore precluded Grande from disputing the issue at trial. [ROA.8198](#).

C. Evidence at trial

At trial, the Labels built their case on evidence that Rightscorp had sent over 1.3 million automated email complaints to Grande since 2010, and that Grande did

not terminate the internet service of any of the accused infringers. [ROA.11530-31](#), [12456-57](#), [12489](#), [12733-34](#). The great majority of these emails—about 75%—concerned works not in suit and/or alleged infringement outside the damages period. [ROA.12621](#), [12765](#).

The Labels knew that a key part of Grande’s defense would be attacking the accuracy and reliability of Rightscorp’s notices. Rightscorp’s emails did not contain any actual evidence of copyright infringement. *See, e.g.*, [ROA.349189-204](#). Rightscorp cannot detect the transmission of files over BitTorrent; at best, Rightscorp can determine that a BitTorrent user is offering to share a particular file, but it cannot tell how or when the user obtained the file or whether the user shared any portion of it with another BitTorrent user. [ROA.11850-53](#).

At trial, it emerged that Rightscorp had deleted—seemingly intentionally— all of the data (“bit fields”⁴) it collected from Grande internet users in connection with its “notices of infringement.” [ROA.12207](#), [12220-21](#), [13252-53](#), [13255-56](#). As a result, to substantiate Rightscorp’s email accusations, the Labels were left with (1) the fact that Rightscorp had sent the email in the first place, and (2) a collection of approximately 60,000 files Rightscorp claimed to have downloaded from Grande

⁴ In the BitTorrent protocol, a user’s bitfield shows how much of a given file a user possesses on their computer. [ROA.11763](#). According to Rightscorp, it relied on bitfield data in deciding whether to accuse a given BitTorrent user of offering to share copyrighted content. [ROA.11765](#).

users after sending a complaint. [ROA.11689-90](#), [13263-68](#). This 60,000 figure was inflated by the inclusion of files not claimed to be copies of works in suit and by Rightscorp repeatedly downloading the same file from the same user. [ROA.13263-68](#). In fact, there were fewer than 4,000 unique downloads of songs at issue in the lawsuit. [ROA.13263-68](#). Rightscorp did not maintain records of how often it tried and failed to download a file from an accused infringer, so it was impossible to know if the downloaded files supported or undermined the reliability of Rightscorp's detections. [ROA.11875-78](#), [12179-80](#), [13261-63](#).

To counter these bad facts, the Labels were allowed, over Grande's objections, to introduce the fact that Cox Communications was previously found contributorily liable for copyright infringement based on notices sent by Rightscorp. This became the centerpiece of the Labels' case. *See, e.g.*, [ROA.11538-41](#), [11548](#), [11551](#) (six mentions of the *Cox* verdict in the Labels' opening statement). The district court refused tell the jury—or let Grande tell the jury—that the *Cox* verdict was reversed on appeal. [ROA.12418-23](#), [12451-52](#).

The district court also permitted the Labels to introduce evidence of Grande's failed DMCA safe harbor defense, even though there was no DMCA-related issue left for trial and the DMCA expressly prohibits allowing a failed safe harbor defense to “bear adversely” on liability. [ROA.11490-91](#), [11533](#), [12353-65](#), [12652-54](#); *see also*

17 U.S.C. § 512(l). The Labels presented Grande’s failure to qualify for the safe harbor as tantamount to liability. *See, e.g.,* ROA.11533 (in opening, telling the jury that the safe harbor was a “get-out-of-jail-free card” that Grande chose not to take advantage of). The district court’s ruling also allowed the Labels to hammer away at the fact that Grande began terminating accused copyright infringers after the lawsuit was filed in April 2017, inviting the jury to see that as an admission that Grande should have been doing so all along.⁵ *See, e.g.,* ROA.12456-57, 12489, 12733-34.

At the conclusion of the 14-day trial, the jury returned a verdict finding Grande contributorily liable for infringement of all 1,403 sound recordings in suit. The jury also found that Grande’s infringement was willful. The jury awarded \$46,766,200 in statutory damages, or \$33,333 per song. *See* 17 U.S.C. § 504(c)(1-2) (statutory damages are up to \$30,000 per work, or up to \$150,000 per work if the infringement was willful).

⁵ The Labels also repeatedly suggested that Grande had been terminating accused infringers before 2010 and that Grande changed its policy to make more money. ROA.11523-25, 13530, 11536-37, 11540, 11546, 12333, 12391-93. In fact, the evidence showed that during this period, Grande had only occasionally suspended service to subscribers, on an ad hoc basis, when it received copyright complaints about their account. ROA.12391-95. The 2010 policy change—which replaced ad hoc suspensions with a dedicated program of sending mailings to subscribers notifying them of copyright complaints—was implemented by legal counsel for Grande’s former owner, and there was no evidence at trial regarding the motivation. ROA.11524, 12397-98.

D. Rulings presented for review

This appeal challenges the district court's rulings reflected in (1) the order denying Grande's renewed motion for judgment as a matter of law or a new trial ([ROA.11015](#)), including its reference back to legal questions earlier resolved at summary judgment ([ROA.6378](#)), (2) the jury instructions ([ROA.9907](#)), and (3) the final judgment ([ROA.10033](#)).

SUMMARY OF THE ARGUMENT

A jury found Grande liable for contributory infringement of 1,403 copyrighted songs—all because Grande did not terminate internet service to the accused infringers. The district court paved the way for this verdict by instructing the jury that contributory liability is appropriate if Grande failed to take “basic measures” to terminate accused infringers’ “access to infringing sound recordings.” In effect, the district court decided that failing to terminate service equals contributory liability, and then it told the jury what verdict to reach.

The district court was wrong. Instead of submitting the case to the jury, the district court should have granted judgment as a matter of law for Grande. The Supreme Court has authorized only two forms of contributory liability: (1) distributing a product or service “good for nothing else but infringement”; and (2) inducing infringement, as shown by “clear expression or other affirmative steps taken to foster infringement.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 932, 936–37 (2005). The district court incorrectly—and improvidently—fashioned a third, under which internet service providers are now obligated to cut off internet service to entire households based on accusations of copyright infringement.

The district court also should have granted judgment as a matter of law because the Labels' evidence was legally insufficient. There was no evidence that Grande's contribution to any infringement was material. Grande merely provided content-neutral internet access. This falls short of the purposeful, culpable conduct that *Grokster* requires. *Cf. Twitter, Inc. v. Taamneh*, 598 U.S. 471, 499 (2023) (“[W]e generally do not think that internet or cell service providers incur culpability merely for providing their services to the public writ large.”).

The Labels' evidence fell short in another fundamental way: they inexplicably failed to introduce their copyrighted songs into evidence. As a result, the jury could not compare any copyrighted work to any alleged copy. This means there was no legally evidentiary sufficient basis for the jury to find direct infringement. “[T]he law of this circuit prohibits finding copyright infringement without a side-by-side comparison of the two works.” *Bridgmon v. Array Sys. Corp.*, 325 F.3d 572, 577 (5th Cir. 2003).

The judgment is also defective because of an error in the damages calculation. The district court determined that each of the 1,403 songs in suit was eligible for a separate award of statutory damages, even though many of the songs were registered together as compilations—i.e., albums. Section 504(c)(1) of Title 17 states in plain

language that “all the parts of a compilation . . . constitute one work” for purposes of statutory damages. Alone, this error requires a dramatic reduction in damages.

Because there is insufficient evidence to sustain the verdict of contributory liability (under either a correct jury instruction or the instruction as given), the Court should vacate the district court’s judgment and enter judgment that the Labels take nothing. In the alternative, the Court should remand the case for a new trial. In the alternative to that, the judgment should be modified—or vacated and remanded with instructions for the district court to modify it—to correct the district court’s error in the calculation of statutory damages.

STANDARDS OF REVIEW

A. Legal conclusions are reviewed de novo.

In Section I, Grande challenges the district court’s legal rulings; they are reviewed de novo. *Janvey v. Dillon Gage, Inc. of Dallas*, [856 F.3d 377, 384](#) (5th Cir. 2017) (“We review a district court’s denial of a motion for judgment as a matter of law de novo, applying the same standards as the district court.”); *accord Reeves v. Sanderson Plumbing Prods., Inc.*, [530 U.S. 133, 149](#) (2000) (“[T]he standard for granting summary judgment mirrors the standard for judgment as a matter of law, such that the inquiry under each is the same.”) (cleaned up⁶).

Because this Court, in reviewing those legal rulings, applies the same standard as the district court, Grande pauses to address the district court’s application of the wrong standard in analyzing and ruling on Grande’s renewed motion for JMOL.

In denying Grande’s motion, the district court said it was “improper” for Grande to have re-urged earlier-resolved legal arguments. [ROA.11020](#). And, instead of merely denying the renewed motion for JMOL or indicating that the court had not changed its mind about the law, the district court downgraded Grande’s JMOL request on the basis of these renewed legal arguments, treating them instead as

⁶ The parenthetical “cleaned up” indicates that internal quotation marks, alterations, or citations have been omitted from the quoted passage. *See United States v. Reyes*, [866 F.3d 316, 321](#) (5th Cir. 2017).

requests only for a new trial. [ROA.11020](#). The district court then evaluated the challenged legal conclusions, but only for “manifest error of law.” [ROA.11020-21](#); *see also, e.g.*, [ROA.11026](#), [11036](#), [11044](#).

To be clear, Grande fully preserved those legal issues—not merely as new-trial complaints—but also as warranting entry of judgment as a matter of law. In fact, in insisting that Grande had done something “improper” by re-urging legal arguments in its renewed motion for JMOL, the Labels catalogued the court’s prior summary judgment rulings that had “already considered and rejected” Grande’s legal arguments. [ROA.10881-85](#).

There was nothing improper about Grande’s re-urging legal arguments in its renewed motion for JMOL. Indeed, then-prevailing Fifth Circuit law required Grande to renew even purely legal issues in its Rule 50(b) motion to preserve them and to confer jurisdiction on this Court to address them. *See, e.g., Feld Motor Sports, Inc. v. Traxxas, L.P.*, [861 F.3d 591, 595–96 & n.4](#) (5th Cir. 2017), *abrogated by Dupree v. Younger*, [598 U.S. 729, 733 n.2, 736](#) (2023). The U.S. Supreme Court did not issue *Dupree*—holding that pure questions of law resolved at summary judgment need not be renewed post-trial—until two weeks after the district court’s order denying Grande’s Rule 50(b) motion. *Dupree*, [598 U.S. at 733](#).

Yet, even after *Dupree*, the district court’s criticism of Grande for re-urging legal arguments does not hold up. [ROA.11020](#). *Dupree* acknowledges as a “fair concern” that “the line between factual and legal questions can be vexing.” [598 U.S. at 737](#). So, *Dupree* says, “it would not be surprising if ‘prudent counsel . . . make sure to renew their arguments in a Rule 50 motion’ out of an abundance of caution.” *Id.* at 738 (quoting *Feld v. Feld*, [688 F.3d 779, 783](#) (D.C. Cir. 2012)). That is precisely what Grande did.

Again, as the district court correctly observed, Grande fully preserved its challenges to the district court’s erroneous legal conclusions. [ROA.11020](#). Regardless of the standard the district court used in ruling on the questions of law Grande re-urged in its renewed motion for JMOL, *see* [ROA.11020-21](#), this Court’s review of the district court’s legal conclusions is plenary. *GE Cap. Com., Inc. v. Worthington Nat’l Bank*, [754 F.3d 297, 302](#) (5th Cir. 2014).

B. The district court’s related charge error is reviewed for abuse of discretion, with underlying conclusions of law reviewed de novo.

The district court’s erroneous view of the law was replicated in the jury charge. “Jury instructions are reviewed for abuse of discretion.” *Janvey*, [856 F.3d at 388](#). While the scope of review requires the Court to consider the charge as a whole, *Mid-Continent Cas. Co. v. Petroleum Sols., Inc.*, [917 F.3d 352, 357](#) (5th Cir. 2019), “[t]he abuse-of-discretion standard includes review to determine that the

discretion was not guided by erroneous legal conclusions.” *Koon v. United States*, 518 U.S. 81, 100 (1996). “A district court by definition abuses its discretion when it makes an error of law.” *Id.* Thus, when a challenged jury instruction hinges on a question of law, review is de novo. *GE Cap. Com.*, 754 F.3d at 302.

C. Legal insufficiency of the evidence is reviewed de novo.

In Section II, Grande challenges the legal sufficiency of the evidence. *See* ROA.11015-55. The Court “review[s] a district court’s denial of a motion for judgment as a matter of law de novo, applying the same standards as the district court.” *Janvey*, 856 F.3d at 384. “Under Rule 50, a court should render judgment as a matter of law when ‘a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.’” *Reeves*, 530 U.S. at 149 (quoting FED. R. CIV. P. 50(a)).

In reviewing the evidence developed at trial, “the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.” *Id.* (cleaned up).

D. The district court’s legal ruling as to statutory damages is reviewed de novo.

In Section III, Grande challenges the district court’s grant of JMOL on the amount of works eligible for statutory damages. This Court has not decided the

standard for reviewing what constitutes a “work” for statutory damages purposes, but other courts treat it as a mixed question of fact and law subject to de novo review. *See, e.g., VHT, Inc. v. Zillow Grp., Inc.*, [918 F.3d 723, 747](#) (9th Cir. 2019); *Yellow Pages Photos, Inc. v. Ziplocal, LP*, [795 F.3d 1255, 1277](#) (11th Cir. 2015); *Bryant v. Media Right Prods., Inc.*, [603 F.3d 135, 140](#) (2d Cir. 2010). When, as here, legal questions (such as statutory interpretation) predominate, this Court reviews mixed questions of fact and law de novo. *See Beech v. Hercules Drilling Co.*, [691 F.3d 566, 569](#) (5th Cir. 2012).

ARGUMENT

I. The district court’s ruling that Grande can be contributorily liable for providing internet service was erroneous as a matter of law.

The district court should never have allowed the Labels’ contributory infringement claim to go to the jury. Either at the Rule 50 or summary judgment stage, the district court should have rendered judgment as a matter of law for Grande. That is because the Labels’ contributory infringement claim—premised on Grande’s provision of internet service to accused copyright infringers—does not offer a legally valid basis for contributory liability.

The district court also erred when it charged the jury based on the court’s incorrect view of the law. Either legal error warrants reversal.

A. The district court applied the wrong legal standard for contributory infringement.

The district court instructed the jury that Grande is contributorily liable if it “materially contributed to the infringing activity,” and that “[t]his standard is met” if Grande failed to “take basic measures to prevent further damages to copyrighted works.” [ROA.9925](#). That instruction is perhaps not surprising given that the district court told counsel during the charge conference that “I could almost rule as a matter of law” that this standard is satisfied because “your client intentionally continued to provide internet access” and “didn’t act on” copyright infringement complaints. [ROA.13381-82](#). But that gets the law exactly backwards.

As Grande explains, the district court’s expansive view of contributory liability cannot be reconciled with the U.S. Supreme Court’s decisions in *Sony* and *Grokster*. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439 (1984); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 932 (2005). In fact, the Supreme Court’s precedents make clear that Grande’s conduct—providing internet service, which has substantial noninfringing uses—cannot support liability as a matter of law.

1. The district court’s expansive view of contributory liability cannot be reconciled with controlling Supreme Court precedent.

The Supreme Court has recognized two—and only two—types of contributory copyright infringement. The first requires proof that the defendant distributed a product or service without any commercially significant, noninfringing use. *Grokster*, 545 U.S. at 932. The second requires proof of “clear expression or other affirmative steps taken to foster infringement” by the defendant. *Id.* at 936–37. Neither is applicable here.

a. Type 1: Distributing a commodity used solely for infringement

Contributory liability exists when a defendant distributes a product or service that is “good for nothing else but infringement.” *Grokster*, 545 U.S. at 932 (cleaned up). In that circumstance, “there is no legitimate public interest in [the product’s]

unlicensed availability, and there is no injustice in presuming or imputing an intent to infringe.” *Id.*

Conversely, mere sale of a product used for infringement “does not constitute contributory infringement if the product is . . . capable of substantial noninfringing uses.” *Sony*, [464 U.S. at 442](#). This mirrors the standard for contributory liability under patent law. Contributory liability for patent infringement “is confined to the knowing sale of a component especially made for use in connection with a particular patent.” *Id.* at 439–40 (noting that “it is appropriate to refer” to patent law cases in this context “because of the historic kinship between patent law and copyright law”); *see also* [35 U.S.C. § 271\(c\)](#) (distributing “a staple article or commodity of commerce suitable for substantial noninfringing use” is not contributory infringement).

Once the Court determined that the staple-article rule is a part of the copyright law, the outcome in *Sony* was straightforward. The defendants marketed and sold Betamax video tape recorders that consumers used to record copyrighted television programming. *Sony*, [464 U.S. at 422–24](#). The Court identified at least one “commercially significant” noninfringing use of the Betamax: recording programs for personal viewing (a/k/a “time-shifting”). *See, e.g., id.* at 442. Thus, because the Betamax was “capable of substantial noninfringing uses,” the

defendant’s “sale of such equipment to the general public [did] not constitute contributory infringement.” *Id.* at 456.

Here, as the district court correctly observed on summary judgment, “[i]t is beyond dispute that the provision of internet services to customers is capable of substantial and commercially significant noninfringing uses.” [ROA.6415](#). “Contributory liability against Grande,” it said, “must therefore be predicated on ‘actively encouraging (or inducing) infringement through specific acts.’” [ROA.6415](#).

b. Type 2: Inducing others to commit infringement

Separate from contributory liability as under patent law, the Supreme Court held in *Grokster* that “[o]ne infringes contributorily by intentionally inducing or encouraging direct infringement.” [545 U.S. at 930](#) (cleaned up); *see also id.* at 942 (Ginsburg, J., concurring) (“Liability [for contributory copyright infringement] under our jurisprudence may be predicated on actively encouraging (or inducing) infringement through specific acts (as the Court’s opinion develops) or on distributing a product [that] distributees use to infringe copyrights, if the product is not capable of ‘substantial’ or ‘commercially significant’ noninfringing uses. While the two categories overlap, they capture different culpable behavior.”).

Inducement liability requires proof of “clear expression or other affirmative steps taken to foster infringement.” *Id.* at 936–37. “The classic instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations.” *Id.* at 937. Because “[t]he inducement rule . . . premises liability on purposeful, culpable expression and conduct,” it “does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.” *Id.*

Grokster was a textbook case of inducement. The defendants distributed peer-to-peer file sharing software used to obtain and share copyrighted music and movie files. *Id.* at 919–22. The defendants promoted their software as a tool for infringement, and they made their money from advertising space, so that “the extent of the software’s use determine[d] the gain to the distributors.” *Id.* at 938–40.

Thus, although the *Grokster* defendants’ software had theoretical noninfringing uses, the “evidence of the distributors’ words going beyond distribution as such **show[ed] a purpose to cause and profit from third-party acts of copyright infringement.**” *Id.* at 941 (emphasis added). As a result, the defendants’ contributory liability was based not on “presuming or imputing fault [from their distribution of file-sharing software]”—which would run afoul of the staple-article rule—“but from inferring a patently illegal objective from statements

and actions showing what that objective was.” *Id.* Put another way, “where evidence goes beyond a product’s characteristics or the knowledge that it may be put to infringing uses, and shows **statements or actions directed to promoting infringement**, *Sony*’s staple-article rule will not preclude liability.” *Id.* at 935 (emphasis added).

Under this standard, Grande cannot be liable. There is no evidence that Grande actively encouraged or induced—through clear expression or affirmative actions—infringement.

c. The district court’s instruction: Material contribution & failure to act

The district court instructed the jury that Grande is contributorily liable if it “materially contributed to the infringing activity,” and that “[t]his standard is met” if Grande failed to “take basic measures to prevent further damages to copyrighted works.” [ROA.9925](#). The instruction posits a third basis for contributory liability that cannot be reconciled with *Sony* and *Grokster*.

Grokster holds that, unless the plaintiff can show that the defendant distributes a product “good for nothing else but infringement,” the plaintiff must show “purposeful, culpable expression and conduct” to prove contributory infringement. [545 U.S. at 932, 937](#). This means “clear expression or other affirmative steps taken

to foster infringement” or “statements or actions directed to promoting infringement.” *Id.* at 935, 936–37.

The district court here ruled that contributory liability could be based on something far less. Under the district court’s view, reflected in its jury instruction, a jury could permissibly find liability even in the absence of affirmative, culpable conduct—“material contribution” to infringement would be enough. [ROA.9925](#); *see also* [ROA.11036](#) (“Grande has at least one simple measure at its disposal—terminating the internet services of repeat infringers—to prevent further damages to copyrighted works.”). That is not the law.

On this score, *Grokster* expressly rejected the notion of liability based on a failure to stop the infringing use of a product or service: “[I]n the absence of other evidence of intent, **a court would be unable to find contributory liability merely based on a failure to take affirmative steps to prevent infringement**, if the device otherwise was capable of substantial noninfringing uses. Such a holding would tread too close to the *Sony* safe harbor.” [545 U.S. at 939 n.12](#) (emphasis added). Instead, *Grokster* said, the plaintiff must prove that the defendant engaged in affirmative, culpable conduct **in addition** to proving that the defendant had knowledge of underlying direct infringement. *Id.* at 937. *Grokster* was clear that “mere knowledge of infringing potential or of actual infringing uses” is not enough. *Id.*

The district court’s embrace of material contribution as a separate basis for contributory liability was based on a misreading of *Grokster*. The district court concluded that “*Grokster* did not abrogate the common law on contributory liability” and therefore relied instead on the Second Circuit’s mention of “material contribution” in a 1971 case, *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159. [ROA.11036-37](#). However, *Grokster* did not leave open the possibility of additional, unspoken “common law” bases for contributory liability. [545 U.S. at 935](#).

Rather, *Grokster* referred to the common law as the specific basis for inducement liability. *Id.* Maybe most telling is that *Grokster* quoted *Gershwin*’s statement that contributory liability exists where one “induces” or “causes” infringement, while **omitting** *Gershwin*’s addition of “or materially contributed to” infringement. *Id.* at 930. Nothing in *Grokster* suggests that “materially contributing” to infringing conduct simply by providing a service used to infringe is or could be an independent basis of contributory liability.

If there were any doubt, the expansive scope of the district court’s rule would put it to rest. If the district court is right that a party can be contributorily liable for copyright infringement merely by “materially contributing” to the conduct—without any purposeful, culpable conduct of its own—then *Grokster* and *Sony* are

meaningless. No copyright plaintiff would ever need to prove inducement of infringement as in *Grokster*—requiring “clear expression or other affirmative steps taken to foster infringement”—if they could simply show material contribution instead. Likewise, the *Sony* safe harbor could not provide meaningful protection from liability if it is inapplicable whenever the defendant provided some “material” portion of the means for someone else to commit copyright infringement.

All told, the judgment against Grande cannot be what the Supreme Court had in mind when it repeatedly emphasized that the copyright laws must not block legitimate commerce. Copyright owners’ rights must be balanced against “the right of others freely to engage in substantially unrelated areas of commerce.” *Sony*, 464 U.S. at 442. *Sony*’s staple-article rule “absolves the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and limits liability to instances of more acute fault than the mere understanding that some of one’s products will be misused.” *Grokster*, 545 U.S. at 932–33. Because imposing liability on Grande represents a stark departure from the Supreme Court’s two principal contributory copyright infringement cases, the judgment against Grande is untenable.

2. The district court’s legal analysis was grounded on inapposite cases from the Ninth Circuit.

The district court concluded that Grande could be contributorily liable if it failed to use “basic measures” to stop infringement. *See* ROA.9925, 11036. That

wrongheaded notion is derived from a line of cases from the Ninth Circuit.⁷ [ROA.11036](#). Those decisions set out a standard used only in cases involving content providers who can readily remove or disable access to specific infringing content—unlike Grande. It is a standard that no other circuit has **acknowledged**, let alone endorsed or adopted.

The “simple measures” or “basic measures”⁸ theory has its roots in the Labels’ case against Napster. *A&M Records, Inc. v. Napster, Inc.*, [239 F.3d 1004](#) (9th Cir. 2001). In the 1990s, Napster operated a popular online network for sharing digital music files, and it distributed free software for accessing and searching that network. *See id.* at 1021. Before filing suit, the Labels notified Napster of specific infringing files available on Napster’s service, but Napster declined to remove them. *Id.* at 1022 n.6. In considering the appropriate liability standard, the Ninth Circuit held that “[i]f a computer system operator learns of specific infringing materials available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement.” *Id.* at 1021–22.

⁷ The district court repeatedly noted that he sits on the Ninth Circuit by designation. [ROA.11482](#), [1190](#), [12076](#), [12924](#), [13413](#).

⁸ Ninth Circuit cases uniformly use the term “simple measures.” The district court used “basic measures” instead because the district court didn’t “like the word ‘simple.’” [ROA.13383](#).

A few years later, the Ninth Circuit added the “simple measures” gloss in *Amazon.com*. There, the plaintiff alleged that Google contributed to infringement by linking internet users to unauthorized copies of the plaintiff’s copyrighted images through Google Image Search. *Perfect 10, Inc. v. Amazon.com, Inc.*, [508 F.3d 1146, 1172](#) (9th Cir. 2007). Recognizing that it may be straightforward for Google to disable links to the infringing images, the Ninth Circuit held that “a computer system operator can be held contributorily liable if it has actual knowledge that specific infringing material is available using its system, and can take **simple measures** to prevent further damage to copyrighted works, yet continues to provide access to infringing works.” *Id.* (emphasis added) (cleaned up).

The common feature of these cases, and their Ninth Circuit progeny, is that the “simple measures” standard has been applied only to defendants who directly control online content. That is because those defendants can readily remove or disable access to specific infringing content. For instance, in *Napster*, the defendant’s software enabled users to “find and download the music they want,” and the defendant had the ability to remove access to specific files on request. [239 F.3d at 1021–22 & n.6](#). In *Amazon.com*, Google Image Search provided links to the plaintiff’s infringing content that Google could have disabled. [508 F.3d at 1172–73](#). In *Giganews*, the defendants operated online bulletin boards that distributed

infringing content provided by their users. *Perfect 10, Inc. v. Giganews, Inc.*, [847 F.3d 657, 663–64, 671–72](#) (9th Cir. 2017). And in *VHT*, the defendant operated a real estate website that hosted and displayed infringing copies of the plaintiff’s photographs. *VHT, Inc. v. Zillow Grp., Inc.*, [918 F.3d 723, 745](#) (9th Cir. 2019).

Grande is different. Unlike these defendants, Grande does not have direct control over what content is available on the internet. Grande merely provides content-neutral access to the internet as a whole—it does not operate or host websites, and it does not maintain any user-generated content. [ROA.12853-56](#). The evidence was undisputed that Grande does not in any way attempt to monitor what internet users are doing online. [ROA.12862](#). Grande does not know what websites users visit, what content they download, or what shows or movies they stream. [ROA.12858-74](#). As a result, the district court’s “basic measures” instruction is facially inapplicable to Grande’s conduct because there was no evidence Grande does anything that could properly be characterized as “providing access to infringing sound recordings.” The district court’s instruction confused and misled the jury.

Even the Ninth Circuit does not apply the “simple measures” framework to defendants like Grande. The clearest example is *Cobbler Nevada, LLC v. Gonzales*. In *Cobbler*, the plaintiff asserted contributory infringement claims against the operator of an adult foster care home who allegedly allowed third parties to use his

business’s internet connection to share copyrighted movies. 901 F.3d 1142, 1144–45 (9th Cir. 2018). In other words, the defendant was alleged to be contributorily liable because he “continued to allow infringing activity” after receiving “over 400 notices of infringing activity” on his network—just like Grande here. *See id.* at 1148.

The Ninth Circuit affirmed the district court’s dismissal under *Grokster*, finding that the *Cobbler* plaintiff had failed to allege that the defendant “actively encouraged or induced infringement through specific acts,” and that “[p]roviding internet access can hardly be said to be distributing a product or service that is not capable of substantial or commercially significant noninfringing uses.” *Id.* at 1148–49 (cleaned up). The Ninth Circuit did not even mention “simple measures.” *See generally id.* And for good reason: only a defendant with direct control over specific infringing content could conceivably have “simple measures” available to stop further direct infringement. *See also Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 797 (9th Cir. 2007) (“simple measures” standard did not apply to defendant credit card companies that processed infringing transactions).

There is no room to argue that liability based on a failure to take “simple measures” to stop infringement is compatible with *Grokster*. 545 U.S. at 935, 936–37. The Ninth Circuit has made clear that the “simple measures” standard is an articulation of what constitutes “material contribution,” and that it is separate and

distinct from the contributory liability standards discussed in *Grokster*. See *VHT*, [918 F.3d at 745–46](#) (addressing evidence of material contribution/simple measures and inducement separately); *Visa*, [494 F.3d at 801–02](#) (“simple measures” standard “is read more naturally as a test for ‘material contribution’ than as a test for ‘inducement’”).

And, finally, it was error to apply the “simple measures” standard to Grande for another reason. Under *Amazon.com*, an online content provider is contributorily liable for failing to take simple measures to stop infringement only if it first has “**actual knowledge**” of the infringing activity. [508 F.3d at 1172](#) (emphasis added). But the district court’s contributory infringement instruction did not require proof that Grande had actual knowledge of infringement—it alternatively permitted the Labels to show that Grande was willfully blind to infringement. [ROA.9924-25](#). Thus, the instruction improperly allowed the jury to find that Grande was contributorily liable for failing to stop infringement of which it had no actual knowledge. See *VHT*, [918 F.3d at 745](#) (no liability for failing to use simple measures to stop infringement where plaintiff failed to prove actual knowledge of the direct infringement). As a result, the district court’s instruction misstated and misapplied the “simple measures” standard on which it relied. See [ROA.11036](#).

In sum, the “basic measures” instruction given by the district court (1) is based on inapposite case law from the Ninth Circuit and (2) would be erroneous even if this Court were to endorse and adopt the Ninth Circuit’s outlier stance on contributory infringement.

3. This summer, the U.S. Supreme Court confirmed that merely providing internet service is not culpable conduct.

One week after the district court denied Grande’s renewed motion for JMOL, the Supreme Court addressed the question of what conduct is sufficiently culpable to support secondary civil liability for another’s wrongdoing. *Twitter, Inc. v. Taamneh*, [598 U.S. 471](#) (2023). *Twitter* holds that allowing and profiting from bad actors’ use of social media platforms is not affirmative, culpable conduct. *Id.* at 502–03. *Twitter* is particularly instructive because it evaluates the culpability of companies far more directly involved in online activity than an internet service provider like Grande. And *Twitter* confirms that the district court here—which mistakenly believed its views were supported by the common law—erred in expanding contributory liability beyond the two types the Supreme Court approved in *Grokster* and *Sony*.

In *Twitter*, the plaintiffs sued Twitter, Facebook, and Google (YouTube) for aiding and abetting acts of terrorism by knowingly allowing ISIS to use their social media platforms to recruit new members and raise funds. *See id.* at 478. In

considering whether the plaintiffs had stated a claim, the Court began by looking to the common law of aiding and abetting (*id.* at 484–85), just as it did in *Grokster*. [545 U.S. at 936](#). As in *Grokster*, the Court concluded that the fundamental question was whether the defendant’s conduct was sufficiently purposeful and culpable. *Twitter*, [598 U.S. at 489–91](#); *Grokster*, [545 U.S. at 936–37](#).

The pleaded allegations in *Twitter* are illuminating. There, the plaintiffs alleged that Twitter, Facebook, and Google allowed ISIS to upload videos and messages for public display, and that they actively delivered ISIS’s posts to other users based on those users’ information and use history. [596 U.S. at 481](#). The social media companies failed to remove known ISIS accounts, instead letting ISIS benefit from the companies’ recommendation algorithms “to connect with the broader public, fundraise, and radicalize new recruits.” *Id.* at 481–82. In turn, the companies directly profited from advertisements placed on ISIS’s posts, and Google even shared advertising revenue with ISIS based on the popularity of its videos. *Id.*

Even then, the Supreme Court deemed these facts insufficient to show purposeful, culpable conduct. The Court rejected the notion that “defendants’ ‘recommendation’ algorithms go beyond passive aid and constitute active, substantial assistance.” *Id.* at 499. Instead, the defendant’s public social media platforms are simply “infrastructure,” and “[o]nce the platform and sorting-tool

algorithms were up and running, defendants at most allegedly stood back and watched.” *Id.*; *see also id.* at 500 (“At bottom, then, the claim here rests less on affirmative misconduct and more on an alleged failure to stop ISIS from using these platforms.”).

Twitter settles that Grande’s conduct here—providing internet infrastructure and failing to terminate accused infringers—is, at worst, merely “passive nonfeasance.” *See id.* at 500. It is not sufficiently purposeful or culpable to support secondary liability. *Id.* On this point, the Supreme Court expressly recognized that **internet service providers like Grande** are even further removed from any unlawful use of their services:

The mere creation of [social media] platforms . . . is not culpable. To be sure, it might be that bad actors like ISIS are able to use platforms like defendants’ for illegal—sometimes terrible—ends. **But the same could be said of cell phones, email, or the internet generally. Yet, we generally do not think that internet or cell service providers incur culpability merely for providing their services to the public writ large.**

Id. at 499 (emphasis added).

Twitter emphasizes that “a strong showing of assistance and scienter” is necessary. *Id.* at 500. It was absent there because the defendant neither (1) encouraged the unlawful acts nor (2) had any affirmative tort duty to stop them. *Id.* at 500–01. Instead, “defendants’ relationship with ISIS and its supporters appears

have been the same as their relationship with their billion-plus other users: **arm’s length, passive, and largely indifferent.**” *Id.* at 500 (emphasis added).

That is precisely the situation here. Grande treated the accused infringers just as it treated its other subscribers: it provided them with the infrastructure to use the internet and nothing else. There is not a single shred of evidence that Grande did anything other than provide internet access to its subscribers, some of whom were accused copyright infringers. There was no evidence that Grande marketed or advertised the use of its internet service for illegal file sharing. There was no evidence that Grande targeted users of file sharing platforms as potential customers. There was no evidence that Grande ever mentioned BitTorrent or any other file sharing platform in marketing. There was no evidence that Grande condoned infringement of the Labels’ works in public or private communications with subscribers. There was no evidence that Grande configured or designed its network to make illegal file sharing faster or more efficient. There was no evidence that Grande provided information about how to use BitTorrent or directed its customers to BitTorrent file sharing software or websites. In sum, there was no “[e]vidence of active steps taken to encourage direct infringement, such as advertising an infringing use or instructing how to engage in an infringing use.” *See Grokster*, [545 U.S. at 935](#) (cleaned up).

4. The Court should render judgment for Grande.

This is a textbook case for the *Sony* safe harbor. The Labels' case was based entirely on evidence that Grande "fail[ed] to take affirmative steps to prevent infringement," and there is no dispute that internet service is "capable of substantial noninfringing uses." *Id.* at 939 n.12. Providing internet service to accused copyright infringers is not affirmative, culpable conduct that supports secondary liability. *See id.*; *see also Sony*, [464 U.S. at 442](#) (copyright law must not impede "the rights of others freely to engage in substantially unrelated areas of commerce" by providing products and services "widely used for legitimate, unobjectionable purposes"). The internet service Grande provides to customers is essential to society and commerce, and it is capable of a multitude of noninfringing uses. *United States v. Sealed Juvenile*, [781 F.3d 747, 756](#) (5th Cir. 2015); *Cobbler*, [901 F.3d at 1149](#).

Without any affirmative, culpable conduct by Grande, holding Grande secondarily liable for its subscribers' conduct is impermissible. As in *Twitter*: "a contrary holding would effectively hold any communication provider liable for any sort of wrongdoing merely for knowing that the wrongdoers were using its services and failing to stop them. That conclusion would run roughshod over the typical limits on tort liability and take aiding and abetting far beyond its essential culpability moorings." [598 U.S. at 503](#).

In light of *Twitter*, the bottom line is that the district court’s denial of Grande’s renewed motion for JMOL cannot stand. This Court should render judgment that Grande is not contributorily liable for the copyright infringement of its subscribers.

B. The district court’s erroneous view of contributory liability was replicated in the jury charge.

The district court’s contributory infringement instruction recited four elements; the fourth—regarding the conduct by Grande necessary to support liability—was reversible error.⁹ For this element, the district court instructed the jury that the Labels had to prove:

Grande induced, caused, or materially contributed to the infringing activity. This standard is met when a defendant can take basic measures to prevent further damages to copyrighted works, yet intentionally continues to provide access to infringing sound recordings.

ROA.9925. Grande objected to the instruction’s inclusion of “material contribution” as a separate basis for contributory liability, and to the second sentence’s assertion that the failure to use “basic measures” to stop infringement is sufficient. ROA.13374, 13383-84. By misstating the law, this instruction allowed the jury to find Grande contributorily liable without proof that satisfied either of the two types of contributory liability that the U.S. Supreme Court has approved: (1)

⁹ The first three elements are the Labels’ ownership of the copyrights, underlying instances of direct infringement, and Grande’s knowledge of infringement. ROA.9924-25.

distributing a commodity used solely for infringement, or (2) inducing infringement, as shown by clear expression or other affirmative steps taken to foster infringement. ROA.9925; Grokster, 545 U.S. at 932.

Under *Grokster*, the jury should have been instructed that the Labels had to prove that Grande intentionally encouraged or induced instances of direct infringement of the works in suit, as shown by statements or actions directed to promoting infringement. *See supra* Section I.A. Because the district court’s instruction authorized liability in the absence of any purposeful, culpable conduct, there is “substantial and ineradicable doubt whether the jury was properly guided in its deliberations.” *Mid-Continent Cas. Co. v. Petrol. Sols., Inc.*, 917 F.3d 352, 357 (5th Cir. 2019) (cleaned up).

So too, by misstating the standard for proving culpable conduct, the district court failed to properly instruct the jury on the staple-article rule, which precluded Grande from pursuing that defense at trial. That too requires reversal. *See Jowers v. Lincoln Elec. Co.*, 617 F.3d 346, 360 (5th Cir. 2010); *Banc One Cap. Partners Corp. v. Kneipper*, 67 F.3d 1187, 1195 (5th Cir. 1995); *Davis v. Avondale Indus., Inc.*, 975 F.2d 169, 175 (5th Cir. 1992)

Thus, even reviewed as charge error, the district court’s legal errors require reversal. If the Court does not render judgment for Grande based on the district

court's error in failing to grant judgment as a matter of law, the Court should reverse and remand for a new trial. Because the jury returned a general verdict, [ROA.10005](#), there is no way to know if the verdict was improperly based on a finding that Grande materially contributed to infringement or failed to use basic measures to stop infringement. See *Rodriguez v. Riddell Sports, Inc.*, [242 F.3d 567, 577](#) (5th Cir. 2001); *Septimus v. Univ. of Houston*, [399 F.3d 601, 608–09](#) (5th Cir. 2005).

II. The jury's finding of contributory infringement is not supported by substantial evidence.

A. There was no legally sufficient evidence that Grande materially contributed to direct infringement.

In denying Grande's renewed motion for JMOL, the district court concluded there was "sufficient evidence for a reasonable jury to find that Grande materially contributed to its users' direct infringement by failing to terminate users after learning of their specific, often repeated infringement."¹⁰ [ROA.11035](#). The district court was wrong.

¹⁰ The district court did not consider whether there was evidence of purposeful, culpable conduct sufficient to overcome the staple-article rule, or otherwise whether the Labels proved that Grande induced or encourage the acts of direct infringement at issue. [ROA.11033-37](#). As discussed in Section I.A., the absence of any such evidence is a separate basis for entering judgment in Grande's favor.

1. The case law shows that Grande did not materially contribute to infringement as a matter of law.

As discussed *supra*, “material contribution” to infringement is not a viable basis for contributory liability under *Grokster*. See *supra* Section I.A. But even if this Court were to adopt the Ninth Circuit’s material contribution framework, as the district court did, the Ninth Circuit’s case law demonstrates that the Labels’ evidence would still be legally insufficient.¹¹

As noted above, *Cobbler* is almost directly on point. The defendant—an adult foster care home operator—was alleged to be contributorily liable because he provided internet access to the direct infringers. [901 F.3d at 1145](#). In dismissing the plaintiff’s claims, the Ninth Circuit applied exactly the same reading of *Grokster* and *Sony* as in Section I.A.1—identifying “two strands” of contributory liability—and concluded the defendant could not be liable because (1) there were no allegations of any “clear expression” or “affirmative steps to foster the infringement”; and (2) “[p]roviding internet access can hardly be said to be distributing a product or service that is not capable of substantial or commercially significant noninfringing uses.” *Id.* at 1148–49 (cleaned up).

¹¹ There is no Fifth Circuit precedent analyzing material contribution as a separate basis for contributory copyright infringement liability or discussing what evidence might be necessary to meet that standard.

There is no principled basis for distinguishing *Cobbler*, as the district court did, on grounds that the defendant was an individual subscriber and not the internet service provider. *See* [ROA.6416-17](#). In *Cobbler*, like here, the conduct alleged to be contributory infringement was the provision of internet access with knowledge that it would be used for infringement. [901 F.3d at 1145–46](#). The *Cobbler* plaintiff alleged that the defendant failed to “secure, police and protect” his internet connection, which the court found insufficient because “a failure to take affirmative steps to prevent infringement alone cannot trigger liability.” *Id.* at 1146, 1148–49 (cleaned up). That is precisely the legal and factual situation here: the jury found Grande liable based on evidence that Grande failed to take affirmative steps (“basic measures”) to stop internet users from infringing the Labels’ copyrights.

Other Ninth Circuit cases on “material contribution” reinforce the conclusion that the evidence against Grande was legally insufficient. In these cases, conduct far more closely connected to the infringement was found insufficient to support secondary liability. For example, in *VHT*, the court held that hosting infringing photos on a website was not material contribution. [918 F.3d at 744–45](#). At trial, the jury returned a verdict finding Zillow contributorily liable for infringement of the plaintiff’s copyrights in various photos displayed on Zillow’s real estate website. *Id.* The district court granted JMOL for Zillow. *Id.* In affirming, the Ninth

Circuit held that Zillow lacked “simple measures” to stop the infringement because it could not readily identify and remove the infringing photos. *Id.* at 745. Notably, the court rejected the notion that Zillow was obligated to seek out that information, or that Zillow should have employed available technology to identify copyrighted photos. *See id.*

Similarly, in *Giganews*, the court held that operating an online peer-to-peer messaging service (Usenet) that distributed unauthorized copies of copyrighted photos was not material contribution. [847 F.3d at 671–72](#). Although the plaintiff sent “takedown notices” to the defendant asking it to remove the infringing photos, the evidence showed that it was “onerous and unreasonably complicated” for the defendant to locate the infringing content. *Id.*

So too here. There was no way for Grande to locate the infringing content at all. It was not a matter of it being difficult or complicated for Grande to do—it was **impossible**. [ROA.12871-72](#). Grande cannot access its users’ internet-connected devices to see what content they possess or what software they are using. [ROA.12862-73](#). Grande has no way to identify and observe infringing file sharing traffic over its network, either in real-time or historically. [ROA.12862-73](#). As a practical matter, it would be inconceivable for Grande to store traffic on its network for later review simply due to the volume, and most internet traffic is encrypted

anyway. [ROA.12862-68](#). In short, Grande had no “simple measures” to stop activity it was powerless even to identify.

Visa likewise shows that Grande’s provision of internet access did not “materially” contribute to any unauthorized file sharing of the Labels’ songs. There, the Ninth Circuit held that credit card companies did not materially contribute to infringement when they processed online payments for infringing photographs. *Visa*, [494 F.3d at 796, 799–800](#). The court contrasted the plaintiff’s allegations with the facts in its prior decisions in *Fonovisa* and *Napster*, involving a swap meet operator and distributor of file sharing software, respectively. *See id.* at 798–800. The defendants in those cases were contributorily liable because they “increased the level of infringement by **providing a centralized place, whether physical or virtual, where infringing works could be collected, sorted, found, and bought, sold, or exchanged.**” *Id.* at 799 (emphasis added). In *Visa*, in contrast, “the websites [offering the infringing photos for sale were] the site of the infringement, not defendants’ payment networks.” *Id.* (cleaned up).

The same is true here: Grande does not provide or control the “site of the infringement.” *Id.* The direct infringement at issue—the sharing of copyrighted music files over BitTorrent—takes place through the peer-to-peer networks of interconnected computers running BitTorrent software. [ROA.12040-46](#). These

peer-to-peer networks are facilitated by, among others, the websites that distribute BitTorrent software, the websites that offer torrent files for download (which in turn allow users to obtain specific content from other peers), the tracker websites that facilitate communication between peers, and the website hosting companies that make all of that possible. See [ROA.12040-46](#). There was no evidence at trial that Grande has control over any of those persons or companies. Accordingly, the Labels failed to prove material contribution as a matter of law. *Visa*, [494 F.3d at 799–800](#); see also *David v. CBS Interactive Inc.*, No. 2:11-cv-9437, [2012 WL 12884914](#), at *4 (C.D. Cal. July 13, 2012) (operating a website that offers peer-to-peer file sharing software for download is not material contribution under Ninth Circuit precedent because the software “was not developed by Defendants, is not maintained by them, and is accessible elsewhere on the internet”).

2. The Labels failed to present legally sufficient evidence that Grande’s contribution to any infringement was *material*.

Under the Ninth Circuit’s approach, “[m]aterial contribution turns on whether the activity in question ‘substantially assists’ direct infringement.” *Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, [658 F.3d 936, 943](#) (9th Cir. 2011). That requires a “direct connection” between Grande and the infringing conduct. *Visa*, [494 F.3d at 796](#).

At trial, the Labels did not present any evidence of Grande’s qualitative or quantitative contribution to the amount or type of direct infringement of the Labels’ works. There was no evidence that users of Grande’s service infringed the Labels’ copyrights more than the subscribers of other ISPs. There was no evidence that Grande’s policies or practices had any impact on the number of the Labels’ works available over BitTorrent, or on the number of times the works in suit were distributed to third parties. The Labels did not offer evidence of any additional sales they would have made, or revenues they would have earned, if Grande had terminated the internet service of the accused infringers.

Instead, the Labels focused on evidence and issues that had virtually nothing to do with showing that Grande materially assisted any direct infringer. The principal focus of the Labels’ case was Grande’s failure to qualify for the DMCA safe harbor—a topic which did not have bear on any liability or damages issue. The DMCA provides “service providers” with a defense to copyright infringement claims if they implement a policy for terminating the accounts of “repeat infringers” in “appropriate circumstances,” in addition to other technical requirements. 17 U.S.C. § 512(a), (i)(1)(A).

The district court granted summary judgment that Grande was not entitled to raise a DMCA safe harbor defense, so the safe harbor should not have been at issue

during the trial. [ROA.6430](#). That is especially so because the DMCA expressly provides that Grande’s failure to qualify for a safe harbor “shall not bear adversely” on any defense to a copyright infringement claim, including “a defense . . . that the service provider’s conduct is not infringing.” [17 U.S.C. § 512\(l\)](#).

To convince the district court to allow DMCA-related evidence, the Labels promised they would never argue that Grande’s failure to qualify for the safe harbor was relevant to liability:

THE COURT: Well, I think that it’s very important that you stay away from any argument that would suggest to the jury that because they did not avail themselves or were not able to avail themselves of the safe harbor, that that is in some way probative of a copyright infringement --

COUNSEL: Absolutely. There’s no argument.

THE COURT: -- because not only will you hear from me, but if there’s ultimately an award for your client, the Fifth Circuit would probably take a very dim view of upholding it.

COUNSEL: I hear you, Your Honor.

[ROA.11490-91](#). But the Labels broke that promise before the ink could even dry on the hearing transcript. They devoted a substantial amount of their case—their opening statement, their questioning of Grande’s witnesses, the testimony of their own witnesses, and their exhibits—to showing that Grande knew about the safe harbor and knew that it could have provided Grande with a defense to the Labels’

claims. *See, e.g.*, [ROA.11533](#), [12388-89](#), [12408](#), [12437-47](#), [12456-58](#), [12462-64](#), [12482-97](#), [12647-49](#), [12652-54](#), [12838-39](#).

The culmination of the Labels' DMCA strategy came in their argument in closing—the very argument they promised the district court they would never make—that Grande is contributorily liable because it did not qualify for the safe harbor:

They could have availed themselves [of the safe harbor]. The safe harbor was meaningful. Why do you think it exists? It exists because ISPs wanted it. They wanted it because they didn't want to be in a courtroom like this facing evidence like this and saying, Well, we need a way out of this. . . .

And the DMCA gave them that option. It said if you take that simple step of terminating repeat infringers, and one or two other minor points, you can get on safe harbor. . . . But they chose not to do it.

And so now they are responsible because they were willfully blind.

[ROA.13619](#). But all this evidence and argument about the DMCA was facially irrelevant to the question of whether Grande induced, caused, or materially contributed to the direct infringement of the Labels' copyrights.

Another focus of the Labels' case was Grande's awareness of the jury verdict in a different case holding an ISP, Cox Communications, contributorily liable for copyright infringement based on evidence supplied by Rightscorp. *See BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, No. 1:14-cv-1611 (E.D. Va.). The Labels'

obvious objective in introducing this evidence was to dispel any concerns about Rightscorp's methods and suggest that the jury should reach the same result.¹² The Labels brought up the *Cox* verdict every chance they had—*see, e.g.*, [ROA.11538](#), [11539-41](#), [11548](#), [11551](#), [12406-10](#), [12412-13](#), [12448](#), [12671](#)—and it very likely had an impact, especially considering the district court did not permit Grande to tell the jury that the verdict was reversed on appeal. [ROA.12451-52](#). In any event, however, Grande's awareness of the *Cox* verdict provided no legally sufficient basis for finding that Grande contributorily infringed the Labels' copyrights.

The final piece of the Labels' case concerned Grande's "economic incentives" to tolerate copyright infringement on its network. Notably, there was no evidence that Grande's policies concerning copyright infringement complaints were motivated by the fear of lost subscriber revenue. There was no evidence that Grande **ever** considered financial implications in setting its copyright infringement policies. In discovery, the Labels obtained nearly a decade of internal emails and other documents from Grande and its management company, Patriot Media, and no evidence that Grande's copyright policies were motivated by money ever emerged.

¹² Because that is not a proper purpose, courts typically exclude evidence of verdicts in other cases. *See, e.g., Arlio v. Lively*, [474 F.3d 46, 53](#) (2d Cir. 2007) ("Admitting evidence about previous cases inevitably results in trying those cases before the jury, and the merits of the other cases would become inextricably intertwined with the case at bar. . . . District courts must assiduously guard juries against the siren song of irrelevant and prejudicial prior determinations.") (cleaned up).

Instead, over Grande's objections, the Labels offered testimony from an economist, Dr. William Lehr, about the total value to Grande—in revenue terms—of all Grande subscribers accused of copyright infringement (*i.e.*, not only those subscribers Rightscorp accused, and not only those subscribers accused of infringing the works in suit). [ROA.12620-24](#). Dr. Lehr arrived at the conclusion that Grande had a \$49.7 million economic incentive to permit copyright infringement,¹³ multiplying his calculation of the total number of accused repeat infringers by the average lifetime value of a subscriber. [ROA.12599](#). This figure (1) included revenue from subscribers not accused of infringement in the case, (2) included revenue from services other than internet, and (3) included all the revenue from a subscriber, not just the revenue they generated after being accused of infringement. [ROA.12620-24, 12597-98](#).

Dr. Lehr's opinions were not evidence that Grande induced, caused, or materially contributed to the infringement of the Labels' copyrights. Whatever Grande's "incentives" might be, in Dr. Lehr's opinion, this evidence is not probative of whether Grande culpably or substantially assisted acts of copyright infringement.

¹³ The jury awarded \$46.8 million in statutory damages, [ROA.10006](#), and there was no other comparable damages evidence or damages request that would have led the jury into that range.

In sum, the Labels failed to offer legally sufficient evidence of contributory infringement. The Court should therefore reverse the district court's denial of Grande's renewed motion for JMOL and render judgment in Grande's favor.

B. There was no legally sufficient evidence of copying.

At trial, the Labels did not introduce the copyrighted songs at issue into evidence. The Labels accused Grande of secondarily infringing the copyrights in 1,403 songs, but the 1,403 songs were not in evidence. As a result, the Labels could not prove direct copyright infringement. For this added reason, the district court erred in denying Grande's renewed motion for JMOL. [ROA.11022](#), [11055](#).

This Court's case law is crystal clear that the jury must be permitted to compare the copyrighted work to the alleged copy. Otherwise, there is no proof of infringement. See *Bridgmon v. Array Sys. Corp.*, [325 F.3d 572, 577](#) (5th Cir. 2003) (“[T]he law of this circuit prohibits finding copyright infringement without a side-by-side comparison of the two works.”); *King v. Ames*, [179 F.3d 370, 376](#) (5th Cir. 1999) (“To determine whether an instance of copying is legally actionable, a side-by-side comparison must be made between the original and the copy to assess whether the two works are substantially similar. . . . [C]opying is an issue to be determined by comparison of works, not credibility. King's failure to adduce evidence for such a comparison vitiates her claim.”) (cleaned up).

In effect, the district court concluded that these cases do not mean what they say. The district court said it is sufficient if there is “evidence, beyond mere oral testimony, resulting from such a comparison that would permit a layman to view the two works as substantially similar.” [ROA.11022](#). In other words, according to the district court, it is sufficient to introduce evidence that someone or something else compared the two works, so long as that evidence is not solely oral testimony. *Bridgmon* directly refutes the proposition. There, the plaintiff argued that he did not need to produce evidence for the comparison because he could prove that the defendant directly copied his software. *Bridgmon*, [325 F.3d at 577](#). Citing *King*, this Court rejected the plaintiff’s argument, holding that the plaintiff’s “failure to adduce evidence to allow a comparison between [his copyrighted software] and the allegedly infringing program vitiates his claim.” *Id.* That holding applies with equal force here.

The district court’s ruling was motivated by its concern that it would be “impractical in a case of this sort” —one involving over 1,400 different songs—to conduct “a side-by-side comparison . . . in front of the jury.” [ROA.6403](#). But the Labels chose to bring a lawsuit involving over 1,400 songs. They must take the bitter with the sweet—since the Labels introduced a huge number of recordings to increase

their potential damages recovery, requiring them to deal with additional complexities in presenting their case is fully justified.

The district court's concern about practicalities also misapprehended both Grande's argument and this Court's precedent. What *Bridgmon* and *King* make clear is that the evidence must allow the jury to conduct the side-by-side comparison. That does not mean the comparison must take place in open court. If the Labels had entered all 1,403 recordings into evidence, along with the alleged copies that Rightscorp downloaded from users of Grande's network, that would have satisfied this Court's precedents. Doing so would have afforded Grande the opportunity to identify any mismatches, and the jury the chance to review the evidence and conduct any additional necessary comparisons as part of their deliberations. There is nothing unwieldy or inappropriate about enabling the jury to carry out its role as arbiter of the facts fully and completely.¹⁴

To be clear, Grande is not arguing that the other evidence the Labels offered on this point—the testimony of Rightscorp and RIAA employees about their efforts to match copyrighted works to allegedly infringing music files, or the outputs from

¹⁴ Seemingly, it would have been so simple for the Labels to produce the recordings in discovery and introduce them into evidence at trial. Grande's position on this issue comes as no surprise—Grande raised the same argument on summary judgment years before trial. The Labels had every opportunity to cure this clear defect in their evidence, and they chose not to.

the Audible Magic song-matching software—should not have been admitted.¹⁵ Rather, the point is that, no matter what other evidence of direct infringement the Labels offered, they cannot prove direct copyright infringement without a sufficient evidentiary basis for a side-by-side comparison of the copyrighted work and the alleged copy. As in *King* and *Bridgmon*, the Labels’ failure to adduce evidence for such a comparison vitiates their claim. [179 F.3d at 376](#); [325 F.3d at 577](#).

III. The district court erred in granting JMOL that each of the 1,403 songs in suit was eligible for a separate award of statutory damages.

The district court erred in finding that each of the 1,403 songs in suit was eligible for a separate statutory damages award because many of those songs were parts of registered compilations.

The plain language of the Copyright Act mandates the conclusion that each registered compilation is eligible for only one award of statutory damages. “Congress expresses its intentions through statutory text passed by both Houses and signed by the President (or passed over a Presidential veto).” *Oklahoma v. Castro-Huerta*, [142 S. Ct. 2486, 2496](#) (2022). As the Supreme Court has “stated time and again,” “courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous,

¹⁵ Grande believes it was correct to argue that such evidence should not have been admitted, for a variety of different reasons, but Grande is not pursuing those issues in this appeal.

then, this first canon is also the last: judicial inquiry is complete.” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (cleaned up).

That principle is dispositive. The statutory text is unambiguous: it instructs that “all the parts of a compilation . . . constitute one work” for purposes of statutory damages. 17 U.S.C. § 504(c).

It does not matter that a compilation may be made up of individual works that are separately entitled to copyright protection. One species of “compilation” is a “collective work,” which comprises “a number of contributions, constituting separate and independent works in themselves.” 17 U.S.C. § 101. Thus, an infringed collective work is eligible for a single statutory damage award—whether or not its constituent works are independently copyrightable. The relevant House Report underscores this conclusion: “Subsection (c)(1) makes clear, however, that, **although they are regarded as independent works for other purposes**, ‘all the parts of a compilation or derivative work constitute one work’ for this purpose.” H.R. Rep. No. 94-1476, at 162 (1976) (emphasis added).

Thus, the language of the statute and the legislative history extinguish any reasonable dispute regarding the operation of section 504(c). Whatever the status of the parts of a compilation may be in other contexts, for purposes of statutory damages, all the parts of the compilation constitute one work. The Second Circuit

applied this mandate in *Bryant v. Media Right Products, Inc.*, holding that, “[b]ased on a plain reading of the statute . . . , infringement of an album should result in only one statutory damage award.” [603 F.3d 135, 141](#) (2d. Cir. 2010).¹⁶ Any other treatment contradicts the statutory text.

Despite the clear Congressional mandate, some courts have erroneously created a carve-out for compilations comprising individual works that have “independent economic value” and/or have been sold individually by the copyright owners. *See, e.g., Sullivan v. Flora, Inc.*, [936 F.3d 562, 569–72](#) (7th Cir. 2019) (discussing cases from various circuits). The district court repeated this error by holding that each song at issue was eligible for a separate statutory damage award based solely on a finding that the songs were sold individually, without regard to whether the song was part of a compilation. [ROA.11042-44](#).

The Court should follow the statutory text. The evidence at trial established that many of the asserted songs were part of compilations. Although the Labels asserted infringement of 1,403 individual songs, they relied on evidence of only 662

¹⁶ This Court has cited *Bryant* in affirming a district court’s determination that a collection of individual photographs was “a compilation instead of individual works for purposes of calculating damages.” *See Cullum v. Diamond A Hunting, Inc.*, [484 F. App’x 1000, 1002](#) & n.6 (5th Cir. 2012).

registrations.¹⁷ [ROA.9880-901](#). That is because the majority of the Labels’ registrations were not for individual songs—but for **albums**. “An album falls within the Act’s expansive definition of compilation.” *Bryant*, [603 F.3d at 140](#).

The certificates of registration themselves—which are “prima facie evidence . . . of the facts stated” therein ([17 U.S.C. § 410\(c\)](#))—bear numerous hallmarks of compilations. Many of the certificates feature express notations like “Basis for registration: collective work,” “Compilation of sound recordings,” and “Sound recordings registered as a collective work.” *See, e.g.*, [ROA.340339](#), [339927](#), [339176](#). Those same certificates and many others identify the album title as the “Title of Work.” *See also, e.g.*, [ROA.339933](#). Also, many of the certificates identify pre-existing material to be excluded from the registration, as required “in the case of a compilation or derivative work.” *See* [17 U.S.C. § 409](#); [ROA.340339](#). And nearly all the registrations are designated as “works made for hire.” *See generally* [ROA.339125-845](#), [339857-340220](#), [340226-401](#). “Work made for hire” status is available only for certain types of works. [17 U.S.C. § 101](#). Here, because the artists were not employees of the Labels, the only two possible bases for “work made for

¹⁷ Trial began with the Labels alleging infringement of 1,422 songs and 669 registered copyrights. The district court found that 19 songs were not eligible for statutory damages under [17 U.S.C. § 412](#), lowering the number of registrations to 662. [ROA.9928-30](#).

hire” registration are that the work is a “compilation” or a “collective work” (which is a species of compilation). *See id.*

In sum, then, the evidence established that many of the works are compilations (albums) comprising individual works (songs). The statute unequivocally instructs that a compilation is eligible for only one statutory damage award—whether or not its constituent works are separately copyrightable. So the district court erred in holding that each individual song in a compilation was eligible for a statutory damage award. [ROA.11042-44](#).

Here, the evidence can only sustain the conclusion that there were 662 works eligible for statutory damages under section 504(c)(1), which is the number of registrations corresponding to the 1,403 songs in suit. The judgment should be modified to provide for liability with respect to 662 copyrighted works and total statutory damages of \$22,066,446 (calculated at \$33,333 per work, as in the jury verdict).

CONCLUSION

The Court should reverse the district court’s judgment and render judgment that the Labels take nothing. In the alternative, the Court should reverse the district court’s judgment and remand for a new trial framed by a proper jury charge. In the further alternative, the Court should modify the statutory damages award (or

alternately remand so that the district court may do so) to \$22,066,446 based on 662 copyrighted works. Grande requests other appropriate relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 22, 2023, a copy of the foregoing document was filed and served electronically through the Court’s Electronic Case Filing System on lead counsel of record for Plaintiffs—Appellees/Cross-Appellants:

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of FED. R. APP. P. 32(a)(7)(B) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f), this document contains 12,819 words.

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