

**In The
Supreme Court of the United States**

—◆—
JOSHUA MOON, and KIWI FARMS, a website,
Petitioners,

v.

RUSSELL G. GREER,
Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

—◆—
PETITION FOR A WRIT OF CERTIORARI

—◆—
MATTHEW D. HARDIN
Counsel of Record
HARDIN LAW OFFICE
1725 I Street, N.W., Suite 300
Washington, DC 20006
Phone: (202) 802-1948
Email: MatthewDHardin@protonmail.com

NATHANIEL M. LINDZEN
THE LAW OFFICE OF NATHANIEL M. LINDZEN
57 School Street
Wayland, MA 01778
(212) 810-7627
nlindzen@corpfraudlaw.com

Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether receipt of a takedown notice alone is sufficient to impute actual knowledge of copyright infringement to its recipient under the contributory infringement framework set forth in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

2. Whether a recipient of a takedown notice who publishes the notice with limited editorial comment thereon materially contributes to any prior or ongoing direct copyright infringement.

3. Whether the posting of a link to copyrighted material saved at a third-party storage provider is the same as posting the infringing material itself.

**PARTIES TO THE PROCEEDING AND
RULE 29.6 DISCLOSURE STATEMENT**

1. Petitioner “Kiwi Farms, a website” was the defendant in the District Court and the appellee below. Kiwi Farms is a privately-owned website and discussion forum owned and operated by Joshua Moon and has no parent corporation.
2. Petitioner Joshua Moon was the defendant in the District Court and the appellant below.
3. Respondent Russel Greer was the plaintiff in the District Court and the appellee below.

STATEMENT OF RELATED PROCEEDINGS

This case directly relates to the following proceedings:

- *Greer v. Moon, et al.*, 83 F.4th 1283 (10th Cir. 2023) (reversing order granting motion to dismiss).
- *Greer v. Moon, et al.*, No. 2:20-cv-00647-TC-JCB, 2021 U.S. Dist. LEXIS 181340 (D. Utah Sep. 21, 2021) (order granting motion to dismiss).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT.....	ii
STATEMENT OF RELATED PROCEEDINGS....	ii
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVI- SION INVOLVED.....	1
INTRODUCTION	3
STATEMENT OF THE CASE.....	6
REASONS FOR GRANTING THE PETITION ...	9
I. The Tenth Circuit Ignored or Miscon- strued this Court’s Holdings on Material- ity and Knowledge in the Copyright Context	9
a. Actual knowledge is or should be re- quired for secondary contributory cop- yright liability	9
b. The Tenth Circuit’s use of its “notice equals knowledge” standard expands not only the copyright monopoly, but exacerbates monopolistic impulses within the ISP industry itself	14

TABLE OF CONTENTS – Continued

	Page
II. Publication of a Takedown Notice is Quintessential Fair Use and First Amendment Activity which Cannot Give Rise to Copyright Liability	17
a. The Tenth Circuit held that Moon’s response to Greer’s takedown notice, comprising republication of the takedown notice in combination with criticism thereon comprised “material contribution.” But free speech and fair use cannot form the basis of liability in copyright.....	17
b. Moon’s publishing of Greer’s takedown notice and criticism thereon in no way constitutes existing a “material contribution” within this Court’s case law	21
III. The Tenth Circuit Created Liability for Operators of Every Public Platform based on a Fundamental Misunderstanding of Technology	24
CONCLUSION.....	27

APPENDIX

Opinion, United States Court of Appeals for the Tenth Circuit (Oct. 16, 2023)	App. 1
Judgment, United States Court of Appeals for the Tenth Circuit (Oct. 16, 2023).....	App. 24

TABLE OF CONTENTS – Continued

	Page
Order and Memorandum Decision, United States District Court for the District of Utah (Sep. 21, 2021)	App. 25
Order, United States Court of Appeals for the Tenth Circuit (Dec. 4, 2023).....	App. 42
Notice of Appeal to the 10th Circuit Court of Appeals, United States District Court for the District of Utah, Central Division (Oct. 26, 2021)	App. 43
12(b)(6) Motion to Dismiss All Claims, United States District Court for the District of Utah, Central Division (Apr. 9, 2021)	App. 45
Complaint, United States District Court for the District of Utah, Central Division (Sep. 24, 2020)	App. 58

TABLE OF AUTHORITIES

	Page
CASES	
<i>A M Records, Inc. v. Napster, Inc.</i> , 239 F.3d 1004 (9th Cir. 2001).....	3-5, 10, 11, 27
<i>Bose Corp. v. Consumers Union</i> , 466 U.S. 485 (1984).....	18
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	20
<i>Capitol Records, LLC v. Vimeo, LLC</i> , 826 F.3d 78 (2d Cir. 2016).....	13, 23
<i>Clark v. American Broadcasting Companies, Inc.</i> , 684 F.2d 1208 (6th Cir. 1982).....	19
<i>Cobbler Nev., LLC v. Gonzales</i> , 901 F.3d 1142 (9th Cir. 2018).....	24
<i>Costar Group Inc. v. Loopnet, Inc.</i> , 164 F. Supp. 2d 688 (D. Md. 2001).....	12, 22-24, 27, 29
<i>Diversey v. Schmidly</i> , 738 F.3d 1196 (10th Cir. 2013).....	7
<i>Doe v. Gangland Prods., Inc.</i> , 730 F.3d 946 (9th Cir. 2013).....	21
<i>Doe v. GTE Corp.</i> , 347 F.3d 655 (7th Cir. 2003).....	5
<i>Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.</i> , 109 F.3d 1394 (9th Cir. 1997).....	3, 4, 19
<i>Dreamland Ball Room v. Shapiro, Bernstein Co.</i> , 36 F.2d 354 (7th Cir. 1929).....	23
<i>Erickson Prods., Inc. v. Kast</i> , 921 F.3d 822 (9th Cir. 2019).....	12

TABLE OF AUTHORITIES – Continued

	Page
<i>Famous Music v. Bay St. Harness Horse Racing</i> , 554 F.2d 1213 (1st Cir. 1977)	23
<i>Fonovisa, Inc. v. Cherry Auction, Inc.</i> , 76 F.3d 259 (9th Cir. 1996).....	23
<i>Freeman v. Directv, Inc.</i> , 457 F.3d 1001 (9th Cir. 2006)	5
<i>Gershwin Pub. Corp. v. Columbia Artists Man</i> , 443 F.2d 1159 (2d Cir. 1971)	9, 22
<i>Greer v. Herbert</i> , No. 2:16-cv-01067 (D. Utah May 8, 2018)	6
<i>Greer v. Herbert</i> , 768 F. App'x 787 (10th Cir. 2019)	6
<i>Greer v. Freemantle Prods.</i> , 622 F. Supp. 3d 1010 (D. Nev. 2022)	6
<i>Harper & Row, Publishers, Inc. v. Nation Enter- prises</i> , 471 U.S. 539, 592 (1985)	23
<i>Herring Networks, Inc. v. Maddow</i> , 8 F.4th 1148 (9th Cir. 2021).....	21
<i>Hughes v. Benjamin</i> , 437 F. Supp. 3d 382 (S.D.N.Y. 2020)	20, 24
<i>Hustler Magazine v. Falwell</i> , 485 U.S. 46 (1988)	19
<i>Jones v. Dirty World Entertainment Recordings LLC</i> , 755 F.3d 398 (6th Cir. 2014)	13
<i>Kalem Co. v. Harper Bros.</i> , 222 U.S. 55 (1911).....	22
<i>Kelly-Brown v. Winfrey</i> , 717 F.3d 295 (2d Cir. 2013)	28

TABLE OF AUTHORITIES – Continued

	Page
<i>Lenz v. Universal Music Corp.</i> , 137 S. Ct. 416 (2016).....	16
<i>Limelight Networks, Inc. v. Akamai Techs., Inc.</i> , 572 U.S. 915 (2014)	5
<i>Louis Vuitton Malletier, S.A. v. Akanoc Solutions</i> , 658 F.3d 936 (9th Cir. 2011).....	12
<i>Luvdarts, LLC v. AT&T Mobility LLC</i> , 710 F.3d 1068 (9th Cir. 2013).....	12
<i>Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n</i> , 138 S. Ct. 1719 (2018).....	20, 21
<i>Marobie-FL, Inc. v. National Ass’n of Fire Equipment Distributors</i> , 983 F. Supp. 1167 (N.D. Ill. 1997)	26
<i>Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.</i> , 545 U.S. 913 (2005).....	5, 7, 11, 12, 22
<i>Moonbug Entm’t v. BabyBus (Fujian) Network Tech. Co.</i> , No. 21-cv-06536-EMC, 2022 U.S. Dist. LEXIS 33613 (N.D. Cal. Feb. 25, 2022).....	18
<i>Owen v. Elastos Found.</i> , 343 F.R.D. 268 (S.D.N.Y. 2023)	25
<i>Religious Technology Center v. Netcom On-line Communication Services, Inc.</i> , 907 F. Supp. 1361 (N.D. Cal. 1995)	12, 26
<i>Republic of Sudan v. Harrison</i> , 139 S. Ct. 1048 (2019).....	29
<i>Sony Corp. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984)	5, 9-11, 14

TABLE OF AUTHORITIES – Continued

	Page
<i>TCA Television Corp. v. McCollum</i> , 839 F.3d 168 (2d Cir. 2016)	20, 28
<i>United States v. Gasperini</i> , 894 F.3d 482 (2d Cir. 2018)	25, 26
<i>Ventura Content, Ltd. v. Motherless, Inc.</i> , 885 F.3d 597 (9th Cir. 2018).....	25
<i>Vigil v. Doe</i> , 405 F. Supp. 3d 1058 (D.N.M. 2019)	25
 CONSTITUTIONAL PROVISIONS	
U.S. Const., art. I, § 8	1, 5, 10, 14
U.S. Const., amend. I	2, 17, 20, 28
 STATUTES	
17 U.S.C. § 501	2
17 U.S.C. § 507	2
17 U.S.C. § 512(c)	7
17 U.S.C. § 512(c)(3)(A).....	3
17 U.S.C. § 512(c)(3)(A)(iv)	2
28 U.S.C. § 1254(1).....	1
 RULES	
Fed. R. Civ. P. 12(b)(6)	4, 7, 28

TABLE OF AUTHORITIES – Continued

	Page
OTHER AUTHORITIES	
About Lumen, available at: https://lumendatabase.org/pages/about (last accessed February 16, 2024)	18
Alfred C. Yen, <i>Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment</i> , 88 Geo. L.J. 1833 (2000)	13, 14
Brief of Amici Curiae Automattic, Inc., Google, Inc., Twitter, Inc., and Tumblr, Inc., Supporting Petition for Rehearing En Banc, available at www.scotusblog.com/wp-content/uploads/2016/09/16-217-cert-amicus-automattic.pdf	16
Chris Sprigman & Mark Lemley, <i>Why Notice-and-Takedown is a bit of Copyright Law Worth Saving</i> , LA Times (Jun. 21, 2016), available at https://www.latimes.com/opinion/op-ed/la-oe-sprigman-lemley-notice-and-takedown-dmca-20160621-snap-story.html	15
Corynne McSherry, <i>Notice and Takedown Mechanisms: Risks for Freedom of Expression Online</i> (2020), available at www.eff.org/files/2020/09/04/mcsherry_statement_re_copyright_9.7.2020-final.pdf	16
GitHub’s online DCMA Takedown Policy, available at https://docs.github.com/en/site-policy/content-removal-policies/dmca-takedown-policy (last accessed February 16, 2024)	7, 19

TABLE OF AUTHORITIES – Continued

	Page
James Madison, <i>Public Opinion</i> , National Gazette (Dec. 19, 1791)	15
Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, <i>Notice and Takedown in Everyday Practice</i> 37 (U.C. Berkeley Pub. Law Research, Paper No. 2755628, 2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628	16
Laura A. Heymann, <i>Knowing How to Know: Secondary Liability for Speech in Copyright Law</i> , 55 Wake Forest Law Review 333 (2020).....	13
Letter from Zahavah Levine, Chief Counsel, YouTube, to Trevor Potter, Gen. Counsel, McCain-Palin 2008 (Oct. 14, 2008), available at www.dmlp.org/sites/citmedialaw.org/files/Letter%20re%20DMCA%20to%20YouTube.pdf	16
Michael Nollendo, <i>What is Google Drive? A guide to navigating Google’s File Storage Service and Collaboration Tools</i> , available at https://www.businessinsider.com/guides/tech/what-is-google-drive-guide?op=1 (July 28, 2020)	25
Paul Sawers, <i>YouTube: We’ve invested \$100 million in Content ID and paid over \$3 billion to rightsholders</i> , VentureBeat (Nov. 7, 2018), available at https://venturebeat.com/mobile/youtube-weve-invested-100-million-in-content-id-and-paid-over-3-billion-to-rightsholders	15

TABLE OF AUTHORITIES – Continued

	Page
“Takedown Hall of Shame” available at https://www.eff.org/takedowns (last accessed February 16, 2024)	18

PETITION FOR A WRIT OF CERTIORARI

Petitioners Joshua Moon and “Kiwi Farms, a website” respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Tenth Circuit in this case.

**OPINIONS BELOW**

The opinion of the Court of Appeals is published at 83 F.4th 1283. App. 1. The order denying the petitions for rehearing is unpublished but was issued December 4, 2023. App. 101. The opinion of the District Court is unpublished at but available at *Greer v. Moon*, No. 2:20-cv-00647-TC-JCB, 2021 U.S. Dist. LEXIS 181340 (D. Utah Sep. 21, 2021).

**JURISDICTION**

The Tenth Circuit’s judgment was entered on October 16, 2023. App. 1. The timely petition for rehearing was denied on December 4, 2023. App. 42. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

U.S. Const., art. I, § 8 provides in relevant part “[t]he Congress shall have Power . . . To promote the

Progress of Science and Useful Arts, be securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

U.S. Const., amend. I, provides in relevant part that “Congress shall make no law . . . abridging the freedom of speech. . . .”

17 U.S.C. § 501 provides in relevant part that “[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be.”

17 U.S.C. § 507 provides in relevant part that “[n]otwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting . . . is not an infringement of copyright.”

17 U.S.C. § 512(c)(3)(A)(iv) provides in relevant part that notification to a potential infringer must contain “[i]nformation reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.”



INTRODUCTION

This is a case in which a *pro se* plaintiff sued the owner of a website and discussion forum, among other things, alleging contributory copyright infringement. On appeal, all non-copyright claims (which originally were main features of the Complaint) were quietly abandoned.

The Tenth Circuit Court of Appeals took pains in its published decision to reverse the District Court by very liberally construing the copyright claims in favor of the *pro se* Plaintiff. Unfortunately, in doing so the Circuit Court effectively adopted a standard for contributory copyright infringement whereby the requisite knowledge element is satisfied by mere receipt by an Internet service provider (“ISP”) of a Digital Millennium Copyright Act (“DMCA”) takedown notice (“takedown notice”). See *Digital Millennium Copyright Act*, 17 U.S.C. § 512(c)(3)(A). In sum, the Appellate Court held that “notice equals knowledge” – a standard that only, perhaps, existed in the Ninth Circuit until now. See *A M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). The Circuit Court further extended the scope of the Ninth Circuit’s “notice equals knowledge” standard when they held that the website’s publishing of the takedown notice along with limited editorial comment thereon satisfied the “material contribution” element of contributory infringement. Notably, the very two pieces of evidence used to find contributory copyright infringement here were quintessential examples of both free speech and parody or criticism. See *Dr. Seuss Enterprises, L.P. v. Penguin*

Books USA, Inc., 109 F.3d 1394, 1400 (9th Cir. 1997) (“Parody is regarded as a form of social and literary criticism, having a socially significant value as free speech under the First Amendment.”). These two pieces of evidence were also isolated and *de minimis*.

To find the predicate third party direct infringement required for contributory infringement, the Circuit Court also made the subsidiary holding that postings by website forum users of links to third party sites containing allegedly infringing material were direct infringement on the website itself. This holding was remarkable: it has always been held that a website and its publisher are only responsible for content on *their own* website, and are not responsible for content they link to but which is hosted on other websites (in this case, Google Drive). Finally, the Circuit Court required that a defendant like Joshua Moon must somehow assert the affirmative defense of fair use even at the 12(b)(6) stage before an answer has been filed. *See* Fed. R. Civ. P. 12(b)(6).

The Tenth Circuit’s opinion below greatly expands on the already speech-chilling “notice equals knowledge” case law in the Ninth Circuit, i.e., *Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), but shockingly goes still further by dramatically lowering the bar for requisite evidence of “material contribution.” It also further expands secondary liability not just to those whose platforms are directly instrumental in the original direct infringement but those who refer by way of links to an alleged infringement.

The Tenth Circuit’s decision also grossly exceeds the copyright infringement precedents of this Court in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (“*Sony*”), *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (“*Grokster*”) and is even substantially broader than the Ninth Circuit’s *Napster* decision because it creates not just secondary liability, but *de facto* strict secondary liability, where the authority to do so has been granted (but not used), under Article I, § 8 of the U.S. Constitution, to Congress. Noting further that “[n]ormally federal courts refrain from creating secondary liability [let alone strict secondary liability] that is not specified by statute,” *Doe v. GTE Corp.*, 347 F.3d 655, 658 (7th Cir. 2003), petitioners here ask this Court to step in before judicially-created liability for non-statutory causes of action spins even further out of control. *See also Freeman v. Directv, Inc.*, 457 F.3d 1001, 1006 (9th Cir. 2006) (same); *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 572 U.S. 915, 922-23 (2014) (same).

The Tenth Circuit’s decision thus expands the monopolistic power of both copyright holders and large ISP’s more capable of shouldering the resultingly higher compliance costs – it does so at the expense of fair use and free speech. As a result of both, it undermines the very philosophical foundation of copyright law itself – the promotion of public interest, and should be reversed.



STATEMENT OF THE CASE

Russell Greer (“Greer”) is an individual arguably best known, or notorious, for suing, or threatening to sue, popstars who refused to date him. (App. 59, 63), and is inarguably litigious in nature. *See, e.g., Greer v. Herbert*, No. 2:16-cv-01067 (D. Utah May 8, 2018), *Greer v. Herbert*, 768 F. App’x 787 (10th Cir. 2019), *Greer v. Freemantle Prods.*, 622 F. Supp. 3d 1010 (D. Nev. 2022).

Joshua Moon (“Moon”) is the owner of an Internet website called Kiwi Farms, where he is also a user or member. App. 61. Kiwi Farm hosts online discussion forums where individuals can meet to discuss a wide range of topics. However, Kiwi Farms is especially known as a website, or online discussion forum, that caters to those who wish to make fun of others, often in harsh, crude or hyperbolic ways. App. 26. Notably, Kiwi Farms also does not sell advertising space or collect user fees and is not a commercial operation in any conventional sense.

After Greer self-published the literal book on vexatious litigation, an opus entitled “*Why I Sued Taylor Swift and How I Became Falsely Known as Frivolous, Litigious & Crazy*,” Greer attracted critical attention from some of the users at Kiwi Farms. App. 9. Some of these users then, as part of their criticism of Greer, additionally posted links along with critical commentary to his book and, later, a related song that Greer had produced. Both the song and book had, at some point, been copyrighted by Greer. Greer, upset at the criticism

that he and his works were receiving, emailed Moon a DMCA takedown notice in April of 2019. App. 10. *See also* 17 U.S.C. § 512(c)(3). Moon, asserting fair use, declined to take down the allegedly infringing links and postings referencing Greer’s works. App. 27. Moon additionally, as is not entirely uncommon for forums of all stripes,¹ posted Greer’s takedown notice on the website. App. 11. This takedown notice, as any DCMA compliant notice must, also listed Greer’s personal contact information. Finally, Moon, consistent with the overall nature of his website (focused as it is on hyperbolic mockery and criticism) mocked Greer’s attempt to silence his critics by way of the takedown notice. App. 27.

On September 16, 2020, Greer filed a complaint in the U.S. District Court for the District of Utah. App. 58. In his complaint, Greer alleged multiple claims: Contributory Copyright Infringement, Electronic Communications Harassment, False Light, Defamation and Defamation by Implication. Defendant Moon, through counsel, moved under Fed. R. Civ. P. 12(b)(6) for dismissal of all claims, which motion the district court granted. App. 45, 25. In particular, citing to *Grokster, Ltd.*, 545 U.S. 913, 930 (2005), and *Diversey v. Schmidly*, 738 F.3d 1196, 1204 (10th Cir. 2013), the district court found that while Greer had plausibly pled the first two elements of contributory infringement, i.e., “(1) direct copyright infringement by a third party; (2) the defendant knew of the direct infringement,”

¹ *See, e.g.*, Github’s online DCMA Takedown Policy, available at <https://docs.github.com/en/site-policy/content-removal-policies/dmca-takedown-policy> (last accessed February 16, 2024).

that Greer had failed to plausibly allege that “(3) the defendant intentionally caused, induced, or materially contributed to the direct infringement.” App. 27.

Greer retained counsel and appealed the District Court’s dismissal of the contributory copyright infringement claim alone. The Tenth Circuit Court of Appeals then, while paying lip service to the mantra of not taking the role of advocate for a *pro se* plaintiff, proceeded to repeat the most salacious, and largely irrelevant, components of Greer’s original complaint including, *inter alia*, assertions that Kiwi Farms and its users regularly engaged in discrimination, retaliation, bullying and mass incitement of violence (including suicides). App. 7. The Appellate Court then went on to reverse the District Court’s dismissal of Greer’s contributory copyright infringement claim on the basis that: (1) Kiwi Farms users directly infringed on Greer’s copyrights when they posted links to Google Drives containing infringing material; (2) that Moon had knowledge of this upon receipt of Greer’s DMCA takedown notice; and (3) that Moon’s unredacted publication, on Kiwi Farms, of Greer’s takedown notice combined with the additional mockery of same comprised “encouragement” and/or “material contribution” to the direct infringers.

The Tenth Circuit’s holdings are squarely wrong and in tension with this Court’s precedents. The Tenth Circuit’s holdings create virtually *per se* liability for website publishers who publish a takedown notice, and extend a judicially innovative cause of action beyond the bounds of the statutory framework for copyright

cases and past Constitutional limits. This Court should summarily reverse, or alternatively grant the petition and set this case for full briefing and argument in due course.



REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit Ignored or Misconstrued this Court’s Holdings on Materiality and Knowledge in the Copyright Context.

This case presents a story about compliance and speech – not a story about knowledge. However, knowledge and materiality are what secondary infringement are about. The Tenth Circuit decision makes the simplistic assertion that Moon “knew” of the infringement when he received Greer’s takedown notice. This is flatly incorrect under this Court’s precedents.

a. Actual knowledge is or should be required for secondary contributory copyright liability.

The basic judicial doctrine of contributory infringement is that it is present when “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another. . . .” *Gershwin Pub. Corp. v. Columbia Artists Man*, 443 F.2d 1159, 1162 (2d Cir. 1971). Unlike the *Sony* Court, the Tenth Circuit spent little time or thought as to what the essential knowledge element

meant or what evidence might show it. Rather, and simplistically, according to the Tenth Circuit, notice, even a single notice, equals knowledge. Not even the *Napster* Court did that. In contrast, the *Sony* Court agonized over its right to impose secondary liability (and ultimately found a way not to) after noting the fact that the Copyright Act itself never mentions secondary liability and Article I, § 8 of the U.S. Constitution arguably reserves such determinations for Congress . . . which to date has chosen not to act. *Sony Corp.* 464 U.S. 417, 429 (1984). The *Sony* Court ultimately found that Sony's Betamax was capable of substantial non-infringing uses, namely time-shifting, that these constituted fair uses, and that fair use advanced the underlying goal of the Copyright Act (specifically the public good). *Id.* at 430 n.10.

Approximately 16 years later, the Ninth Circuit found peer-to-peer file sharing company Napster liable for contributory copyright infringement, primarily because it came into possession of approximately 12,000 notices of infringement from a music industry trade group and did nothing while simultaneously profiting from the infringement. *Napster, Inc.*, 239 F.3d 1004, 1020 n.5 (9th Cir. 2001). Notwithstanding the fact that its holding ultimately became known as one entailing "notice equals knowledge," the *Napster* Court took pains to illustrate that in addition to the constructive notice provided by the notices of infringement (in that case, there were 12,000 of them), Napster also had plenty of actual knowledge of direct infringement, for instance internal corporate documents showing that

Napster's co-founder had mentioned "the need to remain ignorant of users' real names and IP addresses 'since they are exchanging pirated music'" or that Napster executives "promoted the site with 'screen shots listing infringing files.'" *Id.* at 1020 n.5. The *Napster* Court then went on to evaluate the fair use factors before ultimately finding Napster to be undeserving of the defense.

Approximately four years after the Ninth Circuit's decision in *Napster*, this Court evaluated a similar company by the name of Grokster whose business model arguably relied upon infringement. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). This Court again affirmed that constructive knowledge alone is insufficient, stating that a plaintiff must show something "beyond mere distribution with knowledge of third-party action . . . One infringes contributorily by intentionally inducing or encouraging direct infringement." *Id.* at 914. While offering less theoretical clarity than the *Sony* Court as to the definition of "knowledge," this Court went to great lengths to show direct evidence that Grokster had actual knowledge of infringement. This Court noted for instance the obvious fact that Grokster aggressively sought Napster's former clients and that StreamCast's internal corporate memoranda showed that it explicitly sought to increase the number of copyrighted works on its peer-to-peer network. Though this Court ultimately found Grokster to be a contributory infringer, it did so only after a careful review of evidence showing actual knowledge of wholesale

infringement. Importantly, this Court also took particular notice of the fact that respondents' main goal in accumulating copyrighted works and contributing to their infringement was its own profit. "Here, evidence of the distributors' words and deeds going beyond distribution as such shows a purpose to cause and profit from third-party acts of copyright infringement." *Grokster, Ltd.*, 545 U.S. 913, 941 (2005).

Since *Grokster*, even the Ninth Circuit has struggled with the definition of "knowledge." See, e.g., *Erickson Prods., Inc. v. Kast*, 921 F.3d 822, 832 (9th Cir. 2019) (explaining confusion in its circuit as to the "knowledge" element and summarizing cases that had utilize an "actual knowledge" standard versus those that had employed a "know or reason to know" standard). See, e.g., *Luvdarts, LLC v. AT&T Mobility LLC*, 710 F.3d 1068, 1072-73 (9th Cir. 2013) (holding contributory infringement requires "actual knowledge"); *Louis Vuitton Malletier, S.A. v. Akanoc Solutions*, 658 F.3d 936, 943 (9th Cir. 2011) (knowledge means actual or constructive knowledge); *Religious Technology Center v. Netcom On-line Communication Services, Inc.*, 907 F. Supp. 1361, 1374-75 (N.D. Cal. 1995) (constructive knowledge likely insufficient because of, inter alia, potential fair use defenses); *Costar Group Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688, 707 (D. Md. 2001) ("the bare claim of infringement by a copyright holder does not necessarily give rise to knowledge of an infringement.").

As described below, the case at bar can be resolved on materiality grounds alone. Nevertheless, this Court

should use this opportunity to un-muddy the waters and hold that “actual knowledge” is required for contributory copyright infringement to be found. It should do so because as in the case at bar “the service provider’s employee cannot be expected to know how to distinguish, for example, between infringements and parodies that may qualify as fair use.” *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 97 (2d Cir. 2016). As legal scholar Laura Heymann points out “the concept of knowledge is particularly problematic in the context of contributory infringement because the underlying facts related to (and often known only to) the copyright owner: that she is the owner of the work, that she did not authorize its use, and so forth.” Laura A. Heymann, *Knowing How to Know: Secondary Liability for Speech in Copyright Law*, 55 Wake Forest Law Review 333-380 (2020). In the absence of a clear statement of the type of knowledge that is required, courts will continue to grapple with the issue needlessly expending both judicial and industry resources.

The lack of clarity as to the proper knowledge standard will also cause the proliferation of decisions such as the Tenth Circuit’s where “notice knowledge,” in concert with a weak materiality standard, combine to create an effective climate of strict liability upon receipt of any notice. This effectively grants copyright holders a heckler’s veto on otherwise free speech and fair use.² See Alfred C. Yen, *Internet Service Provider*

² See *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014) (noting that Congress has previously been forced to act to maintain the vibrancy of the Internet

Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment, 88 Geo. L.J. 1833, 1888 (2000) (asserting that because of free speech concerns, “courts must not impute knowledge to ISP’s for purposes of contributory infringement unless it is quite clear that infringement has occurred.”). This result runs counter to the spirit of copyright law, which is “‘not based upon any natural right that the author has in his writings, . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted.’” *Sony Corp.*, 464 U.S. 417, 430 n.10 (1984) (quoting H.R. Rep. No. 2222, 60th Cong., 2d Sess., 7 (1909)). Such a result is also an excessive encroachment on an authority explicitly granted to Congress. *Id.* at 429 (“it is Congress that has been assigned the task of defining the scope of the limited monopoly”).

b. The Tenth Circuit’s use of its “notice equals knowledge” standard expands not only the copyright monopoly, but exacerbates monopolistic impulses within the ISP industry itself.

The Tenth Circuit’s decision is in contravention to the spirit of the Constitutional grant under Article I, § 8 itself, since it serves to expand the monopolistic power of copyright holders rather than limit them. These results also inadvertently increase the

by forestalling a “heckler’s veto” through the immunity it provided under Section 230 of the Communications Act of 1934).

monopolistic power of large ISP's at the expense of smaller ones who likely are unable to absorb or pass on the high costs of compliance infrastructure and technology.^{3,4} As James Madison noted in 1791 while discussing the pervasive evils of monopolies in English history, the specific grant of Congressional authority under the Constitution to regulate patent and copyrights was intended as a check to the expansion of monopolistic power rather than to expand such monopolistic power. *See* James Madison, *Public Opinion*, National Gazette (December 19, 1791). Judicially-created confusion as to whether knowledge means actual knowledge or constructive knowledge stifles free speech.

The current lack of clarity with respect to the “knowledge” element of contributory infringement has already produced much damage. Simply put, in the face of uncertainty, ISP's have and will continue to err on the side of caution by taking down material, thus stifling fair use and free speech upon receipt of anything that may resemble constructive notice. Indeed

³ Paul Sawers, *YouTube: We've invested \$100 million in Content ID and paid over \$3 billion to rightsholders*, VentureBeat (Nov. 7, 2018), available at <https://venturebeat.com/mobile/youtube-weve-invested-100-million-in-content-id-and-paid-over-3-billion-to-rightsholders>.

⁴ Chris Sprigman & Mark Lemley, *Why Notice-and-Takedown is a bit of Copyright Law Worth Saving*, LA Times (Jun. 21, 2016) (The authors note that in order for Google to launch its own content filtering system the company has incurred a cost of \$50 million). available at <https://www.latimes.com/opinion/op-ed/la-oe-sprigman-lemley-notice-and-takedown-dmca-20160621-snap-story.html>.

this has already occurred.⁵ For instance, Legal Scholar Jennifer Urban estimated that 4.2% of takedown notices (a/k/a “constructive notice”) targeted content that did not clearly match the identified infringed work, and that a further 7.3% of takedown notices involved potential lawful expression.⁶ Large Internet service providers including Google, Twitter and Tumblr confirmed similar estimates in their Amicus Brief in *Lenz v. Universal Music Corp.*, 137 S. Ct. 416 (2016) (*Cert. Denied*).⁷ Abusive takedown notices have been used to remove political advertisement, satire, performance art and online information important to virtually all aspects of modern life.⁸

⁵ See, e.g., Letter from Zahavah Levine, Chief Counsel, YouTube, to Trevor Potter, Gen. Counsel, McCain-Palin 2008 (Oct. 14, 2008), available at www.dmlp.org/sites/citmedialaw.org/files/Letter%20re%20DMCA%20to%20YouTube.pdf (noting that even in 2008 with vastly lower Internet traffic volume, manual review of material automatically removed due to takedown notices was already not possible).

⁶ See Jennifer M. Urban, Joe Karaganis & Brianna L. Schofield, *Notice and Takedown in Everyday Practice* 37 (U.C. Berkeley Pub. Law Research, Paper No. 2755628, 2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628.

⁷ Brief of Amici Curiae Automattic, Inc., Google, Inc., Twitter, Inc., and Tumblr, Inc., Supporting Petition for Rehearing En Banc, available at www.scotusblog.com/wp-content/uploads/2016/09/16-217-cert-amicus-automattic.pdf

⁸ Corynne McSherry, *Notice and Takedown Mechanisms: Risks for Freedom of Expression Online* (2020), available at www.eff.org/files/2020/09/04/mcsherry_statement_re_copyright_9.7.2020-final.pdf.

II. Publication of a Takedown Notice is Quintessential Fair Use and First Amendment Activity which Cannot Give Rise to Copyright Liability.

The Tenth Circuit erred in holding that publication of a “takedown notice” in combination with criticism and parody thereon satisfied the “material contribution” element of contributory copyright infringement. This Court should clarify, consistent with other courts, that: (a) that both posting takedown notices and literary criticism are protected free speech and cannot form the basis of a “material contribution” and/or is *de minimis*; and (b) that consistent with the overwhelming weight of case law a “material contribution” must be commercially driven.

- a. The Tenth Circuit held that Moon’s response to Greer’s takedown notice, comprising republication of the takedown notice in combination with criticism thereon comprised “material contribution.” But free speech and fair use cannot form the basis of liability in copyright.**

Posting takedown notices is a societally important exercise of constitutionally protected free speech and cannot, without much more (or even with more), serve as the predicate for contributory infringement. “The First Amendment presupposes that the freedom to speak one’s mind is not only an aspect of individual liberty – and thus a good unto itself – but also is

essential to the common quest for truth and the vitality of society as a whole.” *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503-04 (1984). As noted above, somewhere around 10% of all takedown notices have been estimated to be targeting lawful expression. Any finding that publication of a takedown notice itself gives rise to copyright liability poses a direct threat to free speech and fair use. Courts have confirmed the importance of a right of publication for takedown notices. *Moonbug Entm’t v. BabyBus (Fujian) Network Tech. Co.*, 21-cv-06536-EMC, at *21 (N.D. Cal. Feb. 25, 2022) (“courts have found the filing DMCA notices constitutes an exercise of free speech in connection with an issue of public interest”).

Indeed, the practice of posting takedown notices is well established among free speech advocates; there are entire Internet databases dedicated to re-publishing takedown notices for exactly that reason. This Court can take judicial notice of the existence of lumendatabase.org, which is a project of the Berkman Klein Center for Internet & Society at Harvard University. Lumendatabase.org is a site dedicated entirely to the proposition that transparency on the Internet requires the sharing of takedown notices.⁹ The Electronic Frontier Foundation publishes a similar site.¹⁰

⁹ See About Lumen, available at: <https://lumendatabase.org/pages/about> (last accessed February 16, 2024).

¹⁰ See also “Takedown Hall of Shame” available at <https://www.eff.org/takedowns> (last accessed February 16, 2024).

Many corporations such as Github and Twitter have or do post takedown notices for similar reasons.¹¹

Parodying or criticizing music and literature is a well-established exercise of constitutionally protected free speech and a well-established and transformative fair use under the Copyright Act. Parody, even of the base variety, is protected speech when directed at a limited public figure such as Greer.¹² Such caustic critiques, at least where not defamatory, are both common and a worthy price of a functioning society. See *Hustler Magazine v. Falwell*, 485 U.S. 46, 50-51 (1988) (noting that notwithstanding the base and incestuous caricature contained in Hustler’s parody of Minister Falwell and his mother, “[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”); *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1400 (9th Cir. 1997) (“Parody is regarded as a form of social and literary criticism, having a socially significant value as free speech under the First Amendment.”).

¹¹ See Github’s online DCMA Takedown Policy, available at <https://docs.github.com/en/site-policy/content-removal-policies/dmca-takedown-policy> (last accessed February 16, 2024).

¹² See *Clark v. American Broadcasting Companies, Inc.*, 684 F.2d 1208, 1218 (6th Cir. 1982) (“*Gertz* establishes a two-pronged analysis to determine if an individual is a limited public figure. First, a “public controversy” must exist. *Gertz*, 418 U.S. at 345, 94 S.Ct. at 3009. Second, the nature and extent of the individual’s participation in the particular controversy must be ascertained. *Id.* at 352, 94 S.Ct. at 3013.”).

Of direct applicability to this petition is that parody or criticism of books and music are not only salutary exercises of free speech but also quintessential examples of transformative fair use under the Copyright Act. It matters not whether the “parody is in good taste or bad.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994). Indeed, the transformative nature of the work, in this case by way of parody and criticism, is well established as the most important fair use factor. *TCA Television Corp. v. McCollum*, 839 F.3d 168, 180 (2d Cir. 2016). Not surprisingly, at least one trial court has held that an almost identical fact pattern comprised fair use and did so at the motion to dismiss stage under Fed. R. Civ. P. 12(b)(6). *See Hughes v. Benjamin*, 437 F. Supp. 3d 382, 391 (S.D.N.Y. 2020) (holding that posting of verbatim portions of plaintiff’s copyrighted YouTube broadcasts on defendant’s own YouTube channel was transformative primarily because of the character of defendant’s YouTube channel itself which was dedicated – like Kiwi Farms – to criticizing and skewering those of opposing viewpoints).

This Court must prioritize Moon’s salutary exercises of free speech and fair use over a copyright monopoly. In *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018), this Court grappled with the First Amendment rights of a cake baker who declined to bake a cake for a gay wedding that he found antithetical to his religious beliefs, and who had then been found by the state court to have engaged in discrimination. There, this Court held that the baker’s free speech rights were not given sufficient

weight by the lower court and reversed. Unlike in *Masterpiece Cakeshop* where this Court was required to balance competing constitutional rights, the Court here has a much easier job – balancing an already constitutionally suspect expansion of monopoly powers against free speech and fair use. Indeed, circuit courts already routinely prioritize free speech in a similar context involving SLAPP suits. *See Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1156-57 (9th Cir. 2021) (holding television host Rachel Maddow’s statement that “OAN ‘really literally is paid Russian propaganda’” was opinion and made in furtherance of her right to free speech and thus dismissing defamation suit against her under); *See also Doe v. Gangland Prods., Inc.*, 730 F.3d 946, 953 (9th Cir. 2013) (in context of anti-SLAPP litigation, defendants engaged in protected speech where their statements were in connection with a matter of public interest).

b. Moon’s publishing of Greer’s takedown notice and criticism thereon in no way constitutes existing a “material contribution” within this Court’s case law.

While the term “materially contributed” had not yet entered the lexicon of copyright infringement litigation at the time, the production of a movie based on General Lew Wallace’s book, “Ben Hur,” and marketed and advertised as such to jobbers who then exhibited the films, resulted in a finding of contributory infringement by the producer who, in today’s parlance, would have “materially contributed” to the ultimate

infringement that occurred during the third-party exhibitions. *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911). Similarly, in *Gershwin Pub. Corp. v. Columbia Artists Man*, 443 F.2d 1159 (2d Cir. 1971), that Court held that where respondent managed nearly every aspect of the performer's performances (from choice of venues and program to sales and marketing), and also earned a percentage of the resulting profits, respondent materially contributed to the direct infringement of the actual performers. In *Grokster, Ltd.*, 545 U.S. 913 (2005) this Court found material contribution where Grokster and StreamCast marketed themselves to the public as replacements to Napster which was by then regarded as a known and notorious infringer and where discovery revealed internal StreamCast communications showing that encouraging infringement was an integral part of the profit-driven business model. Notably this Court also bolstered its decision with the fact that Grokster's advertisement revenues were directly related to the number of users on its platform which in turn were drawn in by the lure of free access to known infringing material.

All of the above examples have two things in common: (1) "actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could conclude that the machine owner himself trespassed on the exclusive domain of the copyright owner." *Costar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004); and (2) a commercial or profit motive and result. The commercial motive and result have and should nearly always be present where

contributory infringement is found. *See, e.g., Dreamland Ball Room v. Shapiro, Bernstein Co.*, 36 F.2d 354 (7th Cir. 1929) (contributory infringement found where for-profit dance hall directed and knew of performers use of infringing material); *Famous Music v. Bay St. Harness Horse Racing*, 554 F.2d 1213 (1st Cir. 1977) (same); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996) (for-profit flea market operators with extensive knowledge of the sale of pirated recordings at their venue found to have contributorily infringed).

Notably, where a clear commercial motive and result is not to be found, courts either find *de facto, de minimis* infringement, or no infringement at all. This is unsurprising. “[F]air use, including criticism, comment, and *news reporting*, are generally conducted for profit.” *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 592 (1985) (*emphasis added*). What is more surprising, as was the case in the Tenth Circuit’s decision, is the contrary.

For instance, in *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78 (2d Cir. 2016), a website and forum (not unlike petitioner’s) dedicated to storage and exhibition of videos was found not to have contributorily infringed even where direct but *de minimis* evidence existed in the form of emails both internally and with users indicating that Vimeo employees directly knew and condoned the use of infringing material. *Id.* at 85-86. Providing the theoretical underpinnings behind this rule, the *Costar* Court explained that “[t]here are thousands of owners, contractors, servers, and users

involved in the Internet whose role involves the storage and transmission of data in the establishment and maintenance of an Internet facility. Yet their conduct is not truly ‘copying’ as understood by the Act; rather, they are conduits from or to would-be copiers and have no [financial] interest in the copy itself.” *Costar Group*, 373 F.3d 544, 551 (4th Cir. 2004); *Cobbler Nev., LLC v. Gonzales*, 901 F.3d 1142, 1145 (9th Cir. 2018) (“[s]tatus as the registered subscriber of an infringing IP address, standing alone, does not create a reasonable inference that he is also the infringer”); *Hughes v. Benjamin*, 437 F. Supp. 3d 382, 392 (S.D.N.Y. 2020) (“[t]he Complaint, however, does not specify how . . . channel commercially benefited Benjamin himself”).

To avoid the Tenth Circuit’s decision infecting this Court’s settled jurisprudence, this Court should clarify that protected free speech and fair use cannot be deemed a material contribution to, or encouragement of, direct infringement and, further, make commercial motive an explicit and necessary foundational element of contributory infringement.

III. The Tenth Circuit Created Liability for Operators of Every Public Platform based on a Fundamental Misunderstanding of Technology.

On two separate occasions in the Tenth Circuit decision, that Court acknowledged the fact that the alleged copyright infringement took place on a Google Drive. They erroneously suggested, without reference

to anything other than the *pro se* Complaint, that the relevant Google Drive account was somehow “on” Kiwi Farms. This allegation is technologically impossible. Such a factual impossibility is easily laid bare by recourse to judicially noticeable materials or to the decisions of other courts, and must be corrected. In the absence of a correction, the Tenth Circuit’s decision will impose virtually limitless liability on all public platforms on the Internet where text may be posted by its users, as the necessity of directly sharing files on a platform is no longer a prerequisite to infringement liability. As Business Insider and many other judicially noticeable publications have explained: “Think of Google Drive as a latter-day hard drive. Google Drive gives you the power to upload and save a range of file types – documents, photos, audio, and videos – to Google servers, or the ‘cloud.’”¹³ Numerous courts have repeatedly acknowledged the reality that material on a Google Drive account or similar file sharing account is stored on Google’s servers, and not on some other website. For example, *Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597, 605 (9th Cir. 2018) (involving content allegedly hosted on file-sharing sites); *Vigil v. Doe*, 405 F. Supp. 3d 1058, 1062 (D.N.M. 2019) (involving alleged copyright infringement using Google Drive); *Owen v. Elastos Found.*, 343 F.R.D. 268, 276 (S.D.N.Y. 2023) (holding that “Google servers” contain documents); and *United States v. Gasperini*, 894 F.3d

¹³ Michael Nollendo, *What is Google Drive? A guide to navigating Google’s File Storage Service and Collaboration Tools*, available at <https://www.businessinsider.com/guides/tech/what-is-google-drive-guide?op=1> (July 28, 2020).

482, 488 n.6 (2d Cir. 2018) (noting that Google uses servers from all over the world to store data from users regardless of the user’s location). Against this background, the Tenth Circuit’s apparent assumption that content was *both* on Google Drive *and* on Kiwi Farms cannot be true. To the extent that the Tenth Circuit appears to hold Kiwi Farms Moon responsible for not responding to a takedown notice – and the takedown notice in question refers unambiguously to a Google Drive – there is no conceivable way for the Plaintiff to “take down” material that is on a third party’s servers. The Tenth Circuit’s technological misunderstanding infects its reasoning with respect to the takedown notice and allegations that Moon materially contributed to any infringement, and makes any individual liable for refusal to do the impossible: remove content from third-party servers over which there is not even an allegation of control.

Importantly, the technological mistakes in the Tenth Circuit decision threatens to upset well settled law. *See, e.g., Religious Technology Center v. Netcom On-line Communication Services, Inc.*, 907 F. Supp. 1361, 1371-73 (N.D. Cal. 1995) (computer bulletin board not liable for infringement where it forwarded messages containing infringing material since it acted as unknowing conduit); *Marobie-FL, Inc. v. National Ass’n of Fire Equipment Distributors*, 983 F. Supp. 1167, 1176-79 (N.D. Ill. 1997) (holding that company that provided a host computer for a webpage and access link to Internet users was not directly liable for infringement when administrator of webpage posted

copyrighted images on the page because it only provided the means to display the works but did not engage in the activity itself); *Costar Group Inc. v. Loopnet, Inc.*, 164 F. Supp. 2d 688, 695-96 (D. Md. 2001) (holding that operator of website that hosted real estate listings and photos was not directly liable for copyright infringement because it did not actively participate in copying or displaying the images).

◆

CONCLUSION

The Tenth Circuit's decision in this case was ill-motivated, wrong, dangerous, and out of compliance with this Court's precedents on copyright law. It created strict liability by judicial fiat, where Congress elected not to create liability at all. Worse, the Tenth Circuit created a world where publishers are incentivized to chill their own speech and that of others when a "takedown" notice is received, irrespective of its merit, and file-sharing websites will face perpetual litigation and liability. For all these reasons, this Court must grant certiorari and reverse.

The Tenth Circuit's opinion is built upon four fundamental errors and one procedural error.

First, the Tenth Circuit applied a dangerously stripped-down interpretation of the notice-equals knowledge test from the *Napster* Court, devoid of the evidentiary support of actual knowledge contained in that decision, decisions of other circuits, or indeed this Court itself. Second, the Tenth Circuit decision directly

implicates serious First Amendment concerns by using judicially established examples of protected speech and fair use as the fundamental evidentiary basis for its ultimate finding of “material contribution.” Third, the Tenth Circuit decision likewise strips down the “materially contributed” element of the well-established commercial and profit-centric links and nexus tests. Fourth, the Tenth Circuit creates a technological fiction that re-opens settled law across numerous circuits as to the potential liability of passive Internet conduits of infringing material stored elsewhere. Finally, the Tenth Circuit exacerbates all of the monopoly expanding errors implicated above by breaking a new procedural trail^{14,15} and imposed its own affirmative defense standard to cases where a defendant moves under Fed. R. Civ. P. 12(b)(6) for dismissal – in effect removing, or severely complicating, the process of early dismissal of meritless contributory infringement suits.

While each of the above errors are bad enough on their own to warrant reversal, the sum total requires it. The standard established by the Tenth Circuit lowers the burden to plaintiffs on the only two elements of contributory infringement under the

¹⁴ *TCA Television Corp. v. McCollum*, 839 F.3d 168, 178 (2d Cir. 2016) (“Nevertheless, this court has acknowledged the possibility of fair use being so clearly established by a complaint as to support dismissal of a copyright infringement claim.”).

¹⁵ *Kelly-Brown v. Winfrey*, 717 F.3d 295, 308 (2d Cir. 2013) (“Affirmative defenses may be adjudicated at this stage in the litigation, however, where the facts necessary to establish the defense are evident on the face of the complaint.”).

control of potential secondary infringers – this effectively creates a strict liability framework for any and all ISP’s that carry a link to copyright infringing material. This de facto strict liability framework grossly exceeds the Constitutional leeway for judicial expansion of a statutory framework explicitly reserved for Congress – it also renders much of the non-Section 512 defenses contained in the Copyright Act superfluous.^{16,17}

This framework, if allowed to stand will: (a) result in the requirement of costly automatic takedown compliance software and infrastructure; (b) increase already extensive monopolistic industry landscape in ISP’s due to the cost of compliance software and infrastructure (and related barriers to entry); (c) further increase the likelihood of contributory infringement being found by courts and thus further incentivize the already well documented chilling of free speech and fair use, the very ultimate Constitutional purpose behind the Copyright Act itself; (d) increase the cost of

¹⁶ *Costar Group, Inc. v. Loopnet, Inc.*, 373 F.3d 544, 552 (4th Cir. 2004) (“Even though the DMCA was designed to provide ISPs with a safe harbor from copyright liability, nothing in the language of § 512 indicates that the limitation on liability described therein is exclusive.”).

¹⁷ *See Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1058 (2019) (explaining that courts should be hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law).

defending against meritless suits by procedurally blocking early dismissal of heckler's vetoes.

Respectfully submitted,

MATTHEW D. HARDIN
Counsel of Record
HARDIN LAW OFFICE
1725 I Street, N.W., Suite 300
Washington, DC 20006
Phone: (202) 802-1948
Email: MatthewDHardin@protonmail.com

NATHANIEL M. LINDZEN
THE LAW OFFICE OF NATHANIEL M. LINDZEN
57 School Street
Wayland, MA 01778
(212) 810-7627
nlindzen@corpfraudlaw.com
Counsel for Petitioners