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Ms. Patricia S. Connor
Clerk, U.S. Court of Appeals for the Fourth Circuit
Lewis F. Powell Jr. Courthouse & Annex
1100 East Main Street, Suite 501
Richmond, VA 23219

> **Re:** *BMG Rights Management (US) LLC v. Cox Communications, Inc.* (Nos. 16-1972, 17-1352, 17-1353 (consolidated)); Supplemental authority under Rule 28(j)—*Packingham v. North Carolina*, 2017 WL U.S. 2621313 (U.S. June 19, 2017) (attached)

Dear Ms. Connor:

Last Monday, the Supreme Court unanimously invalidated, on First Amendment grounds, a law that barred registered sex offenders from accessing certain "commercial social networking Web site[s]" on the Internet. *Packingham v. North Carolina*, 2017 WL 2621313, *3. The Court, assuming that the statute was content neutral and the government's interest significant, applied intermediate scrutiny. *Id*. at *6. Finding the statute's "prohibition unprecedented in the scope of First Amendment speech it burden[ed]," the Court held it unconstitutional. *Id.* at *7.

Packingham is directly relevant to what constitute "appropriate circumstances" to terminate Internet access to Cox's customers. Opening Br. 55-58. The decision emphatically establishes the centrality of Internet access to protected First Amendment activity: "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace.'" *Id.* at *5. As the Court recognized, Internet sources are often "the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Id*. at *7.

Indeed, "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights," and violates the "well established"

principle that, “as a general rule, the Government ‘may not suppress lawful speech as the means to suppress unlawful speech.’” *Id.* at *7, *8 (citation omitted).

The Court’s analysis strongly suggests that at least intermediate scrutiny must apply to *any* law that purports to restrict the ability of a class of persons to access the Internet. At a minimum, courts must “exercise extreme caution before suggesting that the First Amendment provides scant protection for access to [the Internet].” *Id.* at *5. And if it offends the Constitution to cut off a *portion* of Internet access to *convicted* criminals, then the district court’s erroneous interpretation of Section 512(i) of the DMCA—which effectively invokes the state’s coercive power to require ISPs to terminate *all* Internet access to merely *accused* infringers—cannot stand.

Respectfully submitted,

/s/ Michael S. Elkin

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