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No. 07-__

IN THE

Supreme Court of the United States

DIRECTV, INC.,
Petitioner,
v.
HOA HUYNH,
Respondent.

DIRECTV, INC.,
Petitioner,
v.
CODY OLIVER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Communications Act makes it illegal for "[a]ny person" to "modif[y] . . . any . . . device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or direct-to-home satellite services . . . ." 47 U.S.C. § 605(e)(4). Respondents modified legitimate devices in order to transform them into devices primarily of assistance in stealing satellite programming and used those devices to view DIRECTV's programming without paying for it. The questions presented are:

1. Did the Court of Appeals err in concluding, in conflict with four circuits, that § 605(e)(4) does not make it illegal to take a legitimate device — such as an access card or receiver — and modify it into a piracy device that can be used to decrypt satellite transmissions?

2. Did the Court of Appeals err in concluding, in conflict with two circuits, that § 605(e)(4) does not apply to "[a]ny person" who modifies a piracy device for personal use, but only to "bigger fish" who do so for commercial purposes?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

The caption on this petition lists all parties to the proceeding before the Court of Appeals.

Petitioner DIRECTV, Inc. ("DIRECTV"), a California corporation, is a wholly owned subsidiary of DIRECTV Enterprises, LLC, a Delaware limited liability company. DIRECTV Enterprises, LLC, is a wholly owned subsidiary of DIRECTV Holdings, LLC, a Delaware limited liability company. DIRECTV Holdings, LLC, is a wholly owned subsidiary of The DIRECTV Group, Inc., a publicly owned Delaware corporation. Liberty Media Corporation holds approximately 41% of the stock of The DIRECTV Group, Inc. The shares of The DIRECTV Group, Inc. and Liberty Media Corporation are publicly traded.

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OPINIONS BELOW

The opinions of the United States District Court for the Northern District of California in *DIRECTV, Inc.* v. *Huynh*, No. 04-3496 CRB (N.D. Cal. decided May 31, 2005), and *DIRECTV, Inc.* v. *Oliver*, No. 04-3454 SBA (N.D. Cal. decided May 12, 2005), are unpublished and are reproduced in the Appendix to this Petition (App.) at 17a-55a. These two cases were consolidated for review before the United States Court of Appeals for the Ninth Circuit. The Court of Appeals' majority opinion and dissent, dated September 11, 2007, are reported at *DIRECTV, Inc.* v. *Huynh*, 503 F.3d 847 (9th Cir. 2007), and are reproduced at App. 1a-16a. The order of the Court of Appeals denying Petitioner's petition for rehearing en banc is unpublished, and is reproduced at App. 56a-57a.

JURISDICTION

The Court of Appeals entered an opinion on September 11, 2007, upholding the dismissal of Petitioner's claims based on violations of 47 U.S.C. § 605(e)(4). A timely petition for rehearing en banc was denied on January 3, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

This case involves the construction of 47 U.S.C. § 605(e)(4), which provides:

> "Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of

> assistance in the unauthorized decryption of satellite cable programming, or direct-to-home satellite services, or is intended for any other activity prohibited by subsection (a) of this section, shall be fined not more than $500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both."

The full text of 47 U.S.C. § 605 is reproduced in the Appendix, beginning at App. 58a.

INTRODUCTION

Since the inception of the satellite broadcast industry, individuals attempting to steal television programming without paying for it — conduct that Congress has labeled "piracy" — have threatened the industry's very survival. These modern day satellite "pirates" are not swashbucklers with peg legs and eye patches, but they are dangerous nevertheless. Satellite pirates are far more numerous than the Blackbeards and Calico Jacks that menaced the seas long ago, and they have stolen wealth — billions of dollars in value — beyond the imagination of the greediest pirate of yore. Although satellite pirates do not roam the high seas — they prefer stealing their hefty bounties from the comfort of their own homes — they have threatened to kill an entire industry.

That is no exaggeration. For as long as there has been satellite broadcasting, there has been satellite piracy. In the 1980s, half of all satellite receivers had been modified for piracy. *See* H.R. No. Rep. 100-887 (II) at 14, 1988 U.S.C.C.A.N. 5577, 5642. At times, the satellite industry has lost more than four billion dollars of revenue a year to piracy. *See, e.g.*, David Lieberman, *Feds enlist hacker to foil piracy ring*, USA Today, Jan. 10, 2003 at 1B. A congressional commit-

tee surveying the carnage in 1988 observed that this new breed of "piracy . . . seriously threatens to undermine the survival" of the entire "satellite industry." H.R. Rep. No. 100-887 (II) at 14, 1988 U.S.C.C.A.N. 5577, 5642.

Congress intervened "to give both prosecutors and civil plaintiffs the legal tools they need to bring piracy under control." *Id.* at 5658. Congress achieved this end by amending the Federal Communications Act to prohibit certain acts of piracy. Congress imposed some penalties on people who simply use pirated devices. *See* 47 U.S.C. § 605(a) and § 605(e)(3)(C)(i)(II). But Congress imposed more substantial penalties on "[a]ny person who manufactures, assembles, [or] modifies . . . any . . . device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or direct-to-home satellite services . . . ." 47 U.S.C. § 605(e)(4) and § 605(e)(3)(C)(i)(II).

Section 605(e)(4), in particular, has played a central role in the efforts of the satellite broadcast industry and federal law enforcement officials to combat piracy. DIRECTV, alone, has filed some 25,000 civil lawsuits based on § 605 and assisted federal law enforcement officials in criminal prosecutions for violations of § 605. These legal actions were intended to create the deterrence that Congress and DIRECTV believe is necessary to ensure the continued viability of the satellite broadcast industry.

At issue in this case is whether the satellite broadcast industry and law enforcement must cede some of the terrain back to the satellite pirates. The Ninth Circuit has limited the scope of § 605(e)(4) in two critical ways — both creating clear and irreconcilable

conflicts with several other circuits. First, the Court of Appeals held that this provision makes it illegal to modify a device that is *already* a piracy device, but not to take a legitimate device and turn it into a piracy device. The Fifth, Sixth, Eighth, and Tenth Circuits all disagree. Second, the Ninth Circuit held that § 605(e)(4) applies only to commercial actors and excludes those who modify devices for their own use. The Fourth and Fifth Circuits disagree.

In so ruling, the Court of Appeals has fragmented the national enforcement regime Congress strove to enact. Everywhere else in the country a satellite pirate who engages in certain acts of piracy is subject to criminal prosecution and hefty civil penalties. Not so for a satellite pirate who engages in the same acts in the Ninth Circuit, which has established itself as the new Barbary Coast for electronic piracy.

STATEMENT

Respondents Huynh and Oliver are two of 25,000 individuals DIRECTV has sued for stealing its programming. Their acts of piracy followed a common pattern.

In order to watch DIRECTV's programming, a customer must have a satellite dish, a receiver, and an access card, which plugs into the receiver. App. 3a. The satellite dish receives DIRECTV's transmission from a satellite, the access card identifies for the receiver the programming that the customer has paid to receive, and then the receiver decrypts that portion of the transmission and converts it into a viewable television program. *Id.*

Because the access card dictates which programs the customer is entitled to receive, it is the natural, and most common, target of satellite pirates. Using a

reprogrammed access card, viewers have decrypted all of DIRECTV's programming without authorization from or payment to DIRECTV. App. 3a. The satellite broadcaster's enemy number one, then, is not so much the consumer who uses a reprogrammed access card, but *the satellite pirate* who has figured out how to reprogram an access card in the first place.

To combat piracy, DIRECTV developed electronic counter measures, or "ECMs." Transmitted from DIRECTV's satellites, the ECM signal disables reprogrammed access cards by sending the cards' software into a "loop" that prevents the cards from functioning. App. 3a. The more sophisticated satellite pirates parried those efforts. They developed a device called an "unlooper" that restores functionality to illicitly modified DIRECTV access cards that have been disabled by DIRECTV's ECMs. App. 3a-4a. In general, unloopers are configured for only one purpose — stealing DIRECTV's satellite signal. App. 4a.

In this case, DIRECTV filed separate complaints against Huynh and Oliver alleging that they had violated 47 U.S.C. § 605(e)(4) by reprogramming DIRECTV access cards and using an unlooper to restore functionality to the cards once the cards were disabled by DIRECTV's ECMs. App. 23a-27a, 39a, 43a-44a. As is common in these cases, both Respondents failed to appear in their respective cases before the district court.[1]

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[1] Respondents also failed to appear before the Court of Appeals. The decisions of the district court were defended in briefing and at oral argument by *amicus curiae*, the Electronic Frontier Foundation.

In both cases, the district court granted DIRECTV default judgment on certain of its claims, but refused to find that Respondents had violated § 605(e)(4). In *Oliver*, the district court held that the defendant's conduct of modifying a DIRECTV access card did not violate § 605(e)(4), because "Plaintiff has not alleged that Defendant was involved in the sale or distribution of the Pirate Access Devices. . . ." App. 47a. In *Huynh*, the district court held that Congress intended for § 605 to "treat differently different participants in the market for piracy products" and as a result § 605(e)(4) applies only to commercial manufacturers or distributors of pirate access devices, not to individuals who assemble or modify the devices for personal use. App. 37a-38a.

A divided panel of the Court of Appeals affirmed the district court judgments, with Judges Fletcher and Hawkins in the majority and Senior Judge Siler, sitting by designation from the Sixth Circuit, in dissent. The Court of Appeals gave two separate grounds for its ruling.

First, the Court of Appeals held that Respondents' alleged conduct — using unloopers to reprogram DIRECTV access cards — did not constitute modification in violation of § 605(e)(4). App. 11a-12a. In the Court of Appeals' view, § 605(e)(4) prohibits only modification of a device that is "primarily of assistance" in piracy in the first place — i.e., *before* the device is modified. App. 11a-12a. As a result, the Court of Appeals concluded that the modification of DIRECTV access cards, which are legitimate devices before they are reprogrammed, does not violate § 605(e)(4). App. 12a.

Second, the Court of Appeals held that DIRECTV could not maintain a cause of action against Huynh or Oliver for violating § 605(e)(4) because the provision "does not apply to individual end-users." App. 13a. In this regard, the Court of Appeals agreed with the district court that "subsection (e)(4) aims at bigger fish — the assemblers, manufacturers, and distributors of piracy devices." App. 13a.

Judge Siler dissented. He believed that "the district courts erred in determining that 47 U.S.C. § 605(e)(4) does not apply to individual use." App. 15a. According to Judge Siler, "[t]he language of the statute is clear" and forbids conduct by "any person" who engages in one of the seven acts listed in the disjunctive in § 605(e)(4). App. 15a-16a. Judge Siler further noted that the Court of Appeals' decision is in conflict with decisions from the United States Courts of Appeals for the Fourth and Fifth Circuits, and that he believed that the Fourth and Fifth Circuits had correctly decided the issue. App. 16a.

The Court of Appeals denied a petition for rehearing en banc. App. 56a-57a.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because (I) the Court of Appeals' holdings create two distinct and irreconcilable conflicts with decisions from other circuits; (II) the correct interpretation of the statute is a matter of national importance, especially in light of the need for a uniform national enforcement regime to combat satellite piracy; and (III) the Court of Appeals' holdings are wrong.

I. THE COURT OF APPEALS HAS CREATED TWO CONFLICTS WITH DECISIONS FROM FIVE OTHER COURTS OF APPEALS.

In approaching this case, the Court of Appeals confronted a harmonious body of appellate opinions that displayed neither confusion nor disagreement about the scope of 47 U.S.C. § 605(e)(4). In issuing its opinion, the Court of Appeals created a distinct circuit conflict on each of its two holdings.

A. The Federal Appellate Courts Are Divided on the Issue of Whether the Modification of Legitimate Devices Constitutes a Violation of § 605(e)(4).

The first conflict is over what acts constitute a violation of § 605(e)(4). Specifically, when Respondents both took an access card and reprogrammed it to turn it into a piracy device, did they violate this provision? The Court of Appeals framed the issue as follows:

> "Because subsection (e)(4) prohibits only the modification of devices that are 'primarily of assistance in the unauthorized decryption of satellite cable programming,' the question is whether DIRECTV's access cards are such devices 'primarily of assistance in piracy.'" App. 11a.

Focusing only on how DIRECTV's access cards are designed to function, the Court of Appeals concluded that "DIRECTV's access cards, which are anti-piracy devices integral to DIRECTV's subscription process, are not devices 'primarily of assistance in piracy.'" *Id.* The Court of Appeals explained:

> "DIRECTV's access card is used in every legitimate system to limit a receiver's decryption of programming to that for which the subscriber has paid. While the card's centrality to DIRECTV's efforts to prevent the pirating of satellite transmissions makes the cards targets for pirates' modification, we reject DIRECTV's argument that their access cards are devices 'primarily of assistance in the unauthorized decryption of satellite cable programming.'" App. 12a.

In other words, the Court of Appeals held, it is not an act of piracy, under § 605(e)(4), to take a device with a legitimate purpose and modify it into a piracy device; the provision prohibits only modifying a device that is *already* a piracy device.

This ruling conflicts directly with the decisions of four different circuits — the Fifth, Sixth, Eighth and Tenth Circuits. Each of those circuits have held that § 605(e)(4) prohibits the modification of legitimate devices to transform them into devices that — once modified — are capable of receiving encrypted satellite broadcasts without authorization. Importantly, and in contrast to the approach taken by the Court of Appeals in the instant case, the Fifth, Sixth, Eighth and Tenth Circuits considered the functionality of the device *after* it had been modified.

In *United States* v. *Harrell*, 983 F.2d 36 (5th Cir. 1993), the Fifth Circuit upheld the conviction of a defendant under § 605(e)(4) for having modified satellite receivers. The defendant argued that the receiver could not qualify as a device that was primarily of assistance in piracy. The Fifth Circuit disagreed and discussed at length how modified

descramblers become primarily of assistance in piracy, holding that:

> "The primary purpose of the legal unscrambling of subscribed programs has been permanently changed by the new computer chip which enables unlimited viewing of unpaid signals. * * * The modified modules are rendered incapable of any service because the observed tampered seal would subject the users to the risk of being reported to the proper authorities. * * * Therefore, the modules cannot be serviced, changed, sold or even given away in fear that the user's piracy be found out. The broken seal has delegated the modules to secrecy, unable to reenter the legal mainstream." *Id.* at 38.

As a result, the Fifth Circuit held that the modification of legitimate receivers violates § 605(e)(4). *Id.* at 40.

In *United States* v. *One Macom Video Cipher II*, 985 F.2d 258 (6th Cir. 1993), the Sixth Circuit, too, confronted a situation in which an individual had modified a legitimate receiver to turn it into a piracy device. The Sixth Circuit noted that the modification of legitimate receivers changes the fundamental function of those devices: "The modified descramblers enabled a purchaser to receive premium pay satellite television channels without paying a fee to the programmers." *Id.* at 259. The Sixth Circuit went on to hold that "*§ 605 prohibits the modification of descramblers*"; that § 605 does not "specifically exclude[] the modification of descramblers from its application"; and that the defendant was therefore "subject to criminal prosecution" for violating § 605(e)(4). *Id.* at 261 (emphasis added).

In *United States* v. *Davis*, 978 F.2d 415, 419-20 (8th Cir. 1992), the Eighth Circuit, sitting en banc, faced the same issue and came to the same conclusion as the Fifth and Sixth Circuits. In *Davis*, the defendant had been convicted of modifying receivers in violation of § 605(e)(4). As in *Harrell* and *One Macom Video Cipher II*, the defendant argued that modified receivers do not qualify as "devices primarily useful for surreptitious interception." The Eighth Circuit rejected this argument and upheld the conviction, noting that "[o]nce completed, the modifications made it possible for the device to descramble and decrypt satellite programming without the knowledge of the cable companies." *Id.* As a result, it held that such modification violated both the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 *et. seq.*, and § 605(e)(4):

> "[t]he government argues that it was not barred from prosecuting defendant's conduct under both 47 U.S.C. § 605(a) & (e)(4) and 18 U.S.C. §§ 2511, 2512. We agree." 978 F.2d at 420.

Finally, in *United States* v. *McNutt*, 908 F.2d 561 (10th Cir. 1990), the Tenth Circuit came to the same conclusion as the Fifth, Sixth and Eighth Circuits and ruled that § 605(e)(4) prohibits the modification of legitimate descramblers to transform them into pirate access devices. The Court specifically found that Congress enacted § 605(e)(4) to protect "operators of satellite television services" from "economic losses from the revenue forgone due to the use of cloned descrambler modules." *Id.* at 564-65 & n.2. As a result, it found that "McNutt therefore could be subject to civil and criminal penalties under § 605." *Id.* at 564.

The Ninth Circuit's opinion in this case is completely and utterly irreconcilable with these decisions by the Fifth, Sixth, Eighth and Tenth Circuits. In all these other circuits, a satellite pirate who takes a legitimate device and modifies it to make it a piracy device is subject to criminal prosecution and stiff civil penalties. In the Ninth Circuit, the same satellite pirate has no criminal exposure, and cannot be sued for that act.

B. The Federal Appellate Courts Are Divided on the Issue of Whether the Prohibitions of § 605(e)(4) Apply Only to Commercial Actors.

The second conflict among the federal circuits is about what sort of actors are subject to § 605(e)(4). The ruling below conflicts with the rulings of two other circuits on this second question.

In the decision below, the Court of Appeals ruled that § 605(e)(4) does not apply to a satellite pirate who modifies a device for his own use:

> "The context of subsection (e)(4) and its penalties indicate that Congress intended that it apply to those who make piracy devices for commercial purposes rather than to end-users who employ piracy devices for individual personal use. The district court properly determined that § 605(e)(4) does not apply to individual end-users." App. 13a.

According to the court below, "section (e)(4) aims at bigger fish — the assemblers, manufacturers, and distributors of piracy devices." *Id.*

The Fifth Circuit, in a unanimous decision written by Judge Higginbotham, has held exactly the opposite: "we hold that § 605(e)(4) prohibits each of the activities listed therein, and provides no

exception for 'individual users.'" *DIRECTV, Inc.* v. *Robson*, 420 F.3d 532, 544 (5th Cir. 2005); *see also United States* v. *Harrell*, 983 F.2d 36, 40 (5th Cir. 1993) (holding that "it is clear that the statute [§ 605(e)(4)] pertains to commercial as well as individual users, including those with their own satellite dishes"). The Fifth Circuit explained:

> "We are persuaded that the district court erred by categorically removing all 'individual users' from the reach of § 605(e)(4). * * * Nothing on the face of § 605(e)(4) suggests such a limitation. Indeed, it provides that '*[a]ny* person' who engages in the prohibited activities is liable. * * *
>
> "In short, we hold that § 605(e)(4) prohibits each of the activities listed therein, and provides no exception for 'individual users.'" *Robson*, 420 F.3d at 543-544 (emphasis in original).

In so holding, the Fifth Circuit specifically disapproved of the district court decision in *DIRECTV, Inc.* v. *Oliver*, which the Ninth Circuit affirmed in this case. The Fifth Circuit noted, with disapproval, that the district court in *Oliver* was among the "number of courts . . . holding that § 605(e)(4) exempts individual users — that is, the provision 'targets upstream manufacturers and distributors, not the ultimate consumer of pirating devices.'" 420 F.3d at 543 & n.45. The Fifth Circuit then stated that "[w]e reject this view." *Id.* at 544.

In *DIRECTV, Inc.* v. *Pernites*, 200 Fed. Appx. 257 (4th Cir. 2006), the Fourth Circuit, in an unpublished opinion, came to the same conclusion as the Fifth Circuit when it vacated the judgment of a district court that had ruled that § 605(e)(4) applies only to

commercial actors.[2] The Fourth Circuit held that "[w]e find the reasoning in *Robson* persuasive and accordingly conclude that § 605(e)(4) does not categorically exempt individual users." 200 Fed. Appx. at 258.

The dissent below recognized that the opinions from the Fourth and Fifth Circuits were in direct conflict with the logic and outcome of the majority. App. 16a. Judge Siler dissented specifically because he agreed with the prior analysis in *Robson* and *Pernites. Id.*

The Court of Appeals did not overcome the conflict by contending that the Fifth Circuit merely "refused to categorically exclude individual users from liability under §605(e)(4)." App. 14a n.5. This artificially narrow view of *Robson* bears no relation to what the Fifth Circuit said and did in that case. The district court in *Robson*, like the Court of Appeals here, held that § 605(e)(4) only applies to commercial actors. The Fifth Circuit reversed a district court on this precise point, and explained:

> "We reject this view. Nothing on the face of § 605(e)(4) suggests such a limitation. Indeed, it provides that '*[a]ny person*' who engages in the prohibited activities is liable." *Robson*, 420 F.3d at 543-544 (emphasis in original).

By relying upon the "any person" language in § 605(e)(4), the Fifth Circuit made clear that all

[2] Citation to the unpublished decision in *Pernites* is appropriate, given that it is the Fourth Circuit's only ruling on the scope of § 605(e)(4) and is being cited in this Petition in order to demonstrate a conflict. *See* 4th Cir. L.R. 32.1 (citation appropriate where party believes decision "has precedential value in relation to a material issue in a case and there is no published opinion that would serve as well").

persons — commercial actors and individual users — are covered by the provision's prohibitions.

Additionally, even under the Court of Appeals' artificially narrow construction of *Robson*, there is still a conflict. The Court of Appeals, in direct conflict with *Robson*, ruled that § 605(e)(4) categorically excludes individual end users when it held that "§ 605(e)(4) does not apply to individual end-users." App. 13a.

* * *

On each of these issues, the conflict among the Courts of Appeals is stark and irreconcilable. No panel of the Ninth Circuit could possibly find a way to hold satellite pirates liable under § 605(e)(4) for similar acts of piracy and no panel of the Ninth Circuit could ever apply any of that provision's prohibitions against end-users. The Ninth Circuit has been given the opportunity to realign itself with the other circuits, and has declined the opportunity. Meanwhile, it is inconceivable that any of the other circuits will come around to the Ninth Circuit's view on either issue. Their holdings are authoritative and explicit. This Court, alone, can resolve the conflict.

II. THIS CASE RAISES ISSUES OF PROFOUND NATIONAL IMPORTANCE.

The current circuit splits have profound public policy consequences. Congress has found that the sorts of activity targeted in these lawsuits "seriously threatens to undermine the survival" of the entire "satellite industry." H.R. Rep. No. 100-887 (II) at 14, 1988 U.S.C.C.A.N. 5577, 5642. Companies invest vast sums to build, launch, and maintain their satellite systems. Rampant piracy deflates the investment — to the tune of up to four billion dollars a

year. *See, e.g.*, David Lieberman, *Feds enlist hacker to foil piracy ring*, USA Today, Jan. 10, 2003 at 1B; *see also* App 25a (district court referencing trade publication estimating DIRECTV's programming revenue losses at one billion dollars per year). DIRECTV, alone, has spent hundreds of millions of dollars per year combating piracy.

As Congress well understood, satellite piracy is a crime that is especially difficult to detect and punish. The act is, by its very nature, "surreptitious" and private. *DIRECTV, Inc.* v. *Minor*, 420 F.3d 546, 550 (5th Cir. 2005). There is no way to trace a pirated signal to its destination. Yet a single satellite pirate using one access device can steal thousands of dollars worth of satellite programming per year.

To address the harms inflicted upon the satellite industry by piracy, Congress amended the Federal Communications Act twice, first in 1984 and a second time in 1988, to criminalize acts of satellite piracy and to provide satellite broadcasters with standing to sue individuals who engage in acts of piracy and to recover damages. In doing so, Congress strove to create a national enforcement regime against piracy and stated its belief that the then existing patchwork of inconsistent, and in some cases non-existent, state laws prohibiting piracy was inadequate to address the danger posed by piracy. In the House Report that accompanied the bill that became the 1984 Cable Act amendments to the Federal Communications Act, the House Committee considering the bill stated that:

> "The Committee recognizes that a number of states have enacted statutes which provide criminal penalties and civil remedies for the theft of cable service and the Committee applauds those efforts. * * * The Committee

believes that this problem is of such severity that the federal penalties and remedies contained herein must be available in all jurisdictions (and enforceable in state or federal court) as part of the arsenal necessary to combat this threat." H.R. Rep. 98-934 at 85, 1984 U.S.C.C.A.N. 4655, 4721.

In 1988, Congress revisited the problem of piracy and the same House Committee that had addressed the issue earlier found that piracy still presented a significant danger that warranted more robust protections for the satellite broadcast industry. The Committee noted that piracy was extensive, citing testimony to support that "there are approximately 350,000-400,000 pirated [satellite broadcast receivers], compared with about 400,000 untampered [satellite broadcast receivers]." H.R. Rep. No. 100-887 (II) at 14, 1988 U.S.C.C.A.N. 5577, 5642. It also noted that "[t]he problem of piracy is rampant . . . among private home users." *Id.* at 5658.

As a result, the Committee recommended (and Congress agreed) that the Federal Communications Act be amended "to deter piracy practices by (1) stiffening applicable civil and criminal penalties, (2) expanding standing to sue, and (3) making the manufacture, sale, modification, importation, exportation, sale or distribution of devices or equipment with knowledge that its primary purpose is to assist in unauthorized decryption of satellite cable programming expressly actionable as a criminal act." *Id.* at 5658. The Committee concluded that it "believes these changes are essential to preserve the longterm viability of the [satellite television] industry" and that "the Committee wants to give both prosecutors and civil plaintiffs the legal tools they need to bring

piracy under control." *Id.* These imperatives were embodied in § 605(e)(4).

The Court of Appeals' reading of § 605(e)(4), undermines those tools, and, with them, Congress's hope of protecting the satellite broadcast industry. Precisely because satellite piracy is surreptitious, the civil damages available for violations of § 605(e)(4) (which range from $10,000 to $100,000, per device, *see* § 605(e)(3)(C)(i)(II)) are a vital component of DIRECTV's enforcement efforts. By ruling that those statutory penalties may not be imposed upon satellite pirates who modify access cards for their own use, the Ninth Circuit has made it difficult, if not impossible, for DIRECTV's civil enforcement actions to have the deterrent effect envisioned by Congress.

The Ninth Circuit's holding that § 605(e)(4) does not prohibit the modification of legitimate devices to transform them into pirate access devices similarly frustrates Congress's efforts to combat piracy. Since the inception of the satellite industry, piracy has been conducted through the modification of legitimate satellite receiver equipment. As we discuss fully below in Section III(A) of the Petition, Congress enacted the 1988 Satellite Act amendments to the Federal Communications Act for the purpose of stopping such modifications — conduct that was not even illegal under § 605(e)(4) as it existed prior to passage of the 1988 amendments. By holding that this core piracy conduct does not violate § 605(e)(4), the Court of Appeals has taken away from DIRECTV and other participants in the satellite broadcast industry a key tool provided by Congress to combat piracy and protect their multi-billion dollar investments in satellite infrastructure.

Finally, this Court should consider this case because the current circuit splits regarding § 605(e)(4) result in disparate and inequitable treatment of individuals who engage in piracy and broadcasters in the satellite industry. In addition to the civil penalties discussed above, it is a federal crime to violate § 605(e)(4) punishable by a fine up to $500,000 and imprisonment up to five years, *per device*. These are serious penalties that should be applied consistently throughout the country, given Congress's express desire to establish a national enforcement regime to combat satellite piracy. Application of the Federal Communications Act to combat satellite piracy should not turn on the state in which the act of piracy is committed. As a result, regardless of whether this Court believes that the Court of Appeals was right or wrong in its interpretation of § 605(e)(4), it should grant the Petition to ensure that the prohibitions and penalties of the Federal Communications Act are applied consistently to all defendants across all jurisdictions.

III. THE COURT OF APPEALS' OPINION IS WRONG.

A. The Court of Appeals' Ruling that Modification of Legitimate Devices Does Not Violate § 605(e)(4) Is Contrary to the Language and History of the Federal Communications Act.

If the Court of Appeals' decision is allowed to stand, it will mean that the 1988 Satellite Act amendments to the Federal Communications Act did not accomplish one of Congress's primary objectives in enacting the amendments, at least for the states within the Ninth Circuit's jurisdiction. As we demon-

strate below, it is undeniable that one of Congress's primary goals in enacting the 1988 Satellite Act amendments was to criminalize the modification of legitimate devices to transform them into pirate access devices and to make civil remedies available to those who are aggrieved by such acts of piracy. *See* 47 U.S.C. §§ 605(e)(3)(A), (e)(4).

In the decision below, however, the Court of Appeals held that the Respondents' modification of DIRECTV access cards did not violate § 605(e)(4) because the devices subject to modification — DIRECTV's access cards — are not "primarily of assistance in the unauthorized decryption of satellite cable programming." App. 11a-12a. In coming to this conclusion, the Court of Appeals only considered the functionality of DIRECTV access cards before they are modified:

> "DIRECTV's access card is used in every legitimate system to limit a receiver's decryption of programming to that for which the subscriber has paid. While the card's centrality to DIRECTV's efforts to prevent the pirating of satellite transmissions makes the cards targets for pirates' modification, we reject DIRECTV's argument that their access cards are devices 'primarily of assistance in the unauthorized decryption of satellite cable programming.'" App. 12a.

The Court of Appeals' tunnel vision in its approach to analyzing whether DIRECTV's access cards could qualify as pirate access devices was error. As we discussed in Section I, the United States Courts of Appeals for the Fifth, Sixth, Eighth and Tenth Circuits took a different approach and also considered the functionality of the devices at issue *after*

they had been modified to determine whether the devices qualified as devices "primarily of assistance in . . . unauthorized decryption" for purposes of 47 U.S.C. § 605(e)(4). *See supra* pp. 9-11, discussing *United States* v. *One Macom Video Cipher II*, 985 F.2d 258, 261 (6th Cir. 1993); *United States* v. *Harrell*, 983 F.2d 36, 38-40 (5th Cir. 1993); *United States* v. *Davis*, 978 F.2d 415, 419-20 (8th Cir. 1992) (en banc); *United States* v. *McNutt*, 908 F.2d 561, 564-65 & n.2 (10th Cir. 1990).

The text of 47 U.S.C. § 605(e)(4) supports the approach taken by the Fifth, Sixth, Eighth and Tenth Circuits and cannot be reconciled with the approach taken by the Court of Appeals below. The provision imposes liability upon "[a]ny person who . . . modifies . . . *any* . . . device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming. . . ." 47 U.S.C. § 605(e)(4) (emphasis added). Nothing in § 605(e)(4) instructs a Court to look only at the function of a device before it is modified in determining whether the device is "primarily of assistance" in piracy.

The language used by Congress applies just as literally to prohibit the modification of devices that, *after* they are modified, are primarily of assistance in piracy. The Court of Appeals' conclusion to the contrary impermissibly deprives the term "modify" in § 605(e)(4) of meaning.

To the extent that there is any ambiguity regarding the scope of 47 U.S.C. § 605(e)(4), it is easily resolved by looking to Congress's intent when it enacted the 1988 Satellite Act amendments to the Federal Communications Act. As this Court observed when interpreting 47 U.S.C. § 605 in *Rathbun* v.

United States, "[e]very statute must be interpreted in the light of reason and common understanding to reach the results intended by the legislature." 355 U.S. 107, 109 (1957). More recently, this Court reiterated this point in *McCreary County* v. *American Civil Liberties Union,* stating that "[e]xamination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country . . . ." 545 U.S. 844, 861 (2005).

When the Ninth Circuit interpreted 47 U.S.C. § 605(e)(4) in this case, it incorporated neither "reason" nor "the results intended by the legislature" into its analysis. As for reason, it would have made no sense for Congress to decide to punish only those who try to improve upon pre-existing piracy devices but not those who take legitimate devices, particularly receivers and access cards, and turn them into piracy devices. Nor does it make sense for Congress to prohibit the "assembly" of pirate access devices from scratch but permit the creation of pirate access devices through the modification of legitimate devices. As for the results intended by the legislature, it is clear that Congress's primary goal in enacting the 1988 Satellite Act amendments was specifically to prohibit the modification of legitimate satellite receivers to transform them into pirate access devices.

The legislative history of the 1988 Satellite Act demonstrates that Congress understood how piracy was being conducted and specifically amended the Federal Communications Act by including a prohibition of such modification to address this specific problem. The House Committee specifically described the process by which such piracy is conducted, emphasizing that it most commonly occurs

through the *modification* of legitimate satellite receivers:

> "In general, 'piracy' refers to the decoding or decryption of scrambled programming without the authorization of the programmer nor payment for the programming. *This theft of service is accomplished by alerting* [sic] *legitimate decoders*, such as the Video-Cypher II, with illicit decoder technology. For example, legitimate chips which decode the service are cloned and placed in decoder boxes to which access is restricted." H.R. Rep. No. 100-887 (II), at 14 (1988), 1988 U.S.C.C.A.N. 5577, 5642 (emphasis added).

The House Committee then observed that almost one-half of the satellite receiving systems in use were *modified* to pirate satellite transmissions, stating that "[t]he Satellite Broadcasting and Communications Association has indicated that there are approximately 350,000- 400,000 pirated descrambler boxes, compared with about 400,000 *untampered boxes*." *Id.* (emphasis added). The Committee reiterated this point later in the report, stating that "[i]t has been estimated than more than one-third of the one million VideoCipher III descramblers (the industry's de factor standard) sold by manufacturer General Instrument have been *compromised* by black market decoding chips." *Id.* at 28-29, 1988 U.S.C.C.A.N. at 5657-5658 (emphasis added).

There is also no question that this modification of legitimate receivers was the type of conduct that Congress was specifically targeting with the 1988 Satellite Act amendments. Prior to the enactment of the 1988 Satellite Act amendments, 47 U.S.C. § 605(e)(4) did not prohibit "modification." In its

report, the House Committee made clear that stopping such modification was a key purpose of the 1988 Satellite Act amendments, stating that "[t]he Committee's amendment is intended to deter piracy practices by * * * making the manufacture, sale, *modification*, importation, exportation, sale or distribution of devices or equipment with knowledge that its primary purpose is to assist in unauthorized decryption of satellite cable programming expressly actionable as a criminal act." *Id.* at 28, 1988 U.S.C.C.A.N. at 5657 (emphasis added).

Given the history of satellite piracy and Congress's response in the 1988 Satellite Act amendments, it is clear that the Court of Appeals' holding here cannot be reconciled with Congress's intent. Under the Court of Appeals' analysis, the modification of legitimate VC II descramblers — even if done for commercial advantage rather than personal use — would not run afoul of § 605(e)(4), because the VC II was "not a device 'primarily of assistance' in piracy" even when modified for that purpose, as was the case with the access cards here. *See* App. 11a-12a. This reading of the statute defeats the purpose for which Congress passed the 1988 Satellite Act amendments to the Federal Communications Act by sanctioning the very conduct that motivated Congress to enact the amendments.

B. The Panel Majority's Ruling that § 605(e)(4) Cannot Apply to End-Users Contradicts the Plain Words of the Statute.

The Court of Appeals' holding that § 605(e)(4) only applies to commercial actors — or "bigger fish" as the Court of Appeals called them — cannot be reconciled with the text of § 605(e)(4) or the structure of the

Federal Communications Act. As we discussed in Section I, the United States Courts of Appeals for the Fourth and Fifth Circuits have adopted the contrary interpretation that § 605(e)(4) applies to every person — commercial actor and individual end-user alike — who manufactures, assembles, modifies, imports, exports, sells, or distributes a device with knowledge that the device is "primarily of assistance" in piracy.

The conclusion adopted by the Fourth and Fifth Circuits is the only interpretation permitted by the plain text of § 605(e)(4). As the Fifth Circuit recognized in *Robson*, the first two words of § 605(e)(4) — "any person" — speak directly to the question whether individuals who modify or assemble devices for their own use can be held liable for violating § 605(e)(4). *See* 420 F.3d at 543-44. The Court of Appeals ignored the words "any person" in its discussion of whom § 605(e)(4) targets. This oversight is remarkable, given that the decision of the Court of Appeals was in obvious conflict with prior decisions of the Fourth and Fifth Circuits that were based, in important part, upon the existence of the words "any person" in § 605(e)(4). Instead of addressing these decisions and the significance of the words "any person," the Court of Appeals assumed, without providing any justification, that when Congress wrote the words "any person," Congress only meant a subcategory of all persons — "those who make piracy devices for commercial purposes." App. 13a. Without question, the Court of Appeals "insert[ed] words that are not now in the statute" in contravention of this Court's precedent. *Marchetti* v. *United States*, 390 U.S. 39, 60 n.18 (1968).

Additionally, Congress knew how to draw the distinction between commercial and personal use, but

did not do so in § 605(e)(4). In fact, Congress drew this very distinction in several provisions in the Federal Communications Act that are in close proximity to § 605(e)(4). *See, e.g.*, 47 § 605 (e)(3)(C)(ii) (imposing increased damages when the violation is for "commercial advantage or private financial gain"). As Judge Siler noted in dissent, "[i]f Congress had intended to limit its [§ 605(e)(4)'s] reach to commercial use, it would have said so." App. 16a.

The Court of Appeals' failure to apply § 605(e)(4) to end-users also stems from a concern that the Federal Communications Act provides "significantly harsher penalties" for violations of (e)(4) than for violations of subsection (a). App. 13a. According to the Court of Appeals, the differences in penalties indicate "that Congress intended that it [§ 605(e)(4)] apply to those who make piracy devices for commercial purposes rather than to end-users who employ piracy devices for individual personal use." *Id.* The Court of Appeals overstated the significance of the difference between the penalties for violations of § 605(a) and § 605(e)(4).

As an initial matter, the disparity between the penalties for violations of § 605(a) and § 605(e)(4) is justified. Persons who intercept encrypted satellite transmissions in violation of § 605(a) are subject to statutory damages ranging from $1,000 to $10,000, while persons who violate § 605(e)(4) are subject to statutory damages ranging from $10,000 to $100,000. 47 U.S.C. § 605(e)(3)(C)(i)(II). Thus, the upper limit of damages for interception and the lower limit for modifying devices is exactly the same. In this case, Huynh and Oliver could have purchased access cards that had already been modified (*i.e.*, "pirated" cards) and simply inserted the cards into their receivers

to obtain free programming. This conduct requires little technical sophistication and violates § 605(a). Instead, Huynh and Oliver used unloopers to modify pirated DIRECTV access cards that had already once been disabled by DIRECTV's anti-piracy countermeasures. This conduct requires greater knowledge, sophistication and commitment regarding the illicit science of piracy and has proven substantially more difficult for DIRECTV to stop with technological countermeasures. Individuals who engage in such sophisticated practices should be punished at least as severely as the maximum penalty imposed upon an individual who merely inserts a pirated access card into a receiver.

Additionally, the wide range of damages available for violation of § 605(e)(4) supports the conclusion that the provision was intended by Congress to apply to both commercial and private activity. By establishing a $10,000 minimum penalty and a $100,000 maximum penalty, Congress provided courts with the latitude necessary to distinguish between end-users who modify a device for their own personal use and commercial actors who modify devices for profit. Moreover, Congress crafted the penalty provisions of the Federal Communications Act to penalize commercial actors far more severely than individual end-users. The penalties imposed for violations of § 605(e)(4) are imposed *per device.* 47 U.S.C. § 605(e)(4). As a result, the total penalties imposed upon commercial actors, who are likely to modify many more devices, are potentially orders of magnitude larger than the penalties imposed upon individual end-users.

In short, the Court of Appeals' conclusion that § 605(e)(4) only applies to commercial actors is

without merit. Accordingly, this Court should grant a writ of certiorari in this case to make clear, consistent with the decisions of the Fourth and Fifth Circuits, that § 605(e)(4) covers the conduct of any person who — whether for commercial or personal use — modifies devices with knowledge that the devices are primarily of assistance in satellite piracy. Only then will Congress's goal of creating a national enforcement regime to combat satellite piracy be fulfilled.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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