No. _____

IN THE

Supreme Court of the United States

AMERICAN BROADCASTING COMPANIES, INC.; DISNEY ENTERPRISES, INC.; CBS BROADCASTING INC.; CBS STUDIOS INC.; NBCUNIVERSAL MEDIA, LLC; NBC STUDIOS, LLC; UNIVERSAL NETWORK TELEVISION, LLC; TELEMUNDO NETWORK GROUP LLC; WNJU–TV BROADCASTING LLC; WNET; THIRTEEN PRODUCTIONS, LLC; FOX TELEVISION STATIONS, INC.; TWENTIETH CENTURY FOX FILM CORPORATION; WPIX, LLC; UNIVISION TELEVISION GROUP, INC.; THE UNIVISION NETWORK LIMITED PARTNERSHIP; AND PUBLIC BROADCASTING SERVICE

Petitioners,

v.

AEREO, INC., F/K/A BAMBOOM LABS, INC.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A copyright holder possesses the exclusive right "to perform the copyrighted work publicly." 17 U.S.C. §106(4). In the Copyright Act of 1976, Congress defined the phrase "[t]o perform … 'publicly'" to include, among other things, "to transmit or otherwise communicate a performance or display of the work … to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." *Id.* §101. Congress enacted that provision with the express intent to bring within the scope of the public-performance right services that retransmit over-the-air television broadcasts to the public. Respondent Aereo offers just such a service. Aereo captures over-the-air television broadcasts and, without obtaining authorization from or compensating anyone, retransmits that programming to tens of thousands of members of the public over the Internet for a profit. According to the Second Circuit, because Aereo sends each of its subscribers an individualized transmission of a performance from a unique copy of each copyrighted program, it is not transmitting performances "to the public," but rather is engaged in tens of thousands of "private" performances to paying strangers.

The question presented is:

Whether a company "publicly performs" a copyrighted television program when it retransmits a broadcast of that program to thousands of paid subscribers over the Internet.

PARTIES TO THE PROCEEDING

The Plaintiffs-Appellants below, who are the Petitioners before this Court, are American Broadcasting Companies, Inc.; Disney Enterprises, Inc., CBS Broadcasting Inc.; CBS Studios Inc.; NBCUniversal Media, LLC; NBC Studios, LLC; Universal Network Television, LLC; Telemundo Network Group LLC; WNJU–TV Broadcasting LLC; WNET; THIRTEEN Productions, LLC (formerly THIRTEEN); Fox Television Stations, Inc.; Twentieth Century Fox Film Corporation; WPIX, LLC (formerly WPIX, Inc.); Univision Television Group, Inc.; The Univision Network Limited Partnership; and Public Broadcasting Service.

The Defendant-Appellee below, who is the Respondent before this Court, is Aereo, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state:

American Broadcasting Companies, Inc. is an indirect, wholly owned subsidiary of The Walt Disney Company, a publicly traded company.

Disney Enterprises, Inc. is a wholly owned subsidiary of The Walt Disney Company, a publicly traded company.

CBS Broadcasting Inc. is an indirect, wholly owned subsidiary of CBS Corporation, a publicly traded company. National Amusements, Inc., a privately held company, beneficially owns the majority of the voting stock of CBS Corporation.

CBS Studios Inc. is an indirect, wholly owned subsidiary of CBS Corporation, a publicly traded company. National Amusements, Inc., a privately held company, beneficially owns the majority of the voting stock of CBS Corporation.

NBCUniversal Media, LLC is indirectly owned by Comcast Corporation. Comcast Corporation is a publicly held corporation. No other publicly held corporation owns 10 percent or more of the equity of NBCUniversal Media, LLC.

NBC Studios, LLC is wholly and indirectly owned by NBCUniversal Media, LLC. NBCUniversal Media, LLC is indirectly owned by Comcast Corporation. Comcast Corporation is a publicly held corporation. No other publicly held corporation owns 10 percent or more of the equity of NBCUniversal Media, LLC.

Universal Network Television, LLC is wholly and indirectly owned by NBCUniversal Media, LLC. NBCUniversal Media, LLC is indirectly owned by Comcast Corporation. Comcast Corporation is a publicly held corporation. No other publicly held corporation owns 10 percent or more of the equity of NBCUniversal Media, LLC.

Telemundo Network Group LLC is wholly and indirectly owned by NBCUniversal Media, LLC. NBCUniversal Media, LLC is indirectly owned by Comcast Corporation. Comcast Corporation is a publicly held corporation. No other publicly held corporation owns 10 percent or more of the equity of NBCUniversal Media, LLC.

WNJU–TV Broadcasting LLC is wholly and indirectly owned by NBCUniversal Media, LLC. NBCUniversal Media, LLC is indirectly owned by Comcast Corporation. Comcast Corporation is a publicly held corporation. No other publicly held corporation owns 10 percent or more of the equity of NBCUniversal Media, LLC.

WNET is a non-profit education corporation chartered by the Board of Regents of the University of the State of New York. WNET has no parent corporation, and there is no publicly held corporation that owns 10 percent or more of its stock.

THIRTEEN Productions, LLC (formerly THIRTEEN) is wholly owned by its parent corporation, WNET, a non-profit education corporation chartered by the Board of Regents of the University of the State of New York. WNET has no parent corporation,

and there is no publicly held corporation that owns 10 percent or more of its stock.

Fox Television Stations, Inc. is a subsidiary of Twenty-First Century Fox, Inc., a publicly traded company. Twenty-First Century Fox, Inc. has no parent company, and no publicly traded company owns 10 percent or more of its stock.

Twentieth Century Fox Film Corporation is a wholly owned subsidiary of Fox Entertainment Group, Inc., which in turn is a subsidiary of Twenty-First Century Fox, Inc., a publicly traded company. Twenty-First Century Fox, Inc. has no parent company, and no publicly traded company owns 10 percent or more of its stock.

WPIX, LLC (formerly WPIX, Inc.) is a wholly-owned subsidiary of Tribune Broadcasting Company, LLC, which in turn is a wholly-owned subsidiary of Tribune Company, which is privately held. JPMorgan Chase & Company, a publicly held company, owns (directly or through affiliates) approximately 9.88% of Tribune Company's stock, according to the most recent information available. This percentage fluctuates, and could total 10% or more while this case is pending.

Univision Television Group, Inc. is wholly owned by PTI Holdings, Inc., which in turn is wholly owned by Univision Local Media, Inc. Univision Local Media, Inc. is wholly owned by Univision Communications Inc., which in turn is wholly owned by Broadcast Media Partners Holdings, Inc., which is itself wholly owned by Broadcasting Media Partners, Inc. None of the above entities is publicly traded.

The Univision Network Limited Partnership is owned by Univision Communications Inc. and Univision Networks & Studios, Inc. Univision Networks & Studios, Inc. is itself wholly owned by Univision Communications Inc. Univision Communications Inc. is wholly owned by Broadcast Media Partners Holdings, Inc., which is itself wholly owned by Broadcasting Media Partners, Inc. None of the above entities is publicly traded.

Public Broadcasting Service is a non-profit District of Columbia corporation with no parent corporation. There is no publicly held corporation that owns 10 percent or more of its stock.

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JURISDICTION

The Court of Appeals entered judgment on April 1, 2013. A timely petition for rehearing en banc was denied on July 16, 2013. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The relevant portions of Sections 101 and 106 of the Copyright Act of 1976, 17 U.S.C. §§101, 106, are set forth in the appendix. Pet.App.156a-157a.

STATEMENT OF THE CASE

This petition presents questions of copyright law that profoundly affect, and potentially endanger, over-the-air broadcast television. For decades, it has been settled law that third parties, such as cable and satellite operators, must obtain authorization to retransmit over-the-air broadcasts of television programs to the public. The broadcast television industry has invested billions of dollars producing and assembling high-quality and creative entertainment and news programming in reliance on this legal regime, which prevents retransmission services from free-riding on broadcas-

ters' investments and provides broadcasters with incentives for further investment and innovation.

The decision below threatens to upend this regime by blessing a business model that retransmits "live TV" to paying customers without obtaining any authorization or paying a penny to the copyright owners. Aereo offers precisely the kind of service Congress sought to prohibit when it revised the Copyright Act to define "public performance" to include retransmissions of over-the-air broadcast transmissions to the public. The Second Circuit nevertheless endorsed Aereo's business model, holding that Aereo's retransmission of over-the-air television broadcasts to its paid subscribers is not a public performance because each Aereo subscriber receives an individualized transmission streamed from an individual subscriber-associated digital copy of the broadcast transmission. In the Second Circuit's view, this technical detail renders Aereo's simultaneous transmissions to thousands of paying subscribers "private." Thus, for example, when tens of thousands of Aereo subscribers all simultaneously watch the same broadcast of the Super Bowl using Aereo, Aereo is not publicly performing the Super Bowl. It is merely making tens of thousands of simultaneous "private" performances to its subscribers.

As courts and commentators have recognized, that nonsensical reasoning cannot be reconciled with the plain text of the Copyright Act or Congress' manifest intent to include retransmission services within the scope of the public-performance right. Congress amended the Act in technology-neutral terms to reach any retransmission "by means of any device or process, whether the members of the public capable of receiving

the performance or display receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. §101. Aereo's conduct falls squarely within that broad definition.

The Second Circuit's decision is already transforming the industry and threatening the very fundamentals of broadcast television. Broadcasters rely on the revenues they receive from the cable and satellite companies that retransmit their signals to recoup their substantial investments in programming, to fund new shows, and to develop new delivery platforms. They and others also have made substantial investments in developing legitimate Internet-based services, such as Hulu, that obtain copyright licenses for the content made available to subscribers.

Unsurprisingly, Aereo, which pays nothing for the content it retransmits and promotes itself as an alternative to cable and satellite retransmission services, has begun to attract subscribers with its low fees. Certain cable and satellite companies have responded by threatening to use the decision below as a road map for reengineering their own delivery systems so they too can retransmit broadcast signals without obtaining the broadcasters' permission. And copycat services have sprung up that, like Aereo, transmit live broadcast television over the Internet without obtaining permission or paying compensation.

This Court's intervention is urgently needed. This Court has had little tolerance for business models built on the for-profit exploitation of the copyrighted works of others. And this Court has repeatedly recognized the important public interest in protecting the viability of

over-the-air broadcast television. But the decision below authorizes the former and imperils the latter. And it does so with reasoning irreconcilable with statutory text, congressional intent, and common sense. Courts outside the Second Circuit have rejected its reasoning, and one has enjoined a copycat service nationwide, *except for the Second Circuit*. The issue here is simply too consequential to allow the Second Circuit to operate with a different set of copyright rules from those envisioned by Congress and operative in the rest of the Nation. This Court's review is needed now.

A. Statutory Background

Copyright protection is designed to "promot[e] broad public availability of literature, music, and the other arts" by "rewarding the creators of copyrighted works." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 710 (1984). To that end, the Copyright Act grants copyright owners "exclusive rights to do and to authorize" certain uses of their works. 17 U.S.C. §106. Among those is the exclusive right, "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, *to perform the copyrighted work publicly*." *Id.* §106(4) (emphasis added). The statute embodies the commonsense principle that one cannot profit from the performance of another's work without authorization from (and generally compensation to) the creator.

As technology has evolved over the years, so too has Congress' understanding of how a copyrighted work can be performed "publicly"—particularly when it comes to television programming. First, broadcast television makes copyrighted works available to broad

segments of the public. Although most individuals watch the programming in the privacy of their own homes, Congress has always understood such broadcasts to be paradigmatic public performances. Second, although over-the-air broadcast television includes copyrighted works that reflect considerable creative and economic investment, broadcast television is available to the public for free, meaning anyone with an antenna can access it. Congress has been mindful of the potential for third parties to exploit this arrangement by profiting off of the "retransmission" of broadcast programming—*i.e.*, by capturing these free broadcasts and retransmitting them to the public for a fee, without the approval of or compensation to those responsible for making the broadcasts available to the public.

This Court considered one such service in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), a case concerning application of the 1909 Copyright Act to a community antenna television (CATV) system. The CATV system operated by capturing distant over-the-air broadcasts using antennas placed on hilltops and retransmitting those signals via cable to viewers in areas unable to receive the distant broadcasts with antennas of their own. The question before the Court was one the Copyright Act did not specifically address at the time—namely, whether such retransmission infringed upon the exclusive public-performance right. Concluding that the "CATV system no more than enhance[d] the viewer's capacity to receive the broadcaster's signals," the Court found no infringement. *Id.* at 399. The Court reasoned that "[i]f an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying

equipment, he would not be 'performing' the programs he received on his television set." *Id.* at 400. The Court found immaterial "[t]he only difference in the case of a CATV"—namely, "that the antenna system is erected and owned not by its users but by an entrepreneur." *Id.*; *see also Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974).

Congress emphatically rejected that approach in the 1976 Copyright Act, which was enacted in part to overrule the result in *Fortnightly*. To that end, Congress enacted a series of definitions designed to ensure that the public-performance right includes retransmission of broadcast signals to the public. In addition to adopting an expansive definition of "perform," *see* 17 U.S.C. §101 ("to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible"), Congress provided:

> To perform or display a work "publicly" means—
>
> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capa-

> ble of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Id. Congress also broadly defined "transmit" as "to communicate … by any device or process whereby images or sounds are received beyond the place from which they are sent." *Id.* And it broadly defined "device" and "process" to mean "one now known or later developed." *Id.*

Three aspects of the second paragraph of the definition of "publicly" (the "Transmit Clause") are particularly noteworthy. First, although the term "public" is not expressly defined, it unquestionably includes subscribers to a commercial retransmission service. Indeed, Congress specifically drafted the Transmit Clause to cover cable retransmission services. *Crisp*, 467 U.S. at 709 ("Congress concluded that cable operators should be required to pay royalties to the owners of copyrighted programs retransmitted by their systems on pain of liability for copyright infringement."); *see also* H.R. Rep. No. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5676-77 ("a cable television system is performing when it retransmits the broadcast to its subscribers").[1] Congress also contrasted the term

[1] Cable companies can claim a compulsory copyright license under 17 U.S.C. §111, and satellite companies under 17 U.S.C. §§119 and 122, but both must abide by Federal Communications Commission rules, which generally require them to obtain broadcasters' consent before retransmitting a broadcast signal. *See* 47 U.S.C. §325(b); 47 C.F.R. §76.64.

"public" with clause (1)'s phrase, a "normal circle of a family and its social acquaintances." 17 U.S.C. §101. Thus, a performance is clearly public when the audience is not limited to the performer's family and friends.

Second, Congress explicitly provided that a performance can be "to the public" regardless of whether "the members of the public capable of receiving the performance … receive it in the same place or in separate places and at the same time or at different times." *Id.* Thus, the fact that a performance might be communicated to individual "members of the public" through multiple transmissions to "separate places … or at different times," *id.*, does not make it any less public.

Third, the language is purposefully broad and technology-neutral. Congress drafted it to include transmitting a performance to the public "by means of *any* device or process." *Id.* (emphasis added). Plainly, Congress did not want liability to turn on the technical details of a transmission service and did not want the statute rendered obsolete by changes in the technology used to communicate performances to the public. Instead, Congress drafted the statute flexibly to anticipate the inevitable development of future technologies, the precise details of which could not be predicted in 1976. To underscore that breadth, Congress separately defined "device" and "process" to include "one now known or later developed." *Id.* The legislative history likewise confirms that "[t]he definition of 'transmit' … is broad enough to include all conceivable forms and combinations of wires and wireless communications media, including but by no means limited to radio and television broadcasting as we know them." H.R. Rep. 94-1476, at 64, *reprinted in* 1976 U.S.C.C.A.N. at 5678.

In short, "if the transmission reaches the public in any form, the case comes within the scope" of the public-performance right. *Id.*

B. Aereo: "Watch Live TV Online"

1. Aereo is a retransmission service that "enables its subscribers to watch broadcast television programs over the internet for a monthly fee." Pet.App.2a. From the subscriber's perspective, watching television over the Internet on Aereo is no different from watching television through a cable or satellite service. A subscriber simply logs on to Aereo, selects from a guide a program currently being broadcast on local television, then watches the program live. Pet.App.3a-5a. Aereo explicitly markets itself as a service that, like a cable or satellite service, allows its subscribers to "watch live TV."[2] Aereo can offer access to that "live TV" programming more cheaply than its competitors in part because, unlike cable and satellite services or licensed Internet video on-demand services, Aereo has not paid anything or obtained any kind of permission to offer this programming. Instead, like the CATV system in *Fortnightly*, Aereo simply captures over-the-air broadcast signals and then, without authorization, profits from retransmitting those broadcasts to its subscribers.

This would seem to be an obvious copyright violation—an entire business model premised on massive for-profit unauthorized exploitation of copyrights where competitors' prices are undercut because they seek authorization and pay fees—and the precise kind of re-

[2] *See* https://aereo.com.

transmission Congress sought to reach when it amended the Copyright Act. Yet Aereo claims to escape that commonsense conclusion and the broad reach and express purpose of the statute because of the details of how it designed its systems (*i.e.*, the devices and processes it employs). In Aereo's view, even though it transmits live television to thousands of members of the public, it is in fact engaged in thousands of *private* performances, and thus is not infringing upon the public-performance right. Aereo derives support for this dubious contention from the Second Circuit's decision in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("*Cablevision*"), *cert. denied*, 129 S. Ct. 2890 (2009), which adopted a novel reading of the Transmit Clause that has since been rejected by other courts and widely criticized by commentators.

Cablevision involved a challenge to a very different service and business model—a cable company's remote storage digital video recording service ("RS-DVR"). From a consumer perspective, an RS-DVR operates much like a VCR, allowing subscribers of licensed cable companies to time-shift copyrighted shows. The service gives the consumer access to a subscriber-specific remote hard drive located at the cable company's offices, instead of a set-top hard-drive located in the subscriber's home, to record programming within the consumer's cable package for later viewing. *See* 536 F.3d at 123-24. As required by law, the cable company had already obtained a license to transmit this programming to its subscribers; the only question was whether the company could offer this "supplemental service that allowed subscribers to store that authorized content for later viewing" without infringing upon the public-

performance right. Pet.App.41a. The Second Circuit resolved that question by adopting a construction of the Transmit Clause that defies both the text of the statute and Congress' intent, by focusing on the specific technology through which retransmission is achieved. Aereo has seized on that construction to contend that its massive for-profit retransmission scheme nonetheless complies with the Copyright Act.

The Second Circuit arrived at its interpretation by focusing on the portion of the Transmit Clause specifying that a transmission of a performance can be "to the public … whether the members of the public capable of receiving the performance … receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. §101. While this language underscores Congress' technology-neutral intent to reach any and all means by which a performance might be transmitted to the public (*i.e.*, "by means of any device or process"), regardless of whether members of the public receive the performance through a single transmission or many, the Second Circuit erroneously read this language as compelling courts to equate a performance with an individual transmission of a performance. *See* 536 F.3d at 134 (the "transmission of a performance is itself a performance"). In other words, in the Second Circuit's view, when Congress wrote "capable of receiving the *performance*," it actually meant "capable of receiving the *transmission*."

As a result of that atextual reading, the court concluded that "the transmit clause directs us to examine who precisely is 'capable of receiving' *a particular transmission of a performance*." *Id.* at 135 (emphasis added). In its view, so long as no two people can receive

the same transmission of a performance, the public-performance right is not violated—even if the performance is being transmitted concurrently to thousands of members of the public. Applying that interpretation to the technology before it, the court determined that the RS-DVR service did not engage in public performance. *Id.* at 137 ("[B]ecause the RS-DVR system, as designed, only makes transmissions to one subscriber using a copy made by that subscriber, … the universe of people capable of receiving an RS-DVR transmission is the single subscriber whose self-made copy is used to create that transmission.").

Nonetheless, in seeming recognition that its decision supplied a blueprint for circumventing Congress' intent in enacting the Transmit Clause, the court cautioned that its opinion should not be read to "permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber." *Id.* at 139. After her views were invited, the Solicitor General relied on the court's cautionary language, *inter alia*, to recommend against review, despite expressing concern about some of the Second Circuit's reasoning if extended beyond the narrow RS-DVR context. Brief for the United States as Amicus Curiae at 6, *Cable News Network, Inc. v. CSC Holdings, Inc.*, 129 S. Ct. 2890 (2009) (No. 08-448), 2009 WL 1511740, at *6 ("U.S. Amicus Br.").

2. Aereo employs a technology that it acknowledges "was designed around the *Cablevision* holding." Pet.App.32a. That much is obvious. Aereo's convoluted design serves no other purpose; it does not make transmission faster, more efficient, or cheaper, except

insofar as Aereo believes its design obviates its need to pay the compensation legally demanded of its competitors. Indeed, Aereo initially confined its operations to New York because the Second Circuit alone had adopted this novel construction of the Transmit Clause. In short, Aereo crafted its system to accomplish what even the Second Circuit recognized in *Cablevision* would frustrate Congress' intent: Aereo itself "creates essentially identical copies of the same program for every user who wishes to watch it in order to avoid copyright liability." *Id.*

Specifically, Aereo captures over-the-air broadcast signals using thousands of dime-sized antennas arranged on circuit boards at its facility in Brooklyn. Pet.App.6a. When a subscriber logs onto Aereo to watch a program, Aereo temporarily assigns one of these miniature antennas to the subscriber, tunes it to the broadcast frequency of the requested channel, and feeds the broadcast signal into a computer system that transcodes the data. Pet.App.7a-8a. Aereo then sends the transcoded data to a server, where a copy of the program is created in real time and saved in a hard-drive directory reserved for that subscriber. Pet.App.6a-7a. If the subscriber has chosen to watch the broadcast live, Aereo will stream it to the subscriber over the Internet from the copy once a buffer of six or seven seconds of programming has been saved. Pet.App.7a. This allows the subscriber to watch a program essentially contemporaneously with its over-the-

air broadcast. *Id.*[3] Aereo's dime-sized antennas are generally assigned "dynamically" to its subscribers; that is, once a subscriber is finished using an antenna to watch or record a program, the antenna is reassigned to another Aereo user. Pet.App.7a-8a & n.7.

As noted, this elaborate system of thousands of miniature antennas and digital copies is not easier, more efficient, or more technologically advanced than other retransmission systems. Rather, it is a "Rube Goldberg-like contrivance" designed for a single reason: "to take advantage of [the] perceived loophole in the law" that *Cablevision* created. Pet.App.40a. In Aereo's view, because each of its antennas is used by only one subscriber at a time, and each subscriber receives a separate transmission of the underlying performance, Aereo is not performing publicly, despite retransmitting the very same broadcast to its thousands of subscribers.

C. Proceedings Below

1. Petitioners own the copyrights to numerous programs broadcast by television stations over the air to viewers. Collectively, Petitioners have spent billions of dollars to produce or obtain the copyrighted works to provide them to the public by means of broadcast transmissions. Because Aereo's unauthorized retransmissions threaten the value of their works and, more fundamentally, their businesses, Petitioners brought suit against Aereo on March 1, 2012, in two separate complaints in the United States District Court for the

[3] Aereo also offers a "Record" function that allows the subscriber to retain the copy for later viewing. Pet.App.7a.

Southern District of New York. Petitioners alleged, *inter alia*, violations of their rights of public performance and reproduction under 17 U.S.C. §106. They immediately moved for a preliminary injunction based on the public-performance claims, seeking to bar Aereo from retransmitting any broadcast of their copyrighted programming to its subscribers.

After expedited discovery and briefing, the District Court (Nathan, J.) held a two-day evidentiary hearing on Petitioners' public-performance claims. On July 11, 2012, the District Court denied the motion. Although the District Court emphasized that "[b]ut for *Cablevision*'s express holding regarding the meaning of … the transmit clause … Plaintiffs would likely prevail on their request for a preliminary injunction," Pet.App.59a-60a, it deemed itself bound by that governing Second Circuit precedent to conclude that Petitioners were unlikely to succeed on the merits of their public-performance claim. Pet.App.60a.

Nevertheless, recognizing that "this case turns on important legal questions," Pet.App.107a, the District Court went on to conclude that Petitioners had demonstrated substantial irreparable harm—a conclusion not disturbed on appeal. The District Court found that "Aereo will damage [Petitioners'] ability to negotiate with advertisers by siphoning viewers from traditional distribution channels" measured by Nielsen, "artificially lowering these ratings," Pet.App.109a-10a; that Aereo will harm Petitioners "by luring cable subscribers from that distribution medium into Aereo's service," Pet.App.116a; that "Aereo's activities will damage [Petitioners'] ability to negotiate retransmission agreements" with cable companies, which amount "to billions

of dollars of revenue for broadcasters," Pet.App.111a, as cable companies "will demand … concessions … or refuse to pay retransmission fees based on Aereo's refusal to do so," Pet.App.111a-12a; and that Petitioners' "loss of control over their content is likely to harm them in other ways" as well. Pet.App.113a.

2. Petitioners appealed to the United States Court of Appeals for the Second Circuit, which affirmed in a 2-1 decision. *See* Pet.App.2a.[4] Writing for the majority, Judge Droney held that *Cablevision* controlled the outcome. Like the RS-DVR system at issue in *Cablevision*, "[w]hen an Aereo customer elects to watch or record a program[,] … Aereo's system creates a unique copy of that program on a portion of a hard drive assigned only to that Aereo user. And when an Aereo user chooses to watch the recorded program, … the transmission sent by Aereo and received by that user is generated from that unique copy." Pet.App.23a. These "two features" meant that, "just as in *Cablevision*, the potential audience of each Aereo transmission is the single user who requested that a program be recorded." *Id.*

Petitioners argued that a broadcast of a performance can be retransmitted "to the public" through multiple transmissions, each of which is to be received by a particular member of the public "in separate places and … at different times." 17 U.S.C. §101. But the majority deemed that argument "foreclosed by *Cablevision*," reasoning that "*Cablevision* made clear that the

[4] Proceedings on Petitioners' claims continued in the District Court during the appeal and remain ongoing.

relevant inquiry under the Transmit Clause is the potential audience of *a particular transmission*, not the potential audience for the underlying work or the particular performance of that work being transmitted." Pet.App.25a-26a (emphasis added). The Second Circuit nonetheless acknowledged that *Cablevision*'s "focus on the potential audience of each particular transmission would essentially read out the 'different times' language" from the statute. Pet.App.21a n.11.

Judge Chin dissented, concluding that Aereo's system is nothing more than "a Rube Goldberg-like contrivance, over-engineered in an attempt to avoid the reach of the Copyright Act and to take advantage of a perceived loophole in the law." Pet.App.40a. In his view, even taking *Cablevision* as a given, "by transmitting (or retransmitting) copyrighted programming to the public without authorization, Aereo is engaging in copyright infringement in clear violation of the Copyright Act." Pet.App.39a.

3. Petitioners filed a timely petition for rehearing *en banc*. On July 16, 2013, the Court of Appeals denied the petition, again over a dissent by Judge Chin, this time joined by Judge Wesley. Pet.App.128a-155a.

Judge Chin began by emphasizing the "exceptional importance" of this case, noting that "the panel majority's decision has already had a significant impact on the entertainment industry." Pet.App.130a. As Judge Chin recognized, "[i]n recent years, with greater competition from cable and the Internet, television broadcasters have come to rely more heavily on retransmission fees, rather than advertising revenue, to make their free public broadcasts profitable." Pet.App.132a. The pan-

el's decision, by "permit[ting] Aereo to retransmit television broadcasts without paying a fee, undermines this model." Pet.App.132a-33a. Specifically, Judge Chin noted that cable and satellite companies would likely "seek elimination of, or a significant reduction in, their retransmission fees" or "adopt[] an Aereo-like system to avoid these fees entirely." Pet.App.130a.

Judge Chin explained why the panel's decision is inconsistent with the statutory language and Congress' evident intent:

> Aereo's system fits squarely within the plain meaning of the transmit clause. The system is a "device or process," which Aereo uses first to receive copyrighted images and sounds and then to transmit them to its subscribers. … Its subscribers are strangers—paying "members of the public"—and under the statute, it matters not whether they are receiving the images "in the same place or in separate places, [or] at the same time or at different times." Under any reasonable construction of the statute, Aereo is performing the broadcasts publicly as it is transmitting copyrighted works "to the public."

Pet.App.136a-37a (quoting 17 U.S.C. §101) (alteration in original) (footnote omitted).

Judge Chin also criticized *Cablevision*'s reasoning, arguing that the court "conflated the phrase 'performance or display' with the term 'transmission,' shifting the focus of the inquiry from whether the transmitter's

audience receives the same content to whether it receives the same transmission." Pet.App.142a. Under the statute, he continued, "the public must be capable of receiving the *performance or display*, not the *transmission*. All that matters is whether the transmitter is enabling members of the public to receive the copyrighted work embodied in the *performance or display*, not whether they can receive the same legally insignificant transmission." Pet.App.144a (emphasis in original).

Finally, Judge Chin criticized the panel for placing decisive weight on how Aereo engineered its system, rather than recognizing that its multiple antennas and unique copies are merely a "device or process" for communicating copyrighted works to the public. Pet.App.149a-51a. As Judge Chin noted, "[i]t is obvious from the text that Congress intended 'any device or process' to have the broadest possible construction so that it could capture technologies that were unimaginable in 1976." Pet.App.149a (quoting 17 U.S.C. §101). Thus, "[c]ourts should … resist the urge to look 'under the hood' at how these processes technically work. Instead, our inquiry should be a functional one." Pet.App.153a-54a. And a "commercial enterprise that sells subscriptions to paying strangers for a broadcast television retransmission service" performs those works publicly. Pet.App.154a.[5]

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[5] Judge Chin also distinguished Aereo from the remote storage DVR service at issue in *Cablevision*. He explained that whereas Cablevision's RS-DVR service produced copies "to supplement its authorized retransmission service," Aereo produces copies "to *enable* it to retransmit programming to its subscribers without a li-

4. During this proceeding, litigation has arisen in other jurisdictions between many of the Petitioners and a copycat service—formerly known as "BarryDriller" and "Aereokiller" but more recently dubbed "FilmOn X"—that operates essentially identically to Aereo. Considering the public-performance question unbound by the Second Circuit's atextual construction of the Transmit Clause, two courts have preliminarily enjoined the copycat service's operations, rejecting the Second Circuit's approach and concluding that there is no loophole in the Copyright Act to exploit. *See Fox Television Stations, Inc. v. BarryDriller Content Sys. PLC*, 915 F. Supp. 2d 1138 (C.D. Cal. 2012), *appeal docketed sub nom.*, *Fox Television Stations, Inc. v. Aereokiller, LLC*, Nos. 13-55156, 13-55157 (9th Cir. Jan. 25, 2013); *Fox Television Stations, Inc. v. FilmOn X LLC*, No. CV 13-758, __ F. Supp. 2d __, 2013 WL 4763414 (D.D.C. Sept. 5, 2013), *appeal docketed*, No. 13-7146 (D.C. Cir. Sept. 17, 2013). The D.C. District Court entered an injunction against the copycat service that applies nationwide except for the Second Circuit. In another suit brought to enjoin Aereo's expansion into Boston, a District Court recently denied injunctive relief, relying heavily on the Second Circuit's decision in this case. *Hearst Stations Inc. v. Aereo, Inc.*, Civ. A. No. 13-11649, slip op. (D. Mass. Oct. 8, 2013). As a consequence of these divergent results, the copycat service is now enjoined from operating everywhere but in the Second Circuit, while Aereo remains free to operate in

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cense. Hence, Aereo's system of antennas and copies are the *means* by which Aereo transmits copyrighted broadcasts to the public." Pet.App.152a-53a (emphasis in original).

New York, Boston, and perhaps other jurisdictions as well.

REASONS FOR GRANTING THE PETITION

This should have been a straightforward case. There is no dispute that Aereo has developed a business model around the massive, for-profit exploitation of the copyrighted works of others. Its competitive advantage in that business model derives from the fact that its competitors pay fees for the commercial retransmission of those copyrighted works, while Aereo does not. It is likewise undisputed that the 1976 Copyright Act was specifically intended to bring commercial retransmission of broadcast television within the scope of the public-performance right. And it is undisputed that Aereo is in the business of retransmitting broadcast television to thousands of members of the public, and has not obtained authorization to do so. That should have been the end of the matter. Business models premised on the unauthorized commercial exploitation of the copyrighted works of others should not be allowed to take root, *cf. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), and the unauthorized retransmission of broadcast television to the public is obvious and unambiguous copyright infringement.

That result is compelled by both the statute and common sense. Whether a retransmission service uses one transmission or ten thousand transmissions does not change the basic reality that a service retransmitting the same broadcast of a program to ten thousand strangers is "transmit[ting] … a performance … to the public, by means of a[] device or process." 17 U.S.C. §101. The Congress that enacted that provision to

overrule the result in *Fortnightly* could not possibly have thought having ten thousand little antennas, instead of one big one, made any difference. To make that clear, Congress underscored that the Transmit Clause is technology-neutral and applies whether the public is gathered in a public place or in individual homes.

The Second Circuit managed to miss the forest for the trees because its analysis was fundamentally skewed by its earlier decision in *Cablevision*. It managed to reach, in two steps, a result it could not reasonably have reached in one. Only by looking at the case through the distorting lens of *Cablevision* and its conflation of performance and transmission could the Second Circuit give a green light to Aereo's business model. Unsurprisingly, the first two courts to consider the question unconstrained by *Cablevision* had little trouble concluding that a service essentially identical to Aereo was engaged in unauthorized public performance and must be immediately enjoined, resulting in a nationwide injunction, except for in the Second Circuit.

The resulting situation is wholly untenable. While conduct like Aereo's is being enjoined throughout the rest of the country, it is allowed to flourish in the largest national market. More broadly, courts outside the Second Circuit have recognized that the Second Circuit is now playing by different copyright rules than the rest of the country. Inside the Second Circuit, technical detail trumps common sense. In most of the rest of the country, courts follow Congress' technology-neutral command and treat ten thousand simultaneous transmissions the same as a single transmission to ten thousand households. The decision below thus not only undermines the value of Petitioners' copyrighted works; it

also incentivizes Aereo's competitors to restructure their operations to avoid paying retransmission fees. And the harm is not limited to this precise context. The decision below provides a blueprint for video on-demand providers, cable companies, and Internet streaming services to circumvent Congress' intent and to avoid compensating copyright owners when they retransmit broadcasts of copyrighted works to their paid subscribers over the Internet. And it rewards designing around the copyright laws with Rube-Goldberg devices that offer no functional improvement. This Court should grant certiorari and eliminate the massive loophole the Second Circuit has created in Congress' carefully crafted copyright regime.

I. The Decision Below Cannot Be Reconciled With the Statutory Text, Congress' Manifest Intent, or the Decisions of Other Courts.

1. Under the Copyright Act, "[t]o perform or display a work 'publicly' means … to transmit or otherwise communicate a performance … of the work … to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. §101. By its plain terms, the statute asks whether "members of the public" are "capable of receiving the performance" of a copyrighted work (*e.g.*, a broadcast of a World Series game). *Id.* It does not matter if they "receive" the performance "in the same place or in separate places" or "at the same time or at different times." It likewise does not matter what kind of "device or process" is used "to transmit or otherwise communicate" the performance. To the contrary, Con-

gress separately defined a "device or process" broadly to include "any device or process whereby images or sounds are received beyond the place from which they are sent," whether "now known or later developed." *Id.* Thus, whether there is one transmission or multiple transmissions, whether the technology is ordinary or innovative, "any device or process" that "transmit[s] … a performance" of a copyrighted work "to the public" performs the work "publicly" within the meaning of the Copyright Act.

To the extent the statute's expansive text leaves any room for doubt, the legislative history eliminates it. Congress enacted the Transmit Clause to overturn *Fortnightly* and ensure that "commercial enterprises whose basic retransmission services are based on the carriage of copyrighted program material" would compensate "the creators of such programs." H.R. Rep. 94-1476, at 88-89, *reprinted in* 1976 U.S.C.C.A.N. at 5703-04. And Congress did not stop with making clear that "a cable television system is performing when it retransmits the broadcast to its subscribers." *Id.* at 63, *reprinted in* 1976 U.S.C.C.A.N. at 5676-77. It also defined "'perform,' 'display,' 'publicly,' and 'transmit'" in the broadest possible terms to reach "*any* further act by which [the initial] rendition or showing [of a work] is transmitted or communicated to the public." *Id.* (emphasis added). In doing so, Congress directed courts to interpret the Transmit Clause functionally, rather than technically. Congress recognized that technological advancements were inevitable and intentionally wrote the statute flexibly to prevent circumvention of its purpose through the technical details of future technologies. *See id.* ("A performance may be accomplished 'either direct-

ly or by means of any device or process,' including all kinds of equipment for reproducing or amplifying sounds or visual images, … *and any other techniques and systems not yet in use or even invented.*" (emphasis added)); S. Rep. No. 94-473, at 60 (1975) (same).

Applying the straightforward text of the statute and the functional approach it demands, courts have had little trouble concluding that technology nearly identical to Aereo's infringes upon the public-performance right. *See BarryDriller*, 915 F. Supp. 2d at 1144-46; *FilmOn X LLC*, 2013 WL 4763414, at *12-14. A system of individualized dime-size antennas and digital copies is just another "device or process" for transmitting a performance to "the public." 17 U.S.C. §101. As the D.C. District Court explained, "[b]y making available Plaintiffs' copyrighted performance to any member of the public who accesses the FilmOn X service, FilmOn X performs the copyrighted work publicly as defined by the Transmit Clause: FilmOn X 'transmit[s] … a performance … of the work … to the public, by means of any device or process.'" *FilmOn X LLC*, 2013 WL 4763414, at *13 (quoting 17 U.S.C. §101; first bracket added). Its service "is in no meaningful way different from cable television companies, whose relationship with broadcasters … was the primary motivation for the 1976 Act's enactment." *Id.* at *14. It is inconceivable that Congress intended such a retransmission service to escape the broad sweep of the public-performance right.

2. The Second Circuit's contrary conclusion rests on a fundamentally flawed reading of the Transmit Clause. In its view, whether a performance is public turns on how many people can receive any given *transmission* of the performance. The Second Circuit reached that con-

clusion by insisting that the phrase "'capable of receiving the performance' refers not to the performance of the underlying work being transmitted but rather to the transmission itself." Pet.App.18a (quoting *Cablevision*, 536 F.3d at 134). On this logic, courts must "examine who precisely is 'capable of receiving' *a particular transmission of a performance*.'" *Id.* (quoting *Cablevision*, 536 F.3d at 135 (emphasis in original)). It "is irrelevant ... whether the public is capable of receiving the same underlying work or original performance of the work by means of many transmissions." Pet.App.22a.

The flaw in this reasoning is obvious: the statute asks whether the public is "capable of receiving the *performance*," 17 U.S.C. §101 (emphasis added), *not* whether it is "capable of receiving the *transmission*." "Transmit" and "perform" are each defined terms with their own meanings. *See* 17 U.S.C. §101. Had Congress intended the inquiry to focus on a particular *transmission* rather than the underlying *performance* being transmitted, it would have said so. *See, e.g.*, 2 Paul Goldstein, *Goldstein on Copyright* §7.7.2, at 7:168 (3d ed. Supp. 2013-1) ("The error in the Second Circuit's construction of the transmit clause was to treat 'transmissions' and 'performance' as synonymous, where the Act clearly treats them as distinct—and different—operative terms."); Jane C. Ginsburg, WNET v. Aereo: *The Second Circuit Persists in Poor (Cable)Vision*, Media Inst., April 23, 2013, www.mediainstitute.org/IPI/2013/042313.php ("The Second Circuit conflated 'performance' with 'transmission' …. This reading does not work in terms of the statute."); Jeffrey Malkan, *The Public Performance Prob-*

lem in Cartoon Network LP v. CSC Holdings, Inc., 89 Or. L. Rev. 505, 532 (2010) ("The statute does not say 'capable of receiving the transmission.'").

In fact, Congress said precisely the opposite: a performance is public "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. §101. Two people cannot receive the *same* transmission of a performance "at different times." The plain text of the statute therefore conclusively refutes the Second Circuit's reading, as Congress *explicitly rejected* the notion that the Transmit Clause could be evaded through the simple expedient of making multiple transmissions. The Second Circuit had no answer; it conceded that its "focus on the potential audience of each particular transmission would essentially read out the 'different times' language" from the statute. Pet.App.21a n.11.

Attempting to patch that gaping hole in its reasoning, the Second Circuit suggested that discrete "private transmissions" should be "aggregate[d]" when they "are generated from the same copy of the work." Pet.App.20a n.11. Thus, in its view, separate transmissions at "different times" can be considered a public performance so long as they stem from a single master copy. Once again, the plain text of the statute defeats this argument: section 101 says nothing about whether transmissions taking place at different times originate from a common source or multiple, individualized copies. Rather, what makes a performance "public" is the *audience*, not the *source*. A work is performed publicly when the performance in question (here, the retransmission of a live broadcast) is transmitted to "members

of the public," 17 U.S.C. §101, that is, to "a substantial number of persons outside of a normal circle of a family and its social acquaintances," *id.*—regardless of whether it is transmitted to all members of the public at the same time, or to different members of the public at different times. *Id.*; *see also BarryDriller*, 915 F. Supp. 2d at 1144.

The Second Circuit appears to have been led astray by a misplaced concern that, unless one focuses on the audience for a particular *transmission*, as opposed to the audience for a *performance*, a "hapless customer" could be liable for violating the public-performance right whenever he "records a program in his den and later transmits the recording to a television in his bedroom." *Cablevision*, 536 F.3d at 136. Yet such a "hapless customer" clearly is not performing the work for any "member[] of the public." 17 U.S.C. §101; *see also BarryDriller*, 915 F. Supp. 2d at 1145 n.12. By contrast, the Second Circuit's reading produces results Congress plainly did not intend. By its logic, Congress would have viewed the CATV system in *Fortnightly* differently if, instead of mounting a single large antenna on a hilltop, a creative entrepreneur had mounted thousands of little antennas, each one associated with a different home. *See* Pet.App.31a n.16 (distinguishing Aereo's system from the CATV antenna in *Fortnightly* on the ground that "the signals from those community TV antennas were shared among many users"). Congress could hardly have made clearer that it did not want liability to turn on such engineering details.

In short, "[v]ery few people gather around their oscilloscopes to admire the sinusoidal waves of a television broadcast *transmission*. People are interested in

watching the *performance* of the *work*." *BarryDriller*, 915 F. Supp. 2d at 1144-45 (emphasis in original). Congress was not oblivious to this reality when it revised the Copyright Act to reach retransmission of broadcast signals. That is why Congress drafted a statute that asks whether the public is "capable of receiving the *performance*," 17 U.S.C. §101 (emphasis added), not whether it is capable of receiving the *transmission*.

3. *Cablevision*'s conflation of transmission and performance created a path dependency that allowed the Second Circuit to reach in two steps a result that it could not have reached in one. Rather than see Aereo's business model as a massive scheme for profiting off of the copyrights of others, the court focused on the minutia of the means of exploitation, despite Congress' command to do otherwise. Courts unburdened by *Cablevision* have had no such difficulties. Indeed, even the Second Circuit seemed to suffer buyer's remorse. Although it deemed itself bound by *Cablevision* to conclude "that technical architecture matters," it suggested that "[p]erhaps the application of the Transmit Clause should focus less on the technical details of a particular system and more on its functionality." Pet.App.33a.

That is a considerable understatement. Long before Aereo and FilmOn X came onto the scene, courts recognized that the Transmit Clause demands a flexible and functional approach. For instance, in *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F. 2d 154 (3d Cir. 1984), the Third Circuit considered whether a video rental store operator publicly performed when he transmitted a performance from a videotape to a private viewing booth. The court held that he did, even

though each transmission of the performance could be received only by the individual inside the viewing booth at the time. *Id.* at 159. As the Third Circuit explained, the video store's "operation is not distinguishable in any significant manner from the exhibition of films at a conventional movie theater." *Id.* (internal quotation marks omitted). That "the cassettes can be viewed in private does not mitigate the essential fact that [the store] is unquestionably open to the public." *Id.*

The Northern District of California likewise held that a company engaged in public performance when it transmitted a movie to a hotel room to be watched "on demand" by a guest. *On Command Video Corp. v. Columbia Pictures Industries*, 777 F. Supp. 787, 790 (N.D. Cal. 1991). The court reached that conclusion because "[h]otel guests watching a video movie in their room … are … members of 'the public[,]' … regardless of where the viewing takes place." *Id.* The court further emphasized that the statute's "different times" language was intended "to cover precisely th[at] sort of single-viewer system." *Id.* It thus concluded, agreeing with *Redd Horne*, that "whether the number of hotel guests … is one or one hundred, and whether these guests view the transmission simultaneously or sequentially, the transmission is still a public performance since it goes to members of the public." *Id.*

4. When the Solicitor General opposed certiorari in *Cablevision*, she noted:

> Some language in the court of appeals' opinion could be read to suggest that a performance is not made available "to the public" unless more than one person is capable of receiving a *particu-*

> *lar* transmission. … Such a construction could threaten to undermine copyright protection in circumstances far beyond those presented here, including with respect to [video on-demand] services or situations in which a party streams copyrighted material on an individualized basis over the Internet.
>
> Taken as a whole, however, the court of appeals' analysis of the public-performance issue should not be understood to reach VOD services or other circumstances beyond those presented in this case.

U.S. Amicus Br., 2009 WL 1511740, at *20-21 (emphasis in original). Unfortunately, the Solicitor General was prescient about the potential implications of *Cablevision*, but unduly optimistic about the Second Circuit's willingness or ability to cabin the decision. Thus, the Solicitor General's reason for recommending denial in *Cablevision* is now among the reasons for granting review here.[6]

[6] Petitioners submit that a decision from this Court finding error in *Cablevision*'s construction of the Transmit Clause and holding that Aereo is engaged in an infringing public performance would not need to address the entirely distinct question of how the Transmit Clause or other portions of the Copyright Act, properly construed, apply to a licensed provider that offers a remote storage DVR service such as that at issue in *Cablevision*. Petitioners do not seek a ruling from this Court on that latter set of issues.

II. The Court of Appeals' Erroneous Resolution of the Exceptionally Important Question Presented Threatens the Broadcast Television Industry.

The decision below has far-reaching adverse consequences for the broadcast television industry, making the need for this Court's review urgent and acute. The decision already is having a transformative effect on the industry. Industry participants will not and cannot afford to wait for something of this magnitude to percolate before responding to new business realities. And once Aereo's technology is entrenched and the industry has restructured itself in response, a ruling by this Court in Petitioners' favor will come too late. The disruption threatened by Aereo will produce changes that will be difficult, if not impossible, to reverse. Accordingly, the exceptional importance of the question presented warrants this Court's resolution now.

As this Court has long recognized, the purpose of copyright is "to secure a fair return for an 'author's' creative labor" with "the ultimate aim …, by this incentive, to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). For that reason, this Court has had little tolerance for business models premised on the unauthorized exploitation of the copyrights of others on a "gigantic scale." *Grokster*, 545 U.S. at 940. The works provided by commercial television broadcasters to a remarkably broad swath of the public cost millions of dollars to produce. Petitioners rely on their ability to control how their programming is used by others in order to recoup those significant investments. Although advertising revenue has traditionally been their most important source of income, "television broadcasters

have come to rely more heavily on retransmission fees, rather than advertising revenue, to make their free public broadcasts profitable." Pet.App.132a.

Aereo is a direct assault on that well-established and statutorily protected model. It seeks to attract current cable and satellite subscribers by offering broadcast television for a lower fee, which it can do because, unlike its competitors, Aereo does not compensate copyright owners or broadcasters for the use of their programming. As Aereo expands its operations, and as copycat services enter the market, broadcasters' inability to exert control over retransmission of their programming will make it increasingly difficult for them to obtain sufficient revenue to continue producing high quality programming that serves the public interest. Having obtained a green light from the decision below, Aereo is unleashing its copyright exploitation model throughout the country. Although Aereo initially confined its operations to localities within the Second Circuit (to enjoy the protection of *Cablevision*), it views the Second Circuit's decision as collaterally estopping the major networks whose copyrights Aereo is exploiting without authorization or compensation. (Although a copycat service has been enjoined outside the Second Circuit, Aereo has not.) Emboldened by the decision below, Aereo has already expanded to Boston, Atlanta, Dallas, Miami, and Salt Lake City,[7] and announced plans to expand to twenty other cities in 2013, including

[7] *See* https://aereo.com/coverage.

Chicago, Houston, Philadelphia, and Washington, D.C., with a total population of over 97 million.[8]

Aereo's victory in the Second Circuit also has led certain cable and satellite companies to question why they should continue to obtain permission to retransmit broadcast programming when their competitor Aereo does not. Time Warner Cable ("TWC") has threatened to develop its own Aereo-like system to avoid compensating copyright owners and broadcasters for the use of their programming.[9] And for a full month this past summer, in an effort to pressure CBS to reduce its retransmission fees, TWC stopped retransmitting CBS to its customers in New York, Los Angeles, and Dallas and urged subscribers in New York to sign up for Aereo to receive CBS broadcasts.[10] Dish Network, a satellite provider, also reportedly has engaged in talks about acquiring Aereo.[11] And some broadcasters have consi-

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[8] Press Release, Aereo, Inc., *Aereo Announces Launch Date for Chicago* (June 27, 2013), *available at* https://aereo.com/assets/marketing/mediakit/press_release_20130627.pdf; Press Release, Aereo, Inc., *Aereo Announces Expansion Plans for 22 New U.S. Cities* (Jan. 8, 2013), *available at* https://aereo.com/assets/marketing/mediakit/press_release_20130108.pdf.

[9] Steve Donohue, *Britt: Aereo Could Help Time Warner Cable Stop Paying Retransmission-Consent Fees*, FierceCable, Apr. 26, 2012, http://www.fiercecable.com/story/britt-aereo-could-help-time-warner-cable-stop-paying-retransmission-consent/2012-04-26.

[10] Bill Carter, *After a Fee Dispute With Time Warner Cable, CBS Goes Dark For Three Million Viewers*, N.Y. Times, Aug. 2, 2013, *available at* http://www.nytimes.com/2013/08/03/business/media/time-warner-cable-removes-cbs-in-3-big-markets.html.

[11] Christopher S. Stewart & William Launder, *Diller Wins a Broadcast-TV Clash*, Wall St. J., July 12, 2012, at B1, *available at*

dered "mov[ing] their free public broadcasts to paid cable" to "protect their copyrighted material." Pet.App.131a.

Aereo also threatens broadcast television in more subtle ways. For instance, Aereo diverts viewers from distribution channels measured by Nielsen ratings, which potential advertisers rely upon to measure viewership. Nielsen does not measure Aereo viewership. Pet.App.110a. And Aereo undermines broadcasters' ability to obtain revenues from allowing their programming to be distributed over the Internet by licensed video on-demand providers, such as Hulu, Netflix, and Amazon. In short, Aereo threatens a profound and devastating effect on broadcast television.

This Court has repeatedly recognized the strong public interest in preserving over-the-air broadcast television. In *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), for example, the Court upheld FCC regulations requiring cable companies to devote some of their channels to retransmission of broadcast stations, despite the First Amendment burden those "must-carry" regulations imposed on cable providers. The Court did so because it recognized that "[b]roadcast television is an important source of information to many Americans. Though it is but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on

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http://online.wsj.com/article/SB10001424052702303644004577521362073162108.html; Janko Roettgers, *Does Dish Want To Buy Aereo? Broadcasters Would Love To Know*, paidContent (Apr. 4, 2013), http://paidcontent.org/2013/04/04/does-dish-want-to-buy-aereo-broadcasters-would-love-to-know.

subjects across the whole broad spectrum of speech, thought, and expression." *Id.* at 194; *accord Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) ("[T]he importance of local broadcasting outlets 'can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.'" (quoting *United States v. Sw. Cable Co.*, 392 U.S. 157, 177 (1968))).

The Court's observations are no less true today. Broadcast television remains a critically important source of local and national news—particularly during times of emergency. Broadcasters also perform an important role in promoting an informed citizenry, interrupting their programming, for example, to televise Presidential speeches or news conferences. And broadcast television continues to carry the majority of the country's most popular television shows.

"The interest in maintaining the local broadcasting structure does not evaporate simply because cable has come upon the scene." *Turner*, 512 U.S. at 663. Still today, millions of Americans rely on free over-the-air broadcasts to receive television programming. Protecting noncable households from the loss of over-the-air television broadcast service thus remains "an important federal interest." *Id.* Because the decision below poses a grave threat to that interest, this case presents a question of exceptional importance warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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